IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

HODES & NAUSER, MDs, P.A., on behalf of itself, its patients, physicians, and staff; TRACI LYNN NAUSER, M.D.; TRISTAN FOWLER, D.O.; and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself, its patients, physicians, and staff,	)	
Plaintiffs,	)	
v.	)	Case No. Division No. K.S.A. Chapter 60
KRIS KOBACH, in his official capacity as Attorney General of the State of Kansas; STEPHEN M. HOWE, in his official capacity as District Attorney for Johnson County; MARC BENNETT, in his official capacity as District Attorney for Sedgwick County; SUSAN GILE, in her official capacity as Executive Director of the Kansas Board of Healing Arts; and RONALD M. VARNER, D.O., in his official capacity as President of the Kansas Board of Healing Arts,	)	
Defendants.	)	

PETITION

(Pursuant to K.S.A. Chapter 60)

Plaintiffs, Hodes & Nauser, MDs, P.A., Traci Lynn Nauser, M.D., Tristan Fowler, D.O., and Comprehensive Health of Planned Parenthood Great Plains ("Comprehensive Health"), (collectively "Plaintiffs"), by and through their undersigned attorneys, bring this petition against Defendants, their employees, agents, and successors in office ("Defendants" or "the State") and in support thereof state the following:

I. PRELIMINARY STATEMENT

1. This lawsuit, seeking declaratory and injunctive relief, challenges the Kansas Woman's Right to Know Act ("the WRTK Act" or "the Biased Counseling Scheme"). K.S.A. §§ 65-6708 through 65-6715. A copy is attached as Exhibit A. The Scheme includes amendments made by H.B. 2264 ("the Reversal Amendment"), which take effect July 1, 2023. H.B. 2264 is attached as Exhibit B.

2. Over time, the Biased Counseling Scheme has become increasingly absurd and invasive—requiring patients to be bombarded with medically inaccurate information through multiple channels; imposing numerous onerous and logistically challenging mandatory delays; adding so many irrelevant, stigmatizing, offensive, and sometimes false statements to the mandatory disclosures that Plaintiffs must post a billboard in their office to house them all; and even dictating the paper color, typeface, and font size of the disclosures.

3. In 2019, the Kansas Supreme Court held that Section 1 of the Kansas Constitution Bill of Rights guarantees the fundamental "right of personal autonomy—which includes the ability to control one's own body . . . and to exercise self-determination," and, because Kansans do not relinquish their rights upon becoming pregnant, this includes protection for the right to abortion. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 660, 440 P.3d 461, 492 (2019).

4. Despite this landmark ruling—and Kansans' resounding rejection of the State's

attempt to eliminate this constitutional protection in 2022—this year the Kansas Legislature amended the Biased Counseling Scheme for the *sixth* time to add harmful new requirements for physicians to disseminate to their patients no less than five times, in four separate ways, the false message that "it may be possible to reverse the intended effects of a medication abortion that uses mifepristone." H.B. 2264 § 1(c)(1)(A) ("the Reversal Amendment"). This additional layer of regulation was piled on at a time when providers are struggling to meet the demands of an unprecedented surge of patients seeking abortion after the federal right to abortion was rescinded.

5. Compelling providers to serve as the State's mouthpiece and disseminators for inaccurate and ideological government-scripted messages that are designed to pressure patients into choosing childbirth over abortion, and enlisting providers to enforce the Biased Counseling Scheme's multiple mandatory delays and onerous bureaucratic requirements—regardless of the patient's circumstances or how certain they are in their decision to terminate their pregnancy—interferes with the principles of bodily integrity and patient autonomy that underlie informed consent. Drowning patients in a firehose of irrelevant information likewise inhibits their ability to provide truly informed consent by creating confusion, diluting the information that is imperative to their decision-making, and undermining their trust in their provider.

6. Accordingly, the Biased Counseling Scheme is the antithesis of an informed-consent requirement. Instead, it singles out abortion care for medically unnecessary additional regulation that delays and impedes access to abortion, stigmatizes and demeans people seeking abortion, and perpetuates the discriminatory view that pregnant people are uniquely in need of the State's paternalistic intervention into their health care and family planning decisions.

II. JURISDICTION AND VENUE

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

8. Plaintiffs' requests for declaratory and injunctive relief are authorized by K.S.A. §§ 60-1701, 60-1703 (declaratory relief) and K.S.A. §§ 60-901, 60-902 (injunctive relief).

9. Venue in this Court is proper under K.S.A. § 60-602(2) because Defendant Howe maintains his office in this district, and under K.S.A. § 60-603(3) because the enforcement authority of Defendants Kobach and Howe is exercised in Johnson County.

III. PARTIES

A. Plaintiffs

10. Plaintiff Traci Lynn Nauser, M.D., is a board-certified obstetrician-gynecologist licensed to practice medicine in Kansas. For the past 24 years, she has been providing a full range of obstetrical and gynecological services, including but not limited to family planning services, pap smears, prenatal care, delivery of babies, gynecological procedures and surgeries, screening for and treatment of sexually transmitted infections, screening for gynecological and breast cancers, treatment of menopausal symptoms, treatment of dysfunctional uterine bleeding and fibroids, infertility treatments, and abortions up to 21 weeks and 6 days of pregnancy (dated from the patient's last menstrual period, or "LMP"). Dr. Nauser sues on her own behalf and on behalf of her patients.

11. Plaintiff Hodes & Nauser, MDs, P.A., is the private medical practice owned and operated by Dr. Nauser. The practice is located in Overland Park, Kansas, and goes by the name "Center for Women's Health." Hodes & Nauser, MDs, P.A., sues on its own behalf, on behalf of its physicians and staff, and on behalf of its patients.

12. Plaintiff Tristan Fowler, D.O., is an obstetrician-gynecologist and joined Hodes &

Nauser, MDs, P.A., in 2020. He graduated from Kansas City University of Medicine and completed his residency in Obstetrics and Gynecology at Michigan State University-Sparrow Hospital. While there, he also served as an Assistant Professor of Obstetrics and Gynecology at Michigan State University. Like Dr. Nauser, Dr. Fowler provides a full range of obstetrical and gynecological services, including abortion services. Dr. Fowler sues on his own behalf and on behalf of his patients.

13. Plaintiff Comprehensive Health of Planned Parenthood Great Plains ("Comprehensive Health") operates three health care centers in Kansas, located in Overland Park, Wichita, and Kansas City, that provide a full range of family-planning services, including well-person preventative care visits; breast and chest exams; pap tests; sexually transmitted infection testing; a wide range of U.S. Food and Drug Administration-approved contraception methods, including highly effective, long-acting reversible contraceptives; pregnancy testing; risk assessments to screen for high-risk pregnancy issues; prenatal referral services; urinary tract infection treatment; cervical cancer and testicular cancer screening; fertility awareness services; and abortions up to 21 weeks and 6 days of pregnancy LMP. Comprehensive Health sues on its own behalf, on behalf of its physicians and staff, and on behalf of its patients.

B. Defendants

14. Defendant Kris Kobach is the Attorney General and is responsible for defending Kansas laws against constitutional challenge. K.S.A. § 75-702. As Attorney General, Defendant Kobach is the "chief law enforcement officer of the state" and "one of the state's prosecuting attorneys." *State ex. rel Miller v. Rohleder*, 208 Kan. 193, 194, 490 P.2d 374, 376 (1971); *accord* K.S.A. § 22-2202(r). Pursuant to this prosecutorial power, Defendant Kobach may assist in the prosecution of and take over prosecutions of violations of Kansas criminal laws, upon the request

of a District Attorney. Defendant Kobach is also authorized to assist in the prosecution of and take over prosecutions of any violation of the Kansas Healing Arts Act, upon the request of the Board of Healing Arts. Defendant Kobach is sued in his official capacity, as are his agents and successors.

