

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
DIVISION 3

TRUST WOMEN FOUNDATION INC.)
d/b/a)
SOUTH WIND WOMEN'S CENTER)
d/b/a TRUST WOMEN WICHITA,)

Plaintiff,)

v.)

Case No. 2019 CV 60

MARC BENNETT,)
in his official capacity as District Attorney)
for Sedgwick County, Kansas;)
KATHLEEN SELZER LIPPERT, in her)
official capacity as the Executive Director)
of the Kansas Board of Healing Arts;)
ROBIN D. DURRETT, in her official)
capacity as President of the Kansas Board)
of Healing Arts; and DEREK SCHMIDT,)
in his official capacity as Attorney General)
of the State of Kansas,)

Defendants.)

First Amended Verified Petition and Application for Restraining Order
(Pursuant to K.S.A. Chapter 60)

Plaintiff Trust Women Foundation Inc. d/b/a South Wind Women's Center d/b/a Trust Women Wichita ("Trust Women" or "the Clinic"), on behalf of itself and its patients, by and through its undersigned attorneys, brings this petition against the above-named Defendants, their employees, agents, and successors in office ("Defendants"), and in support thereof allege the following:

I. PRELIMINARY STATEMENT

1. This lawsuit challenges Kansas law prohibiting the provision of any medication when used for the purpose of inducing an abortion, unless the prescribing physician is in the same room and

in the presence of the patient when the medication is administered (the “medication in-person requirement”). The medication in-person requirement is set forth at K.S.A. § 65-4a10, a copy of which is annexed hereto as Exhibit 1.

2. This lawsuit further challenges Sections 6 and 7 of Kansas House Bill 2028, the Kansas Telemedicine Act, to the extent they have a prohibitory effect on the provision of abortion when read in conjunction with K.S.A. § 65-4a10. *See* Memorandum Opinion and Entry of Judgment on Plaintiff’s Motion for a Temporary Injunction and Temporary Restraining Order 7-8, *Trust Women v. Schmidt*, No. 2018-CV-844, (Dec. 31, 2018) (hereinafter “Memorandum Opinion”), a copy of which is annexed hereto as Exhibit 2. A copy of the Kansas Telemedicine Act is annexed hereto as Exhibit 3. Collectively, the medication in-person requirement and Sections 6 and 7 of the Telemedicine Act are referred to herein as the “Challenged Laws.”

3. Failure to comply with the medication in-person requirement is punishable as unprofessional conduct, K.S.A. § 65-4a10(d), “[e]xcept in the case of an abortion performed in a hospital through inducing labor” or in the case of other medical emergencies. K.S.A. § 65-4a10(b)(1)-(2).

4. Section 6 of the Telemedicine Act, when construed in conjunction with the medication in-person requirement, effectively bans the delivery of any abortion procedure via telemedicine. Section 7 of the Telemedicine Act includes a provision which states that only Section 6 of the Act is non-severable, while declaring all other sections severable.

5. Trust Women is a licensed ambulatory surgical center in Wichita, Kansas and has been providing safe, high-quality reproductive health care, including abortions, since 2013. The Clinic brings claims on behalf of itself and its patients, and seeks declaratory and injunctive relief, including facial, or in the alternative, as-applied invalidation of the Challenged Laws.

6. In Kansas, 97% of Kansas counties were without a single clinic that provided abortions; over half of Kansas women lived in those counties as of 2014. Plaintiff is aware of only three other abortion providers in the State: 1) Center for Women's Health in Overland Park, and Planned Parenthood, located in 2) Overland Park and 3) Wichita.

7. The Challenged Laws single out the provision of abortion care from all other medical care and violate the rights of Plaintiff's patients guaranteed by the Kansas Constitution by unduly burdening their fundamental right to access abortion.

8. In addition, by treating women seeking abortions differently from similarly-situated patients seeking all other forms of medical care delivered via telemedicine, the Challenged Laws violate the rights of Plaintiff's patients to equal protection under the law. The Challenged Laws further violate Plaintiff's rights to equal protection by treating them differently from all other health care providers who provide health care via telemedicine without a rational basis to do so.

9. On December 31, 2018, this Court declared the medication in-person requirement codified at K.S.A. § 65-4a10 to be "presently barred of enforcement by an Agreed Order of the Court." Memorandum Opinion 11. However, the Defendants Bennett, Seltzer Lippert, and Durrett have refused to provide Plaintiff with written assurance that they will refrain from enforcing the medication in-person requirement or the Telemedicine Act until final resolution is reached in *Hodes & Nauser v. Norman*, No. 11 C 1298, a lawsuit filed in 2011 challenging a number of abortion restrictions, including K.S.A. § 65-4a10. Additionally, on January 30, 2019, Defendant Schmidt appealed the December 31, 2018 Memorandum Opinion declaring the medication in-person requirement enjoined. On that same date, Defendant Schmidt also filed a Motion to Clarify and/or Dissolve the Agreed Order in *Hodes & Nauser*, enjoining the medication in-person requirement.

10. Thus, Plaintiff now files this petition and motion seeking temporary and permanent injunctive relief to effectuate this Court's order set forth in its December 31, 2018, Memorandum Opinion, and to protect the constitutional rights of Trust Women, its patients, and the health and safety of Kansas women.

II. JURISDICTION AND VENUE

11. This Court has jurisdiction under K.S.A. § 20-301.

12. Plaintiff's action for declaratory and injunctive relief is authorized by K.S.A. §§ 60-1701, 60-1703 (declaratory relief) and K.S.A. § 60-901-K.S.A. § 60-903 (injunction).

13. Venue in this Court is proper under K.S.A. §§ 60-603(3) because the enforcement authority of Defendants Schmidt, Selzer Lippert, and Durrett is exercised in Shawnee County.

III. PARTIES

A. Plaintiff

14. Trust Women is a health care facility in Wichita, Kansas that has been providing pregnancy testing, contraception counseling, and abortion care to women since 2013. The Clinic is a member of the National Abortion Federation, the professional association of abortion providers, and has been continuously licensed as an ambulatory surgical center by the Kansas Department of Health and Environment since July 2014. The Clinic brings this action on its own behalf and on behalf of its patients who seek pregnancy termination services presently and in the future.

B. Defendants

15. Defendant Marc Bennett is the District Attorney for Sedgwick County, Kansas, in which Plaintiff's clinic is located. As District Attorney, Defendant Bennett has the authority to prosecute

violations of K.S.A. § 65-4a10 occurring in Sedgwick County.¹ See K.S.A. § 22a-104 (district attorney duties); K.S.A. § 22-2602 (place of trial). District Attorney Bennett is sued in his official capacity, as are his agents and successors.

16. Defendant Kathleen Selzer Lippert is the Executive Director of the Kansas Board of Healing Arts and Defendant Robin D. Durrett, D.O. is the President of the Kansas Board of Healing Arts, the agency responsible for enforcing violations of the medication in-person requirement, which may be punishable as unprofessional conduct. See K.S.A. § 65-4a10(d) (specifying that a violation is “unprofessional conduct under K.S.A. 65-2837”) and K.S.A. § 65-2836(b) (describing the Board of Healing Arts’ enforcement authority)). Defendants Selzer Lipper and Durrett are sued in their official capacities, as are their agents and successors.

