ELECTRONICALLY FILED
2025 Jun 24 PM 4:54
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2025-CV-000298
PII COMPLIANT

**IN THE DISTRICT COURT OF SHAWNEE COUNTY**

**CIVIL COURT DEPARTMENT**

| | |
|---|---|
| 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,<br><br>*Plaintiffs*,<br><br>v.<br><br>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,<br><br>*Defendants*. | CASE NO. SN-2025-CV-000298<br>Division No. 3 |

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

COME NOW Plaintiffs, by and through counsel, and for their Response to Defendants' Motion to Dismiss state as follows:

**INTRODUCTION**

This case presents significant constitutional questions under the Kansas Constitution Bill of Rights. As the Petition explains, every person in Kansas has the right to make deeply personal decisions about their body and health free from undue government interference. Section 1 of the Kansas Constitution Bill of Rights recognizes an inalienable natural right to personal autonomy, including the right to

decide whether to continue a pregnancy. Laws that infringe on this fundamental right are subject to strict scrutiny. Likewise, all Kansans are entitled to equal protection under the laws. Sections 1 and 2 of the Kansas Constitution Bill of Rights prohibit the State from enforcing discriminatory laws—particularly when those laws burden fundamental rights or operate in arbitrary and irrational ways without meeting appropriate scrutiny.

Defendants' motion to dismiss is both procedurally improper and substantively without merit. Plaintiffs have stated viable constitutional claims and have standing to assert both their own rights and those of their patients. The Petition establishes third-party standing, presents actionable equal protection claims, and alleges concrete and ongoing harms caused by the challenged provisions.

Contrary to Defendants' assertions, all necessary parties are before the Court, the claims were filed after injury occurred, and it is Defendants—not Plaintiffs—who failed to meet procedural deadlines. Moreover, Defendants improperly rely on facts outside the four corners of the Petition, which cannot be considered at the pleading stage. Dismissal at this stage would be premature and unjustified.

## FACTS

Plaintiffs Aria Medical Clinic, LLC ("Aria Medical") and Elyse Gilbert, CNM, bring this action to challenge Kansas laws and regulations that single out medication abortion patients and providers for unequal treatment. Under Kansas law, APRNs like Ms. Gilbert are otherwise fully authorized to prescribe a wide range of medications, including controlled substances as well as mifepristone and misoprostol, for a variety of health conditions. K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2);

Pet. ¶ 80. Yet when it comes to abortion care, Kansas imposes a categorical prohibition that prevents APRNs from prescribing medications used to safely terminate a pregnancy, despite their training and clinical competence and that they may prescribe these same medications for other purposes. *See* K.S.A. 65-1130(d)(1) and K.A.R. 60-11-104a(a)(2) ("Abortion Restrictions"); Pet. ¶¶ 3–7, 15, 28–34, 65–79, 118–128.

As a result of these restrictions, patients at Aria Medical—most of whom seek abortion care early in pregnancy—face unnecessary and harmful barriers. Pet. ¶¶ 83–89, 95–100, 109–116. The restrictions delay or deny access to timely medication abortion by requiring that patients be seen only by physicians, even when qualified APRNs like Ms. Gilbert are available to provide care. This has led to longer wait times, increased travel burdens, and in some cases, the complete loss of the option for medication abortion. *See* Pet. ¶¶ 10, 32, 84, 86, 89, 98–100, 109–111.

These burdens fall hardest on patients who are already marginalized: people with low incomes, those who live in rural areas, and individuals who cannot easily take time off work, arrange childcare, or travel long distances for care. *See* Pet. ¶¶ 10, 32, 84, 86, 89, 98–100, 109–111. The state's arbitrary restrictions thus exacerbate existing disparities in health care access, reinforcing structural inequities based on income and geography. *See* Pet. ¶¶ 109–112. While APRNs remain free to prescribe the same medications for miscarriage management or other indications, they are barred from doing so when a patient's intent is to end a pregnancy. *See* Pet. ¶¶ 65–

79. The law treats abortion differently not because of medical necessity or safety concerns, but solely because of its political salience. *See* Pet. ¶¶ 48–89.

This disparate treatment violates the equality and bodily autonomy guarantees protected by Sections 1 and 2 of the Kansas Constitution Bill of Rights. The law imposes burdens on pregnant people that are not imposed on others seeking comparable medical care, and it denies them access to providers who are otherwise fully qualified to care for them. Pet. ¶¶ 129–162. It imposes an undue burden on Ms. Gilbert, who—despite possessing the education, experience, training, licensure, and qualifications necessary to provide medication abortion—is prohibited from doing so in Kansas. Pet. ¶¶ 118–128. She is subject to disparate treatment compared to other APRNs who prescribe medications for non-abortion forms of family planning, those who prescribe the same drugs for non-abortion reasons, and those who prescribe medications for any other purpose. Pet. ¶¶ 146–148. Because Aria Medical cannot rely on APRNs to provide medication abortion, it is forced to operate under staffing constraints that limit its ability to meet patient demand—harming patients directly and disproportionately. *See* Pet. ¶¶ 8–9, 90; 95–116. Through this lawsuit, Plaintiffs seek not only to vindicate their own rights, but also the rights of their patients from being denied equal access to essential reproductive health care, simply because the care they seek involves ending a pregnancy.

