

No. 19-121693-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Trust Women Foundation Inc.
d/b/a South Wind Women’s Center, d/b/a Trust Women Wichita,

Plaintiff-Appellant,

v.

Marc Bennett, in his official capacity as District Attorney for Sedgwick County, Kansas; Kathleen Selzer Lippert, in her official capacity as the Executive Director of the Kansas Board of Healing Arts; Robin D. Durrett, in his official capacity as President of the Kansas Board of Healing Arts; and Derek Schmidt, in his official capacity as Attorney General of the State of Kansas,

Defendants-Appellees.

**PLAINTIFF-APPELLANT TRUST WOMEN FOUNDATION INC.’S
EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

INTRODUCTION

Plaintiff-appellant Trust Women respectfully moves under K.S.A. 60-262(c), (f) for an injunction prohibiting enforcement of the in-person requirement for medication abortion, K.S.A. 65-4a10, pending the resolution of this appeal or, at a minimum, during the COVID-19 state of disaster emergency.¹ Trust Women requests expeditious resolution of this motion. *See* Admin. Order No. 2020-PR-016, ¶¶ 4, 6 (Kan. S. Ct. Mar. 18, 2020) (permitting “emergency operations” during the COVID-19 emergency and defining that

¹ *See* State of Disaster Emergency Proclamation (Mar. 12, 2020), <https://governor.kansas.gov/wp-content/uploads/2020/03/2020-03-12-Proclamation.pdf>.

term to include motions requiring expeditious resolution). Without immediate relief, Trust Women risks being forced to sharply reduce the availability of abortions at its Wichita clinic and may become unable to provide any abortion care.

During the unprecedented public-health crisis caused by the COVID-19 pandemic, health-care providers are increasingly relying on telemedicine to limit in-person interactions while providing care. In fact, Governor Kelly recently issued an executive order encouraging physicians to use telemedicine whenever appropriate, to limit the spread of COVID-19. There is one and only one health-care service for which telemedicine is banned in Kansas: medication abortion. Medication abortion is the use of medications to terminate early pregnancy. Under Kansas law, when a patient takes the first pill in the two-drug medication-abortion regimen, she must be “in the same room and in the physical presence of the physician.” K.S.A. 65-4a10(b).

Because the in-person requirement impairs the fundamental right to abortion, it is subject to strict scrutiny. Defendants cannot show that the state has a compelling interest in banning the use of telemedicine for medication abortions or that this ban is narrowly tailored. At a hearing at which defendants presented *no* witnesses or exhibits, unrefuted evidence established that there is no medical justification for the prohibition. Telemedicine has been used safely in multiple states to provide medication abortions, and it is used in Kansas for medical services carrying far greater risk than medication abortion.

Meanwhile, the in-person requirement is unduly restricting the ability of physicians to provide medication abortions and is exacerbating the burdens on patients seeking abortion care amid the COVID-19 pandemic. Because Trust Women has long been unable

to find in-state physicians to provide abortions, it is forced to rely on out-of-state physicians who are licensed in Kansas and willing to fly to Wichita. Those physicians' ability to travel has become increasingly hindered due to restricted flight availability, their obligations to help with the ongoing health crisis in their own communities, and concerns for the wellbeing of themselves and their families, coworkers, and patients.

While an injunction would not remedy all barriers to abortion in Kansas, it would allow Trust Women's physicians to provide medication abortions to patients at the Wichita clinic remotely, without requiring physician travel. This would secure the ability of Trust Women's patients to continue to access essential health care during the public-health crisis, while also reducing the risk of transmission.

BACKGROUND

A. Obstacles to Providing Abortion in Kansas

Kansas has only three abortion providers. (R. 1:236). About 56% of Kansas women of reproductive age live in a county without an abortion provider. (R. 3:43-44). Women in western Kansas must travel up to 180 miles for an abortion. (R. 3:95).

Trust Women operates a clinic in Wichita, providing reproductive health care, including both surgical and medication abortion. (R. 1:244-45; 2:137-38; 3:80-83, 91).² Medication abortion involves taking a combination of two medications to terminate early pregnancies. (R. 3:30). The patient takes mifepristone at the clinic, then 24 to 36 hours

² Surgical abortion involves the use of instruments, but it is not actually surgery, as there is no incision. Nat'l Acads. of Sci., Eng'g & Med., *The Safety & Quality of Abortion Care in the United States*, 10, 59, 179 (National Academies Press 2018).

later takes misoprostol at home. (R. 3:30-31, 55-56). The patient passes the pregnancy at home in a process similar to miscarriage. (R. 3:31, 148-49). Medication abortion is extremely safe—safer than taking Tylenol, penicillin, or Viagra. (R. 3:33, 57-58). Major complications (e.g., heavy bleeding or serious infection) occur in fewer than 0.3% of patients. (R. 3:32, 56).

Before the COVID-19 pandemic, Trust Women’s ability to provide abortion was already limited because Trust Women has historically been unable to find in-state physicians to work with the clinic. Trust Women is forced to rely primarily on physicians who are licensed in Kansas but live in other states and are willing to fly to Wichita. (R. 1:249; 3:87, 89-91). The non-resident physicians who currently provide abortion care at Trust Women each have full-time medical practices or teaching obligations in their home communities. Declaration of Julie Burkhart at ¶¶ 10-12, Exh. A (“Burkhart Decl.”).

Even in non-pandemic times, Trust Women can offer abortion only on Thursdays and Fridays due to the limited availability of its physicians. (R. 3:89-90, 132-33). Each physician is typically available to travel to the clinic once every four to six weeks. (Burkhart Decl. ¶¶ 10, 11). To minimize the impact on the physician’s full-time professional obligations and family responsibilities, the physician flies out on Wednesday evening or early Thursday morning, provides abortion care on Thursday and Friday, and then returns home on Friday evening. (Burkhart Decl. ¶ 9). Trust Women’s schedule on Thursdays and Fridays is packed, leading to long wait times. Patients spend six to eight hours at the clinic for a medication or surgical abortion. (R. 3:91-92, 111, 150).

Patients face numerous obstacles to accessing abortion. The cost is generally not covered by insurance or Medicaid. (R. 1:230; 3:43-44, 151). About half of Trust Women's patients live outside the Wichita area, and many patients have transportation issues. (R. 3:94-95). The limited appointment availability is another hurdle; women regularly call the clinic seeking appointments on days other than Thursdays and Fridays. (R. 3:98). Trust Women's physicians have experienced flight delays and cancellations, forcing the clinic to cancel or delay patient appointments. (R. 3:90).

These obstacles delay abortion access and harm patients even under normal circumstances. (R. 3:42-45, 149-53). Health risks associated with pregnancy increase with gestation; delaying abortion access increases exposure to those pregnancy-related risks. (R. 3:152-53). Although abortion is extremely safe at all stages, the complication rate is higher in the second trimester. (R. 3:44). The patient's financial cost is lower earlier in pregnancy. (R. 3:91, 153). Because of limited appointment availability, some patients wanting medication abortions have been unable to get an appointment before the 10-week gestational cutoff for medication abortion and have instead had to have surgical abortions. (R. 3:112-13, 154-56).