17. Defendant Derek Schmidt is the Attorney General of Kansas. As Attorney General, Defendant Schmidt 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 (1971); accord K.S.A. § 22-2202(q). Pursuant to this prosecutorial power, the Attorney General may assist a county attorney in the prosecution of a case and take over the prosecution of such a case upon the county attorney’s request. See *State ex rel. Stephan v. Reynolds*, 234 Kan. 574, 578-79 (1984). As the Attorney General, Defendant Schmidt is also responsible for defending Kansas laws against constitutional challenges. K.S.A. § 75-702. Defendant Schmidt is sued in his official capacity, as are his agents and successors.

¹ Although the medication in-person requirement states that a violation “shall constitute unprofessional conduct under” the Kansas Healing Arts Act, which authorizes the Board of Healing Arts to impose punishments for violation of the Act, the Attorney General previously represented to this Court that the Sedgwick County District Attorney has independent enforcement authority over K.S.A. § 65-4a10 as a violation of the Board of Healing Arts Act may be punishable as a misdemeanor pursuant to K.S.A. § 65-2862.

IV. STATUTORY FRAMEWORK AND RELEVANT FACTS

A. Pre-Existing Kansas Laws and Regulations Limit Women's Access to Abortion Care.

18. Sections 6 and 7 of the Telemedicine Act, when construed with K.S.A. § 65-4a10, are Kansas' latest legislative effort to restrict abortion access. But Kansas' existing statutory scheme already circumscribes access to abortion in a variety of ways.

19. Abortions are generally prohibited after viability (K.S.A. § 65-6703(a)), and it is illegal to perform an abortion after 22 weeks 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). Furthermore, the Legislature has passed laws prohibiting certain methods of abortion. *See* K.S.A. § 65-6721 (banning intact dilation and evacuation abortions); K.S.A. § 65-6741 (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*, 52 Kan. App. 2d 274, 368 P.3d 667 (Kan. Ct. App. 2016), *review granted* (Apr. 11, 2016)).

20. Additionally, women seeking abortions must receive state-mandated information and then wait a minimum of 24-hours before obtaining the abortion. K.S.A. § 65-6709.

21. 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(j). The insurance plan for government employees prohibits coverage for an abortion unless the pregnancy threatens the woman's life.² Private

² Kan. Dep't of Health & Env't, State Employee Health Plan, 39 (2015), available at <http://www.kdheks.gov/hcf/sehp/BenefitDescriptions/2015-Aetna-Plan-A.pdf>.

insurance policies are likewise prohibited from offering coverage for abortions (with the exception of abortions necessary to preserve a woman's life) unless coverage is offered through a separate and optional rider. Moreover, insurance provided via an exchange pursuant to the Affordable Care Act is prohibited from covering virtually all abortions, even if offered through a separate insurance rider. K.S.A. § 40-2,190. In addition, women reliant on Medicaid cannot obtain coverage for an abortion unless the pregnancy is life-threatening or 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).

22. K.S.A. §§ 65-4a01-4a12, passed in 2011, create a burdensome regulatory scheme concerning the licensing of medical facilities that provide abortions. The medication in-person requirement was enacted as part of this regulatory scheme and requires that any abortion-inducing drug be administered in the same room and in the physical presence of the physician who provided the drug to the patient. K.S.A. § 65-4a10.

23. In 2011 the regulations implementing K.S.A. §§ 65-4a01-4a12, issued by the Kansas Department of Health and Environment, were enjoined by the issuance of a temporary restraining order in a separate lawsuit challenging the constitutionality of Kansas' abortion licensing scheme. *See* Order Granting TRO Pending Hr'ing on Appl. for Temporary Inj., *Hodes & Nauser v. Moser*, now *Norman*, No. 11 C 1298 (Nov. 10, 2011). The medication in-person requirement, K.S.A. § 65-4a10, is part of the abortion licensing scheme. On December 2, 2011, the defendants in *Hodes & Nauser v. Norman*, including the Attorney General, stipulated that they would not enforce K.S.A. §§ 65-4a01-4a12 or its implementing regulations during the pendency of that case. *See* Agreed Order 1, *Hodes & Nauser v. Norman*, No. 11 C 1298 (Dec. 2, 2011) (hereinafter the "*Hodes & Nauser* Agreed Order"). A copy of the Agreed Order is attached hereto as Exhibit 4.

24. Defendants Bennett, Selzer Lippert, and Durrett are not named as defendants in *Hodes & Nauser v. Norman*, No. 11 C 1298.

25. In November 2018, Plaintiff challenged Sections 6 and 7 of the Telemedicine Act as an unconstitutional ban on the provision of medication abortion via telemedicine. In that case, *Trust Women v. Schmidt*, No. 2018-CV-844, the Attorney General asserted, *inter alia*, that because Defendants Bennett, Selzer Lipper, and Durrett were not parties to the *Hodes & Nauser* Agreed Order, they were free to enforce K.S.A. § 65-4a10.

26. On December 31, 2018, in response to the Defendant Attorney General's assertions in *Trust Women v. Schmidt*, No. 2018-CV-844 regarding the enforceability of the medication in-person requirement, this Court declared that K.S.A. § 65-4a10 remains enjoined and "is presently barred of enforcement by an Agreed Order of the Court in 11CV1298." Memorandum Opinion 11.

27. Beginning in early January 2019 Plaintiff's counsel contacted Defendant Bennett and General Counsel for the Board of Healing Arts seeking confirmation that they would not attempt to enforce K.S.A. § 65-4a10 and/or Section 6 of the Telemedicine Act, and provided them with a copy of this Court's Memorandum Opinion. To date, however, Defendants have failed to provide Plaintiff with such confirmation.³

28. On January 30, 2019, Defendant Schmidt submitted a Notice of Appeal in *Trust Women v. Schmidt*, No. 2018-CV-844, on the basis that the District Court improperly modified and extended the Agreed Order in *Hodes & Nauser v. Norman*, and simultaneously filed a Motion to Clarify and/or Dissolve Injunction Relating to K.S.A. 65-4a10 in the *Hodes & Nauser v. Norman* case.

B. The Challenged Laws Single Out and Ban Telemedicine for Abortion Care.

³ Plaintiff maintains that K.S.A. § 65-4a10 is currently enjoined by the Agreed Order and is therefore unenforceable by *any* Kansas official, including Defendants Bennett, Selzer Lipper, and Durrett.

1. The Medication In-Person Requirement

29. The medication in-person requirement provides that “[e]xcept in the case of an abortion performed in a hospital inducing labor: [] [w]hen RU-486 (mifepristone) is used for the purpose of inducing an abortion, the drug shall initially be administered by or in the same room and in the physical presence of the physician who prescribed, dispensed or otherwise provided the drug to the patient.” K.S.A. § 65-4a10(b)(1) (as amended by 2015 Kan. Sess. Laws Ch. 84 (H.B. 2228), § 1(b)(1)).⁴

30. There is no medical justification for requiring a physician to be in the room with a patient when there is a qualified health professional present to administer mifepristone at the direction of a physician.

31. The medication in-person requirement also provides that “when any other drug is used for the purpose of inducing an abortion, the drug or the prescription for such drug shall be given to the patient by or in the room and in the physical presence of the physician who prescribed, dispensed or otherwise provided the prescription to the patient.” *Id.* This provision is similarly medically unnecessary. There is nothing distinctive about medications prescribed to induce an abortion that justifies this discriminatory treatment.

2. The Telemedicine Act

32. The Telemedicine Act authorizes the use of telemedicine to “provide or support healthcare delivery, that facilitate the assessment, diagnosis, consultation, treatment, education and care management of a patient’s healthcare.” K.S.A. § 40-2,211.