## PROCEDURAL POSTURE

On July 5, 2024, the Kansas Supreme Court issued its holding in *Hodes & Nauser, MDs, P.A. v. Stanek*, 318 Kan. 995, 551 P.3d 62 (2024) (hereinafter "*Hodes III*") striking down the entirety of S.B. 36 (2011) and associated regulations, including

physician-only and in-person laws that were codified as K.S.A. 65-4a10, because they violated Section 1 of the Kansas Constitution Bill of Rights. Pet. ¶ 45. About nine months later, Plaintiffs filed this lawsuit. Pet., generally.

Defendants Moreland, Watson, and Bennett were served with process on April 28, 2025 (Court file, 05-06-2025 Returns of Service for Moreland, Watson, and Bennett), making their responsive pleading due May 19, 2025. Defendants Kobach and Kansas State Board of Nursing ("KSBN") were served with process on April 29, 2025 (Court file, 05-06-2025 Returns of Service for Kobach and KSBN), making the responsive pleading due for these Defendants on May 20, 2025. On May 19, 2025, all Defendants obtained a 14-day extension of the responsive pleading deadlines. (Court file, 05-19-2025 Clerk's Extension.) Thus, Defendants Moreland, Watson, and Bennett were required to file their responsive pleadings by June 2, 2025, and Defendants Kobach and KSBN were required to file their responsive pleadings by June 3, 2025. Yet, Defendants' Motion to Dismiss was filed for *all* Defendants on June 3, 2025—even though the deadline for Moreland, Watson, and Bennett had already expired.

## LEGAL STANDARD

When considering a motion to dismiss under K.S.A. 60-212(b)(6) and 60-212(b)(7), "a trial court must decide the issue based on only the well-pleaded facts and inferences reasonably drawn from them." *Rodina v. Castaneda*, 60 Kan. App. 2d 384, 386, 494 P.3d 172 (2021). A court may only consider the plaintiff's petition and any attachments to it. *Rogers v. Wells Fargo Bank, N.A.*, 64 Kan. App. 2d 290, 303,

551 P.3d 142 (2024). All factual disputes must be resolved in favor of the plaintiff. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019).

"Dismissal is proper only when the allegations in the petition clearly demonstrate that the plaintiff does not have a claim." *Steckline Commc'ns, Inc. v. J. Broad. Grp. of Kansas, Inc.*, 305 Kan. 761, 768, 388 P.3d 84 (2017). "If those facts and inferences state *any* claim upon which relief can be granted, dismissal is improper." *Id.* (citing *Cohen v. Battaglia*, 296 Kan. 542, 545–46, 293 P.3d 752 (2013)). Indeed, Kansas courts have repeatedly cautioned that dismissal under K.S.A. 60-212(b)(6) "'is the exception, not the rule.'" *Rogers*, 64 Kan. App. 2d at 295 (quoting *Minjarez-Almeida v. Kansas Bd. of Regents*, 63 Kan. App. 2d 225, 232, 527 P.3d 931 (2023)).

## ARGUMENT

### I. Plaintiffs Have Third-Party Standing to Assert the Rights of Their Patients.

Defendants do not contest that Plaintiffs have first-party standing to bring this case, but they argue that Plaintiffs may not assert the constitutional rights of their patients. That argument is wholly unfounded. Kansas courts have repeatedly recognized that medical providers may bring constitutional claims on behalf of their patients, particularly in the context of reproductive health care. Plaintiffs have sufficiently alleged a close provider-patient relationship and that their patients face real obstacles to asserting their own rights—precisely the circumstances in which third-party standing is appropriate.

### A. Third-Party Standing Principles for Medical Providers Are Well-Settled.

A medical provider's ability to bring claims on behalf of their patients is well-settled in Kansas. *See, e.g.*, *Hodes & Nauser, MDs, P.A. v. Stanek ("Hodes III")*, 318 Kan. 995, 551 P.3d 62 (2024) (abortion providers asserted right to personal autonomy on behalf of their patients); *Hodes & Nauser, MDs, P.A. v. Kobach ("Hodes II")*, 318 Kan. 940, 551 P.3d 37 (2024) (same); *Hodes & Nauser, MDs, P.A. v. Schmidt ("Hodes I")*, 309 Kan. 610, 440 P.3d 461 (2019) (same); *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006) (medical provider asserted privacy rights of its patients); *Trust Women Foundation, Inc. v. Bennett*, No. 121,693, 2022 WL 1597011, (Kan. App. 2022) (unpublished opinion) (abortion provider asserted rights of its patients); *In re Hodes & Nauser MDs, P.A. v. Kobach*, No. 23CV03140, 2023 WL 7130406, at *16 (Kan. 10th Jud. Dist. Ct. Oct. 30, 2023)[1] (abortion providers had third-party standing to challenge various abortion restrictions in Kansas on behalf of their patients). And contrary to Defendants' assertions, it is also well-settled in federal court. *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 318–20 (2020) (plurality opinion) (collecting cases) ("We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations."), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *accord id.* at 354 n.4 (Roberts, C.J., concurring); *Griswold v.*

[1]Westlaw incorrectly lists the date on this order as January 1, 2023.

*Connecticut*, 381 U.S. 479, 481 (1965) (holding that healthcare providers had third-party standing to assert the rights of patients seeking to use contraception).

