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2018 Nov 08 PM 4:07
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2018-CV-000844

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
DIVISION 7

TRUST WOMEN FOUNDATION INC. d/b/a SOUTH WIND WOMEN'S CENTER d/b/a TRUST WOMEN WICHITA,	)	
Plaintiff,	)	
v.	)	Case No. _____
DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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Plaintiff, Trust Women Foundation Inc. d/b/a South Wind Women's Center d/b/a Trust Women Wichita ("Trust Women" or "the Clinic") seeks to continue offering medication abortion services via telemedicine in order to alleviate the burdens currently faced by pregnant women seeking abortions in Kansas. Plaintiff applies for a preliminary injunction and temporary restraining order pursuant to K.S.A. § 60-903 and § 60-905, to prevent the enforcement of Section 6 of House Bill 2028 ("Section 6" or the "Telemedicine Abortion Ban"), which bans the provision of abortions services via telemedicine. The Telemedicine Abortion Ban infringes upon patient access to abortion care, and threatens Plaintiff and its patients with irreparable harm.

INTRODUCTION

House Bill 2028, the Kansas Telemedicine Act (K.S.A. §§40-2,210 through 40-2,216) (the "Act"), was enacted to promote the use of telemedicine in the state and thereby expand access to necessary health care services to Kansas state residents. Yet the Kansas Telemedicine Act fails to do so, because it explicitly prohibits the use of telemedicine to provide abortion care, even though abortion is more common, and far safer, than many other medical services that are currently provided via telemedicine. The Telemedicine Abortion Ban, by prohibiting the provision of any abortion services via telemedicine, violates Sections 1 and 2 of the Kansas Constitution. The Act prevents Plaintiff from serving its patients' needs, and precludes the Clinic from expanding access to abortion care by offering telemedicine services in more rural areas. Thus, the Telemedicine Abortion Ban irreparably harms Plaintiff and its patients not only by violating their constitutional rights, but also by heightening the burdens Kansas women face in accessing abortion in a state where access is already very limited. The State's interests will be adequately protected if a preliminary injunction is issued because permitting Plaintiff to continue providing medication

abortion via telemedicine will preserve the status quo, advance Kansas women's health, and protect their constitutional rights.

As set forth below, Trust Women is likely to succeed on the merits of its claim that Section 6 violates its patients' fundamental right to obtain a pre-viability abortion, because the Telemedicine Abortion Ban restricts the safe, effective provision of medication abortion without conferring any public health or safety benefit. Additionally, because Section 6 singles out medical providers who offer abortion care and patients who seek this care, Plaintiff is likely to succeed on the merits of its claims that the Telemedicine Abortion Ban violates its equal protection rights and those of its patients.

BACKGROUND

I. Abortion Access in Kansas

In Kansas, as in many areas of the United States, women have limited access to abortion services. In 2014, 97 percent of Kansas' counties did not have an abortion provider and 56 percent of Kansan women lived in those counties. Aff. of Daniel A. Grossman, M.D. in Supp. Pl.'s Mot. Temp. Injct. and Temp. Rest. Ord., attached as Exhibit 1 to Pl.'s Mot. Temp. Injct. and Temp. Rest. Ord. ("Grossman Aff.") ¶28.

There are only four abortion clinics in Kansas—Trust Women Wichita, Center for Women's Health in Overland Park; and Planned Parenthood (Overland Park and Wichita)—all of which are clustered in two metropolitan areas, leaving vast swaths of the state without access to an abortion provider. Grossman Aff. ¶27; Aff. of Julie Burkhart in Supp. Pl.'s Mot. Temp. Injct. and Temp. Rest. Ord., attached as Exhibit 2 to Pl.'s Mot. Temp. Injct. and Temp. Rest. Ord. ("Burkhart Aff.") ¶19. For women living in western Kansas, they must travel at least 180 miles in order to reach the nearest abortion provider. Burkart Aff. ¶19; Aff. of Colleen P. McNicholas,

D.O., M.S.C.I., F.A.C.O.G. in Supp. Pl.'s Mot. Temp. Injct. and Temp. Rest. Ord., attached as Exhibit 3 to Pl.'s Mot. for Temp. Injct. and Temp. Rest. Ord. ("McNicholas Aff.") ¶30.

Abortion is an important component of comprehensive women's health care. Grossman Aff. ¶¶8, 10; McNicholas Aff. ¶3. Women seek abortions for a variety of medical and personal reasons. Some women seek abortion because they are in an unstable or abusive relationship and do not want to have children given their current life situation. Burkhart Aff. ¶6; Grossman Aff. ¶12. Many have children (Grossman Aff. ¶7); about 70 percent of Plaintiff's abortion patients have at least one child, and do not have the ability to care for another child. Burkhart Aff. ¶6. Some women may not have the financial resources to care for a child (Grossman Aff. ¶11); at least 30 percent of Plaintiff's patients live at or below the federal poverty line. Burkhart Aff. ¶6. Others may have become pregnant as a result of sexual assault and do not want to carry the pregnancy to term. Burkhart Aff. ¶6. There are women who have medical conditions that make pregnancy and childbirth particularly risky to their health, or who have received a diagnosis of a grave or lethal anomaly. Burkhart Aff. ¶6. Indeed, women with unintended pregnancies face increased risks of poor health outcomes when they do not have access to safe abortion care. Grossman Aff. ¶10.

