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CLERK OF THE JOHNSON COUNTY DISTRICT COURT
CASE NUMBER: 23CV03140
PII COMPLIANT

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

HODES & NAUSER, MDs, P.A., on behalf of itself, its patients, physicians, and staff; TRACI LYNN NAUSER, M.D.; and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself, its patients, physicians, and staff,

Plaintiffs,

v.

KRIS KOBACH, in his official capacity as Attorney General of the State of Kansas; STEPHEN M. HOWE, in his official capacity as District Attorney for Johnson County; MARC BENNETT, in his official capacity as District Attorney for Sedgwick County; MARK A. DUPREE SR., in his official capacity as District Attorney for Wyandotte County; State of Kansas *ex rel.* Kansas State Board of Healing Arts; and JANET STANEK, in her official capacity as Secretary of the Kansas Department of Health and Environment,

Defendants.

Case No. 23CV03140

Division No. 12

K.S.A. Chapter 60

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Dated: April 11, 2025

(Filing Contains Material Subject to the Court's 7/22/2024 Protective Order)

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INTRODUCTION

This case presents the question whether Kansas women deserve complete and truthful information before making the life-altering decision to have an abortion or to become a parent. For three decades, the Woman's Right to Know Act has ensured they receive exactly that—accurate details about fetal development, potential risks, available alternatives, and resources that support women's family planning decisions. Far from infringing the constitutional right to self-determination, the Act's protections reinforce that right, empowering women to make informed decisions about pregnancy, abortion, and childbirth.

Plaintiffs—abortion providers with a financial stake in deregulating abortion in Kansas—ask this Court to strip away these safeguards, leaving women with less information and less time to consider it. As outlined in the State Defendants' motion for summary judgment, Plaintiffs' challenge fails on multiple fronts as a matter of law and for lack of admissible evidence. Plaintiffs' own summary judgment motion fails for similar reasons—they misunderstand controlling law, and they ignore contrary evidence on critical questions. First, they offer no admissible evidence that any woman's constitutional rights have been infringed. Second, Plaintiffs attack the entire Act despite acknowledging that most provisions are consistent with their own practices. Third, they misunderstand Kansas constitutional law, which protects *both* the right to terminate a pregnancy and the right to continue it—a right to choose that demands accurate information about both paths.

The only authentic voices in this case—women who have experienced abortion—reveal its import. They describe being rushed through procedures without adequate information, leaving them with profound regret. Even Plaintiff Dr. Nauser has candidly testified about the heartbreak following her own abortion, despite having what she called "more informed consent" than anyone could possibly have. These experiences illuminate why the Act's modest requirements—a 24-hour notice

period, a meeting with a physician 30 minutes before the abortion, the chance to view an ultrasound, and disclosure of scientific information about fetal development—provide crucial protections that foster genuine choice.

After allegedly complying with the Act for nearly thirty years, Plaintiffs now seek its wholesale invalidation. Yet they cannot produce a single case of a woman harmed by its terms. Their claims rest instead on speculation, inadmissible hearsay, and legal theories rejected by the courts. Plaintiffs' motion should be denied to preserve these vital safeguards for Kansas women.

STATE DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

1. State Defendants incorporate their statement of undisputed material facts from their brief in support of their motion for summary judgment.

I. Abortion in Kansas before the WRTKA

2. The WRTKA is an informed consent statute. It was enacted in 1997.

3. Prior to the enactment of the WRTKA, Kansas did not have an abortion-specific informed consent statute.

4. Two women have testified in this case about their abortion experiences under the pre-WRTKA regime.

5. Donna Pond received an abortion in Wichita, Kansas in 1986. Ex. 66, Pond Tr. 19:13-18, 28:9-29:7, 34:5-7.

6. Ms. Pond was 16 when she became pregnant with twins, and, when she found out, she was "[s]cared" and "didn't want to have a baby." Ex. 66, Pond Tr. 30:4-5, 31:19-21, 34:8-17.

7. Ms. Pond decided to have an abortion "pretty much the same day" she discovered she was pregnant. Ex. 66, Pond Tr. 35:6-8.

8. Planned Parenthood was the only medical provider Ms. Pond spoke to about her pregnancy, and "the only thing that they really talked about [were her] options for an abortion." Ex. 66, Pond Tr. 33:18-34:1, 36:6-12.

9. When she arrived at the clinic for her abortion, Ms. Pond "paid for the procedure," received an ultrasound, received "some Valium, and then did the procedure." Ex. 66, Pond. Tr. 37:20-38:4, 39:24-40:5.

10. She did not recall receiving any information regarding the "risks of an abortion procedure" or the "alternatives to abortion." Ex. 66, Pond Tr. 40:6-12.

11. Ms. Pond asked "if the Valium would have hurt the babies" because she "was kind of waffling a little bit." Ex. 66, Pond Tr. 38:20-39:9.

12. Instead of halting the procedure, the physician told Ms. Pond she "wouldn't be able to take care of one baby, let alone two." Ex. 66, Pond Tr. 38:20-39:9.

13. Ms. Pond "didn't feel good about" her abortion immediately afterward, and, nearly forty years later, she still "regret[s] the whole situation, and knowing that [she] . . . killed two babies." Ex. 66, Pond Tr. 45:2-9, 51:20-52:5.

14. Sheryl Hoyle also had an abortion in Kansas before the WRTKA was enacted. Ex. 64, Hoyle Tr. 29:15-21.

15. Ms. Hoyle did not receive any informed consent materials from the physicians before her abortion; nor did she have an ultrasound. Ex. 64, Hoyle Tr. 41:13-24.

16. Ms. Hoyle does not recall the physician even introducing himself or being given an opportunity to "ask [] questions about the procedure." Ex. 64, Hoyle Tr. 44:3-6. No one at the abortion clinic asked if she was "sure about [her] decision to have an abortion" or explained "what the doctor would be doing during the abortion." Ex. 64, Hoyle Tr. 45:4-6.

17. Ms. Hoyle immediately regretted her decision to get an abortion and believes that if she had been given the opportunity to "see[] the sonogram, see[] the

heartbeat, [she] would not have chosen" an abortion because "[i]t would have shown proof of life." Ex. 64, Hoyle Tr. 48:8-13, 52:1-53:1.

18. If Ms. Hoyle had been informed about the emotional harm that abortion can cause, she would not have gotten the abortion. Ex. 64, Hoyle Tr. 53:4-54:6.

19. Ms. Hoyle regrets her decision and has developed an inability to trust people, particularly physicians, because of the lack of informed consent she received before her abortion. Ex. 64, Hoyle Tr. 48:8-13, 74:21-75:8.

20. For nearly thirty years, Plaintiffs claim to have complied with the WRTKA's informed consent regime without substantial challenge.

21. Plaintiffs separately asserted, and later dismissed, challenges to a 2013 amendment to the Act, but they never sought to undo the entire Act until this lawsuit. Exs. A-E; Defs. Summ. J. Br. Fact Nos. 26-37.

II. Informed consent

22. The doctrine of "[i]nformed consent refers to an ethical principle and a set of practices that instantiate that principle, which holds that as a matter of respect for the patient as a person and for the patient's authority, doctors are not to do to patients things without the patient's consent. And that consent should be duly informed. They should have sufficient information to give informed consent or an informed refusal." Ex. 49, Curlin Tr. 149:7-17.

23. To satisfy the requirements of informed consent, a physician must provide patients with "information [] a reasonable person would want to know … about what his or her options are and what can be reasonably foreseen as following from those options." Ex. 49, Curlin Tr. 142:19-143:12.

24. Principles of informed consent favor giving more disclosures than fewer, even if there is disagreement about a disclosure's materiality. Ex. 46, Curlin Rpt. ¶ 40.

25. This is true even when a patient initially displays certainty in their decision. Without a thorough process, the doctor cannot confirm the patient's consent is truly informed. Clinicians thus cannot avoid the informed-consent process by claiming a patient's decision was firm; they must provide enough information for reasonable understanding before consent can finally be given. Ex. 46, Curlin Rpt. ¶ 43.

26. Given the importance of informed consent, state "authorities often do not leave the informed consent process to the discretion of the clinician" as "those who believe in and offer particular interventions or technologies … often are not reliable reporters of all that is at stake in such interventions or of alternatives a patient might consider." Ex. 46, Curlin Rpt. ¶ 50.

27. The same is true with abortion providers: "[w]hen abortion providers refuse to provide [unfavorable] facts, they contradict the principle of informed consent and thereby undermine the integrity of the medical profession." Ex. 46, Curlin Rpt. ¶ 52.

A. Consent before abortion

28. With abortion, the need for adequate informed consent is heightened because of the third-party to the procedure: the unborn child.

29. "Human development begins at fertilization." Ex. 46, Curlin Rpt. ¶ 19 (citation omitted); Ex. 44, Condic Rpt. ¶¶ 13-14.

30. "There is universal consensus that life begins at conception and that the embryo and fetus are human. … The humanity of the fetus and embryo and when human life begins are scientific facts," as is their separateness from the body of the mother they inhabit. Ex. 56, Wubbenhorst Rpt. ¶¶ 33, 36-45 (collecting sources); Ex. 46, Curlin Rpt. ¶¶ 11, 20, 22 ("the human embryo or human fetus is literally an unborn child."); Ex. 50, Pierucci Rpt. ¶¶ 6-8; Ex. 44, Condic Rpt. ¶¶ 12-13.

31. When a procedure "has grave and irreversible effects" on another human, such as with abortion, "the regulation characteristically requires more information to be given." Ex. 46, Curlin Rpt. ¶¶ 11, 49.

32. The main goal of informed consent in abortion "is the concept of choice – the choice to keep one's baby, or to abort him or her." Ex. 56, Wubbenhorst Rpt. ¶ 71.

33. "If women receive information that causes them to change their mind regarding abortion, this is empowering them to exercise their choice to have their babies. To not disclose detailed information is not only dishonest and unethical, it curtails a woman's right to fully understand the consequences of her decision and to choose accordingly." Ex. 56, Wubbenhorst Rpt. ¶ 71.

34. Without the Statutes, Plaintiffs will not give their patients the information necessary to ensure fully informed consent. Ex. 46, Curlin Rpt. ¶¶ 11, 14.

35. "[I]t is not possible for a woman to give truly informed consent regarding abortion without understanding the central facts that are provided in the" Statutes. Ex. 46, Curlin Rpt. ¶ 52.

III. The compelling need for the Statutes

36. The Statutes enhance patient autonomy by "provid[ing] factual and relevant information [and procedures] that the Plaintiffs otherwise would withhold" or not comply with. Ex. 46, Curlin Rpt. ¶ 11; Ex. 56, Wubbenhorst Rpt. ¶¶ 31-32.

Abortion and the unborn child:

37. Informed consent requires disclosing the humanity of the fetus as a separate and unique unborn child: "[t]o not disclose detailed information is … dishonest and unethical." Ex. 56, Wubbenhorst Rpt. ¶ 71; Ex. 46, Curlin Rpt. ¶¶ 11, 30.

38. Such information includes that the fetus is a person separate from his or her mother. Wubbenhorst Rpt. ¶¶ 33, 36-45 (collecting sources); Ex. 46, Curlin Rpt. ¶¶

11, 20, 22 ("the human embryo or human fetus is literally an unborn child."); Ex. 50, Pierucci Rpt. ¶¶ 6-8; Ex. 44, Condic Rpt. ¶¶ 12-13.

39. It must therefore be disclosed that "abortion [by definition] terminate[s] the life of a whole, separate, unique, living human being." Ex. 46, Curlin Rpt. ¶ 30; Ex. 56, Wubbenhorst Rpt. ¶ 42; Ex. 44, Condic Rpt. ¶¶ 13, 15, 42.

40. This language is not judgmental or meant to dissuade women; rather "[t]he language of 'unborn child' is straightforward, accurate, and commonsense" and relied on by prestigious medical institutions like the Mayo Clinic and Johns Hopkins Medicine in patient-facing materials. Ex. 46, Curlin Rpt. ¶ 23; Ex. 50, Pierucci Rpt. ¶ 8 ("[W]hether the human being is identified as an embryo or a fetus, the developing person is never anything other than a human being.").

41. Informed consent requires disclosing "the effects of abortion on the fetus," including an accurate description of the fetus and the abortion procedure. Ex. 46, Curlin Rpt. ¶¶ 14, 30; Ex. 56, Wubbenhorst Rpt. ¶¶ 42, 59, 61; Ex. 44, Condic Rpt. ¶¶ 13, 15, 42; Ex. 50, Pierucci Rpt. ¶¶ 13-30; Ex. 51, Pierucci Reb. Rpt. ¶¶ 3, 6, 8; Ex. 16, Sawicki Tr. 45:21–46:7.

42. Without the WRTKA, Plaintiffs will not acknowledge the humanity of the unborn child but instead refer to him or her solely via euphemism. *See* Ex. 46, Curlin Rpt. ¶¶ 24, 36, 45.

43. [redacted]

44. [redacted]

Physical and emotional risks:

45. Informed consent requires the disclosure of the risks "and possible outcomes associated with an intervention." Ex. 56, Wubbenhorst Rpt. ¶¶ 31, 141; Ex. 46, Curlin Rpt. ¶ 11; Ex. 53, Scrafford Rpt. ¶¶ 12, 14; Ex. 16, Sawicki Tr. 46:13-48:3.

46. For abortion, this includes physical risks, such as septic abortion, uterine/cervical damage, increased risk pre-term birth in subsequent pregnancies, increased risk of breast cancer, and abnormal placental attachment, among others. Ex. 56, Wubbenhorst Rpt. ¶¶ 125, 141; Ex. 41, Brind Rpt. ¶¶ 13, 17.

47. Informed consent also requires that abortion providers disclose the risks of "significant negative mental health outcomes" for women who get abortions, including PTSD, depression, and drug and alcohol abuse, among others. Ex. 56, Wubbenhorst Rpt. ¶¶ 11-12, 19, 130, 134-36.

48. The WRTKA ensures women are informed about abortion risks that may not otherwise be disclosed to them, thereby ensuring they can weigh potential complications before deciding if they want to proceed. Ex. 56, Wubbenhorst Rpt. ¶ 141.

49. Without the WRTKA, Plaintiffs only disclose the immediate physical risks of their abortion procedures, such as retained fetal matter, allergic reactions, and uterine perforations. *See* Exs. F-O; Ex. 2, Nauser Reb. Rpt. ¶ 7.

50. Plaintiffs do not disclose emotional harms which may arise or other potential long-term physical risks. *See* Exs. F-O; Ex. 2, Nauser Reb. Rpt. ¶ 7.

Alternatives and resources:

51. "The goal of proper informed consent is to ensure full disclosure of … alternatives to the proposed intervention." Ex. 56, Wubbenhorst Rpt. ¶ 31; Ex. 46, Curlin Rpt. ¶ 50.

52. That is especially true in the context of abortions, where "60% of women would [] cho[ose] to give birth if they ha[ve] emotional or financial support." Ex. 56, Wubbenhorst Rpt. ¶ 142.

53. Disclosure of the resources available to help women continue their pregnancy thus has been shown to improve "psychological outcomes for the parents." Ex. 56, Wubbenhorst Rpt. ¶¶ 7, 10, 30.

54. Absent the WRTKA, Plaintiffs do not voluntarily tell patients about resources available that could make such decisions feasible. *See* Ex. F; Ex. G [redacted]; Ex. 35, Sandoval 230(b)(6) Tr. 210:19-211:13 (providers only give more information if patients ask).

Fetal pain:

55. "[F]etal pain is a concern of women considering abortion." Ex. 56, Wubbenhorst Rpt. ¶ 70 (citation omitted).

56. Fetuses can feel pain as early as 12-20 weeks gestation, with pain-capable structures like the cortical subplate forming by 12 weeks and measurable stress responses to noxious stimuli evident by 18-23 weeks. Ex. 56, Wubbenhorst Rpt. ¶ 48; Ex. 44, Condic Rpt. ¶¶ 16, 28; Ex. 50, Pierucci Rpt. ¶¶ 58-60.

57. The "signs, symptoms, and behaviors that are indicative of pain at every other age are also measurably or reproducibly present early in fetal developmental." Ex. 50, Pierucci Rpt. ¶ 64; Ex. 44, Condic Rpt. ¶ 28.

58. Fetal anesthesia has been the standard ethical practice for fetal surgical procedures since the 1980s. It improves outcomes for fetuses. Ex. 56, Wubbenhorst Rpt. ¶ 57; Ex. 50, Pierucci Rpt. ¶ 43; Ex. 44, Condic Rpt. ¶¶ 32, 42.

59. Explaining the evidence of fetal pain enhances a woman's autonomy and facilitates trust with her physician. The potential for fetal pain must therefore "be explained to pregnant women considering abortion." Ex. 56, Wubbenhorst Rpt. ¶ 61.

60. Without the WRTKA, Plaintiffs will not disclose to patients that their unborn child may be able to experience pain at the time of the abortion.

