IN THE DISTRICT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

HODES & NAUSER, MDs, P.A., on behalf of itself, its patients, physicians, and staff; TRACI LYNN NAUSER, M.D.; TRISTAN FOWLER, D.O.; and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself and 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; SUSAN GILE, in her official capacity as Executive Director of the Kansas Board of Health Arts; and RONALD M. VARNER, D.O., in his official capacity as President of the Kansas Board of Healing Arts, and JANET STANEK, in her official capacity as Secretary of the Kansas Department of Health and the Environment Defendants.	Case No. 23CV03140 Division No. 12 K.S.A. Chapter 60

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED PETITION

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INTRODUCTION

In response to the State moving to dismiss certain claims based on Plaintiffs' failure to allege well-pled facts, Plaintiffs do not cite to where the missing allegations can be found in their Amended Petition. Instead, Plaintiffs lean into the supposed merits of those claims and repeat their unsupported legal conclusions. But more is required to survive a motion to dismiss. And Plaintiffs cannot proceed in asking this Court to strike down every single provision in Kansas's long-established abortion informed-consent statute, the Woman's Right to Know Act ("the Act"), without first clearing the pleading bar for each of their claims.

On their free speech claim, Plaintiffs have now conceded that multiple provisions—those they admit to having made *no* specific speech allegations against—do not address speech at all. And on their equal-protection sex-discrimination claim, Plaintiffs do not dispute that they have failed to allege that men and women are similarly situated when it comes to pregnancy and abortion—an essential allegation to proceed on such a claim. Nor do they identify any facts for their allegation that the law imposes "stereotypes."

On vagueness, Plaintiffs merely repeat their conclusory contentions that directly contradict the text of the H.B. 2264—asserting again that they are unable to "identify" certain information that the Act "does not specify," when in fact H.B. 2264 says that Kansas Department of Health and Environment will "identify" and "specify" those materials. And KDHE has now done so. The Amended Petition does not address KDHE's publications implementing H.B. 2264, and the vagueness claim as alleged—while never supported by facts—is now moot.

Plaintiffs' Opposition thus makes even clearer why this Court should dismiss the second (in part), fourth, and fifth causes of action.

ARGUMENT

I. Plaintiffs do not dispute that their speech claim fails to allege that numerous provisions of the Act regulate speech.

Plaintiffs bear the burden of stating a plausible claim for relief against each statutory provision they challenge. In response to the State pointing out that the Amended Petition makes no particular speech allegations as to numerous provisions of the Act, (Doc. 71 at 3-4), Plaintiffs concede that many of these provisions "*do not* directly regulate speech," (Doc. 75 at 4) (emphasis added). That should be the end of the matter. Because the Amended Petition does not even allege that numerous provisions violate speech rights, the Court should sever them from the speech claim and dismiss the claim in part.

The Amended Petition does not contain well-pled facts sufficient to state a speech claim on the several provisions identified in the State's Motion. (Doc. 71 at 3-4) (no well-pled speech allegations as to K.S.A. 65-6708 (naming the Act); 65-6709 (e), (f), (j) (certification, reporting, and recordkeeping requirements); 65-6709 (g) (providing that the woman need not pay for the abortion until the 24-hour waiting period has expired); 65-6709(m)(2) (defining "medically challenging pregnancy"); 65-6710(b) (printing and video formatting requirements for the state-published materials); 65-6710(c) (requirement that the state-published materials be available at no cost to the provider); 65-6714 (severability clause); 65-6715 (clarifying the legality of abortion); H.B. 2264 §§ 1(a), 3, 4, 6, 7 (definitions); §§ 1(k), 5 (naming the amendment); § 1(j) (severability clause for provisions regarding abortion pill reversal); § 2 (provisions concerning insurance); § 8 (repealing certain provisions); § 9 (providing that amendment becomes effective upon publication); K.S.A. 65-6709 (medical-emergency exception); H.B. 2264 § 1(c)(1), (d) (same); K.S.A. 65-6709(a), (b), (d) (informed consent waiting period); H.B. 2264 § 1(c)(1), (d) (same); K.S.A. 65-6709

(c), (h), (i) (ultrasound waiting period); K.S.A. 65-6710(a) (requirement that KDHE publish certain materials); H.B. 2264 § 1(e) (same); K.S.A. 65-6712 (enforcement mechanisms); H.B. 2264 § 1(f)–(i) (same).