Plaintiff is a licensed Ambulatory Surgical Center in Kansas and has provided safe, high-quality reproductive health care since 2013. Burkhart Aff. ¶¶1-3. Trust Women provides a full range of services to its patients, including transgender care, HIV/AIDS testing, wellwoman exams, and contraception services, with a particular focus on providing access to individuals in underserved communities. *Id*. at ¶¶1, 4. The Clinic also offers abortion care, including medication abortion up to 10 weeks, as measured from the first day of a woman's last menstrual period ("LMP"), and surgical abortions up to 21 weeks, 6 days LMP. *Id*.

Legal abortion is one of the safest medical procedures in the United States. Grossman Aff. ¶9; McNicholas Aff. ¶6. In Kansas, medication abortion accounted for over 58 percent of abortions in 2017.[1] The vast majority of Trust Women's patients in the first trimester choose medication abortion. Burkhart Aff. ¶5; McNicholas Aff. ¶14. Despite the fact that it is an extremely safe and effective way to provide care, Section 6 bans the provision of medication abortion through telemedicine, thereby increasing the burdens that Kansas women face in accessing abortions.

A number of pre-existing Kansas laws already circumscribe women's ability to access safe, legal, and affordable abortion care. Abortions are generally prohibited after viability (K.S.A. § 65-6703(a)) and certain methods of abortion are prohibited altogether. *See* K.S.A. § 65-6721 (banning intact dilation and evacuation abortions); K.S.A. §§ 65-6741–65-6749 (banning dilation and evacuation abortion without first performing fetal demise, temporarily enjoined by *Hodes & Nauser, MDs, P.A. v Schmidt*, No. 2015CV000490, 2015 WL 13065200 (Kan. Dist. Ct. June 30, 2015), *aff'd*, 368 P.3d 667 (Kan. Ct. App. 2016), *review granted* (Apr. 11, 2016). It is illegal to perform an abortion after 22 weeks LMP unless two physicians certify that the woman's life is endangered or she faces substantial and irreversible impairment of her physical health. K.S.A. §§ 65-6724(a), 65-6723(f). Additionally, women seeking abortions must receive certain state-mandated information and undergo a mandatory delay of at least 24-hours before obtaining the abortion. K.S.A. § 65-6709. State agencies and employees are prohibited from providing abortion services, K.S.A. § 65-6733, and abortions cannot be performed on University of Kansas properties except in the case of a medical emergency. K.S.A. § 76-3308(i). The insurance plan for government employees bars coverage for abortion unless the pregnancy threatens the woman's

[1] *Abortions in Kansas, 2017 Preliminary Report*, Kan. Dep't of Health & Env't, (April 2018), *available at* http://www.kdheks.gov/phi/abortion_sum/2017_Preliminary_Abortion_Report.pdf.

life. *State Employee Health Plan*, Kan. Dep't of Health & Env't, 39 (2015), *available at* http://www.kdheks.gov/hcf/sehp/BenefitDescriptions/Aetna/2018/2018_Plan_C_Aetna.pdf. Similarly, private insurance policies cannot cover abortions not necessary to preserve a woman's life except through a separate and optional rider, and insurance provided via an exchange pursuant to the Affordable Care Act cannot cover "elective" abortions, even through a rider. K.S.A. § 40-2, 190. In addition, women reliant on Medicaid can only obtain coverage for abortion if the pregnancy is life-threatening or is the result of rape or incest. *State ex rel. Kline v. Sebelius*, No. 05-C-1050, 2006 WL 237113 at *6 (Kan. Dist. Ct. Jan. 24, 2006).

Against this backdrop, Section 6 of H.B. 2028 was enacted, prohibiting the provision of any abortion service through telemedicine and thus further restricting Kansas women's ability to access safe abortion care.

II. Telemedicine and Medication Abortion

Medication abortion is a safe and effective alternative to surgical abortion that allows a woman in early pregnancy to terminate a pregnancy non-surgically, through a combination of two medications: mifepristone and misoprostol. Grossman Aff. ¶15; McNicholas Aff. ¶8. It has been available in the United States since 2000, and is generally available to women up to 10 weeks LMP. McNicholas Aff. ¶¶9-10; Grossman Aff. ¶14. Medication abortion requires no anesthesia or sedation; women are screened for eligibility and contraindications, and receive counseling before provided with the medication. Grossman Aff. ¶15; McNicholas Aff. ¶8. The complication rate for medication abortion is less than half of one percent. Grossman Aff. ¶22; McNicholas Aff. ¶9. In March of 2016, the FDA acknowledged the impressive safety record of medication abortion in the United States when it approved an updated label for Mifeprex, bringing the labeling information in line with current medical practices and reaffirming that medication abortion is extremely safe and highly effective. McNicholas Aff. ¶9.

Many women for whom medication abortion is an option prefer it over surgical abortion because it allows them to complete the abortion in the privacy of their own home in the company of loved ones, it feels more natural, and gives them more control over the procedure because they can better plan and schedule the time and location of their abortion. Grossman Aff. ¶17; McNicholas ¶11; Burkhart Aff. ¶12. Further, for some women, including those with uterine abnormalities, like uterine fibroids or cervical stenosis, or who are severely obese, there are medical reasons why medication abortion is a safer option for them than surgical abortion. Grossman Aff. ¶19; McNicholas Aff. ¶13. For women seeking abortion under distressing circumstances like sexual assault, medication abortion allows them to avoid potential trauma from having instruments placed in their vagina. Grossman Aff. ¶18; McNicholas Aff. ¶12.