⁴ The medication in-person requirement does not apply in the case of medical emergency. K.S.A. § 65-4a10(b)(2) (as amended by 2015 Kan. Sess. Laws Ch. 84 (H.B. 2228), § 2).

33. The Telemedicine Act's primary purpose is to expand access to health care services by establishing patient-provider relationships and confidentiality and privacy assurance, K.S.A. § 40-2, 212, and to guarantee insurance parity for telemedicine services, K.S.A. § 40-2,213.

34. As defined by the Telemedicine Act, "telemedicine" is "the delivery of healthcare services or consultations while the patient is at an originating site and the healthcare provider is at a distant site." K.S.A. § 40-2,211. As Kansas recognizes, a face-to-face meeting is not necessary to establish a physician-patient relationship or to provide the "same standards of practice and conduct that apply to healthcare services delivered via in-person contact." K.S.A. § 40-2,212.

35. While encouraging the use of telemedicine generally, Sections 6 and 7 of the Telemedicine Act single out and, when construed in conjunction with K.S.A. § 65-4a10, effectively ban telemedicine for abortion services, including medication abortions. K.S.A. § 40-2, 215.

36. Telemedicine has been available in Kansas since 1991 and has been routinely and successfully utilized by Kansas medical practitioners for many years.

37. The use of telemedicine in Kansas has expanded patients' access to care. For example, Kansas University Center for Telemedicine & Telehealth first began providing care via telemedicine in 1991 and currently uses telemedicine in more than thirty medical specialties—including autism diagnosis, cardiology, oncology/hematology, pain management, pediatrics, psychiatry, and psychology—to provide consults and other medical services including follow-up care, in-depth therapy, and medication management.

38. Neurologists provide lifesaving care to patients in rural areas of Kansas using telemedicine via the WesleyCare Virtual Network. They use telemedicine to diagnose stroke patients at hospitals who do not have a neurologist available based on imaging scans. In addition, neurologists can prescribe appropriate treatment—including IV-tPA, the only FDA approved treatment for

ischemic stroke that can save lives and improve the quality of life for stroke victims if administered within 4.5 hours of the onset of symptoms—via telemedicine. While IV-tPA is potentially life-saving for one type of stroke, it is potentially fatal for the other. Nevertheless, the provision of these acute neurology services is permitted under the Telemedicine Act.

39. Additionally, Newton Medical Center located in Newton, Kansas treats patients in its general inpatient setting using a videoconferencing monitor and camera, in conjunction with a robot on a rolling stand equipped with a digital stethoscope and other diagnostic equipment. In 2017, Newton also developed a telestroke program in which patients who arrive in the Newton emergency department exhibiting signs of stroke are connected by staff to remote neurologists for rapid diagnosis and treatment.

40. In all medical contexts except abortion, Kansas law authorizes physicians to use telemedicine to provide consultations and treatment recommendations and dispense prescription medications to patients. *See* K.S.A. §§ 40-2,214 – 2,215. However, in conjunction with the Telemedicine Act’s passage, which was intended to expand the availability of telemedicine throughout the State, it prohibits “the delivery of any abortion procedure via telemedicine.” K.S.A. § 40-2,215.

41. Further, the Telemedicine Act includes a non-severability clause that applies only to Section 6: if Section 6’s abortion provision is determined to be unconstitutional or invalid, the entire Telemedicine Act falls. K.S.A. § 40-2,216.

C. Abortions, Including Medication Abortions Provided By Telemedicine, Are Safe and Effective.

42. Legal abortion is among the safest, most common medical procedures in contemporary medical practice. In fact, nearly one in four women in the United States (23.7%) will have had an

abortion by the time she is 45 years old. Complication rates for abortion are similar to or lower than for other outpatient procedures.

43. Leading medical authorities, including the American College of Obstetricians and Gynecologists (“ACOG”), the American Medical Association, the American Academy of Family Physicians, the American Academy of Pediatrics, and the American Osteopathic Association have all concluded not just that abortion is an extremely safe medical procedure, but that it is one of the safest medical procedures performed in the United States.

44. In one of the most comprehensive studies to date, published in *Obstetrics & Gynecology*, the medical journal of ACOG, researchers found that major complications (defined as those requiring hospital admission, surgery, or blood transfusion) from abortions occurred in less than one-quarter of one percent (0.23%) of cases.

45. In fact, abortion is far safer than the alternative of carrying a pregnancy to term. The risk of death associated with childbirth is approximately 14 times higher than that associated with abortion, and every pregnancy-related complication is more common among women having live births than among those having abortions. Kansas is ranked as 22 in the United States for maternal mortality, with 17.7 deaths per 100,000 births. By contrast, according to the CDC, there were only 0.62 deaths per 100,000 legally induced abortions in the period 2008 through 2013, a fatality rate of 0.0006%.

46. Every year, 2% to 10% of pregnant women in the United States suffer from gestational diabetes mellitus, and approximately half of these women will go on to develop type two diabetes after pregnancy. According to the CDC, 144 in 10,000 women who gave birth in a hospital in the United States in 2014 experienced unexpected outcomes of labor and delivery that resulted in

significant short- or long-term consequences. Such “severe maternal morbidity” disproportionately affects minority women.

47. Abortions may be performed by surgical or medical means. Surgical abortion requires no incision or cutting; it is accomplished through the use of suction and/or instruments to evacuate the contents of the uterus. Surgical abortion may involve the use of anesthesia or sedation. Medication abortion involves the administration of medications (in the forms of pills) to induce an abortion. Medication abortion requires no anesthesia or sedation; women are screened for eligibility and contraindications, receive counseling, and are then provided with the medications.

48. The Clinic performs medication abortions up to 11 weeks, as measured from the first day of a woman’s last menstrual period. Medication abortion is administered by oral consumption of two different medications. The patient takes the first medication, mifepristone, at the Clinic. Mifepristone (distributed as Mifeprex) blocks progesterone, a hormone essential to sustain a pregnancy. The patient then takes the second medication, misoprostol, within 24-36 hours, at home or another location of her choosing. The misoprostol causes the uterus to contract and empty its contents, generally within hours.

49. Medication abortion is an extremely safe and effective alternative to surgical abortion for women in early pregnancy. It has been available to women in the United States since 2000. The serious complication rate, requiring hospitalization for infection treatment or transfusion, for medication abortion is less than half of one percent.

50. Because there is only a small window of time when medication abortions are available, any delay could foreclose the option entirely for some women, including those for whom a medication abortion is medically-indicated or highly preferred for deeply personal reasons. While legal abortion is an extremely safe procedure, delaying the procedure until later in pregnancy increases

the risks of the procedure and the rate of complications and requires women to undergo more complex, invasive, and expensive abortion care.

51. Studies have shown that telemedicine improves access to early medication abortion in underserved areas, enables women to be evaluated and treated sooner, and provides them with greater choice of abortion procedure.

52. The reported risks associated with medication abortion provided via telemedicine are similar in magnitude to the adverse effects of common prescriptions and over-the-counter medications. Moreover, the complication rate for medication abortion—whether provided in-person at a clinic or by telemedicine—is exceedingly low (less than 0.5%). To the extent these rare complications do occur, they will arise after a patient has already left the provider's office, because the second pill in the medication abortion regimen (which causes the uterus to contract and empty), is consumed by the patient at her home or another location of her choosing. In other words, such rare complications would occur whether medication abortion is provided in person or by telemedicine.

