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2025 Jun 03 PM 3:48
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2025-CV-000298
PII COMPLIANT

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
CIVIL DIVISION

ARIA MEDICAL CLINIC, LLC, a Kansas domestic professional limited liability company, on its own and on behalf of its patients; and ELYSE GILBERT, CNM, on her own and on behalf of her patients. Plaintiffs, v. KANSAS STATE BOARD OF NURSING; ANDREA WATSON, in her official capacity as president of the Kansas State Board of Nursing; CAROL MORELAND, in her official capacity as executive administrator of the Kansas State Board of Nursing; KRIS KOBACH, in his official capacity as Attorney General of the State of Kansas; MARC BENNETT, in his official capacity as District Attorney for Sedgwick County. Defendants.	Proceeding Pursuant to Chapter 60 K.S.A. Case No. SN-2025-CV-298 Division No. 3

DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

This case concerns Kansas's authority to require that only physicians can prescribe abortion-inducing drugs in the interest, among others, of maternal-child health and patient safety. Plaintiffs challenge K.S.A. § 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2), which restrict prescriptive authority for chemical abortion drugs to licensed physicians, seeking to expand this authority to advanced practice registered nurses in pursuit of what they describe as "cost savings" and increased profitability for their clinic. In this, their suit is directly at odds with the interests of Kansas women. Chemical abortion carries significant medical risks, with data showing that more than 10

percent of women experience adverse events, including sepsis, infection, hemorrhaging, and other serious complications.

Against this backdrop of documented patient safety concerns, Kansas has maintained the longstanding requirement—grounded in *Roe v. Wade*'s emphasis on the primacy of the physician-patient relationship in the context of abortions—that abortions be performed only by physicians with appropriate medical training. This requirement ensures that the providers prescribing abortion-inducing drugs possess the medical expertise to manage the complications associated with chemical abortion.

Plaintiffs' suit, which pits their interests against their patients', fails on multiple grounds. First, Plaintiffs lack third-party standing to assert their patients' constitutional rights, as their economic interest in reducing costs directly conflicts with their patients' interest in receiving care from properly trained physicians. Second, Plaintiffs' patients are necessary parties whom Plaintiffs have failed to join. Third, there is no right to perform an abortion under Kansas law and thus Plaintiffs' first-party equal protection claims fail. Fourth, their claims are barred by laches and for failure to allege irreparable harm in light of Plaintiffs' nearly three-year delay in bringing this challenge. For these reasons, Defendants, Kansas officials and entities tasked with enforcing the challenged laws, respectfully request the Court dismiss Plaintiffs' complaint for failure to state a claim.

BACKGROUND

I. Voluminous data show that chemical abortion is dangerous to a patient's health.

This case concerns the safety of chemical abortion and whether the Kansas legislature may, as it has for decades, limit prescriptive authority for abortion-inducing drugs to medical doctors who have the requisite training and skill to manage the high rate of adverse outcomes associated

with chemical abortion. The largest ever study conducted on the safety of the "abortion pill"—the two-drug regimen of mifepristone followed by misoprostol which induces fetal demise—shows that "10.93 percent of women experience an adverse event" from mifepristone abortions. Jamie Hall & Ryan Anderson, *The Abortion Pill Harms Women: Insurance Data Reveals Repeated Abortion Attempts Due to High Failure Rate*, ETHICS AND PUBLIC POLICY CENTER, p. 1 (May 12, 2025), https://bit.ly/3SSl8Jk. The Hall and Anderson study reviewed the largest sample size ever: 865,727 insurance records between 2017 and 2023. *Id.* Out of those 865,727 women who underwent chemical abortion, more than 1 in 10 women "experience[d] sepsis, infection, hemorrhaging, or another serious adverse event within 45 days following a mifepristone abortion." *Id.*at 2. 5.26 percent of the women surveyed experienced a failed abortion. *Id.*