Providing medication abortion via telemedicine has been recognized by the American College of Obstetricians and Gynecologists (ACOG) as important to improving services for rural women, and is consistent with the current FDA label for Mifeprex. McNicholas Aff. ¶¶16, 21; Grossman Aff. ¶28. Medication abortion has been provided via telemedicine in Iowa since 2008, in Alaska since 2011, in Maine and Illinois since 2016, and most recently in Washington, Hawaii, and Oregon. Grossman Aff. ¶26. Studies based on the provision of medication abortion via telemedicine have shown that the complication rate for medication abortion is exceedingly low (less than 0.5%), whether it is provided in-person or by telemedicine. Grossman Aff. ¶22; McNicholas Aff. ¶23. To the extent that complications do arise with medication abortion, because the second medication used in the regimen is consumed outside of the clinic, almost all possible complications— which are rare—will occur after patients have already left the provider's office. Burkhart Aff. ¶10; Grossman Aff. ¶¶23-25. In other words, such rare complications would occur

whether the medication abortion is provided in-person at a clinic or through telemedicine. Grossman Aff. ¶24.

The provision of medication abortion via telemedicine benefits public health because it improves access to underserved areas and enables women to receive care earlier in their pregnancies thus reducing the rare health risks associated with later abortions. Grossman Aff. ¶¶ 20, 27-29, 33; McNicholas Aff. ¶¶23, 27. Studies regarding the efficacy and safety of telemedicine abortion have shown that it improves access to abortion care, particularly for those who live in rural and underserved areas, by making care available closer to home, decreasing wait times, and increasing appointment availability. Grossman Aff. ¶28, 29, 32. Further, providers report that telemedicine improves patient access by removing the need for both providers and patients to travel long distances and by reducing wait times for appointments and – importantly – that their interactions with patients are essentially the same as an in-person visit. Grossman Aff. ¶¶ 26, 29-31.

In Kansas, telemedicine has provided much needed medical care since 1991. Grossman Aff. ¶34; McNicholas Aff. ¶17. Both the University of Kansas and Newton Medical Center in Newton, Kansas, have telemedicine programs. Grossman Aff. ¶34; McNicholas Aff. ¶17. Additionally, the WesleyCare Virtual Network connects neurologists with patients in rural areas of Kansas via telemedicine. Grossman Aff. ¶34; McNicholas Aff. ¶17. The University of Kansas Center for Telemedicine and Telehealth promotes the use of telemedicine in more than thirty medical specialties, and in Newton, telemedicine is utilized to treat both patients in its general inpatient setting, via a videoconferencing monitor and camera, as well as stroke victims in need of rapid diagnosis and treatment. Grossman Aff. ¶34; McNicholas Aff. ¶17. The WesleyCare website states that in Kansas, neurologists – through telemedicine – prescribe IV-tPA to stroke patients in

hospitals that do not have neurologists on staff based on imaging scans. Grossman Aff. ¶34; McNicholas Aff. ¶17. While IV-tPA is potentially life-saving for patients who suffer an ischemic stroke, it is potentially fatal for hemorrhagic stroke patients as its risks include intracranial and major systemic hemorrhage. Grossman Aff. ¶34; McNicholas Aff. ¶17.

There is no medical justification for singling out abortion care and prohibiting the practice of telemedicine in the context of medication abortion. There is clear consensus among the medical community that providing medication abortion through telemedicine is medically appropriate and may offer other advantages by eliminating the need for patients and/or physicians to travel long distances and by reducing wait times. Grossman Aff. ¶¶29-32; McNicholas Aff. ¶¶21, 25. In fact, all evidence supports that medication abortion through telemedicine is as safe and effective as the provision of medication abortion in an in-person clinic visit. Grossman Aff. ¶¶22-25. A recent report jointly prepared by the National Academies of Sciences, Engineering, and Medicine concluded that medication abortion does not require the physical presence of a physician, and that telemedicine medication abortion is just as safe as in-person medication abortion. Grossman Aff. ¶¶24-25.

Further, a 7-year study conducted in Iowa with over 19,000 medication abortion patients, 8,765 of which were performed with telemedicine and 10,405 of which received in-person care, found that only .26 percent of the 19,170 patients experienced a clinically significant adverse event. Grossman Aff. ¶23. Of the telemedicine patients, only .18 percent experienced such adverse events and there were no reported deaths or cases that required surgery among *any* of the medication abortion patients. *Id*. Indeed, as NAS, Safety and Quality of Abortion Care found, the reported risks of medication abortion are similar in magnitude to the adverse effects of common prescriptions and over-the-counter medications. *Id*. at ¶25.

III. Impact of the Telemedicine Abortion Ban

By prohibiting the provision of medication abortion via telemedicine, the Telemedicine Abortion Ban restricts Plaintiff's ability to provide abortion services, limiting abortion care to just two days a week because the Clinic's physicians must fly in to provide care from out-of-state. Burkhart Aff. ¶16. Currently, Trust Women is able to offer medication abortion services on weekend days and additional week days through the use of telemedicine, and has seen a significant drop in wait times—reducing average patient wait times from between 6 and 8 hours to just 1.5-2 hours. Burkhart Aff. ¶¶ 18, 21, 24-25. The Clinic initially began utilizing telemedicine to expand the days and times when mediation abortion services are available, in order to better meet the needs of its patients. *Id*. at ¶8. Absent the Telemedicine Abortion Ban, Trust Women would continue increasing patient access to early abortion by allowing more women to take advantage of these expanded hours and enabling them to receive care on additional days of the week. Burkhart Aff. ¶¶8-9; McNicholas Aff. ¶25. Trust Women also intends to expand its services to reach women in rural locations who have to travel significant distances to access abortion care, utilizing telemedicine to provide care closer to women's homes and alleviating the burdens of driving long distances to access a health care facility. Burkhart Aff. ¶¶ 9, 19, 22-23; McNicholas Aff. ¶31. Trust Women has been in the process of exploring how to provide telemedicine abortion care in rural locations, including utilizing a mobile medical unit that could travel to various remote locations as needed, and Clinic staff have attended informational meetings and national conferences focused on mobile and remote healthcare to inform these efforts. Burkhart Aff. ¶¶ 22-23. However, the Telemedicine Abortion Ban will prevent Plaintiff from implementing this plan, thus denying women who live in rural areas of Kansas the same benefits that telemedicine offers to similarly situated residents.