Plaintiffs also do not dispute that the Act contains an express severability clause, which provides a presumption of severability. Under Kansas law, "[s]everability will be assumed if the [allegedly] unconstitutional part can be severed without doing violence to legislative intent." *Clark v. City of Williamsburg*, 388 F. Supp. 3d 1346, 1362 (D. Kan. 2019), aff'd, 844 F. Appx. 4, (10th Cir. 2021) (cleaned up). And courts treat a severability clause itself as "direct evidence of legislative intent"— a "touchstone." *Gannon v. State*, 304 Kan. 490, 520, 372 P.3d 1181, 1199 (2016).

Unable to deny the weighty legal presumptions in favor of severance, Plaintiffs instead make the strained argument that the Kansas Legislature would not have advanced the provisions individually or piecemeal (Doc. 75 at 4). The Act's legislative history directly undercuts that claim. The Act as it exists today was passed through six different enactments over the span of 26 years. The legislative history of revisions shows a considered, gradual approach to these health-and-safety regulations; it was never a single wholesale take-or-leave bill. This piecemeal legislative history establishes not only that "the [A]ct would have been passed without the [allegedly unconstitutional] portion" but was in fact enacted into law at various times without many of the challenged provisions. *Outdoor Sys., Inc. v. City of Lenexa, Kan.*, 67 F. Supp. 2d at 1241 (quoting *Thompson v. K.F.B. Ins. Co.*, 252 Kan. 1010, 850 P.2d 773, 782 (1993)). As a result, "the statute would operate effectively to carry out the intention of the legislature with such portion stricken," *id.*, —as indeed, it has in the past.

Moreover, the severability clause was enacted as part of the original Act in 1997, further showing that the legislature was aware of its intent to sever when adopting various related provisions in 2009, 2011, 2013, 2017, and 2023—and still adopted those other provisions nonetheless and without removing the severability clause. Plaintiffs' conclusory assertion that "[n]one of these provisions can carry out th[eir] asserted purpose in isolation," (Doc 75 at 5)—is thus directly contradicted by the Act's enactment history.

None of Plaintiffs' examples overcome the presumption of severability. (Doc 75 at 4-5.) Of course, a 24-hour or 30-minute informed-consent time period could still function even if some of the disseminated information were stripped from the statute. Indeed, the provisions added in 2009, 2011, 2013, 2017, and 2023 all came *after* the 24-hour provision was already in effect. And the 30-minute reflection period was enacted in 2009, *before* the 2011, 2013, 2017, and 2023 amendments. Similarly, the enforcement provision applies to *all* conduct requirements under the Act, not just those that Plaintiffs allege implicate speech, and thus is not inextricably intertwined with those provisions. And Plaintiffs' suggestion that the Act "can[not] . . . be titled 'The Woman's Right to *Know* Act' without prescribing the information" (Doc. 75 at 4-5) (emphasis in original) is stranger still, because the title could easily apply to any range of information—as it has through six amendments since 1997.Nothing requires this Court to wait until the *remedy* phase of the case, as Plaintiffs urge, (Doc. 75 at 4), to dismiss portions of the lawsuit where the Amended Petition fails to state a claim. The Court can dismiss the speech claim in part now, as pleading rules require, based on the absence of specific allegations. K.S.A. 60-212 (b)(6). For where a portion of a statute is severable, the Court "should and need not decide whether the rest of the statute is unconstitutional." *Williams Nat. Gas Co. v. Supra Energy, Inc.*, 261 Kan. 624, 931 P.2d 7, 629 (1997). Plaintiffs' insistence that this Court proceed all the

way through the merits on each and every provision while conceding that their speech claim sweeps in statutes that are not speech based—only to later strike those claims in crafting the "scope of relief," (Doc 75 at 4)—proposes a waste of judicial resources and needless expansion of discovery when the case can be narrowed at the pleading stage.

Plaintiffs do not clear the pleading bar on their speech claim for numerous provisions of the Act that do not implicate speech, (Doc. 71 at 3-4.), and the speech claim should be dismissed in part.

II. Plaintiffs do not plead the essential elements of an equal-protection sex-discrimination claim.

Plaintiffs' equal-protection sex-discrimination claim lacks two essential elements for pleading such a claim. First, the Amended Petition does not allege that men and women are similarly situated when it comes to pregnancy or abortion. And second, it does not state facts alleging intentional discrimination by the State. Each defect requires dismissal of the claim.