Abortion pill reversal:

61. Informed consent principles require that women be notified about the possibility of abortion pill reversal (APR). Ex. 46, Curlin Rpt. ¶¶ 56, 72, 76, 78; Ex. 56, Wubbenhorst Rpt. ¶¶ 176-77; Ex. 53, Scrafford Rpt. ¶ 10.

62. Scientific evidence supports APR, as progesterone, a hormone safely used in pregnancy care for over 50 years, which can outcompete mifepristone at receptor sites to sustain fetal development. Ex. 56, Wubbenhorst Rpt. ¶¶ 153, 160, 175; Ex. 46, Curlin Rpt. ¶¶ 64-65; Ex. 53, Scrafford Rpt. ¶ 7; Ex. 10, Schreiber Rpt. ¶¶ 14, 40; Ex. 12, Schreiber Tr. 57:15-58:15, 101:3-13.

63. The practice has proven effective in all 50 states and over 86 countries. Ex. 53, Scrafford Rpt. ¶¶ 8-9.

64. Withholding information about APR risks damaging physician-patient trust and harming women who change their minds after taking mifepristone. Ex. 46, Curlin Rpt. ¶ 72; Ex. 56, Wubbenhorst Rpt. ¶¶ 175, 177.

65. Without H.B. 2264, Plaintiffs will not notify their patients about APR.

Coercion:

66. 24% of abortions are "unwanted or coerced"; only 33% of abortions are wanted. "60% of women would have chosen to give birth if they had emotional or financial support." Ex. 56, Wubbenhorst Rpt. ¶ 142.

67. "Part of adequate informed consent is an assessment as to whether a person undergoing an intervention is under duress or coercion to do so." Ex. 56, Wubbenhorst Rpt. ¶ 144; Ex. 49, Curlin Tr. 110:7-11; Ex. 16, Sawicki Tr. 59:20-60:9, 60:19-24.

68. Doing so "protects the integrity of the medical profession," by mitigating the risk an abortion patient "is under duress or some kind of external force or coercion." Ex. 56, Wubbenhorst Rpt. ¶ 146; Ex. 49, Curlin Tr. 191:2-192:5.

69. The WRTKA's provisions, such as the pre-payment provision, the notice and waiting periods, the coercion signage and screening, and the physician-patient meeting all work together to ensure a woman's choice to get an abortion is free from coercion. Ex. 56, Wubbenhorst Rpt. ¶¶ 69, 144; Ex. 49, Curlin Tr. 191:2-192:5.

70. Without the WRTKA, Plaintiffs will only engage in minimal coercion screening and will abandon many of the Act's other coercion safeguards altogether. Ex. 35, Sandoval Tr. 104:7-105:3; Ex. 5, Nauser 230(b)(6) Tr. 119:6-120:2.

Notice and waiting periods:

71. The 24-hour notice and 30-minute waiting periods in the WRTKA enhance informed consent by "giv[ing] patients time to digest the information before undergoing abortion." Ex. 46, Curlin Rpt. ¶ 44.

72. Such waiting periods reflect standard medical practice before serious medical interventions. Ex. 49, Curlin Tr.194:12-196:13.

73. Plaintiffs' ethicist, Dr. Wynia, agrees that "a waiting period can prevent coercion and promote autonomy if it's imposed for a medical procedure," and, as such, waiting periods "are most likely to be appropriate for irreversible procedures that affect life and fertility." Ex. 20, Wynia Tr. 163:15–164:10, 164:24–165:19.

Certification:

74. "[R]equiring a patient to affirm receiving information before undergoing an intervention does not coerce the patient. It is routine for states and hospitals and clinicians to insist on patients receiving information and affirming such receipt as a condition of undergoing an intervention." Ex. 46, Curlin Rpt. ¶ 48.

75. [redacted]

76. [redacted]

[redacted]

Informed consent enhances the physician-patient relationship:

77. "[T]he statutes do not undermine the physician-patient relationship by making physicians agents of the state who must act as if they believe what they do not believe." Ex. 46, Curlin Rpt. ¶ 79.

78. Withholding the Act's disclosures harms the physician-patient relationship by flouting the informed consent principle of transparency. Ex. 46, Curlin Rpt. ¶ 81.

79. "[N]othing in the statute prevents clinicians from making clear … they are required by law to give the patient the state-mandated information. … Any such qualifications, assuming they are offered in good faith and have a sound basis, will further enhance the patient's autonomy by giving the patient more information to consider before they either consent to or decline abortion." Ex. 46, Curlin Rpt. ¶ 80.

80. Plaintiffs identify for their patients what information is state-mandated and what information is not. Ex. 5, Nauser 230(b)(6) Tr. 128:17-129:16; Ex. 6, Nauser 230(b)(6) Tr. 307:23-308:12, 308:21-309:6, 382:12-19, 383:12-17, 388:5-12; Ex. 36, Wales 230(b)(6) Tr. 164:3-165:5, 249:10-17.

81. Plaintiffs also notify patients of the statements with which they disagree, including on the 24-hour consent form itself. *See* Ex. Q (informing patients that a physician's admitting privileges was not reflective of a physician's ability to perform an abortion "safe[ly] with low rates of serious complications"). Ex. 6, Nauser 230(b)(6) Tr. 307:23-308:12 308:21-309:6, 382:12-19, 383:12-17, 388:5-12; Ex. 36, Wales 230(b)(6) Tr. 164:3-165:5, 249:10-17.

H.B. 2749:

82. H.B. 2749 was enacted to inform policymaking that better address the social concerns of women facing the decision to have an abortion, including opportunities for women to access assistance in pregnancy care. Exs. R-T.

83. H.B. 2749 is similar to laws in 14 states, including New York and Oregon, that gather vital public health data on the reasons for abortion. Ex. 58, Wubbenhorst Supp. Rpt. ¶¶ 9, 26-27, 30, 48; Ex. 48, Curlin Supp. Rpt. ¶ 15.

84. Collecting this information aligns with medical practice. OB/GYNs and other clinicians ask patients for the reasons they've chosen elective procedures. Such requests impose no unique burden on abortion providers or patients. Ex. 58, Wubbenhorst Supp. Rpt. ¶¶ 6-8, 12-17.

85. [redacted]

86. "[A]bortion providers have been asking these questions as part of research carried out in abortion clinics[] for decades." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 68.

87. Third parties create Plaintiffs' informed consent materials. Ex. 35, Sandoval 230(b)(6) Tr. 188:8-193:4, 229:9-16; Ex. 5, Nauser 230(b)(6) Tr. 272:6-274:4.

88. After the Court's temporary injunction, Plaintiffs now only briefly discuss the risks, benefits, and alternatives to abortion with their patients. *See* Ex. 35, Sandoval 230(b)(6) Tr. 208:10-215:1; Ex. 5, Nauser 230(b)(6) Tr. 156:3-157:4, 182:8-22, 213:6-214:16.

89. At her deposition, Dr. Nauser testified about her own abortion. Dr. Nauser became pregnant with quadruplets and aborted two of them to mitigate "the risks of a quadruple pregnancy." Ex. 5, Nauser 230(b)(6) Tr. 141:12-156:2.

90. Later, Dr. Nauser had a medical emergency and lost the other two children. As a physician, "they[] [were] fetuses. But, as the person that was pregnant, they were babies. They had names." After she lost them, she "grieved…[and has] never forgotten [them]. Every Christmas [she] put[s] up specific ornaments for them." Ex. 5, Nauser 230(b)(6) Tr. 141:12-156:2.

91. [redacted]

92. [redacted]

93. [redacted]

94. [redacted]

95. [redacted]

96. [redacted]

97. [redacted]

[redacted]

98. [redacted]

99. Planned Parenthood has refused to produce similar reports in its possession. *See generally* Pl. Feb. 26, 2025 Opp'n to State Defs. Mot. Compel.

100. A recent *New York Times* front-page exposé detailed "scores of allegations" that "accuse Planned Parenthood of poor care." See Katie Benner, Botched Care and Tired Staff: Planned Parenthood in Crisis, N.Y. Times (Feb. 15, 2025). Ex. BB.

101. The *New York Times* explained that Planned Parenthood's "patients complained that they felt like they were in a factory" and that a former Planned Parenthood nurse "said that clinics were operating like 'a conveyor belt' for patients." Ex. BB.

102. The only former abortion patients disclosed as witnesses—including Ms. Pond and Ms. Hoyle—oppose Plaintiffs' attempts to invalidate the Statutes.

103. Leslie Wolbert testified that before her abortion with a Planned Parenthood affiliate, she felt "pressured by" Planned Parenthood "to make a decision to abort quickly" and that she "never got to process that [she] was actually pregnant." Ms. Wolbert "put [her] trust in the people at Planned Parenthood," but she was never "told that [she] could keep the baby. The only thing that [she] kept being told [wa]s that [she] needed to abort." Ex. 67, Wolbert Tr. 42:5-68:12.

104. Elizabeth Gillette testified about her abortion experience at a Planned Parenthood affiliate. Ms. Gillette "wanted to keep [her] baby" and hoped to "get the full picture [of] what [her] choices were" at her Planned Parenthood appointment. Instead, "they started to really push that the only option for [her] was an abortion."

Her boyfriend also pressured her into having an abortion and drove her to her appointment. Ex. 63, Gillette Tr. 67:1-9, 68:4-69:3.

105. "From the moment [Ms. Gillette] entered that facility [she asked] about getting a refund, leaving, not being sure, not wanting to be there, trying to find a way to get out of there." "[B]ut [she] had [her] boyfriend on one shoulder, a doctor on another, the receptionist, the person on the phone all telling me that this was the best, that [she] would feel relieved, that [she] couldn't leave, that [she] wouldn't have time if [she] came back later. There was -- there was nobody there counseling me, nobody giving [her] other options, no referrals out, nothing." Ex. 63, Gillette Tr. 78:10-79:10, 80:12-24.

106. Ms. Gillette believed that if she could just "hear the heartbeat" she knew she wouldn't "follow through with" it; but when she "asked to see the heartbeat, [the doctor refused] refused" and she "asked to see the ultrasound," she was only shown a "still shot." "[She] ended up crying and being unwilling to take the medication until [the doctor] put [her] into her office…[she] was there for about 45 minutes crying, begging [her] boyfriend to take [her] away from [t]here. [She] was trapped. [She] felt trapped. [She] felt like [she] didn't have the ability to leave. [She] didn't have [her] own car. And so in order to get out of there, [she] swallowed the pill." And, afterwards, she "suffer[ed] from some severe depression, some anxiety, [and] eating disorders." Ex. 63, Gillette Tr. 63:12-64:13, 72:6-24, 76:21-78:1.

107. Arianna Neely testified that the opportunity to view her ultrasound of her child helped her to decide not to have an abortion. Ex. 65, Neely Tr. 97:17-99:1.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

1. Uncontroverted.[1]

2. Uncontroverted.

3. Uncontroverted that Dr. Nauser testified Hodes & Nauser performs abortions on unborn children diagnosed with anomalies; controverted that they perform "many" such abortions, as Hodes & Nauser provides no evidence to quantify or substantiate their claim. Ex. 1, Nauser Rpt. ¶ 16.

4. Uncontroverted, except as to the characterization "full range" which is controverted and not supported by the cited testimony.

5. Uncontroverted.

6. Uncontroverted.

7. Uncontroverted that Kansas law, common law, and medical ethics require Plaintiffs to obtain informed consent from patients before performing abortions. Controverted[2] that [redacted] By refusing to voluntarily supply patients with the information called for by the WRTKA, Plaintiffs have failed to obtain adequate informed consent since the Court's temporary injunction. Ex. 46, Curlin Rpt. ¶¶ 11, 30, 40, 43, 52 (""it is not possible

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[1] Consistent with Kansas Supreme Court Rule 141(b)(1)(B) and prevailing law, all "uncontroverted" facts in State Defendants' Response are uncontroverted for purposes of this motion only. *See, e.g., Williams v. Derifield,* No. 04 C 5633, 2006 WL 1120490, *1 (N.D.Ill. Apr.25, 2006) (rejecting request to consider facts admitted under Rule 56.1 to be admitted at trial); *Chen v. Mayflower Transit, Inc.,* No. 99 C 6261, 2004 WL 2535258, at *2–3 (N.D.Ill. Sep.23, 2004) (same).

[2] State Defendants object to Plaintiffs' statement of facts, generally, as a significant number of Plaintiffs' record citations do not support, or relate to, the proposition asserted. Given the frequency of these erroneous citations and the page limitations for State Defendants' Response, it is impracticable for State Defendants to elaborate on each mis-citation. State Defendants' response instead specifically identifies only the most egregious examples, along with those instances when none of Plaintiffs' record citations support the identified proposition.

for a woman to give truly informed consent regarding abortion without understanding the central facts that are provided in the state-mandated information."); Ex. 56, Wubbenhorst Rpt. ¶¶ 31-32, 71.

8. Uncontroverted that professional standards of care obligate Plaintiffs to secure informed consent from patients before performing abortions. Controverted that Plaintiffs' approach qualifies as "patient-centered," when, absent the WRTKA, they withhold information which patients value and deem material to their abortion decision. Ex. 63, Gillette Tr. 78:10-79:10, 80:12-24 ("There was -- there was nobody there counseling me, nobody giving [her] other options, no referrals out, nothing"); Ex. 64, Hoyle Tr. 48:8-13, 52:1-53:1, 53:4-54:6; Ex. 67, Wolbert Tr. 42:5-68:12; Ex. 46, Curlin Rpt. ¶¶ 11, 14, 30, 44, 56, 72, 76; Ex. 56, Wubbenhorst Rpt. ¶¶ 31, 42, 59, 70-71, 141, 176-77; Ex. 44, Condic Rpt. ¶¶ 13, 15, 42; Ex. 50, Pierucci Rpt. ¶¶ 13-30; Ex. 51, Pierucci Reb. Rpt. ¶¶ 3, 6, 8; Ex. 53, Scrafford Rpt. ¶¶ 10, 12, 14.

9. The first sentence is controverted as to whether asking the reasons for patient medical decision-making is clinically or operationally necessary. Ex. 58, Wubbenhorst Supp. Rpt. ¶¶ 6-8, 12-17, 68; Ex. U. The second sentence is not controverted to the extent it refers to some patients.

10. Uncontroverted.

11. Controverted that neonatologists generally place viability around 24 weeks LMP and that "fetal viability does not occur before 22-23 weeks LMP." Dr. Pierucci, a neonatologist, explained that while "the edge of viability has decreased to approximately 22–23 weeks gestation," there are now "an increasing number of cases even [] lower" and cited examples of children who have survived, despite being born before 22-23 weeks gestation. Ex. 50, Pierucci Rpt. ¶ 48.

12. Uncontroverted.

13. The first sentence is controverted because it does not provide a complete description of the process of surgical abortion and relies on euphemism to obscure the process— D&E and D&C procedures dismember an unborn child, not merely "empty [] uterine contents." Ex. 56, Wubbenhorst Rpt. ¶ 59; Ex. 46, Curlin Rpt. ¶ 24. The second sentence is controverted to the extent that abortion involves potential psychological risks not at issue for miscarriage treatment. Ex. 56, Wubbenhorst Rpt. ¶¶ 11-12, 19, 130, 134-36 (noting the "significant negative mental health outcomes" for women who get abortions, including PTSD, depression, and drug and alcohol abuse).

14. Controverted. While these abortions do not involve incisions, they do involve dismembering the unborn child and can result in serious side effects to the mother. Ex. 56, Wubbenhorst Rpt. ¶ 59; Ex. 46, Curlin Rpt. ¶ 24.

15. The first sentence is uncontroverted. The second sentence is controverted only to the extent it suggests that guidelines from ACOG and WHO are controlling in this matter. *See* Ex. 46, Curlin Rpt. ¶¶ 24, 32-35.

16. Controverted only with respect to the characterization "stops the pregnancy from growing," which is a euphemism. Ex. 56, Wubbenhorst Rpt. ¶¶ 42, 61, 63.

17. Controverted. The cited testimony does not support the proposition asserted. Research suggests that mifepristone alone is ineffective in approximately 25% of cases. Ex. 56, Wubbenhorst Rpt. ¶ 157.

18. Controverted only with respect to the characterization "expel the pregnancy," which should read "expel the fetus." Ex. 53, Scrafford Rpt. ¶ 6.

19. Controverted only to the extent this statement fails to disclose the REMS the FDA has instituted for mifepristone. Ex. 56, Wubbenhorst Rpt. ¶¶ 75-81.

20. Controverted as to the characterization "nearly all," when studies relied on by ACOG show continued pregnancy after chemical abortion in approximately 1% of cases and as many as 3.6% of cases where patients were taking progesterone. Ex.

CC. Also controverted with respect to the characterization "terminating an early pregnancy," which is a euphemism. Ex. 56, Wubbenhorst Rpt. ¶¶ 42, 61, 63.