These data are borne out in the conditions prevailing in abortion clinics throughout the United States. A recent *New York Times* investigation reports that abortion clinics across the United States, such as Planned Parenthood, are facing serious safety issues that have resulted in botched medical procedures and compromised patient care. Katie Benner, *Botched Care and Tired Staff: Planned Parenthood in Crisis*, N.Y. TIMES (February 15, 2025), https://bit.ly/4mvh8MB. The investigation documents alarming cases including a failed abortion in Albany, New York where "the baby was still in her womb" twelve weeks after the procedure, and a Nebraska incident where a clinician failed to realize a woman was four months pregnant before inserting an IUD, leading to a stillborn birth. *Id.* Former employees describe dangerous conditions, facilities plagued by sewage leaks, broken equipment, and expired medications. *Id.* Staff turnover of around 50 percent annually has led to inadequately trained personnel, with medical assistants practicing blood draws for only an hour before performing procedures on patients. *Id.* The crisis has created what one former nurse

described as "a conveyor belt" for patients, with appointments rushed to 10 minutes and employees sometimes administering wrong medications or prepping patients for incorrect procedures. *Id.* These systemic problems have resulted in numerous malpractice lawsuits and patient safety incidents that highlight the deteriorating conditions at clinics serving some of America's most vulnerable populations. *Id.*[1]

II. Plaintiffs seek to reduce the safeguards protecting maternal health.

Notwithstanding the ongoing public health crisis associated with chemical abortion, Plaintiffs, Wichita-based Aria Medical and one of its remote, California-based certified nurse midwives, ask this Court to eliminate a cornerstone of abortion regulation since at least *Roe v. Wade*—the rule that a "State," like Kansas "may proscribe any abortion by a person who is not a physician." 410 U.S. 113, 165 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Plaintiffs specifically challenge K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2). These laws prohibit advanced practice registered nurses from "prescrib[ing] any drug that is intended to cause an abortion." K.S.A. 65-1130(d)(1); *see also* K.A.R. 60-11-104a(a)(2) (same).

More than three years ago, on April 25, 2022, the Legislature amended K.S.A. § 65-1130(d)(1) to specifically prohibit advanced practice registered nurses from prescribing abortion-inducing drugs. 2022 Kan. Session Laws 680. The corresponding regulation, K.A.R. 60-11-104a(a)(2), was promulgated shortly thereafter in October 2022. K.A.R. 60-11-104a (Oct. 14, 2022). Aria Medical began operations in January 2023 and alleges it has been providing abortion

[1] Defendants acknowledge that the well-documented evidence of medical complications from abortion-inducing drugs is outside the pleadings. Defendants offer this information for background and to refute Plaintiffs' claims about the purported safety and other uses for these drugs. *See* Petition at ¶¶ 48–78. Defendants ask the Court to decide this Motion solely on the facts of Plaintiffs' claims, and not their legal conclusions and medical opinions about the purported safety of abortion-inducing drugs.

medications since that time. Pet. ¶ 14. Ms. Gilbert alleges she has 10 years of experience as a certified nurse midwife, noting "she has provided many abortions." Pet. ¶ 123. Plaintiffs' experience and Kansas law mean that Plaintiffs knew about the laws when they began providing abortions in Kansas. *See State v. Cook*, 286 Kan. 766, 775, 187 P.3d 1283, 1289 (2008) ("Citizens are presumed to know that the legislature has made certain conduct illegal."). Yet Plaintiffs waited over two and a half years to bring this suit, undercutting any claim of irreparable harm.

Plaintiffs ask this Court to do away with chemical abortion safety measures so Aria Medical can "engage in costs savings by employing [advanced practice registered nurses] to prescribe medication abortion." Pet. ¶ 102. Indeed, reducing costs to grow Aria Medical's business is the animating purpose of the suit. Plaintiffs seek to enlist this Court in making their business "more cost-effective": "[s]ince medication abortion provided by [advanced practice registered nurses] can be more cost-effective than the same care provided by physicians, Aria Medical is spending more money to [provide abortion] than it would if [K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2)] were not in effect." Pet. ¶ 9; *see also id.* ¶ 38 (explaining that advanced practice registered nurses are more "cost-effective" than physicians); *id.* ¶ 114 (Plaintiffs can provide more abortions through advanced practice registered nurses because doing so is "cost-effective"). Plaintiffs similarly seek this Court's help in "increas[ing Plaintiff Elyse Gilbert's] income" by expanding her practice to include chemical abortion. Pet. ¶ 124; *see also id.* ¶ 126 (same). The primary injury alleged by Plaintiffs is to their bottom line, as K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) "negatively impact[] Aria Medical financially." Pet. ¶ 101; *see also id.* ¶ 90 (alleging that K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) harm Plaintiffs because of "increased financial costs").