B. Deepening Obstacles to Abortion During the COVID-19 Pandemic

Trust Women is committed to ensuring the safety of its staff, patients, and community during the COVID-19 pandemic while continuing to provide timely, high-quality abortion care. Trust Women has implemented measures to reduce risk of transmission while still providing essential abortion care. (Burkhart Decl. ¶¶ 15, 16). These measures include screening patients and staff before entering the facility,

maintaining distance between patients, and keeping the number of individuals within the clinic at any given time to a minimum. (*Id.* ¶ 16). To prevent patient interaction, medication-abortion patients receive their ultrasound, examination, health-education session, and medications in a single examination room and encounter only two clinical staff members. (*Id.*).

Accessing abortion is becoming more difficult during the COVID-19 pandemic. For example, Kansas K-12 schools have been closed for the school year, and patients are having difficulty finding childcare; as a precaution, Trust Women is not allowing children in the clinic as it usually does.³ (Burkhart Decl. ¶ 19). Transportation options for patients have also become more limited.⁴

The pandemic is also drastically curtailing the ability of Trust Women's physicians to travel to Wichita. Even before the pandemic, there were relatively few options for commercial flights given the size of the Wichita market. Now, during the pandemic, flight options are sharply reduced.⁵ Trust Women is finding it increasingly difficult to find flights that will fit within physicians' schedules, and when flights are available, physicians have

³ Executive Order No. 20-07, *Temporarily closing K-12 schools to slow the spread of COVID-19*.

⁴ See, e.g., Greyhound, *COVID-19 Update: Schedule and Service Changes*, <https://www.greyhound.com/en/help-and-info/travel-info/schedule-service-changes> (last visited Mar. 29, 2020).

⁵ Kyle Arnold, *Parked jets and fewer flights: Government aid paves way for airlines to shrink during COVID-19 crisis*, Dallas Morning News (Mar. 25, 2020), <https://www.dallasnews.com/business/airlines/2020/03/25/parked-jets-and-furloughs-government-aid-paves-way-for-airlines-to-shrink-during-covid-19-crisis/>.

experienced last-minute cancellations. (Burkhart Decl. ¶¶ 24-26). There are growing concerns that civilian flights will be grounded.⁶ (Burkhart Decl. ¶¶ 27-29). Two Trust Women physicians are unable to travel to Wichita beyond March 2020 while the pandemic is ongoing due to professional and family obligations. (Burkhart Decl. ¶ 10). All of this is happening while Trust Women is also experiencing unprecedented demand for appointments. (Burkhart Decl. ¶¶ 21-23). Absent an injunction, Trust Women anticipates it will soon be forced to drastically curtail its provision of abortion care.

C. Medication-Abortion Access Through Telemedicine

If Trust Women's physicians become unable to travel to Wichita during the COVID-19 outbreak, the only way they might provide abortion care to Trust Women's patients would be via telemedicine. Telemedicine is used throughout the United States in practically every area of medicine—including obstetrics and gynecology. (R. 1:239; 3:33-34, 142-45). Kansas health-care practitioners have used telemedicine to provide consultations, follow-up care, and medication management in more than thirty specialties, including cardiology and oncology. (R. 1:239; 3:34-35).

Telemedicine has become a critical method for providing health care during the pandemic in areas other than abortion. On March 22, 2020, Governor Kelly issued an

⁶ See, e.g., Andy Pasztor & Alison Sider, David Slotnick, *U.S. Domestic Passenger Flights Could Virtually Shut Down, Voluntarily or by Government Order*, Wall Street Journal (Mar. 23, 2020), <https://www.wsj.com/articles/u-s-domestic-passenger-flights-could-virtually-shut-down-voluntarily-or-by-government-order-11585013673>; *Airlines Could Completely Shut Down Flights in the US as the Coronavirus Rages On*, Business Insider (Mar. 24, 2020), <https://www.businessinsider.com/coronavirus-airlines-flight-shutdown-us-covid19-2020-3>.

executive order “encourag[ing all physicians] to utilize telemedicine services, when appropriate for their patients.” Executive Order No. 20-08 § 2, *Temporarily expanding telemedicine and addressing certain licensing requirements to combat the effects of COVID-19* (Mar. 22, 2020). The Governor ordered that the Board of Healing Arts “shall not enforce any statute, rule or regulation that would require physicians to conduct an in-person examination of a patient prior to the issuance of a prescription or . . . the administration of medication, including controlled substances.” *Id.* § 1. The order, however, expressly “does not affect the enforcement of . . . K.S.A. 65-4a10.” *Id.* § 9.

Although Kansas law encourages telemedicine in other areas of medicine (R. 1:110-13), the Kansas legislature has singled out one service for which telemedicine is prohibited: medication abortion. Under K.S.A. 65-4a10, a patient receiving a medication abortion must take the first drug, mifepristone, “in the same room and in the physical presence of the physician who prescribed” it. K.S.A. 65-4a10(b)(1). The Board of Healing Arts can suspend or revoke the license of a physician who violates this in-person requirement. *See* K.S.A. 65-4a10(d) (“A violation of this section shall constitute unprofessional conduct”); K.S.A. 65-2836(b) (providing for license revocation, suspension, or limitation, or public censure, for “an act of unprofessional or dishonorable conduct”).

Unrefuted testimony established that there is no medical justification for the in-person requirement. (R. 3:37, 73, 131-32). Because a physician need not ever physically touch the patient to provide a medication abortion, physicians can provide the same level of abortion care remotely as they can provide in person. (R. 3:58, 133, 140). Telemedicine has been used to provide medication abortion in the United States since at least 2008 and

is currently being provided in at least 10 states. (R. 3:51, 58-59). Studies have borne out the safety of telemedicine for medication abortion. (R. 3:50-53). The National Academies of Sciences, Engineering, and Medicine has concluded that physicians need not be physically present when medication abortion is provided to the patient. (R. 3:38, 53). The American College of Obstetricians and Gynecologists has stated that telemedicine is appropriate for medication abortion. (R. 3:24, 72-73). In rare cases in which complications occur from medication abortion, it does not matter to the patient's health whether the physician saw the patient in person or remotely because the effects of the medications occur only after the patient leaves the clinic. (R. 3:54-55).

D. Trust Women's Use of Telemedicine

Trust Women used telemedicine to provide medication abortions for about three months in 2018. (R. 3:96, 134, 155). At that time, it was clear that K.S.A. 65-4a10 was enjoined by an order that was agreed to by the Attorney General in *Hodes & Nauser v. Moser* ("Hodes 2011"), No. 11-CV-1298 (Shawnee Cty. Dist. Ct.). (R. 1:66; 2:134).

