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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2011-CV-001298

**IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS**

Hodes & Nauser, MDs, P.A., *et al.*,	Plaintiffs,
v.	Case No. 2011-CV-1298 Division No. 7
Lee A. Norman, M.D., in his official capacity as Acting Secretary of the Kansas Department of Health and Environment, *et al.*,	Defendants.

Pursuant to K.S.A. Chapter 60

MOTION TO CLARIFY AND/OR DISSOLVE INJUNCTION RELATING TO K.S.A. 65-4a10

In December 2011, this Court entered an Agreed Order, stating its November 2011 Temporary Restraining Order would continue until final judgment, and defendants would not enforce the challenged Act—K.S.A. 2011 Supp. 65-4a01 through 65-4a12, including K.S.A. 2011 Supp. 65-4a10 (the "medication-in-person requirement"). In 2015, the Kansas Legislature significantly amended K.S.A. 65-4a10 and repealed the enjoined 2011 statute. The changes, which addressed the concerns plaintiffs raised in their complaints at the time, were passed by near-unanimous majorities in both legislative chambers, were signed by the governor, and went into effect on June 11, 2015.

Defendants did not agree in 2011 that they would not enforce a statute enacted 3½ years later with virtually no opposition—a statute plaintiffs here admit they can and do comply with. Yet in a *separate lawsuit* with separate parties filed in late 2018, this Court recently has construed the 2011 Agreed Order *in this case* to have that exact effect. This is not the bargain defendants struck. Defendants thus seek an Order clarifying that the Agreed Order only related to the Act challenged in 2011 and/or dissolving the portion of the injunction relating to K.S.A. 65-4a10.

FACTUAL AND PROCEDURAL BACKGROUND

1. In 2011, the Kansas Legislature enacted the H. Sub S.B. 36 ("the Act"). L. 2011, ch. 82.

2. The Kansas Governor signed the Act into law on May 16, 2011. Senate Journal, 66th Day, at 1313 (June 1, 2011).

3. The relevant portion of K.S.A. 2011 Supp. 65-4a10 originally stated:

> When RU-486 (mifepristone) or any drug is used for the purpose of inducing an abortion, the drug must 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.

4. Prior to its passage, a hearing on what eventually became the Act was held on March 9, 2011, before the House Federal and State Affairs Committee. A copy of the minutes of that meeting are attached as Exhibit 1.

5. One of the plaintiffs in this action, Dr. Herbert Hodes, testified before the House Committee.

6. During his testimony, Dr. Hodes was asked for an explanation of the "RU486 portion of the bill" regarding the use of medication—RU-486, or mifepristone—to induce an abortion. Dr. Hodes responded, in part, that the RU-486 portion of the bill was "perfect." 3/9/11 Minutes (attached as Exhibit 1).

7. The provisions of the Act were scheduled to go into effect on July 1, 2011. See K.S.A. 65-4a01 – K.S.A. 65-4a12 (listing July 1, 2011, as the effective date).

8. On June 28, 2011, plaintiffs filed a Complaint, along with a Motion for Temporary Restraining Order and Preliminary Injunction, in the U.S. District Court of Kansas to enjoin enforcement of the Act and temporary regulations that had been promulgated by the Kansas Department of Health and Environment (KDHE).

9. On July 1, 2011, the U.S. District Court granted plaintiffs' request for a preliminary injunction.

10. In October 2011, KDHE promulgated K.A.R. 28-34-126 through K.A.R. 28-34-144 ("the Regulations") to implement the Act's legislative directives. See *Kansas Register*, Vol. 30, No. 43, at 1471-78 (Oct. 27, 2011) (setting forth the provisions of K.A.R. 28-34-126 – K.A.R. 28-34-144, which list K.S.A. 65-4a05 and K.S.A. 65-4a09 as the authorizing statutes).

11. The Regulations were published in the *Kansas Register* on October 27, 2011, and were scheduled to take effect on November 14, 2011. *Kansas Register*, Vol. 30, No. 43, at 1471-78 (Oct. 27, 2011).

12. On November 9, 2011, plaintiffs filed a Verified Petition and Application for Restraining Order, along with an Application for Temporary Injunction, to enjoin enforcement of the Act and Regulations.

13. In support of plaintiffs' Verified Petition and Application for Restraining Order, plaintiffs claimed that the medication-in-person requirement did not have a medical emergency exception, and that the requirement would "greatly hinder the provision of abortions, particularly hospital-based abortions, which are sometimes performed in medically urgent situations (such as where the woman is experiencing preterm premature rupture of membranes), and which entail the administration of drugs over a period of hours or days." Verified Petition and Application for Restraining Order, ¶ 44.

14. In her affidavit in support of the Application Motion for Temporary Injunction, plaintiff Traci Nauser repeated the claim that the medication-in-person

requirement would "greatly hinder" the provision of hospital-based abortions. Application for Restraining Order, Affidavit of Traci Nauser, M.D., ¶ 4(b).

15. On November 10, 2011, this Court granted the temporary restraining order pending a hearing on plaintiffs' request for a temporary injunction, stating:

> Defendants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment, Steven Howe, District Attorney of Johnson County, and Derek Schmidt, Kansas Attorney General, along with their offices, agencies, agents and successors, are hereby restrained, enjoined and prohibited from enforcing the Permanent Regulations, K.A.R. § 28-34-126 – 144 (2011) until further order of this Court. This Order will issue without bond as allowed pursuant to K.S.A. §§ 60-902 and 903.

11/10/11 Order Granting Temporary Restraining Order (attached as Exhibit 2).

16. On November 18, 2011, this Court clarified the temporary restraining order with a written opinion, explaining that "the initial TRO order is clarified to express that its effect is to stay any parallel licensing procedure until the standards (the permanent regulations) … are first determined or until further order of the Court." 11/18/11 Order, at 6 (attached as Exhibit 3).

17. On December 2, 2011, this Court entered an Agreed Order whereby the parties stipulated "that the Temporary Restraining Order entered on November 10, 2011, shall remain in effect pending the Court's issuance of a final judgment." Defendants agreed they would not enforce the challenged 2011 Act or Regulations while the case was pending. 12/2/11 Agreed Order (attached as Exhibit 4).

18. During the 2015 legislative session, the Kansas Legislature considered and passed Senate Substitute for House Bill 2228 ("S. Sub. H.B. 2228") (attached as Exhibit 5), which revised the existing language of K.S.A. 2011 Supp. 65-4a10 and repealed the previous version of the statute. In particular:

- On May 21, 2015, the Kansas Senate passed S. Sub. for H.B. 2228 by a vote of 39-0. Senate Journal, 70th Day, at 773 (May 21, 2015).

- On May 30, 2015, the Kansas House of Representatives passed Senate Substitute for House Bill 2228 by a vote of 109-2. House Journal, 75th Day, at 951 (May 30, 2015).

19. On June 2, 2015, Senate Substitute for House Bill 2228 was enrolled and presented to the governor. House Journal, 78th Day, at 1043 (June 2, 2015).

20. On June 5, 2015, the governor signed Senate Substitute for House Bill 2228. House Journal, 81st Day, at 1677 (June 5, 2015).

21. On June 11, 2015, Senate Substitute for House Bill 2228 was published in the *Kansas Register* and immediately took effect upon that publication. Kansas Register, Vol. 34, No. 24 at 603 (June 15, 2015), *available at* http://kssos.org/pubs/register/2015/Vol_34_No_24_June_11_2015_pages_587-606.pdf.

22. The 2015 medication-in-person requirement, codified in K.S.A. 2015 Supp. 65-4a10, now reads as follows:

> *(b)(1) Except in the case of an abortion performed in a hospital through inducing labor: (A)* When RU-486 (mifepristone) ~~or any drug~~ is used for the purpose of inducing an abortion, the drug ~~must~~ *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.*

Exhibit 5 (striking through now-removed language and italicizing language added in 2015).

23. To date, the Court has not issued an Order in this case formally altering 2011 Agreed Order enjoining K.S.A. 2011 Supp. 65-4a10(b), though the enjoined statute has since been repealed and replaced by the 2015 medication-in-person requirement.

24. On December 8, 2015, plaintiffs filed their Second Amended Petition.

25. In the Second Amended Petition, plaintiffs acknowledge that there have been several statutory changes since 2011, including changes enacted in 2014 to the statutes regarding the medical emergency exception and the 2015 medication-in-person requirement. Second Amended Petition, at 13-15 (¶¶ 46-47).

26. For their "Fourth Claim For Relief," plaintiffs claim that the 2015 medication-in-person requirement "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 mifepristone and other medications used to induce an abortion." Second Amended Petition, at 21, ¶ 79.

27. When they filed their Second Amended Petition, plaintiffs never sought to amend the 2011 Temporary Restraining Order or Agreed Order and did not seek to enjoin any later-enacted statutes.