LEGAL STANDARD

In ruling on a motion to dismiss, courts "accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom." *Bd. of Cnty. Commissioners of Sumner Cnty. v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494, 500 (2008). "However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened or if these allegations are contradicted by the description itself." *Gatlin v. Hartley, Nicholson, Hartley & Arnett, P.A.*, 29 Kan. App. 2d 318, 319, 26 P.3d 1284, 1286 (2001).

ARGUMENT

Plaintiffs claim the challenged laws infringe their patients' rights of bodily autonomy and self-determination and violate the equal protection rights of Plaintiffs and their patients. Pet. ¶¶ 131, 137, 146, 156. Yet Plaintiffs' first two claims, which they assert derivatively on behalf of their patients, fail because Plaintiffs have failed to allege facts sufficient to give rise to third-party standing. Those claims also fail because Plaintiffs' patients are necessary parties. And Plaintiffs third and fourth claims, which they assert on their own behalf, fail because there is no right to perform an abortion under the Constitution of Kansas.

I. Plaintiffs lack standing to sue on behalf of their patients.

Plaintiffs cannot establish third-party standing consistent with Kansas law or federal due process. As a result, the Court lacks jurisdiction over claims one and two, asserted on a third-party basis.

A. Plaintiffs have not met their burden to establish third-party standing.

Kansas law allows third-party standing only in "special situations," as recognized by federal precedent. *Landrith v. Jordan*, 308 P.3d 31, 2013 WL 5187269, at *8 (Kan. Ct. App. 2013). In

addition to an injury in fact, the plaintiff must also "have a close relation to the third party" and "there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* (citing *Powers v. Ohio,* 499 U.S. 400, 411 (1991)). "When a question of standing is raised, the party asserting the claim… has the burden to establish standing requirements." *Baker v. Hayden*, 313 Kan. 667, 673, 490 P.3d 1164, 1170 (2021).

The Kansas Supreme Court has followed historical federal precedent allowing abortion providers "to assert their patients' rights" to privacy from state investigation. *See Alpha Med. Clinic v. Anderson,* 280 Kan. 903, 921, 128 P.3d 364, 377 (2006) (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)). But the Kansas Supreme Court has not addressed that issue since *Dobbs*, which criticized the third-party standing doctrine on this point, or in the context of laws like those challenged here, which are designed to protect women receiving abortions and the unborn. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 286–87 (2022) (citing *June Med. Servs. LLC v. Russo*, 591 U.S. 299 (2020) (dissents of Alito & Gorsuch, J.J.); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 632 n.1 (2016) (Thomas, J., dissenting)). *Dobbs* thus cast "grave doubt" on a carte blanche approach to third-party standing in abortion cases. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 19-5516, 2022 WL 2866607, at *2 (6th Cir. July 21, 2022) (Bush, J., concurring in part and dissenting in part).[2] Plaintiffs cannot establish either the required "close relationship" or a hindrance to first-party litigation. The Court should dismiss their third-party claims.