21. Uncontroverted.

22. Controverted. The Woman's Right to Know Act speaks for itself.

23. Controverted. The cited testimony does not support the proposition asserted. Additionally, similar informed consent statutes are ubiquitous in Kansas. *See* State Defs. Summ. J. Br. at 35-38. Moreover, Plaintiffs' contention fails because it relies on inadmissible hearsay testimony. *See* Defs. Summ. J. Br. at 18-30.

24. Controverted. The Woman's Right to Know Act speaks for itself.

25. Controverted. The Woman's Right to Know Act speaks for itself. Controverted that the WRTKA's disclosures are medically inaccurate or irrelevant. Evidence shows an unborn child has physical structures to experience pain by 22 weeks LMP. Ex. 56, Wubbenhorst Rpt. ¶ 48; Ex. 44, Condic Rpt. ¶¶ 16, 28; Ex. 50, Pierucci Rpt. ¶¶ 58-60. A fetus is a distinct human being. Ex. 56, Wubbenhorst Rpt. ¶¶ 33, 36-45 (noting the "universal consensus" that a fetus is a human); Ex. 46, Curlin Rpt. ¶¶ 11, 20, 22 ("the human embryo or human fetus is literally an unborn child."); Ex. 50, Pierucci Rpt. ¶¶ 6-8; Ex. 44, Condic Rpt. ¶¶ 12-13. The only abortion patients testifying here confirm fetal development details matter to women's decisions. Ex. 63, Gillette Tr. 63:12-64:13, 72:6-24, 76:21-78:1 (noting that if she could just "hear the [baby's] hearbeat" she knew she wouldn't "follow through with" it); Ex. 64, Hoyle Tr. 48:8-13, 52:1-53:1 (testifying that if she had been given the opportunity to "see[] the sonogram, see[] the heartbeat, [she] would not have chosen" an abortion because "[i]t would have shown proof of life."); Ex. 65, Neely Tr. 97:17-99:1 (testifying that she decided not to have an abortion after seeing an ultrasound of her unborn child); *see also* Ex. 56, Wubbenhorst Rpt. ¶ 70.

26. Controverted. The Woman's Right to Know Act speaks for itself.

27. Controverted that this study credibly establishes 43% of KDHE's pamphlet statements as medically inaccurate or misleading. *See* Ex. 26, Daniels Tr. 40:5–14 (conceding that she has "never done a comprehensive analysis" of Kansas's current informed consent materials), 64:11–22 (admitting that her study does not prove that any of the Kansas informed consent statements are medically inaccurate).

28. Controverted. The Woman's Right to Know Act speaks for itself.

29. Controverted. The Woman's Right to Know Act speaks for itself.

30. Controverted. The Woman's Right to Know Act speaks for itself.

31. Controverted. The Woman's Right to Know Act speaks for itself.

32. Controverted. The Woman's Right to Know Act speaks for itself.

33. Uncontroverted.

34. Controverted. The Woman's Right to Know Act speaks for itself.

35. Controverted. The Woman's Right to Know Act speaks for itself.

36. Controverted. The Woman's Right to Know Act speaks for itself.

37. Controverted. The Woman's Right to Know Act speaks for itself.

38. Uncontroverted that Plaintiffs have a duty to obtain the informed consent of their patients. Controverted that these duties alone cause abortion providers to provide adequate informed consent. *See generally* Ex. 66, Pond. Tr. (not receiving adequate informed consent pre-WRTKA despite providers' duties); Ex. 64, Hoyle Tr. (same). Controverted that the WRTKA "singles out" abortion for additional requirements, as Kansas also imposes informed consent requirements on many other medical procedures. *See* State Defs. Summ. J. Br. at 35-38.

39. Controverted. Other medical procedures in Kansas are subject to similar regulation. For example, Plaintiffs' handling of fetal tissue—as with so many other areas of medicine, *see* State Defs. Summ. J. Br. at 35-38—is subject to informed consent requirements. *See* K.S.A. § 65-67a07. Controverted that the cited Curlin testimony supports this proposition.

40. Controverted. The first clause is controverted because Plaintiffs can and do distinguish their speech from the State's speech in providing the Act's disclosures, including that they disagree with some of the statements in the WRTKA. Ex. 5, Nauser 230(b)(6) Tr. 128:17-129:16; Ex. 6, Nauser 230(b)(6) Tr. 307:23-308:12, 308:21-309:6, 382:12-19, 383:12-17, 388:5-12; Ex. 36, Wales 230(b)(6) Tr. 164:3-165:5, 249:10-17. The second and third clauses are legal conclusions without factual support. No patients have testified about these alleged harms; the cited testimony is inadmissible hearsay and speculation. *See* Defs. Summ. J. Br. at 18-30.

41. Controverted. The Woman's Right to Know Act speaks for itself. Further controverted that any of the information in the WRTKA is irrelevant or distressing to women, as Plaintiffs have produced no admissible evidence of such harm despite purportedly complying with the WRTKA for nearly 30 years. *See* Defs. Summ. J. Br. at 18-30. Controverted that the cited Wubbenhorst and Donovan testimony supports this proposition.

42. Controverted that Plaintiffs accurately depict the WRTKA's legal requirements; the law speaks for itself. The remainder of the representations in this paragraph are bare legal conclusions unsupported by facts: no women patients have testified that they found the WRTKA disclosures to be irrelevant, medically inaccurate, or harmful, or that waiting periods caused injury. Defs. Br. Sup. Mot. for Summ. J. at 18-30. Plaintiffs' cited testimony thus relies on inadmissible hearsay and baseless conjecture. *Id.* Controverted that the cited Wubbenhorst and Donovan testimony supports this proposition.

43. Controverted. Controverted that the cited testimony supports this proposition. Additionally, a physician's assessment of what is material to a patient's informed consent can be flawed or incomplete. Ex. 46, Curlin Rpt. ¶ 50. For instance, Plaintiffs concede they withhold information regarding fetal development from their patients, yet the only women patients testifying in this

case assert that such information was (or would have been) crucial to their abortion decisions. Ex. 63, Gillette Tr. 63:12-64:13, 72:6-24, 76:21-78:1 (noting that if she could just "hear the [baby's] hearbeat" she knew she wouldn't "follow through with" it); Ex. 64, Hoyle Tr. 48:8-13, 52:1-53:1 (testifying that if she had been given the opportunity to "see[] the sonogram, see[] the heartbeat, [she] would not have chosen" an abortion because "[i]t would have shown proof of life."); Ex. 65, Neely Tr. 97:17-99:1 (testifying that she decided not to have an abortion after she was given an opportunity to view an ultrasound of her unborn child); Ex. 46, Curlin Rpt. ¶ 14. No patients have testified that they were confused by "mixed signals" from providers; Plaintiffs differentiate their statements from the State's and provide corrective disclosures when they contest WRTKA requirements. Ex. 5, Nauser 230(b)(6) Tr. 128:17-129:16; Ex. 6, Nauser 230(b)(6) Tr. 307:23-308:12, 308:21-309:6, 382:12-19, 383:12-17, 388:5-12; Ex. 36, Wales 230(b)(6) Tr. 164:3-165:5, 249:10-17. Nor do any women claim the WRTKA damaged their relationship with their physician, caused distress, or fostered shame or stigma. Plaintiffs' cited testimony relies on inadmissible hearsay and speculation.

44. Controverted. Plaintiffs have offered no documentary evidence to support their allegations that WRTKA compliance "consumed their limited resources and staff time" or caused turnover. *See* Section III.C, below. Even if admissible evidence exists, the harm was self-inflicted: the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709.

45. Controverted. Plaintiffs have provided no documentary evidence of these alleged harms. To the extent they occurred, these burdens were caused by Plaintiffs' procedures, not the Act, as the cited testimony reveals they stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709.

46. Controverted. Plaintiffs have provided no documentary evidence of these alleged harms. And to the extent they occurred, these burdens were caused by Plaintiffs' procedures, not the Act, as the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709.

47. Controverted. Plaintiffs have provided no documentary evidence of these alleged harms. To the extent they occurred, these burdens were caused by Plaintiffs' procedures, not the Act, as the cited testimony reveals they stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709.

48. Controverted. The WRTKA does not limit patient volume. Hodes & Nauser still sees the same daily number of patients as it saw before the Court's temporary injunction. Ex. 5, Nauser 230(b)(6) Tr. 76:21-77:25. Planned Parenthood adjusts appointments to demand, hiring physicians as needed, both before and after the injunction. Ex. 36, Wales 230(b)(6) Tr. 44:4-51:6 ("our capacity was functionally what we were providing. You know, if we had a boost in demand we would have increased staffing"). Nor did the Act require Plaintiffs to alter patient flow; Plaintiffs still mandate physician meetings and offer ultrasound views and still adhere to largely the same flow as before the temporary injunction. Defs. Summ. J. Br. at 22-23; Exs. K-L, O.

49. Controverted that a patient meeting their physician before a procedure offers "no medical benefit." Ex. 16, Sawicki Tr. 76:2-14, 79:19-80:10; Ex. 20, Wynia Tr. 163:15–164:10, 164:24–165:19; Ex. 46, Curlin Rpt. ¶ 44; Ex. 49, Curlin Tr. 191:2-192:5. But, more importantly, it is controverted that these hypothetical circumstances ever occurred. Dr. Nauser is the only physician who performs abortions at Hodes & Nauser, so patients would have to wait for her return from

delivery, regardless of the WRTKA. Ex. 5, Nauser 230(b)(6) Tr. 76:21-79:15. Planned Parenthood offers no such emergency medical care and only had one abortion provider at their clinics at a time, making such hypothetical scenarios inapplicable. Ex. 36, Wales 230(b)(6) Tr. 243:22-246:3; Ex. 37, Casey Tr. 65:14-24.

50. Controverted. First, Plaintiffs lack evidence that the WRTKA delayed abortions. And any cited delays or denials, if credible, were self-inflicted, as the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. Second, Plaintiffs offer no evidence that abortions could occur sooner than 24 hours. Plaintiffs parenthetical purporting to summarize Dr. Wales' testimony is inaccurate. She merely said that, post-injunction, Planned Parenthood stopped rejecting patients for skipping its voluntary certification, not that they now schedule patients for abortions within 24 hours. Ex. 36, Wales 230(b)(6) Tr. 64:4-15. The uncontroverted evidence shows the opposite is true: Plaintiffs book patients several days or weeks ahead of their appointments. *See* Ex. DD; Ex. 35, Sandoval 230(b)(6) Tr. 97:14-17.

51. Controverted. Plaintiffs have provided no documentary evidence of these alleged harms; the testimony of these harms is speculation and hearsay; no patient has testified to these alleged harms; and to the extent they occurred, they were caused by Plaintiffs, not the Act, as the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709.

52. Controverted. Plaintiffs have no documentary evidence of these alleged harms; to the extent they occurred, they were caused by Plaintiffs, not the Act, as the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which

the Act does not require. Additionally, their claims of patient distress and staff trauma lean solely on inadmissible hearsay. Defs. Summ. J. Br. at 24-25.

53. Controverted. Plaintiffs have provided no documentary evidence of these alleged harms; to the extent they occurred, they were caused by Plaintiffs, not the Act, as the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709. Additionally, their claims of patient distress and staff trauma lean solely on inadmissible hearsay and speculation. Defs. Summ. J. Br. at 24-25.

54. Controverted. The cited testimony does not support the proposition that patients were ever denied care altogether because of the Act. Nor do Plaintiffs provide any documentary evidence of any of these alleged harms. To the extent they occurred, they were caused by Plaintiffs, not the Act, as the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709. Additionally, their claims of patient distress and staff trauma lean solely on inadmissible hearsay. Defs. Summ. J. Br. at 24-25.

55. Controverted. First, any patient allegedly turned away was harmed by Plaintiffs' protocols, not the Act, as the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709. Second, to support these claims, Plaintiffs testify to the contents of documents which they refuse to produce—their patient medical and scheduling records. *See* Section III.C, below. Third, Plaintiffs specifically testified that they were not aware of any instance where a patient was unable to access an abortion because of the Act. Ex. 36, Wales 230(b)(6) Tr. 145:5-14.

56. Controverted. The WRTKA speaks for itself. Furthermore, the 30-minute waiting period and the coercion signage requirement enhance, not infringe, women's autonomy. Ex. 16, Sawicki Tr. 76:2-14, 79:19-80:10; Ex. 20, Wynia Tr. 163:15–164:10, 164:24–165:19. And Plaintiffs still offer women the right to view and keep their ultrasound image, meet with their provider, and certify receipt of Plaintiffs' disclosures. Ex. 35, Sandoval 230(b)(6) Tr. 146:14-18, 161:13-16, 167:22-168:7, 169:3-19, 287:5-23; Ex. 5, Nauser 230(b)(6) Tr. 160:19-161:11, 227:18-229:12, 223:3-6, 285:1-20; Exs. F, I-L. Plaintiffs have no evidence of any woman who was unable to get, or delayed from receiving, an abortion because of the Act; all delays cited were caused by Plaintiffs, not the Act as the cited testimony reveals these alleged harms stem from Plaintiffs demand that patients print, sign, date, and timestamp consent forms 24 hours in advance, which the Act does not require. *See* K.S.A. § 65-6709. Moreover, Plaintiffs' contention fails because it relies on inadmissible hearsay and speculation. *See* Defs. Summ. J. Br. at 18-30.

57. Controverted. Plaintiffs' expert testified that the 30-minute waiting period, abortion alternatives disclosures, gestational age disclosures, and the coercion signage requirement do not infringe women's autonomy. Ex. 16, Sawicki Tr. 44:8–45:1, 50:7–23, 51:12–52:1, 76:2-14, 79:19-80:10; Ex. 20, Wynia Tr. 163:15–164:10, 164:24–165:19. And the mandated disclosures enhance, not hinder, women's autonomy by provid[ing] factual and relevant information that the Plaintiffs otherwise would withhold." Ex. 46, Curlin Rpt. ¶ 11; Ex. 56, Wubbenhorst Rpt. ¶¶ 31-32. [redacted] Finally, Plaintiffs have no evidence beyond inadmissible hearsay testimony and speculation of abortion patients claiming the WRTKA disrupted their decision-making or that they'd fully weighed their choice pre-appointment. State Defs. Br. Supp. Mot. Summ J. 24-25.

58. Controverted. Plaintiffs offer no evidence that the Kansas legislature acted with such stereotypes in mind when enacting and amending the WRTKA. In speculating about these motivations, Plaintiffs' experts ignore the WRTKA's legislative history altogether but instead rely solely on improper speculation. *See* Ex., 21 Syrett Rpt. ¶¶ 48–56; Ex. 24, Syrett Tr. 57:8–14 (acknowledging he does not know or claim that Kansas legislators supported the Act because of sex stereotypes); Ex. 24, Syrett Tr. 51:24–52:21 (admitting that it is impossible to determine legislator's motive for supporting a particular bill, including the WRTKA).

59. Controverted that Plaintiffs have any proof that the Kansas legislatures acted with these intentions in mind when enacting these older laws or that the Kansas legislatures which enacted and amended the WRTKA acted with such intentions in mind. *See* Ex. 21, Syrett Rpt. ¶¶ 48–56; Ex. 24, Syrett Tr. 57:8–14 (acknowledging he does not know or claim that Kansas legislators supported the Act because of sex stereotypes); Ex. 24, Syrett Tr. 51:24–52:21 (admitting that it is impossible to determine legislator's motive for supporting a particular bill, including the WRTKA).

60. Controverted. These statements of third parties more than a century ago are immaterial and are not attributable to the Kansas legislature in enacting and amending the WRTKA. *See* Ex. 21, Syrett Rpt. ¶¶ 48–56; Ex. 24, Syrett Tr. 57:8–14 (acknowledging he does not know or claim that Kansas legislators supported the Act because of sex stereotypes); Ex. 24, Syrett Tr. 51:24–52:21 (admitting it is impossible to determine legislator's motive for supporting a particular bill, including the WRTKA).

61. Controverted that Plaintiffs' objections reflect medical consensus and that APR is either experimental or potentially dangerous. Ex. 56, Wubbenhorst Rpt. ¶¶ 153, 160, 175; Ex. 46, Curlin Rpt. ¶¶ 64-65; Ex. 53, Scrafford Rpt. ¶¶ 7-9.

Additionally, a physician's assessment of what is material to a patient's informed consent can be flawed or incomplete. Ex. 46, Curlin Rpt. ¶ 50. For instance, Plaintiffs concede they withhold information regarding fetal development from their patients, yet the only women patients testifying in this case assert that such information was (or would have been) crucial to their abortion decisions. Ex. 63, Gillette Tr. 63:12-64:13, 72:6-24, 76:21-78:1; Ex. 64, Hoyle Tr. 48:8-13, 52:1-53:1; Ex. 65, Neely Tr. 97:17-99:1; *see also* Ex. 56, Wubbenhorst Rpt. ¶ 70.