28. On April 7, 2016, counsel for defendants contacted counsel for plaintiffs, asking if plaintiffs would stipulate that the 2011 Agreed Order did not extend to a law passed four years later. (In other words, while plaintiffs could challenge the law or seek to modify the previous Temporary Restraining Order to enjoin the new law, the 2011 Agreed Order did not extend to later legislation.) Plaintiffs declined to enter into such an agreement on April 14, 2016.

29. Less than a week after plaintiffs declined defendants' request, plaintiffs responded to defendants' interrogatories, admitting that they presently can comply with the 2015 medication-in-person requirement and indicating that their present challenge to that statute hinges on a decision that they may decide to change their practice at some point in the future:

> Although Plaintiffs are currently able to comply with **K.S.A. 65-4a10(b)** (requiring that when mifepristone is "used for the purpose of inducing an abortion," it must be "administered by or in the same room and in the physician presence of the physician," and 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 same room and in the physical presence of the physician"), compliance in the long-term is not sustainable. Complying with this unnecessary requirement when other staff are qualified to administer drugs used to induce abortion takes time away from tasks Drs. Hodes and Nauser must undertake as physicians and disrupts their practice.

Plaintiffs' Interrogatory Answers, at 19 (served April 19, 2016) (attached as Exhibit 6).

30. Because plaintiffs admitted they were complying with the 2015 medication-in-person requirement, defendants had no need to return to this Court in 2016 to clarify that the 2011 Agreed Order did not extend to a statute enacted four years after the fact.

31. Defendants designated as experts Dr. Laura M. Kenny, M.D., and Dr. Melissa J. Hague, M.D., and provided expert witness reports to plaintiffs.

32. Regarding the medication-in-person requirement, Dr. Kenny stated:

> Medication error is one of the largest causes of adverse patient events. Having a physician in the room at the time of administration of mifepristone increases the likelihood that the proper medication was administered, that the patient herself actually received the medication, that the medication was administered properly, and that the correct dose was given. Having a physician in the room at the time of the medication administration also helps ensure that a patient has been adequately

> informed of the drug's intended effect, possible side effects, and possible complications.

Expert Witness Disclosure and Report of Dr. Laura Kenny, M.D., ¶ 30.

33. Regarding the medication-in-person requirement, Dr. Hague stated:

> Having a physician in the room at the time of a drug's administration ensures that the patient herself actually takes the drug and that the drug is not subsequently given to another person. Having a physician in the room at the time of the drug's administration also helps ensure that a patient is properly informed of the drug's intended effect, possible side effects, and possible complications.

Expert Witness Disclosure and Report of Dr. Melissa Hague, M.D., ¶ 31.

34. Defendants took Plaintiff Traci Nauser's deposition on October 15, 2018.

35. At that time, Plaintiff Nauser described the office's performance of medication abortions, following her initial consultation with the woman, as follows:

> I go back in and I give her the Mifepristone and a cup of water. She takes it, and that's based on law that I have to do that.
>
> And then I give her instructions that – the Cytotec that I'm sending her home with is in a bottle and I write on there what time she is to take it. She's already been given – she doesn't actually need ibuprofen so forget that. I then write down for her when you start cramping, I write on the back of her aftercare instructions how I want her to take ibuprofen and Tylenol, massage her uterus, be up and around, call me if there's any questions or concerns.

Nauser Deposition, at 64:9-21 (Excerpts of Nauser Deposition attached as Exhibit 7).

36. Plaintiff Nauser also testified that her office performs a "very rare, very small number of medical abortions," and that they only have been offering medication abortions for "four years." Nauser Deposition, at 62:15-16, 57:24 (Exhibit 7).

37. Later in the deposition, the following discussion took place:

> Q. Turning to K.S.A. 65-4a10(b), which has to do with the administration of a medication abortion. Please read that paragraph and then we can discuss it.
>
> A. Okay.

Q. Is it accurate that you are complying with that statutory provision regarding medication abortions right now?

A. Correct.

Nauser Deposition, at 148:20 – 149:3 (Exhibit 7).

38. On December 31, 2018, this Court ruled in a separate case involving different plaintiffs and excluding two of the defendants here—*Trust Women Foundation, Inc. v. Schmidt*, Shawnee County Case No. 2018-CV-844—that the 2011 Temporary Restraining Order and Agreed Order *in this case* extended to the 2015 medication-in-person requirement.

39. The Court's Order in *Trust Women* misstates the parties' stipulation in this case and alters that agreement, and it has the effect of enjoining a statute that plaintiffs here do not have standing to challenge.

DISCUSSION

The 2011 Agreed Order cannot and does not enjoin enforcement of a statute enacted four years after the parties' stipulation.

Plaintiffs initially challenged K.S.A. 2011 Supp. 65-4a10 and asked that the statute be temporarily and permanently enjoined. After this Court entered its Temporary Restraining Order on November 10, 2011, the parties agreed to stay the enforcement of the 2011 Act and treat the TRO as a temporary injunction with regard to the 2011 Act and accompanying Regulations. But K.S.A. 2011 Supp. 65-4a10 no longer exists—it was specifically repealed in June 2015 and replaced by an amended provision that addressed plaintiffs' specific concerns at the time. Plaintiffs have since amended their Petition to include a challenge to the 2015 statute. They have not requested an injunction of the 2015 medication-in-person requirement.

Plaintiffs have indicated that they will not stipulate that the 2011 Agreed Order does not apply to the 2015 medication-in-person requirement. But at the same time they have refused to acknowledge that the parties could not have agreed to stay enforcement of a law years in the future, and they have acknowledged in their own sworn admissions and testimony that they can and do comply with the 2015 law. This attempt to hold in abeyance indefinitely any laws passed by the legislature concerning clinic regulations is contrary to Kansas law and is not consistent with the intention of the parties when they consented to the Court's Agreed Order in December 2011.

Defendants request an Order from this Court making clear that the 2011 stay does not apply to the 2015 medication-in-person requirement. In the alternative, defendants state that they did not and do not agree to any stay of enforcement relating to the 2015 medication-in-person requirement, and any portion of the Agreed Order that may be construed to relate to that later-enacted statute must be dissolved.

1. **Defendants never agreed in 2011 to a stay of all future legislation, nor could the parties have agreed to—or could the Court have entered—such an advisory Order enjoining yet-to-be-adopted and yet-to-be-challenged legislation.**

Like their federal counterparts, Kansas courts "do not have the constitutional power to issue advisory opinions." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, Syl. ¶ 11, Syl. ¶ 1, 179 P.3d 366 (2008). Rather, Kansas courts' jurisdiction is "limited to cases of actual controversy." *Dept. of Revenue v. Dow Chemical Co.*, 231 Kan. 37, Syl. ¶ 3, 642 P.2d 104 (1982).

The actual-controversy requirement is a continuing one that "must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official*

English v. Arizona, 520 U.S. 43, 67 (1997). Ripeness, as one of the justiciability principles that guard against advisory opinions, requires that before a court may take action, " issues must have taken shape and be concrete rather than hypothetical and abstract." *State ex rel. Morrison*, 285 Kan. at 892. This requirement is "'designed "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."'" 285 Kan. at 892 (quoting *National Park Hospitality Ass'n v. Department of Interior,* 538 U.S. 803, 807 (2003)). This includes situations that are "'of a hypothetical or abstract character.'" 285 Kan. at 892 (quoting *Flast v. Cohen,* 392 U.S. 83, 100 (1968)).

As the Kansas Supreme Court explained in analyzing the constitutional defect in the judicial trigger provision in *Morrison* that would determine the enforceability of a law before it went into effect:

> The issues presented in the judicial trigger suit contemplated by the Act would be hypothetical, essentially asking: If the provisions were being enforced, would they infringe on any constitutional right? The parties and the court would speculate on what rights an aggrieved party might assert as having been violated, and those issues would be considered in the abstract without actual facts to inform the court's analysis and resolution of the questions.

State ex rel. Morrison, 285 Kan. at 892.

The actual-case-or-controversy requirement—or prohibition against advisory opinions—can seem academic, but it makes sense practically as well. Courts cannot issue orders on laws that have not been passed. The courts and the parties would have no idea what those laws might say, how they might affect people, and whether they would in fact have any impact on potential parties' rights. Any discussion would be

entirely hypothetical and speculative—the very reasons why courts lack jurisdiction to enter advisory opinions in the first place.

In the context of this case, this makes ample sense. The parties had no idea in November 2011 that the Kansas Legislature would make changes to the medication-in-person requirement (in 2015 or at any time), or what those changes might be. The parties did not know whether any changes would be enacted with near-unanimous, bipartisan support, including neutral testimony from abortion providers. The parties did not know whether plaintiffs would comply with those changes or whether any newly enacted law would have any impact on the plaintiffs' practice. And certainly the Court did not have the constitutional authority to enter an Order enjoining the enforcement of any future law. After all, parties cannot confer or consent to subject matter jurisdiction when a court's authority is lacking as a matter of law. See *Associated Wholesale Grocers, Inc. v. Americold Corporation*, 293 Kan. 633, 639, 270 P.3d 1074 (2011); *Labette Community College v. Board of Crawford County Comm'rs*, 258 Kan. 622, 626, 907 P.2d 127 (1995).

