IN THE DISTRICT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

HODES & NAUSER, MDs, P.A., on behalf of itself, its patients, physicians, and staff; TRACI LYNN NAUSER, M.D.; TRISTAN FOWLER, D.O.; and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself and its patients, physicians, and staff, Plaintiffs, v. KRIS KOBACH, in his official capacity as Attorney General of the State of Kansas; STEPHEN M. HOWE, in his official capacity as District Attorney for Johnson County; MARC BENNETT, in his official capacity as District Attorney for Sedgwick County; MARK A. DUPREE SR., in his official capacity as District Attorney for Wyandotte County; SUSAN GILE, in her official capacity as Executive Director of the Kansas Board of Health Arts; and RONALD M. VARNER, D.O., in his official capacity as President of the Kansas Board of Healing Arts, and JANET STANEK, in her official capacity as Secretary of the Kansas Department of Health and the Environment Defendants.	Case No. 23CV03140 Division No. 12 K.S.A. Chapter 60

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Defendants, Kansas Attorney General Kris W. Kobach and District Attorneys Stephen M. Howe, Marc Bennett, and Mark A. Dupree, Sr. ("Defendants"), submit this brief in support of their motion to dismiss Plaintiffs' Amended Petition because the petition fails to state free speech or equal protection claims under the Kansas Constitution and because its vagueness claim is not ripe. See K.S.A. 60–212(b)(1), (6).

INTRODUCTION

Plaintiffs ask this Court to strike down every single provision in Kansas's longstanding informed-consent statute for abortion, the Woman's Right to Know Act ("the Act"), most of which has been in effect since 1997. The Amended Petition alleges that the Act—which Plaintiffs concede they have complied with for decades—violates multiple provisions of the Kansas Constitution. Yet several of Plaintiffs' sweeping claims (specifically, those involving free speech and equal protection) lack support in either fact or law. And their vagueness claim is unripe.

First, Plaintiffs bring a free speech claim against the entire Act and make specific free-speech allegations as to certain portions of the statute. But the Amended Petition fails to allege that several provisions of the Act regulate speech at all, even incidentally.

Second, Plaintiffs assert only a bare legal conclusion that the Act constitutes sex discrimination in violation of equal protection. Such a claim has never been accepted by any Kansas court, and every federal court to consider a sex-discrimination claim based on equal protection has rejected it out of hand—even under *Roe v. Wade*. The Amended Petition further fails to allege any facts suggesting that the Act is sex-based rather than procedure-based, or that women and men are similarly situated when it comes to pregnancy, as would be required to state an equal protection claim.

Third, the Amended Petition alleges that a new provision of the Act, H.B. 2264, 2023 Leg., 90th Sess. (Kan. 2023), is unconstitutionally vague; but Plaintiffs do not allege that it will ever be operative as written. H.B. 2264 simply describes, in a general sense, information that a state agency must publish in print and on its website. Circumstances that would require Plaintiffs to provide that information to women cannot arise until we know precisely what it is the agency determines should be provided. Without any agency-promulgated language, there is nothing for the Court to consider; Plaintiffs are fighting a phantom.

For these reasons, the State urges this Court to dismiss Plaintiffs' second claim for relief in part, and the fourth and fifth claims for relief entirely.

STATEMENT OF FACTS

The Legislature first enacted the Woman's Right to Know Act in 1997 and has amended the Act several times since. The Act's purpose is to protect unborn life and women's health by ensuring that women who seek an abortion have received all information necessary to inform their decision, as part of informed consent. The Act accomplishes this purpose in two ways.

First, the Act directs physicians to provide information about the nature of the abortion procedure, its risks and consequences, and its alternatives, at least 24 hours before performing an abortion. K.S.A. 67-6509(a), (b), (d), 67-6510; H.B. 2264 § 1(c). It further requires that physicians offer women the opportunity to view the ultrasound image and listen to the fetal heartbeat of her unborn child at least 30 minutes before the abortion procedure. K.S.A. 65-6709(h), (i). These requirements are waived in the case of a medical emergency. K.S.A. 65-6709, 65-6711.

Second, the Act requires facilities that offer abortion to provide notices informing women of their rights related to abortion and informed consent. K.S.A. 65-6709(k); H.B. 2264 § 1(b). The notice must include information on reversing the

effects of an incomplete medication abortion, if a woman wishes to continue her pregnancy, and "other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion." H.B. 2264 § 1(b)(1). The 2023 amendment to the Act instructs the Kansas Department of Health and Environment ("KDHE") to publish this information and resources on its website within 90 days of the July 1, 2023, effective date. § 1(e).

LEGAL STANDARD

This Court should dismiss claims in Plaintiffs' Amended Petition if it has "fail[ed] to state a claim upon which relief can be granted," K.S.A. 60-212(b)(6). In doing so, it must "assume as true the well-pled facts and allegations" in "the petition." *Steckline Commc'ns v. J. Broad. Grp. of Kan.*, 305 Kan. 761, 768, 388 P.3d 84, 90 (2017). However, courts are not "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." *Weil & Assocs. v. Urb. Renewal Agency*, 206 Kan. 405, 413–14, 479 P.2d 875, 883 (1971); *see also Kurcharski-Berger v. Hill's Pet Nutrition, Inc.*, 60 Kan. App. 2d 510, 515–16, 494 P.3d 283, 289 (2021).

ARGUMENT

I. Plaintiffs' free speech claim must be dismissed in part because the Amended Petition fails to allege that several provisions of the Act regulate speech at all.