15. Defendant Susan Gile is the Executive Director, and Defendant Ronald M. Varner, D.O., is the President, of the Board of Healing Arts, the agency responsible for enforcing violations of the WRTK Act, which may be punishable as unprofessional conduct. *See* K.S.A. §§ 65-6712, 65-2836(b) (describing the Board of Healing Arts' enforcement authority regarding unprofessional conduct). A physician guilty of unprofessional conduct may have their license "revoked, suspended or limited," "may be publicly censured or placed under probationary conditions," or may have their "application for a license or for reinstatement of a license . . . denied." K.S.A. § 65-2836. Defendants Gile and Varner are sued in their official capacities, as are their agents and successors.

16. Defendant Stephen M. Howe is the District Attorney for Johnson County, which includes Overland Park. As District Attorney, Defendant Howe is empowered to prosecute violations of the WRTK Act occurring in Johnson County. *See* K.S.A. § 22a-104 (district attorney duties); K.S.A. § 22-2602 (place of trial). An act of unprofessional conduct also exposes a physician to prosecution for a misdemeanor and monetary penalties for each separate offense. *See* K.S.A. § 65-2862. District Attorney Howe is sued in his official capacity, as are his agents and successors.

17. Defendant Marc Bennett is the District Attorney for Sedgwick County, which includes Wichita. As District Attorney, Defendant Bennett is empowered to prosecute violations of the WRTK Act occurring in Sedgwick County. *See* K.S.A. §§ 22a-104, 22-2602, 65-2862. District Attorney Bennett is sued in his official capacity, as are his agents and successors.

IV. STATUTORY FRAMEWORK AND RELEVANT FACTS

A. Abortion Care in Kansas

18. Legal abortion is among the safest, most common health services in the United States. In fact, abortion is far safer than the alternative of carrying a pregnancy to term. The risk of death associated with childbirth is approximately 13 times higher than that associated with abortion, and every pregnancy-related complication is more common among people who undergo childbirth than people who have abortions. For 2016–2020, Kansas's maternal mortality rate of 19.9 maternal deaths per 100,000 live births exceeded the national average.[1] By contrast, according to the CDC, the case-fatality rate for legal abortion for 2013–2019 was 0.43 deaths per 100,000 legal abortions.[2]

19. Approximately one in four American women of reproductive age has had an abortion.

20. Access to safe and legal abortion is critical to gender equality and women's equal participation in economic and social life. People denied a wanted abortion are more likely to experience economic insecurity and raise their existing children in poverty.

21. Abortion is legal in Kansas and protected as a fundamental right under the Kansas Constitution, yet it is subject to restrictions not imposed in any other area of health care. For example: both public and private insurance are largely prohibited from covering abortion, K.S.A. § 40-2,190; abortion patients and providers are subject to numerous tax penalties not imposed on patients and providers of other health care, K.S.A. §§ 65-6733(b), 79-32,261(d)(2) 79-

[1] Kansas Maternal Mortality Review Committee, *Defining Maternal Mortality*, https://kmmrc.org (last visited June 2, 2023).
[2] Katherine Kortsmit et al., *Abortion Surveillance – United States, 2020*, Ctrs. for Disease Control & Prevention (Nov. 25, 2022), https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm?s_cid=ss7110a1_w.

32,182b(c), 79-3606; and pre-viability abortion is generally prohibited in Kansas after 22 weeks LMP, even where indicated for a fetal diagnosis, K.S.A. §§ 65-6703(a), 65-6725(a).

22. Multiple other abortion restrictions have been enjoined by the Kansas courts. In 2019, the Kansas Supreme Court recognized that the Kansas Constitution guarantees individuals the right to abortion and affirmed a temporary injunction barring enforcement of K.S.A. § 65-6741 *et seq.*, which bans the standard method of abortion after approximately 15 weeks. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019). In April 2021, a Shawnee County district court entered a permanent injunction against that ban. *Hodes & Nauser v. Schmidt*, No. 2015-CV-490, 2021 WL 7450395 (Kan. Dist. Ct. Apr. 7, 2021), *appeal docketed* No. 21-124130-S (argument heard March 27, 2023). In December 2021, a Shawnee County district court held unconstitutional and permanently enjoined a 2011 set of statutes and regulations that targeted abortion care for unique and additional regulation that applied on top of Kansas's generally applicable laws governing health care. *Hodes & Nauser v. Norman*, No. 2011-CV-1298, 2021 WL 7906942 (Kan. Dist. Ct. Dec. 3, 2021) (holding K.S.A. §§ 65-4a01–4a12 and implementing regulations violated Kansans' rights to abortion and equal protection), *appeal docketed* No. 22-125051-S (argument heard March 27, 2023). And in 2022, the Kansas Court of Appeals directed a Shawnee County district court to enter a temporary injunction against a 2011 law that barred patients from accessing abortion via telehealth. *Tr. Women Found. v. Bennett*, No. 2019-CV-60, 2022 WL 18062279 (Kan. Dist. Ct. Nov. 23, 2022), *on remand from Tr. Women Found. v. Bennett*, No. 121,693, 2022 WL 1597011 (Kan. Ct. App. May 20, 2022).

23. Since the United States Supreme Court overturned *Roe v. Wade* and rescinded federal constitutional protection for the right to abortion in *Dobbs v. Jackson Women's Health Organization*, 14 states have banned abortion, and several others—including states that border

Kansas—have prohibited it after the earliest weeks of pregnancy. As a result, access to this essential health care is even more severely restricted across the Midwest.

24. Demand for abortion care at Plaintiffs' facilities increased exponentially after *Dobbs*. Plaintiffs receive a greater volume of calls from people in need of abortion care than they can possibly accommodate, especially given the numerous onerous, medically unnecessary requirements piled on by the Biased Counseling Scheme. Consequently, Kansans confront longer wait times for abortion appointments, substantially longer travel distances, and other barriers.

25. The majority of abortion care provided in the United States is either through use of medications (medication abortion) or via an outpatient procedure (procedural abortion). Procedural abortions involve a two-step process in which the medical provider first partially dilates the patient's cervix (using medications and/or mechanical or osmotic dilators), then evacuates the uterus using suction aspiration, instruments, or some combination. Dilation is done either the same day or the day before, and the procedural abortion typically takes around five minutes in the first trimester of pregnancy and ten to twenty minutes in the second trimester, depending on the patient's response to the procedure and the complexity of the case.

26. Medication abortions are typically indicated up to 11 weeks LMP and involve the ingestion of medication to terminate the pregnancy, expelling the pregnancy via vaginal bleeding, akin to a heavy period or spontaneous miscarriage. The standard and most common regimen of medication abortion is a combination of two prescription drugs, mifepristone and misoprostol. Mifepristone, also known as "RU-486" or by its commercial name, Mifeprex, was first approved by the U.S. Food and Drug Administration ("FDA") in 2000 for use, in conjunction with misoprostol, to terminate an early pregnancy. The combined use of mifepristone and misoprostol—referred to as "medication abortion"—is regulated by the FDA.

27. Mifepristone works by binding to progesterone receptors in the body, temporarily blocking the hormone progesterone, which is necessary to maintain pregnancy. This causes the pregnancy tissue and lining of the uterus to break down and separate from the wall of the uterus. Because mifepristone has a higher affinity for progesterone receptors, it binds to them more tightly than progesterone. Mifepristone also increases the efficacy of the second drug in the regimen, misoprostol, by weakening the endometrial lining and increasing the strength and efficacy of uterine contractions. Misoprostol, which is taken 24 to 48 hours after mifepristone, causes the uterus to contract and expel its contents.

28. Since 2000, more than five million patients in the United States have had a medication abortion using these medications.[3]

29. The FDA updated the drug label for mifepristone in 2016 to bring it up to date with certain evidence-based protocols used by health care professionals for the provision of medication abortion. As provided by the 2016 label, the protocol for administration of medication abortion is as follows: on day one, the patient takes 200 mg of mifepristone orally; 24 to 48 hours later, the patient takes 800 mcg of misoprostol buccally (meaning, held inside the cheek while the pills dissolve). As the FDA has found, as well as dozens of studies have found, this protocol is exceedingly safe and effective in terminating pregnancy.

