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

In the Matter of: Case No. 23CV03140
Division 12

HODES & NAUSER MDS PA
TRACI LYNN NAUSER MD
TRISTAN FOWLER
COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS,
Plaintiffs

vs

KRIS KOBACH
STEPHEN M HOWE
MARC BENNETT
SUSAN GILE
RONALD M VARNER
MARK A DUPREE SR
JANET STANEK,
Defendants

JOURNAL ENTRY ON PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION

This matter came before the Court for hearing on the plaintiffs' motion for a temporary injunction, in accordance with KSA 60-901, et. seq. The plaintiffs, Hodes & Nauser, MDs, P.A., Traci L. Nauser, M.D., Tristan Fowler, D.O., and Comprehensive Health of Planned Parenthood Great Plains (unless otherwise indicated, collectively sometimes referred to as "Hodes & Nauser") appear with their respective counsel, and defendants Kris Kobach, Stephen M. Howe, Marc Bennett, Susan Gile, Ronald Varner, and Janice Stanek (unless otherwise indicated, collectively sometimes referred to as "State") also appear with their various respective counsel, as set forth on the record.

Being duly advised, the Court is prepared to rule, having considered the plaintiffs' moving papers, the defendants' respective briefs in response, and the plaintiffs' Reply Memorandum, along with the various supporting materials and affidavits.

I. Introduction

The issue of abortion and a woman's right to choose has remained a hot-button social and political issue for decades in the United States, and the dispute currently before the Court reflects that ongoing tension between governmental policy mandates and the individual rights of Kansans and those within its borders. The instant case involves the evaluation of whether certain State abortion laws, some currently active and another awaiting judicial review, are: 1) valid and constitutional exercises of the State's authority to oversee the health care profession; or 2) unconstitutional efforts to inject itself into the physician-patient relationship in a singular and discrete set of circumstances, which infringes on the natural rights of Kansas citizens and other persons that are protected under our state Constitution.

Because a woman's right to bodily autonomy (including her right to decide whether to terminate or continue a pregnancy) is fundamental, the Court concludes, for purposes of this request for temporary relief, that the State's rationale and schemes simply do not survive constitutional review under Section 1 of the Kansas Constitution Bill of Rights, as it relates to plaintiffs' patients. Similarly, because the intimate and intensely-personal nature of the physician-patient relationship and the concept of truly informed consent both necessarily involve and require physicians to exercise professional judgment and discretion as to whether to "speak" or "not speak" State-sponsored information when necessary and appropriate for a pregnant patient, the Court further concludes that the State's rationale and schemes also violate the fundamental rights of "free speech" held by the provider plaintiffs themselves (and others

similarly situated), as bestowed by Section 11 of the Kansas Constitution Bill of Rights. Plaintiffs are likely to succeed on the merits of their claims in this matter, and thus, they are entitled to a temporary injunction as to portions of the existing "Woman's-Right-to-Know" Act and the contemplated Medication Abortion "Reversal" Amendment.

The Kansas Supreme Court has previously noted that trial courts face a "heavy task" when wrestling with these issues, and this Court concurs in the observation that no easy decisions exist on what may be one of the most divisive social issues of our modern history. See *Hodes & Nauser MD's, P.A. v. Schmidt*, 309 Kan. 610, 681, 440 P.3d 461 (Kan. 2019). Towards that end, as it is duty bound to act, this Court has, in this context of a temporary injunction, impartially and dispassionately evaluated the legitimacy and propriety, from a state constitutional standpoint, and the asserted impacts of the statutory enactments at issue with an attitude of "active and critical analysis," as part of the requisite "searching judicial inquiry" required by Kansas law. *Id.* at 682 (citations omitted). Inevitably, some likely will disagree or take issue with the interim conclusions reached herein on Plaintiffs' motion for a Temporary Injunction, whether based upon specific moral, ethical, or spiritual concerns. However, such considerations are (and must be) separate and apart from this Court's role in evaluating the potential constitutional encroachment (or lack thereof) of the State's efforts to impose its authority under the auspices of police power, given our state Founding Father's emphasis on (and the primacy of) the people's inalienable natural rights. Those constitutional guarantees include the people's rights to make their own decisions regarding their bodies, health, family formation, and family life-decisions that can include whether to continue a pregnancy—all of which are necessary corollaries to the right of bodily autonomy. Similarly, the right to freedom of speech, whether to speak or avoid compelled speech, is also a fundamental right that our state founders held dear

and enshrined in the Bill of Rights, thus, it demands protection under a strict scrutiny standard in this case.

Accordingly, in light of the Court's analysis and conclusions regarding plaintiffs' likelihood of success on the merits of their claims, along with an assessment of the additional balancing factors necessary when considering injunctive relief, the Court hereby **GRANTS** plaintiffs' motion, **IN PART**, and hereby temporarily enjoins, ***as further described below***, the defendants from enforcing, in any way, KSA 65-6709, portions of KSA 65-6710 (namely (a)(3), and (a)(4)), KSA 65-6712, and H.B. 2264, pending a full hearing on the merits on plaintiffs' request for a permanent injunction and declaratory judgment.

II. Findings of Fact

A. Findings regarding the statutory schemes.

At the outset, the Court believes a factual summary of the legislative provisions at issue is appropriate and necessary, along with the historical changes to what the Legislature has titled the "Woman's-Right-to-Know" Act (K.S.A. 65-6708 through -6715) (hereinafter sometimes referred to as the "Act").[1]

The original 1997 enactment in Kansas.

The "Woman's-Right-to-Know" Act (KSA 65-6708 to -6715) was initially enacted in 1997 by the Kansas Legislature. In relevant part, KSA 65-6709 provided that "voluntary and informed consent" existed **only if**, at least 24 hours in advance of an abortion, "the physician who is to perform the abortion or the referring physician" has, in writing, informed the woman:

1. The name of the physician who will perform the abortion;
2. a description of the proposed abortion method;
3. a description of risks related to the proposed abortion method, including risks to the woman's reproductive health and alternatives to the abortion that a

[1] The Court takes judicial notice of these legislative actions in accordance with Kansas law.

reasonable patient would consider material to the decision of whether or not to undergo the abortion;
4. the probable gestational age of the fetus at the time the abortion is to be performed, along with a detailed statement of Kansas law regarding abortions post "viability";
5. the probable anatomical and physiological characteristics of the fetus at the time the abortion is to be performed;
6. the medical risks associated with carrying a fetus to term; and
7. any need for anti-Rh immune globulin therapy, if she is Rh negative, the likely consequences of refusing such therapy and the cost of the therapy.

The Act at that time further required additional written notification to the patient, which was required to be provided by "the physician who is to perform the abortion, the referring physician or a qualified person." Those additional notifications included that:

(1) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials given to her and described in K.S.A. 65–6710,[2] and amendments thereto;
(2) The printed materials in KSA 65-6710, and amendments thereto, describe the fetus and list agencies which offer alternatives to abortion with a special section listing adoption services;
(3) the father of the fetus is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion except that in the case of rape this information may be omitted; and
(4) the woman 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.

Thus, the statutory scheme, in practical effect, imposed at least a 24-hour minimum waiting period prior to obtaining the desired medical procedure, regardless of the patient's history, medical status, or status of her existing decision-making process (whether complete and voluntary or still contemplated).

[2] The statute required physicians to provide the printed materials described in KSA 65-6710 to each patient seeking abortion care at least 24 hours prior to an abortion.

In addition, prior to the procedure, preparation for the procedure, or administration of any medication for the procedure, the physician that was to perform the procedure (and his/her staff) was statutorily mandated to meet privately with the patient to ensure that she has an adequate opportunity to ask questions of the physician concerning the abortion. Any questions were to be answered by the physician in the patient's "own language."[3] Thereafter, the woman was required to fill out and sign a written certification that she has been provided all of the materials, information, and consultations required therein, which the physician performing the procedure (or an agent) then receives and maintains the certification.

Finally, the provisions (KSA 65-6710) also required the Kansas Department of Health and Environment (KDHE) to publish and widely distribute (with annual updates) information and written materials identifying "public and private agencies and services available" as an alternative to obtaining an abortion (adoption services, aid agencies, prenatal care), along with information that the biological father of a child, once born, has legal support obligations. The published information also was to include the following statement, as part of the written materials KDHE maintained and that physicians were obligated to provide in writing prior to the 24-hour waiting period:

> "Many 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. The law requires that your physician or the physician's agent provide the enclosed information."

KDHE was further required to create and make available materials on the probable anatomical and physiological characteristics of the fetus at various times throughout a normal pregnancy at

[3] The original statutory scheme provided no guidance on exactly what is needed to comply with this requirement, so whether translators/interpreters are required to be available is unclear and not expressly delineated. The absence of clarification on these requirements remains unchanged through the current versions.

every two-week milestone. The information was required to be "objective, nonjudgmental and designed to convey only accurate scientific information about the fetus." No specific size, font, or color requirements were imposed in the 1997 version of the Act; however, the information was required to be in typeface "large enough to be clearly legible" and made available in both Spanish and English.

The 2009 Amendments.

In 2009, S.B. 238 was passed, which amended the Act to change various requirements, including, in relevant part:

a. Limiting the circumstances that qualify as a "medical emergency," which, if present, avoids myriad requirements under the scheme;
b. Adding required written information be provided prior to the 24-hour waiting period to include the contact information for free counseling relating to "medically challenging pregnancies"[4] and for free perinatal hospice services;
c. Obligating KDHE to post its information also online on its governmental website;
d. Adding a second waiting period of 30 minutes after the in-person "question and answer" session between the patient and her physician;
e. Adding the obligation of physicians using ultrasound equipment in preparation for or during an abortion procedure to:
    1. Inform the patient that she has the right to view the ultrasound image of her fetus at no cost and make the offer to view;
    2. Inform the patient that she has the right to receive a copy of the ultrasound image of her fetus at no cost and make the offer to receive; and
    3. Certify in writing (with a time stamp denoting these discussions) that these requirements have been met, along with a signed affirmation by the patient that she has accepted or rejected these options;
f. Adding the obligation of physicians using heart-monitoring equipment in preparation for or during an abortion procedure to:
    1. Inform the patient that she has the right to hear the heartbeat of her fetus at no cost and makes the offer to listen;
    2. Certify in writing (with a time stamp denoting these discussions) that these requirements have been met, along with a signed affirmation by the patient that she has accepted or rejected these options;
g. Adding a requirement to post a sign in a location that is "clearly visible to patients" and with lettering that is legible and shall be at least ¾ inch boldface type, which prescribes:

[4] A "medically challenging pregnancy" was defined as a "a pregnancy where the fetus is diagnosed as having: (1) A severe anomaly; or (2) an illness, disease or defect which is invariably fatal."

> 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.

The 2011 Amendments.

In 2011, H.B. 2035 was passed, which modified the Act's provisions to include the following, in part:

a. Changing the word "fetus" in the statutory scheme to "unborn child" throughout the text;
b. Adding a statement to the information that must be provided in writing prior to the mandatory 24-hour waiting period that "the abortion will terminate the life of a whole, separate, unique, living human being";
c. Legislatively defining a "human being" as an "individual . . . . during the entire embryonic and fetal ages from fertilization to full gestation."

The 2013 Amendments.

In 2013, H.B. 2253 was enacted, which modified the Act's provisions to include the following, in relevant part:

a. Adding specific information to the statements that must be provided in writing prior to the mandatory 24-hour waiting period, regarding the "risk of premature birth in future pregnancies" (after an abortion procedure) and the "risk of breast cancer" (after an abortion procedure)";
b. Adding a requirement to provide patients "a listing of websites for national perinatal assistance," including those that provide the services for free;
c. Adding to the information that must be provided in writing prior to the mandatory 24-hour waiting period, that:

> "by no later than 20 weeks from fertilization, the unborn child has the physical structures necessary to experience pain. There is evidence that by 20 weeks from fertilization unborn children seek to evade certain stimuli in a manner that in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to unborn children who are 20 weeks from fertilization or older who undergo prenatal surgery";

d. Adding a requirement that the conspicuously-posted sign for patients also include the internet address for the KDHE website, from which additional pregnancy resources may be obtained, along with further mandatory statements on the sign. Specifically, it added the following mandatory language:

> "It is unlawful for anyone to make you have an abortion against your will, even if you are a minor. The father of your child must provide support for the child, even if he has offered to pay for an abortion. If you decide not to have an abortion, you may qualify for financial help for pregnancy, childbirth and newborn care. If you qualify, Medicaid will pay or help pay the cost of doctor, clinic, hospital and other related medical expenses, including childbirth delivery services and care for your newborn baby. Many agencies are willing to provide assistance so that you may carry your child to term, and to assist you after your child's birth";

e. Requiring each office or clinic at which abortion services are provided that maintains a public website to link to the KDHE's website, along with the following message:

> "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." (emphasis added).

f. Adding requirements that KDHE include in the printed/website materials, which are also required to be handed out by each physician, the following statements:

> "(A) That by no later than 20 weeks from fertilization, the unborn child has the physical structures necessary to experience pain; (B) that there is evidence that by 20 weeks from fertilization unborn children seek to evade certain stimuli in a manner that in an infant or an adult would be interpreted to be a response to pain; (C) that anesthesia is routinely administered to unborn children who are 20 weeks from fertilization or older who undergo prenatal surgery; (D) that less than 5% of all natural pregnancies end in spontaneous miscarriage after detection of cardiac activity, and a fetal heartbeat is, therefore, a key medical indicator that an unborn child is likely to achieve the capacity for live birth; and (E) that abortion terminates the life of a whole, separate, unique, living human being";

g. Specifying, in detail, exactly what language/message that KDHE is required to disclose, including about: the various time periods during a woman's pregnancy, along with reiteration of Kansas law's requirements and restrictions relating to an

abortion; information about adoption, information about child support; and information about parentage actions.

The 2014 Amendments.

In 2014, S.B. 54 passed, which amended the Act in the following manner:

a. Modified the language of KSA 65-6709 by ***deleting*** the statute's mandatory representation and requirement that the KDHE provide, on its website, "objective, nonjudgmental, scientifically accurate" information pertaining to pregnancy and the fetus's development. The updated language required providers to maintain the link on its website to the KDHE's site; however, the amended version provided that a "website containing information" exists and could be reached by "clicking" the link on the physician/clinic/offices page.

The 2017 Amendments.

In 2017, S.B. 83 was enacted, which amended the Act (and specifically KSA 65-6709) as follows:

a. Specifying that the written messaging that physician providers were required to provide prior to the 24-hour waiting period, do so on "white paper in a printed format in black ink with 12-point Times New Roman font";
b. Adding the obligation to provide the following additional information on the specific physician performing the procedure, prior to the inception of the 24-hour waiting period:
   (A) The name of such physician;
   (B) the year in which such physician received a medical doctor's degree;
   (C) the date on which such physician's employment commenced at the facility where the abortion is to be performed;
   (D) whether any disciplinary action has been taken against such physician by the state board of healing arts by marking either a box indicating "yes" or a box indicating "no" and if the box indicating "yes" is marked, then provide the website addresses to the board documentation for each disciplinary action;
   (E) whether such physician has malpractice insurance by marking either a box indicating "yes" or a box indicating "no";
   (F) whether such physician has clinical privileges at any hospital located within 30 miles of the facility where the abortion is to be performed by marking either a box indicating "yes" or a box indicating "no" and if the box indicating "yes" is marked, then provide the name of each such hospital and the date such privileges were issued;
   (G) the name of any hospital where such physician has lost clinical privileges; and

(H) whether such physician is a resident of this state by marking either a box indicating "yes" or a box indicating "no".

The 2023 Amendment—H.B. 2264 (the "Medication Abortion Reversal" Amendment or "Amendment").

In 2023, the Legislature passed HB 2264 and overrode the Governor's veto, thereby enacting new provisions within the Act "requiring certain notifications that a medication abortion may be reversed," amongst several other changes. Those provisions ***were*** to become effective on July 1, 2023.[5] Specifically, the new provisions:

a. Created a new section 65-6708, which would:

i. Add an additional signage requirement for providers of medication abortions or pharmacies where the medication is provided, requiring them to post a "conspicuous sign that is clearly visible to patients and customers" with legible lettering that is at least ¾ of an inch boldfaced type stating the following message:

> "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."

The law further would mandate that the sign also include information referencing the KDHE 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."

ii. Mandate that, for private offices of freestanding clinics, identical signs (as described above, supra i) be placed in "each waiting room and patient consultation room used by patients seeking medication abortions."[6]

[5] By stipulation, the parties have agreed that the defendant will not seek to enforce any of the provisions of H.B. 2264, until this Court rules on the instant motion. See FOF, 60; Doc. 32, 38.

[6] Hospitals and pharmacies also have additional signage requirements that are similar but distinct in terms of placement; however, given the issues presented, the details pertaining to those locations are less germane to the Court's ruling on this case.

iii. Prohibit performing or attempting to perform a medication abortion using mifepristone, until the expiration of a mandatory minimum 24-hour waiting period expires after the provision of both a mandatory written statement by the physician (except in certain narrow circumstances defined as a "medical emergency")[7] and a mandatory oral (by telephone or in person) statement by the physician that:

> "(A) That 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 (B) information on reversing the effects of a medication abortion that uses mifepristone is available on the department of health and environment's website, required to be maintained under K.S.A. 65–6710, and amendments thereto, and other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion."

iv. Thereafter, further require the physician to provide the same information again in writing to the patient;

v. Require the KDHE to publish "comprehensible materials designed to inform women of the possibility of reversing the effects of a medication abortion that uses mifepristone and resources available for that purpose;

vi. Establish criminal penalties for health-care providers that violate the provisions, including both misdemeanors and felonies;

vii. Establish civil penalties that KDHE shall assess against a health-care provider of $10,000 per day for each day that the requisite signage is not properly posted and that any medication abortion is performed;

viii. Establish a new civil cause of action (a "private attorney general action") that inures to 1) the woman, 2) the alleged father who impregnated the woman, and 3) the parents of either the woman or alleged father, if the woman was not 18 or if the woman died as a result of the medication abortion. The cause of action would allow recovery of "actual damages, exemplary and punitive damages, and any other appropriate relief" as well as "attorney fees and costs" to a prevailing plaintiff. As part of this contemplated cause of action, the identity of the woman patient would, as a default, be public record, and only if the Court expressly finds and explains why the "anonymity of the woman should be preserved from public disclosure" and enters a corresponding order detailing why that anonymity is "essential", how the order is "narrowly tailored to serve that interest, and why "no reasonable less restrictive alternative exists" to the woman's anonymity.

[7] In the circumstances constituting a "medical emergency," the Act requires that the provider shall, if possible, discuss the medical indications that an abortion is necessary to avert the woman's death or that a 24-hour delay would create a serious risk of substantial and irreversible impairment of a major bodily function, excluding psychological or emotional conditions.

ix. Add an additional severability provision for the new sections established therein.