Plaintiffs protest that the Act "singles out women and people capable of becoming pregnant," (Doc. 35 ¶ 139), and "refers to 'woman' or 'pregnant woman'" many times, (Doc. 75 at 6-7). That a statute refers to women cannot possibly render it unconstitutional. Elsewise whole swaths of state law would be rendered unconstitutional. Further, neither allegation is sufficient to state an equal-protection claim, because "a threshold requirement for stating an equal protection claim is to demonstrate that the challenged statutory enactment treats 'arguably indistinguishable' classes of people differently." *In re Weisgerber*, 285 Kan. 98, 106, 169 P.3d 321, 328 (2007). Equal protection "is essentially a direction that all persons *similarly situated* should be treated alike." *City of Cleburne, Tex v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, (1985) (emphasis added). And "[w]hen men and women are not in fact similarly situated in the area covered by the legislation in

question, the Equal Protection Clause is not violated." *Caban v. Mohammed*, 441 U.S. 380, 398, 99 S. Ct. 1760, 1771 (1979). But the Amended Petition does not allege that men and women (or pregnant people and non-pregnant people) are "similarly situated," much less "arguably indistinguishable," when it comes to pregnancy decisions. This failure to plead is fatal.

Nor does the Act's potential effect of encouraging childbirth state an equal protection claim. Even under *Roe v. Wade*, the U.S. Supreme Court "established conclusively that it is not *ipso facto* sex discrimination" for state laws to disfavor abortion or encourage women to carry a pregnancy to term. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273, 113 S. Ct. 753, 761(1993). Rather, the Supreme Court "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469, 101 S. Ct. 1200, 1204 (1981). The Amended Petition does not plead any facts suggesting that the Act's requirements for a procedure only one sex can undergo is "entirely unrelated to any differences between men and women," as required to state an equal-protection claim. Id.

Unable to address these facial defects in their Amended Petition, Plaintiffs rely in their Opposition on scattered cases involving different laws from other states and challenges not based on equal protection clauses. (Doc. 75 at 9, n. 1). Cases about *pregnancy discrimination*, for example, are entirely different from cases regarding medical regulation of the abortion procedure. And Plaintiffs' reliance on Justice Blackmun's concurrence in *Casey* is particularly misplaced, given that *Casey* upheld an informed-consent abortion law substantially similar to the Act. (Doc. 75 at 8 (citing *Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring)). Plaintiffs still have not

cited a single case where a statute regulating the performance of abortion was subject to a viable equal-protection sex-discrimination claim.

Plaintiffs have not pled sufficient facts to support their conclusory allegation that the Act "perpetuates sex-based stereotypes." (Doc. 35 ¶ 139). For example, the Amended Petition asserts that the Act assumes "motherhood is the appropriate role for women," (Doc. 35 ¶ 139), but the Act does no such thing. Rather, it provides information on adoption options and on the legal and financial obligations of the child's father. K.S.A. 65-6710 (a)(3). And contrary to Plaintiffs' conclusory assertion that the Act supposes "women need paternalistic State intervention to guide their decision to continue or terminate a pregnancy," (Doc. 35 ¶ 139), the Act leaves the ultimate abortion decision entirely to the pregnant woman. In fact, the Act ensures that the woman is informed that she cannot be "force[d] . . . to have an abortion" and that the abortion decision turns on her "freely given and voluntary consent." K.S.A. 65-6709 (k).

Plaintiffs' failure to allege plausible facts supporting an invidious "stereotype" in the Act is fatal to their equal-protection claim. This Court is not "required to accept conclusory allegations on the legal effects" of facts "if these allegations do not reasonably follow from" those facts and should dismiss the sex-discrimination claim. *Weil & Assocs. V. Urb. Renewal Agency of Wichita*, 206 Kan. 405, 413–14, 479 P.2d 875 (1971); see also *Murrell v. Sch. Dist. No. 1, Denver*, 186 F.3d 1238, 1249 (10th Cir. 1999) (affirming summary dismissal of equal-protection claim when the "complaint fails to allege intentional gender-based discrimination . . . and therefore fails to state an equal protection claim as a matter of law").

III. Plaintiffs' vagueness claim is mooted by KDHE's publication of the specific "information" and "resources" referenced in H.B. 2264.

All along, Plaintiffs have been asking this Court to prematurely invalidate statutory language that they concede described "forthcoming KDHE resources." (Doc.

75 at 20.) But this Court is "constitutionally without authority to render advisory opinions." *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 165, 210 P.3d 105, 109 (2009). And "[a]s part of the Kansas case-or-controversy requirement in an injunction action, . . . issues must be ripe, having taken fixed and final shape rather than remaining nebulous and contingent." Id., 289 Kan. at 160.