D. The Challenged Laws Target Women's Access to Abortion Care with No Justification or Corresponding Medical Benefit.

53. There is no medical justification for singling out abortion care and prohibiting the practice of telemedicine in the context of medication abortion. A recent consensus study report jointly prepared by the National Academies of Sciences, Engineering, and Medicine found no evidence that taking medication abortion requires the physical presence of a physician and concluded that telemedicine medication abortion is just as safe as in-person medication abortion.

54. Providing medication abortion via telemedicine is consistent with the current medication indications described in the FDA label for Mifeprex. ACOG has also concluded that medication

abortion can be provided safely and effectively with a high level of patient satisfaction using telemedicine.

55. In fact, medication abortion has been practiced by telemedicine in Iowa since 2008, in Alaska since 2011, in Maine since 2016, by at least one clinic in Illinois since 2016, and most recently in Washington, Hawaii, and Oregon through the Gyunity TelAbortion Study. Studies have shown that the serious complication rate for medication abortion is exceedingly low (less than 0.5%), whether provided in-person or by telemedicine.

56. Trust Women recently began providing medication abortion via telemedicine in an effort to expand access to services.

57. In 2017, nearly half of Trust Women Wichita's abortion patients had a medication abortion and amongst those for whom medication was an option, nearly three-quarters chose medication abortion over surgical abortion.

58. Due to the hostility that abortion providers face in Kansas, and the nationwide shortage of abortion providers, the Clinic has been unable to recruit and hire local physicians.

59. Before introducing telemedicine at the Clinic, Trust Women was only able to provide abortion care two days a week, because the Clinic's physicians must travel to Wichita from out of state in order to provide abortion services.

60. Because the Clinic does not have to transport a physician to Wichita for telemedicine medication abortion appointments, it has been able to expand the provision of medication abortion by offering this service on additional weekdays and on Saturdays. Trust Women intends to further expand access to abortion care by offering medication abortion via telemedicine during evening hours and in more rural locations throughout Kansas, so that women are able to receive care closer to their homes.

61. Plaintiff's provision of medication abortion via telemedicine has already subjected it to unwarranted scrutiny. On Friday, December 14, 2018, Kansans for Life announced that it had filed a complaint with the Board of Healing Arts, asking it to investigate Plaintiff's alleged provision of "illegal" medication abortions using telemedicine.

62. Lacking confirmation from Defendants Bennett, Selzer Lipper, and Durrett that they would not seek to enforce the medication in-person requirement and/or Section 6 of the Telemedicine Act, Plaintiff ceased providing medication abortion via telemedicine. As a result, the Clinic has been limited to providing medication abortion only two days a week, and cannot expand telemedicine care to rural locations.

63. There are no benefits, medical or otherwise, to the Challenged Laws. Neither the medication in-person requirement nor Section 6 of the Telemedicine Act improve women's health and there is no medical basis for either one. Telemedicine has been used to safely provide medication abortion for a decade and has been deemed to be as safe as the provision of medication abortion in-person at a clinic. Conspicuously, the Challenged Laws contain no legislative findings or information explaining their purpose and provide no justification for their differential treatment of abortion.

64. Requiring the physician to be physically present to examine the patient prior to administering medication abortion creates an undue burden for women seeking abortion by restricting their access to safe abortion care.

65. The Challenged Laws limit the number of days the Clinic can provide care to only two days a week and preclude the Clinic from expanding its services in the future to offer women medication abortion in more rural areas, closer to where they reside, which would alleviate the travel and logistical burdens these women face when trying to access abortion care.

66. By depriving women of access to abortion care delivered via telemedicine, without conferring any corresponding health benefit, the Challenged Laws create an undue burden on women's constitutional right to access abortion in Kansas.

67. Additionally, Sections 6 and 7 of the Telemedicine Act impermissibly single out abortion from all other forms of medical care. The Telemedicine Act promotes the use of telemedicine to expand access to health care for Kansans, but Sections 6 and 7, when read in conjunction with the medication in-person requirement, prohibit health care providers from providing constitutionally protected medical care without a legitimate reason.

68. Section 6 of the Telemedicine Act explicitly singles out abortion providers and women seeking abortions for discriminatory treatment in a statute that is otherwise designed to protect and increase access to health care services.

69. Section 7 of the Telemedicine Act also impermissibly singles out telemedicine for abortion care by expressly declaring Section 6 the only non-severable section of the Act, and by specifically stating that all other sections are severable.

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF (Fundamental Right to Terminate a Pregnancy)

70. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 69 above.

71. The Challenged Laws violate Sections 1 and 2 of the Bill of Rights of the Kansas Constitution by requiring the physician providing the abortion to be in the same room as the patient, and banning the use of telemedicine to provide abortion services, thereby unconstitutionally burdening the fundamental right of Plaintiff's patients to terminate a previable pregnancy.

SECOND CLAIM FOR RELIEF
(Improper Purpose)

72. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 69 above.

73. The Challenged Laws violate Section 1 of the Bill of Rights of the Kansas Constitution because they were enacted with the improper purpose of unconstitutionally burdening a woman's right to obtain pregnancy termination services.

THIRD CLAIM FOR RELIEF
(Denial of Equal Protection to Abortion Patients)

74. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 69 above.

75. The Challenged Laws violate the Kansas Constitution's equal protection guarantee by singling out a medical procedure sought only by women for differential treatment and imposing burdens on women seeking to exercise their fundamental right to terminate a previable pregnancy that are not imposed on other similarly-situated individuals, including patients who seek other forms of medical care via telemedicine.

FOURTH CLAIM FOR RELIEF
(Denial of Equal Protection to Abortion Providers)

76. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 69 above.

77. The Challenged Laws violate Section 1 of the Bill of Rights of the Kansas Constitution, which guarantees Plaintiff equal protection under the law, by denying only physicians performing abortions the ability to provide care via telemedicine and by requiring the physician to be in the same room, in the physical presence of the patient in order to provide medication abortion services.

FIFTH CLAIM FOR RELIEF
(Declaratory Judgment)

78. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 69 above.

79. Pursuant to K.S.A. § 60-1704, Plaintiff is entitled to a determination of how the Challenged Laws affect its rights, status, or other legal relations and how they affect the rights, status, or other legal relations of its patients.

80. Plaintiff is further entitled to a determination of whether the provision of Section 7, expressly declaring Section 6 non-severable from the Telemedicine Act, is null and void.

APPLICATION FOR TEMPORARY RESTRAINING ORDER

81. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 69 above.

82. K.S.A. § 60-902 provides that a court may grant a restraining order on the basis of a verified pleading showing that a party is entitled to the relief demanded. K.S.A. § 60-902. K.S.A. § 60-903 allows a restraining order to be granted without notice or bond, so long as it does not disturb the status quo. K.S.A. § 60-903(8); *see also State v. Alston*, 256 Kan. 571, 579 (1994). The Kansas Supreme Court has explained:

The *McKinney* court noted that K.S.A. [§60-903] provides for the issuance of a restraining order as a provisional remedy to a party entitled to relief, restraining the commission or continuance of some act. An application for a restraining order is also considered the application for a temporary injunction. A restraining order remains in force until the hearing for the temporary injunction. It observed that 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. The restraining order can go no further than to preserve the status quo until the hearing is held for the temporary injunction, the status quo being the last actual, peaceable, uncontested position of the parties which preceded the pending controversy.

Alston, 256 Kan. at 579.

83. An application for a restraining order is also an application for a temporary injunction, and the Court should set a hearing on Plaintiff's application for a temporary injunction. K.S.A. § 60-903.