Turning to the facts here, defendants never agreed in 2011 that they would not enforce any future legislative enactments relating to abortion facilities. And the Court could not have entered an order staying enforcement of any future laws—even if the laws repealed and replaced provisions that were currently being challenged. As a matter of common sense and constitutional precedent, the 2011 Agreed Order cannot and does not extend to the 2015 medication-in-person requirement. Defendants thus ask the Court to clarify the 2011 Agreed Order, making clear that it does not apply to legislation enacted after the date of that filing.

2. The 2011 Agreed Order's previous injunction of K.S.A. 2011 Supp. 65-4a10 (now repealed) is moot, and plaintiffs lack standing to challenge the 2015 medication-in-person requirement.

As "part of the Kansas case-or-controversy requirement in an injunction action, courts require: (a) parties must have standing; (b) issues must not be moot; (c) issues must be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) issues may not present a political question." *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 165-66, 210 P.3d 105 (2009). The previous discussion demonstrates that the Agreed Order here—if it were to apply to the 2015 medication-in-person law—would prematurely enjoin yet-to-be-enacted laws. Both common sense and Kansas law require that it be limited, as the parties intended, to the 2011 Act and Regulations.

The actual-case-or-controversy requirement also imports other jurisdictional defects to the 2011 Agreed Order now that K.S.A. 2011 Supp. 65-4a10 has been repealed and replaced with a substantively modified provision that addressed plaintiffs' specific concerns at the time. First, the portion of the injunction covering that statute must necessarily be vacated, as an injunction of repealed legislation is necessarily moot. Second, because plaintiffs can and do comply with the 2015 medication-in-person requirement, they do not have standing to challenge that law.

The 2015 medication-in-person statute is significantly narrower than that which was originally enacted in 2011—so much so, in fact, that the original harms plaintiffs alleged when seeking the temporary restraining order against enforcement of K.S.A. 2011 Supp. 65-4a10 are completely absent from the present statute. Both Kansas's actual-controversy requirement and basic common sense demand that the challenge

brought against K.S.A. 2011 Supp. 65-4a10 be dismissed, and that the portion of the Agreed Stay enjoining that repealed statute must be dissolved.

2.1. This Court does not have subject matter jurisdiction to consider a legal challenge to a repealed statute. Thus, plaintiffs' moot challenge to the medication-in-person requirement in K.S.A. 2011 Supp. 65-4a10 must be dismissed, and any portion of the 2011 stay regarding that repealed statute must be vacated.

A legal challenge becomes "moot" and must be dismissed "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 287 (2000) (quoting *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979) (internal quotations omitted)). In such instances, the "crucial question" is whether maintaining a temporary injunction "'will have some effect in the real world.'" *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1181-82 (10th Cir. 2000) (quoting *Kennecott Utah Copper Corp. v. Becker,* 186 F.3d 1261, 1266 (10th Cir.1999)).Courts across the country have recognized that "parties have no legally cognizable interest in the constitutional validity of an obsolete statute." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson,* 236 F.3d 1174, 1182 (10th Cir. 2000). Instead, "the repeal of a challenged statute is one of those events that makes it 'absolutely clear that the allegedly wrongful behavior'"—including "the threat of prosecution under one of the repealed sections—'could not reasonably be expected to recur.'" 236 F.3d at 1182 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 189 (2000), and *United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968)). Indeed, an injunction issued against "a repealed [statute] is a textbook example of" an advisory opinion—that is, "advising what the law would be upon a hypothetical

state of facts." *National Advertising Co. v. City & County of Denver,* 912 F.2d 405, 412 (10th Cir.1990).

Based on this rationale, both Kansas and federal courts have held that if a challenged law that has been temporarily enjoined is repealed—as K.S.A. 2011 Supp. 65-4a10 was in June 2015—the challenge to the obsolete law becomes moot, and the injunction relating to that law must be vacated. Accord *Sierra Club v. Moser*, 298 Kan. 22, Syl. ¶ 10, 310 P.3d 360 (2013) ("If legal or factual circumstances have changed during the time [a case is pending] so that a decision of this court on an issue would be unavailing, this court ordinarily will not consider and decide the mooted issue."); *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1246 (10th Cir. 2009) ("[T]he repeal of a challenged statute causes a case to become moot because it extinguishes the plaintiff's legally cognizable interest in the outcome."). See also *Jones v. Temmer*, 57 F.3d 921 (10th Cir. 1995) (holding that the judgment must be vacated and the legal challenge dismissed when plaintiff's appeal was rendered moot by legislature's amendment of challenged statute).

Three decisions of the Tenth Circuit are instructive. In *Citizens for Responsible Gov't*, 236 F.3d 1174 (10th Cir. 2000), several plaintiffs brought challenges in federal court to provisions of Colorado's Fair Campaign Practices Act (FCPA) under the First and Fourteenth Amendments to the United States Constitution. The district court upheld most of the challenged provisions and invalidated others. All parties appealed.

During the course of the appeal, however, the Colorado General Assembly amended various provisions of the FCPA—"add[ing], delet[ing], or amend[ing]" the challenged definitions within the Act, repealing and replacing other challenged sections,

and leaving some sections unaffected. 236 F.3d at 1181. In light of these changes, the Tenth Circuit dismissed all the challenges to the repealed sections (including those that had been repealed and replaced with other language) and vacated the portions of the district court's injunction that related to those sections. 236 F.3d at 1181-82.

Similarly, *Camfield v. City of Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001), involved a First Amendment challenge to public officials' seizure of copies of the film *The Tin Drum* after a judge concluded that the film violated Oklahoma's child pornography and obscenity laws. During the course of the litigation, the Oklahoma Legislature made "significant revision[s]" to the applicable laws by narrowing the definition of "child pornography" to include "only material in which a minor is actually 'engaged in' or 'observes' any of several statutorily-defined sexual acts." 248 F.3d at 1222. As a result of these changes, the Oklahoma law "no longer criminalize[d] material" like the film in question. 248 F.3d at 1223.

The Tenth Circuit concluded that "this amendment moot[ed] Camfield's constitutional challenge." 248 F.3d at 1223. The court explained that "a statutory amendment moots a case 'to the extent that it removes challenged features of the prior law.'" 248 F.3d at 1223 (quoting *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta,* 219 F.3d 1301, 1310 (11th Cir. 2000)). The *Camfield* court explained:

> Here, the Legislature deleted the "simulated sex" language from section 1021.2 that Camfield argues is overbroad. Any decision on our part as to the constitutional validity of that prior version of the statute would constitute a "textbook example of advising what the law would be upon a hypothetical state of facts" rather than upon an actual case or controversy … .

248 F.3d at 1223. Based on this reasoning, the court found that it lacked jurisdiction to consider the constitutionality of the repealed statute and dismissed the challenge to that law as moot. 248 F.3d at 1223-24, 1235.

Finally, the Tenth Circuit observed that a case is not rendered moot when a new law was substantially similar to the challenged aspects of the repealed law. *Stout*, 562 F.3d at 1246 (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 662 n. 3 (1993) and *Naturist Soc'y, Inc. v. Fillyaw,* 958 F.2d 1515, 1520 (11th Cir.1992)). In *Stout*, the plaintiffs challenged certain portions of the Kansas Code of Judicial Conduct pertaining to elections, but the Kansas Supreme Court issued a new code while the suit was pending that significantly narrowed the challenged provisions. 592 F.3d at 1243-44. The Tenth Circuit held that the "change is fundamental to a degree that impacts our jurisdiction over the plaintiffs' challenges to the old" Code of Conduct provisions, and it vacated a temporary injunction against enforcement of the repealed canons. 562 F.3d at 1248-49.

The actual-controversy analysis in Kansas is the same as the analysis in the Tenth Circuit. See, *e.g.*, *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014); *Sierra Club*, 298 Kan. at 60. Any legal challenge—and in particular a request for such drastic and extraordinary relief as a temporary injunction of a statute enacted through the democratic process—must be viewed "in the light of the law as it now stands, not as it stood" when the original petition was filed. *State of N.M. ex rel. New Mexico State Highway Dep't v. Goldschmidt*, 629 F.2d 665, 667 (10th Cir. 1980).

Applying these principles here, K.S.A. 2011 Supp. 65-4a10 was repealed in 2015—replaced by a substantively different provision that addressed plaintiffs' specific

concerns at the time. The previous injunction of that statute is moot. The portion of the 2011 Agreed Order enjoining that now defunct law must be vacated.

2.2. Because plaintiffs have admitted they can and do comply with the 2015 medication-in-person requirement, they lack standing to challenge that law. Count IV in their Second Amended Petition must be dismissed.