B. Additional Findings of Fact relating to the parties and issues raised herein.

In addition, for purposes of ruling on the instant request for temporary injunctive relief, the Court finds the following facts to be more likely than not to be true, given the record currently before the Court:

1. Plaintiff Traci L. Nauser, M.D. is a board-certified obstetrician-gynecologist (OB/Gyn) that provides a range of obstetrical and gynecological services to patients. Those services include elective abortion procedures (through 21.6 weeks LMP)[8], both medical (through 9 weeks, six days LMP) and surgical in conformity with Kansas law. She acts as an employed physician of Hodes & Nauser, MDs, P.A. ("Hodes & Nauser") d/b/a "Center for Women's Health," which is the professional association that she owns and operates. She is licensed to practice the healing arts in Kansas and brings her claims on both her behalf and on behalf of patients that she treats within the state of Kansas.

2. Hodes & Nauser currently operates its private practice with two physicians (including Dr. Nauser) and one nurse practitioner. Hodes & Nauser treats pregnant patients that have normal pregnancies, as well as higher risk pregnancies (i.e., where the patient has some underlying medical condition that complicates her pregnancy). It also treats patients and provides abortion care for patients in circumstances where the fetus has been previously diagnosed with a severe and/or lethal abnormality. In addition,

[8] For consistency and clarity herein, the Court will refer to timeframes relating to pregnancy as they relate to the date of last menstrual period ("LMP"), which is generally accepted and recognized as the appropriate medical terminology from an obstetrical/gynecological standpoint.

Hodes & Nauser's physicians and employees provide the full spectrum of other obstetrical and gynecological services to its patients.

3. Plaintiff Tristan Fowler, D.O. is an OB/Gyn that also provides a full-range of health-care services in that subspecialty, including the provision of elective abortion procedures, at Hodes & Nauser. He also brings claims both on his own behalf as well as on behalf of patients that he treats within the state of Kansas.

4. Dr. Iman Alsadan, M.D. is a practitioner that is employed by plaintiff Comprehensive Health of Planned Parenthood Great Plains ("Comprehensive Health"), and he, as well as other physicians there, also provides the range of obstetrical and gynecological services to patients in Kansas (including the provision of elective abortion procedures), in his capacity as a physician practitioner and the Chief Medical Officer of Comprehensive Health. He also brings claims both on his own behalf as well as on behalf of patients that he treats within the state of Kansas.

5. Comprehensive Health sues on its own behalf, on behalf of its employed physicians and staff, and on behalf of its patients that are seen within the state of Kansas.

6. The record reflects that there are only four entities/locations where elective abortions are performed in the state of Kansas: Plaintiff Hodes & Nauser, Plaintiff Planned Parenthood Great Plains, Trust Women, and Aria Medical.

7. The Kansas Healing Arts Act authorizes the Kansas Board of Healing Arts ("Board") to exercise its enforcement authority by investigating and taking action against licensees that engage in unlawful and/or "unprofessional" conduct. It does so as part of its statutory duty/mission to protect the public on health-care related issues.

8. The Board fulfills its statutory mission by engaging in robust evaluative and/or investigative activities, once a complaint against a licensee is received.

9. The process for the Board involves detailed evaluation, investigation, internal review, and ultimately hearings, where appropriate.

10. The investigative process, performed by Board investigators, involves records collection, interviews of fact witnesses, amongst other standard investigative processes and tools.

11. Once the investigation by the Board is completed, the complaint proceeds through internal Board review, including by a Board attorney familiar with the statutory processes and professional obligations of a licensee.

12. The internal review process by the Board may also include an internal peer-review process, where it is reviewed by professionals within the subspecialty/practice area at issue.

13. If a complaint is not considered “closed” after a peer-review, then the matter is referred to a Disciplinary Committee for further consideration of appropriate professional discipline, if any, against the licensee.

14. "Unprofessional conduct" under the Kansas Healing Arts Act, and specifically KSA 65-2837, includes, amongst other things:

> --Conduct likely to deceive, defraud or harm the public.
>
> --Making a false or misleading statement regarding the licensee's skill or the efficacy or value of the drug, treatment or remedy prescribed by the licensee or at the licensee's direction in the treatment of any disease or other condition of the body or mind.
>
> --The use of any false, fraudulent or deceptive statement in any document connected with the practice of the healing arts including the intentional falsifying or fraudulent altering of a patient or medical care facility record.

> --Prescribing, dispensing, administering or distributing a prescription drug or substance, including a controlled substance, in an improper or inappropriate manner, or for other than a valid medical purpose, or not in the course of the licensee's professional practice.
>
> --Repeated failure to practice healing arts with that level of care, skill and treatment that is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances.

15. The Board has a variety of enforcement mechanisms and types of disciplinary action, including: limiting, suspending, or revoking a professional licensee's licensure with the State. In the event of revocation, the professional licensee would not be authorized to practice the "healing arts" within the state of Kansas.

16. In short, there is an already-existing (regardless of the Act and/or Amendment) "extensive internal administrative process" to evaluate complaints against all professional licensees of the healing arts, including OB/Gyn physicians, and that process is intended to address matters directly relating to the practice of the "healing arts," including "informed consent" by patients or a purported lack thereof. Those legal obligations and processes have existed for decades—well before the promulgation of the Act or the Amendment.

17. There is no evidence in the record before the Court that professional licensees that provide abortion services to patients within the state of Kansas, or even OB/Gyn physicians more broadly, have historically (or at any time material) failed to provide informed consent to their patients (on abortion or any other care contemplated or provided) either in statistically-significant numbers or in proportionally-greater numbers than other professional licensees under the Healing Arts Act.

18. Nor is there any evidence in the record before the Court that the Board has or had, prior to the enactment of the statutory "informed consent" provisions or any amendments thereto, imposed formal disciplinary action at higher-rates or numbers against abortion providers or OB/Gyn professionals than some other subspecialty or provider subset, as it relates to any asserted failure to provide "informed consent" to their patients, either generally or in the specific instance of a contemplated abortion.

19. The requirements of the statutory "informed consent" provisions (the Act and the Amendment) impose a non-waivable 24-hour waiting period for patients that desire to terminate their pregnancy through an abortion procedure, in the absence of a "medical emergency". In addition, there is a mandatory and non-waivable 30-minute waiting period under the Act immediately preceding the procedure itself and after the physician that is to perform the procedure has personally counseled the patient and offered the patient the opportunity to listen to the fetus' heartbeat and see an ultrasound image of the fetus—regardless of the physician's judgment as to whether such a delay and interaction is in the best interests of his/her patient and regardless of the patient's desires and level of decisional certainty.

20. The requirements of the statutory "informed consent" provisions require the posting in plaintiffs' offices of multiple "conspicuous" signs (as large as 4 feet by 3 feet) communicating specific State-mandated messaging to patients considering abortion in areas of the offices that patients are likely to see this information, regardless of whether those patients are there for abortion-related care or not.

21. A mandatory and non-waivable waiting period of 24 hours has, in many instances, substantially limited (and will likely continue to substantially limit in the future)

plaintiffs' patients' ability to effectively obtain the medical procedure they desire. This delay must be imposed under these provisions, regardless of the patients' level of earlier discussions with health-care providers prior to the inception of the waiting period, the patients' level of certainty with their decision, or any of the specifics of the patient's particular circumstances or needs.

22. Plaintiffs' patients have been denied access to the procedure to terminate their pregnancies due to the mandatory waiting periods or paperwork requirements of the statutory "informed consent" provisions of the Act. The mandatory waiting periods have resulted in delays and rescheduling or, in some instances, complete denial of access to their desired medical care—whether a medication abortion or surgical abortion—due to the mere passage of time required by the mandatory waiting period. Plaintiffs' patients appear to have sustained (and are likely to sustain in the future) serious physical, emotional, financial, social, and logistical hardships as a result of these delays and/or denials, which the Court concludes are likely an infringement on their respective rights—past, current and future.

23. The Court finds that this infringement is likely to continue for future patients in Kansas, including plaintiffs' patients, if the statutory "informed consent" provisions, whether under the Act or the proposed Amendment, are allowed to remain (or go into) in effect.

24. Since the United States Supreme Court's decision last year in *Dobbs v Jackson Women's Health Organization*, 597 US, ---, 142 S.Ct. 2228 (2022), the plaintiffs have seen a significant increase in patients (including out-of-state patients) seeking to access abortion care, many of whom travel from significantly greater distances than

plaintiffs' patients historically did before *Dobbs* reversed the U.S. Supreme Court's prior long-standing holding in *Roe v. Wade*. Indeed, Comprehensive Health has demonstrated that their numbers of patients seeking access to abortion has risen approximately 40% above plaintiffs' pre-*Dobbs* patient numbers for comparable treatment. And for plaintiff Comprehensive Health, approximately 50% of those abortion patients now come from states other than Kansas and Missouri.

25. Nearly 2/3rds of Comprehensive Health's patients seeking abortion care have traveled over 100 miles to access these services since the *Dobbs* decision. This is because of the increasing shortage of OB/Gyn providers in surrounding states throughout the Midwest that are both willing and legally able to provide these types of medical services under their respective state laws. Of that percentage, over 2/3rds are traveling over 250 miles, which is in stark contrast to the pre-*Dobbs* patient data from plaintiff Comprehensive Health.

26. This influx of new patients for the plaintiffs has resulted in a corresponding delay in the plaintiffs' patients' ability to access such care, both for out-of-state patients and for Kansans alike, with appointments generally only available approximately three weeks out (or longer) from scheduling contact.

27. Abortion providers in Kansas, including plaintiffs, have no discretion to exercise any clinical or professional judgment to omit any of the mandated material within the Act or within the Amendment. They are required to provide, in multiple formats at multiple times, the State's mandated messaging under the statutory "informed consent" provisions. This includes not only oral (sometimes in-person) disclosures but also written disclosures of mandatory information generated by the State, which

include a litany of information, including as described in KSA 65-6710. This increases the time providers must set aside for specific abortion patients to individually provide all of this information as well as the administrative burdens on each of them and their staff.

28. There are two methods through which an abortion may be performed: by administration of medication or by procedure.

29. Medication abortion most often involves taking two medications by mouth, a first dose of mifepristone and a second medication, misoprostol, approximately 24-48 hours later (usually buccally), which ends the pregnancy in an experience similar to a miscarriage.

30. These same medications are used to manage a patient's incomplete miscarriage, if that occurs.

31. Medication abortion is very safe; complications occur only in a very small percentage of cases. The more compelling evidence reflects that the risks of such complications associated with a medication abortion is similar in magnitude to the risk of adverse effects of commonly-prescribed medications and other over-the-counter medications (NSAIDs such as Tylenol, etc.). Medication abortion is also highly effective, with an overall rate of pregnancy termination of over 97% in the United States under the protocol described by plaintiffs.

32. Abortion is generally considered by experts in the obstetrical/gynecologic field to be one of the safest types of medical care provided in the United States. In fact, major complications occur in just 0.23% of abortions performed in an outpatient, office-

based setting. That is likely lower risk than other office-based outpatient procedures, like vasectomy (major complications at 0.2 to 0.8% of cases).

33. Statistically, abortion is approximately twelve to thirteen (12-13) times safer for the pregnant woman than carrying a pregnancy to term, in terms of risk of death.

34. Abortion is not uncommonly utilized by women in the United States. Approximately one in every four women in the United States will obtain an abortion during their reproductive lifetime.

35. As of 2021, approximately 60% of women that obtained an abortion in Kansas have already given birth to children when they undergo the procedure.

36. Over 99% of abortions in Kansas (during 2022) were performed in Kansas in the first 21 weeks LMP, with well over 85% of abortions in Kansas occurring during the first 12 weeks of pregnancy.

37. The evidence presented indicates that there generally is not a "bright line" date on which every fetus reaches "viability;" however, the State's affiants suggest that "the edge" of viability is now often 22-23 weeks LMP. Thus, viability (as a general principle) appears unlikely to ordinarily occur prior to the statutory cutoff of 22 weeks LMP.[9]

38. Women seek abortions for a variety of medical, family, economic, and/or personal reasons. Some terminate their pregnancy because they have concluded that it is not the right time to become a parent or to add to their existing family. Others access abortion services because of their existing need to care for the children they already

[9] This statutory prohibition has limited exceptions for the health and safety of the mother after that time.

have. Still others decide to terminate their pregnancy due to an invariably-fatal fetal abnormality that has been diagnosed.

39. The significant majority of women that undergo abortion care in the state of Kansas (over 99% in 2022) obtain that care prior to 22 weeks after last menstrual period (LMP).

40. Indeed, Kansas statutes generally prohibit abortions from being legally performed after 22 weeks LMP, except in very narrow circumstances in which the pregnant woman's life or physical health is at risk. See KSA 65-6723 (2023). Abortions are generally prohibited after "viability" in the state of Kansas, except in those narrow circumstances in which the woman's life or physical health is at risk. KSA 65-6703 (2023).

41. Medication abortions are typically performed, in accordance with generally-accepted professional standards, through 11 weeks LMP.

42. Reducing the very small number of abortion providers in the state of Kansas inevitably results in longer wait times for Kansas women to access these services, and this delay likely increases the relative risks these patients bear—either during the abortion procedure or in continuing a pregnancy until they are able to access the desired services.

43. The risks to the pregnant woman, in terms of both morbidity and mortality, increases with the gestational age of the fetus. In that regard, abortion is a time-sensitive health care service.

44. Pregnancy places significant stress on a human body, causes a variety of physiologic changes to a woman, which impact every organ system. Pregnancy further

exacerbates underlying medical conditions that a pregnant woman may have and can result in the development of other co-morbidities. Delay in accessing abortion services can and does increase the risks of harm to the women.

45. Physicians, including plaintiffs, in accordance with the statutory "informed consent" provisions at issue (whether the Act or the Amendment), have no discretion to exercise any clinical or professional judgment during their conversations with their patients relating to risks and benefits, insofar as it pertains to communication of the State's mandatory messaging required under the provisions.

46. The vast majority of plaintiffs' patients are certain of their decision to seek an abortion by the time they are seen by the plaintiffs at their offices. Indeed, the evidence confirms that by the time a patient sets an appointment for an abortion, that patient has invested significant time, research, discussion, and thought regarding their circumstances and impending decision regarding their pregnancy.

47. Plaintiffs have offered evidence to support their conclusion that many of the mandatory disclosures in either the Act or the Amendment are medically irrelevant, inaccurate, or provide purely ideologic/existential statements that they neither agree with nor believe are necessary and appropriate data points that further the traditional informed consent process established by their professional standards of care, their ethical obligations, and their common law duties.

48. Plaintiffs have indicated that they would likely cease providing medication abortion care to patients in Kansas, if required to comply with the Amendment promulgated earlier this year, as they believe that the Amendment's requirements create ethical and legal dilemmas for them.

49. Plaintiffs strenuously object to any mandatory requirement that they communicate the State-mandated message contained in the Act and the Amendment and would likely not provide some or all of these disclosures, absent a statutory mandate, as they perceive much of the information as medically irrelevant, inaccurate (in parts), and potentially detrimental to the patient, depending on the needs of that individual patient.

50. In addition, the plaintiffs have demonstrated that they likely sustain significant burdens on themselves, individually and as a health-care providing institution, due to the increased amount of time and resources necessary for plaintiffs and their staff to comply with the Act's mandatory disclosure requirements, while correspondingly, these requirements often result in confusion, frustration, and distress sustained by their patients in understanding why these mandatory waiting periods and repetitive disclosures are being provided by their health care providers at the State's insistence. Indeed, plaintiffs have indicated that they could likely see significantly more patients and provide care more expeditiously, absent the mandates imposed by the current Act.

51. As part of plaintiffs' typical and traditional informed consent process relating to abortion (as well as more generally), the provider plaintiffs each talk with their patients regarding their diagnosis, the nature of the treatment and the risks/benefits, what they should expect both during and after the treatment, along with other options. This is generally based upon professional standards of care, as established by respected national accrediting organizations, such as ACOG (American College of Obstetrics & Gynecology). This process is universally tailored to the patients'

specific needs, to ensure that the patient fully understands the risks, benefits, and alternatives.

52. There is no credible scientific/medical evidence that the "reversal" therapy proposed in the Amendment actually "reverses" the effects of mifepristone. Indeed, the overwhelming weight of credible evidence, given this record, suggests that such a theory is misleading, untested, potentially-dangerous for women, and speculative.

53. The State's affiants' testimony and explanation of the "reversal" therapy and the limited case studies proffered, to the extent that they claim "reversal" therapy is tested, safe, and therapeutic, are not credible or grounded in established and appropriately peer-reviewed and validated science.

54. The only randomized controlled study of the effect of progesterone after patients begin a medication abortion by taking mifepristone (a.k.a. "reversal" therapy) was halted by the researchers due to several patients manifesting serious adverse impacts from the study protocol.

55. The general consensus within the mainstream medical community, at this time, is that a fetus cannot experience "pain" prior to 24 weeks LMP at the earliest—and probably not until at least 28 weeks LMP.

56. The weight of credible evidence reflects that nociception is not "pain" as understood in the medical and/or scientific community. The concepts of "pain" and "nociception" are neither medically synonymous nor equivalent.

57. There is no credible evidence in the record that abortion increases the risk of preterm delivery or labor, and the overwhelming weight of authority demonstrates that this is unlikely to be true or accurate. Indeed, the National Academies of Sciences,

Engineering, and Medicine has actively reviewed these issues, and their current position is that abortion does not increase such risks. Other major medical organizations concur with these conclusions, which are the current mainstream medical consensus.

58. There is no credible evidence in the record that abortion increases the risk of breast cancer, and the overwhelming weight of authority demonstrates that this is unlikely to be true or accurate. the National Cancer Institute and the National Academies of Sciences, Engineering, and Medicine have actively reviewed these issues, and their current position is that abortion does not increase such risks. Other major medical organizations concur with these conclusions, which are the current mainstream medical consensus.

59. Plaintiffs have proffered credible evidence that many (potentially 30-40%) of the disclosures required by the Act (as described in KSA 65-6710) are "medically inaccurate" and inconsistent with generally accepted science of embryonic and/or fetal development.

60. The parties previously stipulated that the defendants, including their officers, agents, servants, employees, successors, and all other persons in concert or participation with them, have agreed not to enforce the Amendment in any manner, prior to this Court ruling on the pending Motion for a Temporary Injunction. See Doc. 32, 38.