30. Because of mifepristone's track record of safety and efficacy, in January 2023, the FDA took the long overdue action of removing medically unnecessary restrictions that required it to be dispensed in-person by a certified health care provider instead of direct to patient telehealth.[4]

[3] *See A Private Choice for Early Abortion*, Danco, https://www.earlyoptionpill.com (last visited May 24, 2023) (brand-name mifepristone has been used by over five million patients in the U.S.).
[4] *See* U.S. Food & Drug Admin., *Information About Mifepristone for Medical Termination of Pregnancy Through 10 Weeks Gestation* (Mar. 23, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

31. Plaintiffs offer both procedural and medication abortion.

32. Plaintiffs' patients obtain abortions for a variety of reasons. Nationally, approximately sixty percent of people who access abortion already have children and do not feel they can adequately parent and provide for additional children. Some younger patients believe that parenthood will interfere with completing their education, which would hinder both their own development and their ability to provide for a family. Other patients seek abortions because they are pregnant as a result of rape, are victims of intimate-partner violence, because the pregnancy threatens their health, or because they face a lethal fetal diagnosis. Some patients simply do not wish to remain pregnant or to become parents.

33. Plaintiffs' physicians and staff advise each patient that the decision to continue or terminate pregnancy is theirs alone to make and that an abortion will only be provided if they are making a voluntary decision and are firm in their decision to terminate their pregnancy.

34. The overwhelming majority of Plaintiffs' patients are certain of their decision to have an abortion by the time they call to schedule their appointment. In rare cases where a patient expresses any doubt or ambivalence about their decision to have an abortion at their appointment, Plaintiffs instruct the patient to take more time to consider the decision and only return for the abortion if and when they have made up their mind.

B. Informed Consent

35. The standard of care before initiating any abortion is to provide patients with information that is necessary and relevant to their decision-making, afford the opportunity to ask questions, and ensure that the patient is certain in their decision to terminate their pregnancy. As medical professionals, Plaintiffs' physicians and staff are guided by ethical and professional duties to provide accurate, adequate, and understandable information to their patients about their health

status and all medically relevant health care options.

36. Under common law, the informed-consent doctrine developed to safeguard and promote patient autonomy by ensuring that medical professionals "provide *sufficient* information to their patients to permit patients to make intelligent, informed decisions about medical treatment." *Rojas v. Barker*, 40 Kan. App. 2d 758, 761–62, 195 P.3d 785, 788 (Kan. Ct. App. 2008) (emphasis added).

37. The Kansas Supreme Court pioneered the modern approach of defining the scope of the information physicians are required to disclose with respect to the medical profession's standard of care. *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960), *clarified on denial of reh'g* 187 Kan. 186, 354 P.2d 670 (1960). In *Natanson*, the Court recognized that the physician's duty to disclose "significant facts within his knowledge which are necessary to form the basis of an intelligent consent" is "primarily a question of medical judgment" and limited it "to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances." *Id.* at 393, 409.

38. Courts have limited the duty of disclosure to medically material facts about the patient's diagnosis, prognosis, and the risks and benefits of the proposed treatment and its alternatives (including foregoing treatment altogether). *See, e.g.*, *Rojas*, 40 Kan. App. 2d at 761–62, 195 P.3d at 788 ("A physician or surgeon is obligated to inform the patient of the nature of the patient's illness, of the *significant* risks and consequences inherent to the proposed treatment or procedure, and of *reasonable, medically acceptable* alternatives to the proposed treatment, including the option to forego treatment altogether." (emphases added))

39. Consistent with the informed-consent doctrine, medical ethics provide that health care providers should exercise their clinical judgment to provide medically relevant and accurate

information about the risks and benefits of a proposed course of treatment, as well as its alternatives, and tailor this dialogue to the patient's unique values and preferences.

40. Informed consent is one component of the ethical provision of medical treatment. Obtaining informed consent demonstrates respect for patients as autonomous moral agents who are competent to control their own bodies and direct their own lives, and promotes patients' welfare by advancing their best interests. A respectful informed consent process is also critical to building and maintaining trust between the physician and patient.

41. According to the American Medical Association ("AMA") Code of Medical Ethics, "[t]ruthful and open communication between physician and patient is essential for trust in the relationship and for respect for autonomy."[5]

42. Accordingly, "[c]onduct likely to deceive, defraud or harm the public" is unprofessional conduct under K.S.A. § 65-2837(b)(12), subject to misdemeanor liability and fines, K.S.A. § 65-2862, and licensure penalties up to and including revocation, K.S.A. § 65-2836(b). As is aiding or abetting "the practice of the healing arts by" a practitioner who "fail[s] to adhere to the applicable standard of care," K.S.A. §§ 65-2837(a), (b)(14), or making a "false or misleading statement regarding . . . the efficacy or value of a drug." K.S.A. §§ 65-2837(b)(13), 65-1626(vvv)(8).

43. Health care providers are trained to create space for patients to ask questions, share concerns, and guide discussion of their care. Approaching informed consent as a process of shared decision-making that includes a mutual sharing of truthful and relevant information promotes patient autonomy and the provider-patient relationship.

[5] AMA Code of Medical Ethics, Opinion 2.1.3, https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/code-of-medical-ethics-chapter-2.pdf (last visited June 3, 2023).

44. Non-medical, inaccurate, or irrelevant information all fall far outside the bounds of informed consent. Overriding health care providers' clinical judgment and ability to take patients' unique values and preferences into account also contravenes informed consent, as well as its underlying principles of bodily integrity, decisional autonomy, and trust in the provider-patient relationship.

C. Kansas's Biased Counseling Scheme

45. In 1997, the Kansas Legislature first passed a biased counseling scheme that applied only to abortion—a law it euphemistically dubbed "the Woman's Right to Know Act." Even though abortion providers—like all health care providers—were already required under common law and professional standards to fulfill their duty to disclose adequate information for the patient to provide informed consent, then-Representative Susan Wagle sponsored the bill because she "believe[d] the word 'choice' is a propaganda tool . . . used to deceive women" and that "Kansas women involved in a crisis pregnancy" were thus uniquely in need of the State's paternalistic influence.[6]

46. Although its sponsors described the Biased Counseling Scheme as an informed-consent statute, it bears no resemblance to the legal or ethical concepts of informed consent.

1) The Original Act

47. The original version dictates that, except in a medical emergency, an abortion cannot be provided until at least 24 hours after the pregnant person receives certain state-mandated disclosures in writing and is given state-published printed materials ("the Pamphlet"). The 1997 Act also requires that prior to an abortion, the patient meet privately with the physician who will

[6] *Hearing on the Woman's Right to Know Act* Before the H. Comm. on the Judiciary, 1997 Reg. Sess. (Feb. 13, 1997) (statement of Rep. Susan Wagle).

perform the abortion and certify in writing that they have done so and been provided the state-mandated disclosures and state-published printed materials.

48. In addition to information that providers already have the duty to disclose under professional and ethical standards, the state-mandated disclosures contain information and verbatim statements that are medically irrelevant and designed to dissuade the patient from having an abortion. These include:

- The text of a Kansas law that prohibits abortion after fetal viability unless the abortion provider and another physician both determine that the abortion is "necessary to preserve the life of the pregnant woman" or "the fetus is affected by a severe or life-threatening deformity or abnormality";
- That "[i]f the child is born alive, the attending physician has the legal obligation to take all reasonable steps necessary to maintain the life and health of the child";
- That "[m]edical assistance benefits may be available for prenatal care, childbirth and neonatal care";
- That the state-published materials "describe the fetus and list agencies which offer alternatives to abortion with a special section listing adoption services";
- That "the father of the fetus is liable to assist in the support of [the] child, even in instances where he has offered to pay for the abortion," except in cases where the pregnancy was the result of rape; and
- That the pregnant person "is free to withhold or withdraw her consent to the abortion at any time prior to invasion of the uterus without affecting her right to future care or treatment and without the loss of any state or federally-funded benefits to which she might otherwise be entitled." 1997 Kansas Laws Ch. 190 (S.B. 204).