In their original Verified Petition and Application for Restraining Order, plaintiffs claimed that the 2011 medication-in-person requirement violated their patients' privacy rights because it would hinder their ability to provide hospital-based abortions, without providing exceptions for a medical emergency. (Verified Petition and Application for Restraining Order, Sixth Claim for Relief, ¶¶ 44, 82.)

> Section 10 of the Act also requires that any "abortion-inducing" drug 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(a) ("medication-in-person requirement"). There is no medical emergency exception to the medication-in-person requirement, and it will greatly hinder the provision of abortions, particularly hospital-based induction abortions, which are sometimes performed in medically urgent situations (such as where the woman is experiencing preterm premature rupture of membranes), and which entail the administration of drugs over a period of hours or days.

Verified Petition and Application for Restraining Order, ¶ 44; Accompanying Affidavit of Traci Nauser, M.D., ¶ 4(b). This same language was included in plaintiffs' First Amended Petition, which was filed in December 2011. First Amended Verified Petition and Application for Restraining Order, ¶ 48.

Plaintiffs' Application for a Temporary Injunction similarly focused on the need for an exception for induced abortions at a hospital. In discussing K.S.A. 2011 Supp. 65-4a10 (which she called Section 10 of the 2011 Act) in her affidavit, plaintiff Nauser opined at length regarding the hardship she claimed was associated with requiring a

physician to remain in the hospital room during an hours-long induced abortion. See Affidavit of Traci Nauser, ¶¶ 50-52. Nauser's only commentary concerning the requirement, other than inducing an abortion in a hospital, was that it is "not customary for physicians to personally administer medications," and that medications "are typically administered by a nurse or other member of the staff." Nauser Affidavit, at ¶ 49. (These comments were directed toward medications generally, not abortion-inducing drugs or mifepristone.)

The 2015 medication-in-person requirement alleviates plaintiffs' stated concerns, clarifying that labor-induced abortions and abortions performed in hospitals are not subject to the requirement that the physician be physically present when an abortion medication is administered. See K.S.A. 2015 Supp. 65-4a10(b)(1) (stating that the medication-in-person requirements of that section apply "[e]xcept in the case of an abortion performed in a hospital through inducing labor"). In fact, with the passage of the 2015 statute, Kansas law only requires that the physician personally administer (or be physically present during the administration of) mifepristone, commonly known as RU-486:

> (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[.]

K.S.A. 2015 Supp. 65-4a10(b)(1)(A). When any other medication is used to induce an abortion, the statute requires that the physician be present either when a drug is given to the patient or when the patient is given the prescription:

> (B) [W]hen 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.

K.S.A. 2015 Supp. 65-4a10(b)(1)(B).

Plaintiffs have admitted they can and do comply with the 2015 law. In her October 2018 deposition, Plaintiff Nauser described the manner in which plaintiffs administer medication abortions—a process that complies completely with the 2015 medication-in-person requirement. Nauser Deposition, at 64:9-21 (Exhibit 7). Nauser indicated that plaintiffs only started performing medication abortions "four years" ago, and that medication abortions in plaintiffs' office were still "very rare." Nauser Deposition, at 57:24, 62:15 (Exhibit 7). Indeed, she specifically and unambiguously admitted in her deposition that plaintiffs can and do comply with the 2015 statute. Nauser Deposition, at 148:20 – 149:3 (Exhibit 7).

A court's ability to determine whether a particular law is constitutional "only arises when the question is presented in an actual case or controversy between parties." *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015). Again, this is because Kansas courts are constitutionally without authority to render advisory opinions. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897, 179 P.3d 366 (2008); *312 Education Ass'n v. U.S.D. No. 312*, 273 Kan. 875, 882, 47 P.3d 383 (2002); *Sheila A. v. Finney*, 253 Kan. 793, Syl. ¶ 1, 861 P.2d 120 (1993); see also *Westar Energy, Inc. v. Wittig*, 44 Kan. App. 2d 182, 235 P.3d 515, 523 (2010).

As part of the Kansas case-or-controversy requirement, "parties must have standing." *Shipe v. Public Wholesale Water Supply Dist. No. 25,* 289 Kan. 160, Syl. ¶ 2, 210 P.3d 105 (2009). After all, standing is "a component of subject matter jurisdiction." *Kansas Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 678.

> [I]t is clear that if a party does not have standing to challenge an action or to request a particular type of relief, then "there is no justiciable case or controversy" and the suit must be dismissed. *Kansas Bar Ass'n v. Judges of the Third Judicial Dist.,* 270 Kan. 489, 490, 14 P.3d 1154 (2000). We have also indicated that when a person who does not have standing to file suit asks for relief, it is tantamount to a request for an advisory opinion. 270 Kan. at 491.

Shipe, 289 Kan. at 166-67.

At its heart, the standing requirement seeks to determine whether the plaintiff has alleged an *actual, cognizable injury*—that is, "whether a party has alleged a sufficient personal stake in the outcome of the controversy to invoke jurisdiction and to justify the court exercising its remedial powers on the party's behalf." *Kansas Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 678. "[A] party must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." *Ternes v. Galichia,* 297 Kan. 918, 921, 305 P.3d 617 (2013).

Both the Kansas Supreme Court and the United States Supreme Court have held that litigants lack standing to challenge a law when the law does not impact their rights:

> "A party has standing to challenge constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations."

Cross v. Kansas Dep't of Revenue, 279 Kan. 501, 507-08, 110 P.3d 438 (2005) (quoting *Ulster County Court v. Allen,* 442 U.S. 140, 154-55 (1979)).

Here, there is no question that plaintiffs can comply—and are complying—with the 2015 medication-in-person requirement. Their only basis for challenging that provision is plaintiffs' unsubstantiated claim in their Interrogatory Answer that their

compliance is "not sustainable." Plaintiffs' Response to Interrogatory 14 (attached as Exhibit 6). Such an assertion does not demonstrate a "concrete, particularized, and actual or imminent" injury. *Ternes,* 297 Kan. at 921. And it points to other justiciability problems, such as ripeness. See *Shipe*, 289 Kan. at 170 ("To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract."). Plaintiffs lack standing to challenge the 2015 medication-in-person requirement.

It is important to note that this Court has never made the findings of fact and conclusions of law necessary to enjoin the law. See K.S.A. 60-906 (requiring "[e]very order granting an injunction and every restraining order" to "set forth the reasons for its issuance" in "specific in terms"). The only reason the Agreed Order is valid is that it was backed by the agreement of the parties. If the Agreed Order is to be extended beyond the parties' agreement, the Court must consider the evidence and issue a valid temporary injunction in compliance with K.S.A.60-906.

The evidence in the case—including Plaintiff Nauser's own testimony—demonstrates the important interests served by the 2015 law. Having a physician in the room increases the likelihood that the proper medication was administered; that the patient herself actually received the medication, and that the drug is not subsequently given to another person; that the medication was administered properly; that the correct dose was given; and that a patient has been adequately informed of the drug's intended effect, possible side effects, and possible complications.

The public harm in enjoining a statute that was enacted by the Kansas Legislature—the people's elected representatives—is very real. House Bill 2228 received bipartisan support in the 2015 legislative session and was adopted by

overwhelming majorities in both legislative chambers: 109-2 in the House and 39-0 in the Senate. There was no neutral or opponent testimony to the bill. See Supplemental Note on Senate Substitute For House Bill No. 2228, p. 2, http://www.kslegislature.org/li/b2015_16/measures/documents/supp_note_hb2228_04_0000.pdf. The people of Kansas have a legitimate and important expectation that laws passed through the democratic process actually take effect.

In cases seeking to strike down statutes, plaintiffs bear the weighty responsibility of clearly and unequivocally demonstrating that a temporary injunction is warranted. Here, 2011 Supp. 65-4a10 was repealed in June 2015; there is no case-or-controversy presented with a repealed law. And plaintiffs have not demonstrated any cognizable harm flowing from the 2015 medication-in-person requirement—they can and do comply with that law, and apparently have done so since before the law was enacted.

Kansans have a real and important interest in having the laws passed by their elected representatives become effective. The 2011 Agreed Order cannot and does not apply to the 2015 medication-in-person requirement. This Court should enter an Order clarifying the scope of the previous stay and vacating the portion of its injunction relating to the repealed 2011 law. Similarly, the Court should find that plaintiffs lack standing to challenge the 2015 medication-in-person requirement and thus dismiss Count IV of plaintiffs' Petition for lack of standing.