Trust Women's telemedicine protocol is nearly identical to its in-person protocol. (R. 3:99-106, 136-41). For telemedicine, patients come to the Wichita clinic, and physicians provide care remotely using secure videoconferencing. (R. 3:100, 145). The clinic uses the same equipment for telemedicine abortion that it uses for in-person abortion, with the addition of a laptop. (R. 3:134-35). The patient receives the same ultrasound in the same exam room, and the patient's medical record is stored in the same electronic location. (R. 3:100-02, 134-37). The physician reviews the patient's medical record and ultrasound images, consults with the patient, and determines whether the patient is eligible

for medication abortion in the same way with telemedicine as with in-person treatment, except that the physician appears by video. (R. 3:100-05, 135-41).

There are only two significant differences. First, whereas the physician generally performs the ultrasound for an in-person abortion, in the telemedicine setting an ultrasound technician performs the ultrasound while the physician watches over video so that the physician can direct the technician as needed. (R 3:100-02, 106, 135-36, 138). Second, if the physician is in person, he or she typically hands the patient the medications, whereas, for a telemedicine abortion, a nurse or medical assistant hands the patient the medicine while the physician supervises over video. (R. 3:105-06, 138).

Telemedicine enabled Trust Women to offer medication abortions more than two days a week and outside normal business hours. (R. 3:96-97, 108-09, 150). Patients needed to spend only one to two hours at the clinic rather than six to eight hours. (R. 3:91-92, 97, 150-51). Telemedicine made it easier for patients to fit the appointment into their schedules; reduced the amount of time needed to be away from work, school, and family; and allowed patients to access abortion earlier in their pregnancies, thus reducing the risk of complications and lowering their financial cost. (R. 3:97-98, 150-53). None of Trust Women's patients who received medication abortion via telemedicine experienced complications. (R. 3:106-07).

E. Trust Women's Decision to Stop Using Telemedicine

On December 3, 2018, in litigation referred to as "*Trust Women I*," the Attorney General asserted for the first time that, although he was a signatory to the *Hodes 2011* agreed order, the order "did not prohibit others—for example the Board of Healing Arts or

the Sedgwick County District Attorney—from enforcing K.S.A. 65-4a10.” Def.’s Resp. Opposing Pl.’s Mot. for Temp. Inj. & TRO at 4 n.1, *Trust Women Found. Inc. v. Schmidt* (“*Trust Women I*”), No. 2018-CV-844 (Shawnee Cty. Dist. Ct. Dec. 3, 2018). The *Trust Women I* court explained that the agreed order in *Hodes 2011* is still in effect and that K.S.A. 65-4a10 thus remains “enjoined from enforcement.” (R. 1:52, 57). The court did not, however, explain whether the *Hodes 2011* agreed order precludes enforcement by the Sedgwick County District Attorney or the Board of Healing Arts. (R. 2:135). Lacking certainty that K.S.A. 65-4a10 could not be enforced against Trust Women’s physicians, Trust Women stopped using telemedicine on December 31, 2018. (R. 3:107).

F. This Litigation

Trust Women filed this suit on January 29, 2019, on behalf of itself and its patients. After a hearing, the district court denied Trust Women’s motion for a temporary injunction, ruling that Trust Women did not “prove” that it or its patients “will suffer” irreparable injury. (R. 2:154, 156). The court “assume[d] the existence of some constitutional violation which would provide Plaintiff a substantial likelihood of prevailing on the merits,” but nevertheless concluded that the constitutional violation was not irreparable harm. (R. 2:154). In the same order, the court dismissed Trust Women’s claims against the Board of Healing Arts defendants for lack of standing. (R. 2:132-58).

G. Medication Abortion Via Telemedicine Will Benefit Public Health During the COVID-19 Pandemic.

Abortion is essential, time-sensitive healthcare. In response to the COVID-19 pandemic, the American College of Obstetricians and Gynecologists (“ACOG”) and seven

other leading medical and health organizations made clear that abortion care is essential care because it cannot be delayed without risking the health and safety of the patient.⁷

If the in-person requirement were not enforced, Trust Women would reinstate its use of telemedicine at the Wichita clinic. (R. 3:107). Trust Women estimates it would be able to provide medication abortions up to five days per week. (Burkhart Decl. ¶ 37). This would alleviate the burdens on Trust Women and its patients, securing the availability of medication abortions during the COVID-19 pandemic.

It would also benefit public health. Governments and experts have emphasized the importance of social distancing and the use of telemedicine to reduce the risk of COVID-19 transmission.⁸ Patient-privacy regulations for telemedicine have been loosened to encourage its use during the pandemic.⁹ Governor Kelly’s recent Executive Order explains that “any impediment to receiving health care through telemedicine impedes our ability to promote and secure the safety and protection of the civilian population” during the pandemic. Exec. Order No. 20-08 at 2.

⁷ See *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>.

⁸ The White House, *The President’s Coronavirus Guidelines For America* (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf; Am. Med. Ass’n, *AMA Supports Telehealth Initiative to Improve Health Care Access* (Mar. 19, 2020), <https://www.ama-assn.org/press-center/press-releases/ama-supports-telehealth-initiative-improve-health-care-access>.

⁹ U.S. Dep’t of Health & Human Servs., *Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency*, <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>.

Providing medication abortion via telemedicine would protect Trust Women’s physicians and patients. By enabling Trust Women to expand the days it provides care, patient appointments could be further spaced apart so that no more than 25 patients would be seen per day, thus minimizing the possibility of patient interaction with each other. (Burkhart Decl. ¶¶ 37, 38). And because physicians would be able to provide care without traveling, their risk of exposure during travel would be eliminated, thus protecting the physicians and their families, as well as patients. Telemedicine would also further minimize the use of personal protective equipment (PPE) because a physician providing care remotely would not need PPE. (Burkhart Decl. ¶ 38).

ARGUMENT

A temporary injunction is warranted upon a showing of “a substantial likelihood of eventually prevailing on the merits; a reasonable probability of suffering irreparable future injury; the lack of obtaining an adequate remedy at law; the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; and the impact of issuing the injunction will not be adverse to the public interest.” *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 492-93, 173 P.3d 642, 648 (2007). Each element was established through uncontested evidence at the hearing in the district court. The emergence of the COVID-19 crisis has only worsened the gravity and likelihood of irreparable harm. An injunction pending appeal should issue to ensure that Trust Women’s patients can continue to access medication abortion.

I. Trust Women Has a Substantial Likelihood of Prevailing on the Merits.

Trust Women need show only that it is “substantially likely to win, not that [it] absolutely will.” *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 674, 440 P.3d 461, 499 (2019). This element is easily met here.