62. Controverted that H.B. 2264 requires Plaintiffs to "convey the State's message," as they can and do distinguish their speech from the State's speech in furnishing these disclosures and provide their own corrective disclosures where they disagree with those required by the WRTKA. Ex. 5, Nauser 230(b)(6) Tr. 128:17-129:16; Ex. 6, Nauser 230(b)(6) Tr. 307:23-308:12, 308:21-309:6, 382:12-19, 383:12-17, 388:5-12; Ex. 36, Wales 230(b)(6) Tr. 164:3-165:5, 249:10-17. Furthermore, such information is vital, offering a critical option for women who start a medication abortion but reconsider after taking the first pill. Ex. 46, Curlin Rpt. ¶ 72; Ex. 56, Wubbenhorst Rpt. ¶¶ 175, 177. Controverted that the Act suggests patients should not be certain in their abortion decision; if a physician discerns a patient is operating with that mindset, he or she should "counsel[] the patient to prevent this potential misunderstanding." Ex. 46, Curlin Rpt. ¶ 71

63. Controverted. The cited testimony does not support the proposition. H.B. 2264 does not require Plaintiffs to "convey the State's message," as they can and do distinguish their speech from the State's speech in making the disclosures and provide corrective disclosures where they disagree with those required by the WRTKA. Ex. 5, Nauser 230(b)(6) Tr. 128:17-129:16; Ex. 6, Nauser 230(b)(6) Tr. 307:23-308:12, 308:21-309:6, 382:12-19, 383:12-17, 388:5-12; Ex. 36, Wales 230(b)(6) Tr. 164:3-165:5, 249:10-17. Also, there is evidence supporting APR and no evidence to suggest it will confuse or harm patients. Ex. 56, Wubbenhorst Rpt. ¶¶

153, 160, 175, 177; Ex. 46, Curlin Rpt. ¶¶ 64-65, 72; Ex. 53, Scrafford Rpt. ¶¶ 7-9; Ex. 10, Schreiber Rpt. ¶¶ 14, 40; Ex. 12, Schreiber Tr. 57:15-58:15, 101:3-13.

64. Uncontroverted as to Dr. Nauser's testimony. Controverted that Planned Parenthood has presented similar evidence. Ms. Wales testified that "there is a chance" they would take similar measures. Ex. 36, Wales Dep. 371:13-19. Controverted that H.B. 2264 requires the results claimed by Plaintiffs. *See* H.B. 2264. Controverted that the cited Curlin testimony supports this proposition.

65. Controverted. The cited testimony does not support the proposition.

66. Controverted. The cited testimony does not support the proposition.

67. Uncontroverted that the CDC, vital registrars, and professional associations issue recommendations and standard forms. Controverted that the State of Kansas is somehow required to follow these standard forms and recommendations. Even Plaintiffs' experts recognize that "[b]est practices and professional consensus are used to revisit contents of reports as needed." Ex. 32, Lee Rpt. ¶ 36. This alleged consensus is hardly reliable or binding.

68. Controverted. The laws speak for themselves. Controverted that prior to H.B. 2749 the information in the ITOP form was solely left to the discretion of the Secretary. *See* K.S.A. § 65-445(b) (specifying information that **must** be included in ITOP reports); K.S.A. § 65-6709(e) (same).

69. Uncontroverted that KDHE's ITOP form collected the specified information. Controverted that the decision to collect such information was shaped by "the professional consensus." *See* KDHE 2d Rog. R&Os No. 36 ("KDHE cannot reasonably describe why KDHE modeled its ITOP form on the U.S Standard Report of Induced Termination of Pregnancy as the form dates back to at least as early as 2014.").

70. Uncontroverted.

71. Uncontroverted that the legislature did not consult KDHE while drafting H.B. 2749. Controverted that the legislature was obligated to do so.

72. Controverted that Plaintiffs accurately depict the legal requirements contained in H.B. 2749; the law speaks for itself. However, State Defendants specifically controvert Plaintiffs' representation that patients may not "decline to answer" the identified queries: "the patient is not obligated to answer the questions" presented in H.B. 2749. Ex. 48, Curlin Supp. Rpt. ¶¶ 14-15.

73. Controverted that Plaintiffs accurately depict the legal requirements contained in H.B. 2749; the law speaks for itself. State Defendants specifically controvert Plaintiffs' implication that patients may not decline to answer the identified queries: "the patient is not obligated to answer the questions" presented in H.B. 2749. Ex. 48, Curlin Supp. Rpt. ¶¶ 14-15.

74. Controverted. The proposed amendment speaks for itself.

75. Controverted. The proposed amendment and house journal speak for themselves.

76. Controverted. Plaintiffs' contention fails because it relies on inadmissible hearsay. *See* Defs. Summ. J. Br. at 18-30. Controverted that the statement of one legislator can be attributed to the Kansas legislature as a whole. Further controverted in that the cited Donovan testimony does not support the proposition.

77. Controverted that Plaintiffs have any admissible evidence that the Kansas legislature acted on this basis when enacting H.B. 2749. *See* Ex. 21, Syrett Rpt. ¶¶ 48–56; Ex. 24, Syrett Tr. 57:8–14 (acknowledging he does not know or claim that Kansas legislators supported the challenged laws because of sex stereotypes); Ex. 24, Syrett Tr. 51:24–52:21 (admitting that it is impossible to determine legislator's motive for supporting a particular bill, including the WRTKA). Rather, the legislative record reveals H.B. 2749's purpose: to build policies that better address

the social concerns of women facing an abortion decision, including opportunities for women to access assistance in pregnancy care. Exs. R-T.

78. Controverted. [redacted]. Second, this information is "materially relevant to forming policy to mitigate demand for abortion, and asking the patient herself respects her authority to say what her reasons are." Ex. 48, Curlin Supp. Rpt. ¶ 13. Plaintiffs thus "fundamentally misunderstand the purpose of the data collected by [H.B. 2749], which is to guide state policymaking concerning abortion." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 50

79. Controverted. First, providers nationwide have participated in data collection related to patients' decision-making since the early 1970s without any evidence that such queries are traumatizing, infantilizing, or harm those whose considerations are not captured by questionnaires. Ex. 60, Donovan Rpt. ¶ 19. Second, if any patients' reason is not listed, H.B. "anticipates that the patient may choose to decline to answer." Ex. 23, Syrett Supp. Rpt. ¶ 3. Third, Plaintiffs acknowledge that "'there is not a way to construct a robust list of "reasons" for abortion.' In such cases … the State may continue to collect data on the reasons of abortion to the best of its ability, even if that data does not include every possible reason for abortion." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 52. Fourth, there is "no data to support the assertion that data collection leads to stigmatization and negative health effects for women seeking abortion." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 65. Fifth, Plaintiffs resort to bare speculation for claims of theorized harm which they and their experts are not qualified to make, for none of the deponents speculating of this harm are psychiatrists or psychologists.

80. Controverted that H.B. 2749's list of reasons is insufficiently comprehensive or that any omissions somehow harm abortion patients. Plaintiffs acknowledge that "'there is not a way to construct a robust list of "reasons" for abortion.' In such cases …

the State may continue to collect data on the reasons of abortion to the best of its ability, even if that data does not include every possible reason for abortion." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 52.

81. Controverted. First, providers nationwide have participated in data collection related to patients' decision-making since the early 1970s without any evidence that such queries are traumatizing, infantilizing, or harm those whose considerations are not captured by questionnaires. Ex. 60, Donovan Rpt. ¶ 19. Second, "clinicians cannot avoid asking patients about domestic violence or child abuse out of a desire not to 'judge' a patient, because the risk to the patient's physical safety outweighs the theoretical risk of a patient feeling 'judged.'" Ex. 58, Wubbenhorst Supp. Rpt. ¶ 35.

82. Controverted. There is no evidence H.B. 2749's questions have, or would, ever cause the alleged harm. First, providers nationwide have participated in data collection related to patients' decision-making since the early 1970s without any evidence that such queries are traumatizing, infantilizing, or harm those whose considerations are not captured by questionnaires. Ex. 60, Donovan Rpt. ¶ 19. Second, "clinicians cannot avoid asking patients about domestic violence or child abuse out of a desire not to 'judge' a patient, because the risk to the patient's physical safety outweighs the theoretical risk of a patient feeling 'judged.'" Wubbenhorst Supp. Rpt. ¶ 35. Third, there is "no data to support the assertion that data collection leads to stigmatization and negative health effects for women seeking abortion." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 65. Fourth, Plaintiffs resort to bare speculation for claims of theorized harm which they and their experts are not qualified to make, for the cited deponents are not psychiatrists or psychologists. Controverted, the cited Donovan testimony does not support the proposition.

83. The first sentence is controverted because providers nationwide have participated in similar data collection related to patients' decision-making since the

early 1970s without any evidence that such queries "erode trust in the physician-patient relationship [or] intrude on patient privacy." *See* Ex. 60, Donovan Rpt. ¶ 19. In the second sentence, it is controverted that Plaintiffs accurately depict H.B. 2749's legal requirements; the law speaks for itself. Moreover, there is no basis for speculating that H.B. 2749's questions interfere with the physician-patient relationship; indeed, "it is hard to think of a better use of a clinician's time, or greater needs, than to potentially identify women and girls trapped in sex trafficking, domestic violence, or sexual abuse. Patient-centered care must incorporate such questions into conversations with patients in order to help women and girls in abusive situations." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 42. Nor is there any reason to suppose the collected information could be used to identify patients. Ex. 61, Donovan Tr. 245:21–246:10. Controverted, the cited Donovan testimony does not support the proposition.

84. Controverted. "[T]here is no specific identifiable information on the form" and "the data is stored in a secure database," making any threat of identification virtually non-existent. Ex. 71, Smith (KDHE) Dep. 40:23-41:14. Nor does the information collected by H.B. 2749 qualify as "identifiable data" under federal law. Ex. 61, Donovan Tr. 278:6–279:6; Ex. 60, Donovan Rpt. ¶¶ 14–17. "[N]othing in [H.B. 2749] would put at risk a patient's identity, confidentiality, or privacy." Ex. 61, Donovan Tr. 245:21–246:10. The claim is unsupported by the cited testimony.

85. Controverted. The legislative record reveals H.B. 2749's purpose: to build policies that better address the social concerns of women facing an abortion decision, including opportunities for women to access assistance in pregnancy care. Exs. R-T.

86. First, it is controverted that Plaintiffs accurately describe H.B. 2749's legal requirements; the law speaks for itself. Second, there is no evidence to suggest similar surveys have ever impacted patients in this way, nor are Plaintiffs and

their experts qualified to opine that they might. First, providers nationwide have participated in data collection related to patients' decision-making since the early 1970s without any evidence that such queries are traumatizing, infantilizing, or harm those whose considerations are not captured by questionnaires. Ex. 60, Donovan Rpt. ¶ 19. Second, "clinicians cannot avoid asking patients about domestic violence or child abuse out of a desire not to 'judge' a patient, because the risk to the patient's physical safety outweighs the theoretical risk of a patient feeling 'judged.'" Ex. 58, Wubbenhorst Supp. Rpt. ¶ 35. Third, there is "no data to support the assertion that data collection leads to stigmatization and negative health effects for women seeking abortion." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 65.

87. Controverted. H.B. 2749's questions enhance patient care, and there is no evidence to suggest H.B. 2749 will harm patients in the manner alleged by Plaintiffs, nor are Plaintiffs and their experts qualified to opine that they might. Ex. 58, Wubbenhorst Supp. Rpt. ¶¶ 35, 65; Ex. 60, Donovan Rpt. ¶ 19. Controverted that the cited Donovan testimony does not support the proposition.

88. Controverted. "There is no ethical norm that requires the state to ignore the frequency of these health-related challenges faced by women seeking abortion" simply because identical information is not sought in other contexts; "[o]n the contrary, it seems obvious that the state has an interest in doing what it can to mitigate these challenges as part of its interest in 'improv[ing] the health of the community.'" Ex. 48, Curlin Supp. Rpt. ¶ 7. Controverted in that the cited Curlin testimony does not support the proposition.

89. Controverted. H.B. 2749 "does not single out abortion providers in comparison to other clinicians. Ob-Gyns and other physicians generally ask patients their reasons for requesting elective medical procedures as a part of the standard of care." Ex. 58, Wubbenhorst Supp. Rpt. ¶¶ 6-8. Plaintiffs' claims of stigma, intrusion, or labels of deviancy lack evidence—similar questions have been

asked in clinics for decades without trauma, making it a practical step to inform policy, not judge women. Ex. 58, Wubbenhorst Supp. Rpt. ¶¶ 35, 36, 58, 65, 68; Ex. 48, Curlin Supp. Rpt. ¶ 16.

90. Uncontroverted.

91. Controverted. Paragraph 91 states a legal conclusion.

92. Controverted. Paragraph 92 states a legal conclusion.

93. Uncontroverted.

94. Controverted. First, H.B. 2749 is validly enacted amendment to K.S.A. § 65-445; Plaintiffs' citations do not support Plaintiffs' characterization that H.B. 2749 was "shoehorned" into the statute. Second, the organizations referenced by Plaintiffs are not "authoritative source[s] on ITOP reporting," such that Kansas could somehow "depart" from their recommendations. Ex. 68, Ahmed (KDHE) Dep. 29:5-31:4. Nor does the claim regarding subjective statements violate "any norm in medicine, public health, or research. How often women seek abortions for different reasons is materially relevant to forming policy to mitigate demand for abortion, and asking the patient herself respects her authority to say what her reasons are." Ex. 48, Curlin Supp. Rpt. ¶ 13.

95. Controverted that public health surveillance is an inappropriate tool for collecting the H.B. 2749 data. *See* Ex. 48, Curlin Supp. Rpt. ¶¶ 12, 14; Ex. 58, Wubbenhorst Supp. Rpt. ¶ 29; Ex. 60, Donovan Rpt. ¶ 18. Controverted in that the cited Donovan testimony does not support the proposition.

96. Controverted in that Paragraph 96 is a legal conclusion and/or expert opinion and not a fact. H.B. 2749 meets the CDC definition of public health surveillance. Ex. 60, Donovan Rpt. ¶ 18; Ex. 48, Curlin Supp. Rpt. ¶¶ 12, 14; Ex. 58, Wubbenhorst Supp. Rpt. ¶ 29. And the legislative record reveals the bill's purpose: to build policies that better address the social concerns of women facing an abortion decision, including opportunities for women to access assistance in

pregnancy care. Exs. R-T. Controverted in that the cited Donovan testimony does not support the proposition.

97. Controverted in that Paragraph 97 is a legal conclusion and/or expert opinion and not a fact and the cited testimony does not support the proposition. Moreover, Plaintiffs citation to Donovan is misleading; she testified that consent is "generally not required" in public health surveillance, not that it is never received. Ex. 61, Donovan Tr. 150:4-10. Nor is Plaintiffs' representation material in these circumstances because "the patient is not obligated to answer the questions" presented in H.B. 2749. Ex. 48, Curlin Supp. Rpt. ¶¶ 14-15. Controverted in that the cited Donovan testimony does not support the proposition.

98. Controverted in that Paragraph 98 is a legal conclusion and/or expert opinion and not a fact, and the conclusion is incorrect. *See* Ex. 61, Donovan Tr. 150:11-15. Further controverted in that Paragraph 98 is immaterial because the law benefits the population and patients are not obligated to answer the questions" presented in H.B. 2749, rendering any data collected voluntary and consensual. Ex. 48, Curlin Supp. Rpt. ¶¶ 14-15; Ex. 58, Wubbenhorst Supp. Rpt. ¶ 69.

99. Controverted in that Paragraph 99 is a legal conclusion and/or expert opinion and not a fact and the cited testimony does not support the proposition. Further controverted that such data must be comprehensive to be used for public health action. H.B. 2749 is designed to seek comprehensive data from the groups from which the State seeks information. Ex. 61, Donovan Tr. 164:7–24. Even if gaps exist, public health data is often partial and imprecise, yet States rightly collect it; demanding perfect data is unrealistic. Ex. 48, Curlin Supp. Rpt. ¶ 14; Ex. 58, Wubbenhorst Supp. Rpt. ¶ 52.

100. Controverted in that Paragraph 100 is a legal conclusion and/or expert opinion and not a fact.

101. Controverted. The cited testimony does not support the proposition. KDHE representatives testified that they were not aware of the public health purpose of H.B. 2749, not that they could not identify any such purpose. Ex. 71 Smith (KDHE) Dep. 27:1-30:12 (simply stating that she was "not … aware of" the purpose for H.B. 2749's data collection). The legislative record reveals the bill's purpose: to build policies that better address the social concerns of women facing an abortion decision, including opportunities for women to access assistance in pregnancy care. Exs. R-T. Moreover, Plaintiffs' out-of-context quote of Ms. Donovan's testimony is misleading. Ms. Donovan testified that data "doesn't have utility until it's collected, analyzed, and interpreted for the purposes of public health planning and ... assessment and evaluation and resource allocation." Ex. 61, Donovan Tr. at 201:18–202:9. That makes "statistical analysis" a "use" and "purpose of data collection." *Id.* at 177:14–178:18. And she tied the statistical analysis to H.B. 2749, which states that the information obtained "may be used only for statistical purposes." *Id.* at 179:22–182:21; H.B. 2749 § 1(f).