III. Legal Analysis

A. Plaintiffs' standing to bring this action.

The State has challenged plaintiffs legal standing to prosecute the asserted claims for declaratory and injunctive relief. The plaintiffs in this case seek to assert claims for declaratory

judgment and injunctive relief under Kansas law, both on their own behalf and on behalf of their current and future patients. See Amended Petition. Plaintiffs contend that the Act (K.S.A. 65-6708 to -6715), as well as a new enactment that was slated to take effect on July 1, 2023 (H.B. 2264) (hereinafter sometimes collectively referred to as the "statutory 'informed consent' provisions"), are unconstitutional—for a variety of reasons. Specifically, they claim that these statutory "informed consent" provisions violate their patients' fundamental rights to bodily autonomy guaranteed under the Kansas Constitution, Bill of Rights, § 1; that they violate the plaintiffs' own fundamental rights to "freedom of speech" enshrined in Section 11 of the Kansas Constitution's Bill of Rights and unlawfully interfere with and invade the physician-patient relationship; that they violate their patients' rights to equal protection under law, which is guaranteed under Section 1 of the Kansas Constitution's Bill of Rights; and that they violate their own rights, as health-care providers, under Section 10 of the Kansas Constitution's Bill of Rights because they are unconstitutionally vague and unenforceable and fail to provide meaningful notice as to what is required to avoid the various enforcement mechanisms contemplated by these statutory "informed consent" provisions. See Amended Petition [Doc. 35]; Plaintiffs' Motion for Temporary Injunction and Brief in Support [Doc. 3 & 4].

For an actual controversy to exist, a party plaintiff must have standing to commence an action. Standing "means the party must have a personal stake in the outcome." *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). Standing is a component of subject-matter jurisdiction. *Id.* It presents a question of law and can be raised at any time. *Id.* at 673. Our Supreme Court has called standing "'one of the most amorphous concepts in the entire domain of public law.'" *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 750, 189 P.3d 494 (2008).

Kansas courts use a two-part standing test. *League of Women Voters of Kansas v. Schwab*, 63 Kan.App.2d 187, 200 (2023)(citing *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 680, 359 P.3d 33 (2015)). To demonstrate standing, a party "'must show a cognizable injury and establish a causal connection between the injury and the challenged conduct.'" *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. *League of Women Voters of Kansas*, supra at 200.

Each element of standing "must be proved in the same way as any other matter and with the degree of evidence required at the successive stages of the litigation." 298 Kan. at 1123. When standing is determined without an evidentiary hearing, the court must resolve factual disputes in the plaintiffs' favor and plaintiffs need only make a *prima facie* showing of jurisdiction. See *Id.*; see also *KNEA v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017).

Kansas appellate courts have also long recognized that organizations, associations, or entities may properly assert standing to sue for non-parties/third-parties, where there is a sufficient nexus between the entity and those whose rights/claims it seeks to vindicate. See e.g. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 680, 359 P.3d 33 (2015)(holding that trade associations had independent standing to commence claims on behalf of members that had claims, on an individual basis, even where the individuals were not required to grant complete relief). Similarly, in constitutional-challenge cases, the Kansas appellate courts have also recognized that entities may assert third-party rights of customers. *City of Wichita v. Wallace*, 246 Kan. 253, 267, 788 P.2d 270 (1990)(finding business had standing to assert freedom of speech constitutional challenges for its customers); *State v. Neighbors,* 21 Kan.App.2d 824, 829, 908 P.2d 649 (1995)(same); *DPR, Inc. v. City of Pittsburg*, 24 Kan. App.

2d 703, 707, 953 P.2d 231, 236 (1998)(same; holding that plaintiff [business] "does have standing to raise issues involving the rights of third parties" in its constitutional challenge to a city ordinance).

In the context of medical procedures/services, such as in the instant case, the United States Supreme Court has also consistently held that medical providers (such as those that provide abortion services) have standing to assert the constitutional rights of their patients.[10] *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (2020)(noting that "[w]e have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations.")(citations omitted)(abrogated on other grounds). Generally, plaintiffs may assert third-party rights in cases where the enforcement of a challenged restriction against the litigant would indirectly cause a violation of third-party rights. *Id.*; see also *Singleton v Wulff,* 428 U.S. 106, 117 (1976)(holding that "the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against," a woman's medical decision making regarding the termination of pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 445-46, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)).

While the Kansas Court of Appeals did not squarely address this specific issue in recent related medication-abortion litigation between the State and another abortion provider, it noted that the medical-clinic plaintiff in that case had standing to bring claims to challenge the constitutionality of certain abortion-related statutes because it showed that both it ***and its patients*** were likely to suffer cognizable "harm" from enforcement of the statute. See *Trust*

[10] Although this federal precedent is not strictly binding on this Court's decisions regarding purely state law issues, the Court nonetheless finds the general analysis and conclusions persuasive at it relates to the similar issue of standing to assert state-law constitutional claims in this matter.

Women Foundation, Inc. v Bennett, 509 P.3d 599, No. 121,693 at 10-11, 13 (Kan. App., May 20, 2022)(unpublished).[11] More importantly, and as the State appropriately acknowledges, the Kansas Supreme Court has previously held, albeit in a slightly different context, that physicians may assert constitutional rights held by their patients. See *Alpha Medical Clinic v Anderson*, 280 Kan. 903, 921, 128 P.3d 364 (Kan. 2006)(citing *Singleton v. Wulff*, 428 U.S. 106, 117, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (physician had standing to assert rights of patients seeking abortions; patient "may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit")).

As it relates to standing, the Court finds the State's references to the *Dobbs* decision and various dicta contained therein to be unpersuasive, non-binding, and contrary to the controlling precedent from our state's highest court on a state-law standing issue. Equally unavailing is the State's arguments that some perceived financial conflict between a health-care provider and its patients somehow belies the "closeness" of the relationship between a doctor and a patient, such that this Court should disregard *Alpha Medical* and preclude third-party standing in matters such as this.

In this case, the Court concludes that the plaintiffs have adequately demonstrated (more likely than not) sufficient legal standing to bring these claims against the State—both in their

[11] Of additional import to the Court, the Court notes that the Kansas Court of Appeals as well as the Supreme Court both considered and adjudicated other similarly-situated cases, without finding the plaintiff providers lacked standing to bring claims on behalf of their patients, as well as in their own right. See *Hodes & Nauser MDs, P.A. v Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019); *Hodes & Nauser MDs, P.A. v Schmidt*, 52 Kan.App. 2d 274, 368 P.3d 667 (2016). The Court also takes judicial notice of *Hodes & Nauser MDs, P.A. v Norman*, 2021 WL 7906942 (Shawnee County District Court Memorandum Decision of December 3, 2021). In that matter (also litigating the constitutionality of various abortion-related statutes and regulations), it appears that the State likewise attempted to raise the issue of standing of the plaintiff providers to bring claims for their patients; however, those arguments were soundly rejected by the District Court there, particularly in light of the State's apparent stipulation that the plaintiff providers had "standing to challenge the Act and Regulations on behalf of themselves and their patients." The Court does not find this admission necessarily dispositive of the State's argument and will, nonetheless, address the merits; however, the Court concludes that principles of judicial estoppel weigh heavily against the propriety of the State's instant arguments on this point as well. Regardless, the Court (as discussed below) concludes that plaintiffs have adequately demonstrated standing—both in their own right and on behalf of their respective patients.

own right and on behalf of their patients, whose fundamental rights are potentially implicated and impaired by the statutory schemes at issue. First, the Court agrees that obstetrical/gynecologic physicians that perform abortions, in this context, are uniquely positioned and qualified to litigate the constitutionality of the State's actions at issue in these statutory "informed consent" provisions and any constitutional implications of the State's alleged interference with, or discrimination against, a woman's fundamental right to bodily autonomy (including the right to abortion). Enforcement of the challenged statutory schemes involved here would likely result in violation of the third-party patients' fundamental rights (as discussed below), in that the additional delays and mandatory waiting periods (as well as injection of myriad State-mandated discussions/notices that dilute and/or obstruct truly informed consent by these patients) certainly interfere with the free exercise of the patient's fundamental rights (through delayed and/or reduced/eliminated access to the services the patient seeks and desires and through impairment of the right to make any decision relating to that fundamental right in the private context of appropriate informed discussions with her provider, as required by the requisite standard of care in that subspecialty). Thus, plaintiffs have valid legal standing to pursue their claims on behalf of their patients.

Additionally, the Court concludes that the plaintiffs have adequately demonstrated that they have sufficient standing, even in their own right, to assert the claims at issue. Plaintiffs assert and have proffered evidence that these statutory mandates result (or would result, if allowed to become effective) in delay, patient confusion, and needless expenditure of the providers own time and resources, which would take away from their otherwise available patient-care time and work as a health-care provider. See Findings of Fact ("FOF"), 50. Moreover, plaintiffs have shown that the statutory scheme compels them to provide information

(both verbal and written) that the State deems desirable in the context of what is otherwise a private and personal medical decision by a patient, even where the health-care providers firmly believe that the State's message is improper, inaccurate (in many respects), counterproductive to both their patients' interests and their informed consent obligations under the common law and prevailing professional standards, and unethical. FOF 44-46. In doing so, they assert that the statutory scheme violates their "free speech" rights codified in Section 11 of the Kansas Constitution's Bill of Rights, which is a right they, as health-care providers, independently hold.

Further, they contend that compliance with both the State-mandated messages involved herein and what they understand the applicable standard of care to be (as it relates to informed consent) would be essentially impossible and would subject them to potential discipline by the Kansas Board of Healing Arts for "unprofessional conduct." See *Trust Women Foundation, Inc*, supra at 11 (finding that the plaintiff entity had standing to bring claims based upon *the risks of potential* professional discipline by the Board of Healing Arts to its employed/agent physicians). Faced with these risks, plaintiffs submit that they may not be able to continue providing abortion care (at least with respect to medication abortions), which implicates their business operations, as well as patient care and the corresponding rights of their patients—including their fundamental rights to bodily autonomy prescribed by the Kansas Constitution. The Kansas Court of Appeals has concluded that:

> "If Trust Women does not have physicians because the Board suspends or revokes the physicians' licenses for engaging in telemedicine medication abortions as prohibited by K.S.A. 65-4a10, then Trust Women cannot offer telemedicine medication abortion services. As discussed above, this particularly harms Trust Women and its patients by reducing access to and delaying abortions."

Id. (concluding that *the potential threat of professional discipline* is sufficient to confer standing, even pre-enforcement). In short, plaintiffs have adequately demonstrated that they have standing

to assert the claims at issue, both on behalf of their current and anticipated patients and on their own behalf. The State's arguments to the contrary are unpersuasive and rejected. These plaintiffs have legal standing to sue in this matter.

B. Plaintiffs' request for a Temporary Injunction of the Statutory "informed consent" provisions.

Plaintiffs' have requested a Temporary Injunction seeking to enjoin the State from enforcing either the existing statutes within the Act or H.B. 2264 ("Medication Abortion Reversal Amendment" or "Amendment"), which was to take effect on July 1, 2023 and was intended to supplement the Act's provisions.[12] Thus, the Court turns to the applicable law regarding issuance of a temporary injunction.

Under Kansas law, five factors are necessary for issuing a temporary injunction: (1) a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability of suffering irreparable future injury; (3) the lack of obtaining an adequate remedy at law; (4) the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; (5) and the impact of issuing the injunction will not be adverse to the public interest. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709, 713 (2012)(citing *Steffes v City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843 (2007)); accord *Hodes & Nauser, MDs, P.A. v. Schmidt*, et al, 309 Kan. 610, 619, 440 P.3d 461 (Kan. 2019). The moving party generally bears the burden of proof to demonstrate a prima facie case showing "reasonable probability" of success on the merits, as well as that he/she will suffer irreparable injury, absent a temporary injunction. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 461, 726 P.2d 287, 289–90 (1986)

[12] Since the filing of this action, the parties stipulated that the defendants would not enforce the provisions of H.B. 2264 in any manner against any person, until the Court rules. Thus, this portion of the law has not, as a practical matter become effective. See FOF, 60.

An injunction is an equitable remedy and its grant or denial in each case is governed by principles of equity. *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, Syl. ¶ 1, 689 P.2d 860 (1984). The purpose of a temporary or preliminary injunction is not to determine any controverted right, but to prevent injury to a claimed right pending a final determination of the controversy on its merits. *Wichita Wire, Inc. v. Lenox*, supra at 290.

1. Are plaintiffs substantially likely to prevail on the merits of their claims with respect to the statutory "informed consent" provisions of the Act and the Medication Abortion Reversal Amendment to the Act?

In evaluating this first element necessary to obtain a temporary injunction, the Court must evaluate the plaintiffs' claims and the components of such claims to address the "likelihood of success" on such claims. While there are myriad open and unanswered legal questions under existing case-law authority in Kansas on the issues raised herein, this Court does not start with a blank slate. The Kansas Supreme Court's prior decision in *Hodes & Nauser MDs, P.A. v Schmidt*, 309 Kan. 610, 663 (2019) ("*Hodes*"), necessarily guides this Court on many of the issues presented. However, *Hodes* does not address the entirety of the necessary framework, given plaintiffs' claims, which also implicate other provisions of the Kansas Constitution not raised in that case. Moreover, the Court believes, at least for purposes of a temporary injunction, that analyzing the original Act separately from the Medication Abortion Reversal Amendment provisions is both necessary and appropriate, given the slightly different posture for those statutory mandates—one of which has yet to go into effect.[13]

[13] The State does not attempt to separate its analysis between existing law (the Act) and newly-promulgated Amendment provisions, instead generally arguing that the "Woman's-Right-to-Know Act," including the Medication Abortion Reversal Amendment, is a unified regulatory scheme that passes constitutional muster. As such, it describes the purported governmental interests generically and collectively and does not distinguish between the existing provisions and the new Amendment, which deals with one specific aspect and type of abortion care. The Court concludes that it is necessary to address these issues separately, given the slightly-different posture and issues presented. Consequently, the Court will address, to the extent necessary, each of these asserted interests independently for both the existing Act and the new Amendment.

a. Analytic framework for constitutional review of statutory enactments.

Kansas appellate courts have approved the use of a three-tiered approach or set of standards when evaluating the constitutionality of a governmental restriction on an individual's rights. Namely, there is:

> "(1) the rational basis standard, which requires only that the legislative enactment bear some rational relationship to a legitimate state interest; (2) the heightened or intermediate scrutiny standard, which requires the enactment to substantially further an important state interest; and (3) the strict scrutiny standard, which requires the enactment serve some compelling state interest and be narrowly tailored to further that interest."

Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 663 (2019). The determination of which of the three standards applies depends on the nature of the right at stake and the individuals involved. *Id.* (citing *Farley*, 241 Kan. at 669, 740 P.2d 1058).

Notably, the general default rule is that "[a] statute comes before the court cloaked in a presumption of constitutionality and it is the duty of the one attacking the statute to sustain the burden of proof." *Hodes & Nauser*, supra at 673 (citing *Liggett*, 223 Kan. at 616, 576 P.2d 221). When a statute is presumed constitutional, "all doubts must be resolved in favor of its validity. If there is any reasonable way to construe that statute as constitutionally valid, this court has the authority and duty to do so." *Miller v. Johnson*, 295 Kan. 636, 646-47, 289 P.3d 1098 (2012).

However, a far more demanding burden falls upon the State in cases involving suspect classifications or fundamental rights. *Hodes & Nauser*, supra at 673. In such circumstances, **the trial court must**:

> "***peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny***."

Id. (citing *Liggett*, 223 Kan. at 617, 576 P.2d 221)(emphasis added). In such a case, "the burden of proof is shifted from plaintiff to defendant/State and the ordinary presumption of validity of

the statute is reversed." *Id.*; *Farley*, 241 Kan. at 670, 740 P.2d 1058. This burden shift stems from the recognition that government infringement of a fundamental right is inherently suspect. *Hodes & Nauser*, supra at 673. Moreover, in such a burden-shifted analysis, the trial court must engage in a "searching judicial inquiry" as a method to "smoke out 'illegitimate' governmental action by ensuring that the state is pursuing a specific goal "important enough to warrant use of a highly suspect tool." *Id.* at 673-74 (citations omitted).

b. The *Hodes* decision requires application of strict scrutiny of State regulation that infringes on a fundamental right protected by Section 1 of the Kansas Constitution's Bill of Rights.

Section 1 of the Kansas Constitution's Bill of Rights, which was enacted and ratified in 1859, provides:

> "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."

Equal rights, KS CONST B. of R. § 1. Significantly, this language varies from the language of the Fourteenth Amendment to the United States Constitution, which had historically (prior to the *Hodes* decision) been thought by Kansas appellate courts to be coextensive with the protections and analysis required in Kansas.

In 2019, the Kansas Supreme Court announced its ruling in *Hodes & Nauser MDs, P.A. v Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), in which it recognized the fundamental natural right to personal/bodily autonomy that inures to all Kansans and those within its borders. It concluded that the right to control one's own body, to assert bodily integrity, and to exercise self-determination was fundamental and protected under Section 1 of the Kansas Constitution's Bill of Rights. *Id.* at 660, 680. This right is separate, distinct, and broader than the protections contemplated under the United States' Constitution. The Court, in *Hodes,* concluded that a

woman's fundamental right to such bodily autonomy, equal to that of a man's, included the ability to make her own decisions regarding her body, health, family formation, and family life—including the right to either continue or terminate a pregnancy.[14] *Id.*

Consequently, Kansas law requires that this Court apply strict scrutiny to any state law or regulation that infringes upon a woman's right to terminate a pregnancy. *Id.* ***Any*** infringement, i.e., one "regardless of degree," leads to a presumption that the government's action is unconstitutional. *Id.* at 669. The State may not infringe upon such a right, unless the State demonstrates a "compelling governmental interest" that is, in fact, advanced by regulation and that is "narrowly tailored" to achieve that interest. *Id.* In that regard, a "compelling interest" is one that is "'not only extremely weighty, possibly urgent, but also rare-much rarer than merely legitimate interests and rarer too than important interests.'" *Id.* at 663 (citation omitted).

In light of the various levels of constitutional scrutiny that have been established by prior Kansas precedent, an analysis of what differentiates "legitimate" interests from "important" or "compelling" ones is necessary and appropriate. In the Court's view, and particularly with respect to the issue of a woman's right to bodily autonomy (including the right to proceed with or terminate a pregnancy), where an asserted State interest falls along the spectrum of legitimacy and/or importance for constitutional purposes (i.e. illegitimate, legitimate but unimportant, important, or compelling) generally involves a consideration of both the nature and timing of the

[14] The State contends it is "unclear" on the status of Kansas law and appears to question whether the Kansas Supreme Court's decision in *Hodes* remains "good law" after the United States Supreme Court issued its decision in 2022 regarding *Dobbs v Jackson Women's Health Org*. See State's Response in Opposition ("Response"), pg. 10. However, such arguments are specious. A federal decision interpreting the United States Constitution in no way impacts a decision from this state's highest court on the interpretation of its own state Constitution when the provisions are not identical or even substantially similar. Indeed, part of the prior *Hodes* decision's rationale was that the Kansas Constitution provides further and distinct protections from those contemplated pre-*Dobbs* under the Fourteenth Amendment to the US Constitution. Thus, the State's lack of clarity on this issue is both puzzling and concerning. Regardless, this Court is duty bound to follow what it believes to be binding applicable precedent from its superior appellate courts on this purely state-law issue.