Defendants suggest that dicta in *Dobbs* erases third-party standing precedent here in Kansas state court. *See* Mot. Dismiss at 7. Not so. *See Yellowhammer Fund v. Marshall*, No. 2:23CV450-MHT, 2025 WL 959948, at *11 (M.D. Ala. Mar. 31, 2025) ("[The defendant] misreads *Dobbs* insofar as he suggests that the Supreme Court, in eight words, upended the law of standing. *Dobbs* was not a case about standing, and it did not overrule any precedent except where the Court explicitly said so."). If abortion providers lacked third-party standing in *Dobbs*, the Supreme Court would not have reached the merits in that case. And the dicta in *Dobbs* especially does not impact the recognized third-party standing principles in Kansas state court, which have consistently allowed abortion providers to assert the rights of their patients, both before and after the *Dobbs* decision.[2] *See supra* 7.

[2]Courts have also said that plaintiffs have "standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth v. Seldin*, 422 U.S. 490, 510 (1975). Courts have allowed third-party standing in cases involving a variety of fact patterns and interests. *DPR, Inc. v. City of Pittsburg*, 24 Kan. App. 2d 703, 708, 953 P.2d 231 (1998) (holding that a business "does have standing to raise issues involving the rights of third parties" in its constitutional challenge to a city ordinance that would be enforced against it); *see also Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that a criminal defendant had third-party standing to assert the rights of potential jurors excluded from jury service); *Carey v. Pop. Servs. Int'l*, 431 U.S. 678, 683–684 (1977) (holding that a company selling non-medical contraceptives had third-party standing to assert the rights of potential customers, including minors); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that a beer vendor had third-party standing to assert the rights of potential customers where the statute prohibited vendors from distributing beer to young men rather than directly prohibiting young men from drinking beer). This further demonstrates that Plaintiffs are suitable parties to assert their patients' rights because the Abortion Restrictions would be enforced against Plaintiff Gilbert and other APRNs that Plaintiff Aria Medical would like to employ, indirectly impacting their patients' rights.

### B. Plaintiffs Have a Close Relationship with Their Patients, and Their Patients Face a Hindrance to Asserting Their Own Rights.

Defendants insist that Plaintiffs have not established third-party standing because, in Defendants' view, Plaintiffs do not have a close relationship with their patients and there "are no insurmountable obstacles to patient suits." Mot. Dismiss at 8–9. This misstates the standard courts occasionally consider as another way of establishing third-party standing. For the second prong, courts do not require that third parties face "insurmountable obstacles" to bringing a lawsuit themselves for third-party standing to be satisfied.[3] They only require that there is "some hindrance" to a third party's ability to protect their own interests. *Landrith v. Jordan*, No. 107,959, 2013 WL 5187269, at *8 (Kan. App. 2013) (unpublished opinion) (citing *Powers*, 499 U.S. at 411). Nevertheless, Plaintiffs have a close relationship with their patients, who in turn face hindrances to protecting their own interests in court.

First, Plaintiffs have a close relationship with their patients. Aria Medical provides abortion care, contraception, and pregnancy dating to hundreds of patients across Kansas, many of whom seek care under time-sensitive, emotionally complex circumstances.[4] *See* Pet. ¶¶ 16, 92, 100. These patients trust Aria Medical and Ms. Gilbert to provide essential medical services and counseling—services which

[3]Notably, Defendants rely solely on dissenting opinions for the "insurmountable obstacles" standard.

[4]Defendants suggest that one of Plaintiffs' *thousands* of patients could be a plaintiff here. Mot. Dismiss at 9. But the number of abortions referenced in the Petition refers to the number of abortions performed in total by *all* Kansas clinicians, Pet. ¶ 96, not just Aria Medical clinicians.

Plaintiffs are committed to providing in a compassionate way. *See* Pet. ¶¶ 81, 99. The close, confidential relationship between provider and patient is not diminished by the brevity of appointments, especially when care involves sensitive decisions about bodily autonomy. Contrary to Defendants' position (Mot. Dismiss at 8–9), the close relationship consideration has never been dependent on the duration of the relationship. *See Powers*, 449 U.S. at 413 (enumerating the close-relationship and hindrance considerations in a case where a litigant and the third parties had not spent any time with one another). Indeed, in the context of reproductive health and abortion in particular, patients and their providers arguably have a closer relationship than other provider-patient relationships due to the deeply personal and often stigmatized nature of the care being provided.

Second, Plaintiffs' patients also face significant barriers to asserting their own rights.[5] Many are balancing jobs, school, and caregiving responsibilities, and lack the time or financial resources to litigate. *See* Pet. ¶¶ 99–102. Others fear community stigma, job-related repercussions, or the emotional toll of publicly disclosing their abortion experiences. *See* Pet. ¶ 17. These practical and social barriers readily meet the "some hindrance" standard. *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion); *Alpha Med. Clinic*, 280 Kan. at 921.

Plaintiffs without a doubt satisfy the well-established criteria for third-party standing under Kansas law, and their claims should proceed.

[5]Notably, none of the legal challenges to abortion restrictions in Kansas have included individual patients as named plaintiffs.