LEGAL STANDARD

Plaintiff is entitled to a temporary injunction when, as here, 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). At the court's discretion, a temporary injunction may be issued without bond. K.S.A. § 60-905(b). Here, because Plaintiff satisfies all the requirements for entry of a temporary injunction, its motion should be granted. Further, given that Defendant stands to suffer no pecuniary harm as a result of the requested injunction, Plaintiff respectfully requests that the Court issue the temporary injunction without bond.

If the Court will be unable to render a decision on Plaintiff's application for a temporary injunction prior to January 1, 2019, which is the Act's effective date, then Plaintiff requests the entry of a temporary restraining order to prevent enforcement of the Act in the interim. K.S.A. § 60-903 authorizes the issuance of a temporary restraining order "without notice or bond." K.S.A. § 60-903; *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860, 865 (1984) ("Where it appears to the judge that a restraining order will not result in damage to the party restrained, no bond is required of the movant."). "The purpose of such order is to restrain a defendant for a very brief period, pending a hearing on the application for a temporary injunction." *McKinney*, 236 Kan. at 227. Such relief would be appropriate here, because Defendants will suffer no pecuniary or other harms during the pendency of Plaintiff's motion for a temporary injunction.

ARGUMENT

I. Plaintiff Is Likely to Succeed on the Merits of Its Claims Under the Kansas Constitution.

The Abortion Telemedicine Ban is a clear violation of Plaintiff's patients' fundamental right to terminate a pre-viable pregnancy and of Plaintiff's right and the rights of its patients to be treated equally under the law, as provided by Sections 1 and 2 of the Kansas Constitution Bill of Rights.[2] "Sections 1 and 2 of the Kansas Constitution Bill of Rights 'are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.'" *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22, 28 (2005) (quoting *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058, 1061 (1987)). In general, these provisions "echo federal standards," *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006), but in some instances, they may afford "greater rights than the federal Constitution." *Farley*, 241 Kan. at 671.

For over 40 years the United States Supreme Court has held that under the due process clause of the Fourteenth Amendment, a woman has a fundamental right to terminate her pregnancy without undue interference from the State. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). Prior to viability, states may not impose an undue burden on this right. *See id.* at 876; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). Although the Kansas Supreme Court has not yet determined the scope of protection for the right to terminate a pregnancy afforded by the Kansas Constitution, *see Alpha Med. Clinic*, 280 Kan. at 920, as with the right to be treated equally under the law, such protection will be coextensive with or greater

[2] Section 1 of the Bill of Rights of the Kansas Constitution affords express protection for "life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rts. § 1. Section 2 of the Bill of Rights provides for equal protection of the people, with no special privileges or immunities granted by the legislature. Kan. Const. Bill of Rts. § 2.

than that afforded by the United States' Constitution. Indeed, the Kansas Court of Appeals found that "[b]ecause the right to abortion is part of the liberty protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Kansas Constitution provides the same right to abortion that is protected under federal law." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan. App. 2d 274, 288, 368 P.3d 667, 675 (2016) *review granted* (April 11, 2016).

As discussed below, under the applicable standard of review, Plaintiff has established a likelihood of success that the Telemedicine Abortion Ban violates the protections afforded by the Kansas Constitution.

A. Plaintiff is Substantially Likely to Succeed on the Merits of Its Claim that the Act Violates the Right to Terminate a Pregnancy Before Viability.

Plaintiff has established a likelihood of success on the merits of its due process claim for three reasons: (1) the Act unduly burdens a woman's fundamental right to obtain an abortion before viability by proscribing the provision of medication abortion via telemedicine; (2) the Act imposes such burdens without conferring any health benefit or otherwise furthering the health and safety of Kansas women; and (3) the Act was passed for the improper purpose of restricting abortion.

1. Section 6 Creates an Undue Burden on Women's Right to Access Abortion Care, and Fails to Confer Any Health Benefit or Otherwise Advance Any Valid State Interest.

The Kansas Constitution must, at a minimum, protect the right to terminate a pre-viable pregnancy to the same extent as the federal constitution and arguably provides even stronger protection. *Alpha Med. Clinic*, 280 Kan. at 920. The U.S. Supreme Court most recently clarified the applicable standard for evaluating abortion regulations that restrict a woman's access to abortion care in *Whole Woman's Health*, holding that courts tasked with evaluating the constitutionality of a state law regulating abortion are required to "consider the burdens a law

imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2298. Where the burdens the law imposes exceed its benefits, they are undue, and thus, unconstitutional. *See id.* at 2300, 2309–10, 2313, 2318. The *Whole Woman's Health* Court also reaffirmed that where a woman's constitutional right to access abortion is at stake, courts retain an independent duty to review evidence as to both the burdens a law imposes and the actual benefits it confers. *Id.* at 2309–10.