State's action/regulatory effort, in the context of the facts and surrounding circumstances. See e.g. *Roe v Wade*, 410 U.S. 113, 159-163, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973)(noting that at some point in time, a woman's privacy right is no longer sole and that the right must be balanced in light of circumstances at that juncture); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 448, 103 S. Ct. 2481, 2502, 76 L. Ed. 2d 687 (1983)(evaluating state's claimed interests in light of relevant stage/progress of pregnancy to determine whether the scheme passes constitutional scrutiny)(overruled by *Planned Parenthood of SE Penn. v. Casey*, 505 U.S.833, 112 S.Ct. 2791, 120 L.Ed. 2d 674 (1992)); *A C.L.U. of Kansas & W. Missouri v. Praeger*, 863 F. Supp. 2d 1125, 1131 (D. Kan. 2012)(framing analysis using stage of pregnancy to assess constitutional permissibility of state statutes governing abortion).[15] Thus, a particular asserted interest may be legitimate, or even important, at one point in time but become more or less important (even rising to the rare "compelling" interest) at some other point along the relevant timeline. See *Roe,* supra.

c. The Court must apply strict scrutiny because plaintiffs have demonstrated a likely infringement of their rights under Section 1 of the Kansas Constitution Bill of Rights, as it relates to the statutory "Informed Consent" provisions.

In light of the record, the Court is compelled to apply a strict scrutiny analysis because both the Act and the Amendment unquestionably infringe upon a woman's right to bodily autonomy, which necessarily involves plaintiffs and their patients. As described, the Act and the Amendment both interpose substantial "roadblocks" to the free exercise by a woman of her right

[15] In citing to *Roe* and its progeny, the Court merely intends to note what appears to be an appropriate analysis of evaluating a State-asserted interest, in the specific context of abortion/bodily autonomy decisions. The ultimate conclusions in those cases, as well as the legal framework applied under the U.S. Constitution are less relevant to this matter, although the Court certainly considers the pre-*Casey* analysis as potentially-insightful authority relevant to the instant review. In that regard, our Supreme Court in *Hodes* expressly rejected the analysis adopted by the U.S. Supreme Court in *Casey*, as being "less rigorous" than what is required by Section 1 of the Kansas Constitution. See *Hodes*, supra at 665.

to bodily autonomy in the context of terminating a pregnancy. First, the Act's provisions require a mandatory 24-hour waiting period after a detailed disclosure of State-directed messaging[16] before allowing a woman to proceed with terminating the pregnancy—regardless of the level of the woman's prior education, deliberation, or decision-making relating to that choice. There are no exceptions to this delay; nor will the current record support any demonstrated compelling rationale for such a delay. A second level of non-discretionary delay then occurs when a patient is subsequently required to wait out at least a mandatory thirty (30) minute hold, so she can meet privately with ***the specific physician that is to provide the abortion procedure*** (whether medication or surgical) to ask questions and receive answers "in her own language." Relatedly, prior to the commencement of the 30-minute minimum hold, the patient must be informed of her right to obtain an ultrasound image of the fetus (if ultrasound technology is to be used prior to or during the procedure) and her right to listen to the fetal heartbeat (if ultrasound or other heart monitoring is used), regardless of whether the woman's provider believes, in his/her professional judgment, that such disclosure and delay is medically necessary or appropriate under the circumstances and regardless of the patient's desires. Of similar import (and as further described in greater detail below, relating to the Court's analysis of Section 11 of the Kansas Constitution Bill of Rights), the Court concludes that the Act, by "wedging" its way into the physician-patient relationship in this narrow circumstance, infringes on a woman's fundamental right to bodily autonomy (as well as the provider's separate rights to "free speech"), which necessarily involves the private, intensely-personal, and fact-driven decision-making/consent process. This infringement manifests itself, given the current record, by impairing and materially interfering

[16] Indeed, the State-mandated pamphlet viewable on the KDHE website as of the date this matter was argued (August 10, 2023) contained over thirty (30) pages of materials that must be provided to any patient seeking to terminate her pregnancy in Kansas. See KSA 65-6709 (2023). This is in addition to various other disclosure items that must also be provided both orally and in writing to such patients.

with that consent process and the right to independently consider the germane, accurate, medical information with the assistance of a trusted health care professional and without State interference. Insofar as the injected State-sponsored messaging of the Act necessarily: invades that physician-patient relationship; imposes, without exception, obligations beyond those required (in the physician's professional judgment) under the circumstances; and places a figurative "thumb" on the decision-making scale by advocating for the State's preferred message and outcome, it infringes on the woman's right to make that private decision with her health-care provider without unwarranted delay or interference.[17] For all of these reasons, the Act appears to likely infringe upon a woman's fundamental natural right to bodily autonomy.

Significantly, in cases involving abortion-related medical services in Kansas, time is often a critical factor that impacts a woman's right to exercise her fundamental rights. Medication abortions are only generally authorized under the standard of care up through the eleventh week LMP. FOF 41. Procedural abortions can only be obtained through viability,[18] with a default time limit for obtaining an abortion (in most circumstances) contemplated at 22 weeks LMP. See FOF, 37; KSA 65-6723 (2023). In fact, the record before the Court reflects that over 99% of abortions in Kansas (during 2022) were performed in Kansas in the first 21 weeks LMP, with well over 85% during the first 12 weeks. FOF, 36, 39; see also

[17] The *Hodes* Court noted, with apparent approval, the proposition that the right to bodily autonomy necessarily involves "the right to shape for oneself, without unwarranted governmental intrusion, one's identity, destiny, and place in the world" and "make their own decisions regarding her body, health, family formation, and family life". *Hodes*, supra at 484, 502.

[18] "Viability," as defined in Kansas statutes is "that stage of fetal development ***when it is the physician's judgment according to accepted obstetrical or neonatal standards of care and practice applied by physicians in the same or similar circumstances*** that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measures." KSA 65-6701(m)(2023)(emphasis added). The record reflects conflicting evidence on when that status is likely to occur, which is probably why such a determination in a particular case is ultimately left up to the medical judgment of the practitioner. However, the more persuasive evidence appears to reveal that the medical consensus is that viability generally is less likely to be reached before the statutory "cutoff" for abortions in Kansas—22 weeks LMP. See FOF, 37.

https://www.kdhe.ks.gov/DocumentCenter/View/29328/KS-Abortions-2022-PDF (Abortions in Kansas, 2022)(preliminary report).[19] Delays, such as those contemplated by the Act, increase the costs, logistics, and risks to the pregnant woman seeking to avail herself of her fundamental rights, and likely decrease or eliminate access to these services by pregnant women, such as plaintiffs' patients. FOF 22-26, 47. Thus, time is of the essence in many cases—particularly where a woman may have just learned relevant information (the fact of pregnancy, fetal diagnosis, maternal health risks, etc.). Correspondingly, delays (accompanied by voluminous government-mandated disclosures injected into that self-determinative process), such as those mandated by the Act, are therefore likely to result in actual infringement of patients' rights. See FOF, 22-26. In sum, the Court concludes that the plaintiffs have demonstrated that the Act likely infringes upon a woman's fundamental natural right to bodily autonomy, including the right to terminate her pregnancy, if she so chooses. Thus, strict scrutiny must be applied to the Act.

Likewise, the plaintiffs have also demonstrated that the Amendment is likely to infringe upon the fundamental right to bodily autonomy held by their patients that seek abortions in Kansas. Much like the Act's provisions, the Amendment also imposes a mandatory 24-hour waiting period after receiving (both orally by the physician to perform the medication abortion and in writing) the State-mandated messaging on the availability of a "reversal" therapy. However, the Amendment goes even further by also expressly enacting and authorizing criminal penalties, mandatory statutory monetary penalties, and potential professional discipline by the Board of Healing Arts on all physicians that violate the Amendment's dictates and by creating a new civil cause of action that, in effect, publicly "outs" the identity of a woman that has had a medication abortion—absent the Court finding and explaining: why anonymity should be

[19] The Court has also taken judicial notice of the respective websites of the KDHE (Woman's-Right-to-Know data and annual abortion reports) and the Kansas BHA and the content displayed therein.

provided to her, that anonymity is "essential," and that the Court's order is drafted such that it is "narrowly tailored" and no "reasonable less restrictive alternative [to privacy and anonymity] exists." See HB 2264, Section 1(f), (g), (h), and (i)(2023). In doing so, it impermissibly infringes on women's fundamental rights to decide matters regarding her body without public scrutiny and in contravention of any messaging prescribed by the sovereign.[20] Consequently, much like the Act, the Amendment likely also infringes upon a woman's fundamental right to bodily autonomy for the same reasons as this Court concludes the Act likely does. In short, strict scrutiny must be applied both to the Act and the proposed Amendment.

d. The statutory "Informed Consent" provisions are unlikely to survive a strict scrutiny review, and thus, they are likely to prevail on the merits of their constitutional claims under Section 1.

i. Application of Strict Scrutiny to the Act.

Plaintiffs appear likely to succeed on the merits of their constitutional claims under Section 1 of the Kansas Constitution Bill of Rights, as it relates to the Act, because the State has not demonstrated, based upon the current record, that the Act is likely to survive strict scrutiny.

The State asserts essentially four purported interests that it claims underlie (and are served by) the Act generally, including the Amendment: 1) protecting potential life, 2) protecting "maternal health," 3) regulation of the medical profession through what it argues is reasonable regulation of licensees' conduct, and 4) prevention of fetal pain. See State's Response, pg. 5. In the context of the statutory "informed consent" provisions, the State has not demonstrated that

[20] See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766, 106 S. Ct. 2169, 2182, 90 L. Ed. 2d 779 (1986), overruled by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)(noting that a woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly.)(citing Stevens in concurrence). Measures such as those promulgated by this Amendment appear likely to "chill" the patients' exercise of their rights, for fear of involuntary disclosure of their identity in documents submitted in public court filings.

any of these proffered interests rise to the level of a "compelling" interest to which the statutory scheme is narrowly tailored to effectuate that interest and, in fact, furthers the interest.[21]

a. Mandating "informed consent" content as part of professional regulation.

As an initial matter, the Act was (and is) entitled the "Woman's-Right-to-Know" Act, and in most respects, the text, context, and legislative history (albeit sparce) suggests that the primary stated "interest" sought to be furthered in promulgating the Act over the years was adequate "informed consent," to ensure that women had "sufficient" information to make a decision regarding an abortion. As such, the Court will address this asserted interest first. This interest appears to correspond to the State's claimed interest in regulation of the medical profession, as it pertains to the requisite "informed consent" process required of all physicians by physician ethics, common law, and, indirectly, by statute under the Healing Arts Act.

This Court has little doubt that the State has a legitimate and, likely, important ***generalized*** interest in regulating professional standards for licensees of the healing arts to ensure adequate patient care, which includes appropriate discussions to "inform" patients on the care they receive. However, does that interest, in the instant case and for purposes of a request for a temporary injunction, rise to the level of a "compelling" interest under the circumstances, so that it justifies the extensive mandated disclosures for a singular aspect of health care provided by a very small number of licensed providers who actually perform the procedure? The current record before the Court demonstrates that it likely does not.

[21] The State argues that "strict scrutiny" is inapplicable to the issues presented and that the Court need only find that its interests are "legitimate" and that the statutory scheme is "rationally related" to effectuate those interests. State's Response, pg. 11-12. Indeed, most of its arguments, along with the sworn statements it has submitted to support its opposition to temporary injunctive relief, speak primarily in terms of "legitimate" or "valid" interests. However, the Court believes that Kansas law demands the application of "strict scrutiny" to the case at bar, and thus, it rejects the State's arguments that seek to employ a lesser standard—in contravention of the clear mandate of *Hodes*.

Informed consent, as contemplated under Kansas law, arises from an initial premise, as the Supreme Court in *Hodes* noted, of:

> "thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment."

Natanson v. Kline, 186 Kan. 393, 406-07 (1960);[22] see also *Hodes* at 643. Towards that end, Kansas law has long held that "informed consent" does *not* require a disclosure of all risks of a contemplated therapy or medical procedure, no matter how remote or tangential, but rather those disclosures that a "reasonable medical practitioner would make under the same or similar circumstances." *Natanson*, supra at 409-410; see also *Collins v. Meeker*, 198 Kan. 390, 397 (1967). In other words, "informed consent" requires the disclosure of "material" information, as deemed appropriate by a reasonable practitioner exercising his/her own professional judgment. See *Id.*; see also *Acuna v. Turkish*, 930 A.2d 416, 428 (N.J. 2007)(holding that informed consent required practitioners "to provide their pregnant patients seeking an abortion only with ***material medical*** information"). Kansas law has never required (of any practitioner or subspecialty) disclosure of "any and all results which might possibly follow a medical or surgical procedure." See *Tatro v. Lueken*, 212 Kan. 606, 616 (1973). Invariably, informed consent by a medical professional involves primarily a question of medical judgment by the provider. *Natanson*, supra 409-410.

Given this backdrop and these generally-applicable principles already imposed upon the medical community within the state of Kansas, the question becomes: has the State demonstrated

[22] Kansas was on the forefront of "informed consent" law, as developed through common law, starting with *Natanson*. While the nuances and specifics have been further flushed out since *Natanson*, the general principles and requirements have remained consistent for decades now. Obviously, the general principles, much like fundamental rights, apply with equal force to both men and women. See *Hodes,* supra, at 645-650.

that the Act was motivated by and furthers an interest that is "compelling" in a "narrowly-tailored" way?

At this juncture, the State has not met its burden. There is no competent evidence that pregnant women were (or are) making decisions about proceeding with or terminating their pregnancy without the truly material medical information relating to the risks, benefits, alternatives, and likely outcomes of having an abortion (See FOF, 17-18); in fact, plaintiffs have submitted evidence that they provide necessary and appropriate information, as prescribed by the well-established applicable standard of care within their subspecialty. See FOF, 51. Nor is there record evidence to support an assertion that the information mandated by the Act is likely to impact patients' decision-making or solidify their decision, whether immediately upon receiving this information or at any point during the mandatory waiting period dictated by the Act. See FOF, 46. Further, as noted by the State, there already exists a robust legal and administrative "backstop" to ensure that health care providers, including those that provide abortion care, are ensuring "informed consent" is received by their patients, as required by and consistent with their medical and professional judgment and the applicable standard of care. See FOF, 7-16; see also BHA Response, pg. 3-4 and Affidavit of Gile.

If the true State interest is the regulation of the medical profession and the requisite "informed consent" process (as it relates to the abortion-specific context), the Act appears to be a solution in search of a problem at this juncture. It imposes significant obstructions to the exercise of a fundamental right by plaintiffs' patients and others similarly situated by mandating the communication and receipt of detailed information on a host of topics (ranging, for example, from where the provider lives to information on state laws that mandate the father of the fetus is obligated to pay child support after birth) and requiring that the patient wait out an arbitrary and

mandatory waiting period after receiving this State message—all without any evidence to suggest that abortion providers, such as plaintiffs, have been performing abortions on patients without ensuring informed consent by provision of medically relevant and necessary information, as required by the well-established applicable standard of care. Nor is there credible and persuasive evidence to suggest that pregnant women are making uninformed, hasty, and/or reactionary decisions on this procedure, such that regulation imposing mandatory waiting periods is somehow justified as a "compelling" (rare and urgent) interest. Indeed, the existing current record belies the State's contention. Consequently, the Court simply cannot conclude, at this juncture, that the regulation of "the medical profession" and of "informed consent" qualifies as a *compelling* interest under the circumstances, particularly given that the Act's various disclosure mandates of seemingly-irrelevant (in many respects) non-medical information with corresponding non-waivable waiting periods apply **only** to this singular therapeutic process provided by a very small subset of practitioners of the healing arts.

Likewise, the Court simply cannot conclude, at this juncture, that the Act is "narrowly tailored" to further the State's asserted interest in regulating the medical profession. Notably, the Act appears directed not to traditional concepts of "professional regulation" but rather to mandating disclosure of a preferred State-sponsored message, which seeks to discourage pregnant patients from terminating their pregnancies and to construct temporal and administrative hurdles to interfere with those patients' ability to freely exercising their rights.[23] Indeed, the provision of such voluminous quantities of information, much of which appears entirely *unrelated* to the true risks and results of an abortion or to those other disclosures that a

[23] A more-detailed discussion of the Act's requirements that the physician providers transmit the State's preferred message on pregnancy and a decision to continue or terminate a pregnancy is discussed *infra*, as it relates to the plaintiffs' "free speech" claims under Section 11 of the Kansas Constitution Bill of Rights.

reasonable practitioner in that subspecialty would make under the same or similar circumstances in his/her medical judgment and discretion,[24] seems more likely to undermine the very interest that the State asserts in this matter. By overwhelming patients with information other than that strictly necessary to reach an informed decision on the procedure at issue, both orally and in writing in multiple locations at multiple times, the significance of the ***material*** medical information conveyed appears likely to be diluted, and the consent seems potentially likely to be less informed—not more. In addition, there is no credible evidence that the mandatory delays imposed by the Act for arbitrary periods of time are likely to, in fact, improve either the consent/decision-making process by pregnant patients or conduct by the medical profession. Nor has the State demonstrated that the Act is the least restrictive means to effectuate its stated interest, given the currently sweeping nature of the mandates. As such, the Court concludes that the Act does not seek to advance the interest in any "narrowly tailored" way—certainly not in a manner that is the least restrictive means.[25]

Moreover, any State interest in ensuring "informed consent" generically, seems unlikely to constitutionally justify regulations/statutory schemes that are designed primarily to influence a

[24] A few of the Act's requirements and mandatory disclosures that must precede the mandatory waiting periods do, in fact, relate to the risks, benefits, and likely outcomes of the procedure, along with alternatives to the procedure. See KSA 65-6709(a)(2), (3), (7). However, the majority of these required disclosures appear, at least given the current record, to be likely inaccurate (e.g., "fetal pain," risk of premature birth, risk of breast cancer), irrelevant (e.g., where physician resides, malpractice insurance, perinatal hospice services, child support), and/or designed to influence the woman's informed choice between abortion and childbirth (e.g., ideologic statements that "abortion will terminate the life of a whole, separate, unique, living human being," adoption service providers). This may explain, in part, the legislature's 2014 amendment to the Act, which eliminated the "objective, non-judgmental, scientifically accurate" language describing the State's mandatory written disclosures. See KSA 65-6710 (2023); see FOFs on Act history--(2014) amendment.