### C. Allowing Third-Party Standing Would Not Violate Due Process.

There is simply no basis for Defendants' assertion that allowing third-party standing would violate the due process rights of unnamed parties. Mot. Dismiss at 10–12. First, Plaintiffs do not have a conflict of interest with their patients. Defendants assert that Plaintiffs have a pecuniary interest that conflicts with their patients' interests (Mot. Dismiss at 10), but Aria Medical Clinic "strives to provide care no matter the patient's ability to pay." Pet. ¶ 112.[6] While Plaintiffs have an interest in providing care, that interest is not adverse—it supports the same goals patients seek: accessible, timely, and patient-centered care. Courts have long recognized that financial interests do not defeat third-party standing where the interests are aligned. *June Med. Servs. L.L.C.*, 591 U.S. at 318–20 (Roberts, C.J., concurring) (plurality opinion); *Singleton*, 428 U.S. at 117–18 (plurality opinion).

Second, the relief requested in this case would not "extinguish rights provided for women by the Kansas legislature." Mot. Dismiss at 11. Indeed, neither K.S.A. 65-1120 nor K.S.A. 65-1122(f) provide any rights at all *to patients*. On the contrary, a favorable decision would fulfill the rights promised to all people by the Kansas Constitution Bill of Rights by striking down a provision that violates the right to

[6]Plaintiffs also have an interest in improving service delivery, which includes making it more cost effective so that they can continue to deliver high quality patient care to many people. The economic impact of the Abortion Restrictions does not detract from Plaintiffs' third-party standing; in fact, it shows that Plaintiffs have suffered a first party injury-in-fact due to the restrictions. *Singleton v. Wulff*, 428 U.S. 106, 112–13 (1976) (plurality opinion) (noting that the "there is no doubt now that the respondent-physicians suffer concrete injury from the operation of the challenged statute" because of the economic impact of it on the abortion providers and proceeding to find that they had third-party standing to assert the rights of their patients). *See Hodes III*, 318 Kan. 995.

personal autonomy. A decision in Plaintiffs' favor would not take away any options for Kansas patients or do away with any statutory rights; Kansans would instead have expanded options by being able to be treated by APRNs or could still choose to see a physician for abortion care if they wish. In other words, third-party standing does not adjudicate the rights of specific, unnamed individuals, nor bind them to any judgment—they remain free to assert their own rights in the future.

## II. Patients Are Not Necessary Parties.

Defendants incorrectly argue that Plaintiffs' failure to join their patients as parties warrants dismissal. But under K.S.A. 60-219(a)(1), joinder is only required when the absent party claims a legal interest and their absence would impair their ability to protect that interest or expose existing parties to inconsistent obligations. *Dexter v. Brake*, 38 Kan. App. 2d 1005, 1011–13, 174 P.3d 924 (2008). Neither condition is met here. Plaintiffs assert third-party standing to challenge laws that directly restrict their ability to provide care. The requested relief would not bind or prejudice their patients—who retain full legal autonomy to assert their own rights in the future by selecting a physician rather than an APRN to provide their abortion care—and courts have long recognized that medical providers may represent their patients' constitutional interests without joining them as parties.

That was the case in *Hodes I*, 309 Kan. 610, 614 (2019) (concluding that plaintiffs showed that they were substantially likely to succeed on claims brought on behalf of themselves and their patients), and it is currently the case in *In re Hodes & Nauser MDs, P.A. v. Kobach*, No. 23CV03140, 2023 WL 7130406, at *16 (Kan. 10th Jud. Dist. Ct., Oct. 30, 2023) ("[P]laintiffs have valid legal standing to pursue their

claims on behalf of their patients."); *see also June Med. Servs. L.L.C,* 591 U.S. at 318–20 (2020) (plurality opinion) (collecting cases in which abortion providers asserted rights of patients without joinder). As reproductive healthcare providers, Plaintiffs here are equally qualified to represent the interests of their patients without joining them as parties and risking unfair treatment. Defendants attempt to reduce Plaintiffs' allegations to a mere desire to increase profits. Mot. Dismiss at 14. That is not the crux of Plaintiffs' grievance. As explained *supra* n.6, Plaintiffs seek to improve service delivery, including making it more cost-effective so that they can continue delivering timely, efficient, high-quality patient care to many people. Their efforts do not threaten the statutory rights of their patients in a way that necessitates joining those patients as parties to this suit.

This case asks the Court to remove an unconstitutional burden imposed on the right to access abortion care, a right protected by the Kansas Constitution. *See* Pet. ¶¶ 10–11. Plaintiffs seek to prevent Defendants from enforcing the Abortion Restrictions because those laws unlawfully restrict their patients' ability to receive abortion care from qualified providers. *See* Pet. ¶¶ 99–100, 131, 137. These restrictions significantly reduce the number of qualified providers, create unnecessary barriers and delays, and deny patients safe, evidence-based care. *See* Pet. ¶ 99–100, 104–08, 131, 137.

A favorable ruling would ensure that patients retain the right to access medication abortion care—and from more qualified providers than currently allowed under Kansas law. *See id*. An unfavorable ruling would mean that while care remains

available, it would continue to be subject to unconstitutional restrictions. In either scenario, Plaintiffs adequately represent their patients' interests. Contrary to Defendants' claims, no outcome of this case would "impair or impede" patients' ability to protect their interests in abortion care. *See* Mot. Dismiss at 14. Moreover, Defendants fail to show a "substantial risk" that any ruling in this case would result in "double, multiple, or otherwise inconsistent obligations" for the parties. *See id.* Their argument that Plaintiffs' patients are necessary parties and that due process rights are at risk must therefore be rejected.[7]

## III. Plaintiffs Adequately Pled Their Equal Protection Claims.

Kansas law prohibits APRNs from prescribing certain medications *only* when used for abortion, while allowing those same medications for other uses. This classification burdens the fundamental rights of patients and irrationally