84. As demonstrated in the First Amended Verified Petition, Plaintiff and its patients will suffer immediate and irreparable harms if Defendants are not restrained from enforcing the Challenged Laws.

85. This Court's December 31, 2018, Memorandum Opinion found that Section 6 of the Telemedicine Act "has no anchor for operation" because K.S.A. § 65-4a10 "is presently barred of enforcement by [the *Hodes & Nauser*] Agreed Order." Memorandum Opinion at 11.

86. On or around January 2, 2019, in an effort to avoid unnecessary litigation, counsel for Trust Women sought written confirmation from Defendants Bennett, and Defendants Seltzer Lippert, and Durrett (via General Counsel for the Board of Healing Arts) that they will not seek to enforce the medication in-person requirement and/or Section 6, in light of the *Hodes & Nauser* Agreed Order and the December 31, 2018, Memorandum and Opinion.

87. On January 7, 2019, Plaintiff's counsel again asked Defendants Bennett, Seltzer Lippert, and Durrett to confirm, via written agreement, that they would not seek to enforce the medication in-person requirement and Section 6 during the pendency of 11-CV-1298. Plaintiff's counsel indicated that, absent such an agreement, Trust Women would seek relief from the District Court.

88. To date, Defendants Bennett, Seltzer Lippert, and Durrett have refused to provide Plaintiff with the requested confirmation.

89. Additionally, Defendant Schmidt has moved both to appeal Judge Theis' December 31, 2018 Order and to Clarify and/or Dissolve the Agreed Order in *Hodes & Nauser*, so that K.S.A. § 65-4a10 is no longer enjoined and will be enforceable, thereby preventing Trust Women from resuming the provision of telemedicine abortion care.

90. A violation of the medication in-person requirement can result in a range of punishments. The potential consequences for violation of K.S.A. § 65-4a10 include revocation, suspension or public censure of license, the imposition of civil fines (pursuant to K.S.A. § 65 2863a), and misdemeanor charges (*see* K.S.A. § 65-2862).

91. These consequences are anything but theoretical. On December 14, 2018, Kansans for Life announced that it had filed a complaint with the Board of Healing Arts, asking the Board to investigate Plaintiff's alleged provision of "illegal" medication abortions using telemedicine.

92. Accordingly, Plaintiff seeks this temporary restraining order to prevent the real threat of irreparable harm should Defendant Bennett, or Defendants Selzer Lippert and Durrett determine that they are not bound by either the 2011 *Hodes & Nauser* Agreed Order or this Court's December 31, 2018 Memorandum Opinion. Moreover, Defendant Schmidt's appeal of the December 31, 2018 Memorandum Opinion and Motion to Clarify and/or Dissolve the Agreed Order enjoining the medication in-person requirement put Plaintiff in a precarious position. Absent temporary relief from this Court, Plaintiff has no way of knowing whether any Defendants will seek to enforce the medication in-person requirement and/or Section 6 of the Telemedicine Act now, or at some time in the future.

REQUEST FOR RELIEF

WHEREFORE Plaintiff requests that this Court:

- A. Grant a Restraining Order ex-parte, without bond, that restrains Defendants from enforcing the Challenged Laws until this Court rules on the request for a Temporary Injunction.
- B. Grant a Temporary Injunction, without bond, that prevents Defendants from enforcing the Challenged Laws.
- C. Grant a Permanent Injunction restraining Defendants from enforcing the Challenged Laws, on their face, or in the alternative, as applied to Plaintiff.
- D. Issue a Declaratory Judgment that the Challenged Laws violate rights of Plaintiff and its patients protected by the Bill of Rights of the Kansas Constitution.
- E. Issue a Declaratory Judgment that the provision of Section 7, which declares Section 6 of the Telemedicine Act non-severable, is null and void.

F. Grant such other and further relief as this Court deems just and proper, including costs and attorneys' fees.

Respectfully submitted,

/s/ Robert V. Eye

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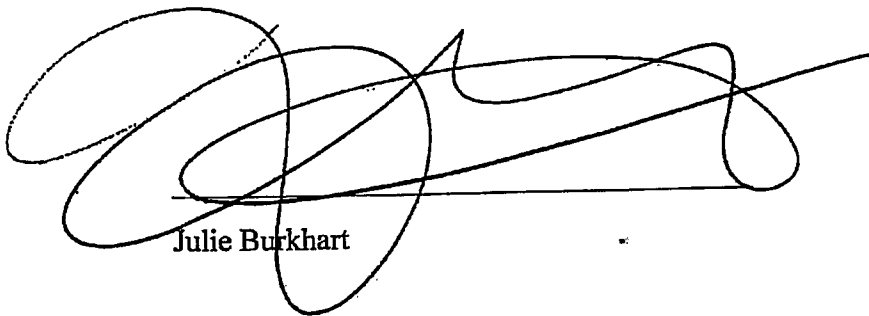
**Application Pending for Admission Pro Hac Vice*

ATTORNEYS FOR PLAINTIFF

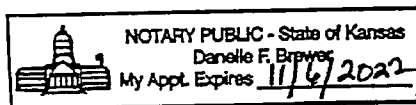
VERIFICATION

STATE OF KANSAS)
) ss.
COUNTY OF SEDGWICK)

I, Julie Burkhart, of lawful age, being first duly sworn upon oath states: I have read the above Verified Petition, know the contents and know that the statements made therein are true and correct.


Julie Burkhart

SUBSCRIBED AND SWORN to before me this 5th day of February, 2019 by the person named herein, known to me to be the person so indicated.




Notary Public

My Appointment Expires:

11/6/2022

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of February, 2019, I electronically filed the above and foregoing with the Clerk of the Court using the Court's Electronic Filing System, which will send a notice of electronic filing to all counsel of record and I provided copies of the above by first class mail to Defendant Schmidt.

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/s/ Robert V. Eye
Robert V. Eye

Exhibit 1

West's Kansas Statutes Annotated

Chapter 65. Public Health

Article 4a. Abortion Facility Licensure

K.S.A. 65-4a10

65-4a10. Performance of abortions; only physicians; RU-486 or any drug induced abortion requirements;
violations

Currentness

(a) No abortion shall be performed or induced by any person other than a physician licensed to practice medicine in the state of Kansas.

(b)(1) Except in the case of an abortion performed in a hospital through inducing labor: (A) When RU-486 (mifepristone) is used for the purpose of inducing an abortion, the drug shall initially be administered by or in the same room and in the physical presence of the physician who prescribed, dispensed or otherwise provided the drug to the patient; and (B) when any other drug is used for the purpose of inducing an abortion, the drug or the prescription for such drug shall be given to the patient by or in the same room and in the physical presence of the physician who prescribed, dispensed or otherwise provided the drug or prescription to the patient.

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

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

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

Credits

Laws 2011, ch. 82, § 10, eff. July 1, 2011; Laws 2015, ch. 84, § 1, eff. June 11, 2015.

K. S. A. 65-4a10, KS ST 65-4a10

Statutes are current through laws effective on or before July 1, 2018, enacted during the 2018 Regular Session of the Kansas Legislature.

End of Document

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Exhibit 2

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

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

2018 DEC 31 P 4:41

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.)