A. The In-Person Requirement is Unconstitutional.

1. The In-Person Requirement Impermissibly Interferes with the Fundamental Right to Abortion.

Each woman has the right under the Kansas Constitution to decide “whether to continue a pregnancy.” *Hodes & Nauser*, 309 Kan. at 680, 440 P.3d at 502. “Although not absolute, this right is fundamental.” *Id.*, 309 Kan. at 614, 440 P.3d at 466. Thus, the “most searching” standard, strict scrutiny, applies. *Id.*, 309 Kan. at 663, 440 P.3d at 493. Under that standard, “once a plaintiff proves an infringement—regardless of degree—the government’s action is presumed unconstitutional.” *Id.*, 309 Kan. at 669, 440 P.3d at 496. “[T]he State is prohibited from restricting that right unless it can show it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest.” *Id.*, 309 Kan. at 680, 440 P.3d at 502.

Unrefuted evidence established that the in-person requirement impairs the right to abortion by making abortion less accessible, thus forcing women to delay having an abortion, increasing both health risks and financial costs. (R. 3:42-45, 60-62, 91, 149-53). *See Hodes & Nauser*, 309 Kan. at 672, 440 P.3d at 498 (right to abortion impaired where law results in delayed abortion or increased health risks). Women who are delayed must continue carrying their unwanted pregnancies until they are able to access an abortion,

which is itself an impairment. *See id.* And for some women, delay makes them ineligible for medication abortion. (R. 3:62, 112-13, 148-49, 154-56).

Defendants cannot show that the state has a compelling interest in banning the use of telemedicine for medication abortions—especially during the COVID-19 pandemic when the state is encouraging telemedicine in other areas. “[W]hen the State has to show a compelling interest under strict scrutiny, it must show something that is ‘not only extremely weighty, possibly urgent, but also rare.’” *Hodes & Nauser*, 309 Kan. at 670, 440 P.3d at 497 (citation omitted). Telemedicine is used widely in Kansas, including in cardiology, oncology, and diagnosing and treating strokes. (R. 1:239; 3:34-35). Kansas law facilitates the use of telemedicine for other treatments and other medications, including controlled substances, and places telemedicine generally on par with in-person medical care. (R. 1:110-13, §§ 1(a), 3(b), 4(b), 5(a)). In fact, Governor Kelly’s COVID-related executive order mandated that the Board of Healing Arts not enforce laws requiring physicians to conduct in-person exams before prescribing or administering other medications, including controlled substances. Exec. Order No. 20-08 § 1.

The state has no extremely weighty, urgent, rare reason for singling out medication abortion for an outright telemedicine ban, particularly during the pandemic. As Trust Women’s expert testified, “telemedicine provision [of] medication abortion is just a[s] safe and effective . . . as providing that service with an in-person visit.” (R. 3:69). “[T]here is no medical basis for these laws,” and “a requirement for physicians to be in the same room is outside the standard of care.” (R. 3:37, 73; *accord* R. 3:131-32). That testimony was un rebutted. Studies comparing in-person medication abortion against telemedicine have

shown there is no clinically significant difference in effectiveness or in the prevalence of adverse events. (R. 3:48-52). And leading medical organizations have concluded that telemedicine is appropriate for providing medication abortion. (R. 3:24, 38, 53, 72-73).

Nor can defendants show that an in-person requirement for medication abortion is narrowly tailored to serve an interest in health and safety. The telemedicine ban does not apply to medical treatments or medications that have greater health and safety risks than medication abortion does. (R. 3:34-35, 57-58, 142-44). Banning telemedicine for medication abortions also undermines, rather than serves, the state's interest in health and safety: the ban delays access to abortion care, subjecting women to increased health risks both from continued pregnancy and from abortion complications. (R. 3:42-45, 149-53).

2. The in-person requirement impermissibly interferes with Trust Women's and its patients' rights to equal protection.

Trust Women is also substantially likely to succeed on its claim that its patients' equal-protection rights are violated. The "guiding principle" of the equal-protection guarantee "is that similarly situated individuals should be treated alike." *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22, 27 (2005). Kansas singles out women seeking medication abortion and treats them differently from all other persons who seek comparable or riskier care through telemedicine. Strict scrutiny applies to this classification because it involves a fundamental right. *Hodes & Nauser*, 309 Kan. at 614, 440 P.3d at 466. Thus, "the burden of proof to justify the classification shifts to the proponent of the statute." *Jurado v. Popejoy Const. Co.*, 253 Kan. 116, 124, 853 P.2d 669, 676 (1993) (citation omitted). For the reasons just discussed, however, defendants cannot show that the state's classification

between medication-abortion patients and similarly situated patients is necessary to serve any compelling state interest or that it is narrowly tailored. *Supra*, pp. 15-16.

B. Trust Women Has Standing to Sue the Board of Healing Arts Defendants.

The district court erroneously dismissed Trust Women’s claims against the Board of Healing Arts defendants and denied an injunction against them because it held that Trust Women lacks standing to sue them. (R. 2:132-57.) Trust Women is likely to prevail in showing that it has standing to sue the Board defendants because it has a cognizable injury that is causally connected to the Board of Healing Arts. *See Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33, 49 (2015).

1. Trust Women and its patients have a cognizable injury

The cognizable-injury requirement ensures that the plaintiff has a personal stake in the outcome rather than only a generalized grievance or a general interest common to all members of the public. *See Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196, 1210 (2014). Trust Women has actual, present injuries because of the in-person requirement. It prevents Trust Women from providing its patients an important medical service— medication abortion via telemedicine. This harms Trust Women’s patients in multiple ways, including by reducing access to and delaying medication abortion. *Supra*, pp. 3-5, 9-10; *infra*, pp. 20-24.

Trust Women has an injury even if the Board of Healing Arts has not yet taken any adverse action against any of Trust Women’s physicians. Enforcement is not a prerequisite to challenging the law. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014);

Wilson v. Stocker, 819 F.2d 943, 946-47 (10th Cir. 1987). Fear of future enforcement is enough so long as it “is not imaginary or wholly speculative.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 302 (1979). There is a credible risk that the Board of Healing Arts will enforce K.S.A. 65-4a10. The Attorney General has argued that the Board can enforce K.S.A. 65-4a10. Def.’s Resp. Opposing Pl.’s Mot. for Temp. Inj. & TRO at 4 n.1, *Trust Women I* (Dec. 3, 2018). The Board has refused to provide non-enforcement assurance, and in fact a complaint has been filed before the Board concerning a physician’s use of telemedicine at Trust Women in 2018. (R. 1:353; 2:136; 3:88, 117, 122, 125-26).

2. The injury is causally connected to the Board of Healing Arts

The “causal connection” element is also readily met. For this element, the “injury must be fairly traceable to the challenged action of the defendant.” *Kan. Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 681, 359 P.3d at 51 (internal quotation marks, brackets, and ellipses omitted). “[T]he fairly traceable standard does not set a high bar for plaintiffs,” and it “is lower than that of proximate cause.” *Id.*, 302 Kan. at 681-82, 359 P.3d at 51.