[25] If the State were simply interested in ensuring that pregnant women contemplating the termination of their pregnancy had the Act's contemplated information and resources available, the Legislature certainly could have fashioned a disclosure requirement that would merely point women to those resources, if they chose to review them. Instead, it seeks to substitute the physician's independent medical judgment with a mandatory and lengthy list of "information" foisted on the providers and their patients that promotes the State's preferred message on abortion. In that respect, the Act appears to further fall short of being narrowly tailored to accomplish a truly informed consent.

woman's informed choice between maintaining or terminating a pregnancy. See *City of Akon v Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443-44 (noting that "State does not have unreviewable authority to decide what information a woman must be provided before she chooses" to terminate her pregnancy). In its desire to influence these choices, the State's efforts, when considered in totality, simply do not further its proffered goal/interest in any "narrow way." Instead, the Act substitutes the State's judgment for the independent judgment of the woman's trusted health-care fiduciary by dictating the "information" it deems important and appropriate for pregnant women to receive. This is in lieu of what the medical professionals believe is appropriate and necessary, as prescribed and guided by the well-established standard of care within their subspecialty (such as ACOG standards on informed consent). Tellingly, the State admits that "it would be impossible for the State to determine in advance which patients might find relevant each particular piece of information". Response, pg. 15. Yet, all of the information in the Act is mandatory, whether a patient might find it relevant or important or not. The State's stark admission is strong evidence tending to disprove a "narrowly-tailored" finding. And, it constitutes further support for why the content of informed consent discussions between a patient and a provider are traditionally the purview of the clinician's professional judgment, in light of applicable and prevailing standards of care. In short, the Act does not survive strict scrutiny based upon this asserted State interest.

b. "Maternal/patient Health or Safety".

Correspondingly, some courts have suggested that interests in regulating medical professionals' conduct (discussed above) rests, in part, on the State's additional interest in "patient health." See e.g. *City of Akron*, supra at 443. The State, thus, asserts that "promoting or protecting . . . patient safety ha[s] been court-recognized as [an] interest[] that may be

compelling." See Response, pg. 13 (citing *Hodes*, supra at 501 [678]). Notably, this is not (and was not) a judicial finding or holding by the Kansas Supreme Court that such concerns were, in fact, compelling in that case or whether that might be extrapolated somehow to this case. The fact that an interest **may be** "compelling"[26] in a particular circumstance is not the same thing as affirmatively demonstrating that it **likely is** "compelling" in a particular matter and with respect to a specific State regulatory action. The latter is the question more properly before this Court, and the State's generic references do nothing to address or advance that inquiry. See *Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012)(noting "Supreme Court case law instructs that overly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest.")(citations omitted). Instead, this Court must conduct its own preliminary analysis, specific to the facts and circumstances presented, as contemplated by the Kansas Supreme Court in *Hodes*. See *Hodes,* supra at 673-74, 682 (requiring a searching judicial inquiry using active and critical analysis to ensure that the State is "pursuing a goal important enough to warrant use of a highly suspect tool").

In the instant case, the Court also concludes that "promoting maternal/patient safety" does not rise to the level of a demonstrated "compelling" interest that the Act furthers in a "narrowly-tailored" fashion and, in fact, advances that interest. Just as there is no evidence in the record to suggest that pregnant patients who are contemplating the termination of their pregnancies lack necessary or material information and are making their decisions without adequate knowledge and a "voluntary" consent, the record is equally devoid of any credible evidence that the disclosures mandated by the Act, when combined with mandatory waiting periods, are likely to address an "urgent" or "rare" need to improve the pregnant patient's health

[26] or "legitimate" or "important" or "substantial"

or increase her safety. Indeed, the record robustly demonstrates that abortion, particularly when performed in the earlier stages of pregnancy, is very safe—much safer than many other common medical procedures or medication therapies. FOF 31-33. Conversely, the risks associated with carrying a fetus to term and delivering appear likely to far exceed the risks during a legal Kansas abortion procedure, whether surgical or medication. FOF 33, 43-44. Those risks inherent to pregnancy undertaken by a pregnant woman increase throughout the pregnancy, with substantial resulting physiologic changes to the woman's body. *Id*. While ensuring voluntary consent, such that a tortious battery does not occur, might bear (on some basic level) on patient health and/or safety, the Court finds no credible evidence to support a suggestion that this interest rises to the very limited or "rare" instances of a "compelling" interest, on this record. No credible persuasive evidence reflects that there is some urgent unmet need with respect to informed consent (at any time material) that underlies the Act and its requirements. As such, the State has not provided sufficient credible evidence to demonstrate that "promotion of patient/maternal health" is a "compelling" governmental interest, as it relates to the Act and its various mandates—either in terms of disclosures or in terms of the delays.

Similarly, this Court is currently hard-pressed to conclude that the Act is "narrowly tailored" to effectuate this asserted State interest, even if it were compelling. A statutory scheme that arbitrarily delays desired medical treatment and increases the risks to a pregnant woman (even if to a limited degree) hardly seems directed, much less specifically and narrowly tailored, to bring about increased maternal/patient health and/or safety. In fact, the record belies such a conclusion and demonstrates that the Act's mandatory disclosures and delays likely increase maternal risk and reduce patient safety. See *Id.* First, maternal safety appears likely ***decreased*** with delays that result in increased risks to the mother—when abortion is otherwise very safe.

FOF, 31-33. In addition, the State also compels statements, in the required disclosures, that abortion poses risks of "premature birth" and "breast cancer," which arguably implicates "maternal health." See KSA 65-6710 (2023); see also https://www.kdhe.ks.gov/2060/Womans-Right-to-Know-Act, and Response, pg. 22. However, the weight of the credible evidence submitted in the current record before the Court reveals that the State's mandated disclosures regarding "increased" risks (whether preterm labor or breast cancer) for women having an abortion are likely inaccurate, misleading, and/or not generally-accepted views within the mainstream medical community. See FOF 57-58. In other words, the current state of medical/scientific consensus, at least as set forth in the record before this Court, belies the State's argument and its mandated disclosures on those issues. Instead, the State's affiants contort their affidavit testimony and the related evidence to try and justify what appear to be misleading and inaccurate pronouncements on the ramifications of an abortion—all to promote the State's clear preference in favor of childbirth, rather than abortion.[27] To require disclosures that are inaccurate and misleading, in an effort to delay or prevent a pregnant woman from exercising her right to terminate her pregnancy seems unlikely narrowly tailored to improve maternal health or safety, given the increasing risks to a pregnant woman throughout pregnancy. And the Court is skeptical that the Act's requirements, in fact, actually effectuate such a State

[27] The Court notes that the State's affiants (and to a lesser and limited degree, the plaintiffs' affiants) appear to use somewhat flamboyant rhetoric, questionable logic/logical leaps, and hyperbolic statements at times, and several have offered a multitude of opinions on a wide array of subjects, many of which the Court considers unlikely to be of a true and admissible "expert" nature, as contemplated by KSA 60-226 and KSA 60-456, 60-457. This Court notes that it has a "gatekeeping" function under the Kansas rules, when it comes to "expert" testimony, and it takes that function/role seriously. The parties are instructed that the Court will closely review expert disclosures relating to witnesses that may testify at trial for compliance with applicable legal standards governing admissibility. Further, any challenges or objections to such testimony should be submitted in accordance with Division 12 rules, in conjunction with KSA 60-456 and 60-457, as the Court intends to ensure that trial is one focused on facts and admissible evidence, within the context of prevailing legal principles—not unbridled rhetoric or threadbare and incomplete factual assertions, even though these issues may touch on a much-debated and vigorously-contested social issue.

interest. Rather, the Act appears to be a thinly-veiled effort to stigmatize the procedure and instill fear in patients that are contemplating an abortion, such that they make an alternative choice, based upon disproven and unsupportable claims. In that respect, the Court likewise concludes that the Act is not "narrowly tailored" to effectuate the interest of maternal/patient health and/or safety; nor does it, in fact, advance those interests through its non-discretionary disclosures that precede the mandatory waiting periods.

c. Protection of the fetus/potential life.

Additionally, the State asserts that "protecting" the fetus and/or potential life "has been court-recognized as [an] interest[] that may be compelling." See Response, pg. 12 (citing *Hodes*, supra at 501 [678]). But, the State must do more than merely refer, in summary and generalized fashion, to an interest and call it "compelling" or note that it "may be" compelling in order to meet its burden. Given that the Act infringes upon a fundamental right, the burden lies with the State to ***affirmatively demonstrate*** that the asserted interest **likely is** "compelling" in a particular matter and with respect to a specific State regulatory action. Under a "strict scrutiny" analysis, the State must demonstrate that the "recited harms are real, not merely conjectural—which then gives rise to a State interest—and that the regulation will in fact alleviate these harms in a direct and material way." See *Awad*, supra at 1129-30 (citation omitted).

The State has simply failed to affirmatively demonstrate that the protection of a fetus/potential life rises to the rare "compelling" interests that the Act furthers. Again, as with the prior discussion regarding "informed consent," there is no credible evidence before the Court reflecting a demonstrable and real problem or shortcoming with respect to informed consent in the context of abortion or that pregnant women considering abortion are not aware of relevant medical information (through the normal informed consent process and as dictated by the

professional standard of care) for purposes of their decision. Certainly, promotion of potential life is a legitimate and, perhaps, important interest as a general statement, and as courts have previously noted, that interest ultimately can develop to the extent that it qualifies as "compelling" at points after viability. However, prior to that viability threshold along the pregnancy continuum, the Court believes that a woman's fundamental right eclipses any such proffered State interest and necessarily precludes a "compelling" finding with respect to "protection of potential life." Otherwise, a woman's fundamental right would be, for practical purposes, something less than "fundamental". Consequently, the Court concludes that the State has not demonstrated that protection of "potential life" during the pre-viability stage in Kansas (when abortion is legal) rises to the level of a "compelling" interest, in the context of the Act's mandates.

Nor is the Act "narrowly tailored" to effectuate a State interest in protecting "potential life" for the same reasons that the Court noted with respect to both the informed consent/professional regulation interest and maternal health/safety interest discussed above. The existing Act's mandates now range far and wide, in terms of compulsory disclosures while the figurative "clock" is still "running" until the decision to terminate a pregnancy is no longer legally or medically permissible. Despite this passage of time, the Act prohibits a woman from exercising her fundamental right, should she so choose, until the arbitrary and non-discretionary statutory time period has passed. In that respect, it likely ***does*** effectuate the State's claimed purpose (protection of the fetus) by preventing women from exercising their fundamental right to bodily autonomy. However, it does so only by valuing that State's asserted interest above a woman's fundamental right to choose during timeframes where the pregnant woman's rights eclipse those of any developing potential life. Consequently, the Act is impermissible because it

simply supersedes and supplants, at a pre-viability stage, a woman's fundamental right and prevents a woman (given the mandatory disclosures and delays) from freely exercising her rights at a time of her choosing, even if fully informed by her provider and certain in her choice. In spite of the infringement, the woman could ultimately potentially choose to proceed with terminating the pregnancy, assuming the statutory or medical limits (with respect to medical abortion) had not passed after the mandatory waiting period had been met. Moreover, the scope and substance of the mandatory disclosures are often entirely untethered to "protecting potential life," (e.g. disclosures on domicile of practitioner, when the practitioner graduated from medical school, counseling resources for "medically challenging pregnancies," child support obligations, inaccurate information on risks of breast cancer and premature labor), which is certainly inconsistent with "narrow tailoring". Similarly, mandatory visible signage in common areas of a practitioner's office that are directed solely at abortion when such offices/practitioners provide a much broader range of services beyond abortion falls far short of the "least restrictive means." As such, there is no credible evidence that any of the Act's regulatory mandates to patients and practitioners, in fact, advance the State's asserted interest (protecting fetal/potential life) in a narrowly-tailored way, even if it were determined "compelling". The Act clearly falls short of the "least restrictive means" necessary to promote this asserted interest.

d. Prevention of "fetal pain."

Lastly, the Court notes that the State's asserted interest in preventing "fetal pain" also falls short of being a "compelling" governmental interest in this case, given the record before the Court. Both the overwhelming weight of authority and current mainstream medical/scientific thought support the conclusion that a fetus likely cannot physiologically experience "pain," as currently envisioned and understood scientifically, before approximately 28 weeks, if at all. FOF

55. The anatomy and physiologic development of a fetus before that time makes "pain" unlikely to be experienced, at least based upon current mainstream views on the subject within the relevant pain community. FOF, 55-56. This is well after the time that Kansas law typically precludes physicians from even legally performing either medical abortions or procedural abortions—absent very limited circumstances (22 weeks LMP). While the State's witnesses argue that a fetus normally develops physiologic structures through which it has "nociception," much earlier (even possibly as early as 8-10 weeks),[28] such arguments lack force when it comes to a purported interest in "preventing fetal pain". The Court concludes that "nociception" that manifests as a reflexive and unconscious reaction is ***not*** the same thing as a subjective appreciation of "pain," as that concept is generally understood within the medical community that deals with such matters. See FOF 56. In light of those facts, it is difficult to conceptualize how such an interest could rise to the level of "compelling" with respect to the Act.

Similarly, the Act's dictates appear to be wholly disconnected from any such interests, given a reasonable reading of the record before the Court, and thus, the Act cannot be considered narrowly tailored to accomplish any perceived interest by the State. At best, there is ***a portion*** of the required disclosures within the Act (that must be made prior to the commencement of the mandatory waiting period) that implies that a fetus can perceive pain "by no later than 20 weeks from fertilization" (22 weeks LMP). See KSA 65-6709(b)(6) (2023). The subpart goes on to note that "Anesthesia is routinely administered to unborn children who are 20 weeks from fertilization [22 weeks LMP] or older who undergo prenatal surgery." *Id.* The clear and unmistakable conclusion/implication that the State wishes pregnant patients to reach after reviewing such information is "a fetus consciously experiences pain—no later than 22 weeks

[28] The State's affiants are all over the "map" on when "pain," as they describe it, could theoretically be experienced by a fetus.

LMP". Setting aside that the disclosure implies a conclusion out of step with the mainstream medical consensus and appears to mislead by omission, there is no evidence in the record to suggest that such disclosures are directly or actually related to "preventing fetal pain" and accomplish the State's asserted goal/interest in "preventing fetal pain" in a narrowly-tailored manner, given the presumptive statutory limits of 22 weeks LMP for performing a legal abortion in Kansas. Instead, those specific provisions appear likely directed to misleading and shaming pregnant women into believing that a fetus may experience "pain" during an abortion, in a transparent effort to dissuade them from choosing that course. Moreover, the voluminous remaining requirements of the Act, in light of the mandatory delay/waiting periods, belies a finding of "narrow" tailoring or the use of "least restrictive means," if the interest is "prevention of fetal pain."

Simply put, none of the proffered interests identified by the State, either individually or collectively, rises to the level of "compelling," in the Court's view, given the record before the Court at this juncture. Nor is the Act narrowly tailored to effectuate those interests. Indeed, there is little evidence that the Act actually furthers any of the stated interests (other than perhaps the protection of the fetus/potential life), even if any of the four asserted "interests" rose to the type of rare and urgent interest required under *Hodes'* prescribed strict scrutiny analysis. Accordingly, the Court finds, at least at this preliminary juncture, that the plaintiffs are likely to prevail on the merits on their claims pertaining to the Act and Section 1 of the Kansas Constitution Bill of Rights.

ii. Application of Strict Scrutiny to the Medication Abortion Reversal Amendment.

As it relates to the Medication Abortion Reversal Amendment, plaintiffs have likewise demonstrated a likelihood of succeeding on the merits of their claims, insofar as it appears that

the Amendment cannot survive a strict scrutiny analysis. First, the State has not demonstrated ***any*** compelling governmental interest, if they are even legitimate, as it relates to this new mandatory disclosure set forth in the Amendment. In addition, the new provisions contemplated by the Amendment simply are not narrowly tailored to serve any asserted "compelling" governmental interest utilizing the least restrictive means; nor is there credible evidence in the record that would support a conclusion that it likely furthers the State's asserted interests, in fact. Accordingly, the Court finds that plaintiffs are likely to prevail on the merits of their claims that the Amendment is unconstitutional and violative of their patients' respective rights to bodily autonomy, as guaranteed by Section 1 of the Kansas Constitution Bill of Rights.

As mentioned above, the State asserts essentially four purported interests that it claims underlie and are served by the Act, including the Amendment at issue: 1) protection of potential life, 2) protection of "maternal health" (ostensibly through increased "informed consent" of women), 3) regulation of the medical profession through what it argues is reasonable regulation of licensees' conduct, and 4) prevention of fetal pain. Each is discussed below.

a. Protecting the fetus/potential life.

Having engaged in its independent preliminary evaluation, the Court concludes that any interest the State ***arguably has*** in promoting potential life during the course of a pregnancy simply does not rise to the level or character of a "compelling" interest, in this specific case and scheme, as it relates to the Amendment. Medication abortions are largely permissible and authorized for use only through the tenth week of pregnancy (up to 11 weeks LMP). See FOF, 41. During that timeframe, a pregnant woman's fundamental natural right to make decisions regarding her pregnancy (particularly related to a medication abortion during the earlier stages of pregnancy such as with a medication abortion) precludes the State from asserting that the

promotion of potential life is a legitimate counter-veiling ***compelling*** interest ***at that point in time***,[29] and the woman's fundamental right must be deemed paramount during at least the timeframe where medication abortion is available, if it is to have meaning in any concrete and meaningful sense. See *Roe*, supra at 153-57. As discussed above (section III.B.1.c, supra), the Amendment clearly infringes upon that right, as it requires a mandatory State-sponsored message with a corresponding mandatory 24-hour waiting period, which delays, significantly interferes with, and, in some cases, entirely prevents women from exercising those natural and fundamental rights. Given the paramount nature of the woman's right to bodily autonomy, particularly during that early timeframe, the State simply cannot demonstrate that protection of potential life (i.e., the fetus) is a "compelling" interest, as it relates to the Amendment and the correspondingly-relevant timeframes for its mandated messaging and waiting period. The asserted State interest falls far short of being the type of "extremely weighty," "potentially urgent," or very "rare" interests that can or should qualify as "compelling," given the existing record and prevailing Kansas law.

In light of the Court's conclusion, a full examination of whether the statutory scheme is "narrowly tailored" to accomplish that interest is unnecessary; however, it seems patent that plaintiffs have demonstrated the unlikelihood of that finding as well. The "reversal" Amendment contemplates that, if a woman were to change her mind and opt to continue a pregnancy,[30] she could (based upon the State's messaging passed along by her physician provider or through the State's public messaging efforts) seek to avail herself of the "reversal" therapy envisioned by the

[29] The Court suspects that, hypothetically, such an interest would grow in import along with the fetus and that the State's interest might become substantial, or even compelling, at some later point along the pregnancy timeline. The confines and parameters of that analysis need not be decided today, however.

[30] Having already commenced a medication abortion with Mifepristone, medication that is likely to terminate the embryo's growth and development (amongst other physiologic impacts on the woman).

disclosures, thereby ***possibly*** allowing for continued pregnancy. First, there is an absence of credible evidence in the record to support that the asserted State interest, if it were compelling, could not be just as effectively promoted and advanced by the State through a simple publicity campaign by the State, standing alone, such that pregnant women might be aware of this theory and could act accordingly, if they desired. Thus, it is simply not "narrowly tailored" by using the least restrictive means to advance the State's proffered interest in the protection of "potential life."