[2] *See also Swanson v. Hilgers*, No. 4:24CV3072, 2024 WL 4135939, at *5 (D. Neb. Sept. 9, 2024) ("What's more, the decision in *Dobbs* at least casts some doubt on existing precedent regarding third-party standing related to the regulation of reproductive-health services."); *State v. Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d 863, 869 n.* (Fla. Dist. Ct. App. 2022) ("[A]ny former decision from the United States Supreme Court acknowledging such 'standing' of a party to advocate on behalf of a person not appearing in the case, regarding that person's purported irreparable

1. Plaintiffs do not have a "close relationship" with patients such that standing is conferred.

At the outset, third-party standing requires a "close" and "*existing* ... relationship" between Plaintiffs and their patients, which is "quite distinct from the *hypothetical*" relationship. *See Kowalski v. Tesmer*, 543 U.S. 125, 130–31 (2004) (emphases in original). Unlike other doctor-patient relationships, abortion providers rarely "develop a close relationship" with their patients; "their relationship is generally brief and very limited." *June Med.*, 591 U.S. at 403 (Alito, J., with Thomas & Gorsuch, J.J., dissenting). Plaintiffs' Petition shows that is certainly the case here.

Plaintiffs have failed to allege they have a close relationship with patients seeking abortions from Aria Medical. Aria Medical has existed for just two years. Pet. ¶ 14. Aria Medical is not a primary-care clinic or a clinic devoted to women's health, with a continuing panel of patients. Rather, Aria Medical's services are limited to abortions and contraception. Pet. ¶ 92. Like the "conveyor belt" approach described by the *New York Times*, Aria Medical sees a "high volume of patients" whose interaction with the clinic is limited to a "brief online survey," followed by a brief "telehealth" or in-person visit at which a physician "dispenses the necessary medications." Pet. ¶¶ 93, 94. Most of Aria Medical's patients are not from Wichita. Pet. ¶¶ 98, 111. Indeed, the Petition does not even allege that Plaintiff Elyse Gilbert is a Kansas resident, with any ongoing investment in the lives of her patients or the Wichita community. To the contrary, Plaintiff Gilbert is a California-based nurse-midwife, who only recently (2024) obtained a Kansas certified nurse-midwife license and provides consultations for Aria Medical's patients over the phone and by text

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harm is now in question."); *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 654 (Ky. 2023) (denying abortion providers third-party standing).

message. Pet. ¶¶ 118–19, 123, 125. Plaintiffs have no continuing relationship with their patients, whom they see for mere minutes via computer screen, let alone a close relationship.

2. There are no insurmountable obstacles to patient suits.

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

The same is true here. Plaintiffs allege that their patients' abortion rights have been infringed by K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) for at least the last three years. That time period encompasses a large volume of patients—for example, according to Plaintiffs, 19,200 and 22,720 abortions were provided by Kansas clinicians in 2023 and 2024, respectively. Pet. ¶ 96. That not *one* of Plaintiffs' thousands of patients is willing to participate in this suit strongly suggests that Plaintiffs lack the requisite connection to their patients to assert their rights vicariously. Any of these women could have filed a first-party suit under the theories Plaintiffs assert in claims one and two. And if any of those women had been harmed in the manner alleged by Plaintiffs, it is hard to fathom why none of them ever challenged the laws, particularly because they could have been

afforded privacy protection via use of a pseudonym. *See Unwitting Victim v. C.S.*, 273 Kan. 937, 942, 47 P.3d 392, 397 (2002). If K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) injure patients' autonomy, self-determination, and right to equal protection, nothing stops patients from suing. That bars Plaintiffs' third-party claims.

B. Allowing third-party standing would violate due process.

Even if Plaintiffs could meet the elements of third-party standing, the "blatant conflict of interest between an abortion provider and its patients" concerning laws "that protect their [patients'] health" precludes Plaintiffs' third-party claims. *June Med.*, 591 U.S. at 401 (Alito, J., dissenting). Third-party standing is not appropriate where the interests of the plaintiff and the third party whose rights it invokes "are not parallel and, indeed, are potentially in conflict." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004). So "[w]hen an abortion regulation is enacted for the asserted purpose of protecting the health of women, an abortion provider seeking to strike down that law should not be able to rely on the constitutional rights of women." *June Med.*, 591 U.S. at 402 (Alito, J., dissenting).