[7]Even if this court were to take an unprecedented step and find that patients are necessary parties, dismissal of Plaintiffs' suit is not required. A court can exercise its discretion to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." K.S.A. 60-219(b). This is a case-specific inquiry, in which a court will consider several factors, including to what extent a judgment rendered in the absence of the contingently necessary person might be prejudicial to that person or to those already parties; the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; whether a judgment rendered in the absence of the contingently necessary person would be adequate; and whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. *Hershaw v. Farm & City Ins. Co.*, 32 Kan. App. 2d 684, 690, 87 P.3d 360 (2004). Here, any practical considerations in joining individual patients weigh strongly against dismissal. And, as explained, preventing Plaintiffs from seeking review of the Abortion Restrictions raises greater due process concerns than resolving the case without them. Any conceivable prejudice to patients or Plaintiffs is nonexistent: the interests of both weigh in favor of invalidating and enjoining enforcement of the Abortion Restrictions so that constitutionally protected abortion care can be unburdened. Declaratory and injunctive relief would fully address Plaintiffs' injuries, and by extension, their patients'. As thoroughly outlined in Plaintiffs' third-party standing allegations, no realistic alternative forum to pursue a remedy would exist if this action were dismissed. Thus, this suit should proceed even if the Court finds that Plaintiffs' patients are necessary parties.

discriminates against qualified providers and those who employ them. Under well-established equal protection principles, Plaintiffs have pled sufficient facts to survive dismissal.

### A. Defendants Do Not Substantively Challenge the Equal Protection Claims Relating to Patients.

Defendants do not substantively challenge the constitutional claim asserted on behalf of Plaintiffs' patients in Claim 2 of the Petition. *See* Mot. Dismiss at 14–16 (challenging only Claims 3 and 4). Their motion to dismiss addresses only Claims 3 and 4, which concern Plaintiffs' own rights under the Kansas Constitution. As a result, the Court need not reach the merits of Claim 2 at this stage. Because Defendants raise no argument that the allegations in Claim 2 fail to state a claim or lack legal support, that claim must proceed. To the extent Defendants dispute Plaintiffs' standing to assert Claim 2, Plaintiffs have established third-party standing, as explained above. But absent a substantive challenge, the sufficiency of the allegations in Claim 2 is not before the Court.

### B. An Equal Protection Claim Is Proper When There Is a Classification Treating Similarly Situated People Differently, and the Government Fails to Meet the Appropriate Scrutiny.

"The guiding principle of the Equal Protection Clause is that similarly situated individuals should be treated alike." *State v. Limon,* 280 Kan. 275, 283, 122 P.3d 22 (2005). When reviewing an equal protection claim, a Kansas court follows a three-step analysis. *State v. LaPointe*, 309 Kan. 299, 316, 434 P.3d 850 (2019). First, it examines whether the law creates a classification that results in different treatment of individuals who are similarly situated. *Id.* If it finds that individuals who are

"arguably indistinguishable" are being treated differently, the court then determines the appropriate level of scrutiny by considering the nature of the classification or the rights involved. *Id.* Finally, the court applies that level of scrutiny to evaluate the constitutionality of the statute. *Id.*

Notably, Defendants do not dispute that the Abortion Restrictions create a classification that treats similarly situated individuals differently. *See LaPointe*, 309 Kan. at 316; *Limon*, 280 Kan. at 283; *cf.* Mot. Dismiss at 14–16. Because Defendants have not raised this argument, it is waived at this stage and cannot be raised for the first time in reply. *See City of Wichita v. McDonald's Corp.,* 266 Kan. 708, 724, 971 P.2d 1189 (1999) ("A reply brief is an inappropriate vehicle for raising additional issues."). Therefore, the allegation of the classifications created by the laws is unchallenged and not within the scope of the motion to dismiss.

There is no question that APRNs and those who employ them are being treated differently when it comes to abortion medication than all other medication. Defendants similarly do not challenge that. Finally, Defendants do not really engage with the scrutiny standards.

Federal and Kansas courts have long recognized three levels of scrutiny in equal protection cases. *Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 316, 255 P.3d 1186 (2011). The rational basis standard asks whether a statutory classification is reasonably related to a legitimate legislative purpose. *Id.* The heightened, or intermediate, scrutiny standard requires that the classification substantially advance an important legislative objective. *Id.*

Finally, the strict scrutiny standard demands that the classification be narrowly tailored to serve a compelling state interest. *Id.* "[I]n cases involving 'suspect classifications' or 'fundamental interests'[,] the presumption of constitutionality displaced and the burden [is] placed on the party asserting constitutionality to demonstrate a compelling state interest which justifies the classification." *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987). A challenged law will only be subject to the rational basis test if the legislative classification neither targets a suspect class nor burdens a fundamental right. *Limon*, 280 Kan. at 283–84.

### C. Applying the Equal Protection Standard, Plaintiffs Bring Plausible Claims that the Nature of the Classifications and the Discrimination Implicate a Fundamental Right.

Claims 1 and 2—though not substantively contested in Defendants' motion—alleges that Kansas law discriminates against Plaintiffs' patients in a manner that infringes on their constitutional right to access abortion care free from undue governmental interference. As established in *Hodes I*, 309 Kan. at 646, and reaffirmed in *Hodes II*, 318 Kan. at 950 and *Hodes III*, 318 Kan. at 1005, laws that burden the right to abortion are subject to strict scrutiny under the Kansas Constitution.