Now that KDHE has promulgated those "resources" and "information," Plaintiffs' vagueness claim is moot.[1] The Amended Petition does not allege a vagueness claim against the implementing materials that H.B. 2264 directed KDHE published no later than September 29, 2023,[2] providing the very specifics Plaintiffs say the Act is "silent" on. (Doc. 75 at 19). These "changed circumstances" after "commencement of [the] action" therefore render "a judgment . . . unavailing as to the issue presented" in the Amended Petition. *State v. Roat*, 311 Kan. 581, 596, 466 P.3d 439, 450 (2020) (affirming dismissal of claims based on mootness).

Even setting aside mootness, the vagueness claim fails on its face. This Court decides a motion to dismiss based on the operative complaint. And while Plaintiffs assert that they have "pled facts showing that the Reversal Amendment" is unclear, (Doc. 75 at 19), and that "facts alleged . . . show that [it] invites arbitrary and unreasonable enforcement," (Doc. 75 at 20), they do not support those assertions with *any* citations to the Amended Petition. Well-pled *facts* are required to avoid dismissal at the pleading stage, K.S.A. 60-212(b)(6), and Plaintiffs identify none supporting their vagueness claim.

Put differently, to survive a motion to dismiss, Plaintiffs must do more than state legal conclusions—especially, as here, where those are contradicted by the face of the challenged statute. Specifically, the Amended Petition alleges that the Reversal

[1] Counsel for KDHE represented to undersigned counsel on September 29, 2023, that the resources and information specified by H.B. 2264 would be published on KDHE's website today.
[2] KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT, WOMAN'S RIGHT TO KNOW ACT, http://www.womansrighttoknow.org/ (last checked Sept. 29, 2023)

Amendment "does not specify what constitutes [the] resources" and relevant "information." (Doc. 35 ¶ 141). But a plain reading of the statute refutes this. The "relevant . . . resources" and "information" are to be "identif[ied]" by KDHE H.B. 2264 § 1(e), not by Plaintiffs or other abortion providers. Indeed, even Plaintiffs concede that the "KDHE provision uses parallel language" to the provisions applying to abortion providers. (Doc. 75 at 20); see H.B. 2264 §§ 1(b)(1), 1(c)(1)(B) (referencing "other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion").

In fact, the statutory language at issue is not only "parallel" but *identical*. Section 1(e) provides that KDHE is responsible for creating the specific informational materials at issue:

> Within 90 days after the effective date of this section, the department of health and environment shall cause to be published . . . ***comprehensible materials designed to inform women of the possibility of reversing the effects of a medication abortion that uses mifepristone and information on resources available*** to reverse the effects of a medication abortion that uses mifepristone. The website shall also include ***other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion***.

(Emphasis supplied.) Performing abortionists must convey that same information to each patient as part of informed consent, namely that "information on reversing the effects of a medication abortion that uses mifepristone is available on the department of health and environment's website . . . and other relevant telephone and internet resources containing information on where the patient can obtain timely assistance

to attempt to reverse the medication abortion." H.B. 2264 § 1(c)(1)(B). Lastly, abortion facilities providing chemical abortions must post a "notice [which] shall also include information about the department of health and environment website . . . and other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion." H.B. 2264 § 1(b).

Plaintiffs' Opposition completely ignores the "presumption that identical words used in different parts of the same statute carry the same meaning." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85, 137 S. Ct. 1718, 1723 (cleaned up). Even across *different* statutes,"[i]dentical words or terms used . . . on a specific subject are [ordinarily] interpreted to have the same meaning in the absence of anything in the context to indicate that a different meaning was intended." *State v. Kleypas*, 305 Kan. 224, 262, 382 P.3d 373, 405 (2016) (citation omitted). The Amended Petition states no facts to provide such "context" warranting reading identical words within the statute to have divergent meanings. Nor does the Amended Petition allege facts "indicat[ing] that a different meaning was intended." Id. at 262. Nothing in Plaintiffs' Opposition to the Motion to Dismiss addresses this fatal pleading defect, either.

Because Plaintiffs' vagueness claim "do[es] not reasonably follow from" their "description" of these provisions, this Court is not "required to accept" Plaintiffs' "conclusory allegations" that those provisions infringe Plaintiffs' rights. *Weil*, 206 Kan. at 413–14. In any event, Plaintiffs' allegation that the Act fails to "specify what constitutes such resources or how to go about identifying them," (Doc. 35 ¶ 141), is moot. KDHE has specified and identified them through their publication, as the Act always made clear would happen. Should Plaintiffs wish to challenge KDHE's published implementation of H.B. 2264's provisions, they will need to amend their

claims. The Amended Petition contains no such allegations, and thus the vagueness claim against the Reversal Amendment cannot survive the State's Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Defendants Kansas Attorney General Kris W. Kobach and District Attorneys Stephen M. Howe, Marc Bennett, and Mark A. Dupree, Sr., respectfully request that the Court dismiss Plaintiffs' speech claim in part and equal-protection sex-discrimination claim for failure to state a claim, and Plaintiffs' vagueness claim based on mootness.