Thus, under controlling Supreme Court precedent, abortion regulations that impose burdens exceeding their purported benefits create an undue burden and therefore violate a woman's right to choose a pre-viability abortion. Under this standard, without evidence demonstrating that the Telemedicine Abortion Ban confers *any* benefits, let alone benefits sufficient to outweigh the clear burdens it imposes, Section 6 must be found unconstitutional. Here, the Legislature offered no justification whatsoever for the Telemedicine Abortion Ban, and there is no evidence that it provides any health, safety, or other benefits. Medical consensus is clear that medication abortion is one of the safest forms of abortion, and for some patients, it is medically indicated or strongly preferred for personal reasons. Grossman Aff. ¶¶9, 17-19, 23-25; McNicholas Aff. ¶¶9, 11-13. Medication abortion has been provided via telemedicine in the United States since 2008, and scientific evidence demonstrates that the use of telemedicine to provide medication abortions is safe and effective and can expand access to services women both want and need. Grossman Aff. ¶¶22-23, 29; McNicholas Aff. ¶23. As recognized by the NAS, Safety and Quality of Abortion Care Report, the extremely low risks of medication abortion are not increased by the provision of medication abortion via telemedicine, rather than in-person. Grossman Aff. ¶24; McNicholas Aff. ¶23. Like an in-person clinic appointment, during a telemedicine medication abortion, the physician screens the patients for eligibility and contraindications, reviews the ultrasound,

communicates with the patient face-to-face via videoconferencing, and answers any questions the patient may have. Burkhart Aff. ¶¶26-34; McNicholas Aff. ¶22. If the Telemedicine Abortion Ban takes effect, women's access to medication abortion via telemedicine will be eliminated, harming women in Kansas by making it more difficult for them to receive abortion care.

Importantly, medication abortion is only available for a finite period within the first 70 days of pregnancy. Grossman Aff. ¶14; McNicholas Aff. ¶10. Because the physicians who provide abortion services at Trust Women travel to the Clinic from out of state, Plaintiff will only be able to offer abortion services two days a week if the Ban takes effect. Burkhart Aff. ¶¶ 8, 16. This would severely limit the number of medication abortions the clinic can provide and poses significant scheduling restrictions for women, because if a woman cannot travel to the Clinic on one of the two days a physician is present, she must delay her procedure until she is able to conform her schedule to the limited availability of Trust Women's physicians. Burkhart Aff. ¶¶ 19-20. For women who are close to the gestational cut off for medication abortion, such a delay in care can push them past the window when medication abortion is available and force them to instead have a surgical procedure. Grossman Aff. ¶¶29, 33; McNicholas Aff. ¶26; Burkhart Aff. ¶20. While abortion is an extremely safe procedure throughout pregnancy, the risk of complications increases with gestational age, so any delay will increase the risks of the procedure to the patient. Grossman Aff. ¶¶20, 33; McNicholas Aff. ¶27. Further, banning the provision of medication abortion via telemedicine eliminates Plaintiff's ability to expand its services and offer abortion via telemedicine in more rural locations. Burkhart Aff. ¶9. For women in rural locations, traveling to the clinic to receive abortion care imposes logistical hurdles that hamper their ability to receive timely access to medication abortion. Grossman Aff. ¶¶28, 30-31; McNicholas Aff. ¶¶16, 30; Burkhart Aff. ¶19.

When such hurdles are combined with Plaintiff's limited schedule, these women may lose access to medication abortion entirely.

Because the Telemedicine Abortion Ban unduly burdens a woman's fundamental right to obtain a lawful abortion without conferring any health or other benefits to the woman or the state, Plaintiff is likely to succeed on its claim that Section 6 is unconstitutional. *See Planned Parenthood of the Heartland v. Iowa Bd. of Med.*, 865 N.W. 2d 252, 264, 267 (Iowa 2015) (weighing the State's asserted justification for an abortion telemedicine ban against the burden placed on women seeking to terminate a pregnancy and finding that a physician could provide medication abortion without being "personally present," *and* that the record indicated "that the telemedicine rule would make it more challenging for many women who wish to exercise their constitutional right to terminate a pregnancy[.]").

2. The Act was Passed with the Improper Purpose of Restricting Access to Abortion.

Laws created with the purpose of hindering women's access to abortion care are unconstitutional. *See Planned Parenthood of Se. Penn. v. Casey,* 505 U.S. 833, 877 (1992) ("A statue with [the purpose of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus] is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the women's free choice, not hinder it."). To evaluate whether the state has restricted abortion for a valid purpose, a court must look at the totality of the circumstances, including the practical operation of the challenged provision. *See Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 540 (1993). Such an evaluation "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he historical background of the decision," and "the specific sequence of events leading up [to] the challenged decision," and "[t]he legislative or administrative

history." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977); s*ee also Planned Parenthood of Wisc., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 994–95 (W.D. Wis. 2015), *aff'd sub nom. Planned Parenthood of Wisc., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015) (striking down an admitting privileges law in part based on finding that it was passed with the improper purpose of restricting the availability of abortion services in Wisconsin, under the *Arlington Heights* standard).