**MEMORANDUM OPINION AND ENTRY OF JUDGMENT
ON PLAINTIFF'S MOTION FOR A TEMPORARY INJUNCTION
AND TEMPORARY RESTRAINING ORDER**

NATURE OF THE CASE:

Pending before this Court is Plaintiff's Motion for a Temporary Injunction and Temporary Restraining Order. The Plaintiff provides abortion services, the extent of which is not of concern, but includes providing the means for drug induced abortions which the proffered

evidence advances must occur within the first ninety days of the pregnancy, absent some exigency. The Plaintiff's challenge is to Section 6 of 2018 Senate Sub. for HB 2028, which it is alleged purports to establish a ban on the provision of drug induced abortions by means of telemedicine, which Plaintiffs assert constitutes an "undue burden" on eligible patients seeking such form of abortion. The Court heard arguments on this motion on December 14, 2018. Plaintiff appeared by Leah Wiederhorn and Robert Eye. Defendant appeared by Assistant Attorney General Shon Qualseth and Assistant Solicitor General Bryan Clark.

CONCLUSIONS OF LAW:

Having considered the arguments, briefing, and evidence presented, the Court believes the following considerations apply, the result of which moots, and avoids, any of the injunctive relief prayed for in this suit.

Nothing in the text of 2018 Senate Sub. for HB 2028 purports to authorize the practice of telemedicine

rather it merely assures that, when telemedicine is practiced, other statutes impacting the practice of medicine apply. Accordingly, standing alone, Section 6 of 2018 Senate Sub. for HB 2028 can only be read in like fashion and does not, nor need not, "authorize" the practice of telemedicine.

Accordingly, to have a meaningful purpose, or intent, Section 6 of 2018 Senate Sub. for HB 2028, which states that "nothing in this act shall be construed to authorize the delivery of any abortion procedure via telemedicine" must be construed, as this Court does, in conjunction with other relevant statutes that restrict the practice of medicine.

Here, K.S.A. § 65-4a10 impacts medical abortion practices by requiring the prescribing physician be in the same room as the patient when the abortion drugs are administered, subject to exceptions for certain in-hospital induced abortions and other emergencies. Clearly neither 2018 Senate Sub. for HB 2028, nor its Section 6 itself, contains an independent prohibition

on the provision of abortion through the use of medications nor by telemedicine. The contents of 2018 HB 2512 were converted by the legislature into Senate Sub. for HB 2028 and testimony in support of HB 2512 supports the above view as it reflects recognition of its tie-in to K.S.A. 65-4a10. See *Defendant's Response Opposing Plaintiff's Motion for Temporary Injunction and Temporary Restraining Order* at Exhibit A.

If, in legal fact, Section 6 of 2018 Senate Sub. for HB 2028 was to be construed as intending an independent ban on the use of telemedicine in the delivery of medically induced abortions, hence, without reference to K.S.A. 65-4a10, its principally time limited use for the first ninety days of a pregnancy would constitute an absolute ban, one without emergency provisions. This fact, itself, would be an additional factor impacting scrutiny of it in light of accepted constitutional guarantees surrounding abortion procedures, if, and when, the merits were tested in regard to their constitutionality. See *Stenberg v.*

Carhart, 120 S.Ct. 2597 (2000). The strength of the medical evidence regarding the lack of a health exception would be determinative. See *Gonzales v. Carhart*, 127 S.Ct. 1610, 1636 (2007).

In case 11CV1298, now pending in the District Court of Shawnee County, and in which the Kansas Attorney General was a named party, as well as independently representing the State's interests, the Court entered an *Agreed Order* (attached) temporarily enjoining the enforcement of House Substitute for SENATE BILL NO. 36 - "the Act" - which subsequently was codified as K.S.A. 65-4a01-4a12. Section 10 of the latter Act was codified as K.S.A. 65-4a10. The latter Act provided for severability of its sections should any be found invalid. See Section 12 at K.S.A. 65-4a12. As originally enacted in 2011, Section 10 had no emergency exceptions. The 2015 legislature amended K.S.A. 65-4a10 (L. 2015, ch. 84), such that its provisions were not to be seen as an absolute ban on non-complying abortion procedures in cases of certain in-hospital or

other medical emergencies. L. 2015, ch. 84, § 1(b)(1) and (2). It also expanded the range of abortion inducing drugs subject to the in-person administration requirement. *Id.* at § 1(b)(1)B. The remainder of the Act remained textually as it was, other than a necessary renumbering of its Sections.

The December 2, 2011 *Agreed Order* stated that during the pendency of the proceedings in what was then captioned *Hodes & Nauser v. Moser*, now *Anderson*, No. 11-C-1298, the Attorney General would not seek to enforce the Act, *i.e.*, K.S.A. §§ 65-4a01-4a12, as well as the associated implementing regulations. As noted, the proceedings in that case are still pending and still in the discovery phase. No party has moved to modify the *Agreed Order*. Hence, all provisions of the Act, particularly those remaining textually unchanged from the 2011 version, still stand as under challenge in that suit and are enjoined from enforcement as a matter of fact. The 2015 legislative amendment may

have altered the focus of review, but did not moot the Agreed Order. See K.S.A. 77-201 First:

" . . . the provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of the prior provisions and not a new enactment."

See also *Sunflower Racing, Inc. v. Board of County Comm'rs of Wyandotte County*, 256 Kan. 426, 439-440 (1994).

While the Attorney General has challenged his status as a defendant in this case, his position can be seen to lose its efficacy if Section 6 of 2018 Senate Sub. for HB 2028 is necessarily required to be construed with K.S.A. 65-4a10 to give it any effective meaning. He was a named Defendant in 11CV1298 because he is the State's chief law enforcement officer and the Act, by designating a violation of K.S.A. 65-4a10 as "unprofessional conduct", contains criminal sanctions (K.S.A. 65-2862), the prosecution of which can be controlled by the Attorney General. See *State, ex rel. Foster v. City of Kansas City*, 186 Kan. 190, 194-196

(1960). Further, the Attorney General, acting in his capacity as the State's attorney presenting a defense to the Act, stipulated and agreed to the *Agreed Order* entered in 11CV1298 enjoining its enforcement and is ethically bound to honor it as long as it stands. *Foster* at 196-197.

Hence, given the necessary symbiosis between Section 6 of 2018 Senate Sub. for HB 2028 and K.S.A. 65-4a10, the *Agreed Order* entered in 11CV1298 not only necessarily thwarts independent enforcement of Section 6 as a matter of law, but also embeds the Attorney General properly in this case either as a proper defendant as an enforcement officer, and/or, as well, binds him ethically in his capacity as the State's attorney in 11C1298. Thus, until that *Agreed Order* is modified through a proper, yet separate; proceeding, his complaint of improvident or misplaced involvement here should not be recognized. *Koch Engineering Co. v. Faulconer*, 227 Kan. 813, 829-830 (1980). The Attorney General, as reflected in the *Defendants' Answer to*

Plaintiff's Second Amended Verified Petition entered December 29, 2015, recognized that if the above was his position, he knew the proper procedure for doing so (*Id.* at ¶ 99).

The above is buttressed, as noted, by the fact that the challenged language of K.S.A. 65-4a10, notwithstanding the 2015 legislative amendment adding emergency exceptions to the requirement that the prescribing physician must be present in the room when the abortion inducing drugs are administered, nevertheless, remains intact. Hence, the *Agreed Order* has not been mooted in regard to that provision's enforcement as has been argued by the Attorney General. His further claim that the Plaintiffs in 11CV1298 only challenged Section 10 of the 2011 Act (K.S.A. 65-4a10) based on its lack of emergency provisions is simply not correct as a matter of the pleadings in 11CV1298, even through its Second Amended Petition, by example only:

"SIXTH CLAIM FOR RELIEF (Patients' Privacy Rights - Medication-in-Person Requirement)"

81. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 80 above.