CONCLUSION

No purpose is served by staying enforcement of an obsolete law. In fact, such a challenge is prohibited by Kansas's actual-controversy requirement. And such action frustrates the will of Kansans, who have a fundamental interest in having laws passed by the representatives they elected go into effect. Moreover, plaintiffs lack standing to challenge K.S.A. 2015 Supp. 65-4a10, as they admit they can and do comply with its provisions. For all these reasons, this Court should vacate its temporary injunction of K.S.A. 2011 Supp. 65-4a10, dismiss plaintiffs' challenge to that repealed statute as moot, dismiss plaintiffs' challenge to K.S.A. 2015 Supp. 65-4a10 for lack of standing, and allow the medication-in-person requirement adopted in 2015 to go into effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed on January 30, 2019, and sent via electronic mail on, addressed to:

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Case No. 2011-CV-1298

MOTION TO CLARIFY AND/OR DISSOLVE INJUNCTION RELATING TO K.S.A. 65-4a10

EXHIBIT 1

Minutes of the House Federal & State Affairs Committee Meeting
March 9, 2011

Approved: 3/28/11
Date

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman Steven Brunk at 1:30 p.m. on March 09, 2011, in Room 346-S of the Capitol.

All members were present except:
Representative Fund – excused
Representative Huebert - excused
Representative Kiegerl - excused
Representative Seiwert – excused
Representative Peterson - excused

Committee staff present:
Mike Heim, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Julian Efird, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Stephen Bainum, Committee Assistant

Conferees appearing before the Committee:
Kathy Ostrowski, Legislative Director, Kansans for Life
Herbert Hodes, M.D. Center for W omen's Health

Others attending:
See attached list.

The Chairman opened the hearing on **HB 2337 Licensing of abortion clinics by department of health and environment.**

Mike Heim reviewed the thirteen sections in the bill.

Representative Brunk asked for a definition of "culpable mental state" in Section 8 on page 5. Mike said it is not considering the mental state when a crime is committed because that is no excuse for the crime. Representative Loganbill asked Mike if he was aware of any other statute that goes into this amount of detail for any other medical condition. Mike said he was not the best one to answer that question. Representative Knox asked if doctors offices, hospital and surgical centers were licensed now by KDHE? Mike said there was a license procedure but again, he is not the best one to ask. He also asked if the fee structure was similar to the fees in this bill. Representative Brunk said that a revised fiscal note was coming.

Kari Bruffett, Assistant Secretary, Policy & External Affairs, Kansas Department of Health and Environment said that a new fiscal note was being worked on and would be made available soon. Representative Knox asked if the inspections and licensure were fee funded? Charles Moore, KDHE answered the question in relation to hospitals. State licensing is all state funds. Once a hospital is medicaid, medicare certified, then there is a combination of Federal and state money.

Kathy Ostrowski, Legislative Director of Kansans for Life presented testimony as a proponent of **HB 2337** (Attachment 1). She said that abortion clinic licensure is on firm constitutional ground. **HB 2337** is based on the abortion industry's own professional standards, and for the most part, is identical to the bills that were passed and vetoed in 2003 and 2005. The attachments mentioned in her testimony are available from Kansans for Life.

Representative Brunk called attention to the fact that two other legislative bodies had passed very similar bills in 2003 and 2005. Representative Rubin asked what the status of Krishna Rajanna's license was. Kathy said that it was eventually revoked.

Herbert Hodes, M.D., Center for W omen's Health, presented testimony as an opponent of **HB 2337** (Attachment 2). He said that the authors of **HB 2337** ignored the May 2002 Guidelines for Office-Based Surgery passed by the Kansas Board of Healing Arts.

Representative Gatewood asked for an explanation of the RU486 portion of the bill. Dr. Hodes said that

The minutes of the House Federal and State Affairs Committee at 1:30 p.m. on March 09, 2011, in Room 346-S of the Capitol.

he did not prescribe RU486 because he was not comfortable with some of its issues. The main thing is where does the patient live and how willing is she to come back. He said that that portion of the bill was perfect. Representative Wolfe Moore stated that this bill was about asking to legislate guidelines for a procedures, and in affect, overruling the physicians and surgeons who set out these guidelines. Representative Knox asked if disclaimers of liability were standard procedure? Dr. Hodes said that you cannot give away your privileges. Patients sign the disclaimer because they want the surgery. The reason for the disclaimer is to get the patient to return to us for a follow up exam.

Representative Patton said that you mentioned that there had been many deaths over the last few years from abortions with unintended outcomes, how many? Dr. Hodes denied that he said many deaths. He said there had been a few in Kansas, maybe 5 maternal deaths in the last 5 years or 10 years.

The Chairman said that he would keep this hearing open for a later date.

The next meeting is scheduled for March 10, 2011.

The meeting was adjourned at 3:15 p.m.

Case No. 2011-CV-1298

MOTION TO CLARIFY AND/OR DISSOLVE INJUNCTION RELATING TO K.S.A. 65-4a10

EXHIBIT 2

Order Granting Temporary Restraining Order
Pending Hearing on Application for Temporary Injunction
November 10, 2011

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 7

HODES & NAUSER, MDs, P.A.; HERBERT C. HODES, M.D.; and TRACI LYNN NAUSER, M.D.,	)	
Plaintiffs,	)	
v.	)	**Case No.** 11 C 1298
ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment; STEPHEN HOWE, in his official capacity as District Attorney for Johnson County, Kansas; and DEREK SCHMIDT, in his official capacity as Attorney General for the State of Kansas,	)	
Defendants.	)	

Order Granting Temporary Restraining Order
Pending Hearing on Application for ~~Restraining Order~~ Temporary Injunction.
(Pursuant to K.S.A. Chapter 60)

On this 10th day of November, 2011, this matter comes before the Court on Plaintiffs' Verified Petition and Application for Restraining Order via telephone conference of record. Plaintiffs seek a Restraining Order on behalf of themselves and their patients, restraining, enjoining and prohibiting Defendants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment ("KDHE"), Stephen Howe, District Attorney of Johnson County, and Derek Schmidt, Kansas Attorney General, along with their offices, agencies, agents and successors, from enforcing K.A.R. § 28-34-126 – 144 (2011) (the "Permanent Regulations") regarding the licensing of facilities performing abortion, until such time as this Court rules on Plaintiffs' Application for a Temporary Injunction. The Court having reviewed Plaintiffs' Verified Petition and Application

for Restraining Order, and being fully advised in the premises, finds that Plaintiffs would sustain irreparable harm were this Order not entered, and that Plaintiffs have no other adequate remedy at law. Based on review of Plaintiffs' Verified Petition and Application for Restraining Order, the Court also concludes that the issuance of this Order will merely maintain the status quo, and that Plaintiffs have alleged sufficient facts to make an initial showing that they are likely to succeed on the merits on one or more of their claims. The Court makes the following findings based on review of the Verified Petition and Application for Restraining Order.

Findings of Fact

1. The Restraining Order is sought by Plaintiffs Hodes & Nauser, MDs, PA; Dr. Herbert Hodes; and Dr. Traci Nauser, who seek, on behalf of themselves and their patients, to temporarily restrain Defendants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment, Stephen Howe, District Attorney of Johnson County, and Derek Schmidt, Kansas Attorney General, along with their offices, agencies, agents and successors, from enforcing K.A.R. § 28-34-126 – 144 (2011) (the "Permanent Regulations") until such time as this Court rules on Plaintiffs' Application for a Temporary Injunction.

2. Based on the allegations contained in the Verified Petition, the Court finds that absent immediate injunctive relief, the Permanent Regulations will take effect on November 14, 2011, and will cause irreparable harm to Plaintiffs and their patients. Specifically, the Permanent Regulations will force Plaintiffs to cease provide abortion services in their private obstetrics-gynecology practice, in which they have provided such services for decades. This cessation of services will cause irreparable harm to both Plaintiffs and women seeking abortion services from Plaintiffs, and monetary damages are inadequate to compensate Plaintiffs or their patients for harms that will ensue absent relief.

3. Based on the allegations contained in the Verified Petition, the Court finds that the threatened harm to Plaintiffs and their patients outweighs any potential harm to Defendants because the Restraining Order imposes no affirmative obligation, administrative burden, or cost upon Defendants and will merely maintain the status quo, allowing Plaintiffs to continue providing abortion services in their medical office, subject to multiple layers of government regulation and oversight (including by the Kansas Board of Healing Arts and KDHE), as they have for many years.

4. This Restraining Order is not adverse to the public interest in that it will protect Plaintiffs' current practice, and patients' access to the health services provided in that practice, and in that Plaintiffs' practice is already subject to government regulation and oversight by the Kansas state agencies referenced above.

Restraining Order

Based on the foregoing findings and for good cause shown, the Court does hereby enter a Restraining Order that:

> Defendants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment, Stephen Howe, District Attorney of Johnson County, and Derek Schmidt, Kansas Attorney General, along with their offices, agencies, agents and successors, are hereby restrained, enjoined and prohibited from enforcing the Permanent Regulations, K.A.R. § 28-34-126 – 144 (2011) until further order of this Court. This Order will issue without bond as allowed pursuant to K.S.A. §§ 60-902 and 903. A hearing on Plaintiffs' Application for Temporary Injunction is scheduled for December 6, 2011 at 9:30 a.m.

