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. 2018-CV-844
DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas,	)	
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Section 6 of the Kansas Telemedicine Act ("the Act") prohibits abortion providers from providing medication abortion via telemedicine. In doing so, Section 6 contradicts the clear purpose of the Act—to expand its citizens' access to health care by making medical treatment more accessible. While Defendant would have the Court believe that Section 6 was intended to protect pregnant women's health, he fails to set forth any evidence of how it actually does so. Nor has Defendant presented any evidence to challenge Plaintiff's showing that there is no genuine medical justification for banning the provision of medication abortion via telemedicine. Defendant cannot overcome the invalidity of Section 6 by attributing intentions to the legislature that are not supported by legislative findings or *any other evidence*.

To obfuscate this fact, Defendant argues Plaintiff lacks standing to bring its claims, and that the Kansas Constitution does not support any right to terminate a pre-viability pregnancy. Defendant is wrong on both accounts. Plaintiff's standing cannot seriously be contested, and Kansas' constitutional protections are coextensive with or broader than those of the federal constitution. Because Plaintiff has established a likelihood of success on the merits, the Court should preserve the status quo and enjoin Section 6 while the Act's validity is fully assessed.

ARGUMENT

I. Plaintiff Has Standing to Bring Its Claims.

Despite Defendant's attempt to argue otherwise, Plaintiff has standing to pursue its claims because: (i) Section 6 of the Act prohibits the provision of medication abortion via telemedicine, causing both Plaintiff and its patients harm; (ii) K.S.A. § 65-4a10 is currently not enforceable; thus, Plaintiff's injury would be redressed by enjoining Section 6; and (iii) the Attorney General, as the chief law enforcement officer of the State, is a proper defendant in this action.

A. A Temporary Injunction of Section 6 Provides the Relief Plaintiff Seeks.

1. Section 6 is Appropriately Construed as a Prohibition Under Kansas Law.

Section 6 unambiguously states, "[n]othing in the Kansas telemedicine act shall be construed to authorize the delivery of any abortion procedure via telemedicine." K.S.A. § 2,215. As confirmed by Kansas Supreme Court precedent, the Act is clearly prohibitory. The Kansas Supreme Court has held that statutory language such as "[n]othing in this act shall be construed to authorize" an action generally means that such action is prohibited. *See, e.g.*, *Seaman Dist. Teachers' Association of Shawnee Cty. v. Bd. of Ed. of Seaman Unified Sch. Dist. No. 345*, 217 Kan. 233, 246, 535 P.2d 889, 899 (1975) (noting that statute stating "[n]othing in this act shall be construed to authorize a strike" was "designed to prohibit a strike"). Accordingly, Section 6's non-authorization language is appropriately interpreted as a prohibition on the use of telemedicine to provide medication abortion.

2. No Other Kansas Law Prohibiting the Provision of Medication Abortion Via Telemedicine Is Currently in Effect.

While Defendant is correct that K.S.A. § 65-4a10 prohibits the use of telemedicine for medication abortion, this statute has been enjoined by court order since 2011 and is thus currently unenforceable.

In 2011, this Court issued a temporary restraining order barring the Attorney General, among others, from enforcing the implementing regulations regarding K.S.A. § 65-4a10, which provides for a medication-in-person requirement, along with other provisions of a Kansas regulatory scheme restricting the provision of abortion, collectively codified at K.S.A. §§ 65-4a01–4a12. Order Granting TRO Pending Hr'ing on Appl. for Temporary Inj., *Hodes & Nauser v. Moser*, Nov. 10, 2011, No. 11C-1298 (hereinafter the "2011 Restraining Order"). On December 2, 2011, the parties in *Hodes & Nauser* stipulated that the restraining order would

"remain in effect pending the Court's issuance of a final judgment in this matter." Agreed Order 1, *Hodes & Nauser v. Moser*, No. 11C-1298 (hereinafter the "Agreed Order"). The Agreed Order made clear that K.S.A. §§ 65-4a01–4a12, as well as the associated implementing regulations, would not be enforced during the pendency of the case. *Id*. K.S.A. § 65-4a10 falls squarely within the sections covered by the Agreed Order, and though these statutory sections were subsequently amended in 2015, the 2011 Restraining Order and Agreed Order are still in effect. [1]

A temporary restraining order persists until final judgment in the case and does not lapse if the underlying law is amended. Kansas statutory law specifically contemplates and addresses the manner in which a change of circumstances may impact a temporary injunction and restraining order: "At any time before the judgment the party restrained or enjoined may apply to the judge . . . to vacate or modify the same," K.S.A. § 60-910(a). If a party believes that "a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest…[t]he party seeking relief bears the burden of establishing that changed circumstances warrant relief" and only the *court* has authority to grant such relief. *Horne v. Flores*, 557 U.S. 433, 447 (2009) (internal quotation marks and citation omitted)[2]; *see also Kan. Judicial Watch v. Stout*, 562 F.3d 1240, 1244 (10th Cir. 2009) ("We must now decide whether adoption of the new canons moots the plaintiffs' challenge to the old canons. We conclude that it does . . . [and] we vacate the preliminary injunction.). Indeed, "[t]he proper

[1] Even if Defendant were correct that the 2015 amendment moots the claims against K.S.A. § 65-4a10 in *Hodes & Nauser v. Moser*, No. 11C-1298, it is for the court, rather than the legislature or the parties, to decide whether to vacate or modify the temporary restraining order.

[2] Though *Horne v. Flores* refers to Fed. R. Civ. P. 60(b)(5), permitting a party to seek relief from an order, it contains the same intent as K.S.A. § 60-910(a). 557 U.S. at 447 ("[T]he Rule provides a means by which a party can ask a court to modify or vacate a judgment or order[.]"); *see also Fredricks v. Foltz*, 221 Kan. 28, 30, 557 P.2d 1252 (1976) (finding federal interpretations persuasive where state and federal rules are similar).

manner for a party to test the validity of an order of a court is not to defy the order, but to move to have it set aside in the court which issued it or in some court having supervisory jurisdiction." *Koch Eng'g Co. v. Faulconer*, 227 Kan. 813, 830, 610 P.2d 1094, 1106 (1980).

Defendant is well aware of this procedural requirement; in his answer to the plaintiffs' amended petition in *Hodes & Nauser*, he specifically stated that he planned on filing "a motion with the Court to modify the stay to allow the amended health and safety statutes to take effect." *See* Defs.' Answer to Pls.' Second Am. Verified Pet. ¶ 99, Dec. 29, 2015, No. 11C-1298, attached hereto as Exhibit A. Further, after K.S.A. § 65-4a10 was amended in 2015, Defendant's counsel explicitly inquired into whether plaintiffs in that action would be willing to enter into a stipulation to allow the medication-in-person requirement to take effect, and informed plaintiffs' counsel that defendants would file a motion to modify the Agreed Order in the absence of such agreement. The plaintiffs declined to agree to any such stipulation, and opposing counsel never pursued it further with the court. *See* Email from Tiseme Zegeye, Staff Attorney, Center for Reproductive Rights, to Sarah Warner, Attorney, Thompson, Ramsdell, Qualseth, & Warner, P.A. (April 14, 2016) (on file with Plaintiff's counsel), attached hereto as Exhibit B. It is perplexing that Defendant now claims the 2015 amendments are in effect and currently bar the provision of telemedicine, Def.'s Resp. Opposing Pl.'s Mot. for Temporary Inj. and TRO 6 (hereinafter "Def.'s Resp."), when the law and Defendant's own papers and correspondence clearly state otherwise.