102. Controverted. KDHE did not testify that it has "no[] plan to take any public health action;" its representatives simply testified that they were "not specifically aware" of whether KDHE intended to take such action. Ex. 68 Ahmed (KDHE) Dep. 52:5-55:22; Ex. 71 Smith (KDHE) Dep. 25:12- 26:14, 30:22-31:11. But the legislative record reveals what actions H.B. 2749 will inform: policies to better address the social concerns of women facing an abortion decision, including opportunities for women to access assistance in pregnancy care. Exs. R-T. Controverted that the cited Donovan testimony does not support the proposition.

103. Controverted. The opt-out provision does not make H.B. 2749 non-comprehensive. Ex. 61, Donovan Tr. 162:4-12. Additionally, H.B. 2749 is designed to seek comprehensive data from the groups from which the State seeks information. Ex. 61, Donovan Tr. 164:7–24. Even if gaps exist, public health data is

often partial and imprecise, yet States rightly collect it; demanding perfect data sets an unrealistic standard. Ex. 48, Curlin Supp. Rpt. ¶ 14. Controverted that the cited Donovan testimony does not support the proposition.

104. Controverted. The cited testimony does not support the proposition. None of this information could be used to "re-identify" patients. "[T]here is no specific identifiable information on the form" and "the data is stored in a secure database," making risk of identification virtually non-existent. A Ex. 71 Smith (KDHE) Dep. 40:23-41:14. Nor does information collected by H.B. 2749 qualify as "identifiable data" under federal law. Ex. 61, Donovan Tr. 278:6–279:6; Ex. 60, Donovan Rpt. at ¶¶ 14–17. "[N]othing in [H.B. 2749] would put at risk a patient's identity, confidentiality, or privacy." Ex. 61, Donovan Tr. 245:21–246:10.

105. Controverted that such studies detail the reason Kansas women are currently seeking abortions. Rather, "[t]hese studies underscore the point that data from the Reporting Requirement could inform public health policy … But th[is] data [is] not specific to Kansas. The connection to changes in maternal-child health policy to better support pregnant mothers, based on local, context-specific data is obvious, and data from Kansas women is the appropriate source to inform Kansas health policy." Ex. 58, Wubbenhorst Supp. Rpt. ¶ 32.

106. Controverted as to materiality. H.B. 2749 "is not subject to IRB approved protocols." Donovoan Rpt. ¶ 15.

107. Controverted. H.B. 2749 seeks a unique subset information: the reasons women in Kansas are currently getting abortions, which was not covered by the studies referenced by Plaintiffs. Ex. 58, Wubbenhorst Supp. Rpt. ¶ 32. In seeking this information, H.B. 2749 protects patient privacy and informed consent. Ex. 48, Curlin Supp. Rpt. ¶¶ 14-15; Ex. 71 Smith (KDHE) Dep. 40:23-41:1; Ex. 61, Donovan Tr. 245:21–246:10, 278:6–279:6; Ex. 60, Donovan Rpt. ¶¶ 14–17. Controverted that the cited Donovan testimony does not support the proposition.

LEGAL STANDARD

The Court must review "the facts in the light most favorable to the party opposing summary judgment. If 'reasonable minds could differ as to the conclusions drawn from the evidence[,]' . . . summary judgment should be denied." *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549, 558 (2015) (internal citations omitted).

ARGUMENT

Plaintiffs' motion for summary judgment fails on several grounds. They: lack third-party standing to assert their patients' rights; misapply legal standards for constitutional challenges to informed consent laws; provide no admissible evidence of constitutional rights infringement; present Free Speech and Equal Protection claims that fail as a matter of law; cannot overcome the fact that the Statutes advance compelling state interests through narrowly tailored means; and fail to address all of the requirements for permanent injunctive relief.

I. Plaintiffs lack third-party standing.

Plaintiffs ask the Court to find that the Statutes infringe their patients' autonomy and equal protection rights as a matter of law. Yet their motion overlooks a dispositive threshold issue: third-party standing to assert their patients' rights. This oversight is fatal to Plaintiffs first, third, fourth, and fifth claims for relief regarding the right to self-determination and bodily autonomy, equal protection, and vagueness asserted on behalf of Plaintiffs' patients.

As explained in State Defendants dispositive motions, which State Defendants incorporate here by reference, *see* Defs. Summ. J. Br. and Defs. Mot. Vacate and Dismiss, third-party standing isn't presumed but must be proven at each stage of the case. *See, e.g.*, *Landrith v. Jordan*, 308 P.3d 31, 2013 WL 5187269, at *9 (Kan. Ct. App. 2013). Plaintiffs are not relieved of this burden because the Court found third-party standing at the preliminary injunction stage, where

injunction findings are only "provisional" and "interlocutory" in nature. *H&R Block Enterprises, LLC v. Taxes Latinos Americanos, LLC*, 2014 WL 12779235, at *6 (W.D. Mo. Feb. 19, 2014). At both summary judgment and at trial, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Plaintiffs' motion ignores this entirely, fatally undermining their third-party claims.

Even if they had addressed third-party standing, however, their arguments would fail. First, Plaintiffs do not have a "close relationship" with their abortion patients. Third-party standing requires an "*existing*. . . relationship," which is "quite distinct from a *hypothetical*" relationship. *See Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (emphases in original). Unlike other doctor-patient relationships, abortion providers rarely have "a close relationship" with their patients; rather, "their relationship is generally brief and very limited." *June Med. Services L.L.C. v. Russon*, 591 U.S. 299, 403 (2020) (Alito, J., dissenting). Plaintiffs' clinics often function as a "conveyor belt" for patients, Fact No. 101, where patients are rushed through the most consequential decision of their life. Fact Nos. 102-07.

Second, "[t]here are no 'insurmountable' obstacles stopping women seeking abortions from asserting their own rights." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 631 (2016) (Thomas, J., dissenting). To the contrary, "interested women have challenged abortion regulations on their own behalf in case after case." *June Med.*, 591 U.S. at 414 (Gorsuch, J., dissenting) (collecting cases). Justiciability of those cases poses no concern, for "if a woman seeking an abortion brings suit, her claim will survive the end of her pregnancy under the capable-of-repetition-yet-evading-review exception to mootness." *Id.* at 405 (Alito, J., dissenting). Nor is the potential loss of privacy a deterrent to suit, since women "can sue under a pseudonym" and avail themselves of "[o]ther precautions [that] may be taken

during the course of litigation to avoid revealing their identities." *Id.* Plaintiffs have no evidence their patients face any hindrances to suit. Defs. Summ. J. Fact No. 56.

Third, Plaintiffs' their theory is precluded because of the "blatant conflict of interest between an abortion provider and its patients" for laws "that protect their [patients'] health." *June Med.*, 591 U.S. at 401 (Alito, J., dissenting). Third-party standing is not appropriate where the interests of the plaintiff and the third party whose rights it invokes "are not parallel and, indeed, are potentially in conflict." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15 (2004). So "[w]hen an abortion regulation is enacted for the asserted purpose of protecting the health of women, an abortion provider seeking to strike down that law should not be able to rely on the constitutional rights of women." *June Med.*, 591 U.S. at 402 (Alito, J., dissenting). That is readily apparent for Plaintiffs' challenge of the WRTKA. For one, they purport to invoke the rights of their patients to invalidate a law that gives those same patients the right to sue them. Defs. Summ. J. Fact No. 42. Further, they have a pecuniary interest in minimizing informed consent to maximize total patients seen, while each patient individually has an interest in ensuring they receive appropriate disclosure. Defs. Summ. J. Fact Nos. 57, 60-65. That conflict violates due process by deciding the rights of Plaintiffs' patients without joining them as parties or giving them adequate representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997).

II. The legal framework for evaluating Plaintiffs' autonomy claims.

To adequately evaluate their motion for summary judgment, the Court must first decide several threshold legal issues: the "nature of the right" at issue and the evidence needed to show its violation; the standards for facial versus as-applied standards; and whether the WRTKA is severable.

A. Actual infringement

The Supreme Court of Kansas has recognized a state constitutional right to bodily autonomy and self-determination, which includes a woman's right "to decide whether to continue a pregnancy." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 620, 440 P.3d 461, 471 (2019) (*Hodes I*). Plaintiffs, whose goal is the de-regulation of abortion in Kansas, focus only on half of this right, concerning the right to abortion. But the right of bodily autonomy is broader than abortion, as it also protects a woman's right to continue a pregnancy and have a child. *Id.*, 309 Kan. at 644-45, 440 P.3d at 483 (the right to "bring up children" is a fundamental right). The Kansas right to bodily autonomy is thus not "pro-abortion" or "pro-life," it is fundamentally *pro-choice*. The right to bodily autonomy protects Kansas women's right to choose abortion or childbirth, and make an informed decision between the two. *See Hodes I*, 440 P.3d at 486 ("[I]mplicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy.") (citation omitted). The nature of the right at stake is pivotal here because the Woman's Right to Know Act reinforces the right to self-determination and enhances a woman's decision-making process by providing her with relevant information, ensuring she has sufficient time to make the decision, and shielding her from coercion by abortion providers, family members, boyfriends, and others. Plaintiffs' ethicist, Dr. Wynia, agrees that "a waiting period can prevent coercion and promote autonomy if it's imposed for a medical procedure," and that waiting periods "are most likely to be appropriate for irreversible procedures that affect life and fertility." Ex. 20, Wynia Tr. 163:15–164:10, 164:24–165:19. That admission by Plaintiffs' experts precludes granting summary judgment on this question.

That WRTKA bolsters women's right to self-determination sets this case apart from the *Hodes* trio of cases. *Hodes I* and *II* concerned a prohibition on dilation and evacuation or "D & E" abortions. *Hodes I*, 309 Kan. at 620, 440 P.3d at

471; *Hodes & Nauser, MDs, P.A. v. Kobach*, 318 Kan. 940, 551 P.3d 37 (2024) (*Hodes II*). And *Hodes III* concerned a 2011 statute which specifically dictated the physical structure of abortion facilities and equipment purchases, imposed staffing ratios and admitting privileges, and required that abortion providers procure costly licenses, thereby apparently curbing abortion access due to the limited number of facilities that could afford to comply. *Hodes & Nauser, MDs, P.A. v. Stanek*, 318 Kan. 995, 1021, 551 P.3d 62, 80 (2024) (*Hodes III*). Here, by contrast, the Woman's Right to Know Act does not prohibit an abortion method (which distinguishes this case from *Hodes I* and *II*), and Plaintiffs have no admissible evidence that the WRTKA has limited any woman's access to an abortion (unlike *Hodes III*).

Indeed, courts analyze waiting-period and informed-consent laws that touch upon fundamental rights differently than prohibitory laws like those at issue in *Hodes I–III*. Take *Rocky Mountain Gun Owners v. Polis*, 701 F. Supp. 3d 1121 (D. Colo. 2023). There, the State of Colorado passed a law imposing a three-day waiting period on the purchase of firearms. While recognizing that this law potentially implicated the Second Amendment right to bear arms, the District Court ultimately found no constitutional violation because the law at issue was designed to prevent "impulsive" and "'heat of the moment' gun acquisition." *Id.* Gun purchase "waiting periods . . . interrupt[] gun access only temporarily" and thus do not violate the Second Amendment. *Id.* at 1142. *Rocky Mountain Gun Owners* is supported by numerous other decisions in both Second Amendment and abortion-rights cases.[3]

[3] *See, e.g., Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016) (upholding 10-day waiting period to purchase firearms); *Ortega v. Lujan Grisham*, 741 F. Supp. 3d 1027 (D.N.M. 2024) (upholding 7-day waiting period to purchase firearms); *Vermont Fed'n of Sportsmen's Clubs v. Birmingham*, 741 F. Supp. 3d 172 (D. Vt. 2024) (upholding 3-day waiting period to purchase firearms); *see Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) (upholding 24-hour waiting period for abortion following provision of certain information); *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478 (6th Cir. 2021) (upholding 48-hour waiting period for abortion and noting "[b]efore making life's big decisions, it is often wise to take time to reflect."); *Karlin*

Nor, contrary to Plaintiffs' assertions, does the Woman's Right to Know Act "target[] . . . abortion for unique state oversight." Pls. Summ. J. Br. at 23. Just the opposite. To begin, federal law imposes a waiting period of not just 24 hours but *30 days* for coverage of sterilization. *See* Ex. 20, Wynia Tr. 159:9-161:9. And Kansas law imposes informed consent requirements on a wide swath of medical procedures as different from abortion as the administration of "psychotropic medication," K.A.R. 28-39-231 (requiring informed consent, documentation of the reason for use of the drug, and ongoing monitoring); dry needling, K.A.R. 100-29-19 (requiring informed consent and documentation of the same); weight-loss medication, K.A.R. 100-22-8a (prohibiting the administration of certain fat-loss drugs without first obtaining the informed consent of the patient, in writing); and many others.[4] Consider, for example, the dry needling regulation. Before performing the

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v. Foust, 188 F.3d 446 (7th Cir. 1999) (upholding 24-hour waiting period for abortion); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994) (upholding 24-hour waiting period for abortion).

[4] *See, e.g.*, K.S.A. § 65-4974 (requiring informed consent before research on human subjects); K.S.A. § 65-67a07 (requiring informed consent before fetal tissue donation); K.S.A. § 65-1,157a (requiring informed consent from the parents prior to screening an newborn infant for hearing loss); K.S.A. § 39-7,121g (requiring a parent to receive "informed consent indicating the risks and benefits of using banked donor human breast milk" before the use of the same); K.S.A. § 65-1,249 (requiring a parent's informed consent before permitting the collection of an umbilical cord, umbilical cord blood, amniotic fluid and placenta tissue for medical research); K.A.R. 30-60-76 (requiring informed consent from human research subjects); K.A.R. 129-5-88(b)(5) (excluding family planning services and materials from Medicaid programs unless informed consent is first procured); K.A.R. 102-1-10a (declaring it unprofessional conduct for a psychologist to provide clinical psychological services without first obtaining the patient's informed consent); K.A.R. 100-72-3 (declaring it professional misconduct for a naturopathy practitioner to provide certain forms of treatment without first receiving the informed consent of the patient); K.A.R. 102-3-12a (declaring it unprofessional conduct for a counselor to electronically record sessions with a client, permit third-party observations of counseling activities, or releasing information to third parties without first receiving the patient's informed consent); K.A.R. 30-63-23 (requiring providers of community services to obtain informed consent prior to using medications or similar interventions to treat mental illness).

procedure, a dry-needling practitioner must obtain written informed consent from the patient that describes, among other things, the risks and benefits of dry needling; "each anatomical region of training completed by the physical therapist"; and "the diagnosis for which the physical therapist is performing dry needling." K.A.R. 100-29-19. Similarly, psychologists are guilty of unprofessional conduct if they fail "to obtain and document" informed consent from a client, including a "description of the possible effects of treatment or procedures when there are known risks to the client or patient" and that a "proposed treatment or procedure is experimental." K.A.R. 102-1-10a(e).

This background informs Plaintiffs' threshold evidentiary burden that requires them to show "actual infringement" of their patients' right to terminate or continue a pregnancy. *Hodes III*, 318 Kan. at 1009, 551 P.3d at 73-74. This evidentiary showing focuses on the "nature of the right at stake" and requires evidence that actual women were actually deterred from exercising their right to choose abortion or childbirth because of the Statutes. *Id.* Showing actual infringement of the right to self-determination and bodily autonomy is uniquely difficult in the context of informed consent laws because, far from infringing the right to self-determination, "the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus," ensure that a woman is "apprised of the health risks of abortion and childbirth." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992). Put another way, to the extent a law *informs* a woman's exercise of her right to self-determination, it cannot violate that right even if the law results in the woman choosing childbirth because such a choice is itself protected by the State Constitution. The Kansas Constitution, as interpreted by the Supreme Court of Kansas, only prohibits laws that prevent women from choosing

abortion or childbirth—the Woman's Right to Know Act does neither.[5] Because Plaintiffs have adduced no admissible evidence that women want less information and time to deliberate before making the weighty choice between abortion and continuing a pregnancy, Plaintiffs' motion for summary judgment fails.

B. Facial versus as-applied challenges

Kansas courts recognize two types of constitutional challenges to state statutes: facial and as-applied. *See State v. Watson*, 273 Kan. 426, 435, 44 P.3d 357, 364 (2002). The distinction between facial and as-applied challenges is "important . . . because although 'classifying a lawsuit as facial or as-applied . . . does not speak at all to the substantive rule of law necessary to establish a constitutional violation,' it does 'affect[ ] the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy.'" *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4 (2019) (quoting *Bucklew v. Precythe*, 587 U.S. 119 (2019)) (alterations original). The facial-versus-as-applied dichotomy applies to the *Hodes* actual infringement test. *State v. Hall*, 2025 WL 496691, at *12 (Kan. Ct. App. 2025) (determining actual infringement under *Hodes* trilogy sufficient for facial and as-applied challenges). Although Plaintiffs assert a facial challenge, Pls. Supp. Sec. Am. Pet. at 46 (seeking an "injunction restraining Defendants ... from enforcing" the Statutes), their claims fail under either standard.