Plaintiffs allege concrete and substantial burdens on their patients' ability to access abortion care. Medication abortion is time-sensitive and available only in the early weeks of pregnancy. Pet. ¶¶ 17, 84–85. The Abortion Restrictions delay access by barring APRNs from prescribing this care, pushing some patients beyond the gestational window in which medication abortion remains a medically appropriate option. Pet. ¶¶ 84–87. These delays are not theoretical—they can result in the total

denial of abortion care, especially for patients for whom medication abortion is medically indicated or personally preferred. *Id.*

The harms are particularly acute in Kansas, where APRNs serve as critical providers for patients in low-income and rural communities. Pet. ¶¶ 31–32. By excluding APRNs from providing this care, Kansas law reduces the pool of qualified providers, creates unnecessary barriers, and denies patients timely, evidence-based treatment. *See* Pet. ¶¶ 96–100. Plaintiffs further allege that APRNs are highly trained in reproductive health care and fully capable of safely managing medication abortion. Pet. ¶¶ 31–32. These allegations are more than sufficient to state a constitutional violation. Even minimal burdens on the right to abortion trigger strict scrutiny. *Hodes III*, 318 Kan. at 1005, 1010.

Claims 3 and 4 assert that these same restrictions also violate the rights of Plaintiffs Aria Medical and Elyse Gilbert. Plaintiffs allege that the laws discriminate against them in a manner intended to burden their patients' fundamental rights—bringing their claims within the ambit of strict scrutiny as well. In the alternative, Plaintiffs argue that even under rational basis review, the Abortion Restrictions are unconstitutional, as they bear no reasonable relationship to a legitimate government interest.

### D. The Abortion Restrictions Also Cannot Withstand a Rational Basis Review.

Even under the most deferential standard, the Abortion Restrictions fail because they arbitrarily target abortion without a rational justification. Kansas equal protection law mandates that classifications are not arbitrary, irrational, or

unrelated to a legitimate governmental purpose. *Peden v. State*, 261 Kan. 239, 252–53, 930 P.2d 1 (1996). While the rational basis standard is lenient, it is hardly "toothless." *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 194–95, 273 P.3d 709 (2012). A proffered rational basis must be more than simply a legitimate goal—the classification must bear some reasonable relationship to the asserted legislative objective. *See Mudd v. Neosho Memorial Regional Medical Center*, 275 Kan. 187, 198, 62 P.3d 236 (2003) (cleaned up). "Put another way, the proffered rational basis must both explain the distinction drawn by the statute between two classes of individuals *and* be a legitimate legislative objective. *See State v. Cheeks*, 298 Kan. 1, 8, 310 P.3d 346 (2013), *overruled in part*, *Lapointe*, 309 Kan. at 318.

Here, Plaintiffs argue that Kansas law irrationally prohibits APRNs from prescribing misoprostol and mifepristone *only* when used for abortion, even though APRNs are otherwise permitted to prescribe these same medications for a wide range of other medical purposes—including life-threatening and complex conditions. Misoprostol is commonly prescribed by APRNs to treat postpartum hemorrhage, manage miscarriage, prevent gastric ulcers, support arthritis treatment, and assist in labor induction and IUD placement. Pet. ¶¶ 66–72. Mifepristone, similarly, is used by APRNs to manage miscarriage and treat conditions such as endogenous Cushing's Syndrome, uterine fibroids, and ovarian cancer. Pet. ¶¶ 74–78.

APRNs are legally authorized to prescribe both drugs for these non-abortion uses so long as doing so falls within their scope of practice. Pet. ¶ 79. Yet Kansas prohibits APRNs from prescribing either medication when the purpose is abortion—

*despite the fact that the drugs are the same, and in some cases, their medical effects are identical*. This prohibition, therefore, cannot be justified by concerns over patient safety or clinical risk.[8] Moreover, the overwhelming facts demonstrate safety. *See* Pet. ¶¶ 48–89, *cf. infra* 23–24. In fact, Plaintiffs allege that APRNs regularly prescribe medications with far greater potential for harm, including controlled substances that carry significant risks of addiction and overdose. Pet. ¶ 80. This contradiction exposes the lack of any rational basis for the abortion-specific restriction. The Abortion Restrictions arbitrarily single out abortion care for more burdensome treatment without a legitimate justification and disregard the medical judgment of qualified providers.

Moreover, a State desire to infringe upon the fundamental right of bodily autonomy is an illegitimate state goal. This is sufficient to defeat Defendants' motion to dismiss. Even if strict scrutiny does not apply, the irrationality of the classification independently renders the law unconstitutional.

[8]Also, as alleged in the Petition, there is no active physician-only law. Each law cited in Defendants' motion suggesting a physician-only requirement for abortion care has been temporarily enjoined. *See In re Hodes & Nauser MDs, P.A. v. Kobach*, Case No. 23CV03140, 2023 WL 7130406, at *42 (10th Jud. Dist. Ct., Oct. 30, 2023). The only statutes not enjoined are K.S.A. 65-6703 (which only applies to abortions occurring outside the time window of medication abortion: after viability); K.S.A. 65-6704 (which would suggest a physician must be on a case with a minor, but that does not mean that an APRN could not prescribe medication); K.S.A. 65-6705 (which references physicians and abortion clinic staff); and K.S.A. 65-6711 (which provides a physician may need to inform a woman of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death, but that does not say only a physician can prescribe.)

