

IN THE THIRD JUDICIAL DISTRICT  
DISTRICT COURT, SHAWNEE COUNTY, KANSAS  
DIVISION 7

TRUST WOMEN FOUNDATION INC.	)	
d/b/a	)	
SOUTH WIND WOMEN’S CENTER	)	
d/b/a TRUST WOMEN WICHITA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. _____
	)	
DEREK SCHMIDT, in his official	)	
capacity as Attorney General	)	
of the State of Kansas,	)	
	)	
Defendant.	)	

**PETITION**

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

Plaintiff Trust Women Foundation Inc. d/b/a South Wind Women’s Center d/b/a Trust Women Wichita (“Trust Women” or “the Clinic”), on behalf of itself and its patients, by and through its undersigned attorneys, brings this petition against the above-named Defendant, his employees, agents, and successors in office (“Defendant”), and in support thereof allege the following:

**I. PRELIMINARY STATEMENT**

1. This lawsuit challenges Section 6 of Kansas House Bill 2028, the Kansas Telemedicine Act, and the provision of Section 7 declaring Section 6 to be non-severable, which was signed into law on May 12, 2018, and is scheduled to take effect on January 1, 2019. A copy of the Act is annexed hereto as Exhibit 1.

2. Section 6 of House Bill 2028 (hereinafter “the Act” or the “Telemedicine Abortion Ban”) effectively bans the delivery of any abortion procedure via telemedicine.

3. Section 7 of the Act includes a provision which states that only Section 6 of the Act is non-severable, while declaring all other sections severable.

4. Trust Women is a licensed ambulatory surgical center in Wichita, Kansas and has been providing safe, high-quality reproductive health care, including abortions, since 2013. The Clinic brings claims on behalf of itself and its patients, and seeks declaratory and injunctive relief, including facial invalidation of the Act.

5. The Telemedicine Abortion Ban singles out the provision of abortion care from all other medical care and violates the rights of Plaintiff's patients guaranteed by the Kansas Constitution by unduly burdening their fundamental right to access abortion.

6. In addition, by treating women seeking abortions differently from similarly-situated patients seeking all other forms of medical care delivered via telemedicine, the Act violates the rights of Plaintiff's patients to equal protection under the law. The Act further violates Plaintiff's rights to equal protection by treating them differently from all other health care providers who provide health care via telemedicine without a rational basis to do so.

7. Temporary and permanent injunctive relief is necessary to protect the constitutional rights of Plaintiff, its patients, and the health and safety of women.

## **II. JURISDICTION AND VENUE**

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

9. Plaintiff's action for declaratory and injunctive relief is authorized by K.S.A. §§ 60-1701, 60-1703 (declaratory relief) and K.S.A. § 60-901-K.S.A. § 60-903 (injunction).

10. Venue in this Court is proper under K.S.A. §§ 60-603(3) because the enforcement authority of Defendant Schmidt is exercised in this district.

## **III. PARTIES**

### **A. Plaintiff**

11. Trust Women is a health care facility in Wichita, Kansas that has been providing pregnancy testing, contraception counseling, and abortion care to women since 2013. The Clinic is a member of the National Abortion Federation, the professional association of abortion providers, and has been continuously licensed as an ambulatory surgical center by the Kansas Department of Health and Environment since July 2014. The Clinic brings this action on its own behalf and on behalf of its patients who seek pregnancy termination services presently and in the future.

### **B. Defendant**

12. Defendant Derek Schmidt is the Attorney General of Kansas. He is responsible for defending Kansas laws against constitutional challenge. K.S.A. § 75-702. Defendant Schmidt is sued in his official capacity, as are his agents and successors.

## **IV. STATUTORY FRAMEWORK AND RELEVANT FACTS**

### **A. Pre-Existing Kansas Laws and Regulations Limit Women's Access to Abortion Care.**

13. The Telemedicine Abortion Ban is Kansas' latest legislative effort to restrict abortion access, by prohibiting the provision of abortion via telemedicine and attempting to make this provision nonseverable from the remainder of the Kansas Telemedicine Act. But Kansas' existing statutory scheme already circumscribes access to abortion in a variety of ways.