Further, the Board of Healing Arts and the District Attorney for Sedgwick County are also bound by the 2011 Restraining Order, despite Defendant's claims to the contrary. As chief law officer of the State, the Attorney General entered into a binding agreement to extend the 2011 Restraining Order and refrain from enforcing K.S.A. § 65-4a10. It follows logically that

other state officials are also bound by the Attorney General's decision. *See, e.g.*, *State v. Finch*, 128 Kan. 665, 280 P. 910, 911 (1929) ("Adequate enforcement of the law involves co-ordinated action upon the part of these officials as well as all state and local executive officials."). The Attorney General, in his supervisory power, has the authority "to direct with superintending oversight the official conduct and acts of such officials; and it is his prescribed duty to exercise and perform these acts, and to do whatever may be necessary and proper to render his power in these respects effective." *Id*. at 913. It makes little sense that state officials could legitimately take a position contrary to the chief law officer of the State when that officer has the power to direct their conduct, including dismissing actions, in an effort to coordinate the enforcement of the law. *See id*. (holding it was proper for attorney general to dismiss county attorney's attempted prosecution of an informant to whom the attorney general had previously promised immunity); *see also State ex rel. Foster v. City of Kansas City*, 186 Kan. 190, 195–96, 350 P.2d 37, 41 (1960) (citing to *Finch* as settling that, if there is any controversy between the county attorney and the attorney general, the attorney general outranks the county attorney).

Thus, Plaintiff has standing to pursue its claims and need not challenge K.S.A. § 65-4a10, a law that is currently unenforceable, in order to gain the relief sought here—the ability to continue providing medication abortion via telemedicine.[3]

B. The Attorney General Is the Proper Defendant.

The Attorney General is the "chief law enforcement officer of the state" and "one of the state's prosecuting attorneys." *State ex rel. Miller v. Rohleder*, 208 Kan. 193, 194, 490 P.2d 374, 375 (1971). Further, "[w]herever the public interest is involved or the state is a party, the

[3] Indeed, it would be duplicative and counter to the interest of judicial economy for Plaintiff to challenge the constitutionality of a law that is currently being challenged in another lawsuit.

attorney general is primarily the proper counsel to appear." *Mem'l Hosp. Association. Inc. v. Knutson*, 239 Kan. 663, 668, 22 P.2d 1093, 1097 (1986); *see also Foster*, 186 Kan. at 194, 350 P.2d at 40-41 ("[I]n this court any case in which the attorney general appears involves the public interest. The corollary is likewise true because wherever the public interest is involved or the state is a party, the attorney general is primarily the proper counsel to appear.").

Defendant readily admits that the public interest is at stake here. *See* Def.'s Resp. 35 ("[T]he State and the public have a strong interest in resolving the relevant policy questions through the democratic process."); *see also id*. at 36-37 ("The public also has a strong interest in women's health, as well as in regulating the medical profession."). Indeed, Defendant explicitly claims that "[a]n injunction would be adverse to the public interest." *Id*. at 36-37. As Defendant concedes this case involves the public's interest, the Attorney General is a proper party to this action.

Additionally, the Kansas Supreme Court has concluded "that the Attorney General's powers are as broad as the common law unless restricted or modified by statute." *Finch*, 280 P. at 913. As the state's "principal law officer [the Attorney General's] authority is coextensive with the public legal affairs of the whole community. As a representative of that state, an attorney-general is empowered to bring any action which he deems necessary for the protection of the public interest. His authority in this respect is necessarily implied from the nature of his office, and will be presumed to exist, in the absence of evidence to the contrary." *Id*. at 912 (internal citations and quotations omitted). It follows that, as the chief law officer, the Attorney General has enforcement authority here.

The Act fails to specify how it will be enforced or who will impose penalties for any violations. *See generally* K.S.A. §§ 2,210-2,216. While the Act does provide for the Board of

Healing Arts (which regulates health professionals) to "adopt such rules and regulations as may be necessary to effectuate the provisions of the Kansas telemedicine act," these rules and regulations have not yet been promulgated, leaving open the question of who will enforce the Act and how it will be enforced. K.S.A. §§ 2,214 (a) and (b).[4] Contrary to Defendant's contention that the Board of Healing Arts has the authority to enforce the Act, promulgating regulations to *effectuate* the Act is not the same as having the authority to *enforce* it. *Cf.* K.S.A. § 65-4a10(d) (specifying that a violation is "unprofessional conduct under K.S.A. 65-2837," which falls squarely under the Board of Healing Arts' enforcement authority (K.S.A. § 65-2836(b))).

Finally, the Attorney General is a named Defendant in *Hodes & Nauser v. Moser*, No. 11C-1298, and *Hodes & Nauser v. Schmidt*, No. 13C-705 and has never presented the argument he makes here, that because a statute does not expressly provide for the attorney general to enforce the law, the attorney general is not a proper party to the action.

II. Plaintiff Has Established a Likelihood of Success that Enforcement of the Act Will Violate Its Constitutional Rights and Those of Its Patients.

Defendant's arguments regarding Plaintiff's likelihood of success on its claims rely on erroneous interpretations of the law and disregard key facts advanced by Plaintiff via sworn affidavits. First, the Kansas Supreme Court has repeatedly interpreted Sections 1 and 2 of the Kansas Constitution consistently with the due process and equal protection clauses of the Fourteenth Amendment; therefore, Plaintiff appropriately brings claims under those provisions.

[4] The Act also instructs the Behavioral Sciences Regulatory Board "to adopt such rules and regulations as may be necessary to effectuate the provisions of the act." K.S.A. §§ 2,214 (c). Yet, the Behavioral Sciences Regulatory Board regulates the provision of mental health care and thus, would not be a proper defendant in this case. Similarly, The Kansas Department of Health and Environment has the authority to "implement and administer" only Section 8 of the Act, which applies to speech-language pathology services and audiology services. H.B. 2028 § 8(a)-(b). As such, they also are not an appropriate defendant in this case.

Second, Defendant misapplies the undue burden standard that was first articulated in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and most recently clarified in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Third, Section 6's discriminatory treatment of both physicians providing and patients seeking abortion care fails even rational basis review. And finally, Defendant's public interest argument fails because granting Plaintiff's request for temporary injunctive relief will merely preserve the status quo and protect against the likely violation of Kansas citizens' constitutional rights.

A. The Kansas Constitution Supports the Right to Terminate a Pre-Viability Pregnancy.

For over a century, the Kansas Supreme Court has held that Sections 1 and 2 of the Kansas Constitution have "much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058, 1061 (1987); *see also State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22, 28 (2005); *State ex rel. Stephan v. Parrish*, 257 Kan. 294, 310, 891 P.2d 445, 457 (1995); *State ex rel. Tomasic v. Kansas City*, 230 Kan. 404, 426, 636 P.2d 760, 777 (1981); *Manzanares v. Bell*, 214 Kan. 589, 602, 522 P.2d 1291, 1302-03 (1981); *Henry v. Bauder*, 213 Kan. 751, 752–53, 518 P.2d 362, 364-65 (1974); *Tri–State Hotel Co. v. Londerholm*, 195 Kan. 748, 759, 408 P.2d 877, 887 (1965); *State v. Wilson*, 101 Kan. 789, 168 P. 679, 682 (1917). Indeed, the Court has found that in some cases, the Kansas Constitution "affords separate, adequate, and *greater* rights than the federal Constitution." *Farley* 241 Kan. at 671, 740 P.2d at 1063 (emphasis added).

Defendant ignores this overwhelming precedent, and instead posits that Kansas courts only embrace the protections of federal law if Kansas constitutional provisions are "literally or

effectively identical to a federal counterpart." Def.'s Resp. 18-19.[5] Defendant then argues that Sections 1 and 2 of the Kansas Constitution do not incorporate the right to terminate a pre-viability pregnancy because those sections contain no literal reference to abortion, privacy, or the phrase "due process of law."[6] Defendant's arguments fail for two reasons: *first*, as recognized by the Kansas Supreme Court, the Kansas Constitution is intended not merely to meet existing conditions, but to "govern future contingencies," *State ex rel. Stephan v. Finney*, 254 Kan. 632, 643, 867 P.2d 1034, 1042 (1994) (internal citations and quotations omitted); *second*, the Court has not limited the protections afforded under Sections 1 and 2 to those explicitly recognized in statute or common law at the time the Kansas Constitution was adopted. Rather, the Court has relied on an evolving understanding of liberty and rights under the Fourteenth Amendment to guide its decisions under Sections 1 and 2. *See Limon*, 280 Kan. at 294-95. This evolving understanding includes how the rights identified in the Kansas Constitution apply to women and their ability to participate equally in society.