DISTRICT COURT JUDGE

Case No. 2011-CV-1298

MOTION TO CLARIFY AND/OR DISSOLVE INJUNCTION RELATING TO K.S.A. 65-4a10

EXHIBIT 3

Order
November 18, 2011

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

HODES & NAUSER, MDs, P.A.; HERBERT C. HODES, M.D.; and TRACI LYNN NAUSER, M.D., Plaintiffs, vs. ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment; STEPHEN HOWE, in his official capacity as District Attorney for Johnson County, Kansas; and DEREK SCHMIDT, in his official capacity as Attorney General for the State of Kansas, Defendants.	Case No. 11C1298

ORDER

The Court has reviewed Defendants' motion requesting modification of the outstanding TRO and the Plaintiffs' response.

Given the short time for consideration precedent to the last conference/hearing and the lack of opportunity thereafter due to the impending holiday and the Court's closure that evening, the original order is probably due some technical revision as to its basis, nevertheless, its effect, as expressed is correct, that is, no negative action be taken pending the scheduled hearing.

The Court would agree that some confusion might arise from the Court's explanation in its reference to the pending licensing process, as distinguished from Plaintiffs' challenge to the permanent regulations. The Court considers its jurisdiction to be principally, if not exclusively, under the Kansas Judicial Review Act's provisions for review of a rule and regulation, for which Plaintiffs have standing. (K.S.A. 75-611c), notwithstanding Plaintiffs' pleadings lack of such nomenclature. Given the procedure to adoption of these permanent regulations, no current administrative remedy appears to be available and the Defendants asserted denial of waivers or other provisional stay seemingly

require no further agency interface before proceeding to Court.

Correspondingly, as the Court noted, as the TRO from Judge Murgia stayed any action under the temporary regulations or licensing procedures, which only expired on November 14, 2011, and which was effective beginning July 1, 2011, any action by KDHE in regard to licensing, enforcement, or deadlines itself was stayed, if not nullified. Simply, one could not make a licensing determination based on temporary regulations never given effect.

Hence, the Court's comments at inception was an attempt to indicate that the licensing process may have yet not begun, much less concluded, and that, probably, a renewal of procedure was required, since certainly Plaintiffs would have Kansas Judicial Review Act remedies from a denial of licensure, hence, certainly, a need for new timelines at a minimum. This licensing procedure, however, since now to be based on the permanent regulations, is also compromised by the fact that their effectiveness is now stayed subject to Court

review. Thus, no standards for measuring the licensing requirement *vis a vis* a compliance with them could be affirmatively accomplished under the administrative procedure alluded to.

The Court's thought at the time was that the agency could proceed to determine in what sense, if any, the Plaintiffs' facility and staffing did or did not comply and that any determination would not become final until after the full administrative process had been concluded (K.S.A. 77-526; K.S.A. 77-527), including judicial review where a stay of decision may be entered (K.S.A. 77-616). Here, Plaintiffs', heretofore, lawful business is now subject to termination pursuant to a new licensing procedure that fails to recognize any provisional license pending the licencing process. Further, no waiver was granted. Thus, meaningful administrative relief, without a TRO, is at least suspect. *Compare,* K.S.A. 77-512.

Further, given the stay/TRO is in effect to review the rule and regulations, no true benefit would seem to arise by permitting the administrative licensing

process to run on a parallel track, particularly, since the Court's ruling on the rules and regulations may or may not change the standards upon which licensure would or would not be granted. Further, given the Court's recognition that this parallel remedy could, itself, be subject to stay at some point, a parallel proceeding would accomplish little, if anything.

Further, Plaintiffs' claim potential harm from an agency decision that most probably, at least presently, would deny licensure. Even if that conclusion could/would be stayed pending exhaustion of administrative remedies and judicial review, if sought, nevertheless, the danger advanced is that an initial agency declaration of non-licensure, even though subject to further review or stay, might, through an abundance of caution and/or a lack of legal sophistication in third parties, have an unintended consequence of debarring Plaintiffs' from otherwise perfectly available entitlements, contractual or otherwise, which in turn would undermine the very purpose of the TRO now in place. Thus, allowing the

parallel administrative process to proceed would yield marginal, if any, benefit beyond the present status quo, yet, on the other hand, could potentially create confusion or induce an upset in the status quo based on a misperception by others with whom Plaintiffs have third party arrangements, and over which the Court has no control.

Accordingly, and for the reasons stated, the motion to modify the TRO is denied, but the initial TRO order is clarified to express that its effect is to stay any parallel licensing procedure until the standards (the permanent regulations), which are the subject of the December 6-7th hearing, are first determined or until further order of the Court.

In so far as this order makes any modification in the Court's temporary restraining order, it is effective when filed with the Clerk of this Court. Notice of its contents is reflected by the noted distribution below.

IT IS SO ORDERED, this 18th day of November, 2011.

Franklin R. Theis
Judge of the District Court
Division Seven

cc: LJ Leatherman
Bonnie Scott Jones
Teresa A. Woody
Todd N. Thompson
Tim Keck
Jeffrey A. Chaney
Steve Howe

Case No. 2011-CV-1298

MOTION TO CLARIFY AND/OR DISSOLVE INJUNCTION RELATING TO K.S.A. 65-4a10

EXHIBIT 4

Agreed Order
December 2, 2011

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

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

Case No. 2011-CV-1298

MOTION TO CLARIFY AND/OR DISSOLVE INJUNCTION RELATING TO K.S.A. 65-4a10

EXHIBIT 5

2015 Medication-In-Person Requirement
Effective June 15, 2015

Senate Substitute for HOUSE BILL No. 2228

AN ACT concerning abortion; relating to the administration of abortifacient drugs; amending K.S.A. 2014 Supp. 65-4a10 and repealing the existing section.

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

Section 1. K.S.A. 2014 Supp. 65-4a10 is hereby amended to read as follows: 65-4a10. (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) ~~or any drug~~ is used for the purpose of inducing an abortion, the drug ~~must~~ *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.

~~(b)~~ *(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.

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

Sec. 2. K.S.A. 2014 Supp. 65-4a10 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the Kansas register.

I hereby certify that the above BILL originated in the HOUSE, and passed that body

_____

HOUSE concurred in
SENATE amendments _____

_____
Speaker of the House.

_____
Chief Clerk of the House.

Passed the SENATE
as amended _____

_____
President of the Senate.

_____
Secretary of the Senate.

APPROVED _____

_____
Governor.

Case No. 2011-CV-1298

MOTION TO CLARIFY AND/OR DISSOLVE INJUNCTION RELATING TO K.S.A. 65-4a10

EXHIBIT 6

Excerpt from Plaintiffs' Responses to Interrogatories 12, 13, 14
April 19, 2016

IN THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS

Hodes & Nauser, MDs, P.A., *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 2011-CV-1298
	)	Division No. 7
Susan Mosier, M.D., in her official Capacity as Secretary of the Kansas Department of Health and Environment, *et al.*,	)	
Defendants.	)	

Pursuant to K.S.A. Chapter 60

PLAINTIFFS' ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFF HODES & NAUSER, MDs, P.A.

Pursuant to K.S.A. 60-226 and K.S.A. 60-233, Plaintiffs, by and through their undersigned counsel, hereby object and respond to Interrogatories 12, 13, and 14 in Defendants' First Set of Interrogatories to Plaintiff Hodes & Nauser, MDs, P.A., Plaintiff Hodes, and Plaintiff Nauser, dated March 17, 2016 (the "Interrogatories").

GENERAL OBJECTIONS

1. The Plaintiffs object to the Interrogatories to the extent that they seek to impose a burden or obligation beyond those required or permitted by the Kansas Rules of Civil Procedure, the Local Rules of this Court, other applicable law, or any orders of the Court.

2. The Plaintiffs object to the Interrogatories to the extent they are overly broad, unduly burdensome or seek information that is not relevant to the claims or defenses asserted by the parties in this litigation, or are otherwise outside the scope of discovery permitted by the

explained above, they cannot do. Moreover, neither requirement is necessary: the physician is available to the patient throughout the procedure (no additional "licensed health professional" is needed), and continuous monitoring of vital signs is unnecessary during an abortion that involves only local anesthesia. Indeed, taking a patient's vital signs would take longer than the procedure itself. Accordingly, if a patient is not sedated, Plaintiffs follow the standard of care, and take each patient's vital signs at check in, before the procedure, after the procedure, and before discharge.

Although Plaintiffs are currently able to comply with **K.S.A. 65-4a10(b)** (requiring that when mifepristone is "used for the purpose of inducing an abortion," it must be "administered by or in the same room and in the physician presence of the physician," and 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 same room and in the physical presence of the physician"), compliance in the long-term is not sustainable. Complying with this unnecessary requirement when other staff are qualified to administer drugs used to induce abortion takes time away from tasks Drs. Hodes and Nauser must undertake as physicians and disrupts their practice.