The conflict of interest is readily apparent for Plaintiffs' challenge of K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2). In claims one and two, Plaintiffs purport to invoke the rights of their patients to invalidate a law that protects those same patients by ensuring that a qualified physician will perform their abortion. Not only that, but the women's interest in receiving care from a qualified physician is directly adverse to Plaintiffs' pecuniary interest in completing more procedures while paying less for the persons performing them. Just as in *June Medical*, "it's pretty hard to ignore the potential for conflict here." 591 U.S. at 415 (Gorsuch, J., dissenting). A favorable ruling for Plaintiffs in this case would also affect an end-run around abortion-specific protections in

Kansas Woman's Right to Know Act, K.S.A. §§ 65-6701-16, which give women a civil cause of action for failure of informed consent, K.S.A. § 65-6716(h), but only apply to the provision of abortion by physicians, not advance practice registered nurses.

This conflict of interest also poses a problem of federal due process under the Fourteenth Amendment to the United States Constitution. Plaintiffs seek to adjudicate the rights of all women in Kansas who might seek an abortion, but none of them are parties here. This violates the "due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). This is part of "our deep-rooted historic tradition that everyone should have his own day in court." *Id.* (quotation omitted). The law allows only a handful of narrow exceptions, none of which apply here. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008).

The decision Plaintiffs seek in this case will extinguish rights provided for women by the Kansas legislature and will have the same effect as a binding decision on the claims of the women whose rights they invoke. Plaintiffs expressly invoke the rights of those women—both their rights of autonomy and their rights to equal protection. And yet, at the same time, Plaintiffs seek an order to permanently bar state executive officials from any enforcement of the women's statutory protections under K.S.A. § 65-1120 and K.S.A. § 65-1122(f). Thus, this proceeding would not simply have an impact or collateral effect on the rights of Plaintiffs' women patients under the Statute—

it would actually decide them in their absence. It would thus violate "[t]he fundamental requirement of due process" that a party receive "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted).

A decision in Plaintiffs' favor would not be confined to the circumstances of Plaintiffs' claims, since they are facial challenges to all potential applications. Pet. pp. 33-34 (seeking declaratory relief and injunction on facial, not as-applied, basis). A final decision on those facial challenges would bar state executive officials from enforcing the Statute anywhere in the State. That would sweep away the rights of all women seeking chemical abortions in Kansas.

II. Plaintiffs' failure to join affected patients, who are necessary parties, requires dismissal of their challenge.

While the Court lacks jurisdiction over Plaintiffs' third-party claims because they cannot represent their patients, the failure to join those patients also requires dismissal of Plaintiffs' claims under the principles that govern joinder of necessary parties. Kansas law demands joinder of an absent party when disposing of the action without that party may, as a "practical matter, impair or impede the person's ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest." K.S.A. 60-219(a)(1)(B). If such a person cannot feasibly be joined, the law requires dismissal if the Court determines in equity and good conscience that the action cannot proceed without the joinder of the absent party. K.S.A. 60-219(b).

Here, the infeasibility of joining the women requires dismissal. Kansas's necessary-party statute is "closely modeled on Federal Rule 19," *Shawnee Hills Mobile Homes, Inc. v. Rural Water Dist. No. 6*, 217 Kan. 421, 427, 537 P.2d 210, 216 (1975), which embodies principles that are both prudential and "the fundamentals of due process." *Britton v. Green*, 325 F.2d 377, 382 (10th Cir.

1963). Indeed, joining a necessary party "preserves the principles of due process that are inherent in Rule 19 and which long antedate the Rules of Civil Procedure." *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 635 F.3d 87, 101 (3d Cir. 2011) (Jordan, J., concurring in part) (citing *Torrence v. Shedd*, 144 U.S. 527, 532 (1892)). Those principles compel dismissal here because the women whose rights Plaintiffs seek to decide cannot feasibly be joined.

Courts employ the Rule 19 framework to promote "fair treatment of nonparties in certain circumstances where their interests, and particularly their due process rights, are at risk from litigation between others." *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 464 (D.C. Cir. 2017); *accord Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 224 (5th Cir. 1946). Indeed, "[t]he failure of the court to protect those not before it may amount to a violation of due process should the judgment in the action have the effect of destroying their rights." 7 Wright & Miller, Fed. Prac. & Proc. Civ. § 1602 (3d ed. 2025).