82. Section 10 of the Act violates Plaintiffs' patients' privacy rights under Section 1 of the Kansas Bill of Rights because it imposes significant and medically unjustified burdens on the provision of 'abortion-inducing' drugs, making it extremely difficult, if not impossible, for physicians to provide such drugs, even in situations where prompt termination of pregnancy is necessary to protect a woman's life or health. K.S.A. § 65-4a10(a)."

Petition at ¶¶'s 81-82. Also see First Amended

Petition at ¶¶'s 83-84; Second Amended Petition at ¶¶'s 81-82.

Simply, unquestionably, the 11CV1298 Plaintiffs were, and are, challenging the physician being present requirement of K.S.A. 65-4a10 as a medically unnecessary - undue burden - to the attainment of an abortion within the first ninety days of a pregnancy. e.g., *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

Further, any argument that the Agreed Order entered in 11CV1298 was limited to enforcement efforts

against only those Plaintiffs is wrong. The "Act" itself and any implementing regulations were enjoined of enforcement. Hence, there is no basis to argue that enforcement against others with like interests somehow were excepted. Again, unless and until the *Agreed Order* is modified in a properly noticed proceeding, the Plaintiff in this case is entitled to enjoy that umbrella of protection and safe harbor provided by the *Agreed Order* and, therefore, not be exposed to any threat of selective enforcement because of, perhaps, of a change in position by the State, a position that should not, and will not, be recognized by the Court in the context of this current proceeding.

Based on the reasons stated above, it must be concluded that as the prescribing physician in the room when the abortion inducing drugs are administered requirement still exists, but is presently barred of enforcement by an *Agreed Order* of the Court in 11CV1298, Section 6 of 2018 Senate Sub. for HB 2028 has no anchor for operation. As such, Section 6, not

itself establishing a prohibition, leaves Plaintiff's claims - so long as the *Agreed Order* exists in 11CV1298 - requesting Section 6 of 2018 Senate Sub. for HB 2028 be enjoined states no present relief necessarily to be derived, or to be presently delivered, from this suit hence, not ripe for review, leaves Plaintiff without the necessary present standing to call for review because K.S.A. 65-4a10 is presently inoperative. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897 (2008).

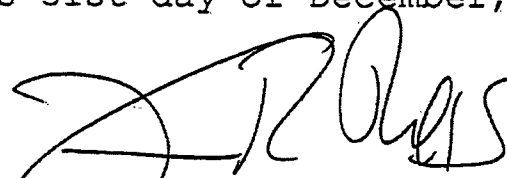
Accordingly, this case is dismissed without prejudice for failure to state a claim that is now jurisdictionally competent for review.

ENTRY OF JUDGMENT

Judgment is entered for the Defendant, Derek Schmidt, in his official capacity as Attorney General of the State of Kansas, and against the Plaintiff, Trust Women Foundation, Inc. d/b/a South Wind Women's Center d/b/a Trust Women Wichita, dismissing this case without prejudice for the reasons stated in the foregoing *Memorandum Opinion*. Costs are taxed to the

Plaintiff. This Entry of Judgment shall be effective when filed with the Clerk of the District Court and no further journal entry is required.

IT IS SO ORDERED t2his 31st day of December, 2018.

A handwritten signature in black ink, appearing to read 'F. Theis', written over a horizontal line.

Franklin R. Theis
Judge of the District Court
Division Seven

cc: Leah Wiederhorn
Jessica Sklarsky
Robert V. Eye
Shon Qualseth
Jeffrey A. Chanay
Bryan C. Clark

Exhibit 3

Senate Substitute for HOUSE BILL No. 2028

AN ACT concerning health and healthcare; relating to the practice of telemedicine; Kansas medical assistance program; enacting the Kansas telemedicine act; amending K.S.A. 2017 Supp. 40-2,103 and 40-19c09 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) Sections 1 through 7, and amendments thereto, shall be known and may be cited as the Kansas telemedicine act.

(b) This section shall take effect on and after January 1, 2019.

New Sec. 2. (a) For purposes of Kansas telemedicine act:

(1) "Distant site" means a site at which a healthcare provider is located while providing healthcare services by means of telemedicine.

(2) "Healthcare provider" means a physician, licensed physician assistant, licensed advanced practice registered nurse or person licensed, registered, certified or otherwise authorized to practice by the behavioral sciences regulatory board.

(3) "Originating site" means a site at which a patient is located at the time healthcare services are provided by means of telemedicine.

(4) "Physician" means a person licensed to practice medicine and surgery by the state board of healing arts.

(5) "Telemedicine," including "telehealth," means the delivery of healthcare services or consultations while the patient is at an originating site and the healthcare provider is at a distant site. Telemedicine shall be provided by means of real-time two-way interactive audio, visual, or audio-visual communications, including the application of secure video conferencing or store-and-forward technology to provide or support healthcare delivery, that facilitate the assessment, diagnosis, consultation, treatment, education and care management of a patient's healthcare. "Telemedicine" does not include communication between:

(A) Healthcare providers that consist solely of a telephone voice-only conversation, email or facsimile transmission; or

(B) a physician and a patient that consists solely of an email or facsimile transmission.

(b) This section shall take effect on and after January 1, 2019.

New Sec. 3. (a) The same requirements for patient privacy and confidentiality under the health insurance portability and accountability act of 1996 and 42 C.F.R. § 2.13, as applicable, that apply to healthcare services delivered via in-person contact shall also apply to healthcare services delivered via telemedicine. Nothing in this section shall supersede the provisions of any state law relating to the confidentiality, privacy, security or privileged status of protected health information.

(b) Telemedicine may be used to establish a valid provider-patient relationship.

(c) The same standards of practice and conduct that apply to healthcare services delivered via in-person contact shall also apply to healthcare services delivered via telemedicine.

(d) (1) A person authorized by law to provide and who provides telemedicine services to a patient shall provide the patient with guidance on appropriate follow-up care.

(2) (A) Except when otherwise prohibited by any other provision of law, when the patient consents and the patient has a primary care or other treating physician, the person providing telemedicine services shall send within three business days a report to such primary care or other treating physician of the treatment and services rendered to the patient in the telemedicine encounter.

(B) A person licensed, registered, certified or otherwise authorized to practice by the behavioral sciences regulatory board shall not be required to comply with the provisions of subparagraph (A).

(e) This section shall take effect on and after January 1, 2019.

New Sec. 4. (a) The provisions of this section shall apply to any individual or group health insurance policy, medical service plan, contract, hospital service corporation contract, hospital and medical service cor-

service corporation contract, fraternal benefit society, health maintenance organization or the Kansas medical assistance program shall exclude an otherwise covered healthcare service from coverage solely because such service is provided through telemedicine, rather than in-person contact, or based upon the lack of a commercial office for the practice of medicine, when such service is delivered by a healthcare provider.

(c) The insured's medical record shall serve to satisfy all documentation for the reimbursement of all telemedicine healthcare services, and no additional documentation outside of the medical record shall be required.

(d) Payment or reimbursement of covered healthcare services delivered through telemedicine may be established by an insurance company, nonprofit health service corporation, nonprofit medical and hospital service corporation or health maintenance organization in the same manner as payment or reimbursement for covered services that are delivered via in-person contact are established.