49. The contents of the Pamphlet are one-sided and far afield from the type of information traditionally provided when obtaining informed consent for a proposed course of treatment, including:

- The required disclosure of "[g]eographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while her child is dependent, including but not limited to, adoption agencies";
- The statement that "Kansas law permits adoptive parents to pay costs of prenatal care, childbirth and neonatal care";
- The statements that "[m]any public and private agencies exist to provide counseling and information on available services. You are strongly urged to seek their assistance to obtain guidance during your pregnancy. In addition, you are encouraged to seek information on abortion services, alternatives to abortion, including adoption, and resources available to post-partum mothers"[7]; and
- "Materials that inform the pregnant woman of the probable anatomical and physiological characteristics of the fetus at two-week gestational increments from fertilization to full term, including pictures or drawings representing the development of a fetus at two-week gestational increments, and any relevant information on the possibility of the fetus' survival." 1997 Kansas Laws Ch. 190 (S.B. 204).

50. Other than in a medical emergency, the 1997 Act does not permit patients to decline any of the state-mandated information or the Pamphlet, or to obtain an abortion less than 24 hours

[7] In 2013, an amendment removed "abortion services" from this list. *See infra* ¶ 70.

after receiving such information and materials, regardless of their wishes, life circumstances, stage of pregnancy, or certainty in their decision.

51. The mandated 24-hour delay is arbitrary, paternalistic, and insults patients by telling them that they have not thought about their decision long or well enough. Individually, and together with other aspects of the Scheme, it also delays patients, who could otherwise schedule their appointments when they and a clinician are available.

52. The 1997 Act also requires that prior to an abortion, the pregnant person "meet privately with the physician who is to perform the abortion and such person's staff to ensure that she has an adequate opportunity to ask questions of and obtain information from the physician concerning the abortion." 1997 Kansas Laws Ch. 190 (S.B. 204). The Act does not permit any other physician besides the one who will perform the abortion to meet this requirement.

53. "Any physician who intentionally, knowingly or recklessly fails to provide" the state-published materials in accordance with the WRTK Act "is guilty of unprofessional conduct as defined in K.S.A. 65-2837 and amendments thereto."[8] K.S.A. § 65-6712. Unprofessional conduct is grounds for "appropriate disciplinary action," including revocation, suspension, or limitation of the physician's license, public censure, or probationary conditions. K.S.A. § 65-2836. An act of unprofessional conduct also exposes a physician to prosecution for a misdemeanor and to monetary penalties for each separate offense. *See* K.S.A. § 65-2862.

54. In the ensuing decades, the WRTK Act has been amended multiple times to add ever more restrictive requirements that push it further and further afield from ensuring informed consent, and increasingly, into the realm of the absurd. The Amendments have also made providing

[8] Prior to a 1998 amendment, the penalty attached to any failure to provide informed consent in accordance with the WRTK Act.

and accessing abortion increasingly more difficult.

2) 2009 Amendment

55. The WRTK Act was amended in 2009 to impose four additional requirements before an abortion can be provided, make certain adjustments to the state-mandated disclosures and the Pamphlet, and to require the Kansas Department of Health and Environment ("KDHE") to publish the information in the Pamphlet on its website and in an "informational video" (also published on its website), that "show[s] ultrasound images, using the best available ultrasound technology, of a fetus at two week gestational increments." 2009 Kansas Laws Ch. 28 (S.B. 238).

56. The 2009 Amendment adds to the state-mandated disclosures "the contact information for free counseling assistance for medically challenging pregnancies and the contact information for free perinatal hospice services." A "list of providers of free ultrasound services" were also added to the Pamphlet and the KDHE website. 2009 Kansas Laws Ch. 28 (S.B. 238).

57. Separate from the changes to the disclosures, the new requirements imposed by the 2009 Amendment further interfere with Plaintiffs' patients' access to abortion and ability to give true informed consent, and complicate Plaintiffs' operations and interrupt patient flow.

58. First, the 2009 Amendment adds a *second* mandatory delay, requiring patients to wait out a 30-minute timer after the patient's mandatory private meeting with the physician who is to perform the abortion, prior to receiving abortion care.

59. Second, the 2009 Amendment requires "[a] physician who will use ultrasound equipment" to prepare for or perform the abortion to inform the patient "at least 30 minutes" before the abortion that they have "the right to view the ultrasound image of her unborn child" and "receive a physical picture of the ultrasound image" at "no additional expense," to certify that this offer was made, and to obtain the pregnant person's "signed acceptance or rejection" of that

opportunity. 2009 Kansas Laws Ch. 28 (S.B. 238).

60. Third, "[a] physician who will use heart monitor equipment" to prepare for or perform an abortion must fulfill the same information, offer, certification, and signature requirements regarding the patient's "right to listen to the heartbeat of her unborn child" at least 30 minutes before the abortion. 2009 Kansas Laws Ch. 28 (S.B. 238).

61. Finally, the 2009 Amendment requires "[a]ny private office, freestanding surgical outpatient clinic or other facility or clinic in which abortions are performed" to "conspicuously post a sign" in a location "clearly visible" to patients printed with the following information in "at least three quarters of an inch boldfaced type":

> Notice: It is against the law for anyone, regardless of their relationship to you, to force you to have an abortion. By law, we cannot perform an abortion on you unless we have your freely given and voluntary consent. It is against the law to perform an abortion on you against your will. You have the right to contact any local or state law enforcement agency to receive protection from any actual or threatened physical abuse or violence. You have the right to change your mind at any time prior to the actual abortion and request that the abortion procedure cease.

2009 Kansas Laws Ch. 28 (S.B. 238). To comply with the signage requirement's font specifications, Plaintiffs must post a giant sign that occupies a glaring amount of wall space. For reference, the font on the sign must be nearly five times larger than Times New Roman 12-point font, in which this Petition is written.

62. The 2009 Amendment—in particular, the 30-minute mandatory delay—insults and demeans patients by telling them that they have not thought about their decision long or well enough.

63. The 30-minute mandatory delay, layered with the pre-existing requirement that the physician who is to perform the abortion personally meet with the patient before the abortion, also interrupts patient flow, consumes staff capacity and resources, and causes unnecessary delays to

care. For example, if Dr. Nauser is called to perform a delivery for a patient at the hospital after having fulfilled the requirement that she personally meet with a patient prior to an abortion, her abortion patient is either stuck waiting for Dr. Nauser to return to the office or must restart the 30-minute clock with another physician. Comprehensive Health patients may wait up to triple the amount of time mandated by the State for their physician, if, for example, the physician is providing other care or is with other patients.

3) 2011 Amendment

64. The WRTK Act was again amended in 2011 to replace "fetus" with "unborn child" throughout the scheme and to add to the state-mandated disclosures, the Pamphlet, and the KDHE website and video the statement that "the abortion will terminate the life of a whole, separate, unique, living human being." 2011 Kansas Laws Ch. 44 (H.B. 2035).

65. The 2011 Amendment also adds to the Act the definition of "human being" as "an individual living member of the species homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." 2011 Kansas Laws Ch. 44 (H.B. 2035).

66. According to the American College of Obstetricians and Gynecologists ("ACOG"), the nation's premier professional organization of obstetrician-gynecologists, "unborn child" is not a medically accurate term for describing a pregnancy.[9] The standard terminology agreed upon by the Ob/Gyn community is "embryo" for a pregnancy through 8 weeks LMP and "fetus" after that point until delivery.

67. There is no universal consensus on the philosophical and ideological question of

[9] Am. Coll. Obstetricians & Gynecologists, *ACOG Guide to Language and Abortion*, https://www.acog.org/contact/media-center/abortion-language-guide (last visited June 3, 2023).

when human life begins. Like the Nation as a whole, the Kansas population is religiously pluralistic, and even within religious traditions, opinions vary on when human life begins. The Kansas Constitution guarantees each and every Kansan the freedom to define their own values in alignment with their personal, religious, and/or cultural beliefs.