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[5] The one case Defendant cites—*State v. Schoonover*—does not support this proposition. 281 Kan. 453, 493, 133 P.3d 48, 77 (2006). In *Schoonover*, the Kansas Supreme Court cites to a number of cases in which provisions from the Kansas Constitution have been interpreted *consistently* with provisions from the federal Constitution, including Sections 1 and 2. *Id.* (citing to *Tomasic*, 230 Kan. at 426, 636 P.2d at 777, which held that both Sections 1 and 2 of the Kansas Constitution are given "much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law."). Thus, *Schoonover* supports Plaintiff's view that Sections 1 and 2 of the Kansas Constitution embrace the same protections as the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution.

[6] Section 1 of the Kansas Constitution does explicitly reference the right to "liberty," which clearly aligns with the language of the Fifth and Fourteenth Amendments from which all substantive due process rights, including abortion rights, emanate. Kan. Const. Bill of Rts. § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, *liberty*, and the pursuit of happiness") (emphasis added). Similarly, both the Fifth and Fourteenth Amendments of the U.S. Constitution state no person shall be deprived "of life, *liberty*, or property, without due process of law." *See* U.S. Const. amends. V and XIV (emphasis added).

Defendant's reliance on *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006), and *Mahaffey v. Attorney General*, 564 N.W.2d 104, 111 (Mich. Ct. App. 1997) to support its argument that there is "no independent state law right to abortion under the Kansas Constitution," Def.'s Resp. 18, is misplaced and unpersuasive. *Alpha Medical Clinic* was decided solely on federal constitutional grounds, and the Kansas Supreme Court did not issue any holding concerning the scope of protection afforded by the Kansas Constitution to the right to terminate a pregnancy: "We have not previously recognized—and need not recognize in this case despite petitioners' invitation to do so—that [rights to privacy protecting abortion] also exist under the Kansas Constitution. *But we customarily interpret its provisions to echo federal standards*." 280 Kan. at 920, 128 P.3d at 377 (emphasis added). Unlike Kansas, the *Mahaffey* court cited no precedent establishing that Michigan state constitutional provisions generally embrace federal standards; thus, *Mahaffey's* underlying premise—that the existence of a federal constitutional right to abortion is "not necessarily relevant," *Mahaffey*, 564 N.W.2d at 109—is inapplicable in Kansas. Defendant fails to cite a single instance in which any Kansas court has determined that the Kansas Constitution affords less protection than its federal counterpart.

Accordingly, this Court should reject Defendant's unsupported assertion that the right to end a pre-viability pregnancy receives no protection under the Kansas Constitution. Def.'s Resp. 18-24.

B. Plaintiff Has Established a Likelihood of Success on Its Claims that Enforcement of the Ban Will Impose an Undue Burden on Plaintiff's Patients' Right to Terminate a Pre-viability Pregnancy.

As described in Plaintiff's opening papers, Section 6 imposes an undue burden on a Kansas woman's constitutional right to terminate a pre-viability pregnancy because it unconstitutionally infringes on a woman's ability *to obtain* an abortion. *See* Pl.'s Mot. for a

Temporary Inj. and TRO 12-15 (hereinafter "Pl.'s Br."). Defendant repeatedly misarticulates the nature of the right in question here, referring to it only as an "ability to make a decision regarding abortion." Def.'s Resp. 27, 30. In doing so, Defendant misapplies the undue burden standard and ignores the significant burdens Section 6 imposes.

Defendant cites *Whole Woman's Health* only twice in his 39-page response, side-stepping key portions of the analysis that this precedent requires. Significantly, *Whole Woman's Health* reaffirms 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. 136 S. Ct. at 2309-10. Mere speculation as to potential, but not evidenced, benefits does not withstand constitutional scrutiny under the undue burden standard. *Id.* at 2310-12.

Defendant alleges that Section 6 furthers the State's interest in insuring maximum safety for the patient, Def.'s Resp. 26, but Defendant's lengthy response provides no evidence to actually support this contention.[7] Rather, Defendant attempts to bolster this unsupported claim by citing to a single Arizona state court case, *Planned Parenthood Arizona, Inc. v. American Association of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 257 P.3d 181 (Ariz. Ct. App. 2011), which concerned a different, non-analogous regulation (an informed consent provision that requires information to be provided in-person rather than over the phone), and was decided prior to *Whole Woman's Health*. The Arizona court applied a less exacting standard than that which is clearly required now—only asking whether the legislature's conclusions were reasonable. *Id.* at 193-94. *Whole Woman's Health* clarified that mere legislative speculation as to

[7] Defendant's reliance on the testimony of Kansans for Life on a predecessor bill is simply not evidence of the legislature's intent, and should not be considered by this Court.

a law's benefits is insufficient; a court must look at those theoretical benefits and weigh them against evidence of the burdens imposed. *Whole Woman's Health*, 136 S. Ct. at 2310; *Casey*, 505 U.S. at 885.

Here, Plaintiff has provided ample evidence that Section 6 confers no medical health benefit. *See* Pl.'s Br. 5-8, 13-15. Defendant has not offered any evidence to the contrary. Plaintiff has also provided evidence of the significant burdens Section 6 will impose, including: restricting the provision of medication abortion to just two days a week (when Plaintiff's physicians are able to travel to Kansas to provide care); severely limiting the number of medication abortions the clinic can provide and imposing significant scheduling restrictions for women; forcing women to wait 6-8 hours the day of their procedure; potentially delaying care for women who cannot conform their schedules to the clinic's availability; for the women who are close to the gestational cut-off, precluding their ability to receive medication abortion; and foreclosing the clinic's ability to expand services to women in more rural locations. *See* Pl.'s Br. 9, 14. Defendant cannot escape that under *Whole Woman's Health*, any burden associated with an abortion regulation that confers no benefit, like Section 6 of the Act, is by definition undue.

Moreover, Section 6 defies the entire purpose of the Act, which is to promote the use of telemedicine as a means of expanding access to necessary health care services, evincing its improper purpose.[8] Thus, for all the reasons set forth in the Pl.'s Br. 12-15, along with Defendant's inability to present any evidence that Section 6 is intended to and actually does

[8] By Defendant's own statements, Section 6 of the Act was not intended to ensure patient safety. Rather, Defendant asserts that Section 6 was incorporated into the Act as a result of the efforts of anti-abortion activists within the State who were mistakenly concerned that the Act could contradict existing law by permitting the use of telemedicine for medication abortion. Def.'s Resp. 30. As explained *supra*, any existing law that could be interpreted to prohibit telemedicine for medication abortion is currently enjoined, and testimony of a lobbying group is not evidence of the legislature's intent.

promote patients' health, Section 6 imposes an unconstitutional undue burden on women's right to access abortion under Sections 1 and 2 of the Kansas Constitution.

Finally, Plaintiff has established a substantial likelihood that it is entitled to facial relief. Under *Casey,* a law restricting abortion is facially invalid if "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," 505 U.S. at 895. As articulated in *Casey* and *Whole Woman's Health,* courts should consider "those women for whom the provision is an actual rather than irrelevant restriction." *Whole Woman's Health,* 136 S. Ct. at 2320 (citing *Casey*, 505 U.S. at 895). Here, the women affected are Plaintiff's patients who seek medication abortion; and for a large fraction of these women, the telemedicine ban will burden their access to abortion by limiting the days and times when they are able to receive treatment, and forcing at least some women to forego the procedure altogether due to scheduling constraints.