When viewed in totality, the circumstances surrounding the passage of the Act make clear that the sole reason for the inclusion of Section 6 (as well as Section 7[3]) was to preclude access to telemedicine when utilized for abortion services. On its face, Section 6 limits women's access to lawful abortion care without furthering any valid state interest. There are no legislative findings in the Kansas Telemedicine Act; thus, the legislature did not find that banning the provision of abortion services via telemedicine protects maternal health. No doctor testified that the provision of abortion services was incompatible with telemedicine. To the contrary, leading medical

[3] Section 7 of H.B. 2028 declares Section 6 to be non-severable, while designating all other sections of the act expressly severable. By purposefully singling out Section 6 as the only clause in the entire act that is non-severable, Section 7 reveals that Section 6 was passed for an improper purpose and is discriminatory. Additionally, the courts are the ultimate authority in determining which sections of the Kansas Telemedicine Act are severable, pursuant to the Kansas Supreme Court, which has twice stated that the presence of a severability clause is "of no importance." *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1023, 850 P.2d 773, 782 (1993); *285 Truck Line, Inc. v. State Bd. of Tax Appeals*, 183 Kan. 287, 300, 327 P.2d 836, 847 (1958). While a severability clause is evidence of the legislature's intent, when the goal of the statute can be achieved absent the unconstitutional provision, courts sever the unconstitutional provision and leave the remainder of the law intact. *See, e.g.*, *State v. Rupert*, 247 Kan. 512, 802 P.2d 511 (1990) (holding preponderance of the evidence standard for paternity in criminal non-support statute unconstitutional, but severable from the rest of the statute because using the due process beyond a reasonable doubt standard would not damage legislative goal to support children and hold criminally liable parents who fail to provide support). Here, there is no evidence that striking Section 6 of the Act will impair the underlying purpose of the Kansas Telemedicine Act—ostensibly, to expand access for telemedicine services and provide insurance parity for those services—thus, the Court may appropriately determine Section 6 to be unconstitutional and leave the remaining sections of H.B. 2028 intact.

organizations including ACOG and the NAS confirm that the provision of medication abortion via telemedicine is safe and effective. Grossman Aff. ¶¶24-25; McNicholas Aff. ¶¶21, 23. There is simply no reasonable, medical justification for banning the provision of abortion care via telemedicine. *Planned Parenthood of Wisc. et al. v. Van Hollen*, 2013 W.L. 3989238 at 14 (W.D. Wis. Aug. 2, 2013), *aff'd*, 738 F.3d 786 (7th Cir. 2013) (granting preliminary injunction because defendants were unlikely to establish a reasonable relationship between challenged restriction and maternal health).

The lack of any legitimate, reasonable purpose for Section 6 is further confirmed by the State's support for telemedicine in other contexts. *See Planned Parenthood of the Heartland*, 865 N.W. 2d at 269 (the court found significant that the Iowa Board of Medicine "adopted a rule that generally approves of telemedicine, recognizing the existence" of the technology and authorizing the use of telemedicine "in accordance with 'evidence-based' guidelines and standards."). Indeed, the use of telemedicine to diagnosis, consult, treat, and prescribe medication has been utilized in Kansas since 1991. Grossman Aff. ¶34; McNicholas Aff. ¶17. For many Kansans living in rural areas with minimal access to health care, telemedicine has enabled them to receive health care and much needed medical attention, including life-saving care. Grossman Aff. ¶34; McNicholas Aff. ¶17.

In addition, the predictable consequences of the Act demonstrate that its purpose is to restrict access to abortion care. As already detailed *supra* at 9 and 14, the Telemedicine Abortion Ban will limit Plaintiff's ability to provide early access to abortion services because it will force the Clinic's physicians to provide medication abortion just two days a week, when physicians are able to be present in-person. Further, it will remove any opportunity for Plaintiff to procced with its plans to expand telemedicine abortion services to women in rural areas, closer to their homes,

thus forcing these women to continue to drive significant distances, and to overcome a variety of logistical hurdles, in order to receive safe and legal abortion care.

By singling out abortion and prohibiting its provision via telemedicine, yet embracing the use of telemedicine in all other medical contexts, and by failing to articulate any reasonable justification for this differential treatment, Section 6 of H.B. 2028 appears to run afoul of the Kansas Constitution. The Act's discriminatory treatment can only be attributed to an improper purpose – to create a substantial obstacle to access abortion – particularly when viewed in light of the extensive restrictions Kansas has already passed limiting women's ability to access abortion care.

B. Plaintiff is Substantially Likely to Succeed on the Merits of Its Claim that the Act Violates Its and the Rights of Its Patients, to Equal Protection

In addition to imposing an undue burden on a "woman's fundamental right to obtain a lawful abortion," *Alpha Medical Clinic*, 280 Kan. at 921, the Act denies both Plaintiff and its patients the right to equal protection. "The Fourteenth Amendment to the United States Constitution provides that no state shall 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' The Kansas counterpart is found in Sections 1 and 2 of the Bill of Rights of the Kansas Constitution," and "[is] given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." *Farley*, 241 Kan. at 667; *see also Limon*, 280 Kan. at 283.

"The guiding principle of the Equal Protection Clause is that similarly situated individuals should be treated alike." *Limon*, 280 Kan. 275, 283 (internal citations omitted). Where similarly-situated individuals are treated differently, the United States and Kansas Supreme Courts employ three levels of scrutiny to determine whether the disparate treatment is constitutional: i) strict

scrutiny (statutory classification must be necessary to serve a compelling state interest); ii) heightened scrutiny (statutory classification must further a legitimate legislative purpose), and iii) rational basis review (statutory classification must bear a rational relationship to a valid legislative purpose). *Bair v. Peck*, 248 Kan. 824, 830–31, 811 P.2d 1176, 1182 (1991); *see also Miami County Bd. Of Com'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 316, 255 P.3d 1186, 1207 (2011). If the classification fails the applicable test, it violates the equal protection guarantee. *Limon*, 280 Kan. at 283-84.