[5] Plaintiffs apparently argue that every law that regulates an abortion provider infringes women's right to abortion. But that extreme position would effectively exempt abortion providers from all laws—from the fire code to physician licensing requirements. For example, Planned Parenthood representative Dr. Selina Sandoval testified that, in her view, pharmacists should have prescriptive authority to dispense abortion drugs with no physician involvement. Ex. 35, Sandoval 230(b)(6) Tr. 30:10-32:19. According to Dr. Sandoval, requiring physicians to be involved delays abortion—and thus infringes the right to abortion. Ex. 35, Sandoval 230(b)(6) Tr. 30:10-32:19, 34:5-34:25. Thus, Kansas's requirements that a licensed physician provide abortion would violate Plaintiff's reading of *Hodes I-III*.

An as-applied challenge tests a statute's constitutionality in the context of a specific factual scenario. *State v. Garcia*, 306 Kan. 1113, 1117 (2017) (subsequent history omitted). A challenger must prove via "the necessary predicate facts by a preponderance of the evidence," that the law infringes their rights under the particular circumstances at issue. *Hall*, 2025 WL 496691, at *12. Relief is limited to the parties involved, leaving the statute intact for others. *See In re Appeals of Various Applicants*, 298 Kan. 439, 466, 313 P.3d 789, 806 (2013). For Plaintiffs to prevail here, they must present concrete, undisputed evidence of actual infringement—a burden they have not met, as explained below.

In contrast, a facial challenge attacks the statute itself, claiming that it is unconstitutional in *every* possible application. *Garcia*, 306 Kan. at 1117. Kansas courts disfavor facial challenges because they rely "on speculation, run contrary to the fundamental principle of judicial restraint, and threaten to short-circuit the democratic process." *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 298 Kan. 540, 548, (2013). To succeed, the challenger must prove that "no set of circumstances exists under which the Act would be valid." *State v. Jones*, 313 Kan. 917, 932, 492 P.3d 433, 445 (2021); *see also id.* ("'[T]he fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . ..'"). Even when fundamental rights are at stake, the standard for facial challenges does not change: Plaintiffs must demonstrate that no application of the law could withstand scrutiny. *Hall*, 2025 WL 496691, at *2 (rejecting a facial challenge despite implicating the fundamental right to bear arms under Section 4 of the Kansas Constitution Bill of Rights). Finally, most facial challenges are brought pre-enforcement. Here, by contrast, Plaintiffs have been allegedly complying with the WRTKA for nearly thirty years. To succeed on a facial challenge here, Plaintiffs would have to demonstrate that *none* of the women who have visited their clinics, over a thirty-year period, have found helpful *any* of the

information and safeguards imposed by the Statutes. And Plaintiffs' refusal to produce any medical records underscores that they cannot meet this high threshold.

C. Severability

Finally, the Court must consider the doctrine of severability. Plaintiffs' suit presents a blanket challenge to all eight sections of the WRTKA: K.S.A. § 65-6709 to § 65-6716. Pls. Supp. Sec. Am. Pet ¶ 1. Those eight sections total 6,850 words, and include 29 subsections, 40 paragraphs, and 20 clauses. The vast majority of these provisions are entirely uncontroversial requirements that, in practice, Plaintiffs take no issue with. For example, the Act requires abortion providers to describe the "risks related to the proposed abortion method." K.S.A. § 65-6709(a)(3). Plaintiffs purport to comply with this requirement voluntarily. Defs. Summ. J. Fact No. 75. Plaintiffs similarly purport to comply with the Act's requirements: that women be allowed to see the ultrasound of her unborn child, K.S.A. § 65-6709(h); that prohibit requiring pre-payment for abortions, K.S.A. § 65-6709(g); that a physician inform the woman "of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of a major bodily function," K.S.A. § 65-6711; that a physician provide a woman with "a description of the proposed abortions method," K.S.A. § 65-6709(a)(2); that the abortion provider inform the woman that she "is free to withhold or withdraw her consent to the abortion at any time prior to invasion of the uterus," K.S.A. § 65-6709(b)(6); and many others. Defs. Summ. J. Fact Nos. 75, 84, 86, 89. And yet, Plaintiffs seek a blunderbuss injunction against the Act in its entirety—even those provisions for which Plaintiffs claim no harm and comply with.

This overbroad request for relief fails because the WRTKA is severable and Plaintiffs have not carried their burden of proof that every phrase, clause, and provision of the Act is unconstitutional. "The general doctrine" in Kansas "is that only the invalid parts of a statute are without legal efficacy." *State ex rel. Marshall*

v. Consumers Warehouse Mkt., Inc., 185 Kan. 363, 372, 343 P.2d 234, 242 (1959). This rule, which has come to be known as the doctrine of "severability" or "severance" rests on the principle of judicial modesty that a court must "not try to nullify more of a legislature's work than is necessary" because a "ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). As Chief Justice Marshall explained long ago, if any part of an Act is "unconstitutional, the provisions of that part may be disregarded[] while full effect will be given to such as are not repugnant to the constitution . . .." *Bank of Hamilton v. Lessee of Dudley*, 2 Pet. 492, 526, 7 L.Ed. 496 (1829) (Marshall, C.J.).

To determine whether a statute is severable is a two-step inquiry. At step one, the Court asks whether the Legislature intended the Act to be severable. *City of Wichita v. Trotter*, 316 Kan. 310, 321, 514 P.3d 1050, 1058 (2022). At step two, the Court asks whether the unconstitutional provisions of a statute are capable of functioning without the severed provisions. *Id.* Courts apply "a strong presumption of severability." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 625 (2020); *see also Trotter*, 316 Kan. at 321, 514 P.3d at 1058 (same).

The only courts to have considered the question (in suits brought by Plaintiffs), treated the WRTKA as severable, requiring Plaintiffs to prove the unconstitutionality of every challenged provision. *Hodes & Nauser v. Schmidt,* slip opinion, 13–C705 (Shawnee Cnty. Kan. Dist. Ct., June 28, 2013) ("Rather, due to the severability clause contained in section 23 of the Act, this Court must review each individual provision of the Act challenged and determine individually if any of the challenges substantiate injunctive relief.") attached hereto as Exhibit B; *Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Templeton*, 954 F. Supp. 2d 1205, 1217 (D. Kan. 2013) (same).

Indeed, the analysis at step one is straightforward here, as the WRTKA's severability clause provides the Legislature's intent: "The provisions of this act are declared to be severable, and if any provision, word, phrase or clause of the act or the application thereof to any person shall be held invalid, such invalidity shall not affect the validity of the remaining portions of the woman's-right-to-know act." K.S.A. § 65-6714. This severability provision "leaves no doubt about what the [Legislature] wanted if one provision of the law were later declared unconstitutional." *Barr*, 591 U.S. at 624.

At step two, Plaintiffs must show that severing the provisions they claim harm from will render the surviving provisions of the Act unworkable. Plaintiffs have not attempted this painstaking inquiry. State Defendants dispute that Plaintiffs have *any* admissible evidence of patient harm. But even if Plaintiffs had such undisputed evidence, their proposed approach to constitutional review of the Act is a wrecking ball when a scalpel is what is legally required. For example, K.S.A. § 65-6709(c) has two distinct requirements: (1) that a physician meet with a woman before an abortion "to ensure that she has an adequate opportunity to ask questions of and obtain information from the physician concerning the abortion"; (2) that this meeting occur "[a]t least 30 minutes prior to the abortion procedure." Plaintiffs must prove the unconstitutionality of *both* of these requirements *and* that, if one of the requirements is unconstitutional, it cannot be severed from the other. As explained below, Plaintiffs claim no harm from requirement (1) because they purport to voluntarily meet with each woman before an abortion to ensure she has an opportunity to ask questions. As for (2), Plaintiffs have no admissible evidence that the 30-minute waiting period has ever harmed a woman's right to bodily autonomy. To the contrary, the only witnesses who have received abortions testified that they wish they had more time to deliberate, not less. Fact Nos. 4-19, 91-106. This physician-meeting requirement can be severed from the 30-minute

waiting period, as demonstrated by the fact that the waiting period was added in a 2009 amendment. Defs. Summ. J. Fact No. 22.

Because the Act is severable, Plaintiffs must prove that each separate duty, disclosure, and notice is unconstitutional. Plaintiffs' motion for summary judgment fails on this basis alone because they have not even attempted to meet their burden.

III. Plaintiffs fail their burden of proof.

Plaintiffs' claims of actual infringement of the rights to bodily autonomy and self-determination fail for three independent reasons. First, Plaintiffs have failed to provide evidence that the Statutes generally are unconstitutional. Second, for most the Statutes' provisions, Plaintiffs concede they and their patients have suffered no harm. Third, for those provisions that Plaintiffs claim specific harm, they rely on inadmissible evidence and a misreading of the Statutes.

A. Plaintiffs have no evidence to support their global challenges of the WRTKA.

Plaintiffs argue that the WRTKA is unconstitutional as a whole. First, they argue that the Act singles out abortion for unique state oversight and is thus *per se* unconstitutional. Second, Plaintiffs argue that the Act invades the physician-patient relationship and is thus unconstitutional. Pls. Summ. J. Br. at 33-34. But neither theory is a cognizable constitutional harm, and Plaintiffs have not put forth any admissible evidence to invalidate the Act on these bases.

Laws that regulate abortion do not automatically infringe women's autonomy rights. As explained in *Hodes I* and *Hodes III*, laws can regulate abortion without resulting in "an actual impairment" of the right to self-determination and bodily autonomy, *Hodes III*, 318 Kan. at 1008, 551 P.3d at 73. And informed consent laws like the WRTKA exemplify regulations that advance, rather than impair, patient autonomy. Such regulations pervade the medical field, particularly in ethically fraught areas. Defs. Summ. J. Br. at 35-38; *see also infra* at 44-47. Each procedure

these regulations govern—from human research to organ donation—is "singled out" in the sense that the rules are tailored to the unique issues presented by the procedure. Dry needling requires different informed consent procedures from psychotropic medications from the decision to choose between parenting and abortion. But the fact that the State has tailored its approach is not a constitutional flaw; it's a virtue of good regulation. And "[a]n unsupported claim that government action *appears* to impair the section 1 right is not enough to satisfy th[e] burden" of proving infringement. *Hodes III*, 318 Kan. at 1008, 551 P.3d at 73.

Plaintiffs' second argument, that the WRTKA is generally unconstitutional because it interferes with the physician-patient relationship and women's medical decision making, is even more tenuous. Plaintiffs rely almost exclusively on two long-overruled, non-binding decisions for this theory, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), 462 U.S. 416 (1983). *See* Pls. Summ. J. Br. at 43-48. But Kansas law does not recognize standalone claims for "interference with a physician-patient relationship." *Rodriguez v. Sunflower Elec. Power Corp.*, 2000 WL 36745885, at *5 (Kan. Ct. App. Sept. 22, 2000). After its painstaking review of abortion jurisprudence, the Supreme Court of Kansas did not adopt *Akron* or *Thornburgh* but adopted a completely different standard: actual infringement. *Hodes III*, 318 Kan. at 1014, 551 P.3d at 77 (2024). This standard demands concrete proof of harm to a woman's autonomy. Plaintiffs must accordingly prove that Statutes concretely impair women's autonomy rights, either universally, or in specific ways. But Plaintiffs have failed to adduce any uncontroverted evidence such harm. Their global challenge thus fails.

B. Plaintiffs concede that most of the WRTKA's provisions have caused no harm.

Plaintiffs' list of patient harms arising from the WRTKA is informative primarily for the broad swath of provisions it leaves out. *See* Pls. Fact Nos. 38-60. Apart from conclusory speculation that the Act as a whole somehow "invades the physician-patient relationship[] and interferes with patients' medical decision-making," Plaintiffs conspicuously make no attempt to explain how the majority of the Act's provisions have ever or will ever infringe their patients' autonomy rights. *See* Pls. Fact No. 40. Plaintiffs' summary judgment brief makes no mention of any harm arising from the following provisions:

- the pre-payment prohibition, K.S.A. § 65-6709(g);
- the medical emergency section, K.S.A. § 65-6711;
- the website requirement, K.S.A. § 65-6709(l);
- the coercion notice, K.S.A. § 65-6709(k);
- the citation section, K.S.A. § 65-6708;
- the material promulgation section, K.S.A. § 65-6710;
- the unprofessional conduct designation, K.S.A. § 65-6712;
- the severability provision, K.S.A. § 65-6714; and
- the scope section, K.S.A. § 65-6715.

See generally Pls. Summ. J. Br.

Plaintiffs do assert patient harm arising from the ultrasound and heart monitor requirement,[6] K.S.A. § 65-6709(h)-(j); the patient-physician meeting requirement, K.S.A. § 65-6709(c); and the patient certification provision, K.S.A. §§ 65-6709(e)-(f). Pls. Fact Nos. 48, 56. But on closer examination, the alleged harms stem solely from the requirement that these activities take place 30 minutes prior

[6] Plaintiffs have testified that they have no heart monitor equipment. Pls. Fact No. 29 n.4. Their challenge to the heart-monitor requirement therefore fails for an additional reason that they lack standing to challenge it.

to the abortion pursuant to K.S.A. § 65-6709(c), rather than the substance of the provision itself. *See* Pls. Fact No. 48 (claiming that because these tasks had to be performed 30 minutes prior to the abortion, it forced "Plaintiffs to alter their patient flow"), Pls. No. 56 (claiming their patients had been harmed because they had been "forced to wait '[a]t least 30 minutes' after receiving the mandated offer to view and keep the ultrasound image from and meeting privately with their provider, and required to certify receipt of the various mandated disclosures and offers before they could finally receive an abortion."). Indeed, Plaintiffs still voluntarily comply with each of these practices. Resp. Pls. Fact. Nos. 48, 56.

Plaintiffs also allege that the patient certification provision "strip[s] [patients of] their autonomy to determine for themselves when they have sufficiently considered their decision to terminate their pregnancy." Pls. Fact No. 57. But this purported harm is (1) entirely speculative, (2) not supported by any of the evidence cited in Fact No. 57, and (3) contradicted by Plaintiffs' own practices, which also require patients to certify they have reviewed Plaintiffs' informed consent materials. Fact Nos. 75-76. If certifying receipt of informed consent materials was so harmful, surely Plaintiffs would not maintain the practice themselves.

Because Plaintiffs have not made any specific evidentiary showing that these provisions of the Act infringe their patients' autonomy rights, and because these provisions are severable, Plaintiffs are not entitled to summary judgment.

C. The specific harms asserted by Plaintiffs are insufficient and inadmissible.

Plaintiffs' specific claims of harm are confined to a few provisions of K.S.A. § 65-6709. First, Plaintiffs claim that the 24-hour notice period and 30-minute waiting period delayed abortions. Pls. Summ. J. Br. at 36-37. Second, Plaintiffs claim that the informed consent requirement, the readability provision, the physician information provision, and the 30-minute waiting period imposed

operational burdens on Plaintiffs which caused them to see fewer patients. Pls. Summ. J. Br. at 34-35. Third, Plaintiffs contend the informed consent requirement interferes with women's medical decision-making and cause emotional distress to their patients. Pls. Summ. J. Br. at 34. These claimed harms are disputed and the evidence underlying them is inadmissible.

Delay. Plaintiffs have not met the legal standards for infringement of patient autonomy or a facial challenge to the Act that the Act's waiting periods have infringed any woman's rights—let alone all women under every circumstance. No woman has provided testimony in support of Plaintiffs' position that the 24-hour notice or the 30-minute waiting period (or any other provision of the Act) harmed them or infringed their right to self-determination. To the contrary, the only voices of post-abortive women in this case affirm that short, and well-placed waiting periods enhance the decision-making process. For example, Leslie Wolbert felt "pressured" by Planned Parenthood to abort hastily, lamenting she "never got to process" her pregnancy. Fact No. 103. Elizabeth Gillette asked for more time before her abortion, only to be told she "couldn't" and faced a rushed choice with "nobody there counseling" or offering options. Fact Nos. 104-06. Both regretted the lack of time to deliberate. Plaintiffs' own expert, Dr. Matthew Wynia, acknowledges that a waiting period can prevent coercion and promote autonomy if it's imposed for a medical procedure." Fact No. 73. Dr. Wynia could agree that "waiting periods are most likely to be appropriate for irreversible procedures that affect life and fertility." Fact No. 73; *see also* Ex. 16, Sawicki Tr. 42:16-23 (testifying that "it would be beneficial to have more than five minutes to make a [medical] decision"). This conflicting testimony prevents summary judgment in favor of Plaintiffs.

Plaintiffs assert that some patients could have been seen within 24 hours absent the Act's notice period, Pls. Fact No. 49, and that others became "ineligible for their preferred abortion method" or an abortion altogether due to the wait, Pls.