C. Section 6 of the Act Violates Both Plaintiff's Patients and Plaintiff's Rights to Equal Protection.

Defendant argues that Plaintiff's equal protection claims on behalf of itself and its patients should be reviewed under the rational basis test. Def's Resp. 31. To support this contention, Defendant references an "overwhelming and conclusive body of case law," yet fails to cite a single case. *Id.* While Plaintiff agrees that the appropriate level of scrutiny for Plaintiff's equal protection claim is rational basis, strict scrutiny is required for Plaintiff's patients' equal protection claims because, as discussed *supra*, the right to terminate a pre-viability pregnancy is a fundamental right protected by the Kansas Constitution. *See Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, 124, 853 P.2d 669, 676 (1993) ("strict . . . scrutiny applies when fundamental rights are affected . . ."); *Limon,* 280 Kan. at 284, 122 P.2d at 28.

Regardless, Section 6 offends both Plaintiff's patients and Plaintiff's rights to equal protection even under rational basis review. *See* Pl.'s Br. 20-23. Defendant's attempt to justify its differential treatment, by stating that abortion is a unique medical procedure, does not alter the analysis or outcome. *See* Def.'s Resp. 33-34. States' ability to regulate abortion as a unique medical procedure has been recognized only when a state is asserting an interest in promoting fetal life or dignity, and enacts laws that are intended to serve a persuasive function. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 315 (1980) (finding that the Hyde Amendment placed "no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather…encourages alternative activity deemed in the public interest").[9] Never has the argument that abortion is somehow different been advanced to support abortion regulations whose supposed purpose is to protect women's health.

Here, while Defendant's legislative goal of "protecting women's health," *see* Def.'s Resp. 34, is a legitimate one, the Act's singling out of abortion bears no "reasonable relationship" to this goal, and in fact is hostile to it. The entire purpose of the Act is to ensure that Kansas citizens, many of whom lack adequate access to healthcare, can take advantage of the increased access telemedicine provides. Given that the Act allows Kansas' citizens to obtain a broad range of health services via telemedicine, including care that is more complex and riskier than medication abortion, it strains credulity to argue that the Act's prohibition of medication abortion via telemedicine bears any reasonable relationship to "protecting women's health."[10] *Id*.

[9] Indeed, the *Casey* quote Defendant relies upon to justify the classification based on abortion being a unique procedure is in reference to the "abortion decision" and the state's interest in influencing that decision. Def.'s Resp. 33; *Casey*, 505 U.S. at 852.

[10] To the contrary, evidence shows that medication abortion provided via telemedicine is just as safe as medication abortion provided in person. Consistent with the rationale underlying the Act, allowing Kansans to access medication abortion via telemedicine, in fact, enhances patient

D. Temporarily Enjoining the Act Does Not Thwart the Democratic Process, But Rather Furthers the Public Interest By Protecting Kansas Citizens' Constitutional Rights and Preserving the Status Quo.

Plaintiff has established a reasonable probability that its patients and practitioners will suffer distinct, irreparable harms if Section 6 of the Act is not enjoined: The Telemedicine Abortion Ban would limit Trust Women's provision of abortion services to just two days a week, would end the current provision of medication abortion via telemedicine on additional week and weekend days, would squash Plaintiff's efforts to expand medication abortion services to more rural areas of Kansas, discriminates against patients and practitioners, upends the current status quo; and violates the constitutional rights of Plaintiff's patients to terminate a pregnancy.

In contrast, Defendant has offered no evidence that the public interest will be harmed if a temporary injunction is granted. Instead, Defendant argues that Plaintiff's burden when requesting a temporary injunction is more "weighty" here because Plaintiff is challenging "a law enacted through the democratic process." Def.'s Resp. 12; *see also id.* at 11. Not surprisingly, Defendant fails to offer any citation, case or statute, that supports this assertion. Thus, Defendant mischaracterizes the showing Plaintiff must make to obtain a temporary injunction, improperly inserting the "weighty" standard of showing each factor is met "clearly and unequivocally." *Id.* at 11-12. The Kansas Supreme Court has explicitly rejected imposing any burden on a plaintiff seeking a temporary injunction beyond showing a "reasonable probability of irreparable future

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safety, by making it easier for women to access medication abortion care earlier. Pl.'s Br. 7. The complete inability of Defendant to show how women's health is served by the Act's prohibition of medication abortion via telemedicine again evinces the legislature's true purpose—to make abortion care more difficult to secure, which is never a legitimate legislative goal. *See Casey*, 505 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.").

injury." *Bd. of Cty. Comm'rs of Leavenworth Cty. v. Whitson,* 281 Kan. 678, 684, 132 P.3d 920, 925 (2006).

Further, because Plaintiff has alleged a deprivation of a constitutional right, the law's constitutionality is no longer presumed and it is incumbent upon Defendant to demonstrate that the Act furthers a compelling state interest. *Jurado*, 253 Kan. at 124, 853 P.2d at 676; *Farley*, 241 Kan. at 670, 740 p.2d at 1063.[11] Defendant has not done so. While Defendant asserts that the state and public's interest is in protecting women's health, Def.'s Resp. 35-36, he has failed to show how Section 6 of the Act actually furthers that interest. Because enforcement would threaten the health of women seeking abortions, the public's interest in women's health is actually promoted by temporarily enjoining Section 6 of the Act.

CONCLUSION

For the reasons stated herein and in Plaintiff's Memorandum of Law in Support of a Temporary Injunction and Temporary Restraining Order, Plaintiff respectfully requests that this Court issue a Temporary Injunction restraining Defendant from enforcing Section 6 of the Act.

Respectfully submitted,

/s/ Robert V. Eye
Robert V. Eye

[11] Defendant argues that in order to overcome the presumption that the Act is constitutional, Plaintiff must show that "no set of circumstances exist under which the Act would be valid." Def. Res. 12-13. This argument fails for two reasons. Defendant is conflating two distinct legal issues—the presumption of constitutionality and the standard for relief in facial challenges—and this articulates the wrong standard for facial relief in abortion cases: whether "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," 505 U.S. at 895, focusing on "the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894.

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* *Admitted Pro Hac Vice*
** *Application Pending for Admission Pro Hac Vice*

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on this 12th day of December, 2018, 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.

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EXHIBIT A

FILED BY CLERK
DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

2012 JAN 20 P 12: 15

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS

Hodes & Nauser, MDs, P.A.,
et al., Plaintiffs,

v. Case No. 11 C 1298
Division No. 7

Robert Moser, M.D., in his official
Capacity as Secretary of the Kansas
Department of Health and Environment,
et al., Defendants.

Pursuant to K.S.A. Chapter 60

DEFENDANTS' ANSWER

ANSWER TO FIRST AMENDED VERIFIED PETITION

Defendants, in their respective official capacities, for their Answer to plaintiffs' First Amended Verified Petition:

1. Admit as to paragraph 1 only that plaintiffs have brought this action in the District Court of Shawnee County, Kansas.

2. Admit as to paragraph 2 only that plaintiffs claim that their action against K.S.A. § 65-4a01 through § 65-4a12 ("the Act") is brought under the Kansas Constitution and that their action against K.A.R. § 28-34-126 through § 28-34-144 ("the Permanent Regulations") is brought under the Kansas Judicial Review Act ("KJRA").

3. The allegations of paragraph 3 that are speculative opinions and conclusions of law require no response, and the statutes referred to speak for themselves.

4. Deny paragraph 4.

5. Admit as to paragraph 5 only those facts which are documented in the record of *Hodes & Nauser, et al. v. Moser, et al.*, Case No. 11-CV-02365-CM-KMH.

6. Admit paragraph 6.

7. Admit as to paragraph 7 only that prior to November 14, 2011, KDHE had no ability to grant or deny licenses under the Permanent Regulations, but note that plaintiffs were provided a complete copy of the final Permanent Regulations on October 14, 2011 - a month in advance of their effective date.