The level of scrutiny to be applied "depends on the nature of the legislative classification and the rights affected by that classification." *Limon*, 280 Kan. at 283 (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)). Courts first examine whether "arguably indistinguishable classes of individuals" are being treated differently; if there is "differing treatment of similarly situated individuals" then it is clear that "the federal and Kansas Equal Protection Clauses are implicated." *Miami County Bd. Of Com'rs.*, 292 Kan. at 315. Courts must then examine the rights affected by those classifications as "[t]he nature of the rights dictates the level of scrutiny to be applied." *Id.* at 316 (internal citations omitted).

Here, as discussed below, the Act violates the Kansas guarantee of equal protection in two ways: (1) it treats women who seek abortion care through telemedicine differently than all other persons who seek comparable care through telemedicine, and infringes upon their fundamental right to obtain a pre-viability abortion; and (2) it discriminates between qualified health care providers without any rational basis.

1. <u>The Act Violates Plaintiff's Patients' Equal Protection Rights</u>

The Telemedicine Abortion Ban establishes an unconstitutional classification based on the exercise of a fundamental right. Women who seek abortion care via telemedicine are similarly

situated to patients who seeks other forms of medical care via telemedicine. By banning the provision of abortion services via telemedicine, the state is effectively singling out women seeking medication abortion and treating them differently than all other persons who wish to use telemedicine for comparable or riskier care, based on their exercise of the fundamental right to terminate a pre-viable pregnancy.

As discussed *supra* at 11, the right to end a pregnancy before viability is a fundamental right protected under both the U.S. and Kansas Constitution. The Abortion Telemedicine Ban implicates this fundamental right because the statue, on its face, prohibits the use of telemedicine to provide abortion care. In an equal protection challenge, "strict . . . scrutiny applies when fundamental rights are affected or when suspect classifications are involved." *Jurado v. Popejoy Const. Co.*, 253 Kan. 116, 124 853 P.2d 669, 676 (1993) (internal citations omitted); *Limon*, 280 Kan. at 283. Because the State's classification infringes on a fundamental right, the State must show that there is a compelling state interest furthered by the ban of telemedicine for abortion services, *Farley*, 241 Kan. at 667 (when a fundamental interest is at stake, the burden is on the party asserting constitutionality "to demonstrate a compelling state interest which justifies the classification."), "including a *direct relationship* between the classification and the state's goal." *Id.* at 669 (emphasis added).

There is no rational, let alone compelling, reason to prohibit medication abortion delivered via telemedicine, particularly when far riskier procedures can be and are provided through telemedicine. McNicholas Aff. ¶¶17-19; Grossman Aff. ¶¶34-35. There is no analogous restriction for any other form of health care or prescription of medication: The Kansas telemedicine act allows for all other forms of health care to be administered via telemedicine, including the treatment of and administration of potentially fatal medication to stroke patients, and all other medications to

be prescribed via telemedicine. Doctors and leading medical groups confirm that it is just as safe to provide medication abortion via telemedicine as it is to provide in-person at a clinic. Grossman Aff. ¶¶23-25; McNicholas Aff. ¶¶21, 23. The provision of medication abortion via telemedicine has been implemented safely and successfully in a number of other states and scientific studies confirm that the rare complications associated with medication abortion are the same whether it is provided in-person or through telemedicine. Grossman Aff. ¶¶22-25; McNicholas Aff. ¶23. The state's goal, whatever it may be, does not directly relate to classifying women based on their exercise of a fundamental right.

Moreover, a law that disadvantages women who choose abortion solely for the purpose of expressing moral disapproval of it, or burdening access to it, will violate Kansas' equal protection guarantee even under the less-stringent rational basis test, "(1) [a statute] must implicate legitimate goals, and (2) the means chosen by the legislature must bear a rational relationship to those goals." *Limon*, 280 Kan. at 283 (citation omitted). Making abortion care more difficult to secure is not a legitimate goal. *See Casey*, 505 U.S. at 877 ("A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.").

The Act allows Kansas' citizens to obtain a broad range of health services via telemedicine, care that is comparable in skill and risk to, or more complex and riskier than, medication abortion. As detailed above, there is simply no reasonable basis, let alone a compelling interest, to ban the provision of abortion services, particularly medication abortion, via telemedicine. Because the classification established by Section 6 classifies individuals on the basis of their exercise of a fundamental right without furthering any legitimate governmental purpose, it cannot survive any level of scrutiny. *See Jurado*, 253 Kan. at 124. Therefore, Trust Women is likely to succeed on

the merits of its claim that the Telemedicine Abortion Ban violates its patient's rights under Kansas' equal protection guarantee.