Recovery

Plaintiffs' clinic does not currently have "postprocedure recovery rooms that are supervised, staffed, and equipped," **K.S.A. 65-4a09(b)**, "a supervised recovery room," K.S.A. 65-4a09(g), nor a separate "recovery area" with a "nurse station with visual observation of each clinic," **K.A.R. 28-34-133(b)(7).** Patients recover in their procedure rooms, which allows each patient privacy, and they may be accompanied by a friend or family member if they choose. The physical structure of Plaintiffs' clinic is unable to accommodate a separate recovery area that the Act and final Regulations require; accordingly, Plaintiffs cannot comply with these provisions.

VERIFICATION

STATE OF Kansas)
) ss:
COUNTY OF Johnson)

I, Herbert C. Hodes MD, being first duly sworn, state that I am a proper representative of Plaintiff Hodes & Nauser, MDs, P.A., in the captioned case, that I have read the above and foregoing answers to interrogatories, and all statements therein contained are true.

Herbert C. Hodes, MD

Title: _____

Subscribed and sworn to before me this 14 day of April, 2016.

P Wirth

Notary Public

My appointment expires: 5/24/19

NOTARY PUBLIC STATE OF KANSAS | PATRICIA A. LIBICH My Appt. Exp. 5/24/19

VERIFICATION

STATE OF Kansas)
) ss
COUNTY OF Johnson)

I, Traci Nauser MD, being first duly sworn, state that I am a proper representative of Plaintiff Hodes & Nauser, MDs, P.A., in the captioned case, that I have read the above and foregoing answers to interrogatories, and all statements therein contained are true.

T Nauser MD
Title: _____

Subscribed and sworn to before me this 18 day of April, 2016.

Patricia
Notary
Public

My appointment expires: 5/26/19

NOTARY PUBLIC STATE OF KANSAS PATRICIA A. LIBICH My Appt. Exp. 5/26/19

VERIFICATION

STATE OF Kansas)
) ss:
COUNTY OF Johnson)

I, Traci Nauserman, being first duly sworn, state that I am a proper representative of **Plaintiff Hodes & Nauser, MDs, P.A.**, in the captioned case, that I have read the above and foregoing answers to interrogatories, and all statements therein contained are true.

Title: _____

Subscribed and sworn to before me this 18 day of April, 2016.

Notary Public

My appointment expires: 5/26/19

PATRICIA A. LIBICH
My Appt. Exp. 5/26/19

Respectfully submitted,

Tiseme Zegeye, N.Y. Bar No. 5075395*
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*Admitted *Pro Hac Vice*

COUNSEL FOR PLAINTIFFS

Case No. 2011-CV-1298

MOTION TO CLARIFY AND/OR DISSOLVE INJUNCTION RELATING TO K.S.A. 65-4a10

EXHIBIT 7

Excerpts from Deposition of Plaintiff Traci Nauser
October 15, 2018

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

HODES & NAUSER, MDs, P.A.,)
Plaintiff,)
)
vs.) Case No.
) 11-CV-1298
JEFF ANDERSEN, ET AL.,)
Defendants.)

D E P O S I T I O N

OF

TRACI LYNN NAUSER,

taken on behalf of the Defendants, pursuant to Agreement of the Parties, on Monday, October 15, 2018, beginning at 9:30 a.m., at The Woody Law Firm, PC, 1621 Baltimore Avenue, Kansas City, Missouri, before Candace K. Braksick, Certified Shorthand Reporter.

CANDACE K. BRAKSICK, CSR
P. O. Box 1173
Lawrence, Kansas 66044
(785)865-6632

APPEARANCES

The Plaintiff appears by its counsel, Ms. Hillary Schneller and Ms. Kirby Tyrrell, Center for Reproductive Rights, 199 Water Street, 22nd Floor, New York, New York, 10038, and Ms. Teresa Woody, The Woody Law Firm, PC, 1621 Baltimore Avenue, Kansas City, Missouri, 64108.

The Defendants appear by their counsel, Ms. Sarah E. Warner and Mr. Robert C. Hutchison, Thompson Warner, P.A., 333 West Ninth Street, Suite B, Lawrence, Kansas, 66044.

****

TRACI LYNN NAUSER,

called as a witness, having been first duly sworn by the reporter by agreement of counsel, testified under oath as follows:

DIRECT EXAMINATION

By Ms. Warner:

Q Good morning.

A Morning.

Q Dr. Nauser, we met just a second ago but my name is Sarah Warner and I represent the defendants in this matter. Do you understand that?

A Yes.

Q Have you ever given a deposition before?

A Yes.

Q What were the circumstances in which you gave that deposition?

A One was for a sexual consent statute where they were trying to determine if you're under age if you can have consent between two minors, interpretation of that.

Q And were you a party to that suit?

A I was a party.

Q Were you a defendant?

A No, I think the State was. That was a long time ago.

Q Have you performed induction procedures before?
A In residency.
Q Have you performed an induction since you went out into practice?
A Induction abortion?
Q Yes.
A No.
Q Thank you for clarifying. Let's talk about medication abortions. What kinds of medication abortions do you provide?
A Mifepristone.
Q Could you spell that, for the record.
A I can show it (indicating).
Q When you say Mifepristone, do you use a two-drug regimen with those abortions?
A Yes.
Q And what is the other drug?
A Cytotec, C-y-t-o-t-e-c.
Q Not misoprostol?
A That's the same medication.
Q Thank you. Cytotec is the generic?
A Cytotec's technically a brand name.
Q How long have you been doing medication abortions?
A I believe four years.
Q Why did you decide to start providing medication

abortions?
A It was becoming an option that was new, not necessarily just four years ago, but being able to give patients additional options and choices. Some patients would rather go a more natural approach and I had studied it and read about it and knew that it was safe and I felt comfortable trying it and seeing if it would be able to be incorporated into our practice.
Q At that time was Dr. Hodes also practicing with you?
A Yes.
Q Whose idea was it to start doing medication abortions?
A I have no idea. One of the two of us. I don't know. We just talked about it.
Q Is there a reason you hadn't provided them before that time?
A Well, we have an extremely busy OB-GYN practice. I had concerns that there would be a lot more phone calls at night as opposed to all the other phone calls at night that we have to deal with and I have to be well rested to be able to be a good physician, so that was one concern.
I didn't know really how patients were going

to like it. I know how easy and quick and the patients are satisfied with the first trimester terminations so just considering something new when you feel comfortable with other things. With anything in medicine, it takes you a little while before you decide to try something new.

Q What kind of training did you go through in order to provide the medication abortions?

A There's not training, you just need to know how to dose it. I already know how to take care of any of the complications that could potentially arise.

Q You indicated that there might, you were concerned that there may have been more phone calls after hours with the medication abortions. What led to that concern?

A That has not actually turned out to be a true concern of mine but my concerns were if, and I guess I'm thinking of this as if I'm the patient, I'm taking a medicine. At sometime two weeks, within the next two weeks after I take it I'm going to start bleeding and cramping, potentially heavy. That can be scary to patients. Heavy bleeding to a patient and heavy bleeding to an OB-GYN are typically two totally different things. Passing clots scares patients sometimes. Large

clots to me versus large clots to a patient are totally different things usually also.

Being potentially alone at home when this were to happen or at work when it happens or with your kids around when it happens, to me it seemed more scary and I was thinking how I would interpret the procedure, you know, undergoing a medical abortion.

When patients are scared they call and a lot of times people will call you in the middle of the night when they have been having the symptoms all day long, which, you know, you're like, I don't know why you had to wait all night -- all day to call, but that's what happens, you know, and like I said, we have a busy OB-GYN practice and is that one more thing I wanted to potentially be adding to our already busy practice if those were going to be concerns that actually really happened. And it's turned out that's not been the way that it is so that's good.

Q What is the -- we talked about kind of step by step for a surgical abortion. Let's go step by step for a medication abortion. When a woman arrives at the office what happens from there?

A So she checks into the office. We have to check

to make sure she has the appropriate Kansas consent forms at least 24 hours in advance.

Then the nurse -- she gets checked in. The nurses do her vitals. They then put her, just like they do in for a surgical, in for an abortion and counseling. The same people -- me, a nurse -- or I say nurse. Generally that's not -- I don't have all these nurses; there's medical assistants. Me and an assistant go in the room. Sometimes my nurse practitioner is in there, too. If so she's doing the ultrasound while I'm doing the talking; if not I'm doing the ultrasound and then I do talking, or I do talking and counseling while I'm doing the ultrasound.

It's a very fluid discussion. I explain to them the pros and cons of both medical and surgical. I let them know they're both safe so I don't have a concern for safety. I can do them both the same day if they decide to change their mind from medical to surgical, they've already technically printed out all the paperwork for surgical in their medication abortion paperwork, they cost the same, and I just let the patient have her options and let her decide what she wants to do.