Fact No. 55. But Plaintiffs concede that this information, if it exists, would appear in patient records, which track appointment dates, appointment purposes, abortion dates, and gestational age. Ex. 5, Nauser 230(b)(6) Tr. 261:22–262:24. To determine how many abortions occurred just after 24 hours, or how often procedures happened within a day of booking, one would need to review those records. Ex. 5, Nauser 230(b)(6) Tr. 261:22–262:24. Yet Plaintiffs have refused to produce these and instead seek to testify as to the contents of these records in violation of the best evidence rule and the rule against hearsay. *See* K.S.A. § 60-467(a) ("An original writing, recording or photograph is required in order to prove its content"). The best evidence rule prohibits Plaintiffs from offering oral testimony to support their allegations of delay altogether. *See State v. Rohr*, 19 Kan. App. 2d 869, 872, 878 P.2d 221, 223 (1994) (finding a police officer's oral testimony that breath test results had been certified was inadmissible because it "was against the best evidence rule"). And courts must refuse to consider hearsay evidence at summary judgment where a proponent has not shown it would be admissible at trial. *Vore v. U.S. Bank, N.A.*, 84 P.3d 636 (Kan. Ct. App. 2004) (holding that inadmissible hearsay statements cannot create a genuine dispute of material fact); *Clary v. Mainstreet Flower Shoppe*, 344 P.3d 971 (Kan. Ct. App. 2015) ("The district court may not rely on inadmissible hearsay when ruling on a motion for summary judgment").

Operational burdens. Plaintiffs claim that the Act imposes operational burdens on them, which resulted in delayed abortions, and thus patient harm. Pls. Summ. J. Br. at 34-37; Pls. Fact Nos. 44, 47-48, 52-53. But State Defendants dispute this assertion. All of Plaintiffs' undocumented operational burdens relate solely to Plaintiffs' refusal to provide patients with printed copies of the informed consent materials. Resp. Pls. Fact Nos. 44-47. And, even with those additional measures, Plaintiffs' capacity to see patients was not lessened. Resp. Pls. Fact No. 58.

Further, any such harm was caused by Plaintiffs' own procedures or lack thereof. For example, Plaintiffs cite [redacted] testimony to support claims of harm at Hodes & Nauser. Ex. 40, [redacted] Tr. 40:24-44:4. [redacted] describes a patient was denied care because her consent form was "blurred" from a printer malfunction, forcing a rescheduling delay of at least 24 hours. Allegedly, the patient shattered a glass door on her way out and never returned. Planned Parenthood's testimony is similar: patients were allegedly turned away for not completing forms in advance or for only printing them the morning of their appointment. Ex. 36, Wales 230(b)(6) Tr. 144:23-145:4. But this testimony is immaterial, because the WRTKA imposes no requirement that patients bring consent forms to their appointments. Any such requirement is self-imposed. Plaintiffs also claim self-created protocols around the 24-hour consent materials burdened staff, strained operations, and reduced patient capacity. Pls. Fact Nos. 45-46, 48.

Plaintiffs' operational-burden theory fails for an additional, independent reason: any administrative burden imposed by the Act cannot amount to a constitutional violation. Kansas law requires evidence of actual harm to a protected right to declare a statute unconstitutional. *Hodes III*, 318 Kan. 995, 1005, 551 P.3d 62, 71. And while administrative costs might affect Plaintiffs' operations, such costs do not violate their patients' constitutional rights to autonomy and self-determination by themselves. *See Whalen v. Roe*, 429 U.S. 589, 604 (1977) (Laws which "merely ma[k]e the physician's work more laborious or less independent without any impact on the patient[] … [do] not [] violate[] the Constitution."). To accept Plaintiffs' theory that administrative cost alone triggers strict scrutiny would mean that nearly every law applied to Plaintiffs would be unconstitutional.

Interference with decision-making. Plaintiffs assert that certain WRTKA disclosures in K.S.A. 65-6709, including those contained in H.B. 2264, infringe their patients' abortion rights by "invad[ing] the physician-patient relationship[] and

interfer[ing] with patients' medical decision making" with information Plaintiffs' deem to be misleading. Pls. Fact Nos. 40-43. Plaintiffs focus on statements regarding the risks of premature birth and breast cancer; an unborn child's ability to feel pain by 20 weeks; and abortion ending a "whole, separate, unique, living human being." Pls. Summ. J. Br. at 59-60, 73. They do not challenge all of the Act's disclosures. Those non-challenged provisions should thus survive.

At the outset, Plaintiffs' argument fails because their own witness, Dr. Matthew Wynia, has provided testimony that conflicts with Plaintiffs' theory of harm. For example, Dr. Wynia admitted there is "inherent tension in medical ethics between th[e] value of promoting patient autonomy, but then also a physician's duties on behalf of the patient as a shared decisionmaker." Ex. 20, Wynia Tr. 131:22–132:11. As he explains, "they can't both be optimized." *Id.* And this is also true at the "policy level," where "different principles" are in tension "with one another," such that "[t]here might be a range of acceptable alternatives that policy can drive at." *Id.* at 133:6–134:7. Thus, maximizing for autonomy might compromise the physician's value in guiding the patient based on objective information.

Nor have Plaintiffs offered any admissible evidence of patients who have actually been harmed by the Act's disclosures. Plaintiffs thus cannot challenge these disclosures on an as-applied basis. They instead must show that the disclosures are facially unconstitutional such that providing them is unconstitutional in every instance. *Garcia*, 306 Kan. at 1117, 401 P.3d at 592.

Further, mandated disclosures do not burden abortion rights where, as here, they provide truthful, non-misleading, and relevant information. *Casey*, 505 U.S. at 882 (upholding disclosures about procedure and health risks). And a mandated disclosure's constitutionality doesn't depend on alignment with advocacy organizations like the American College of Obstetricians and Gynecologists or public health associations. *EMW Women's Surgical Ctr. v. Beshear*, 920 F.3d 421,

438 (6th Cir. 2019). If it did, states would cede their regulatory power to private entities, rendering informed-consent laws toothless. *Id.* at 439; *see also L. W. by & through Williams v. Skrmetti*, 83 F.4th 460, 478 (6th Cir 2023) (rejecting reliance on medical organizations' statement in support of a constitutional challenge because there was a lack of "judicially manageable standards for ascertaining whether a treatment is 'established' or 'necessary'") (subsequent history omitted). Nor does scientific uncertainty invalidate a mandated disclosure. Legislatures enjoy "wide discretion" in areas of medical debate. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (noting that professional disagreement does not constrain state authority). The Eighth Circuit, for example, upheld a disclosure linking abortion to an "increased risk" of suicide, rejecting claims of falsity despite causation disputes, because the statement wasn't demonstrably untrue. *Planned Parenthood v. Rounds*, 686 F.3d 889, 900 (8th Cir. 2012). That logic governs here.

Plaintiffs' burden of proof is thus not to cherry-pick statements from doctors aligned with their political position. They must prove the WRTKA's disclosures are so conclusively discredited as to be objectively false and misleading. They have not and cannot. State Defendants offer robust support for these disclosures: qualified experts with reports and testimony backing each challenged statement. Fact Nos. 22-88. Faced with credible evidence of medical disagreement, Plaintiffs' motion for summary judgment fails.

To the extent Plaintiffs claim that these disclosures have caused their patients emotional harm, they have only provided the Court with speculation and hearsay to substantiate those claims. *See, e.g.*, Pls. Fact No. 41 (the WRTKA "affords providers no discretion to omit any of the state-mandated disclosures, even if the provider believes **a disclosure** to be irrelevant and/or potentially distressing to **a particular** patient)" 42 ("providing medically irrelevant or inaccurate

information **can violate** a patient's autonomy"); Pls. Fact No. 42 (15-21 ("providing irrelevant information during informed consent process … **can 'undermin[e]** trust' in physician"). Plaintiffs' reliance on conjecture is revealing. While they have purportedly complied with the WRTKA for nearly three decades, they have not mustered a *single* case of a patient being harmed in the ways they claim.

State Defendants, by contrast, have firsthand accounts that the disclosures in the Act are beneficial. Former abortion patients, Ms. Wolbert, Ms. Gillette, Ms. Pond, and Ms. Hoyle, testify to trauma, regret, depression, and more from being rushed into abortions without adequate time or information. Ex. 66, Pond Tr. 45:2-9, 51:20-52:5; Ex. 63, Gillette Tr. 63:12-64:13, 72:6-24; Ex. 67, Wolbert Tr. 42:5-68:12; Ex. 64, Hoyle Dep. Tr. 29:15-47:10, 74:21-75:8. Even Dr. Nauser admits trauma from her own abortion experience. Ex. 5 Nauser 230(b)(6) Tr. 150:20-151:16.

Nor do any of Plaintiffs' patients claim harm from receiving WRTKA disclosures about fetal development, abortion risks, or abortion alternatives. Plaintiffs instead rely on their own inadmissible hearsay relaying such alleged harms. But testimony from post-abortive women like Arianna Neely show that, receiving time to view an ultrasound and consider other options, allows women to fully exercise their right to determine whether to continue a pregnancy and feel empowered doing so, not hindered. Ex. 65, Neely Tr. 97:17-99:1. Others report harm from insufficient information, not too much. Fact Nos. 4-19, 91-106. Plaintiffs' own records reveal patient complaints about poor consent, yet none claim the WRTKA's disclosures caused harm. Fact Nos. 91-99.

IV. Plaintiffs' challenge of H.B. 2749 is not ripe.

"Ripeness, like standing, is an element of subject matter jurisdiction." *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 748, 387 P.3d 795, 802 (2017). A claim ripens only when issues are "concrete rather than hypothetical and abstract." *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 170, 210 P.3d 105, 112

(2009). For constitutional challenges, the bar is even higher: a statute must "clearly violate" the Constitution to be struck down. *Kan. Jud. Rev. v. Stout*, 287 Kan. 450, 460, 196 P.3d 1162, 1171 (2008). When the state hasn't applied the law. As here. courts must "decline the parties' invitation to issue an advisory opinion." *State v. Soto*, 299 Kan. 102, 128–29, 322 P.3d 334, 351–52 (2014).

H.B. 2749 directs the Secretary of Health and Environment to "adopt rules and regulations to implement this section" H.B. 2749 § 1(i). Yet when Plaintiffs tacked on their H.B. 2749 claims, no such rules existed. Nor do they now. KDHE has stipulated not to adopt them until final judgment. July 29, 2024 Joint Stipulation. This delay isn't trivial. The law requires asking patients their reasons for seeking an abortion and collecting demographic data, H.B. 2749 § 1(c)-(e), but patients can decline to answer, and it's silent on who asks or how. Without rules, the impact of the law remains speculative.

Plaintiffs bear the burden of proving H.B. 2749 cannot be implemented constitutionally. They cannot do so. The unwritten regulations could sidestep their objections entirely: a simple form handed to patients, noting optional responses, or a voluntary online survey could satisfy the law without taxing Plaintiffs' resources or stigmatizing anyone—measures Dr. Wynia acknowledged would obviate their concerns regarding compelled speech. Ex. 20, Wynia Tr. 206:2-9. This Court should dismiss Plaintiffs' premature challenge of H.B. 2749.

V. Plaintiffs' free speech rights are not infringed by the Statutes.

Plaintiffs allege the WRTKA and H.B. 2749 violate their free speech rights by compelling "content and viewpoint-based" speech and stifling their "right to speak freely." Pls. Summ. J. Br. at 58. But Plaintiffs' argument mischaracterizes the Statutes. As fully described in pages 35-41 of State Defendants Brief in Support of their Motion for Summary Judgment, the Statutes do not regulate speech—they

govern professional conduct by mandating that certain disclosures be made to abortion patients. In doing so, Plaintiffs are not forced to adopt the State's voice; they admit they can—and do—inform their patients that the disclosures derive from the State and that they disagree with their content. Fact Nos. 80-81.

Here, the Statutes do not regulate Plaintiffs' speech based on content or viewpoint; rather they regulate Plaintiffs' "professional conduct ... [which] incidentally involves speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*) (citing *Casey*, 505 U.S. at 884). An informed-consent requirement falls into this category if (1) the regulation is "tied to a procedure;" (2) the procedure is "sought, offered, or performed;" and (3) the regulation carries information about the "risks or benefits of those procedures." *NIFLA,* 585 U.S. at 768-770. And such a regulation does not infringe free speech if it provides "truthful, nonmisleading information" relating to the procedure. *Casey*, 505 U.S. at 882.

Plaintiffs have not met their burden, much less shown an absence of disputed fact, as to these elements. They have failed to show that each challenged provision is not tied to a procedure—to the contrary, they concede, without specifying, that certain of them are. Pls. Summ. J. Br. at 60 (stating generally that "much of [the information] is not medically material"). Nor do they show on a provision-by-provision basis which disclosures they contend are not truthful or misleading, and the expert evidence they proffer in support of those charges in general is inadmissible as set forth in the State Defendants' *Daubert* motions. And State Defendants have proffered expert evidence that each required disclosure is related to the abortion procedure and truthful and non-misleading. Fact Nos. 22-88. Furthermore, Plaintiffs understand that the disclosures are the State's speech, not their own. Fact No. 80-81. Accordingly, the State is acting well-within its legitimate powers by regulating abortion providers so as to ensure women get this information

which Plaintiffs and other abortion providers "may prefer not to disclose." *Gonzales*, 550 U.S. at 159–60.

Plaintiffs' challenge of H.B. 2749 fares no better: not only is their claim unripe, *see* Section IV, it is also without merit. Like the WRTKA, H.B. 2749 regulates conduct, not speech, and thus is proper medical oversight. *Gonzales*, 550 U.S. at 157. Even if H.B. 2749 were to require doctors to ask questions (which is unknown without implementing regulations), it would involve even less speech incidental to conduct that the WRTKA—rather than stating a specific message, it simply asks a question to facilitate data collection. *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 189 (3d Cir. 2005) (finding that requiring students to complete a survey about their private lives did not constitute compelled speech). The Statutes do not restrain or compel speech, they regulate abortion providers to ensure their patients are informed. Plaintiffs' free speech claims thus fail as a matter of law.

VI. The Statutes do not violate equal protection.

Plaintiffs argue the WRTKA and H.B. 2749 violate "pregnant people's equal protection rights" by discriminating based on their sex and burdening their fundamental right of autonomy. Pls. Summ. J. Br. at 64. But as more fully explained in pages 32-35 of State Defendants Brief in Support of their Motion for Summary Judgment, Plaintiffs' equal protection claims fail for three reasons.

First, not all laws that "touch upon" a fundamental right implicate that right for purposes of a constitutional analysis. *Zablocki v. Redhail*, 434 U.S. 374, 397 (1978) (Powell, J., concurring) ("[T]he Court has yet to hold that all regulation touching upon marriage implicates a 'fundamental right' triggering the most exacting judicial scrutiny."). And, as shown in Section III, above, Plaintiffs fail to prove the Statutes impair patient autonomy. Informed consent laws always touch upon the right of personal autonomy. Yet no court has embraced Plaintiffs' radical

theory that they all violate equal protection. And as explained above, this law does not treat that right differently from other medical procedures. To find otherwise would unravel the medical regulatory landscape and frustrate informed consent.

Second, regulation of sex-specific medical procedures does not constitute sex discrimination. Pregnancy and abortion affect only those who can bear children. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1198 (Idaho 2023); *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting). Moreover, Plaintiffs' own framing of the issue—as affecting "pregnant people," not just women—undercuts their sex-discrimination theory since the Statutes would apply uniformly to all pregnant people affected, regardless of their sex.

Third, absent clear sex-based discrimination, Plaintiffs must prove the Statutes are a "mere pretext" for "invidious discrimination." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022). They cannot. Ensuring informed consent before an abortion does not constitute "invidious[] discriminatory animus." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273-74 (1993). Plaintiffs offer no uncontroverted evidence that Kansas lawmakers acted with bias when enacting the Statutes or their various amendments. Their attempt to impute animus from unrelated legislators decades prior to the Statutes' enactment is not sufficient; discriminatory animus cannot be proven by the mere fact an abortion regulation was enacted. *Id.* at 270 ("Given this record, respondents' contention that a class-based animus has been established can be true only if one of two suggested propositions is true: (1) that opposition to abortion can reasonably be presumed to reflect a sex-based intent, or (2) that intent is irrelevant, and a class-based animus can be determined solely by effect. Neither proposition is supportable.").

VII. Plaintiffs have not addressed the remaining permanent injunction factors and other equitable considerations.

In addition to establishing actual success on the merits of their claims, a permanent injunction may be granted only if Plaintiffs prove "that the absence of an injunction would lead to irreparable harm"; "that no adequate legal remedy exists to address the [Plaintiffs'] claim"; "that [Plaintiffs'] injury would outweigh the harm any injunction may cause to the opposing party"; and "that the injunction, if issued, would not be adverse to the public interest." *Roll v. Howard*, 59 Kan. App. 2d 161, 175, 480 P.3d 192, 203 (2020). Plaintiffs' motion does not address these factors and thus fails. But even if they had, the State Defendants dispute them.