8. Deny paragraph 8.

9. Admit paragraph 9.

10. Admit paragraph 10.

11. Admit paragraph 11 except that the enforcement authority of Defendant Howe is exercised in Johnson County, not Shawnee County.

12. Admit as to paragraph 12 only that plaintiff Hodes is an M.D. licensed to practice medicine in the State of Kansas.

13. Admit as to paragraph 13 only that plaintiff Nauser is an M.D. licensed to practice medicine in the State of Kansas.

14. Admit paragraph 14.

15. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 15.

16. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 16.

17. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 17.

18. Admit as to paragraph 18 only that plaintiffs' practice is subject to oversight and inspections by the Kansas Board of Healing Arts ("KBHA") and KDHE.

19. Admit as to paragraph 19 only that plaintiffs bring this action on their own behalf.

20. Admit paragraph 20.

21. Admit paragraph 21.

22. Admit paragraph 22.

23. Admit as to paragraph 23 only that, in terms of aggregate statistics, an abortion can be a relatively safe procedure for the mother. However, aggregate statistics do not address the context and place of a particular abortion, or the person performing the procedure. Defendants deny that abortion is of such safety that regulations establishing standards rationally related to the State's interest in promoting the health, safety, and welfare of its citizens are unwarranted or precluded.

24. Admit paragraph 24.

25. Admit as to paragraph 25 only that the reference cited in paragraph 14 shows that a majority of the abortions performed in Kansas during 2010 occurred during the first twelve weeks of gestation.

26. Admit as to paragraph 26 only that abortions may be performed by medical or surgical means. However, defendants aver that abortion by medication still requires the timely availability of medical / surgical backup. Defendants further aver that while a surgical abortion requires no incision, it requires dilation and invasion of the

patient's body by instruments which can result in complications, such as perforation of the uterus, internal bleeding, and infection.

27. Admit as to paragraph 27 only that, in terms of aggregate statistics and in comparison with other medical procedures, an abortion can be a relatively safe procedure for the mother. However, aggregate statistics do not address the context and place of a particular abortion, or the person performing the procedure. Defendants deny that abortion is of such safety that regulations establishing standards rationally related to the State's interest in promoting the health, safety, and welfare of its citizens are unwarranted or precluded.

28. Admit as to paragraph 28 only that, in terms of aggregate statistics and in comparison with other medical procedures, an abortion can be a relatively safe procedure for the mother. However, aggregate statistics do not address the context and place of a particular abortion, or the person performing the procedure. Defendants deny that abortion is of such safety that regulations establishing standards rationally related to the State's interest in promoting the health, safety, and welfare of its citizens are unwarranted or precluded.

29. Deny paragraph 29.

30. Deny paragraph 30 to the extent that it alleges that "any delay" in obtaining an abortion may cause increased morbidity and mortality for the mother. Defendants admit that, in terms of aggregate statistics, an abortion can be a relatively safe procedure for the mother. However, aggregate statistics do not address the context and place of a particular abortion, or the person performing the procedure. Defendants deny that abortion is of such safety that regulations establishing standards rationally related to

the State's interest in promoting the health, safety, and welfare of its citizens are unwarranted or precluded.

31. Admit as to paragraph 31 only that there are currently three medical facilities in Kansas that regularly provide elective abortions, that KDHE issued Notices of Intent to Deny to both plaintiffs and Central Family Medical under the Temporary Regulations, and that KDHE issued a license to Comprehensive Health of Planned Parenthood after it demonstrated full compliance with the Temporary Regulations.

32. Admit as to paragraph 32 only that the cited reference shows that a majority of the abortions performed in Kansas during 2010 occurred during the first twelve weeks of gestation.

33. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 33.

34. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 34.

35. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 35.

36. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 36.

37. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 37.

38. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 38.

39. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 39.

40. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 40.

41. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 41.

42. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 42.

43. The allegations of paragraph 43 that are conclusions of law require no response, and the cited provisions of the Act and other laws referred to speak for themselves.

44. The allegations of paragraph 44 that are conclusions of law require no response, and the cited provisions of the Act speak for themselves.

45. Admit as to paragraph 45 only that it partially summarizes the cited provisions of the Act, which speak for themselves.

46. Admit as to paragraph 46 only that it partially summarizes the cited provisions of the Act, which speak for themselves.

47. Deny paragraph 47.

48. Admit as to paragraph 48 only that it partially summarizes the cited provisions of the Act, which speak for themselves.

49. Admit paragraph 49 with the clarification that K.S.A. § 65-4a02(g) allows KDHE to "make exceptions to the standards set forth in law or in rules and regulations when it is determined that the health and welfare of the community require the services

of the hospital or ambulatory surgical center and that the exceptions, as granted, will have no significant adverse impact on the health, safety or welfare of the patients of such hospital or ambulatory surgical center."

50. Admit paragraph 50.

51. Deny paragraph 51.

52. Deny paragraph 52.

53. As to paragraph 53, admit that K.A.R. § 28-34-135(m) promotes health, safety, and welfare via its requirement that "[d]rugs and medications shall be administered to individual patients only by a facility physician or a facility health professional."

54. As to paragraph 54, admit that K.A.R. § 28-34-137(c) promotes health, safety, and welfare via its requirement that another individual is present in the room during a pelvic examination or an abortion procedure regardless of the physician's gender.

55. As to paragraph 55, deny plaintiffs' interpretation of K.A.R. § 28-34-138(f). Prior to receiving notice of this action, KDHE advised counsel for plaintiffs that the intent of K.A.R. § 28-34-138(f) was that "there must be medically appropriate monitoring of the patient's vital signs. Should a complication arise, then medical personnel should respond as appropriate and begin taking vital signs as necessary." A copy of KDHE's letter to Attorneys Woody and Pilate, dated November 9, 2011, is attached as Exhibit A.

56. As to paragraph 56, deny plaintiffs' interpretation of K.A.R. § 28-34-138(c). Prior to receiving notice of this action, KDHE advised counsel for plaintiffs that "'available' [as used in K.A.R. § 28-34-138(c)] is a lesser requirement than that of

'present' as used in K.A.R. § 28-34-137(c). A licensed health professional is available if he or she is within the facility and could be summoned if needed during an abortion procedure." See Exhibit A - KDHE letter to Attorneys Woody and Pilate, dated November 9, 2011.

57. As to paragraph 57, deny plaintiffs' interpretation of K.A.R. § 28-34-139(a)(2). Prior to receiving notice of this action, KDHE advised counsel for plaintiffs that "A physician or health professional need not personally take the patient's vital signs. A medical assistant can take and record the patient's vital signs, such as blood pressure, respirations, heart rate, etc. The intent of this requirement [K.A.R. § 28-34-139(a)(2)] is that a physician or health professional must monitor these vital signs (by reviewing the recorded data) and bleeding of each patient by checking on them at one or more visits - as medically appropriate - prior to the patient's discharge." See Exhibit A - KDHE letter to Attorneys Woody and Pilate, dated November 9, 2011.

58. Deny paragraph 58.

59. As to paragraph 59, admit only that K.A.R. § 28-34-139(a)(3)(A) promotes health, safety, and welfare via its requirement that a patient who has been administered local anesthesia, analgesia or sedation remain in the recovery area for a minimum of 30 minutes following the surgical abortion of an unborn child whose gestational age was 12 weeks or less - the same minimum recovery time specified in specified in the Condensed Abortion Protocol of Planned Parenthood of Central and Northern Arizona, which was among the public comment submissions. A copy of the Condensed Abortion Protocol is attached as Exhibit B. The time periods for recovery are in Section VI(6) at page 3 of the Protocol.

60. Deny paragraph 60 other than its partial summary of the recovery area requirements of the Permanent Regulations, which speak for themselves.

61. Deny paragraph 61, and aver that the access to medical records provided in the Permanent Regulations is the same as that utilized in KDHE's inspections of hospitals and ambulatory surgical centers, and is necessary and appropriate to promote health, safety, and welfare via KDHE's verification of compliance by abortion facilities.