14. Abortions are generally prohibited after viability (K.S.A. § 65-6703(a)), and it is illegal to perform an abortion after 22 weeks unless two physicians certify that the woman's life is endangered or she faces substantial and irreversible impairment of her physical health. K.S.A. §§ 65-6724(a), 65-6723(f). Furthermore, the Legislature has passed laws prohibiting certain methods of abortion. *See* K.S.A. § 65-6721 (banning intact dilation and evacuation abortions);

K.S.A. § 65-6741 (banning dilation and evacuation abortion without first performing fetal demise, temporarily enjoined by *Hodes & Nauser, MDs, P.A. v Schmidt*, No. 2015CV000490, 2015 WL 13065200 (Kan. Dist. Ct. June 30, 2015), *aff'd*, 52 Kan. App. 2d 274, 368 P.3d 667 (Kan. Ct. App. 2016), *review granted* (Apr. 11, 2016)).

15. Additionally, women seeking abortions must receive state-mandated information and then wait a minimum of 24-hours before obtaining the abortion. K.S.A. § 65-6709.

16. State agencies and employees are prohibited from providing abortion services, K.S.A. § 65-6733, and abortions cannot be performed on University of Kansas properties except in the case of a medical emergency. K.S.A. § 76-3308(j). The insurance plan for government employees prohibits coverage for an abortion unless the pregnancy threatens the woman's life.<sup>1</sup> Private insurance policies are likewise prohibited from offering coverage for abortions (with the exception of abortions necessary to preserve a woman's life) unless coverage is offered through a separate and optional rider. Moreover, insurance provided via an exchange pursuant to the Affordable Care Act is prohibited from covering virtually all abortions, even if offered through a separate insurance rider. K.S.A. § 40-2, 190. In addition, women reliant on Medicaid cannot obtain coverage for an abortion unless the pregnancy is life-threatening or the result of rape or incest. *State ex rel. Kline v. Sebelius*, No. 05-C-1050, 2006 WL 237113 at \*6 (Kan. Dist. Ct. Jan. 24, 2006).

17. In 2014, 97% of Kansas counties were without a single clinic that provided abortions; over half of Kansas women lived in those counties. Plaintiff is aware of only four other licensed abortion facilities in Kansas: Hodes & Nauser, MDs, P.A., located in Overland Park, Center for

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<sup>1</sup> Kan. Dep't of Health & Env't, State Employee Health Plan, 39 (2015), available at <http://www.kdheks.gov/hcf/sehp/BenefitDescriptions/2015-Aetna-Plan-A.pdf>.

Women’s Health in Overland Park, and Planned Parenthood, located in Overland Park and Wichita.

**B. House Bill 2028 Singles Out and Bans Telemedicine for Abortion Care.**

18. House Bill 2028 authorizes the use of telemedicine to “provide or support healthcare delivery, that facilitate the assessment, diagnosis, consultation, treatment, education and care management of a patient’s healthcare.” K.S.A. § 40-2,211.

19. The Act’s primary purpose is to expand access to health care services by establishing patient-provider relationships and confidentiality and privacy assurance, K.S.A. § 40-2, 212, and to guarantee insurance parity for telemedicine services, K.S.A. § 40-2,213.

20. As defined by the statute, “telemedicine” is “the delivery of healthcare services or consultations while the patient is at an originating site and the healthcare provider is at a distant site.” K.S.A. § 40-2,211. As Kansas recognizes, a face-to-face meeting is not necessary, or even important, to establish a physician-patient relationship or to provide the “same standards of practice and conduct that apply to healthcare services delivered via in-person contact.” K.S.A. § 40-2,212.

21. While encouraging the use of telemedicine generally, the Telemedicine Abortion Ban singles out and effectively bans telemedicine for abortion services, including medication abortions. K.S.A. § 40-2, 215.

22. Telemedicine has been available in Kansas since 1991, and has been routinely and successfully utilized by Kansas medical practitioners for many years.

23. The use of telemedicine in Kansas has expanded patients’ access to care. For example, Kansas University Center for Telemedicine & Telehealth first began providing care via telemedicine in 1991 and currently, uses telemedicine in more than thirty medical specialties—

including autism diagnosis, cardiology, oncology/hematology, pain management, pediatrics, psychiatry, and psychology—to provide consults and other medical services including follow-up care, in-depth therapy, and medication management.