Irreparable harm and the balance of the harms. Plaintiffs have identified no irreparable harm to themselves or their clinics. To the contrary, the only alleged harm they've identified is the administrative costs they've purportedly incurred in complying with the WRTKA. But monetary injury is not irreparable harm. And in any event, the fact that Plaintiffs' harm is the costs they've incurred highlights the inherent conflict of interest between Plaintiffs (who seek deregulation of their industry) and their patients (whom regulation benefits).

Because Plaintiffs have no injury of their own, they must rely on the alleged harms to their patients. But the only admissible evidence of irreparable harm before the Court is the post-abortive women who have testified that they received inadequate information and time to deliberate before receiving their abortions. Fact Nos. 4-19, 91-106. Indeed, if Plaintiffs' succeed in enjoining the WRTKA in its entirety, those women who have been harmed by Plaintiffs' inadequate disclosures and informed-consent processes will be denied their right to seek redress for that harm. Plaintiffs seek an order to permanently bar state executive officials from any enforcement of the women's statutory rights under WRTKA. So this proceeding would not simply have an impact or collateral effect on the rights of Plaintiffs'

women patients under the WRTKA—it would actually decide them in their absence. It would thus violate "[t]he fundamental requirement of due process" that a party receive "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted). Kansas women will be irreparably harmed from exercising their constitutional right to make an informed decision about abortion or childbirth. Plaintiffs have presented *no* evidence of actual patient harm, whereas State Defendants present evidence of harm from Plaintiffs' lack of disclosures. At minimum, there is a dispute of fact.

Plaintiffs' extended delay in challenging the WRTKA also undermines irreparable harm. Courts consistently hold that "delay in seeking preliminary relief cuts against finding irreparable injury." *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994). An "extraordinary delay in seeking" injunctive relief demonstrates a lack of urgency and, thus, a lack of irreparable harm. *Wireless Agents, L.L.C. v. T-Mobile USA, Inc.*, 2006 WL 1540587, at *3-5 (N.D. Tex. June 6, 2006). Plaintiffs allege they have complied with the WRTKA since 1997. Defs. Summ. J. Fact No. 4. If the WRTKA truly caused irreparable harm to Plaintiffs or their patients, Plaintiffs would not have waited nearly 30 years to challenge it, and they'd be able to identify actual women harmed by it. Nor would Plaintiffs have continued to adhere to many of the WRTKA's provisions—such as the private meeting requirement, a version of the coercion notice requirement, the ultrasound requirement, and the pre-payment prohibition—after this Court granted a temporary injunction. Fact Nos. 84, 87, 89, 91. Plaintiffs' voluntary compliance shows these terms are not harmful, let alone irreparably so.

Public interest. The public interest in this case is ensuring women have adequate information and time to make decisions about abortion and parenting, and to prohibit misconduct by abortion providers. Every citizen of the State of Kansas "is considered to be master of his own body" and therefore may consent to or deny

medical care. *Hodes I*, 309 Kan. at 643, 440 P.3d at 482. Every citizen of the State of Kansas similarly has the right "to make choices about how to conduct their own lives," and, according to the Supreme Court of Kansas, no issue of self-determination is more fundamental to that right than "family formation[] and family life." *Id.* The Woman's Right to Know Act supports these constitutional values, and an injunction against the Act would defeat the public's interest here.

Laches. As explained in State Defendants' Motion for Summary Judgment, and incorporated by reference here, the doctrine of laches bars Plaintiffs claims. Laches is an equitable defense that precludes claims that a party has unreasonably delayed in asserting, to the prejudice of the opposing party. *Matter of Marriage of Doud & Modrcin*, 59 Kan. App. 2d 244, 253, 480 P.3d 800, 807 (2020). The doctrine of laches has two elements: (1) unreasonable delay by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense. *State ex rel. SRS v. Cleland*, 42 Kan. App. 2d 482, 493, 213 P.3d 1091, 1098 (2009).

The WRTKA was enacted in 1997, and Plaintiffs purport to have complied with its provisions continuously for more than 25 years. Defs. Summ. J. Fact Nos. 1-11. The statute was amended multiple times—in 2009, 2011, 2013, 2014, and 2017—yet Plaintiffs never challenged the core provisions of the Act until this lawsuit. Defs. Summ. J. Fact Nos. 21-41. This delay is particularly troubling because Plaintiffs have demonstrated their willingness to challenge Kansas abortion law, including specific aspects of the WRTKA, when they disagreed with them. Not only has Hodes & Nauser challenged three other Kansas abortion laws, but, in 2013, Planned Parenthood filed a lawsuit challenging three specific WRTKA provisions added by recent amendments. Fact. Nos. 26-38. But, notably, Planned Parenthood did not challenge the fundamental informed consent framework that had been in place since 1997. Defs. Summ. J. Fact Nos. 26-38

In the nearly three decades that Plaintiffs waited to challenge the WRTKA, the statutory regime became embedded in Kansas's healthcare framework. Plaintiffs cannot claim that the law has suddenly become unconstitutional after nearly 30 years of operation. *See Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012 (applying laches to bar a constitutional challenge to Virginia's ballot access requirements, noting that the plaintiffs "displayed an unreasonable and inexcusable lack of diligence" in challenging the various provisions of Virginia's statutory ballot access scheme, which resulted in undue prejudice to the defendants); *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922-23 (D. Ariz. 2016) (applying laches to bar a constitutional challenge to Arizona's ballot access laws where the plaintiffs delayed two years in bringing their claim). Plaintiffs' current challenge appears to be an opportunistic attempt to capitalize on recent decisions rather than a response to any actual change in the law's effect. Giving credence to that opportunism would undermine trust in the court and the rule of law.

Furthermore, Kansas would suffer significant prejudice if Plaintiffs were permitted to challenge the WRTKA at this late date. The State has relied on the validity of the WRTKA for decades, developing administrative infrastructure, training healthcare professionals, and allocating resources based on the statute's requirements. Since the WRTKA's enactment, KDHE has expended substantial resources to promulgate and distribute the educational materials required by the statute. *See* Fact No. 15.

VIII. The Statutes satisfy strict scrutiny.

A. The State has compelling interests in the Statutes.

Determining whether a statute survives strict scrutiny requires a three-part inquiry: "(1) [whether the State] has a compelling interest; (2) [whether] the challenged [law] actually furthers that interest; and (3) [whether] it does so in a

way that is narrowly tailored." *Hodes II*, 318 Kan. at 951–52, 551 P.3d at 47. Each provision of the Statutes further at least one of five compelling interests:

1. **Safeguarding maternal health and safety.** The Statutes ensure (a) women are not coerced into receiving an abortion, (b) women are informed of potential risks arising from both abortion and carrying the child to term, (c) women are not subjected to potential trauma, psychological distress, or depression due to an inadequate understanding of the development of the unborn child and abortion's impact on the child, (d) informing women of other options besides abortion and of resources available to support women who keep their child, and (e) identifying any trying circumstances prompting women to get an abortion so they can be potentially mitigated by the State. *Hodes III*, 318 Kan. at 1017, 551 P.3d at 79 ("protecting maternal health" can be a compelling state interest); *Gonzales*, 550 U.S. at 159–60 (2007) (finding State has interest in protecting maternal mental health).

2. **Upholding integrity in the medical profession.** By requiring the disclosure of abortion procedure details, risks, and alternatives, as well as fetal development, the Statutes avoid the creation of distrust in the medical profession due to a lack of informed consent. *See Hodes III*, 318 Kan. at 1018, 551 P.3d at 79 (preserving the integrity of the medical profession is a compelling state interest); *Gonzales,* 550 U.S. at 157 ("There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" (citations omitted))

3. **Prenatal life.** The Statutes ensure patients are informed about the development of the unborn child before abortion. *Hodes II*, 318 Kan. at 959–60, 551 P.3d at 51 ("promoting respect for the value and dignity of all human life, born and unborn, is [a] compelling" state interest); *accord Hodes I*, 440 P.3d at 501.

4. **Minimizing fetal pain.** The Statutes ensure women receive the evidence about fetal pain capacity pre-abortion. *Dobbs,* 142 S. Ct. at 2284; *see also*

Templeton, 954 F. Supp.2d at 1215-17 (holding abortion providers were not likely to prevail on the merits of claim that fetal pain provision failed strict scrutiny).

5. **Alleviating abortion-related regret.** The Statutes (a) afford women the right to view their ultrasound and materials containing developmental insights before the abortion to minimize post-abortion anguish; (b) ensure women are screened for coercion; and (c) inform women of other options besides abortion and of resources available to support women who keep their child. *Gonzales*, 550 U.S. at 159–60 (State has an interest in ensuring a woman does not "regret her choice to abort [and] struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know"); *Planned Parenthood Rounds*, 530 F.3d at 738 (same).

B. The Statutes are narrowly tailored to further the State's compelling interests.

1. **Citation section (K.S.A. § 65-6708)**: Plaintiffs present no evidence or argument that this infringes any constitutional rights or requires strict scrutiny.

2. **Readability (K.S.A. § 65-6709(a))**: This provision advances all five compelling interests by ensuring that informed consent materials are provided to patients in a clear, legible format. Plaintiffs argue that requiring printed delivery of these materials is overly restrictive, Pls. Summ. J. Br. at 46, 49, but this overlooks the fact that printing requires no additional effort or resources from patients, making it the least restrictive means to guarantee they receive the information.

3. **Physician information disclosures (K.S.A. § 65-6709(a)(1))**: In the context of abortion, where patients often meet their providers only on the day of the procedure, Defs. Summ. J. Fact No. 55, this assures women of their doctor's competence.

4. **Risk disclosures (K.S.A. § 65-6709(a)(2)-(3), (7)-(8), (d))**: These disclosures further the compelling interests of maternal health and medical

integrity by ensuring women receive scientifically supported information about the risks of abortion and childbirth. Fact Nos. 45-50. When undisclosed risks materialize, patients suffer preventable harm and lose trust in providers. Fact Nos. 45-50. The disclosures are narrowly tailored to address issues associated with abortion, avoiding both overinclusion and under inclusion. Nor are they overbroad for providing uniform information, Pls. Summ. J. Br. at 45, as relevance to the majority is standard practice in informed consent laws. Fact Nos. 23-24.

5. **Fetal development disclosures (K.S.A. § 65-6709(a)(4)-(5), (b)(2), (5)-(6), (d))**: The only admissible evidence in this case is that women want to know about fetal development, and they report distress, regret, and eroded trust when denied this information. Fact Nos. 4-19, 91-106. Others testify it led them to reconsider, protecting prenatal life and reducing fetal pain. Fact No. 107.

6. **Alternatives and resource disclosures (K.S.A. § 65-6709(a)(3), (6), (b)(1)-(3))**: Providing alternatives is an undisputed pillar of informed consent, Fact No. 51, yet pre-WRTKA, women often received only abortion as an option. Fact Nos. 4-19. Plaintiffs' discussion of alternatives is cursory at best, Fact No. 54, and they omit resources that make those options viable. Fact No. 54. Former patients report harm mirroring the impact of withheld fetal information. These provisions are narrowly tailored to all five interests.

7. **24-Hour Notice and 30-Minute Waiting Period (K.S.A. § 65-6709(a)-(d))**: The 24-hour notice and the 30-minute waiting period advance all five interests by preventing rushed or coerced decisions. Fact Nos. 71-73. Women have testified to harm from inadequate time to consider their decision for an abortion, while others say more time would have spared lives and pain. Fact Nos. 4-19, 91-106. Plaintiffs argue this is excessive for women have already decided to have an abortion, Pls. Summ. J. Br. at 45-46, 49-50, but Plaintiffs have adduced no evidence from a single woman to support their assertion.

8. **Prepayment Prohibition (K.S.A. § 65-6709(g))**: The pre-payment prohibition advances all five interests as it ensures a woman's decision to have a child or an abortion is not improperly coerced by pre-payment. Plaintiffs acknowledge this as they continue to voluntarily comply with this part of the Act.

9. **Coercion prevention (K.S.A. § 65-6709(b)(4), (k))**: These provisions inform patients of their consent withdrawal rights and coercion's illegality, both of which are central tenets of informed consent. Fact No. 67. Nonetheless, Plaintiffs don't universally screen for coercion. Fact No. 70. Because the undisputed evidence shows that coerced patients suffer substantial harm, including mental distress, regret, and eroded physician trust. Fact Nos. 4-19, 91-106. These provisions thereby advance all five interests by barring coercion and ensuring an unpressured choice. Plaintiffs offer no evidence or argument that these provisions infringe rights or triggers strict scrutiny.

10. **Ultrasound and heart monitor option (K.S.A. § 65-6709(h)-(j))**: The only abortion patients who have testified in this case have testified that they wanted to view their ultrasounds or listen to the baby's heartbeat before their abortion and report harm when they are not allowed to do so. Fact Nos. 4-19, 91-106. Additionally, this information has been shown to help women make a fully informed choice and decide to carry their baby to term, thereby protecting prenatal life and preventing potential fetal pain. Fact No. 37-44, 107.

11. **Physician-Patient Meeting (K.S.A. § 65-6709(c))**: This meeting ensures patients have the chance to meet with their physician and ask questions before their abortion, both of which are essential aspects of informed consent. Fact Nos. 36-81. This meeting requirement furthers all five compelling interests for the same reason as the fetal development disclosures.

12. **Patient Certification (K.S.A. § 65-6709(e)-(f))**: This provision furthers the interests ensuring the informed consent materials were actually received. It is thus

a narrowly tailored procedure to ensure informed consent. Plaintiffs offer no evidence or argument that these provisions infringe rights or trigger strict scrutiny.

13. **Website requirement (K.S.A. § 65-6709(l))**: This provision advances interests in maternal health, medical integrity, prenatal life, and regret prevention by ensuring accessible, state-provided information on fetal development, risks, and alternatives. State Defendants' scientific support, Fact No. 36-81, backs these disclosures. It's narrowly tailored, as no less restrictive means exists to reach potential abortion patients before they schedule an appointment.

14. **Material promulgation (K.S.A. § 65-6710)**: Plaintiffs offer no evidence or argument that this provision infringes rights or triggers strict scrutiny. Nor could they. It is a neutral provision which imposes no duty on them but supports all five interests by making informed consent materials available on request.

15. **Medical emergency (K.S.A. § 65-6711)**: This provision preserves medical integrity by ensuring patients receive, whenever possible, adequate information as to the reason why a physician believes an abortion is necessary to save her life. It is narrowly tailored because it allows doctors to forego the disclosure if necessary.

16. **Unprofessional conduct designation (K.S.A. § 65-6712)**: This enforcement mechanism is a narrow backstop that advances all five interests by ensuring compliance. Plaintiffs offer no evidence or argument that this provision infringes rights or triggers strict scrutiny.

17. **Severability provision (K.S.A. § 65-6714)**: Plaintiffs offer no evidence or argument that this severability section infringes rights or triggers strict scrutiny. It's a neutral provision that imposes no burden.

18. **Scope section (K.S.A. § 65-6715)**: Plaintiffs offer no evidence or argument that this scope section infringes rights or triggers strict scrutiny.

19. **H.B. 2264**: This statute advances medical integrity, prenatal life, and regret prevention by disclosing abortion pill reversal options, which are supported by

scientific evidence and which Plaintiffs withhold from women. Fact Nos. 61-65. Patient testimony underscores its necessity. Fact Nos. 4-19, 91-106. Plaintiffs nonetheless claim that because the information in H.B. 2264 is to be provided in multiple formats, it is somehow not the least restrictive means of achieving these interests. Pls. Summ. J. Br. at 46. A publicity campaign would not suffice to advance the State's interest because there is no guarantee it would actually reach the women who are contemplating a medication abortion. *See* Pls. Summ. J. Br. at 48.

20. **H.B. 2749**: This furthers maternal health and prenatal life via an optional questionnaire on abortion reasons—non-invasive and the least restrictive way to gather critical data. Plaintiffs contend H.B. 2749 fails strict scrutiny because it is underinclusive for not collecting similar information for pregnant women who intend to keep their children. *See* Pls. Summ. J. Br. at 54. But this argument ignores the fact that abortion is a unique decision for which the State is entitled to exert special oversight. Fact Nos. 82-86. Plaintiffs also claim H.B. 2749 is over inclusive because it does not only ask about the reason for abortion but for other demographic information as well. *See* Pls. Summ. J. Br. at 54. But knowledge of demographic information, combined with the reason for the abortion, allow the State to better identify the underlying causes that lead women to seek out an abortion and help the State mitigate the issue.

Because a genuine dispute of material fact exists over whether the Statutes can withstand strict scrutiny, the Court must deny Plaintiffs' motion. *Siruta*, 301 Kan. at 766, 348 P.3d at 558.

CONCLUSION

For these reasons, Plaintiffs' motion for summary judgment should be denied.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of April, 2025, the above and foregoing were electronically filed with the Clerk of the Court using the Court's Electronic Filing System, which will send notice of electronic filing to all counsel of record.

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