62. Deny paragraph 62 other than its partial summary of K.A.R. § 28-34-135(n), which provisions speak for themselves.

63. Deny paragraph 63 other than its partial summary of K.A.R. § 28-34-141(b)(3), which provisions speak for themselves.

64. Deny paragraph 64, and aver that the cited sections of the Permanent Regulations speak for themselves.

65. Deny paragraph 65.

66. Deny paragraph 66.

67. Deny paragraph 67.

68. Deny paragraph 68.

69. Deny paragraph 69.

70. Deny paragraph 70.

71. Deny paragraph 71.

72. Deny paragraph 72.

73. Deny paragraph 73.

74. Admit as to paragraph 74 only that plaintiffs Hodes and Nauser will remain subject to oversight by the KBHA, but deny that the limited oversight of the KBHA of the

individual plaintiffs fully accomplishes the medically reasonable standards for the health, safety, and welfare of those seeking an abortion addressed by the Act and the Permanent Regulations, or addresses the legislature's intent to regulate the facilities where elective abortions are routinely performed.

75. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 75.

76. Deny paragraph 76, and further aver that plaintiffs' First Claim fails to state a claim upon which relief may be granted.

77. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 77.

78. Deny paragraph 78, and further aver that plaintiffs' Second Claim fails to state a claim upon which relief may be granted.

79. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 79.

80. Deny paragraph 80, and further aver that plaintiffs' Third Claim fails to state a claim upon which relief may be granted.

81. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 81.

82. Deny paragraph 82, and further aver that plaintiffs' Fourth Claim fails to state a claim upon which relief may be granted.

83. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 83.

84. Deny paragraph 84, and further aver that plaintiffs' Fifth Claim fails to state a claim upon which relief may be granted.

85. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 85.

86. Deny paragraph 86, and further aver that plaintiffs' Sixth Claim fails to state a claim upon which relief may be granted.

87. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 87.

88. Deny paragraph 88, and further aver that plaintiffs' Seventh Claim fails to state a claim upon which relief may be granted.

89. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 89.

90. Deny paragraph 90, and further aver that plaintiffs' Eighth Claim fails to state a claim upon which relief may be granted.

91. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 91.

92. Deny paragraph 92, and further aver that plaintiffs' Ninth Claim fails to state a claim upon which relief may be granted.

93. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 93.

94. Deny paragraph 94.

95. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 95.

96. Deny paragraph 96, and further aver that plaintiffs' Eleventh Claim fails to state a claim upon which relief may be granted.

97. Deny every allegation not expressly admitted in this Answer.

ANSWER TO APPLICATION FOR RESTRAINING ORDER

To the extent not rendered moot by rulings already made, defendants, in their respective official capacities, for their Answer to plaintiffs' Application for Restraining Order:

1. Incorporate by reference their responses to each of the paragraphs incorporated by reference in paragraph 1.

2. The allegations of paragraph 2 that are conclusions of law require no response, and the statutes and court decisions referred to speak for themselves.

3. The allegations of paragraph 3 that are conclusions of law require no response, and the statute referred to speaks for itself.

4. Deny paragraph 4.

5. Deny paragraph 5.

6. Deny every allegation not expressly admitted in this Answer.

ASSERTION OF LEGISLATIVE IMMUNITY

1. Aver that the Secretary of KDHE and the Attorney General are entitled to absolute legislative immunity for their roles in the development and promulgation of the Act and the Permanent Regulations.

2. Aver that both the Act and the Permanent Regulations are quintessentially legislative in nature.

3. Aver that the Act repeatedly delegates legislative authority to the Secretary of KDHE and explicitly directs that he develop and promulgate the regulations to fulfill the Legislature's mandate.

ADDITIONAL DEFENSES

1. Aver that both the Act and Permanent Regulations are lawful exercises of the state's power to rationally further the health, safety, and welfare of its citizens.

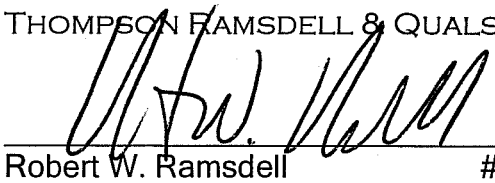
2. Aver that plaintiffs have no basis under Kansas law for seeking an award of attorney's fees in this action, as they have already acknowledged in open court.

3. Advise the Court and counsel that defendants will be filing a Motion for Partial Judgment on the Pleadings regarding plaintiffs' claims which fail to state a basis upon which relief may be granted.

4. Defendants reserve the right to assert any additional defenses for which discovery and subsequent investigation reveal a basis.

Wherefore, defendants ask that plaintiffs take nothing by their First Amended Verified Petition and Application for Restraining Order; that defendants be granted judgment in their favor as to all of plaintiffs' claims; that any costs be assessed against plaintiffs; and that defendants be granted such additional relief as the Court may deem just and equitable.

THOMPSON RAMSDELL & QUALSETH, P.A.



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Hodes & Nauser, et al., v. Moser, et al., Case No. 11 C 1298, Defendants' Answer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Answer was sent via electronic mail and also deposited in the United States mail, proper postage prepaid, on the 20TH day of January, 2012, addressed to:

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Robert Moser, MD, Secretary | Department of Health & Environment | Sam Brownback, Governor

November 9, 2011

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By e-mail and USPS

Cheryl A. Pilate, Esq.
Morgan Pilate LLC
142 N. Cherry
Olathe, KS 66061

Re: Permanent Abortion Facility Regulations, K.A.R. 28-34-126 et seq.

Dear Ms. Woody & Ms. Pilate:

I am writing in further response to the letter Ms. Woody letter sent to me on November 1, 2011. A copy of that letter accompanies this for Ms. Pilate's benefit.

As I stated in my November 2nd letter, the enabling legislation affords KDHE no authority to grant any waivers to an abortion facility meeting the statutory definition of a clinic. The statute provides very limited authority for the granting of exceptions to a hospital or ambulatory surgical center. That provision would not apply to the Center for Women's Health or Central Family Medicine.

However, Ms. Woody's letter did address several provisions of the permanent regulations in a manner that indicates your clients may be construing the regulations more stringently than necessary. Therefore, KDHE is providing the following information:

- K.A.R. 28-34-138(c): "Each licensee shall ensure that a physician and at least one health professional is available to each patient throughout the abortion procedure."

  Note that "available" is a lesser requirement than that of "present" as used in K.A.R. § 28-34-137(c). A licensed health professional is available if he or she is within the facility and could be summoned if needed during an abortion procedure.

- K.A.R. 28-34-138(f) states: "Each licensee shall ensure that health professionals monitor each patient's vital signs throughout the abortion procedure to ensure the health and safety of the patient."

  The intent of this requirement is that there must be medically appropriate monitoring of the patient's vital signs. Should a complication arise, then medical personnel should respond as appropriate and begin taking vital signs as necessary.

- K.A.R. 28-34-139(a)(2) states: "Each applicant and each licensee shall ensure that written policies and procedures are developed and implemented for the post-procedure care of patients who are administered

Exhibit A

local anesthesia, analgesia, or sedation, including the following: ... (2) The vital signs and bleeding of each patient shall be monitored by a physician or a health professional."

A physician or health professional need not personally take the patient's vital signs. A medical assistant can take and record the patient's vital signs, such as blood pressure, respirations, heart rate, etc. The intent of this requirement is that a physician or health professional must monitor these vital signs (by reviewing the recorded data) and bleeding of each patient by checking on them at one or more visits – as medically appropriate – prior to the patient's discharge.

- K.A.R. 28-34-133(b)(7) states: "Each facility shall include the following rooms and areas: ... (7) A recovery area that meets all of the following requirements: (A) Has a nurse station with visual observation of each patient in the recovery area; (B) provides privacy for each patient in the recovery area with at least cubicle curtains around each patient gurney or bed; and (C) has sufficient space to accommodate emergency equipment and personnel in the event of a transfer, as described in K.A.R. 28-34-140."