Respectfully submitted this 29th day of September, 2023.

/s/ Anthony J. Powell
Anthony J. Powell, #14981
Solicitor General
120 SW 10th Ave., Room 200
Topeka, KS 66612-1597
Phone (785) 296-2215
Fax: (785) 296-3131
Email: Anthony.powell@ag.ks.gov

/s/ Robert C. Hutchison
Robert C. Hutchison, #27351
Deputy Attorney General
120 SW 10th Ave., Room 200
Topeka, KS 66612-1597
Phone (785) 296-2215
Fax: (785) 296-3131
Email: Robert.hutchison@ag.ks.gov

/s/ Denise M. Harle
Denise M. Harle, GA Bar No. 176758*
Alliance Defending Freedom
1000 Hurricane Shoals Rd NE, Suite D-1100
Lawrenceville, GA 30043
Phone: (770) 339-0774
Fax: (770) 339-6744
dharle@adflegal.org

/s/ Julia C. Payne
Julia C. Payne, Indiana Bar No. 34728-53*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Phone (480) 444-0020
Fax: (480) 444-0028
Email: jpayne@adflegal.org

Attorneys for Defendants Kris W. Kobach, Stephen M. Howe, Marc Bennett, and Mark Dupree

*Admitted pro hac vice

CERTIFICATE OF SERVICE

This is the certify that on this 29th day of September, 2023, I filed the above and foregoing with the Clerk of the Court, and served electronically to all counsel of record:

Teresa A. Woody
The Woody Law Firm PC
1621 Baltimore Avenue
Kansas City, MO 64108
Phone: (816) 931-5919
Fax: (816) 471-4883
teresa@woodylawfirm.com

Jiaman Wang
Cici Coquillette
Megan Jones
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Phone: (917) 637-3600
Fax: (917) 637-3666
awang@reprorights.org
ccoquillette@reprorights.org
mjones@reprorights.org

David J. Weiner
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
Phone: (202) 942-5000
david.weiner@arnoldporter.com

Paul W. Rodney
Arnold & Porter Kaye Scholer LLP
1144 Fifteenth Street, Suite 3100
Denver, CO 80202
Phone: (303) 863-1000
paul.rodney@arnoldporter.com

Attorney for Plaintiffs Hodes & Nauser, MDs, P.A.; Traci Lynn Nauser, M.D. and Tristan Fowler, D.O.

Mandi R. Hunter
Stephanie L. Hammann
Hunter Law Group, P.A.
1900 W. 75th Street, Suite 120
Prairie Village, KS 66208
Phone: (913) 320-3830
mrh@hunterlawgrouppa.com
sh@hunterlawgrouppa.com

Erin Thompson
4401 W. 109th St., Suite 200
Overland Park, KS 66211
Phone: (913) 345-4617
erin.thompson@ppgreatplains.org

Diana O. Salgado
Planned Parenthood Federation of America
1110 Vermont Avenue NW, Suite 300
Washington, DC 20005
Phone: (212) 261-4399
diana.salgado@ppfa.org

Emma Noftz Stern
Planned Parenthood Federation of America
123 William Street, 9th Floor
New York, NY 10038
Phone: (212) 965-7000
emma.stern@ppfa.org

Attorneys for Plaintiff Comprehensive Health of Planned Parenthood Great Plains

Courtney Cyzman
Cody Bebout
KANSAS STATE BOARD OF
HEALING ARTS
800 SW JACKSON STE A
TOPEKA, KS 66612
COURTNEY.CYZMAN@KS.GOV
CODY.BEBOUT@KS.GOV
Attorneys for Defendants Gile and Varner

Brian Vasqez
Katelyn Radloff
KANSAS DEPARTMENT OF
HEALTH AND ENVIRONMENT
1000 SW JACKSON ST SUITE 560
TOPEKA, KS 666121368
BRIAN.VASQUEZ@KS.GOV
KATELYN.RADLOFF@KS.GOV
Attorneys for Defendant Stanek

By: */s/ Robert C. Hutchison*

Robert C. Hutchison