Even where the decision does "not bind absent persons," if "the nonparty's claim or defense may be impaired as a practical matter, ... this may be deemed a violation of due process." *Id.* "[W]ithout a perfect identi[t]y of interests, a court must be very cautious in concluding that a litigant will serve as a proxy for an absent party." *Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC*, 80 F.4th 223, 235 (3d Cir. 2023). In accordance with these principles, the federal courts of appeals have held that due process demands joining absent parties before the court can proceed with a case.[3] Here too, deciding this case without the participation of the patients the laws seek to protect would prejudice both their rights and Defendants' rights and thus violate due process.

[3] *See, e.g.*, *Britton*, 325 F.2d at 383 (where receivership would interfere with a party's contractual rights, "due process dictates that they be heard in the proceedings for the appointment of a Receiver."); *State of N.C. ex rel. Long v. Warren*, 37 F.3d 1495, 1994 WL 577451 at *3 (4th Cir. 1994)

Plaintiffs' patients are plainly necessary parties because they "claim[] an interest relating to the subject of the action" such that disposing of it in their absence would "impair or impede" their ability to protect that interest. K.S.A. 60-219(a). Indeed, the patient's statutory right to safe medical care, which in this case is an abortion performed by a licensed physician, is at stake. Pet. ¶¶ 129–143. Plaintiffs ask this Court to void this right as unconstitutional in each application. Pet., pp. 33–34 (seeking declaratory relief and injunction on facial, not as-applied, basis). Plaintiffs thus advocate against the rights of their patients rather than for them, for the purposes of their own financial incentives. *See supra*, pp. 8-9. Rather than let patients determine whether they value the right to a qualified physician afforded by K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2), Plaintiffs insist that the statutory rights of each of their patients are void in the face of their unyielding right to increase their profit margins while performing abortions. Barring state enforcement of the law on a facial basis would seriously impair patients' ability to protect their rights as a practical matter.

III. Plaintiffs have failed to state an equal protection claim on their own behalf.

In claims three and four, Plaintiffs allege on a first-party basis that their rights to equal protection under the Kansas Constitution because K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) discriminate against the right to an abortion under the Kansas Constitution by disallowing advanced practice registered nurses to prescribe chemical abortion. Pet. ¶¶ 149–50, 156. But these claims misunderstand Kansas law, as the right at issue is held by Kansas women, not abortion providers. There is no right to *perform* an abortion under the Kansas Constitution.

(table) ("Due process concerns compel the court to conclude that the Debtor must be a party to an action that raises the dischargeability of the Debtor's debts."); *see also Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 123 (1968) (noting that "an injustice is being, or might be, done to the . . . constitutional, rights of an outsider by proceeding with a particular case").

The Supreme Court of Kansas has recognized a state constitutional right to bodily autonomy and self-determination, which includes a woman's right "to decide whether to continue a pregnancy." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 650, 440 P.3d 461, 486 (2019) (*Hodes I*). Plaintiffs, whose goal is the deregulation of abortion in Kansas, focus only on access to abortion procedures. However, the right of bodily autonomy is broader, as it also protects a woman's right to safe medical care—including prenatal and birthing care— as well as her rights to health and procreation. *Id.*, 309 Kan. at 644-45, 440 P.3d at 483 (the right to "bring up children" is a fundamental right). The right to bodily autonomy protects Kansas women's right to choose abortion or childbirth, and make an informed, healthful decision between the two. *See Hodes I*, 440 P.3d at 486 ("[I]mplicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy.") (citation omitted).

In order to succeed on a claim that Kansas law impermissibly curtails a woman's right to an abortion procedure, Plaintiffs' must meet the threshold evidentiary burden requiring them to show "actual infringement" of their patients' right to terminate or continue a pregnancy. *Hodes & Nauser, MDs, P.A. v. Stanek*, 318 Kan. 995, 1009, 551 P.3d 62, 74 (2024) (*Hodes III*). This evidentiary showing focuses on the "nature of the right at stake" and requires evidence that actual women were actually deterred from exercising their right to choose abortion or childbirth because of the law. *Id.*