Here, in the context of a pre-enforcement challenge to a statute, “the causation element of standing requires the named defendants to possess *authority* to enforce the complained-of provision.” *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) (emphasis added); see 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction* § 3531.5 (3d ed.) (causation requirement ensures the plaintiff has not mistakenly sued “an official who lacks authority to enforce a challenged statute”). It is undisputed that the Board of Healing Arts has the authority to enforce K.S.A. 65-4a10. See K.S.A. 65-4a10(d) (violation constitutes unprofessional

conduct); K.S.A. 65-2836(b) (allowing the Board to revoke, suspend, or limit a license for an act of unprofessional conduct). That is enough to confer standing here.

Contrary to the district court's ruling, it does not matter that "it is the physicians who face discipline from the Board of Healing Arts, not Plaintiff." (R. 2:149). An injury may be fairly traceable to the defendant even if it "flows indirectly from the challenged conduct." *Kan. Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 682, 359 P.3d at 51. Standing can rest on the injuries produced by the statute's "coercive effect upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997); Wright, Miller, & Cooper § 3531.5 (defendant public official's acts need not "be aimed directly at the plaintiff"). Trust Women and its patients are harmed by the Board's ability to discipline Trust Women's physicians. Were a physician's license revoked, that physician could no longer provide *any* abortions or offer other medical services at Trust Women—an extremely serious consequence given the great difficulty Trust Women has had finding physicians with a Kansas license willing to provide abortion care in Wichita. (R. 3:87-88).

II. There is a Reasonable Probability That Trust Women and its Patients Will Suffer Irreparable Future Injury Without an Injunction.

Trust Women need only show that "there is a reasonable probability of irreparable future injury." *Bd. of Cty. Comm'rs of Leavenworth Cty. v. Whitson*, 281 Kan. 678, 683, 132 P.3d 920, 925 (2006) (quoting *Empire Mfg. Co. v. Empire Candle, Inc.*, 273 Kan. 72, 86, 41 P.3d 798 (2002)). Before the COVID-19 pandemic, Trust Women and its patients were suffering ongoing irreparable harm. COVID-19 has exacerbated that harm, and it is likely to worsen without injunctive relief.

A. A Constitutional Violation is Irreparable Injury Per Se

Where there is a deprivation of constitutional rights, “no further showing of irreparable harm is required. A deprivation of a constitutional right is, itself, irreparable harm.” *Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (citation omitted); *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (“When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”) (citation omitted). The deprivations of the constitutional rights of Trust Women and its patients are irreparable injuries as a matter of law.

B. Unrefuted Evidence Showed a Reasonable Probability of Irreparable Future Injury.

Trust Women showed a reasonable probability of irreparable injury even before the onset of the COVID-19 pandemic. Absent Kansas’s in-person requirement, Trust Women would not have to fly its Kansas-licensed physicians in from out of state to provide medication abortions at its Wichita clinic. (R. 3:96-97). That would enable Trust Women to provide its patients much more appointment flexibility, offering medication abortion more than two days a week and outside normal business hours. (R. 3:96-97, 108-09, 150).

The in-person requirement harms Trust Women and its patients by precluding Trust Women from offering this extremely safe and effective treatment option despite the absence of even a shred of evidence that the requirement serves a valid health or safety interest. The in-person requirement makes medication abortion less accessible, makes it more difficult for patients to schedule an appointment, and subjects patients to the risk their appointment will be canceled or rescheduled. The prohibition forces some women to wait

so long that they are ineligible for medication abortion and shifts first-trimester abortions into the second trimester. (R. 3:62, 66, 112-13, 154-56). And patients who are not delayed beyond the point of eligibility are still forced to wait until later in their pregnancies to have a medication abortion, increasing both health risks and financial costs to patients, and they are also forced to spend many more hours at the clinic to obtain a medication abortion. (R. 3:42-45, 61-62, 91-92, 97, 149-53). The state introduced no evidence refuting these harms.

In concluding that Trust Women had not established irreparable harm, the district court applied the wrong legal standard. The court required Trust Women to “prove” that its patients “will suffer” irreparable harm. (R. 2:154, 156). But courts may not “requir[e] the moving party to make ‘a showing that the movant *will suffer* irreparable injury unless the injunction issues.’” *Whitson*, 281 Kan. at 683, 132 P.3d at 925 (emphasis added).

Also, contrary to the district court’s conclusion, Trust Women acted diligently and did not “delay in bringing this lawsuit.” (R. 2:155). Trust Women began providing medication abortions via telemedicine in October 2018. (R. 3:96). In December 2018, it first learned of a threat that K.S.A. 65-4a10 could be enforced despite the *Hodes 2011* agreed order. Def.’s Resp. Opposing Pl.’s Mot. for Temp. Inj. & TRO at 4 n.1, *Trust Women I* (Dec. 3, 2018). After unsuccessfully seeking non-enforcement assurances, Trust Women filed suit on January 29, 2019. (R. 1:19). There was no delay.

C. The COVID-19 Pandemic is Intensifying the Severity and Likelihood of Irreparable Injury.

The COVID-19 pandemic has exacerbated the harms to Trust Women and its patients. Trust Women is facing increasing challenges finding transportation options for

its physicians. Far fewer commercial flights to Wichita are available, and the flights that are still scheduled are subject to last-minute cancellations. There is growing concern that domestic commercial flights will be grounded completely. Driving is not a viable option for any of the physicians. Due to their professional and family obligations in their home communities, physicians are limited in when they can travel, and flight options are becoming extremely difficult to find. Physicians have resorted to flying to another city and driving several hours, but that is not a sustainable solution long term. Trust Women has even priced private-flight options, but they are cost prohibitive. Travel on commercial airlines also needlessly puts the physicians at risk of transmission when telemedicine would eliminate any travel-related risk. Already two of Trust Women's out-of-state physicians have indicated they cannot provide in-person abortions in Wichita beyond March 2020. Trust Women has continued to look for local physicians to provide abortion care but has been unable to find any who could cover its services. (Burkhart Decl. ¶¶ 6-8, 10, 24-34).

If more of Trust Women's out-of-state physicians become unable to travel to Wichita, Trust Women will have to drastically curtail its provision of abortion care until the COVID-19 pandemic abates. Many Kansans who have made the decision to end a pregnancy will be significantly burdened, if not entirely blocked, from exercising their fundamental right to access abortion in Kansas. Patients seeking a medication abortion may be delayed past the gestational age cutoff and will instead need a surgical abortion. Patients who decide to end a pregnancy but are unable to do so in Kansas will require far more health-care visits and PPE—including prenatal visits, screening, and hospital delivery—than a medication abortion via telemedicine. Patients who attempt to obtain care

in another state will also face increased risk of infection through travel. (Burkhart Decl. ¶¶ 14, 28-34).