4) 2013 Amendment

68. The Act was further amended in 2013 to add even more medically inaccurate statements to the state-mandated disclosures and the Pamphlet, the KDHE website, and the informational video ("the state-published materials"). The 2013 Amendment provides that the state-published materials must "at a minimum" contain a series of verbatim statements, many of which are medically irrelevant, ideological, controversial, and/or redundant with the other requirements of the WRTK Act.

69. The 2013 Amendment adds to the state-mandated disclosures the medically inaccurate statements that there is a "risk of premature birth in future pregnancies" and a "risk of breast cancer" related to abortion, and that "by no later than 20 weeks from fertilization, the unborn child has the physical structures necessary to experience pain."[10] 2013 Kansas Laws Ch. 119 (H.B. 2253).

[10] Plaintiffs Hodes & Nauser MDs, P.A., Dr. Nauser, and Comprehensive Health previously stipulated that distribution of the Pamphlet satisfies these disclosure requirements. Plaintiffs Hodes & Nauser MDs, P.A., and Dr. Nauser challenged the 2013 Amendment, among other laws, in *Hodes & Nauser, MDs, P.A. v. Schmidt*, No. 2013-CV-705 (Shawnee Cnty. Dist. Ct. Div. 1) (dismissed without prejudice in 2019). The *Hodes & Nauser* stipulation provides that distribution of the materials in the Pamphlet, pursuant to K.S.A. § 65-6709(d), satisfies the disclosure requirements under K.S.A. § 65-6709(a)(3) (risk of premature birth in future pregnancies, risk of breast cancer, and other risks to reproductive health) and K.S.A. § 65-6709(b)(6) (information on "fetal pain"). *Hodes & Nauser*, No. 2013-CV-705 (Shawnee Cnty. Dist. Ct. Div. 1 Oct. 29, 2013). Plaintiff Comprehensive Health also challenged the 2013 Amendment, among other laws, in federal court, in *Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc., v. Templeton*, 954 F. Supp. 2d 1205 (D. Kan. 2013). Like the *Hodes & Nauser* stipulation, the *Comprehensive Health* stipulation provides that distribution of the materials in the Pamphlet satisfies the disclosure requirements under K.S.A. § 65-6709(b)(6) (information on "fetal pain"). It also provides that distribution of the Pamphlet satisfies the disclosure requirement under K.S.A. § 65-6709(b)(5) ("the abortion will terminate the life of a whole, separate, unique, living human being"). Joint Stipulation, *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Templeton*, No. 2:13-cv-02302-KHV-KGG (D. Kan. Aug. 9, 2013), ECF No. 25.

70. The medically inaccurate statement that "a fetal heartbeat is . . . a key medical indicator that an unborn child is likely to achieve the capacity for live birth" was also added to the state-published materials. Moreover, the 2013 Amendment cuts "abortion services" from the statement, in the state-published materials, that "encourag[es]" patients to "seek information" about their options, leaving only "alternatives to abortion, including adoption, and resources available to postpartum mothers." 2013 Kansas Laws Ch. 119 (H.B. 2253).

71. In addition, the 2013 Amendment dictates as minimum requirements for those state-published materials 28 verbatim paragraphs, including the following statements:

- "Pregnancy begins at fertilization with the union of a man's sperm and a woman's egg to form a single-cell embryo. This brand new being contains the original copy of a new individual's complete genetic code. Gender, eye color and other traits are determined at fertilization";
- "Most significant developmental milestones occur long before birth during the first eight weeks following fertilization when most body parts and all body systems appear and begin to function. . . . Eight weeks after fertilization, except for the small size, the developing human's overall appearance and many internal structures closely resemble the newborn";
- "Pregnancy is not just a time for growing all the parts of the body. It is also a time of preparation for survival after birth. Starting more than 30 weeks before birth, many common daily activities seen in children and adults begin in the womb. These activities include, but are not limited to, hiccups, touching the face, breathing motions, urination, right- or left-handedness, thumb-sucking, swallowing, yawning, jaw movement, reflexes, REM sleep, hearing, taste and sensation";

- Information about embryonic and fetal development in half-week increments starting at five weeks LMP, such as:
    - "At 7 ½ weeks, the unborn child reflexively turns away in response to light touch on the face. The fingers also begin to form on the hand";
    - By 9 weeks, "[g]irls also now have ovaries and boys have testes";
    - By 11 weeks, "[t]he uterus is now present, and girls' ovaries now contain reproductive cells that will give rise to eggs later in life";
    - "By 19 weeks, the unborn child's heart has beaten more than 20 million times";
    - By 20 weeks, the "voice box[] moves in a way similar to movement seen during crying after birth";
    - "Nearly all infants born between [28 weeks] and full term survive"; and
    - "What about adoption? Women or couples facing an untimely pregnancy who choose not to take on the full responsibilities of parenthood have another option, which is adoption. Counseling and support services are a key part of adoption and are available from a variety of adoption agencies and parent support groups across the state. A list of adoption agencies is available. There are several ways to make a plan for adoption, including through a child placement agency or through a private attorney. Although fully anonymous adoptions are available, some degree of openness in adoption is more common, such as permitting the birth mother to choose the adoptive parents. A father only has the right to consent to an adoption or refuse consent and raise the child if he provides support for the mother during the last six months of the pregnancy." 2013 Kansas Laws Ch. 119 (H.B. 2253).

72. Evaluation by a panel of specialists in human anatomy found 43.4% of the

statements about embryonic and fetal development included in the state-published materials to be medically inaccurate.[11]

73. The 2013 Amendment added language to the required signage to also include "the address for the pregnancy resources website published" by the KDHE and text duplicating certain statements in the state-mandated disclosures and state-published materials, such as that "[t]he father of your child must provide support for the child" and that [i]f you decide not to have an abortion, you may qualify for financial help for pregnancy, childbirth and newborn care." 2013 Kansas Laws Ch. 119 (H.B. 2253). With this added language, the sign that the Center for Women's Health posts to comply with the Biased Counseling Scheme is 41 inches by 28 inches, or nearly 4 feet by over 2 feet. Comprehensive Health's sign measures 38 inches by 48 inches, or more than 3 feet by 4 feet.

74. Finally, the 2013 Amendment adds an additional requirement for any facility or clinic to "publish an easily identifiable link on the homepage of [their] website that directly links" to the KDHE's website published under the WRTK Act. The text of the link was to state: "The Kansas Department of Health and Environment maintains a website containing objective, nonjudgmental, scientifically accurate information about the development of the unborn child, as well as video of sonogram images of the unborn child at various stages of development. The Kansas Department of Health and Environment's website can be reached by clicking here." 2013 Kansas Laws Ch. 119 (H.B. 2253).

75. The WRTK Act was amended in 2014 to delete the words "objective, nonjudgmental, [and] scientifically accurate" from the required link after Plaintiffs challenged the 2013 Amendment. 2014 Kansas Laws Ch. 87 (S.B. 54).

[11] Informed Consent Project, *Kansas*, https://informedconsentproject.com/states/kansas (last visited June 3, 2023).

5) 2017 Amendment

76. The 2017 Amendment imposed a new requirement ("the Font & Color Requirement") that some—but not all—of the state-mandated disclosures that a patient must receive at least 24 hours prior to an abortion "be provided on white paper in a printed format in black ink with 12-point times new roman font." 2017 Kansas Laws Ch. 88 (S.B. 83).

77. To comply with the Font & Color Requirement without requiring patients to make a separate trip to their facility, Plaintiffs have implemented complicated and time-consuming protocols to ensure that patients bring a printed copy of the state-mandated disclosures and to document that it was printed at least 24 hours prior to the abortion. For instance, the Center for Women's Health and Comprehensive Health direct patients to print the required information in accordance with detailed instructions regarding the required formatting and sign the forms with the time and date that they printed them, to ensure that patients have the materials in printed form at least 24 hours before the abortion. To ensure that patients have printed the materials in accordance with the State's stringent formatting requirements, Dr. Nauser's front office staff offers to review scans of the printed and signed documentation prior to the patient's appointment. Finally, the patient must bring the printed copy to their appointment, and front office staff again reviews to ensure that it meets all of the formatting and timing requirements.