Equally, if not more importantly, the Amendment's "reversal" therapy theory appears, based upon the record before the Court, unproven, theoretical, far from generally accepted within the relevant medical/scientific community, and potentially-dangerous to the pregnant woman—with no credible and evidence-based data that it ***actually facilitates*** a "reversal" of a medication abortion. Try as they might, the State's proffered affiants simply have not persuasively advanced that this theory is anything other than speculative, risky, and experimental, at this juncture. Conversely, the plaintiffs' testimony and evidence highlight these stark conclusions and the complete absence of existing credible peer-reviewed science underlying this theory. There simply is no credible reliable evidence that this "reversal" theory, in fact, actually accomplishes the stated purpose[31] or, in any verifiable way, "protects" a fetus/potential life. As such, plaintiffs have demonstrated, at this juncture, a likelihood of success on the merits on this point, given the State's failure to adequately demonstrate that the Amendment is both narrowly tailored to

[31] The Cambridge Dictionary defines "reverse" as: the act of changing or making something change to its opposite. See https://dictionary.cambridge.org/us/dictionary/english/reversal Using such a definition, the Amendment suggests that this theory changes the "intended effect" of Mifepristone (stopping growth and development of an embryo/fetus and terminating the pregnancy) to its "opposite," by altering the fetus from a "terminated" pregnancy to a renewed and viable one. The record does not even remotely support such a suggestion. It is not grounded in science or the scientific method.

accomplish the asserted State interest using the least restrictive means and (more likely than not), ***in fact***, able to advance the interest of promotion of potential life.

b. Protection of "patient/maternal health".

Likewise, protecting "maternal health," the second interest asserted by the State, falls equally short of a "compelling" interest in this case, as it relates to the Amendment, given the current record. As an initial observation, the State wholly fails to detail or articulate how this asserted interest rises to the level of "compelling," as it relates to the Amendment (or to the Act, more generally). Instead, the State argues summarily, in passing, that both the *Hodes* Court and plaintiffs acknowledge that such an asserted interest "may be compelling". See Response, pg. 13. However, as discussed above, the State has the burden of affirmatively demonstrating that a "compelling" interest is, in fact, advanced by the governmental regulation at issue and that the statutory scheme to which the interest was directed is "narrowly tailored" to effectuate that interest.

The Court concludes, for purposes of the instant motion, that the asserted State interest of "protecting maternal health,"[32] simply fails to constitute a "compelling" governmental interest related to the Amendment at issue in this case or that it is materially advanced by the Amendment in a narrowly-tailored way. In theory, proper informed consent between a patient and a health-care provider could further a legitimate, and probably important, governmental interest of promotion of patient (including pregnant patients) "health" or "safety". However, there is no evidence to support why that interest is compelling ***in this case*** with respect to these

[32] This asserted interest is likely legitimate (as a general statement) and often could be an "important" interest, as with patient health generally (male or female), in the context of certain state regulations. However, the State must demonstrate not merely some academic or theoretical interest but a concrete and real interest that actually underlies the regulatory effort at issue. In this case, the Court concludes the State has failed to demonstrate that such a concrete and real interest either exists or is materially advanced by the Amendment.

statutes at issue, particularly in light of the already extensive regulatory scheme that applies to all practitioners of the healing arts in Kansas, including plaintiff providers and others similarly situated, as well as well-established standards of care for obstetrical/gynecological doctors. Likewise, as discussed above, there is absolutely no credible evidence in the record, at this juncture, that the proposed "reversal" theory endorsed in the Amendment is anything other than experimental and unproven; nor is the Amendment's requirements related thereto (obligatory briefing and mandatory waiting periods) narrowly tailored, for the reasons set forth above. And, the Court is dubious of any suggestion that experimental therapies such as "reversal" therapy for medication abortions in any way advances, in fact, the State's proposed interest in promoting maternal "health" or "safety." If anything, the opposite appears more likely at this juncture, given the unverified theory and the evidence submitted thus far regarding the safety and efficacy of "reversal" therapy. See FOF, 52-54. Indeed, the solitary attempt at conducting a valid properly designed and controlled medical study of this "reversal" theory was abandoned by the study organizers due to adverse outcomes suffered by several subjects undergoing the protocols. See FOF, 54. Experimentation on patients by misleading them into seeking out and utilizing speculative theories/therapies seems anathema to patient safety or patient health, in the Court's view. Furthermore, the State's interest in disseminating information on such a theory could be much more narrowly accomplished by public disclosures, rather than co-opting physicians. In short, the promotion of "maternal health" or "maternal safety" is not a "compelling" governmental interest that is, in fact, advanced by a narrowly-tailored statute, as required by Kansas law. Accordingly, this interest is equally unavailing to the State, as it relates to the Amendment.

c. Regulating "professional conduct" and "fetal pain".

Finally, the Court will summarily dispose of the State's arguments that the Amendment, in any way, addresses (much less advances, in fact) either an interest in the legitimate regulation and oversight of the medical profession or the prevention of "fetal pain." Nowhere within either the express language of the Amendment or any legislative history that the Court could review is there any indication that either concern was a significant interest sought to be addressed by the Amendment. However, even if viewed in retrospect based upon the State's current briefing, it is patent that such interests are not "compelling" when it comes to the requirements contemplated by the Amendment.

The Amendment does not appear to be true or legitimate "regulation of professional conduct" within the healing arts--aimed at addressing some particular existing or potential concern for physicians that provide abortion services. Rather, the provisions of the Amendment are effectively a mandate of the legislatively-preferred and State-sponsored message/speech regarding abortion and a theory to purportedly "reverse" the process, along with various resultant penalty provisions. As discussed above, the provisions seem aimed exclusively at promoting that State ***message***--not at regulating professional conduct as ordinarily contemplated—and are, based upon the current record, without valid and vetted underlying scientific and/or generally-accepted and mainstream support within the medical community for that message. The State's interests in "regulating professional conduct" presumably exists to promote and ensure that medical professionals provide reasonable and appropriate care to their patients, consistent with the applicable standards of care. To suggest that the State has even a legitimate, much less compelling, interest in mandating the communication of information regarding fringe theories that providers must tacitly endorse with their requisite disclosure, when the theory is not

supported as generally accepted, within the standard of care, and/or demonstrably safe and effective is wholly without merit.

Moreover, the Amendment furthers the interest of "regulating" professional conduct only insofar as the statutory mandates compel the professional to either "parrot" the State's preferred messaging or run the risk of possible disciplinary action against their licensure. Which is really to say that the Court is skeptical that the Amendment could even remotely be construed as "advancing," in fact, such an interest, if it even rose to a compelling interest under the circumstances.[33] Instead, the Amendment appears to be a mandate of pure content-based compelled speech by the State with the proverbial "Sword of Damocles" hanging over the physician providers' (including plaintiffs) respective heads, given the criminal, civil, and administrative penalties that lie waiting for them, if they were to exercise their professional medical judgment and refuse to act as a messenger for the State's preferred viewpoint and message. As discussed further below, this Court has serious doubts regarding whether such compelled and content-based speech requirements in the Amendment can survive, as they further appear to violate plaintiffs' constitutional rights to "free speech" under the Kansas Constitution. But, setting that issue aside for the moment, the Amendment simply does not advance, in fact, the purported interest of "regulation of professional conduct", given the existing record.

[33] Notably, identical or nearly-identical statutory language has been introduced and promulgated in a number of other states; however, in ***not one*** state where the language has now been challenged (as far as the Court has discerned from its research) did the statutory mandates pass constitutional muster—either under a state or federal analysis. The Court takes judicial notice of these cases and those Court's rulings and finds the conclusions and holdings of import. See *American Medical Ass'n v Stenehjem*, 412 F.Supp.3d 1134 (D. N.D. 2019)(finding medication abortion "reversal" statute likely facially unconstitutional under the U.S. Constitution and entering preliminary injunction); *Planned Parenthood of TN and N. Miss. v. Slatery*, 523 F.Supp. 985 (M.D. Tenn. 2021)(holding the same as it relates to an identical Tennessee statute); *All-Options, Inc. v. Attorney General of Indiana*, 546 F. Supp. 3d 754 (2021)(same); *Planned Parenthood of Montana v. State*, 409 Mont. 378 (2022)(same under state constitution).

Similarly, prevention of "fetal pain," assuming that is a legitimate interest in these circumstances, is essentially not implicated by the proposed Amendment, given that not even the State's proffered sworn affidavit testimony supports a proposition that "fetal pain" is likely to be subjectively experienced by a fetus by the end of the tenth or eleventh week of pregnancy, [34] the practical "endline" for medication abortions. Indeed, the record before the Court reflects that both the overwhelming weight of authority and current mainstream medical/scientific thought support the conclusion that a fetus likely cannot physiologically experience "pain," as currently envisioned and understood scientifically, before approximately 28 weeks, if at all. This is well after the time that Kansas law typically precludes physicians from even legally and/or ethically performing either medical abortions (up to 11 weeks LMP) or procedural abortions (up to 22 weeks LMP)—absent very limited circumstances. In the instant matter, the Amendment, which addresses only medication abortions, appears only to address situations within those first 10-11 weeks LMP, given the existing standard of care for performing a medication abortion. FOF, 41. Under such a timetable, there simply is no credible support for a contention, based upon actual science, that a fetus experiences pain, as currently understood within mainstream science, during that time period. In light of those facts, it is difficult to conceptualize how such an asserted State interest could rise to the level of legitimate—much less "compelling" interest--with respect to the Amendment.

Moreover, the Amendment's dictates appear, at this juncture, to be wholly disconnected from any such interests, given a reasonable reading of the record before the Court, and the

[34] Despite the great lengths to which the State's affiants stretch to try and equate "nociception" with the generally-accepted medical/scientific definitions of "pain," the Court concludes that such concepts are distinctly different and separate. The Court concludes that it is almost certainly misleading to equate the two concepts, particularly to laypersons who appear potentially likely to be misled by a suggestion that a fetus experiences "pain" and to be, consequently, tacitly encouraged to make a different choice based upon such a disclosure.

Amendment cannot, on this record, be considered narrowly tailored to accomplish any perceived interest by the State. How does an asserted interest in avoiding or preventing "fetal pain" relate to a statute that imposes mandatory delays on a woman freely exercising a fundamental right simply to provide information regarding a "reversal" procedure that would theoretically be invoked, in many (if not most or all) cases, before a fetus can even sense, much less appreciate, pain? That question remains wholly unanswered by the State in its passing summary reference within its opposition papers. Simply stated, the State wholly fails to demonstrate that the Amendment, which infringes on a woman's fundamental natural right to bodily autonomy, is narrowly tailored to accomplish (and in fact does accomplish) any compelling governmental interest relating to the prevention of "fetal pain," at least at this juncture and with the current record before the Court.

In short, the State has not demonstrated that these two remaining interests asserted are either "compelling" or that the Amendment is narrowly tailored to address those interests and, in fact, does further either interest. Consequently and conversely, the plaintiffs have demonstrated that they are likely to prevail on the merits, as it relates to the Amendment, on their constitutional claims derived from Section 1 of the Kansas Constitution Bill of Rights.

e. Section 11 of the Kansas Constitution's Bill of Rights likewise requires strict scrutiny review of State regulation where it infringes upon Kansan's speech.

Much like Section 1 of the Kansas Constitution's Bill of Rights, Section 11 likewise presents similar, but not identical, language to that set forth in the United States Constitution's Bill of Rights. Specifically, Section 11 provides:

> "The liberty of the press shall be inviolate; and **all persons may freely speak, write or publish their sentiments on all subjects**, being responsible for the abuse of such rights."

Kan. Const. Bill of Rights, § 11 (emphasis added).

The Court has located no reported Kansas appellate decision[35] that has articulated what distinction, if any, exists between Section 11 protections afforded under Kansas' Constitution Bill of Rights and one's First Amendment rights under the United States Constitution. However, the Kansas appellate courts have consistently found that freedom of speech is "among the most fundamental personal rights and liberties of the people." *League of Women Voters of Kansas v. Schwab*, 63 Kan.App.2d 187 (2023)(citing *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984)). Kansas courts have previously held that the right under the state Constitution has been "'generally considered coextensive'" with that right protected under the First Amendment to the United States Constitution. *Prager v. Kansas Dept. of Revenue*, 271 Kan. 1, 37, 20 P.3d 39 (2001)(citation omitted); *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980); *League of Women Voters of Kansas v. Schwab*, supra. At its core, the right to "free speech" includes "both the right to speak freely and the right to refrain from speaking at all." *American Medical Assoc. v Stenehjem*, supra at 1148 (citing *Wooley v Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977)); see also *NIFLA v Becerra*, 138 S.Ct. 2361, 201 L.Ed.2d 835, (2018)(invalidating state regulations of "crisis pregnancy centers" on First Amendment grounds because statutes required speaker to provide State-mandated messaging and failed strict scrutiny analysis).

In the "free speech" context, federal precedent has often distinguished its analysis between content-based regulation and content-neutral regulation. Content-based regulation "targets speech based upon its communicative content." *Reed v. Town of Gilbert*, 576 U.S. ——, ——, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," speech

[35] None of the parties have directed the Court to such authority or analysis.

compelled by the government is typically considered content-based regulation. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Generally speaking, content-based regulations are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Id.*; see also *NIFLA v Becerra*, 138 S.Ct. 2361, 2371 201 L.Ed.2d 835, (2018).

A review of applicable Kansas precedent dictates that the "free speech" protections under Section 11 of the Kansas Constitution's Bill of Rights likely demand the application of a "strict scrutiny" analysis as well, if the regulatory scheme at issue infringes upon a fundamental right, such as with "free speech" rights and content-based regulation by the State.[36] See *Prager,* supra; *League of Women Voters of Ks. v. Schwab,* supra. In this case, the Court concludes that the Act and Amendment likely do infringe upon the plaintiffs' fundamental rights to "free speech," as guaranteed under Section 11 of the Kansas Constitution Bill of Rights. As such, it will apply that standard herein. However, before doing so, the Court will address the State's alternative position regarding the relevant legal standards.

The State has argued that the strict-scrutiny standard is inapplicable to such "free speech" claims because it contends that the Act and the Amendment "regulate[] Plaintiffs' 'professional conduct, . . .[which only] incidentally involves speech." Response, pg. 16 (citing *NIFLA*, supra at 2372).[37] Thus, it argues, the plaintiffs' fundamental rights to free speech guaranteed by Section 11 do "not shield Plaintiffs from complying with statutes governing the way they

[36] The Court assumes at this juncture, but does not decide, that the requisite Kansas "strict scrutiny" analysis is consistent with federal case law on such issues, although it appears an open question as to whether the text of Section 11 affords some additional or different guarantees to Kansans. Neither party has yet developed arguments relating to whether the distinctions between the language of the Kansas Bill of Rights and the U.S. Constitution's Bill of Rights merit disparate analysis.

[37] The State has not argued that the regulations at issue are justified under a more-deferential standard applied to regulations aimed at a professional's "commercial speech," which is one of two circumstances identified by the *NIFLA* majority in which it noted that such speech was afforded less protection. *NIFLA*, at 2372.

practice medicine." *Id.* Under the State's apparent view,[38] it contends that the "rational basis" standard applies because the Act and Amendment merely "regulate conduct" of the professionals, who are licensed by the State. See Response, pg. 17-18. This Court disagrees with the State's analysis, as it relates to the applicable standard to apply to content-based State regulations, such as the Act and the Amendment, and the Court further notes that the State's reliance upon *NIFLA* appears not nearly as supportive of their position as they asserted at oral argument.[39]

In *NIFLA*, the U.S. Supreme Court noted that it had traditionally upheld, under a First Amendment analysis, certain state regulations of conduct, including professional conduct, that *incidentally* burden speech. See *NIFLA*, supra at 2373. However, the Court further noted that "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights" *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328 (1963)). The Court went on to stress "the danger of content-based regulations "in the fields of medicine and public health, where information can save lives." *NIFLA*, supra at 2374 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011)). Notably, the majority highlighted:

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[38] The State's arguments as to what it claims is the applicable standard to use in evaluating the constitutionality of the Act and Amendment are not altogether clear—other than it asserts that strict scrutiny does not apply. Response, pg. 16-17. Instead, it appears to endorse the application of the "rational basis" standard (*Id.* at 17-18), with the addition of certain buzz words: "truthful and not misleading"--factors the *Casey* court used in upholding the Pennsylvania statute at issue there, as it related to the patient's right to privacy—not those of the physician and First Amendment "free speech" rights. Perhaps what the State intended was to address the "purely factual and non-controversial" language often applied by federal courts in evaluating regulation of true "commercial speech." See *NIFLA*, supra at 2372. To be sure, the issues involved in this case, along with the Act and Amendment's contours, fall far outside of "purely factual and non-controversial" material, if that were the intent. Regardless, the State does not, in this case, contend that the Act and Amendment are valid regulatory efforts to address purely ***commercial speech***, and the conflation of the two different issues by the State appears to cloud, rather than clarify, the applicable standards. The State also appears to suggest a standard for determining what is, based upon *Casey* and specific language in *NIFLA*, a *per se* permissible "informed consent" regulatory requirement. Response, pg. 17. Specifically, 1) regulation tied to a procedure; 2) the procedure must be "sought, offered, or performed;" and 3) the regulation must carry information about the "risks and benefits" of those procedures". *Id.* (citing *NIFLA* at 2372-73). Setting aside that no Kansas appellate court appears to have identified or approved such a standard, the Court concludes that the State's reads too much into the cited language and, in doing so, overstates its arguments.

[39] Indeed, at oral argument, both sides pointed the Court to *NIFLA*, as it related to the "free speech" issues—each claiming that the U.S. Supreme Court's decision in *NIFLA* supported their respective diametrically-opposed conclusions on the constitutionality of the Act and Amendment.

> "The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, **regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."** *Turner Broadcasting*, 512 U.S., at 641, 114 S.Ct. 2445. **Take medicine, for example. "Doctors help patients make deeply personal decisions, and their candor is crucial."** *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1328 (C.A.11 2017) (en banc) (W. Pryor, J. concurring). **Throughout history, governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities**"

NIFLA at 2374 (emphasis added). In light of those principles and concepts, the Court invalidated a California's regulatory requirement that certain providers (both licensed and unlicensed) of "pregnancy-related" products and services affirmatively communicate certain information, including information about the availability and details of state-sponsored, abortion-related services, to its patients. *Id.* As part of its holding, the Court concluded that the regulatory scheme was not a proper exercise of the State's traditional power to regulate professional's conduct, given constraints imposed by the First Amendment and the licensed providers' constitutional rights. *Id.*

The *NIFLA* Court did acknowledge that it has previously afforded lesser individual First Amendment protection to State regulatory efforts relating to professionals in two situations, depending on the facts and circumstances: namely, in the context of "commercial speech"[40] and of regulation of conduct, including conduct of professionals, where the regulation *incidentally* involves speech. See *NIFLA*, at 2372. In that regard, the *NIFLA* Court held that neither of the categories/circumstances of State regulatory effort[41] that could potentially trigger a lesser degree of judicial scrutiny applied to California's scheme to mandate notification obligations upon those

[40] This exception to strict scrutiny is not at issue in this case.