24. Neurologists provide lifesaving care to patients in rural areas of Kansas using telemedicine via the WesleyCare Virtual Network. They use telemedicine to diagnose stroke patients at hospitals who do not have a neurologist available based on imaging scans. In addition, neurologists can prescribe appropriate treatment—including IV-tPA, the only FDA approved treatment for ischemic stroke that can save lives and improve the quality of life for stroke victims if administered within 4.5 hours of the onset of symptoms—via telemedicine. While IV-tPA is potentially life-saving for one type of stroke, it is potentially fatal for the other. Nevertheless, the provision of these acute neurology services is permitted under House Bill 2028.

25. Additionally, Newton Medical Center located in Newton, Kansas treats patients in its general inpatient setting using a videoconferencing monitor and camera, in conjunction with a robot on a rolling stand equipped with a digital stethoscope and other diagnostic equipment. In 2017, Newton also developed a telestroke program in which patients who arrive in the Newton emergency department exhibiting signs of stroke are connected by staff to remote neurologists for rapid diagnosis and treatment.

26. In all medical contexts except abortion, Kansas law authorizes physicians to use telemedicine to provide consultations and treatment recommendations and dispense prescription medications to patients. *See* K.S.A. §§ 40-2,214 – 2,215. However, in conjunction with House Bill 2028’s passage to expand the availability of telemedicine throughout the State, the Act prohibits “the delivery of any abortion procedure via telemedicine.” K.S.A. § 40-2,215.

27. Further, Kansas included a non-severability clause that applies to the abortion provision only: if the abortion provision is determined to be unconstitutional or invalid, the entire telemedicine act falls. K.S.A. § 40-2,216.

**C. Abortions, Including Medication Abortions Provided By Telemedicine, Are Safe and Effective.**

28. Legal abortion is among the safest, most common medical procedures in contemporary medical practice. In fact, nearly one in four women in the United States (23.7%) will have had an abortion by the time she is 45 years old. Complication rates for abortion are similar to or lower than for other outpatient procedures.

29. Leading medical authorities, including the American College of Obstetricians and Gynecologists (“ACOG”), the American Medical Association, the American Academy of Family Physicians, the American Academy of Pediatrics, and the American Osteopathic Association have all concluded not just that abortion is an extremely safe medical procedure, but that it is one of the safest medical procedures performed in the United States.

30. In one of the most comprehensive studies to date, published in *Obstetrics & Gynecology*, the medical journal of ACOG, researchers found that major complications (defined as those requiring hospital admission, surgery, or blood transfusion) from abortions occurred in less than one-quarter of one percent (0.23%) of cases.

31. In fact, abortion is far safer than the alternative of carrying a pregnancy to term. The risk of death associated with childbirth is approximately 14 times higher than that associated with abortion, and every pregnancy-related complication is more common among women having live births than among those having abortions. Kansas is ranked as 22 in the United States for maternal mortality, with 17.7 deaths per 100,000 births. By contrast, according to the CDC, there

were only 0.62 deaths per 100,000 legally induced abortions in the period 2008 through 2013, a fatality rate of 0.0006%.

32. Every year, 2% to 10% of pregnant women in the United States suffer from gestational diabetes mellitus, and approximately half of these women will go on to develop type two diabetes after pregnancy. According to the CDC, 144 in 10,000 women who gave birth in a hospital in the United States in 2014 experienced unexpected outcomes of labor and delivery that resulted in significant short- or long-term consequences. Such “severe maternal morbidity” disproportionately affects minority women.

33. Abortions may be performed by surgical or medical means. Surgical abortion requires no incision or cutting; it is accomplished through the use of suction and/or instruments to evacuate the contents of the uterus. Surgical abortion may involve the use of anesthesia or sedation. Medication abortion involves the administration of medications (in the forms of pills) to induce an abortion. Medication abortion requires no anesthesia or sedation; women are screened for eligibility and contraindications, receive counseling, and are then provided with the medications.

34. The Clinic performs medication abortions up to 10 weeks, as measured from the first day of a woman’s last menstrual period. Medication abortion is administered by oral consumption of two different medications. The patient takes the first medication, mifepristone, at the Clinic. Mifepristone (distributed as Mifeprex) blocks progesterone, a hormone essential to sustain a pregnancy. The patient then takes the second medication, misoprostol, within 36 hours, at home or another location of her choosing. The misoprostol causes the uterus to contract and empty its contents, generally within hours.