Plaintiffs third and fourth claims make no attempt at this. Rather, they suggest that the right to abortion is violated by the prohibition against advanced practice registered nurses providing chemical abortion. But there is no right to *perform* an abortion in Kansas, nor is there any corollary right under federal law. *See Planned Parenthood of Greater Ohio v. Hodges,* 917 F.3d 908, 912 (6th

Cir. 2019) (there is no "freestanding right to perform abortions."); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000) ("No authority exists to support a conclusion that abortion clinics or abortion providers have a fundamental liberty interest in performing abortions free from governmental regulation. Moreover, physicians as a group are not a suspect class.") (internal citation omitted). Nor does regulation of sex-specific medical procedures constitute sex discrimination. Necessarily, only those who can bear children have direct standing to challenge pregnancy and abortion regulations. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1198 (Idaho 2023); *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting). This is true because it is a biological fact that only humans born female can carry a fetus. Thus, K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) apply uniformly to all "pregnant people." Plaintiffs' equal protection claims accordingly fail.

IV. Plaintiffs' claims are barred by the equitable doctrine of laches and the requirement of showing irreparable harm.

Laches is an equitable defense precluding the bringing of claims that have been unreasonably delayed, to the prejudice of the opposing party. *Matter of Marriage of Doud & Modrcin*, 59 Kan. App. 2d 244, 253, 480 P.3d 800, 807 (2020). "Equity aids the vigilant, not those who slumber on their rights." *N.P. Dodge Corp. v. Calderwood*, 151 Kan. 978, 101 P.2d 883, 885 (1940). The doctrine of laches consists of two elements: (1) unreasonable delay by the plaintiff and (2) prejudice to the defendant. *State ex rel. SRS v. Cleland*, 42 Kan. App. 2d 482, 493, 213 P.3d 1091, 1098 (2009).

A. Plaintiffs unreasonably delayed in bringing their challenge.

K.S.A. § 65-1130 and the relevant amendments to K.A.R. 60-11-104a are the product of the spring 2022 legislative session, and became effective nearly three years ago, on July 1, 2022 and October 14, 2022, respectively. Historically, abortion providers have a documented pattern of

promptly challenging Kansas abortion regulations soon after enactment, making Plaintiffs' delay here inexcusable. *See, e.g.*, *Hodes I*, 309 Kan. 610, 440 P.3d 461; *Hodes & Nauser, MDs, P.A. v. Kobach*, 318 Kan. 940, 551 P.3d 37 (2024); *Hodes III*, 318 Kan. 995, 551 P.3d 62; *Hodes & Nauser v. Schmidt*, slip opinion, 13–C705 (Shawnee Cnty. Kan. Dist. Ct., June 28, 2013); *Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Templeton*, 954 F. Supp. 2d 1205 (D. Kan. 2013). Moreover, Plaintiffs do not claim ignorance of these provisions, nor do they allege that any subsequent event triggered their decision to challenge the law in 2025. Nor have the statute and regulation been modified since their enactment.

The unreasonableness of Plaintiffs' delay is underscored by their own allegations of ongoing harm. Plaintiffs claim that the challenged provisions have "negatively impact[ed] Aria Medical financially" since the clinic's inception and have prevented Plaintiff Gilbert from "increas[ing her] income" through expanded practice. Pet. ¶¶ 101, 124. If these harms were truly significant and ongoing, basic prudence would have dictated prompt legal action, not a nearly three-year delay.

Plaintiffs' conduct stands in contrast to the vigilance expected in constitutional litigation. Courts have consistently found delays of far shorter duration unreasonable in similar circumstances. *See, e.g.*, *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012) (applying laches to four-month delay). The three-year gap between the law's enactment and Plaintiffs' challenge establishes the unreasonableness of their delay as a matter of law.