As ACOG and other leading medical organizations recently emphasized in a joint statement, “Abortion Access During the COVID-19 Outbreak,” abortion is an essential, time-sensitive health-care service.¹⁰ Denial and delay of abortion will impose physical health risks on patients and can cause significant emotional, social, and economic harms that must be borne by Kansas women seeking abortion, the majority of whom are poor or low income and already face enormous obstacles dealing with the COVID-19 emergency.

Meanwhile, the pandemic has resulted in a sharp increase in demand for Trust Women’s services. Patients anxious about how the pandemic will affect them are seeking abortion care sooner rather than later, and abortion access in nearby states is constricting. Patients are also facing increasing challenges during the pandemic, including childcare burdens due to school closures, financial burdens due to layoffs and reductions in work, and reductions in public transportation needed to access essential services. While an injunction against enforcement of the in-person requirement would not erase all of these burdens, including the need for patients to come to the Wichita clinic, it would significantly alleviate them and would ensure that Trust Women can continue to provide medication abortions. (Burkhart Decl. ¶¶ 17-20, 35-39).

¹⁰ Am. Coll. of Obstetricians & Gynecologists et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), <https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak>.

An injunction would also further the interests of public health during the pandemic. By enabling Trust Women to expand the days it provides care, patient appointments could be further spaced apart, thus minimizing the possibility of patient interaction with each other. And because physicians would be able to provide care without traveling, their risk of exposure during travel would be eliminated, thus protecting the physicians and their families, as well as patients. Telemedicine would also further minimize the use of PPE because a physician providing care remotely would not need PPE. (Burkhart Decl. ¶¶ 37, 38).

III. It is Undisputed That the Remaining Elements for Injunctive Relief are Met.

It is undisputed that Trust Women and its patients lack any adequate legal remedy for their constitutional violations. (R. 2:62; *see* R. 2:119-29). And after the hearing on Trust Women's motion, the Attorney General and District Attorney no longer dispute (1) that the threat of injury to Trust Women and its patients outweighs any harm to the other side and (2) that a temporary injunction would not be adverse to the public interest. (*See* R. 2:119-29).

CONCLUSION

Trust Women respectfully requests that the Court enjoin enforcement of the in-person requirement for medication abortion, K.S.A. 65-4a10, pending resolution of this appeal or, alternatively, at least during the pendency of the COVID-19 state of disaster emergency.

Dated: March 31, 2020

Respectfully submitted,

/s/ Robert V. Eye

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Exhibit A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Trust Women Foundation Inc.
d/b/a South Wind Women’s Center, d/b/a Trust Women Wichita,
Plaintiff-Appellant,

v.

Marc Bennett, in his official capacity as District Attorney for Sedgwick County, Kansas;
Kathleen Selzer Lippert, in her official capacity as the Executive Director of the Kansas
Board of Healing Arts; Robin D. Durrett, in his official capacity as President of the Kansas
Board of Healing Arts; and Derek Schmidt, in his official capacity as Attorney General of
the State of Kansas,
Defendants-Appellees.

**DECLARATION OF JULIE BURKHART IN SUPPORT OF
MOTION FOR INJUNCTION PENDING APPEAL**

JULIE BURKHART, hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the founder and CEO of the Trust Women Foundation (“Trust Women”). Trust Women operates clinics offering high-quality reproductive health care, including abortion, transgender care, HIV/AIDS testing, well woman exams, and contraceptive services, providing access for those in underserved communities. Trust Women opened its first clinic, Trust Women South Wind Women’s Center (doing business as “Trust Women Wichita”), in Wichita, Kansas on April 3, 2013. Trust Women opened a clinic in Oklahoma, City, Oklahoma (“Trust Women Oklahoma City”) in 2016.

2. As CEO of Trust Women, I oversee operations at both Trust Women Wichita and Trust Women Oklahoma City, am familiar with all aspects of our policies and practices, and am frequently in contact with Trust Women’s clinical staff and physicians. The facts I state here are

based on my experience, and information and knowledge I have obtained through my work for Trust Women.

3. I submit this declaration in support of Plaintiff's motion for injunction pending appeal prohibiting enforcement of K.S.A. § 65-4a10 (the "medication in-person requirement"). I understand that K.S.A. 65-4a10 prohibits the use of telemedicine for medication abortion, because it requires that a physician be in the same room and in the physical presence of a patient as she takes the first pill in the two-drug regimen.

I. Abortion Care at Trust Women

4. Trust Women operates a clinic in Wichita that provides reproductive health care, including both surgical and medication abortion.

5. Trust Women Wichita provides medication and surgical¹ first trimester abortions as well as second trimester abortions up until 21 weeks, 6 days of pregnancy, as measured from the first day of the patient's last menstrual period ("LMP"). Trust Women Wichita has provided medication abortion since it opened in 2013, and the clinic's safety record has been excellent, with not a single reportable incident since opening.

6. Kansas is a hostile environment for anyone involved in abortion care. The stigma around abortion and harassment of abortion providers, clinics, and patients makes it extremely difficult to recruit and hire new physicians—particularly those that reside in the state.

7. Prior to opening Trust Women Wichita, I made extensive efforts to recruit and hire local providers, but I was ultimately unable to find any local physicians who were willing to regularly provide abortion care at the clinic. Currently, none of the physicians who regularly

¹ Surgical abortion involves the use of instruments, but it is not actually surgery because there is no incision.

provide abortion care at Trust Women Wichita reside in Kansas, let alone the metropolitan Wichita area. (As discussed below, a Wichita-based third-year medical resident trains with Trust Women Wichita's physicians but is likely to be unavailable during the COVID-19 pandemic.)

8. Trust Women Wichita currently has six physicians from California, Washington, Colorado, and Iowa, respectively, who travel to Wichita to provide abortion care at Trust Women Wichita. These physicians are all licensed to practice medicine in Kansas but do not live in Kansas.

9. Prior to the COVID-19 pandemic, each week one of our out-of-state physicians typically would fly to Wichita on a Wednesday evening or early Thursday morning. The physician would then provide abortion care at Trust Women Wichita on Thursdays and Fridays, and then fly home on Friday evening. Even in non-pandemic circumstances, Trust Women Wichita typically is able to provide abortion services only on Thursdays and Fridays due to the need to fly in physicians.

10. Four of our physicians have full-time OB/GYN or reproductive health care practices in their own communities. Three of the four typically travel to Trust Women Wichita once every four to six weeks each. Two of these physicians, however, are not able to travel to Wichita and provide abortions after March 2020. The fourth physician is licensed in both Oklahoma and Kansas and typically travels to Trust Women Wichita once a month, and to Trust Women Oklahoma City once a month.

11. A fifth physician holds a full-time teaching position at a hospital. This physician is available to travel to Trust Women Wichita every four to six weeks but only on weekends due to the physician's professional obligations.