Q After that counseling session, this is not an exact science, but how many patients or what proportion of patients do you think go with the medication abortion versus the surgical abortion?
A Very few.
Q Very few go with the medication abortion?
A After I give them the options and tell them I can do both for them today and they're the same price and they're both safe. Patients like the fact that they're going to leave the office not pregnant, so I would probably say 95 percent of people will change their mind and get a surgical.
Q Do you think that you perform more medication abortions than surgical abortions still?
A No, very rare, very small number of medical abortions.
Q So after you have had this counseling session and the woman has decided to go forward with the medication abortion, or the medical abortion, what happens next?
A Also during that she was given the option to get a picture, all the legal stuff has been done appropriately, and I have to figure out how far pregnant she is, obviously. Then she takes her chart back to the front desk, empties her bladder,

because I need a full bladder to do the ultrasound. She waits until the front office is ready to call her back, finish all the paperwork and any legal stuff that has to be done, and then she gets roomed for me to come bring her medication.

Q You mentioned that gestational age is important. How late can you do a medication abortion right now?

A We at our office do them till seven and seven and a half weeks. There are facilities that go further than that.

Q Why do you choose to stop at seven and seven and a half weeks?

A We just decided when we started to just pick an arbitrary -- if someone was going to have a seven-week miscarriage there's usually not as much bleeding or crampiness if you're eight, nine, ten weeks pregnant, so less scary so hopefully patients would tolerate it better, so we just picked a arbitrary gestational age and haven't changed it since.

Q Once the woman is back in the room you said you go and you give the medication. Could you explain to me how that happens.

A So there's been vitals also at different stages of this process, too.
Q Can I interrupt you real quickly before you jump back in? You've said vitals many times. What do you mean by vitals?
A Blood pressure, heart rate, respirations.
Q Okay. Thank you.
A If they're diabetic we've probably checked their sugar. I go back in and I give her the Mifepristone and a cup of water. She takes it, and that's based on law that I have to do that.

And then I give her instructions that -- the Cytotec that I'm sending her home with is in a bottle and I write on there what time she is to take it. She's already been given -- she doesn't actually need ibuprofen so forget that. I then write down for her when you start cramping, I write on the back of her aftercare instructions how I want her to take ibuprofen and Tylenol, massage her uterus, be up and around, call me if there's any questions or concerns.

We've already gone over the whole packet of stuff that she's printed off the website and some of that's repetitive paperwork, goes back into her bag with her instructions. She knows to call me

if there's any questions or concerns.

We do make them a check-up visit and make them come back in two weeks, and they're also told that this medication can cause birth defects so it's extremely important and just because you bleed and pass clots does not guarantee that you're not pregnant. Until you see no pregnancy on the ultrasound at your follow-up visit you don't know if you're not pregnant, so keep your check-up visit.

Q What kind of questions do you get during the course of that conversation, giving the Mifepristone, then, or administering the Mifepristone, giving the Cytotec, and then having this discussion?

A The majority of the questions were answered already or asked during the counseling part of the session. I go over everything in a quicker general fashion and most of the time patients don't have questions because I'm so thorough with my explanations and the paperwork that they're getting has detailed instructions, tells them what time they have to take stuff, when to call.

I tell them to call if they have any questions; I don't care if it's on the paperwork

or not, if you have any questions call me. Their support person may be in the room then and have questions so I'll answer those questions if they have them.

Q Who might come as a support person?

A It could be anybody: A friend, brother, sister, father, mother, cousin, co-worker; anybody.

Q What kind --

A Husband, I guess I forgot to say, significant other.

Q What kind of side effects might arise during the course of the medication abortion, including the two-drug protocol that you mentioned?

A There's basically no side effects from the Mifepristone. From the Cytotec I'll tell them in the first 24 hours they may have shaking like you're cold and shivery; you're not and it's definitely not a seizure, it's just a natural reaction to that medicine at that dose.

They could have irritation underneath their tongue because they've had four pills dissolving underneath their tongue. I also give them a sucker so that it can dissolve quicker and not taste as gross.

Their temperature can rise, which is just a

chemical reaction, it's not a sign of infection, and sometimes, too, they'll get diarrhea. If there's any of those things that have lasted more than 24 hours around the time that they took their Cytotec those are concerning and they need to call me.

Q Now, Cytotec is the same drug that you administer after a surgical abortion procedure; right?

A I use it for multiple reasons in my practice.

Q And you testified previously that you administer it after a D&C procedure to contract the cervix; right?

A Contract the uterus.

Q Contract the uterus, thank you. Are those dosages different between the Cytotec that's administered after a surgical abortion and the Cytotec that's prescribed for purposes of a medication abortion?

A Yes.

Q How are they different?

A So we give 200 micrograms after a surgical procedure. They also take another 200 micrograms four hours later. And then for the medical abortion we give them four of the 200, so it's 800 micrograms.

Q And do they take those 800 micrograms all at once?

A Yes, they put them under their tongue. I do it 48 hours after the Mifepristone.
Q And you said that you provide those pills from your office; right?
A Yes.
Q Are you aware whether other offices might prescribe those and then have the patient go pick them up from the pharmacy?
A I have no idea what other offices do.
Q We've talked about the side effects. What kind of, and I think we may have discussed this to some extent, but what kinds of complications might arise during the course of a medication abortion from the start at the office through the completion, wherever the woman is at the time?
A The main complication is heavy bleeding to the point that while she's trying to pass the now-demised tissue, you're basically inducing a miscarriage, she can be taking -- her uterus may not contract and her cervix may not open enough that she's having too much bleeding for too long before the tissue is all expelled.

You may have no reaction from the Cytotec and then you have demised tissue in your uterus for up to two weeks, which can lead potentially to an

infection; it's not common but it has the ability to.

You could have an allergic reaction from the Cytotec, which is extremely rare but possible.

Q Does the Cytotec have any, does it interact with any known drugs in any adverse manners?

A No.

Q If a woman is experiencing any of those symptoms that you just described where does she go?

A She is supposed to call my office, talk to, usually, if it's during the day she'll get -- they'll take a message. It goes to the triage nurse and then the triage nurse asks me or my nurse practitioner how to handle whatever's going on.

If it's at night or on the weekend they call the office. They either get me or my nurse practitioner. I'm always on call unless I'm out of town but she takes phone calls for me on Tuesday and Thursday evening so I can sleep more soundly those nights, and then it's handled appropriately. Most things we can handle over the phone with a pharmacy or just giving the patient reassurance that what she's actually experiencing is normal.

Q If it comes out that what she's experiencing is not normal would she go to the hospital? Would she go to your office?
A If she's -- well, I only do them if patients live within a 45-minute radius of my office, that's my personal preference so that I can take care of them. She would either -- if I need to meet her in the middle of the night at the office I'll meet her in the middle of the night. Most of the time things can be taken care of the next day in the office, because I can call medication in if I needed to, but if it's she's bleeding enough that I think she needs a D&C I can do that at my office with no expense to her, she doesn't have to pay for an Emergency Room visit and surgery there, so I will meet her at the office whenever that needs to be done.
Q You mentioned a 45-mile radius. Is that just for medication abortions?
A Forty-five minutes.
Q Oh, 45-minute radius, I'm sorry. Is that just for medication abortions?
A Yes, and it's really 45 minutes to an hour, hour and a half, so close. The Greater Kansas City, St. Joe area, Lawrence.

MS. SCHNELLER: 138(c), which is up here as well (indicating).

Q And 138(c) is the very first point.

A Present within the facility, yes.

Q And we agreed that in light of that interpretation you could comply with that regulation; right?

A Yes.

Q And with regard to 138(f), which is the next point down, we have discussed that at some length. Is there any other reason other than what we've talked about already that you feel that you couldn't comply with that regulation?

A Well, I can't comply because I don't actually know what is intended by the regulation. That's what my answer was before.

Q And is there any other reason?

A I can't answer that until I know what the, what I'm supposed to be complying with.

Q All right. So let's go to the next page of Exhibit 8, page 19. Turning to K.S.A. 65-4a10(b), which has to do with the administration of a medication abortion. Please read that paragraph and then we can discuss it.

A Okay.

Q Is it accurate that you are complying with that

statutory provision regarding medication abortions right now?
A Correct.
Q Let's go on to the Recovery section.
A Okay.
Q Turning to -- well, first, take some time and read that paragraph under Recovery.
A Okay.
Q With regard to K.S.A. 65-4a09, subsection (b), and K.A.R. 28-34-133(b)(7) that deal with recovery areas, recovery rooms, is there a reason that you can't comply with those provisions?
A I don't know what a supervised recovery room is or a separate recovery area. We don't have a separate recovery area with a nurse's station where you can visualize each patient.
Q Let's turn to Exhibit 9 again. In that second page there is a discussion there regarding this particular regulation. Do you see that?
A 133(b)(7)?
Q Yes.
A Yes.
Q Take a minute and read those two paragraphs, then we'll talk about it.
A Okay.