78. Although many patients ask whether they can electronically sign—for example, as part of their electronic medical record—that they have reviewed the information in advance of their appointment, Plaintiffs must tell them that state law does not allow for that.

79. As a result, Plaintiffs' patients must find a way to print the state-mandated materials at least 24 hours in advance of their abortion. Accessing a printer at a specific time presents challenges to many Kansans who need abortion care, especially those who are low-income, those

who have existing children to care for, and those who must evade detection by an abusive partner or family member. For example, in May 2023, a Comprehensive Health patient who was a minor required significant assistance arranging transportation to a library to ensure they had the printed statements in advance of their abortion appointment. That is just one of countless patients impacted by the Scheme.

80. Patients are routinely turned away from Plaintiffs' practices because they have not printed out the state-mandated materials at least 24 hours prior to their appointment, or because the materials did not print in the color ink, font size, and/or typeface dictated by the State. The materials may not print properly because of incorrect printer settings, formatting issues that arise when printing from a mobile device rather than a computer, or the printer running out of black ink or white paper.

81. Some patients are turned away after waiting for an appointment for weeks, traveling hundreds of miles, and arranging complicated logistics, including transportation, work coverage, and childcare, only to realize they do not have their printed, completed, and dated materials in the proper format.

82. When they are turned away because they have not complied with these absurd and bureaucratic requirements, patients are demoralized and traumatized. Many break down in tears and are inconsolable. Some threaten to commit suicide.

83. Plaintiffs' staffs are likewise devastated; the Scheme makes people who have committed themselves to helping patients helpless and unwilling participants in the State's efforts to impede access to abortion.

84. Plaintiffs do their best to reschedule patients who are turned away. But that means patients must take more time away from work, arrange for additional childcare, and either travel

home and return for their abortion appointment the next day or find accommodations nearby. Some patients time out of medication abortion or are pushed beyond Kansas's 22-week LMP gestational limit by the time they can be seen again. Other patients choose to leave the state to seek timelier care or avoid having to surmount as many bureaucratic and absurd obstacles to access the care they need.

85. The 2017 Amendment also added to the state-mandated disclosures detailed information about the physician who will perform the abortion, including the year that they "received a medical doctor's degree," the date that their employment at the abortion facility commenced, and whether they are "a resident of this state." 2017 Kansas Laws Ch. 88 (S.B. 83). That information is medically irrelevant and falls well outside of physicians' duty of disclosure.

6) 2023 Reversal Amendment

86. In 2023, over Governor Kelly's veto, the Kansas Legislature added yet another offensive requirement to the WRTK Act.

87. Section 1 of H.B. 2264 ("the Reversal Amendment") amends the WRTK Act to add several new requirements to communicate medically inaccurate information about an experimental practice that is contrary to Plaintiffs' clinical judgment and the medical consensus. All told, patients must be told about this experimental practice no less than five times and in four different ways.

88. First, any facility or clinic "where mifepristone is prescribed, dispensed or administered for the purpose of inducing a medication abortion" must "post a conspicuous sign" in each patient waiting room and each patient consultation room used by medication abortion patients with the following message about medication abortion reversal:

> NOTICE TO PATIENTS HAVING MEDICATION ABORTIONS THAT USE MIFEPRISTONE: Mifepristone, also known as RU-486 or mifeprex, alone is not

> always effective in ending a pregnancy. It may be possible to reverse its intended effect if the second pill or tablet has not been taken or administered. If you change your mind and wish to try to continue the pregnancy, you can get immediate help by accessing available resources.

H.B. 2264 §§ 1(b)(1)–(2)(A). The sign must be printed with lettering that is "at least ¾ of an inch boldfaced type" and must be "clearly visible to patients." *Id.* § 1(b)(1).

89. In practice, H.B. 2264 would require Plaintiff Dr. Nauser to post five such signs in her office and Comprehensive Health to post at least eight signs in each of their health centers.

90. In addition, any hospital or other facility that is not a private office or "freestanding surgical outpatient clinic" must post such a sign "in each patient admission area used by patients seeking medication abortions that use mifepristone." *Id.* § 1(b)(2)(B).

91. Any pharmacy where mifepristone is prescribed, dispensed, or administered to medication abortion patients also must post such a sign "in the area inside the premises where customers are provided prescription medications and on the exterior of the premises in the area where customers are provided prescription medications via a drive-through window." *Id.* § 1(b)(2)(C).

92. Second, except in the case of a medical emergency, H.B. 2264 requires physicians to inform patients at least 24 hours in advance of a medication abortion "[t]hat it may be possible to reverse the intended effects of a medication abortion that uses mifepristone, if the woman changes her mind, but that time is of the essence" and that "information on reversing the effects of a medication abortion that uses mifepristone is available on" the KDHE's website "and other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion." *Id.* § 1(c)(1). In addition to including this information in the written state-mandated disclosures required under the WRTK Act, H.B. 2264 compels physicians to provide this information "either by telephone or in person"

at least 24 hours prior to the abortion. *Id.*

93. Accordingly, H.B. 2264 forces physicians to orally speak a State-mandated message that is contrary to their beliefs and medical consensus. Not only does this requirement conscript physicians to serve as the State's unwilling mouthpiece, it poses potentially unsustainable and insurmountable operational challenges. At the Center for Women's Health, for instance, Dr. Nauser cannot step away from performing a procedural abortion—or delivering a baby at her obstetrics practice—to personally communicate the information required by H.B. 2264 to a caller seeking medication abortion. Yet, any delay in conveying that information over the phone may effectively result in extending the patient's mandatory waiting period beyond the 24-hour minimum required by the WRTK Act.

94. Third, after the patient has been provided mifepristone, "the physician or an agent of the physician" must "provide a legible, written notice" to the patient that contains the same statements as displayed on the signs. *Id.* § 1(c)(2).

95. Fourth, within 90 days after H.B. 2264's effective date, the KDHE must publish in the Pamphlet and on its website "comprehensible materials" in "English and in each language that is the primary language of 2% or more of the state's population" to "inform women of the possibility of reversing the effects of a medication abortion that uses mifepristone and information on resources available to reverse the effects of a medication abortion that uses mifepristone." The KDHE website must "also include other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion." *Id.* § 1(e).

96. Although the KDHE has until September 28 to publish information and "relevant telephone and internet resources" about medication abortion reversal on its website, H.B. 2264

requires abortion providers to direct patients to such information and resources from July 1. As a result, Plaintiffs may be left with no guidance for as long as 90 days on what the State considers to be a relevant or appropriate resource for assistance with medication abortion reversal.

97. Moreover, H.B. 2264 forces Plaintiffs to bestow legitimacy on an experimental practice that has not been proven safe or effective by forcing them to direct patients toward unknown entities or individuals who purport to provide "assistance to attempt to reverse [a] medication abortion."

98. H.B. 2264 carries criminal penalties. Any person who is convicted for a violation of H.B. 2264 is guilty of a misdemeanor. Any person who is convicted for a second or subsequent violation of H.B. 2264 is guilty of a felony. *Id.* § 1(f).

99. The KDHE will fine any facility that fails to post the required signage $10,000 for every day the signs are not posted. *Id.* § 1(g).

100. Physicians who provide a medication abortion using mifepristone in violation of H.B. 2264 are also subject to civil damages in a lawsuit brought by the patient, the "father" of the fetus or embryo, or the parents of a minor patient or a deceased patient. *Id.* § 1(h).

101. The statement that "it may be possible to reverse the intended effects of a medication abortion that uses mifepristone" is false and deceptive. There is no credible scientific evidence that a medication abortion using mifepristone can be "reversed."

102. Under H.B. 2264, an abortion is defined as "the use or prescription of any instrument, medicine, drug or any other means to terminate the pregnancy of a woman knowing that such termination will, with reasonable likelihood, result in the death of the unborn child." *Id.* § 4(a). Because it is not possible to reverse the intended effect of a medication abortion—*i.e.*, the death of an "unborn child"—the 2023 Reversal Amendment forces providers to confuse and

mislead patients with the untrue message that it may be possible to "reverse the intended effects of a medication abortion that uses mifepristone."