  The statute provides that standards shall prescribed for post-procedure recovery rooms that are supervised, staffed and equipped to meet the patient needs. The regulation reflects this requirement. The regulation must be read in conjunction with K.A.R. 28-34-139(a)(2) which provides that immediate post- procedure care include "observation in a supervised recovery room for as long as the patient's condition warrants." Provided that the patient is within visual observation of a nurse, a patient may remain in a procedure room.

If you have any additional questions on the Permanent Regulations, please direct them to me. I do ask that you ensure Robert Ramsdell, Esq., is copied on any communications with KDHE.

Respectfully,

Paul Gerard Marx

Paul Gerard Marx
Associate Chief Counsel
Health Legal Section
KDHE, Office of Legal Services

C: Timothy E. Keck, Esq.
Robert Ramsdell, Esq.

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KDHE LEGAL OFFICE

the woody law firm pc
TRIAL LAW

Teresa A. Woody teresa@woodylawfirm.com

November 1, 2011

Via Email and USMail

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Associate Chief Counsel – Health Legal Group
Office of Legal Services, KDHE
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RE: Center for Women's Health Application for a License to Operate an Abortion Facility

Dear Mr. Marx:

Thank you for your letter of October 28, 2011, regarding the new permanent regulations governing the licensing process for facilities performing abortions. I write to respond on behalf of my clients, Drs. Hodes and Nauser, who operate the medical office known as the Center for Women's Health ("CWH").

My clients and I have reviewed the Permanent Regulations, and while my clients would like to be able to meet the licensing requirements, they cannot come into compliance with a number of provisions contained in the permanent regulations. Accordingly, prior to moving ahead with an inspection, we would like to know whether KDHE will consider waiver requests from CWH as to the provisions that it cannot meet. I have listed below each provision on which CWH seeks a waiver, along with a brief statement of the basis for the waiver sought.

- 28-34-135(m), which permits only licensed health professionals to administer medications:
  - CWH (like other area medical practices) utilizes trained medical assistants to administer medications under the direction and supervision of a physician; this practice is within the standard of care and within the competency and training of medical assistants.

- 28-34-135(n), which requires registration with the Board of Pharmacy:
  - no mechanism appears to exist for a physician's office to register with the Board of Pharmacy.

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- 28-34-137(c), which requires a second person in the room for any pelvic exam or gynecological procedure:
    - no second person is required by the standard of care for chaperoning purposes if the physician is female and the patient does not elect to have a chaperone present;

- 28-34-138(c), which requires that both a physician and a licensed health professional be available to the patient during an abortion procedure:
    - this requirement is totally unnecessary for a procedure in which no sedation is used; for such procedures (which make up the vast majority of procedures performed at CWH), there is no need for a licensed person beyond the physician to be available to the patient.

- 28-34-138(f), which requires that a licensed health professional monitor the patient's vital signs throughout an abortion procedure:
    - CWH uses only local anesthesia and no sedation for the vast majority of its abortion procedures; there is no medical reason to take the vital signs of a patient during a short procedure for which no sedation is given; there is also no medical reason why a licensed health professional other than the physician need be present in the room for such a procedure.

- 28-34-139(a)(2), which requires that a physician or licensed health professional monitor vitals and bleeding during recovery:
    - CWH (like other area medical practices) utilizes trained medical assistants to monitor patients and take their vital signs after short office procedures performed under only local anesthesia; this practice is within the standard of care and within the competency and training of medical assistants.

- 28-34-139(a)(3), which mandates minimum recovery times:
    - the minimum recovery times given in this provision far exceed the time needed and desired by CWH patients in most cases, particularly because the vast majority of those patients receive no sedation whatsoever; and occupying CWH rooms and staff with patients who no longer need or desire monitoring will severely restrict the patient flow at CWH and the ability of Drs. Hodes and Nauser to serve all of their patients.

- 28-34-139141(b)(3), which requires a urine pregnancy test during a follow-up visit after an abortion:
    - a urine pregnancy test will often come back positive during a follow-up visit after an abortion procedure because the woman still has pregnancy-related hormones in her body; accordingly, an ultrasound or physical exam, rather than a urine pregnancy test, is the appropriate means of testing for continuing pregnancy at a follow-up visit.

- 28-34-144(c), which requires that a licensed abortion facility give KDHE access to patients' medical records:
    - confidentiality is extremely important to patients of CWH, and those patients do not wish for third parties to learn of their identities and reproductive health histories; accordingly we seek permission to redact patients' medical records of potentially identifying information (as that term is defined in HIPAA) before giving KDHE access to those records.

- 28-34-133(b)(7), which requires a recovery area with a nursing station:
    - no special recovery area is needed for simple office-based procedures, and it is within the standard of care (as well as more private for the patient) for CWH to use the patient's procedure room for her recovery; no nursing station is needed in such a procedure room used for recovery, and a patient who is recovering from a procedure involving no sedation does not need to be within constant view of a nurse - periodic checks by an MA are sufficient.

Thank you for your consideration of these waiver requests. Please let me know if KDHE will consider them, and if it would be helpful for us to provide any further information in support of the waivers sought.

Sincerely,

Teresa A. Woody
Attorney for Drs. Hodes and Nauser

TAW:MH
cc: Herbert Hodes, MD
Traci Nauser, MD

Planned Parenthood
of Central and Northern Arizona
5651 North Seventh Street
Phoenix, AZ 85014
(602)277-7526

Planned Parenthood of Central and Northern Arizona
Condensed Abortion Protocol

In response to a request for information from the legislative staff, Planned Parenthood of Central an Northern Arizona is pleased to provide the following condensed protocol related to abortion services provide at our facilities for women who choose to exercise their right to have an abortion performed. These service are offered to ensure access to safe abortions to those patients who have been counseled on every phase c the abortion procedure and who are confident in their decision to terminate their pregnancy.

This condensed protocol covers many of the significant considerations related to the physical facilitie supplies, equipment and personnel involved in the procedure. This condensed protocol does not, howeve cover other important considerations related to this procedure; including patient education & informe consent, patient selection - indications and contraindications, pre abortion procedures,, post procedur management, quality assurance and management of high risk conditions & complications that are included the complete Planned Parenthood of Central and Northern Arizona protocol.

Questions pertaining to the contents of this document may be directed to Beth Weber, Director of Medic Services of Planned Parenthood of Central and Northern Arizona at (602)263-4296.

SURGICAL SERVICES - ABORTION

I. PHYSICAL FACILITIES

Clinics providing abortion services will have:

1. adequate, private space specifically designated for interviewing, counseling and medic evaluation;
2. dressing rooms for staff and patients, and appropriate lavatory facilities;
3. facilities for pre-procedure hand washing;
4. private procedure rooms;
5. adequate lighting and ventilation for abortion procedures;
6. surgical or gynecologic examination table;
7. post-procedure recovery room, properly supervised, staffed and equipped;
8. emergency exit to accommodate a stretcher or gurney;
9. facilities for sterilization of instruments.

II. SUPPLIES AND EQUIPMENT

Supplies and equipment that must be immediately available for use or in an emergency kit include:

1. electrically safe vacuum aspiration equipment, suction tubing, and a supply of sterile pla cannulas in various sizes;
2. conventional surgical instruments for cervical dilation and uterine curettage, in adequate sup to permit individual sterilized instruments for each patient;
3. equipment necessary for required laboratory testing;
4. a battery-operated light source for emergency back-up;
5. syringes and needles;
6. medications for sedation and analgesia and for local anesthesia;
7. antagonists for any narcotics or sedatives used;
8. parenteral dextrose and electrolyte solutions for emergency use;
9. pulse oximeter in the procedure room when a patient receives IV anesthesia or analgesia available to the recovery room if patients have received IV anesthesia or analgesia;
10. medications for management of emergencies as designated by supervising physician;
11. oxygen, with connectors to nasal prongs or mask and resuscitative equipment;
12. stretcher or gurney;
13. ultrasound.