(e) Nothing in this section shall be construed to:

(1) Prohibit an individual or group health insurance policy, medical service plan, contract, hospital service corporation contract, hospital and medical service corporation contract, fraternal benefit society or health maintenance organization that provides coverage for telemedicine or the Kansas medical assistance program from providing coverage for only those services that are medically necessary, subject to the terms and conditions of the covered individual's health benefits plan;

(2) mandate coverage for a healthcare service delivered via telemedicine if such healthcare service is not already a covered healthcare service, when delivered by a healthcare provider subject to the terms and conditions of the covered individual's health benefits plan; or

(3) allow an individual or group health insurance policy, medical service plan, contract, hospital service corporation contract, hospital and medical service corporation contract, fraternal benefit society or health maintenance organization that provides coverage for telemedicine or the Kansas medical assistance program to require a covered individual to use telemedicine or in lieu of receiving an in-person healthcare service or consultation from an in-network provider.

(f) The provisions of K.S.A. 40-2248 and 40-2249a, and amendments thereto, shall not apply to this section.

(g) This section shall take effect on and after January 1, 2019.

New Sec. 5. (a) The state board of healing arts, following consultation with the state board of pharmacy and the board of nursing, shall adopt rules and regulations relating to the prescribing of drugs, including controlled substances, via telemedicine. Such rules and regulations shall be adopted by December 31, 2018.

(b) The state board of healing arts shall adopt such rules and regulations as may be necessary to effectuate the provisions of Kansas telemedicine act. Such rules and regulation, shall be adopted by December 31, 2018.

(c) The behavioral sciences regulatory board shall adopt such rules and regulations as may be necessary to effectuate the provisions of Kansas telemedicine act. Such rules and regulations shall be adopted by December 31, 2018.

New Sec. 6. Nothing in the Kansas telemedicine act shall be construed to authorize the delivery of any abortion procedure via telemedicine.

New Sec. 7. If any provision of the Kansas telemedicine act, or the application thereof to any person or circumstance, is held invalid or unconstitutional by court order, then the remainder of the Kansas telemedicine act and the application of such provision to other persons or circumstances shall not be affected thereby and it shall be conclusively presumed that the legislature would have enacted the remainder of the

services provided by a speech-language pathologist or audiologist licensed by the Kansas department for aging and disability services by means of telehealth, as defined in section 2, and amendments thereto, if such services would be covered by the Kansas medical assistance program when delivered via in-person contact.

(b) The department of health and environment shall implement and administer this section consistent with applicable federal laws and regulations and shall submit to the United States centers for medicare and medicaid services any state medicaid plan amendment, waiver request or other approval request necessary to implement this section.

(c) The department of health and environment shall adopt rules and regulations as may be necessary to implement and administer this section. Such rules and regulations shall be adopted on or before December 31, 2018.

(d) On or before January 13, 2020, the department of health and environment shall prepare an impact report that assesses the social and financial effects of the coverage mandated by this section, including the impacts listed in K.S.A. 40-2249(a) and (b), and amendments thereto, and shall submit such report to the legislature and the house of representatives standing committee on health and human services, the house of representatives standing committee on insurance, the senate standing committee on public health and welfare and the senate standing committee on financial institutions and insurance.

Sec. 9. K.S.A. 2017 Supp. 40-2,103 is hereby amended to read as follows: 40-2,103. The requirements of K.S.A. 40-2,100, 40-2,101, 40-2,102, 40-2,104, 40-2,105, 40-2,114, 40-2,160, 40-2,165 through 40-2,170, ~~inclusive~~; 40-2250, K.S.A. 2017 Supp. 40-2,105a, 40-2,105b, 40-2,184, 40-2,190 ~~and~~, 40-2,194, ~~and sections 1 through 7~~, and amendments thereto, shall apply to all insurance policies, subscriber contracts or certificates of insurance delivered, renewed or issued for delivery within or outside of this state or used within this state by or for an individual who resides or is employed in this state.

Sec. 10. K.S.A. 2017 Supp. 40-19c09 is hereby amended to read as follows: 40-19c09. (a) Corporations organized under the nonprofit medical and hospital service corporation act shall be subject to the provisions of the Kansas general corporation code, articles 60 ~~to through~~ 74, ~~inclusive~~, of chapter 17 of the Kansas Statutes Annotated, and amendments thereto, applicable to nonprofit corporations, to the provisions of K.S.A. 40-214, 40-215, 40-216, 40-218, 40-219, 40-222, 40-223, 40-224, 40-225, 40-229, 40-230, 40-231, 40-235, 40-236, 40-237, 40-247, 40-248, 40-249, 40-250, 40-251, 40-252, 40-2,100, 40-2,101, 40-2,102, 40-2,103, 40-2,104, 40-2,105, 40-2,116, 40-2,117, 40-2,125, 40-2,153, 40-2,154, 40-2,160, 40-2,161, 40-2,163 through 40-2,170, ~~inclusive~~, 40-2a01 et seq., 40-2111 ~~to through~~ 40-2116, ~~inclusive~~, 40-2215 ~~to through~~ 40-2220, ~~inclusive~~, 40-2221a, 40-2221b, 40-2229, 40-2230, 40-2250, 40-2251, 40-2253, 40-2254, 40-2401 ~~to through~~ 40-2421, ~~inclusive~~, and 40-3301 ~~to through~~ 40-3313; ~~inclusive~~, and K.S.A. 2017 Supp. 40-2,105a, 40-2,105b, 40-2,184, 40-2,190 ~~and~~, 40-2,194 ~~and sections 1 through 7~~, and amendments thereto, except as the context otherwise requires, and shall not be subject to any other provisions of the insurance code except as expressly provided in this act.

(b) No policy, agreement, contract or certificate issued by a corporation to which this section applies shall contain a provision which excludes, limits or otherwise restricts coverage because medicaid benefits as permitted by title XIX of the social security act of 1965 are or may be available for the same accident or illness.

(c) Violation of subsection (b) shall be subject to the penalties prescribed by K.S.A. 40-2407 and 40-2411, and amendments thereto.

Sec. 11. K.S.A. 2017 Supp. 40-2,103 and 40-19c09 are hereby repealed.

Senate Substitute for HOUSE BILL No. 2028—page 4

Sec. 12. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the HOUSE, and was adopted by that body

HOUSE adopted
Conference Committee Report _____

Speaker of the House.

Chief Clerk of the House.

Passed the SENATE
as amended _____

SENATE adopted
Conference Committee Report _____

President of the Senate.

Secretary of the Senate.

APPROVED _____

Governor.

Exhibit 4

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

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS

2011 DEC -2 P 1:42

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

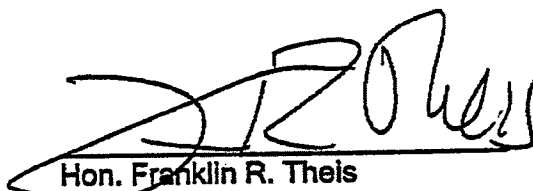
AGREED ORDER

The parties have agreed and jointly stipulated that the Temporary Restraining Order entered on November 10, 2011, shall remain in effect pending the Court's issuance of a final judgment in this matter. During the pendency of these proceedings, defendants shall not seek to enforce either the statutory Act or the Permanent Regulations promulgated by the Kansas Department of Health and Environment.

Therefore, upon this agreement and joint stipulation of the parties, the Court cancels the Temporary Injunction Hearing scheduled on December 6-7, 2011. The Court shall conduct a Status & Scheduling Conference beginning at 9:30 a.m. on December 6, 2011, or as soon thereafter as the matter may be heard.

IT IS SO ORDERED.

12/2/11
Date


Hon. Franklin R. Theis
District Court Judge