103. Upon information and belief, the concept of "reversing" a medication abortion is based on an experimental practice proposed by Dr. George Delgado, who has alleged, based only on two poorly designed studies, that treatment with progesterone can "reverse" the effects of mifepristone prior to the administration of misoprostol. Taken alone, mifepristone administered as part of a medication abortion will terminate a significant percentage of pregnancies, but not all. Separate from other study design flaws and ethical issues, without control groups, Dr. Delgado's papers cannot demonstrate whether progesterone treatment had any impact on participants' pregnancy outcomes.

104. Progesterone has not been approved by the FDA for use in "reversing" the effects of mifepristone. There is no FDA-approved protocol for the administration of progesterone to "reverse" the effects of mifepristone.

105. Moreover, this experimental practice is opposed by ACOG, because its safety and efficacy have not been established.[12]

106. To date, only one clinical trial has been started for the purpose of assessing the potential risks to pregnant people who undergo medication abortion "reversal." This randomized controlled clinical trial was terminated early due to safety risks to the participants after three of the twelve participants experienced severe hemorrhage requiring hospital transport. The trial authors concluded that "patients in early pregnancy who use only mifepristone may be at high risk of

[12] Am. Coll. Obstetricians & Gynecologists, *Facts Are Important: Medication Abortion "Reversal" Is Not Supported By Science*, https://www.acog.org/advocacy/facts-are-important/medication-abortion-reversal-is-not-supported-by-science (last visited June 3, 2023).

significant hemorrhage."[13]

107. Because there is no credible scientific evidence to support the theory that medication abortion can be "reversed," H.B. 2264 compels physicians to personally lie to their patients. Further, forcing physicians to refer patients to "resources" that convey false and deceptive information about medication abortion reversal and offer "assistance" with "attempt[ing]" an experimental and potentially dangerous treatments violates medical ethics and subjects Plaintiffs to potential disciplinary action or liability.

D. The Biased Counseling Scheme Is Not a Proper Informed-Consent Requirement.

108. To the extent the Biased Counseling Scheme was sold as a way to promote informed consent in abortion care, its impact has been the opposite. The Biased Counseling Scheme is not a proper informed-consent requirement because it undermines the principles of bodily integrity and decisional autonomy that underlie the doctrine of informed consent, mandates government-scripted disclosures far outside the scope of physicians' traditional duty of disclosure under established tort law principles, and contravenes medical ethics.

1) No Other Health Care Is Subject to "Informed Consent" Requirements Remotely Comparable to the Biased Counseling Scheme.

109. Abortion is the only health care in Kansas that is subject to unique and additional regulation that undermines—rather than facilitates—patients' ability to provide informed consent. By singling out abortion patients to receive repetitive disclosures of one-size-fits-all information—much of which is irrelevant, medically inaccurate, and/or misleading—and endure arbitrary mandated delays as conditions for accessing critical, time-sensitive health care, the Biased Counseling Scheme discriminates against people seeking abortion and perpetuates the stereotype

[13] Mitchell D. Creinin et al., *Mifepristone Antagonization with Progesterone to Prevent Medical Abortion: A Randomized Controlled Trial*, 135 Obstetrics & Gynecology 158, 158 (2020).

that they are incapable of making thoughtful medical decisions.

110. Kansas does not mandate any specific state-scripted disclosures for any other safe and standard health care. Aside from abortion, the only two treatments that are subject to informed-consent requirements that include any specific disclosures are dry needling[14] and lipodissolve.[15] In stark contrast to the well-documented safety and efficacy of abortion, these practices have been cautioned against by major medical associations like the AMA[16] and the American Society for Dermatologic Surgery.[17]

111. Despite credible concerns about lack of regulation and/or evidence to support their safe use, Kansas law imposes far fewer requirements for informed consent to these practices. *See* K.A.R. 100-29-19(b) (requiring for informed consent to dry needling the patient's signature, the risks and benefits of dry needling, the diagnosis for which the physical therapist is performing dry needling, each anatomical region of training completed by the physical therapist, and a statement that the procedure being performed is dry needling as defined by the physical therapy practice act); K.A.R. 100-22-8a(d)(3) (requiring for written consent to lipodissolve acknowledgement that it is a drug that has not been approved by a federal or state agency, "that a preponderance of competent

[14] Dry needling is a relatively new and unstudied intervention utilized by physical therapists that involves insertion of filiform needles into muscles or tissue. There exists controversy over whether it is properly within physical therapists' scope of practice. *See, e.g.*, David Boyce et al., *Adverse Events Associated with Therapeutic Dry Needling*, 15 Int'l J. Sports Physical Therapy 103 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7015026.

[15] Lipodissolve is an injection of phosphatidylcholine and sodium deoxycholate ("PCDC"), a "nonsurgical method to eliminate unwanted fat" with an "uncertain" record of safety and efficacy. Dominic N. Reeds et al., *Metabolic and Structural Effects of Phosphatidylcholine and Deoxycholate Injections on Subcutaneous Fat*, 33 Aesthetic Surgery J. 400 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3667691. Under Kansas law, physicians are only permitted to administer such injections during "clinical research of PCDC as an investigational new drug" or when it is compounded with written informed consent. K.A.R. 100-22-8a.

[16] The AMA maintains that dry needling is an "invasive procedure" and "should only be performed by practitioners with standard training and familiarity with routine use of needles in their practice, such as licensed medical physicians and licensed acupuncturists." Am. Medical Ass'n, *Dry Needling is an Invasive Procedure H-410.949* (2016), https://policysearch.ama-assn.org/policyfinder/detail/dry%20needling?uri=%2FAMADoc%2FHOD-410.949.xml.

[17] Sandra G. Boodman, *Doctors Warn Against Lipo-dissolve, But Fans Say It Works*, Seattle Times (July 22, 2007), https://www.seattletimes.com/seattle-news/health/doctors-warn-against-lipo-dissolve-but-fans-say-it-works.

medical literature regarding clinical research establishing whether PCDC is safe and effective has not been published," that clinical data will be submitted to an IRB for peer review, and a description of the known and potential side effects of PCDC).

112. Aside from these underregulated or untested treatments, Kansas only imposes generalized informed-consent requirements—limited to the risks, benefits, and side effects of medical interventions—in a select few health care contexts. For instance, Kansas law sets forth certain requirements for obtaining informed consent from individuals with disabilities, but those do not include any specific, government-scripted disclosures. *See, e.g.*, K.A.R. 30-63-23(b)(1)(C); K.A.R. 28-39-228(n).

113. Kansas law does not require a mandatory delay before accessing dry needling, lipodissolve, or any other type of health care.

2) The Biased Counseling Scheme Undermines Informed Consent and Its Underlying Ethical Principles.

114. The Biased Counseling Scheme forces providers to engage in conduct that is antithetical to informed consent and its underlying ethical principles.

115. Forcing providers to disseminate inaccurate and/or misleading information is a gross violation of medical ethics, and it undermines patients' trust in their providers. So too does conscripting health care providers to serve as mouthpieces for the State's ideological message in favor of childbirth and as the State's arm in enforcing mandatory waiting periods, regardless of how certain a patient is in their decision, and other arbitrary restrictions. Likewise, forcing providers to foist the same set of one-size-fits-all state-mandated information upon *all* patients, regardless of individual needs and circumstances or how certain they are in their decision to have an abortion, undermines patient autonomy and shared decision-making.

116. The Biased Counseling Scheme also forces providers to inundate patients with an

overwhelming volume of information, much of which is irrelevant to the patient's individual circumstances.

117. The 2023 Reversal Amendment is among the most extreme requirements yet, as it forces physicians and their agents to speak and otherwise provide their patients with information and resources that are not medically credible and scientifically established. In doing so, it forces providers to violate their ethical obligations to their patients and undermines the provider-patient relationship.