35. Medication abortion is an extremely safe and effective alternative to surgical abortion for women in early pregnancy (up to ten weeks from a woman’s last menstrual period). It has been

available to women in the United States since 2000. The serious complication rate, requiring hospitalization for infection treatment or transfusion, for medication abortion is less than half of one percent.

36. Because there is only a small window of time when medication abortions are available, any delay could foreclose the option entirely for some women, including those for whom a medication abortion is medically-indicated or highly preferred for deeply personal reasons. While legal abortion is an extremely safe procedure, delaying the procedure until later in pregnancy increases the risks of the procedure and the rate of complications and requires women to undergo more complex, invasive, and expensive abortion care.

37. Studies have shown that telemedicine improves access to early medication abortion in underserved areas, enables women to be evaluated and treated sooner, and provides them with greater choice of abortion procedure.

38. The reported risks associated with medication abortion provided via telemedicine are low and similar in magnitude to the adverse effects of common prescriptions and over-the-counter medications. Moreover, because the second pill in the medication abortion regimen (which causes the uterus to contract and empty) will be consumed outside of the office, any potential complication, which are rare, would occur after the patient has left the provider's office. In other words, such rare complications would occur whether medication abortion is provided in person or by telemedicine.

**D. H.B. 2028 Targets Women's Access to Abortion Care with No Justification or Corresponding Medical Benefit.**

39. There is no medical justification for singling out abortion care and prohibiting the practice of telemedicine in the context of medication abortion. A recent consensus study report jointly prepared by the National Academies of Sciences, Engineering, and Medicine found no

evidence that taking medication abortion requires the physical presence of a physician, and concluded that telemedicine medication abortion is just as safe as in-person medication abortion.

40. Providing medication abortion via telemedicine is consistent with the current medication indications described in the FDA label for Mifeprex. ACOG has also concluded that medication abortion can be provided safely and effectively with a high level of patient satisfaction using telemedicine.

41. In fact, medication abortion has been practiced by telemedicine in Iowa since 2008, in Alaska since 2011, in Maine since 2016, by at least one clinic in Illinois since 2016, and most recently in Washington, Hawaii, and Oregon through the Gyunity TelAbortion Study. Studies have shown that the serious complication rate for medication abortion is exceedingly low (less than 0.5%), whether provided in-person or by telemedicine.

42. Trust Women recently began providing medication abortion via telemedicine in an effort to expand access to services. In 2017, nearly half of Trust Women Wichita's abortion patients had a medication abortion and amongst those for whom medication was an option, nearly three-quarters chose medication abortion over surgical abortion.

43. Before introducing telemedicine at the Clinic, Trust Women was only able to provide abortion care two days a week, because the Clinic's physicians must travel to Wichita in order to provide abortion services.

44. Because the Clinic does not have to transport a physician to Wichita for telemedicine medication abortion appointments, it has been able to expand the provision of medication abortion by offering this service on additional weekdays and on Saturdays. Trust Women intends to further expand access to abortion care by offering medication abortion via telemedicine during

evening hours and in more rural locations throughout Kansas, so that women are able to receive care closer to their homes.

45. If the Telemedicine Abortion Ban goes into effect on January 1, 2019, the Clinic will have to cease providing these services and will be unable to expand telemedicine care to rural locations. By proscribing the provision of abortion care through telemedicine, the Telemedicine Abortion Ban limits the Clinic's medication abortion services to just two days a week, and only at the Clinic's Wichita location, thus severely restricting Kansas women's ability to access abortion care.

46. There are no benefits, medical or otherwise, to the Telemedicine Abortion Ban. It does not improve women's health and there is no medical basis for it. Telemedicine has been used to safely provide medication abortion for a decade, and has been deemed to be as safe as the provision of medication abortion in-person at a clinic. Conspicuously, House Bill 2028 contains no legislative findings or information explaining the purpose of the Telemedicine Abortion Ban and provides no justification for its differential treatment of abortion.

47. Requiring the physician to be physically present to examine the patient prior to administering medication abortion creates undue burdens for women seeking abortion by restricting their access to safe abortion care. The Telemedicine Abortion Ban limits the number of days the Clinic can provide care to only two days a week and precludes the Clinic from expanding its services in the future to offer women medication abortion in more rural areas, closer to where they reside, which would alleviate the travel and logistical burdens these women face when trying to access abortion care.