B. The State would be prejudiced by a belated challenge.

Kansas would suffer significant prejudice if Plaintiffs were permitted to challenge K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) at this time. The State has reasonably relied on the validity of its longstanding limitation that only doctors can perform abortions for years. Kansas's

entire regulatory framework for abortion has been constructed around the foundational principle that only physicians may perform abortions. For example, the Woman's Right to Know Act, enacted in 1997, has been specifically tailored to this physician-only model. The Act's informed consent requirements, disclosure obligations, and procedural safeguards all presuppose that a licensed physician will be providing the abortion services. For example, the Act requires that physicians provide specific disclosures, that physicians meet with patients, and that physicians ensure compliance with various informed consent protocols. *See* K.S.A. § 65-6709. This comprehensive statutory scheme would require fundamental restructuring if non-physician providers were suddenly permitted to prescribe abortion-inducing drugs: such practitioners would lack the training, oversight, and legal authority contemplated by the existing framework.

Healthcare providers across Kansas have structured their practices in accordance with these longstanding requirements, and the medical community has developed standards of care that incorporate these restrictions. Disrupting this established framework after three years of implementation would create confusion in the healthcare system and potentially compromise patient safety.

Courts have applied laches to constitutional challenges in similar circumstances. In *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012), the court applied laches to bar a constitutional challenge to Virginia's ballot access requirements, noting that the plaintiffs "displayed an unreasonable and inexcusable lack of diligence" in challenging the various provisions of Virginia's statutory ballot access scheme, which resulted in undue prejudice to the defendants. Similarly, in *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922–23 (D. Ariz. 2016), the court applied laches to bar a constitutional challenge to Arizona's ballot access laws where the plaintiffs delayed two years

in bringing their claim. Here, Plaintiffs' three-year delay is no different. The Court should dismiss Plaintiffs' claims on this independent ground.

C. Plaintiffs' delay negates irreparable harm.

Plaintiffs also cannot establish the irreparable harm necessary to justify the extraordinary remedy of a permanent injunction. To obtain a permanent injunction, Plaintiffs must demonstrate "irreparable harm unless the injunction is issued." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007).

Plaintiffs' extended delay in challenging K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) negates any claim of irreparable harm. Courts consistently hold that "delay in seeking preliminary relief cuts against finding irreparable injury." *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543–44 (10th Cir. 1994). An "extraordinary delay in seeking" injunctive relief demonstrates a lack of urgency and, thus, a lack of irreparable harm. *Wireless Agents, L.L.C. v. T-Mobile USA, Inc.*, 2006 WL 1540587, at *3–5 (N.D. Tex. June 6, 2006).

The three-year delay here is particularly damaging to Plaintiffs' irreparable harm claim given the nature of their alleged injuries. Plaintiffs assert that the challenged provisions prevent them from operating their business in a "cost-effective" manner and limit their ability to "engage in costs savings." Pet. ¶¶ 9, 102, 114. These are quintessentially economic harms that accrue daily—if such harms were truly irreparable, Plaintiffs would have sought immediate relief when the law took effect in 2022. Instead, their willingness to absorb these purported economic losses for two and a half years demonstrates that any harm is both reparable through monetary damages and not sufficiently urgent to warrant extraordinary equitable relief as a matter of law.

Moreover, Plaintiffs' own conduct during the delay period contradicts their claims of irreparable harm. Throughout the three years since these provisions took effect, Aria Medical has continued to operate and expand its services, and Plaintiff Gilbert obtained her Kansas license and began providing services to Kansas patients in 2024. Pet. ¶ 127. This conduct is inconsistent with claims that the challenged provisions cause irreparable harm to their operations.

Plaintiffs' alleged harm to their patients is similarly undermined by the delay. If Kansas women were truly being irreparably harmed by the requirement that only physicians prescribe abortion-inducing drugs, one would expect some evidence of actual patient injury over decades that that requirement has been in effect. Yet Plaintiffs point to no concrete instances of women who were denied care, suffered medical complications, or experienced other irreparable harm specifically because advanced practice registered nurses could not prescribe these medications. The absence of allegations to that effect in their petition, after three years of the laws' operation, shows that any theoretical harm is speculative rather than irreparable.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claims with prejudice.

Dated: June 3, 2025

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify that on June 3, 2025, the above and foregoing were electronically filed with the Clerk of the Court using the Court's Electronic Filing System, which will send notice of electronic filing to all counsel of record.

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