## IV. Plaintiffs Allege Concrete and Ongoing Harms—Laches Does Not Apply.

As a threshold matter, laches is an affirmative defense and is not appropriately resolved on a motion to dismiss unless it clearly appears on the face of the petition. *See* K.S.A. 60-208(c); *Weaver v. Frazee*, 219 Kan. 42, 52, 547 P.2d 1005 (1976). "[I]t is only when such defenses clearly appear on the face of the petition that [a claim] is subject to dismissal under 60-212(b)(6)." *Id.* Because the facts necessary to establish laches—unreasonable delay and resulting prejudice—do not appear in the Petition, Defendants' attempt to invoke laches at this stage must be rejected. Moreover, the facts Plaintiffs would establish to defeat laches (such as the petition being filed mere months after Ms. Gilbert was licensed as an APRN in Kansas) cannot be introduced in evidence at this stage.

Even setting aside this procedural defect, Defendants' laches argument fails on the merits. The mere passage of time does not warrant application of laches. *Steele v. Guardianship & Conservatorship of Crist*, 251 Kan. 712, 725, 840 P.2d 1107 (1992). Courts must consider both the reasonableness of any delay and whether that delay caused actual prejudice. *Id.*; *Dutoit v. Bd. of Cnty. Comm'rs*, 233 Kan. 995, 1001, 667 P.2d 879 (1983).

First, Plaintiffs have not delayed in asserting their rights. This lawsuit was filed approximately nine months after the Kansas Supreme Court invalidated the physician-only in-person restriction in *Hodes III*, 318 Kan. at 995. The law challenged here was enacted before Aria Medical began providing care in Kansas and before it employed an APRN. *See* Pet. ¶¶ 14, 43–47. Plaintiffs acted with diligence upon

experiencing and understanding the burdens the Abortion Restrictions impose. This timeline is nowhere near the kind of delay found unreasonable in cases like *Roach v. State*, 27 Kan. App. 2d 561, 563, 7 P.3d 319 (2000), where plaintiffs waited decades to act.

Second, Defendants have not shown—and cannot show—prejudice resulting from any alleged delay. To invoke laches, the defendant must demonstrate that the delay disadvantaged them in a legally cognizable way. *See Clark v. Chipman*, 212 Kan. 259, 269, 510 P.2d 1257 (1973); *Calkin v. Hudson*, 156 Kan. 308, 318, 133 P.2d 177 (1943). Defendants vaguely reference a reliance interest in limiting abortion care to physicians, but cite no specific detriment. *See* Mot. Dismiss at 17-18. Indeed, the statutes Defendants rely on to support their position are currently enjoined in other litigation. *See In re Hodes & Nauser MDs, P.A. v. Kobach*, No. 23CV03140, 2023 WL 7130406, at *42 (Kan. 10th Jud. Dist. Ct., Oct. 30, 2023); *see also supra* n.8. Furthermore, the claim that non-party healthcare providers may have structured operations around the alleged physician-only rule is speculative and irrelevant. Plaintiffs challenge a restriction that currently burdens their own practice and their patients; the lawsuit does not disrupt any protected reliance interests.

Third, Defendants' reliance on election-related cases is misplaced. Courts apply laches more readily in election challenges because of the inherent time sensitivity of electoral processes. *See Perry v. Judd*, 471 F. App'x 219, 220–21 (4th Cir. 2012); *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 924 (D. Ariz. 2016). In those cases, courts found undue delay where plaintiffs waited until ballots

were printed or deadlines had passed. No such exigency exists here. Plaintiffs seek declaratory and injunctive relief from ongoing constitutional violations—not last-minute changes to imminent elections. The equitable considerations underlying laches in election law are inapplicable.

In sum, Plaintiffs' claims were filed promptly, Defendants show no prejudice, and laches does not appear on the face of the Petition. As such, the doctrine does not bar this suit, and its invocation at the pleading stage is procedurally improper.

## V. Safety Concerns Asserted by Defendants Are Factual and Inappropriate for a Motion to Dismiss.

On a motion to dismiss, this Court must take all factual allegations in the Petition as true and the Court cannot even consider, let alone take as true, the submission of new factual allegations by the moving party. *Rodina*, 60 Kan. App. 2d at 386; *Rogers*, 64 Kan. App. 2d at 290. And yet, several pages of Defendants' Motion to Dismiss are inappropriately filled with allegations not within the Petition that Defendants clearly hope will sway this Court. It categorizes these new facts as statements of law—they are not. *See* Mot. Dismiss, n.1.[9]

The Petition in this case is what governs this Court, and the Court must only consider the ample allegations that support safety. APRNs are fully capable of safely providing medication abortion, consistent with their education, training, licensure, and scope of practice in Kansas. Pet. ¶¶ 29, 48–64. APRNs are highly educated

[9]The full "Background" section in Defendants' motion should be struck beyond the references to the Petition, and Plaintiffs assert that the Petition speaks for itself. *See* Mot. Dismiss at 2–5.