118. Specifically, the government-mandated disclosure that "it may be possible to reverse the intended effects of a medication abortion that uses mifepristone" directly undermines the measures that Plaintiffs take to ensure that their patients are certain about their decision to terminate their pregnancy before an abortion is performed. Indeed, the 2023 Reversal Amendment forces providersto muddle that critical message by conveying false and misleading information that can lead a patient to take mifepristone before they are certain of their decision.

E. The Biased Counseling Scheme Harms Patient Health

119. Not only does the Biased Counseling Scheme lack any medical benefit, it undermines the health and safety of people seeking abortion by delaying time-sensitive health care, requiring providers to force potentially traumatizing information on their patients, and requiring providers to convey medically inaccurate information that poses threats to patients' safety.

120. Research shows that mandatory delay periods can be detrimental to the mental health of people who wish to end their pregnancy. Patients may experience psychological and emotional harm from being forced to remain pregnant against their will, when they have already made the decision to end their pregnancies. In addition to the anxiety many patients experience from unnecessary, state-imposed delays, some patients might be pushed beyond Kansas's 22-week

LMP limit or become ineligible for the abortion method they prefer (for example, delays can prevent some patients from accessing medication abortion).

121. The Biased Counseling Scheme also forces abortion providers to inflict psychological and emotional harm on their patients. For example, it forces providers to inform a patient with a wanted pregnancy who has received a lethal fetal diagnosis that "[m]edical assistance benefits may be available" for neonatal care—even though the fetus has no chance of survival after birth. Similarly, it requires providers to suggest to victims of intimate partner violence or incest that they consider approaching the "father" for child support rather than have an abortion. Further, it requires providers to tell every patient—regardless of their values, religious or moral beliefs, or cultural background—that abortion terminates the life of a "whole, separate, unique, living human being" when there is no universal consensus on the moral status of a pregnancy.

122. The 2023 Reversal Amendment may cause patients emotional harm by forcing them to receive confusing, medically inaccurate information that their physician objects to as false and misleading.

123. The 2023 Reversal Amendment also requires providers to direct patients to "resources" regarding an experimental practice that does not comport with the standard of care. In doing so, the 2023 Reversal Amendment forces providers to endorse an experimental practice that is potentially dangerous.

F. The Biased Counseling Scheme Stigmatizes Abortion and Discriminates Against Pregnant People Seeking Abortion Care.

124. By singling out abortion for overregulation, arbitrarily requiring people seeking abortion to wait both 24 hours prior to an appointment and 30 minutes during an appointment before their consent to treatment is considered valid, and wedging the State's value judgment into

their decision-making, the Biased Counseling Scheme stigmatizes abortion and perpetuates the demeaning view that people seeking abortion are uniquely incapable of making informed health care decisions.

125. By reflecting the State's bias in favor of childbirth and against abortion, the Biased Counseling Scheme also perpetuates the discriminatory stereotype that motherhood is the appropriate role for women and people capable of becoming pregnant and that they cannot decide what is best for themselves and their families without the State's paternalistic intervention.

126. Kansas law does not actively hinder others from making their own reproductive decisions. For example, people who are not pregnant may consent to use contraception or to have a vasectomy to prevent pregnancy, or to use assisted reproductive technologies to become pregnant, without having to first comply with any of the requirements in the Biased Counseling Scheme.

127. Similar classifications based on a person's capacity for pregnancy and childbearing have long been a means by which the government enforces inequality. But, as the Kansas Supreme Court has recognized: "We no longer live in a world of separate spheres for men and women." *Hodes & Nauser*, 309 Kan. at 659, 440 P.3d at 491. Indeed, "[t]rue equality of opportunity in the full range of human endeavor is a Kansas constitutional value, and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago." *Id*.

128. Plaintiffs' patients know better than anyone what is best for their lives and are fully capable of taking the time they need to make the decision to terminate a pregnancy. Research demonstrates that most people seeking abortion are certain of their decision and strongly prefer to obtain abortion care without delay.

129. The Biased Counseling Scheme is designed to dissuade Kansans seeking abortion

from obtaining this health care by imposing arbitrary and demeaning waiting periods and bureaucratic requirements and forcing Plaintiffs to place their imprimatur on government-scripted materials that reflect the State's preference for choosing childbirth, which is all but guaranteed to generate feelings of alienation, guilt, stigma, and shame for the patient. Because it manipulates patients' decision-making in this way, the Biased Counseling Scheme undermines patient autonomy and contravenes the basic requirement that truly informed consent be voluntary and uncoerced.

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
(Fundamental Right to Abortion)

130. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 129 above.

131. The Biased Counseling Scheme violates Section 1 of the Kansas Constitution Bill of Rights because it infringes Plaintiffs' patients' fundamental right to abortion by singling out abortion care for unique and additional regulation and interfering with patients' decisions about pregnancy.

SECOND CLAIM FOR RELIEF
(Right to Free Speech)

132. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 129 above.

133. The Biased Counseling Scheme violates Section 11 of the Kansas Constitution Bill of Rights because it infringes Plaintiffs' right to free speech by targeting their speech for unique restriction based solely on their provision of abortion care and compelling them to communicate government-mandated messages that alter the content of their speech and are contrary to their

views.

THIRD CLAIM FOR RELIEF
(Denial of Equal Protection—Fundamental Right)

134. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 129 above.

135. The Biased Counseling Scheme violates Section 1 of the Kansas Constitution Bill of Rights by denying equal protection of laws to Plaintiffs' patients because it discriminates against them based on their exercise of the fundamental right to abortion.

FOURTH CLAIM FOR RELIEF
(Denial of Equal Protection—Sex Discrimination)

136. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 129 above.

137. The Biased Counseling Scheme violates Section 1 of the Kansas Constitution Bill of Rights by denying equal protection of laws to Plaintiffs' patients because it singles out women and people capable of becoming pregnant, and it perpetuates sex-based stereotypes that motherhood is the appropriate role for women and that women need paternalistic State intervention to guide their decision to continue or terminate a pregnancy.

FIFTH CLAIM FOR RELIEF
(Void for Vagueness)

138. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 129 above.

139. The Reversal Amendment violates Section 10 of the Kansas Constitution Bill of Rights because it is unconstitutionally vague. The Reversal Amendment requires providers to include information about "other relevant telephone and internet resources" on a "conspicuous sign," in the information that must be provided at least 24 hours prior to the abortion, and in a

written notice after dispensing mifepristone, but the Amendment does not specify what constitutes such resources or how to go about identifying them. Nor does it specify whether the information to be identified by the KDHE (within 90 days of July 1) satisfies this requirement.

140. The Reversal Amendment does not give fair warning regarding its requirements, and it does not adequately guard against arbitrary and unreasonable enforcement.

VI. REQUEST FOR RELIEF

WHEREFORE Plaintiffs request that the Court:

A. Issue a declaratory judgment that the Biased Counseling Scheme (K.S.A. §§ 65-6708 through 65-6715) and the Reversal Amendment (H.B. 2264) are unconstitutional and therefore unenforceable.

B. Grant a temporary restraining order without bond restraining Defendants; their officers, agents, servants, and employees, and successors in office; and all other persons who are in concert or participation with them from enforcing the Reversal Amendment, should the Court be unable to rule on Plaintiffs' request for a temporary injunction before the Reversal Amendment's July 1, 2023, effective date.

C. Grant a temporary injunction without bond and a permanent injunction restraining Defendants; their officers, agents, servants, and employees, and successors in office; and all other persons who are in concert or participation with them, from enforcing the Biased Counseling Scheme or the Reversal Amendment.

D. Grant such other and further relief as the Court deems just, proper, and equitable, including an award of costs and attorneys' fees to Plaintiffs.

Respectfully submitted June 6, 2023.

DATED: June 6th, 2023

Respectfully submitted,

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* Motion for Admission *Pro Hac Vice* Forthcoming

CERTIFICATE OF SERVICE

I certify that, on the 6th day of June 2023, the above and foregoing was filed with the Clerk of the Court and served by hand delivery on the following:

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