[redacted] Howard
Exhibit No. 1
Date 10-18-07
Deborah J. Worley, RPR, CCR

EJA00000012

Exhibit B

Planned Parenthood
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All surgical equipment must be safe for the patient and for staff, must meet FDA standards, and will b checked annually to ensure safety and appropriate calibration.

III. PERSONNEL

The Medical Director will be the director of the abortion program. Physicians performing surgery will be licensed board certified/board eligible physicians who have demonstrated competence in the procedures involved and are acceptable to the Medical Director. Family Practice and OB/GYN residents may perform surgery under the direct supervision of the Medical Director or approved provider. A physician with admitting privileges at a local hospital must be available.

An RN, LPN, PA or Nurse Practitioner will be present during every clinic when abortions are performed to provide post-operative monitoring and care.

Surgical assistants and volunteers will receive training in counseling, patient advocacy and the specific responsibilities in the provision of this service.

IV. MEDICAL SCREENING AND EVALUATION

1. A medical history must be completed as required for comprehensive service patients. Special attention must be given to reported allergies to medications, antiseptic solutions, latex or past surgeries.

2. A physical examination including a bimanual exam estimating uterine size and palpation of the adnexa.

3. Laboratory testing shall consist of:
   A. urine or blood test for pregnancy;
   B. hematocrit;
   C. RH typing, unless reliable written documentation of blood type is available;
   D. other tests as indicated (saline suspension, serologic test for syphilis, etc.).

4. All patients will have an ultrasound evaluation. Staff will be trained in ultrasound for the determination of gestational age.

V. ABORTION PROCEDURE

1. Supportive personnel should be available to all patients throughout the abortion procedure.
2. Uterine evacuation must be done in a clean treatment room, using clean drapes, with adequate antisepsis of the vagina and with sterile instruments utilizing no-touch techniques.
3. Local anesthesia, analgesia and sedation may be used by physician order. All necessary equipment and personnel are maintained for safe administration thereof.
4. The manual-surgical-aspiration procedure will be the primary method used.
5. Patients undergoing mid-trimester abortion must have IV access established and maintained until the patient's condition is deemed to be stable in the recovery room.
6. Consciousness must be monitored throughout the procedure. Use of a pulse oximeter is required during all surgical procedures in which higher dose or combined drug narcotic analgesia or intravenous sedation is used. If low dose single drug IV analgesia is used and consciousness is not obtained, a trained person may monitor the patient's respirations, heart rate, and blood pressure. Blood pressure and heart rate must be evaluated and recorded on at least one occasion between the time that the abortion is completed and the patient is transferred to the recovery room.

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VI. RECOVERY ROOM

1. Immediate post-procedure care must consist of observation in a supervised recovery room for as long as the patient's condition warrants. Hospitalization without delay must be arranged if any complication beyond the management capability of affiliate staff occurs or is suspected.

   A licensed health professional who is trained in the management of the recovery area and is capable of providing basic CPR and related emergency care, must remain on the premises until all patients have been discharged.

   A physician must remain on the premises until all patients are stable, or until all patients have left the recovery room, whichever comes first. A physician must sign the discharge order and be readily accessible and available until the last patient has been discharged.

2. Prophylactic Methergine will be used as indicated.

3. RhO (D) immune globulin must be offered to Rh-negative unsensitized women within 72 hours but preferably in the immediate operative period. If the woman refuses, a refusal form must be signed. FDA approved doses must be used as follows:
   - abortion through the end of 12 weeks LMP: 50 micrograms (Microgam) IM;
   - abortion at 13 weeks LMP or later: 300 micrograms (Rhogam) IM.

4. Written instructions with regard to coitus, signs of possible problems, contraceptive use, and general aftercare must be given to each woman. Each patient must have specific instruction regarding access to medical care for complications. When discharged, the woman should be accompanied by a friend or relative. A consumer feedback form shall be given.

5. Contraception must be discussed. Oral contraceptives or DMPA may be initiated on the day the procedure.

6. Time in recovery
   - < 12 weeks = 30 minutes minimum
   - 13 - 16 weeks = 45 minutes minimum
   - 16 - 20 weeks = 60 minutes minimum

7. A call to the patient (when patient consents) will be made within 24 hours after surgery to access patients recovery.

VII. FOLLOW-UP VISIT

1. A post-procedure medical visit will be offered and scheduled for 3 weeks after the abortion. The visit will include a medical examination, including breast exam (when not performed as part of pre-abortion medical screening visit); review of results of all laboratory tests; and offer contraception. A low sensitivity urine pregnancy test will be obtained at the time of the follow visit in order to rule out continuing pregnancy or undiagnosed gestational trophoblastic disease. If a continuing pregnancy is suspected, the patient will be evaluated and a physician provide abortion services will be consulted

EXHIBIT B

From: Tiseme Zegeye
Sent: Thursday, April 14, 2016 5:32 PM
To: Sarah Warner <sarah.warner@trqlaw.com>
Cc: Hillary Schneller <hschneller@reprorights.org>; Stephanie Toti <SToti@reprorights.org>
Subject: RE: Regs - Modification of 2011 Stay in light of 2015 Legislation?

Hi Sarah,

Apologies for the delay in getting back to you. Unfortunately, I don't believe that the parties can come to an agreement on this matter. Plaintiffs cannot stipulate that the Agreed Order staying enforcement of the 2011 Act and Regulations does not apply to K.S.A. 2015 Supp. 65-4a10.

Please don't hesitate to be in touch if you have any questions.

Best wishes,
Tiseme

CENTER FOR REPRODUCTIVE RIGHTS

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From: Sarah Warner [mailto:sarah.warner@trqlaw.com]
Sent: Thursday, April 07, 2016 11:00 AM
To: Stephanie Toti <SToti@reprorights.org>; Tiseme Zegeye <TZegeye@reprorights.org>
Subject: Regs - Modification of 2011 Stay in light of 2015 Legislation?

Hi Stephanie and Tiseme,

I hope all is well for you. I am writing concerning the Agreed Order staying enforcement of the 2011 Act and Regulations (entered December 2, 2011) in the clinic regulations case, and the effect of that order on the 2015 amendments to K.S.A. 65-4a10 (what I'll refer to here as K.S.A. 2015 Supp. 65-4a10).

We are aware that plaintiffs have indicated in their Second Amended Petition that they are challenging K.S.A. 2015 Supp. 65-4a10. We understand these challenges to be based on due-process (what is the rationale for having the physician administer and/or be present during the administration of the medication?) and equal-protection grounds (as part of plaintiffs' facial challenge to the entire Act). We do not understand either challenge to state that plaintiffs cannot comply with K.S.A. 2015 Supp. 65-4a10 (or are not presently complying with those provisions).

In light of the 2015 amendments and plaintiffs' present challenges concerning K.S.A. 2015 Supp. 65-4a10—and in light of the fact that the 2015 Amendments were passed 3½ years after the parties agreed to stay enforcement of the Act in lieu of a temporary injunction hearing—defendants are inquiring whether the parties can stipulate that the Agreed Order staying enforcement of the 2011 Act and Regulations does not apply to K.S.A. 2015 Supp. 65-4a10. In other words, can the parties agree that the 2011 Agreed Order does not apply to K.S.A. 2015 Supp. 65-4a10?

This agreement would have no effect on plaintiffs' ability to challenge K.S.A. 2015 Supp. 65-4a10 in this lawsuit; it would merely allow a law passed nearly unanimously almost a year ago to take effect.

It's defendants' sincere hope that we can come to an agreement on this matter. We ask that you get back with us within a week as to whether plaintiffs consent to the proposal. Otherwise, as we indicated in defendants' Answer, we are prepared to file a Motion to Modify the stay.

Sincerely,
Sarah

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