2. The Act Violates Plaintiff's Equal Protection Rights

While the Telemedicine Abortion Ban impermissibly classifies women based on their exercise of a fundamental right, it also impermissibly discriminates against abortion providers by treating them differently than providers who offer all other forms of medical care via telemedicine. Abortion providers are similarly situated to physicians who provide other types of health care with respect to their ability to provide safe and effective care via telemedicine, yet only abortion providers are prohibited from providing health care services to their patients via telemedicine. Because the Telemedicine Abortion Ban treats similarly situated health care providers differently, this Court should analyze it under the rational basis test. *See Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 195, 273 P.3d 709, 715 (2012). 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." *Cheeks*, 298 Kan. at 8 (quoting *Downtown Bar*, 294 Kan. at 194–95). Here, there is no evidence that the Telemedicine Ban bears a rational relationship to a legitimate goal. The State simply has no legitimate reason to discriminate between qualified health care providers in this way. In light of the demonstrated safety record of telemedicine abortions and the Kansas Telemedicine Act's sanctioning of telemedicine even 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. *See State v. Risjord*, 249 Kan. 497, 503, 819 P.2d 638, 643 (1991) (stating that while, under rational basis, a classification "need not

be an exact exclusion or inclusion of persons or things…[it] may not be created arbitrarily, discriminatorily, or unreasonably."). As stated, animus towards abortion providers is not a permissible basis for legislation. *See Limon*, 280 Kan. at 288 (rational basis review requires "'that classifications are not drawn for the purpose of disadvantaging the group burdened by the law'") (quoting *Romer*, 517 U.S. at 632 (1996)). Indeed, the Kansas Supreme Court has squarely held that "moral disapproval of a group cannot be a legitimate governmental interest." *Limon*, 280 Kan. at 295.

Because there is no rational basis for treating abortion providers differently than all other physicians who provide health care via telemedicine, Plaintiff is likely to prevail when Section 6 is reviewed under the rational basis standard.

II. Plaintiff and Its Patients Seeking Abortions Will Suffer Irreparable Harm if the Telemedicine Abortion Ban is Not Enjoined.

The Kansas Supreme Court has made clear that a plaintiff seeking temporary injunctive relief must only demonstrate a "reasonable probability of irreparable future injury," and has rejected any higher burden. *Bd. of Cty. Comm'rs of Leavenworth Cty. v. Whitson*, 281 Kan. 678, 684, 132 P.3d 920, 925 (2006) (rejecting "proof of the *certainty* of irreparable harm rather than the mere probability" as setting "too high a standard for parties seeking injunctions"). "The purpose of a temporary injunction is to preserve the status quo until the court can determine whether it should grant a permanent injunction." *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 61, 341 P.3d 607, 611 (Kan. Ct. App. 2014) (citing *State v. Alston*, 256 Kan. 571, 579, 887 P.2d 681, 687 (1994)). Here, the Act threatens irreparable harm to women's health by hindering access to abortion care, discriminating against patients and practitioners, and upending the current status quo.

Presently, Kanas women are able to obtain medication abortion via telemedicine at Plaintiff's clinic and Plaintiff is taking steps to further expand the provision of telemedicine services to women in more rural locations. Allowing the Telemedicine Abortion Ban to go into effect on January 1, 2019, would end the Clinic's current provision of medication abortion via telemedicine services, confining the Clinic's provision of abortion services to just two days a week, and would remove any opportunity to expand those services further. As detailed above, by banning the provision of abortions services via telemedicine, the Telemedicine Abortion Ban will infringe upon women's constitutional right to a pre-viability abortion. A threatened violation of a constitutional right alone constitutes irreparable injury because it cannot be remedied by damages after-the-fact. *See, e.g., Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229,* 32 Kan. App. 2d 1104, 1118, 95 P.3d 655, 664 (Kan. Ct. App. 2004) (suggesting that violations of statutory and constitutional rights are a per se injury). Thus, where a plaintiff has alleged deprivation of her 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) (alleged violation of Fourteenth Amendment rights constitutes irreparable harm) (citation omitted); *see also Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir. 2001) (finding irreparable harm where plaintiff alleged violations of First and Fifth Amendment rights).[4]

Additionally, the Telemedicine Abortion Ban may unnecessarily delay women's access to abortion care and cause irreparable harm to women's health because: (1) medication abortion is

[4] The standard for a temporary injunction is similar under Kansas and federal law, *Steffes v. City of Lawrence,* 284 Kan. 380, 394, 160 P.3d 843, 853 (2007), and, at times, the Kansas courts look to federal case law in applying that standard. *See Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 464-65 (1986) (relying on federal precedent in its analysis of irreparable injury).

only available for a limited period of time; (2) medication abortion is preferable or medically indicated for some women; and (3) delays may push a woman beyond the gestational limit for medication abortion, or force her to have a later abortion, increasing the risks to her health, as abortion, though an extremely safe medical procedure, poses increased risks as the pregnancy advances. Because of the adverse impact Section 6 will have on the ability of women to receive access to early abortion services, Plaintiff's motion for a temporary injunction is warranted.

III. Both the Balance of Hardships and the Public Interest Favor Entry of a Temporary Injunction

A plaintiff who seeks a temporary injunction must prove that the threat of injury to the plaintiff outweighs any harm to the other side, and that a temporary injunction would not be adverse to the public interest. *Idbeis*, 285 Kan. at 491. Here, Defendant faces little, if any, injury from issuance of an injunction. The temporary injunction sought will impose no affirmative obligation, administrative burden, or cost upon Defendant and will preserve the status quo. *Id*. at 492. Plaintiff and other abortion providers will continue to be able to provide care to their patients through telemedicine and they will continue to be subject to the existing Kansas regulations of abortion procedures. Further, government officials benefit from the insurance of an injunction against enforcement of an unconstitutional law, as does the public interest when constitutional violations are prevented. *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.") (internal citation omitted).

CONCLUSION

For all the reasons set forth above, Plaintiff respectfully requests that the Court grant its Motion for a Temporary Injunction and Temporary Restraining Order and for such further relief that the Court deems warranted.

Respectfully submitted,

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**Application Pending for Admission Pro Hac Vice*

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