clinicians who routinely prescribe a wide range of medications—including controlled substances and uterotonic agents such as mifepristone and misoprostol—for a variety of indications. Pet. ¶¶ 65–80. Extensive medical literature and data from both national and international studies confirm that medication abortion provided by non-physician clinicians, including APRNs, is equally safe and effective as when provided by physicians. Pet. ¶ 48. A retrospective cohort study from Iowa, for example, found no significant difference in safety or outcomes between in-person and telemedicine medication abortions, including when provided by non-physician clinicians. Pet. ¶ 49. A study done using data from hospitals in Nepal produced similar results. Pet. ¶ 52. Serious complications from medication abortion are exceedingly rare, with rates of major adverse events consistently falling below 0.5%. Pet. ¶ 83. Moreover, the World Health Organization, the American College of Obstetricians and Gynecologists, and numerous other leading medical and public health associations support the delivery of medication abortion care by appropriately trained non-physician providers. Pet. ¶¶ 53–64. Prohibiting APRNs from providing medication abortion care conflicts with the positions and recommendations of the nation's and the world's leading public health and medical professionals. *Id.*

The Abortion Restrictions in Kansas operate not to enhance patient safety, but to arbitrarily withhold access to safe, evidence-based care. Plaintiffs seek to lift these unlawful restrictions in order to deliver care that is fully within APRN competence and training, consistent with best practices in medicine and public health. They also seek to vindicate the rights of their patients who have the constitutional right to

access this care. At this stage, Plaintiffs have more than met their burden of alleging that the Abortion Restrictions are not about safety, and any arguments that Defendants make to the contrary cannot and should not be considered by this Court.

### VI. Defendants' Motion to Dismiss Is Untimely as to Defendants Moreland, Watson, and Bennett.

Three Defendants—Carol Moreland, Andrea Watson, and Marc Bennett—filed this motion after the deadline to do so had passed. Under K.S.A. 60-212(a), a defendant must serve either an answer or a motion under subsection (b) within 21 days of service of the summons and petition. Based on the filed Returns of Service and Clerk's Extension obtained, these three defendants were required to file their responsive pleading by June 2, 2025.

Defendants Moreland, Watson, and Bennett did not file their motion until June 3—one day after their extended deadline had expired. They have offered no explanation or showing of good cause for their failure to timely file. Because untimely motions to dismiss are improper under Kansas law absent excusable neglect or leave of court, this Court should deny their motion as procedurally barred.

## CONCLUSION

Defendants' motion to dismiss should be denied in its entirety. Plaintiffs have properly alleged viable constitutional claims under the Kansas Constitution Bill of Rights, including violations of both the fundamental right to personal autonomy and the guarantee of equal protection. Plaintiffs also have standing to assert these claims on behalf of themselves and their patients, consistent with well-settled Kansas and federal precedent on third-party standing. Defendants' arguments regarding

necessary parties and laches are both legally and factually unsupported. Moreover, Defendants Moreland, Watson, and Bennett filed their motion outside the extended deadline without explanation, and their motion is therefore procedurally improper.

At this stage, the Court must accept Plaintiffs' well-pleaded allegations as true. Those allegations more than suffice to move this case past the pleading stage and into discovery. The harms at issue are ongoing and substantial. Dismissing this action now would unjustly foreclose judicial review of laws that intrude upon Kansans' constitutional rights and arbitrarily burden safe, evidence-based medical care. Plaintiffs respectfully request that the Court deny Defendants' motion and permit this case to proceed.

Dated: June 24, 2025

Respectfully submitted,

**JOSEPH HOLLANDER & CRAFT LLC**

/s/ Anne M. Kindling
Anne M. Kindling, #16140
1508 SW Topeka Blvd
Topeka, KS 66612
Phone: (785) 234-3272
Fax: (855) 955-1318
akindling@josephhollander.com

Samantha M. Fisher, #30490
10104 W. 105th Street
Overland Park, KS 66212
Phone: (913) 361-6450
Fax: (855) 955-1318
sfisher@josephhollander.com

and

**LAWYERING PROJECT INC.**

Jamila Johnson*
3157 Gentilly Blvd., No. 2231
New Orleans, LA 70122
Phone: (347) 706-4981
Fax: (646) 480-8622
jjohnson@lawyeringproject.org

Ronelle Tshiela*
1525 S. Willow Street, Unit 17, #1156
Manchester, NH 03103
Phone: (347) 429-9834
Fax: (646) 480-8622
Rtshiela@lawyeringproject.org

Paige Suelzle*
158 SW 148th Street #1198
Burien, WA 98166
Phone: (347) 515-6073
Fax: (646) 480-8622
psuelzle@lawyeringproject.org

*Admitted *pro hac vice*

*Attorneys for Plaintiffs*

## CERTIFICATE OF SERVICE

I, Anne M. Kindling, do hereby certify that on June 24, 2025, I caused the foregoing to be electronically filed using with the Clerk of the Court using Kansas E-Filing system, which will send notice of electronic filing to all counsel of record.

James Rodriguez
Office of Kansas Attorney General
120 SW 10th Ave, 2nd Floor
Topeka, KS 66612
Jay.Rodriguez@ag.ks.gov

Andrew Nussbaum
First & Fourteenth PLLC
2 N. Cascade Ave., Suite 1430
Colorado Springs, CO 80903
andrew@first-fourteenth.com

Chad E. Blomberg
Brad P. Johnson
First & Fourteenth PLLC
6400 Glenwood St., Suite 201
Overland Park, KS 66202
chad@first-fourteenth.com
brad@first-fourteenth.com

*Attorneys for Defendants*

/s/ Anne M. Kindling
Anne M. Kindling