12. A sixth physician is a fourth-year resident who works full-time in a local health care facility and is available to travel to Trust Women Wichita only once every 8 to 12 weeks.

This physician typically provides abortions under the supervision of another physician present at Trust Women Wichita. This physician has also been given notice that they may be deployed to do general hospitalist work to treat patients in light of the pandemic; if this occurs, the physician will be unavailable to travel to Wichita.

13. A third-year medical resident who lives in Wichita also helps provide abortions at Trust Women Wichita and trains with our physicians. This physician has not provided any abortions except under the supervision of another physician, although the physician is eligible to provide abortions up to 12 weeks gestation without supervision. This physician is only able to be at the clinic about one day per month (sometimes less) and is not expected to be available to provide abortion care at Trust Women Wichita during the COVID-19 pandemic due to the physician's responsibilities at a local hospital.

II. Abortion Care During COVID-19

14. Abortion is a time-sensitive health care service. Patients who have decided to end a pregnancy but are unable to do so will ultimately require far more contacts with the health care system, including prenatal visits and ultimate hospital delivery, than if they were able to obtain an abortion.

15. The safety of Trust Women Wichita's staff and patients are of paramount concern to us during the COVID-19 pandemic. Our physicians and healthcare professionals are deeply concerned about protecting themselves, their families, and our patients from infection and protecting our patients' access to high-quality, timely abortion care during this unprecedented emergency.

16. To that end, Trust Women Wichita is making several efforts in response to the COVID-19 pandemic, including:

- a. Cleaning and sanitizing of surfaces and fabrics in the clinic has been increased, and I engaged our cleaning services to clean every night of the week. Frequently touched surfaces are being disinfected throughout the day and between patients.
- b. Staff are required to remove “street clothes” and must wear scrubs while in the clinic. Staff must leave their scrubs and shoes in the clinic at the end of their shift, which are sanitized and available for their following shift.
- c. When scheduling patients for appointments, staff discuss with patients the need to reschedule their appointment if they develop symptoms of a respiratory infection (e.g., cough, sore throat, fever) on the day they are scheduled to be seen.
- d. Any non-urgent, non-abortion appointments have been moved to telemedicine.
- e. No one with any symptoms of COVID-19 is allowed to enter the clinic. Each patient and staff member is screened for fever and any other symptoms before entering. A staff member screens each patient by taking their temperature and evaluating for any respiratory symptoms before they are permitted to enter the facility. If they have any symptoms, patients’ appointments are rescheduled.
- f. Patients are no longer allowed to bring someone with them to their appointment, except for parents accompanying minor patients.
- g. Volunteers are no longer allowed in the clinic.
- h. Only essential vendors are allowed to enter the clinic, after they are screened for fever and respiratory symptoms.
- i. Every reasonable effort is being made to preserve personal protective equipment while ensuring that health risks are minimized.

- j. In order to maintain distance between patients, in accordance with social distancing recommendations, we removed chairs from the waiting room. We also encourage patients to wait outside or in their cars until we are ready to see them. For medication abortions, each patient is placed in an appropriate room and the entire appointment is conducted in that room, including ultrasound and administering mifepristone.
- k. As much as possible, patient appointments are spaced out and patients are kept in separate rooms during their entire appointment.

17. My clinical staff and physicians have relayed to me concerns that patients have expressed since the COVID-19 pandemic began to impact Kansas. It is my understanding from these conversations that the travel difficulties our patients faced before the COVID-19 pandemic have been significantly amplified by mandatory state-ordered social distancing measures and stay-at-home orders.

18. Patients who have come to Trust Women since the pandemic started to impact Kansas have expressed that their need for abortion care is even more urgent because of COVID-19. For example, patients are worried they will soon be prohibited from traveling at all should more stringent stay-at-home orders be issued. There is also a risk that asking a patient to delay a medication abortion by two or three weeks could turn into several months of delay if the patient contracts COVID-19 or is exposed to it and forced to self-quarantine. Patients also have the added concern that pregnancy may put them at greater risk of adverse health effects should they contract the virus.

19. Our patients have also been impacted due to the closure of schools and daycare centers in Kansas due to COVID-19. Further, whereas Trust Women Wichita used to provide a

children's play area in its waiting room for patients who were not able to find child care during their appointment, we had to disallow children from the clinic entirely as part of our infection control measures for COVID-19.

20. Finally, our patients have been impacted by the widespread layoffs and job losses that are occurring nationwide, in many cases unexpectedly needing financial aid on the date of their appointment.

21. At the same time that it has become even more urgent and difficult for our patients to access abortion care, we have seen an unprecedented increase in the number of patients seeking abortion appointments at Trust Women Wichita. In 2019, Trust Women Wichita provided approximately 1,150 abortion procedures. Of those, approximately 48% were medication abortions. As of March 29, 2020, Trust Women Wichita has seen 194 abortion patients during the month of March alone, and 58 more patients are scheduled for the following week. This is a significant increase over March 2019, when Trust Women Wichita provided 90 abortions.

22. Of the 252 patients either seen or scheduled in March 2020 in Wichita, 136 are for medication abortions. The number of medication abortions has significantly increased during the latter half of March as we have recommended that patients who are eligible for medication abortions choose that option over surgical abortion during the COVID-19 pandemic to try to reduce the risk of exposure to the virus by reducing the patient's time in the clinic.

23. Some, but not all, of the recent steep increase in patient volume is due to decreasing access to abortion care in neighboring states. Because of COVID-19, one Oklahoma clinic temporarily stopped providing abortion services as of the week of March 23. Trust Women Oklahoma City immediately received an increased volume of patient calls following this temporary closure. Texas also ordered all clinics to stop providing most abortion care, resulting in

even more calls to Trust Women Oklahoma City and Trust Women Wichita from patients in Texas seeking abortion care. On March 27, 2020, the Governor of Oklahoma issued an order prohibiting physicians from providing any abortion procedure not necessary to save the life of the pregnant person. Trust Women Oklahoma City had 47 patients scheduled to receive abortion care on March 28. As a result of the Oklahoma Governor's order, I had to temporarily relocate two clinical staff members to Wichita and attempt to reschedule as many abortion patient appointments to Trust Women Wichita as possible. The Texas and Oklahoma orders are being challenged in court.

24. The COVID-19 pandemic has made it significantly more challenging for the clinic's physicians to travel to Wichita from out of state. I understand that commercial airlines are drastically cutting domestic service and have been canceling flights at the last minute without rescheduling them. This is impacting Trust Women's clinics in Wichita and Oklahoma City. Last week, one of our physicians had a flight to Oklahoma City cancelled at the last minute and had to fly to Dallas and then drive from Dallas to Oklahoma City.