[41] Including the regulation of "professional conduct" that incidentally impacts speech.

licensee plaintiff providers. *Id.* at 2375-76. Instead, it found such a regulatory scheme was subject to traditional First Amendment/ "free speech" principles and held that the regulations were unconstitutional abridgments of the licensee's (as well as the unlicensed plaintiffs) rights to "free speech." *Id.*

Neither *NIFLA* nor the *Casey* decision, which addressed First Amendment arguments only in passing, creates, in this Court's reading, some "bright line" rule permitting the government to compel professionals to broadcast preferred messaging under the auspices of "regulating" informed consent as "conduct."[42] The State cannot "foreclose the exercise of constitutional rights by mere labels." See *NAACP v Button*, 371 U.S. 415, 429, 83 S.Ct. 328 (1963). Rather, the Court concludes that only State regulation of true ***conduct*** by a licensee was intended to merit a lesser degree of First Amendment protection, if and where there was some ***incidental*** impact on the licensee's speech. This is a particularly critical nuance to appreciate where a State regulation addresses ***compelled*** speech of a particular message for a small universe of specialists, rather than a generally-applicable regulation of conduct amongst a particular profession (i.e., practitioners of the healing arts, practitioners of the nursing arts, practitioners of physical therapy, etc.).[43] As the Court in *NIFLA* also astutely pointed out:

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[42] Of import, the dissent in *NIFLA* pointed out that the rule of law embodies evenhandedness, and in that regard: "what is sauce for the goose is sauce for the gander." See *NIFLA*, supra at 2385. If the California statutory scheme for licensed providers that mandated those licensees to affirmatively communicate information about available abortion services runs afoul of free speech protections, it is difficult for the Court to conceptualize how the Act and Amendment at issue herein do not likewise violate a Kansas health care provider's free speech rights.

[43] For example, KSA § 65-2837, which defines and addresses "unprofessional conduct" generally for practitioners of the healing arts, includes a number of circumstances where the State ostensibly limits practitioner/licensee "speech" ***incidentally*** by regulating their conduct in the solicitation, representation, marketing, or provision of their services under the Healing Arts Act. This Court has no qualms about concluding that these statutes are valid and permissible (even important) exercises of the State's police powers in regulating conduct. They apply universally to **all practitioners**, regardless of the type of health care service provided. Moreover, those provisions do NOT dictate a content-specific and viewpoint-specific message that practitioners must ascribe to and communicate; their impact on speech is only ***incidental*** to valid regulation of conduct, which *NIFLA* endorsed.

> "States cannot choose the protection that speech receives under the First Amendment [by imposing a licensure requirement], as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects."

NIFLA at 2376. Doing so is "regulat[ing] speech as speech" when the government enacts such a statutory or regulatory scheme. *Id.* That type of governmental action is what "free speech" protections generally prohibit, unless the regulation can survive strict scrutiny.

Importantly, even if the *Casey* decision's passing nod on First Amendment issues was of some precedential concern in this matter,[44] given the decision in *NIFLA*, there are critical distinctions between the Pennsylvania statute in *Casey* and the current Act and Amendment, which further demonstrate that a strict scrutiny analysis should govern this Court's evaluation in light of Section 11 of the Kansas Constitution Bill of Rights. Unlike the statutory scheme in *Casey*, which was relatively unintrusive upon the physician-patient relationship, the State (in the current version of the Act) inserts itself into and largely supplants the physician's judgment and discretion with respect to the nature and extent of an "informed consent" discussion. The Pennsylvania statute at issue in 1992 authorized and permitted a pregnant woman's physician to forego providing ***ANY*** of the mandatory disclosures and imposing a mandatory waiting period where the physician determined that "furnishing the information would [] result[] in a severely adverse effect on the physical or mental health of the patient." See *Casey,* supra at 904 (citing §3205(c) of the law). Moreover, the Pennsylvania statute left the specific content of the actual "informed consent" discussion to the professional's judgment and discretion. Conversely, the

[44] Clearly, the primary focus of *Casey* was to address the pregnant women's substantive due process rights to terminate their pregnancies, given the Fourteenth Amendment considerations and prior holdings in *Roe* and its progeny. It adopted a new standard not applicable to Kansans, in light of the Section 1 analysis established in *Hodes*, as discussed above.

current Act and Amendment prescribe lengthy State-mandated disclosures[45] of questionable relevance, accuracy, and import, as it relates the actual decision contemplated by a pregnant patient, and it requires, ***without exception***, that physicians transmit, both orally and in writing, the information to their pregnant patients desiring an abortion.

Similarly, the Amendment's mandates aren't even tied to the contemplated procedure in a meaningful way—instead, the disclosure relates to an experimental theory that *might be* subsequently undertaken to "reverse" an abortion, the actual procedure being contemplated and provided. And, as discussed herein (below), the mandated disclosures of the Amendment don't actually, at least given the record, relate to or facilitate a pregnant patient's "informed consent" for an abortion; they likely undermine it.

Consequently, given the text of both the Act and the Amendment, this Court concludes that strict scrutiny is required under Kansas law and in light of Section 11 of the Kansas Constitution Bill of Rights. To the extent that the State argues for a lesser degree of "free speech" protection, the Court rejects its argument for purposes of this temporary injunction request, as the provisions are content-based (and viewpoint-based) regulations that regulate speech as speech. Neither the Act nor the Amendment merit more deference to the State's action or less individual protection merely by the State's moniker as "professional regulation" of the "practice of the healing arts." Moreover, these are not the regulation of "conduct" that

[45] These mandatory disclosures go well beyond the provisions addressed under *Casey* and cover a wide array of topics that appear, at least at this preliminary juncture, to be not primarily aimed at facilitating "informed consent" for the procedure contemplated and are not necessarily tied to a procedure at all (for example, in the written signs that are required to be posted in "conspicuous" areas of the practitioner's location as well as in patient care rooms where abortions are performed, even if the licensee provide generalized service for other obstetrical/gynecologic services unrelated to abortion). Undoubtedly, there are the few provisions common to both the Pennsylvania statute and the current Act; however, the Kansas Act goes much further in terms of viewpoint bias and permits no discretion or judgment to enter into the licensee's analysis as to whether the required speech is necessary or appropriate for a particular patient. Instead, failure to comply precipitates licensees' exposure to criminal charges, civil monetary penalties, civil liability, and professional discipline.

"incidentally impact" free speech. They are regulations aimed at "speech as speech," and they demand that physicians providing abortion services set aside their own independent professional judgment and personal relationship with their patient—placing them in an uncomfortable and inappropriate "straightjacket"[46] when having critically-important confidential conversations with their pregnant patients. As such, strict scrutiny review under Section 11 of the Kansas Constitution Bill of Rights is both necessary and appropriate, for such content-based regulations in Kansas. The Court rejects the State's suggestion to the contrary for purposes of the instant motion.

f. Plaintiffs have demonstrated a likely infringement of their rights under Section 11 of the Kansas Constitution's Bill of Rights, as it relates to the "Statutory Informed Consent" provisions.

The Court concludes that the Act and the Amendment both similarly infringe upon the physician plaintiffs' fundamental rights to "free speech" guaranteed under Section 11 of the Kansas Constitution Bill of Rights. As discussed above, content-based governmental regulations typically merit a "strict scrutiny" analysis based upon the notion that the regulation alters the content of an individual's speech and regulates not conduct but "speech as speech." So, do the Act and Amendment infringe upon the plaintiff providers' "free speech rights" because they constitute content-based regulation, as opposed to permissible regulation of conduct that incidentally impacts speech? At this juncture, the Court concludes that they do and that strict scrutiny is required.

First, both the Act and the Amendment specifically require that any licensee provider that provides abortion services must have the detailed mandatory discussions set forth in KSA 65-6709 and in the Amendment ("reversal" information). See KSA 65-6709 (2023) ; KS Legis. 88

[46] See *City of Akron*, supra at 445.

(2023) (H.B. 2264). The plaintiffs have indicated that, if afforded the discretion to exercise their professional judgment with patients contemplating the termination of their pregnancy, they would not *categorically* provide all of the information detailed in the Act and Amendment. FOF, 46-49. Instead, they provide informed consent tailored to their particular patients and as prescribed by the applicable standard of care within the obstetrical/gynecological community. FOF, 51. They have provided persuasive evidence that the information mandated by the current Act and Amendment are factually inaccurate in many instances, inappropriate for some of their patients, universally inconsistent with what they believe is their ethical and legal obligations to provide adequate informed consent consistent with the applicable standard of care, invasive of their confidential fiduciary relationship with their respective patients, and not likely to actually advance the purpose of the traditional informed consent obligation to their patients. See FOF, 51-59. Nevertheless, the Act and the Amendment leave the plaintiffs and other similarly-situated individuals with no choice but to "parrot" the State's desired messaging regarding abortion and its policy favoring alternatives to abortion, regardless of circumstance. Given all of the foregoing, the Court concludes that the Act and Amendment not only infringe upon the patient's rights to privacy and bodily autonomy but, likewise, infringe upon the plaintiff physicians' free speech rights under Section 11 of the Kansas Constitution Bill of Rights.

g. Plaintiffs have demonstrated that the "Statutory Informed Consent" provisions are unlikely to survive a strict scrutiny analysis, as it relates to the providers claims based upon Section 11 of the Kansas Constitution.

1. The Act.

The plaintiffs have demonstrated that the Act is unlikely to survive a strict scrutiny analysis because it is not narrowly tailored to effectuate a compelling governmental interest and

because it does not advance, in fact, such an interest, at least given the current record before the Court.

The Court has previously detailed how the Act is not narrowly tailored to any of the State interests asserted, as it relates to the patients' rights based upon Section 1, and the analysis applies with equal force, as it relates to a Section 11 analysis of the providers' rights. Rather than restate that analysis, the Court incorporates it herein and concludes that the Act simply is not narrowly drawn to accomplish any of the asserted state interests.

However, given the State's briefing, which focuses on the State's legitimate interest in "regulating professional conduct" and, correspondingly, to provide "relevant" information to assist in providing an "informed consent" discussion, the Court will address that point further. First, the Act mandates a broad array of information—much of which the Court concludes is not necessarily tied to the traditional "informed consent" requirements of a tailored discussion with the health care provider regarding the reasonably anticipated medical risks and benefits of the treatment options. See *Natanson*, supra at 409-10. Instead it requires prior communication of data regarding tangential matters such as, for example: where a provider lives or has hospital privileges, whether the provider has malpractice insurance,[47] factually inaccurate information regarding risks of premature birth (following abortion) and an increased risk of breast cancer (following abortion), as well as information on "perinatal hospice services."[48] The Court concludes, given the current record, that such disclosures simply do not improve or support "informed consent" and certainly do not further such an interest in a "narrow" way when all

[47] Kansas law requires **all** health care providers to maintain a minimum level of professional liability insurance in order to maintain their licensure and practice the healing arts. See KSA 40-3402 (2023).

[48] Ostensibly, this relates to patients who have been previously advised that the fetus is unlikely to be viable and will not be capable of surviving after birth—if the patient were to maintain the pregnancy through delivery.

disclosures are mandatory, regardless of circumstance. Similarly, the Act requires other philosophical/existential statements that, despite the State's assertion, are not mere "facts," such as "the abortion will terminate the life of a whole, separate, unique, living human being" or questionable viewpoint-related statements regarding when a fetus might be capable of "pain," as well as what state resources are available—if a woman chooses to continue her pregnancy (child support, medical assistance, adoption services). Again, such mandated disclosures imposed upon a physician during his/her critical discussions with pregnant patients does not appear to this Court to materially advance or effectuate the State's purported interest of "regulating professional conduct" in a narrowly-tailored way.[49] Instead, it appears to single out a particular medical procedure and a small group of available providers; targets, from the State's view, the providers' disfavored practice and messaging; and supplants the providers' traditional informed consent discussion with the State's preferred position. This appears to be the very type of "invidious discrimination of disfavored subjects" that the *NIFLA* Court found unconstitutional and antithetical to "free speech."

Additionally, there is simply no evidence in the record that the Act's mandates would actually (or has) advance(d) a compelling state interest. Assuming that "regulation of professional conduct" is a legitimate and important interest, there is little evidence in the record to support a conclusion that it somehow rises to a compelling interest, particularly as it relates to the infringement on the physician providers' rights to free speech. There are, as discussed, extensive and long-standing common law and historical generalized informed consent

[49] Further, the written signage notifications required at plaintiffs' facilities/offices are not "narrowly tailored". They require "conspicuous" notifications of information specific to abortions when the providers' practices simply are not so limited. Thus, like the issues in *NIFLA*, supra, they are wildly overinclusive, in that every patient is subjected to the State's mandatory messaging on abortion care, regardless of whether they are seeking abortion-related services or any other obstetrical or gynecological care.

requirements under Kansas law, and there is simply no persuasive evidence in the record at this juncture to demonstrate some shortcoming or inadequacy that the Act aimed to remedy. It appears to merely be a pretense—not a compelling interest—aimed at promoting the State's message. No evidence exists in this record to suggest any lack of adequate informed consent by patients, either generally or specific to the abortion context, despite robust processes in place to ensure what the law has long required: disclosure of medically relevant and accurate information regarding the risks, benefits, and alternatives to a form of treatment. See *Natanson*, supra. And, if the goal/intent is to better "inform" the patient on her decision to terminate her pregnancy, there is no competent evidence in this record that it, in fact, does so. To the contrary, it appears that the Act's requirements would likely undermine such purposes—in many respects by foisting a lengthy list of disclosures on both the providers and their patients, which is likely to devalue, overwhelm, and dilute the patient's decision-making process. Simply put, the State has failed to demonstrate that the Act is narrowly tailored to effectuate a compelling governmental interest, and conversely, the plaintiffs have demonstrated a likelihood of success on the merits. The Act does not likely pass a strict scrutiny analysis under Section 11 of the Kansas Constitution Bill of Rights, at least on the record before the Court, and thus, this aspect of the request for a temporary injunction weighs in plaintiffs' favor.

2. The Amendment.

Likewise, the Court concludes that plaintiffs are likely to succeed on the merits of their Section 11 claims regarding the Amendment because the State has not proffered sufficient support on which to conclude that the Amendment is narrowly tailored to effectuate a compelling governmental interest under the circumstances or that it does, in fact, further that purpose/interest.

Much like with respect to plaintiffs' Section 1 claims, the State has failed to demonstrate that the Amendment actually relates to a "compelling" interest, in the Section 11 context. For the same reasons the State's asserted interests are insufficient under Section 1, they fall equally short, when it comes to the physicians' free speech claims. There is no competent or persuasive evidence of a lack of "informed consent" that necessitated specific and targeted disclosures to a small group of professionals for a singular component of health care. Absent such evidence, the Court is hard pressed to conclude any such State interest is sufficiently "rare," "urgent," or "extremely weighty" that it rises to the level of "compelling." As such, the Court concludes that the plaintiffs, at least at this preliminary stage, have demonstrated a likelihood of success on this element.

Furthermore, the Court questions whether the statute is either narrowly tailored or, in fact, capable of advancing the State interest claimed. In fact, it appears that the Amendment likely creates legitimate uncertainty and risk for this particular subspecialty (OB/Gyn's), insofar as compliance with the Amendment almost certainly would require the providers to become the State's mouthpiece in conveying what, at least at this juncture, appears likely to be misleading, unscientific, and inaccurate information. In doing so, it necessarily places the providers on the horns of a dilemma—comply with the State's mandated messaging and force patients to wait the

mandatory 24 hours to "digest" the statements and ensure "voluntary and informed consent"[50] or comply with their pre-existing statutory, common-law, and ethical obligations to provide non-misleading and non-deceptive relevant medical information, consistent with the prevailing standard of medical care within that subspecialty. Both cannot be accomplished (at least based upon this record), and thus both "doors" could potentially lead to disciplinary action against their state licensure, regardless of which the physician chooses. Regulation of professional conduct is traditionally intended to promote patient health and safety, but it also is aimed at providing such professional licensees with clarity as to the parameters of their legal authority and obligations under existing law. The Court has grave reservations and finds it unlikely that the Amendment, in fact, furthers such interests, given the content and mandates. Nor does it promote "patient safety/health," given the Amendment's mandates and subject matter. As such, it cannot be said that, at least on this record, this "interest" is either "compelling" in this particular instance or "narrowly tailored" to accomplish the interest. Nor does the Amendment, in fact, appear likely

[50] Notably, the concept of "informed consent" contemplates providing "reasonable and necessary" information to ensure that the patient makes her decision with relevant information to that choice. It strikes the Court that providing additional information about questionable, unconfirmed, and/or fringe therapeutic "reversal" theories that are indisputably not generally accepted within the obstetrical community, to a woman contemplating the termination of a pregnancy ***undermines***, rather than bolsters, "informed" consent—particularly where the information mandated by the State tends to suggest that a medication abortion is somehow less than a binary and irreversible decision—one that can be "reversed." Moreover, informed consent has historically involved providing relevant information regarding the procedure, risks, and benefits, and the concept does not require discussion or disclosure of **every scintilla** of information that in any way touches on the procedure at issue. See *Rojas v. Barker*, 40 Kan.App. 2d 758 (holding that informed consent is limited to those disclosure which a reasonable medical practitioner would make under the same or similar circumstances); *see also Thornburgh v. Am. Coll. Of Ob. & Gyn*, 476 U.S.747, 764 (holding that broad disclosure laws on abortion are "the antithesis of informed consent" and go "far beyond merely describing the general subject matter relevant to informed consent"). Indeed, it strikes the Court that a patient's consent likely becomes less "informed" when the consent discussion between physician and patient becomes diluted with voluminous and unnecessary tangents that obscure the necessary and important facts truly relevant to that patient's decision. The State through the statutory "informed consent" provisions attempts to micro-manage that personal and private discussion in a way that necessarily infringes on both: 1) the woman's right to make an "informed" decision (and her corresponding right to exercise bodily autonomy based upon the consent); and 2) the plaintiffs right not to be compelled to speak the State's message by injecting specific discussions of this nature. Under the circumstances, this Court concludes, at least at this juncture, that "regulating professional conduct," as proffered, simply does not rise to the level of a "compelling" interest, as contemplated under existing Kansas law, given existing protections/regulations regarding professional conduct.

to further the State's claimed interests for the reasons set forth above. As such, it too fails strict scrutiny, and thus, the plaintiffs have demonstrated that they are likely to prevail on the merits of their Section 11 claims regarding their respective rights to free speech.

h. Given the Court's rulings relating to plaintiffs' Sections 1 and 11 claims, the Court need not address the other claims at this juncture.