48. By depriving women of access to abortion care delivered via telemedicine, without conferring any corresponding health benefit, the Telemedicine Abortion Ban creates an undue burden on women’s constitutional right to access abortion in Kansas.

49. Additionally, the Telemedicine Abortion Ban impermissibly singles out providers of abortion care from all other physicians who provide health care via telemedicine. House Bill 2028 promotes the use of telemedicine to expand access to health care for Kansans, but the Act prohibits health care providers from providing constitutionally protected medical care without a legitimate reason.

50. The Act explicitly singles out abortion providers and women seeking abortions for discriminatory treatment in a statute that is otherwise designed to protect and increase access to health care services.

51. The Act also impermissibly singles out telemedicine for abortion care by expressly declaring it the only non-severable section of the Act, and by specifically stating that all other sections are severable. However, whether a section of a legislative act is severable is ultimately for the Court, not the Legislature, to decide.

## **V. CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF (Fundamental Right to Terminate a Pregnancy)**

52. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 51 above.

53. Section 6 of the Act violates Sections 1 and 2 of the Bill of Rights of the Kansas Constitution by unconstitutionally burdening the fundamental right of Plaintiff’s patients to terminate a previable pregnancy by banning the use of telemedicine to provide abortion services.

### **SECOND CLAIM FOR RELIEF (Improper Purpose)**

54. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 51 above.

55. Section 6 of the Act violates Section 1 of the Bill of Rights of the Kansas Constitution because it was enacted with the improper purpose of unconstitutionally burdening a woman's right to obtain pregnancy termination services.

**THIRD CLAIM FOR RELIEF**  
**(Denial of Equal Protection to Abortion Patients)**

56. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 51 above.

57. Section 6 of the Act violates the Kansas Constitution's equal protection guarantee by singling out a medical procedure sought only by women for differential treatment and imposing burdens on women seeking to exercise their fundamental right to terminate a viable pregnancy that are not imposed on other similarly-situated individuals, including patients who seek other forms of medical care via telemedicine.

**FOURTH CLAIM FOR RELIEF**  
**(Denial of Equal Protection to Abortion Providers)**

58. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 51 above.

59. Section 6 of the Act violates Section 1 of the Bill of Rights of the Kansas Constitution, which guarantees Plaintiff equal protection under the law, by denying only physicians performing abortions the ability to provide care via telemedicine and by requiring the physician to see the patient in person in order to provide medication abortion services.

**FIFTH CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

60. Plaintiff hereby re-alleges and incorporates by reference paragraphs 1 through 51 above.

61. Pursuant to K.S.A. § 60-1704, Plaintiff is entitled to a determination of how the provisions of the Act, and in particular Section 6, affect its rights, status, or other legal relations and how they affect the rights, status, or other legal relations of its patients. Plaintiff is further

entitled to a determination of whether the provision of Section 7, expressly declaring Section 6 non-severable from the Act, is null and void.

**VI. REQUEST FOR RELIEF**

WHEREFORE Plaintiff requests that the Court:

- A. Issue a Declaratory Judgment that Section 6 of the Act is unconstitutional and therefore unenforceable;
- B. Issue a Declaratory Judgment that the provision of Section 7, which declares Section 6 of the Act non-severable, is null and void;
- C. Grant a Temporary Injunction without bond, and a Permanent Injunction restraining Defendant, his agents, and his successors in office from enforcing Section 6 of the Act;
- D. Grant such other and further relief as this Court deems just, proper, and equitable.

Respectfully submitted,

/s/ Robert V. Eye  
Robert V. Eye  
Robert V. Eye Law Office  
4840 Bob Billings Pkwy, Ste 1010  
Lawrence, Kansas 66049  
Phone: 785-234-4040  
Fax: 785-749-1202  
Email: bob@kauffmaneye.com

Leah Wiederhorn\*  
New York Bar Registration No. 4502845  
Jessica Sklarsky\*  
New York Bar Registration No. 5364096  
CENTER FOR REPRODUCTIVE RIGHTS  
199 Water Street, 22<sup>nd</sup> Floor  
New York, NY 10038  
Phone: (917) 637-3628  
Fax: (917) 637-3666

Email: lwiederhorn@reprorights.org  
jsklarsky@reprorights.org

*\*Application Pending for Admission Pro Hac Vice*

ATTORNEYS FOR PLAINTIFF