25. Several of Trust Women Wichita's physicians have experienced last-minute cancellations of multiple flights, and it has been extremely difficult to rebook them on flights that would get them to Wichita in time or that would get them home in a reasonable amount of time. Because Wichita has a relatively small airport and is not a destination that is high in demand, there are relatively few flight options normally. During the pandemic, finding flights has been especially difficult. Long term travel planning is virtually impossible because flights are often canceled with less than a day's notice. Physicians who have flown during the pandemic are seeing that there are very few passengers on each flight, meaning that it is likely unsustainable for airlines to keep these flights going with such little demand.

26. Physicians have had to travel at inconvenient times, disrupting their schedules at home and work and extending the length of each trip to Kansas by several hours or even days. This is becoming unsustainable for some of the physicians, their families, and their full-time practices.

27. I also understand that already, several U.S. airports have been forced to temporarily halt flights because of COVID-19 affecting air traffic controllers. I have also seen media reports that domestic flights may shut down completely in the near future due to COVID-19.

28. I have received a quote for a private plane service for our physicians if commercial flights become unavailable. These flights, however, would cost on average at least ten times as much as our physicians' average flight costs before the COVID-19 pandemic, and potentially more than that. I do not anticipate it will be financially feasible for the clinic to use private planes even in the short-term. I am worried that if commercial airlines shut down or continue to further cut service, the physicians will be unable to travel to Trust Women Wichita to provide care for our patients.

29. Even if commercial airlines continue to operate, or we use private planes, physicians are becoming less able to travel. One of the out-of-state physicians is no longer able to travel because of the physician's responsibilities to care for family members during the pandemic. A second physician has also stated that they are unavailable to travel to Wichita after March 2020. These physicians' absences will burden the Wichita clinic's ability to provide abortion care.

30. I have asked two of our physicians who live within driving distance of Trust Women Wichita whether they would consider driving to Wichita instead of flying. However, these trips would take the physicians approximately seven hours and eight hours, respectively, each way. Due to these physicians' professional and family obligations at home, this amount of travel time

makes driving impractical and in any event would reduce the amount of time each physician could spend at Trust Women Wichita. Driving is simply not a viable option for these physicians, and even if it were, these two physicians would not be able to cover every week that Trust Women Wichita is open.

31. Delay in patients' ability to access abortion services that will result from the clinic's reduced capacity has serious implications. Though abortion is an extremely safe medical procedure, the risks increase as the pregnancy progresses. Pregnancy is uncomfortable or painful for some women, so delay extends this experience. Delays also increase the stress and burdens of maintaining an unwanted pregnancy. This is particularly true for women who have a disease or other medical condition that makes pregnancy a significant health risk or who are pregnant as a result of sexual assault or incest. Moreover, because these patients would continue to be pregnant for a longer period of time, my understanding is that they would also be at increased risk of negative health outcomes if they are diagnosed with COVID-19.

32. Delays can push women whose pregnancies are further along to the point at which a more complicated procedure (known as "D&E") is required. A D&E is sometimes a two-day procedure, and it requires more time in the clinic and a larger number of staff than a procedural abortion earlier in pregnancy.

33. Delaying abortion also can increase costs to the patient. More complicated D&E procedures cost more than methods of abortion earlier in pregnancy. These costs, in turn, will likely lead to additional delay and present an even greater hardship to vulnerable populations during the economic fallout of the COVID-19 pandemic.

34. Other patients could be foreclosed from receiving an abortion altogether because delays extend their pregnancies beyond the legal gestational limit for abortion in Kansas and they

will not be able to travel out of state for care. These patients will be forced to carry unwanted pregnancies to term, resulting in a deprivation of their fundamental right to determine when and whether to have a child or to add to their existing families, as well as greater health and other risks to them and their children.

III. Impact of Telemedicine Ban on Abortion Care at Trust Women During the COVID-19 Pandemic

35. In these circumstances, Kansas's telemedicine ban is likely to lead to a sharp reduction of the availability of medication abortions at Trust Women Wichita

36. If more of Trust Women's physicians become unable to travel to Wichita during the COVID-19 outbreak, the only way they could provide abortion care to Trust Women Wichita's patients would be via telemedicine.

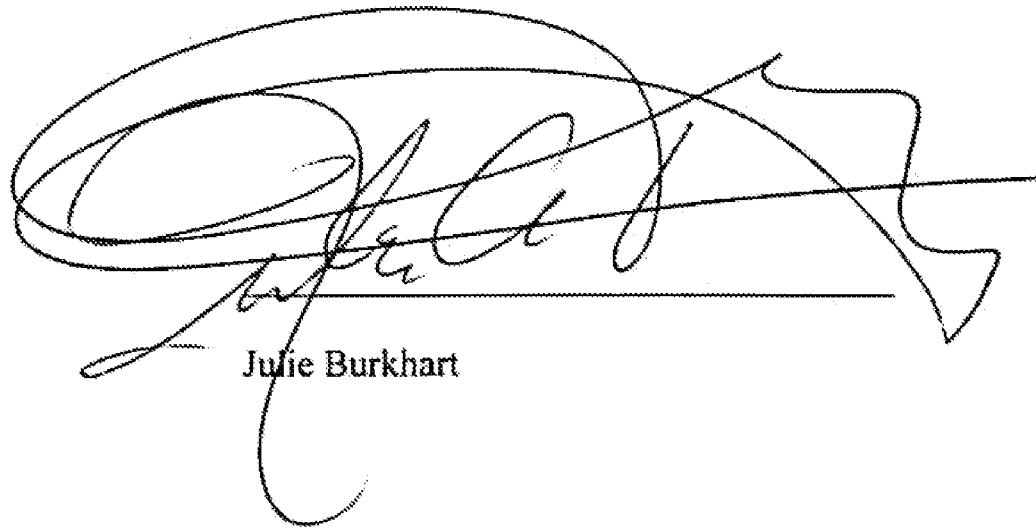
37. If the in-person medication abortion requirement is enjoined, Trust Women will be able to expand the number of days it provides medication abortion—up to five days per week. This would allow the clinic to space out appointments so that the clinic would schedule no more than 25 patients per day, thus reducing the risk of transmission and furthering public health. COVID-19-related travel concerns also will not impact our physicians' ability to provide medication abortion via telemedicine.

38. Transitioning medication abortion care to telemedicine would allow us to provide medication abortions without a physician physically present. Reducing the number of in-person interactions among individuals furthers the interest of reducing transmission. It would also allow us to further reduce the total amount of personal protective equipment (PPE) used; none of the physicians would require any PPE as they would be appearing remotely from out of state.

39. All of Trust Women Wichita's current physicians have indicated that they would be willing to provide medication abortions via telemedicine. Trust Women Wichita would also

gain three additional physicians who are currently unable to travel but would be able to provide medication abortion via telemedicine.

Signed this 31 day of March 2020.



Julie Burkhart

Certificate of Service

This is to certify that on this 31st day of March, 2020, I electronically filed the above and foregoing with the Clerk of the Court using the Court's electronic Filing System, which will send a notice of electronic filing to all counsel of record and provided copies of the above via email.

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