The plaintiffs have claimed in their ***Amended Petition*** that K.S.A 65-708 to 65-6715, the statutory Informed Consent provisions, further violate Section 1 of the Kansas Constitution's Bill of Rights by denial of equal protection, whether arising from deprivation of a fundamental right or a suspect class.[51] See Amended Petition, Doc. 35. Plaintiffs' request for a Temporary Injunction neither addresses these issues nor requests relief on those grounds. Further, this Court has already concluded that the statutory "Informed Consent" provisions are likely, given the preliminary record before the Court, invalid for the reasons set forth above due to infirmities relating to Sections 1 and 11 of the Kansas Constitution Bill of Rights. Accordingly, the Court exercises its discretion and declines to further address plaintiffs' alternative legal claim at this juncture, and these alternative claims do not form the basis for any relief granted herein. That claim awaits another day when the parties present their respective cases in the context of a permanent injunction.

Similarly, the plaintiffs have also raised the issue of unconstitutional vagueness, suggesting that the Amendment violates Section 10 of the Kansas Constitution Bill of Rights. As noted above, this Court has already concluded that the Act and the Amendment are likely, given the preliminary record before the Court, invalid for the reasons set forth above, based upon what

[51] It appears that such "equal protection" claims may now more likely the subject of a Section 2 constitutional challenge, not Section 1. See *Rivera v. Schwab*, 315 Kan. 877, 893-94 (Kan. 2022)(holding that "the textual grounding of equal protection guarantees contained in the Kansas Constitution Bill of Rights is firmly rooted in the language of section 2").

the Court perceives to be likely infirmities relating to Sections 1 and 11 of the Kansas Constitution Bill of Rights. Consequently, the Court does not believe it needs to specifically address plaintiffs' theories based upon unconstitutional vagueness as part of its temporary injunction order. Given that plaintiffs have already demonstrated their right to a temporary injunction based upon applicable Kansas standards, further analysis on these additional claims would not materially impact the Court's ruling and can also await the final hearing/trial of this action, which will address plaintiffs' request for a permanent injunction and declaratory relief.

2. Are the plaintiffs reasonably likely to suffer irreparable injury?

Once plaintiffs have demonstrated a "reasonable probability" of success on the merits of their constitutional-rights claims, it is generally considered axiomatic that irreparable harm exists. Kansas appears to follow the federal standards addressing this element of the analysis. See *Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229*, 32 Kan. App. 2d 1104, 1118 (2004); see also *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996)(holding a "deprivation of constitutional rights is, itself, irreparable harm").

Given the fact that plaintiffs have, as discussed above, demonstrated a reasonable probability of success on the merits of their constitutional claims pertaining to the statutes at issue and the Amendment, the Court next concludes that those constitutional infirmities plaguing the Act and the Amendments would necessarily involve and likely cause "irreparable harm," as contemplated under Kansas law. No further showing is required at this preliminary juncture.

3. Do the plaintiffs have an adequate remedy at law?

Relatedly, the Court concludes that plaintiffs have an inadequate remedy at law to address any potential and/or likely violations of their constitutional rights under the Kansas Constitution.

Long-standing Kansas law dictates that "[a]n adequate remedy at law, which will preclude proceedings in equity, must be equally complete, efficient, practical, and prompt with the remedy in equity." *Mendenhall v. Sch. Dist. No. 83, Jewell Cnty.*, 76 Kan. 173, 90 P. 773, 775 (1907). Given the record before the Court, it is clear that there simply is no adequate legal remedy that would otherwise be equally "complete, efficient, practical, and prompt" as would the remedy of immediate injunctive relief, particularly temporary injunctive relief, until a full and robust evidentiary hearing on the merits can occur. No amount of compensation for pecuniary damages, even if somehow authorized, can provide the practical equivalent of an injunction against enforcement, particularly where the ramifications of permitting the statutory scheme to proceed would be the inability to freely exercise the fundamental rights of the plaintiffs and their patients, both current and future. As the Kansas Supreme Court has aptly noted: limitations on such fundamental natural rights "can impose an obligation on an unwilling woman to carry out a long-term course of conduct that will impact her health and alter her life." *Hodes*, supra at 646. It seems patent that no such remedy at law could qualify as "adequate" under any reasonable definition. Thus, plaintiffs have likewise satisfied this element necessary to obtain a temporary injunction.

4. Does the threatened injury, on balance, outweigh the impact on the State?

The Court further concludes that Plaintiffs have also established that the threat to the provider plaintiffs and their patients outweighs any harm that might inure to the State by inability to enforce these provisions in the interim. See *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 491 (2007)(elements necessary for temporary injunction); see also *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 893 (D. Kan. 2021)(noting "[i]njury to plaintiffs who are deprived of First Amendment rights almost always outweighs the potential harm to the government if an

injunction is granted."); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir.1999) (holding threatened injury to plaintiffs' constitutional rights "outweighs whatever damage there may be to [defendants']" inability to enforce "what appears to be an unconstitutional statute"). The balance of hardships in this case is in lockstep with the Court's conclusions regarding irreparable harm. Plaintiffs have shown a likelihood of success that both their rights and those closely-related fundamental rights to bodily autonomy (including the right to terminate a pregnancy) held by their patients' will be infringed upon if these provisions are allowed to be enforced, moving forward on at least a temporary basis.

In contrast, the State faces minimal, if any, injury or substantive limitations from issuance of a temporary injunction, which will impose no affirmative obligations on the State and will avoid likely violations of the Kansas Constitution that will injure the plaintiffs and their patients during the interim period until the full merits can be considered. The same logic applies to the State's asserted interest in regulating the medical profession because, at this point, the injunction will do nothing more than maintain the administrative status quo with the Board of Healing Arts until the issues can be resolved on the merits. Indeed, until a decision on the merits, the Kansas Board of Healing Arts is still fully capable of engaging in all of its normal regulatory and investigatory activities relating to general complaints against practitioners of the healing arts, even if temporarily enjoined from enforcing, through its processes, the statutory "informed consent" provisions at issue. The sole limitation is that the Board and its agents (or the State generally) may not take action based upon complaints related to the Act or the Amendment, at least until this matter has been fully litigated and adjudicated. Finally, the KDHE will be free to continue to publish and promote its own State-sponsored and endorsed message, both in writing and electronically through the world wide web, and this Court's ruling is unlikely to have any

material impact on those actions, should the State choose to continue advocating such views. The only thing KDHE or any other defendant (or similarly-situated individuals) will not be able to do under the injunctive relief provided herein is that it may not require physicians to take up a figurative "megaphone" and broadcast the State's chosen message[52]—which would necessarily require substituting the State's desired perspective for the physician's professional judgment and freedom to speak based upon the needs of their respective patients and the providers' training, education, experience, and professional judgment. Given the record before the Court, there is little doubt that the irreparable injury flowing from the denial of a temporary injunction clearly outweigh any academic interest/injury the State might perceive and advance. For these reasons, Plaintiffs have demonstrated that the balance of hardships weighs in their favor and in favor of a temporary injunction.

5. Is a temporary injunction adverse or contrary to the public interest?

Finally, Plaintiffs have established that a temporary injunction would not be adverse to the public interest. See *Idbeis*, 285 Kan. at 491. The public's interest in not having Kansas citizens and other persons within the State's borders suffer infringements on their fundamental constitutional rights is served with a targeted temporary injunction as described specifically below, in this Court's view, and carries more weight than the State's expressed public interest in enforcing its preferred and legislatively-enacted message regarding abortion policies, where that purported interest would otherwise run afoul of fundamental natural rights held by individuals within the state. See *Adams*, 919 F. Supp. at 1505. Moreover, given that Kansas citizens resoundingly endorsed this right to bodily autonomy in a constitutional referendum on August 2

[52] And correspondingly may not impose criminal, civil, or statutory monetary penalties upon physicians for their unwillingness and/or refusal to promote that messaging.

in 2022,[53] that endorsement further reinforces the Court's view that a temporary injunction does not run contrary to the public's interests.

C. The State's claim of plaintiffs' delay in seeking injunctive relief.

The State argues that plaintiffs should not be granted any temporary injunctive relief due to the fact that they have, as providers, generally complied with the law through its multiple iterations over the course of more than a decade and have, thus, delayed in seeking the relief requested herein. See Response, pg. 28-29. In the State's view, plaintiffs' compliance with the Act, without commencing specific prior litigation as to those provisions, forecloses preliminary/temporary relief and is reflective of an absence of "imminent injury". *Id.* This Court is aware of the chronology, and indeed raised the issue with plaintiffs during oral argument. After careful consideration on this point, the Court concludes that the failure by plaintiffs to seek earlier injunctive or declaratory relief regarding the prior versions of the Act is, on balance and having considered the relative equities, an insufficient reason to justify the denial of an otherwise appropriate request for ***prospective*** injunctive relief in this matter at this time.

Although the Court was able to find relatively little applicable Kansas case law evaluating such an issue, somewhat-related precedent is informative. See *Trust Women Foundation, Inc. v. Bennett*, 509 P.3d 599 at 8-9 (unpublished May 20, 2022). There the Kansas Court of Appeals referenced authority noting that unnecessary delay in seeking injunctive relief ***may*** be viewed as inconsistent with a plaintiff sustaining imminent injury that justifies equitable relief. See *Id.*; see also 11A Wright & Miller, Federal Practice and Procedure: Civil § 2948.1

[53] The Court takes judicial notice of the relatively-recent referendum on Amendment 2, the "Value them Both" Amendment (HCR 5003), which failed in a special Constitutional referendum on August 2, 2022. The percentage of Kansans that voted against this Amendment was over 59%. A "yes" vote would have removed the Constitutional protections identified in *Hodes*, while a "no" vote rejected a new Section 22, which would have explicitly codified that the Kansas Constitution "does not create or secure a right to abortion." Thus, a significant percentage (nearly 6 in 10) of voters appear to support such constitutional rights to bodily autonomy (in this context) in Kansas.

(2013) ("A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction."); 11A Fed. Prac. & Proc. Civ. § 2946 at 2-3 (3d ed.)(2023). However, the Kansas Court of Appeals nonetheless concluded that the context surrounding the action justified and explained the plaintiffs' decision regarding timing of that case, such that preliminary injunctive relief was not barred as a result of undue delay. *Trust Women Foundation, Inc.*, supra at 8-9.

Similarly, this Court concludes that the State's arguments regarding any "significant" delay are unfounded and that plaintiffs have presented their claims for a temporary injunction without unreasonable delay, given the facts and surrounding circumstances presented in the current record before this Court.

First, the Amendment to the Woman's-Right-to-Know Act was to take effect on July 1, 2023, and the plaintiffs commenced their action prior to the effective date. Simply put, there was no delay in commencing their action to challenge a statutory amendment that had not yet even taken effect.

While a closer issue, the Court similarly concludes that the plaintiffs' request for temporary injunctive relief as to the current Act, were brought without "significant" delay, such that the timing precludes the entry of a temporary injunction. Although the Act has been in effect now for years, in various iterations, the Court concludes that there are (and were) reasonable and legitimate reasons why plaintiffs would not have previously sought relief from the provisions at issue in this matter. First, as noted above, the original version of the Act, passed in 1997 and thereafter amended to become increasingly onerous and intrusive over time, contains somewhat-similar statutory language to the Pennsylvania abortion statute (the Pennsylvania Abortion Control Act), which was directly addressed in the U.S. Supreme Court's decision in *Planned*

Parenthood of S.E. Penn. v. Casey, 505 U.S. 833 (1992). The mandatory waiting period and notification/"informed consent" requirements in that state law were upheld as constitutional by the U.S. Supreme Court, using a new "undue burden" analysis and standard. See *Casey*, supra at 874-79. Despite the *Casey* framework being distinctly different from the required Kansas analysis that is now the law since *Hodes*, that framework and result stood as the "law of the land" for the time during which the Act was in effect. Given that our country's highest court had already ruled that similar state statutory provisions passed Constitutional muster under a Fourteenth Amendment analysis,[54] it stands to reason that the plaintiffs would not have commenced an action claiming Constitutional violations and imminent injury to a fundamental right, and that decision simply cannot be said to be an inequitable "delay," given the history. Indeed, it would be difficult to envision how a party could reasonably commence such an action during that time period in good faith or how one could reasonably conclude that plaintiffs were taking, by inaction at that time, a position "inconsistent" with their current assertion of constitutional harm through infringement of a fundamental right or rights under the Kansas state Constitution.

Those underlying facts and surrounding circumstances, particularly when combined with the mid-2022 sea change in legal precedent resulting from the U.S. Supreme Court's decision in *Dobbs,* lead the Court to conclude that this is not the type of delay that either constitutes "acquiescence" or inconsistent positions by the plaintiffs in filing the instant action, such that preliminary injunctive relief should be rejected out of hand. Nor is there any evidence or suggestion by the State that it has somehow been prejudiced or that it has detrimentally relied

[54] Notably, Kansas courts had, to that point, concluded that its analysis was co-extensive with the Fourteenth Amendment's protections, and thus, there was no apparent divergence on which to reasonably base some challenge (or conclude there was legally-redressable harm) in the years prior to *Hodes*.

upon plaintiffs (or similarly-situated individuals) lack of litigation as to the current Act or the Amendment. In short, the State's claims of delay do not justify rejection of the relief that plaintiffs now seek on behalf of themselves and current/future patients who are likely to be impacted by enforcement of the Act and/or the Amendment.[55]

IV. Conclusion

Reasonable minds can and do, unquestionably, diverge as to the propriety and permissibility of terminating a pregnancy. This Court is deeply aware of the strongly-held and very personal beliefs on both sides of these issues. When "life" begins and the ramifications of similar existential questions raised by the Act and the Amendment have been debated for decades, if not longer, and there is no generally-accepted or recognized answer to such questions, as countless courts to consider the issue have previously noted. This Court will not, and need not, wade into such ideologic debates in order to address the instant request for temporary injunctive relief. Instead, having reviewed the submitted record, the Court has undertaken its "searching judicial inquiry" of the challenged provisions, as required by *Hodes*, with an attitude of "active and critical analysis."

The Court has great respect for the deeply held beliefs on either side of this contentious issue. Nevertheless, the State's capacity to legislate pursuant to its own moral scruples is necessarily curbed by the Kansas Constitution and its Bill of Rights. The State may pick a side

[55] The State also summarily argues that the embedded severability provision within the Amendment also should be utilized, in the event that the Court concludes that any of the Act's provisions are unconstitutional under state law. See Response, pg. 29. Given that the Court is only granting partial temporary injunctive relief, in part because plaintiffs have not demonstrated any infringement to a fundamental right from the various provisions addressing KDHE's website and information generated and promoted by the State contained therein, the Court need not address the severability issue further at this preliminary juncture. A more robust severability analysis can be briefed, addressed, and adjudicated at trial on the permanent injunction request, which is currently set in June of 2024. However, it declines the State's invitation to re-write the Act at this juncture for any number of reasons—not the least of which is that the current Act's mandatory disclosure and waiting period provisions in KSA 65-6709 appear to constitute a unified and integrated scheme designed to infringe upon the plaintiffs' respective fundamental rights.

and viewpoint, but in doing so, it may not trespass upon the natural inalienable rights of the people. In this case, the preliminary record before the Court demonstrates that the provisions at issue invade and unconstitutionally infringe upon Kansans' fundamental rights under Section 1 and 11 of the Kansas Constitution Bill of Rights. This Court treads carefully and with proper respect and deference to the Legislature when evaluating the validity of state laws; however, it also must act in light of the Kansas Supreme Court's consistent admonition:

> "[t]he judiciary ... has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people." *Harris*, 192 Kan. at 206, 387 P.2d 771. So "when legislative action exceeds the boundaries of authority limited by our Constitution, *and transgresses a sacred right guaranteed or reserved to a citizen*, final decision as to invalidity of such action must rest exclusively with the courts." (Emphasis added.) 192 Kan. at 207, 387 P.2d 771."

Hodes, supra at 682 (citing Justice Fatzer's opinion in *Harris)*. Accordingly, the Court has concluded that KSA 65-6709, portions of KSA 65-6710 (namely (a)(3), and (a)(4)), 65-6712, and H.B. 2264 must be temporarily enjoined, pending a final trial of this action.

Thus, the defendants/State[56] are hereby temporarily enjoined as follows:

1. The Defendants/State may not enforce the provisions and requirements of KSA 65-6709, 65-6710(a)(3) and (a)(4), 65-6712, or H.B 2264 (the Amendment), until further Order of this Court after a trial on the merits, which is currently scheduled for June of 2024. This injunction includes specifically:
    a. The mandatory disclosure requirements (including oral, written, or other visible disclosures) expressly set forth in KSA 65-6709 that are imposed upon plaintiffs or other similarly-situated providers of abortion care within the State of Kansas. Neither plaintiffs nor other similarly-situated licensed health care providers shall

[56] Including their officers, agents, servants, employees, successors, and all other persons in concert or participation with them.

be required to comply with (nor may the State require) these requirements to communicate the State's preferred disclosures;

b. The mandatory waiting period provisions (whether 24-hour minimum or 30 minute minimum) expressly set forth in KSA 65-6709. Neither plaintiffs nor other similarly-situated licensed health care providers shall be required to comply with (nor may the State require) these requirements;

c. Those portions of KSA 65-6710 that relate to required physician certification that abortion patients have been advised of the disclosures, as prescribed, and any corresponding certification form. Physicians shall not be required to provide such disclosures, forms, or ensure execution and preservation of such forms as of the effective date of this Order;

d. The provisions defining and dictating that non-compliance with the "Woman's-Right-to-Know" Act constitute "unprofessional conduct" under the Healing Arts Act, including KSA 65-2837;

e. The mandatory disclosure requirements (including oral, written, or other visible disclosures) expressly set forth in H.B. 2264 (the Amendment) that are imposed upon plaintiffs or other similarly-situated providers of abortion care within the State of Kansas. Neither plaintiffs nor other similarly-situated licensed health care providers shall be subject to or required to comply with (nor may the State require) the Amendment's requirements to communicate the State's preferred disclosures.

Plaintiffs are responsible for serving this Order, as required by law, on any interested parties.

Lastly, Under KSA 60-905, a court may not issue a preliminary injunction:

> "unless the party obtaining the same shall give an undertaking with one or more sufficient sureties in an amount fixed and approved by the judge of the court, securing to the party injured the damages such injured party may sustain including attorney fees if it be finally determined that the injunction should not have been granted."

In this case, Defendants have not argued or articulated that they will sustain specific monetary damages, if a temporary injunction was issued. Nor does the Court believe that there is any basis to suspect the same. As such, this Court exercises its discretion and waives any requirement for plaintiffs to obtain a statutory bond. See KSA 60-905 (2023)

IT IS SO ORDERED.

/s/ K CHRISTOPHER JAYARAM
Dated: 10/30/23

____/s/ K. Christopher Jayaram _____
The Honorable K. Christopher Jayaram
Judge of the District Court
Division 12

CERTIFICATE OF SERVICE

Copies of the above and foregoing have been sent by the court to counsel and/or self-represented litigants at the below email addresses provided by them as of record this date of filing.

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