Plaintiffs allege, in a conclusory fashion, that the entire Act infringes their state constitutional right to free speech. (Doc. 35 ¶ 135) (challenging K.S.A. 65-6708–65-6715).[1] But they do not (and cannot) allege that numerous provisions regulate speech at all, even incidentally. See K.S.A. 65-6708 (naming the Act); 65-6709 (e), (f),

[1] This motion does not address section 65-6713 because it was repealed in 2011.

(j) (certification, reporting, and recordkeeping requirements); 65-6709(g) (providing that the woman need not pay for the abortion until the 24-hour waiting period has expired); 65-6709(m)(2) (defining "medically challenging pregnancy"); 65-6710(b) (printing and video formatting requirements for the state-published materials); 65-6710(c) (requirement that the state-published materials be available at no cost to the provider); 65-6714 (severability clause); 65-6715 (clarifying the legality of abortion); H.B. 2264 §§ 1(a), 3, 4, 6, 7 (definitions); §§ 1(k), 5 (naming the amendment); § 1(j) (severability clause for provisions regarding abortion pill reversal); § 2 (provisions concerning insurance); § 8 (repealing certain provisions); § 9 (providing that amendment becomes effective upon publication).

Similarly, Plaintiffs do not allege that the Act's medical emergency exception, K.S.A. 65-6709; H.B. 2264 § 1(c)(1), (d); its informed consent waiting period, 65-6709(a), (b), (d); H.B. 2264 1(c)(1), (d); its ultrasound waiting period, K.S.A. 65-6709(c), (h), (i); its requirement that KDHE publish certain informational materials, § 6710(a); H.B. 2264 § 1(e); or its enforcement mechanisms, K.S.A. 65-6712; H.B. 2264 § 1(f)–(i), regulate Plaintiffs' speech.[2]

Because Plaintiffs' free speech claim "do[es] not reasonably follow from" their "description" of these provisions, this Court is not "required to accept" Plaintiffs' "conclusory allegation[] that those provisions "infringe[] Plaintiffs' right to free speech." *Weil*, 206 Kan. at 413–14. Therefore, this Court should dismiss Plaintiffs' free speech claims as to those provisions.

II. Plaintiffs fail to state a claim that the Act violates equal protection by discriminating on the basis of sex.

Plaintiffs also fail to allege a cognizable equal-protection sex-discrimination claim. The fourth claim for relief alleges that the Act "den[ies] equal protection of

[2] Plaintiffs also challenge the Act's signage provisions and provision requiring a clinic to publish a statement on its website. K.S.A. 65-6709(k), (l); H.B. 2264 1(b). State Defendants do not move to dismiss Plaintiffs' free speech claims as to these provisions.

laws to Plaintiffs' patients" for two reasons: (1) "it singles out women and people capable of becoming pregnant" and (2) "it perpetuates sex-based stereotypes." (Doc. 35 ¶ 139). But neither allegation is sufficient to state an equal protection claim.

First, "a threshold requirement for stating an equal protection claim is to demonstrate that the challenged statutory enactment treats 'arguably indistinguishable' classes of people differently." *In re Weisgerber*, 285 Kan. 98, 106, 69 P.3d 321, 328 (2007). But Plaintiffs do not allege that men and women are similarly situated when it comes to pregnancy or abortion—nor could they credibly do so. "[M]en and women are not similarly situated when it comes [to] pregnancy and abortion." *Planned Parenthood Great Nw., v. State*, 522 P.3d 1132, 1198 (Idaho 2023). "Only women are capable of pregnancy; thus, only women can have an abortion." *Id.*, 522 P.3d at 1198. It would be nonsensical to require the State to apply its informed consent law to biological men.

Nor does the Act single out "people capable of becoming pregnant," (Doc. 35 ¶ 139). Instead, it applies only to abortion providers. K.S.A. 65-6709 et seq. That distinction makes sense because "the goal" of ensuring that patients choosing abortion are well informed "*necessarily requires* a regulation that affects the only sex who can become pregnant, i.e., women," and only that subset of women who are currently pregnant and seeking an abortion. *Planned Parenthood Great Nw.*, 522 P.3d at 1199.

Neither any Kansas case (including *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019)) nor any federal case suggest that abortion regulations present a sex-discrimination issue. Indeed, the U.S. Supreme Court squarely held last year that "a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Dobbs v. Jackson Women's Health Org.*, ___ U.S. ___ , 142 S. Ct. 2228,

2245 (2022). But even before *Dobbs*, the Court had long held that "legislative classification[s] concerning pregnancy" were not discriminatory sex-based classifications and that regulations of medical procedures touching on pregnancy do not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other," *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20, 94 S. Ct. 2485, 2492 n. 20, 41 L. Ed. 2d 256 (1974). Or, more directly, that disfavoring abortion or encouraging women to carry a pregnancy to term does not constitute "invidiously discriminatory animus" against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74, 113 S. Ct. 753, 761, 122 L. Ed. 2d. 34 (1993).

Similarly, two state supreme courts recently rejected sex-discrimination challenges to abortion laws for the same reasons. *See Planned Parenthood Great Nw.*, 522 P.3d at 1198 ("[N]one of these statutes classifies on the basis of sex alone or sexual stereotypes because men and women are not similarly situated when it comes [to] pregnancy and abortion."); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 743 (Iowa 2022) (upholding informed consent law against state constitutional challenge because "[w]omen undeniably are not" similarly situated to men as it relates to pregnancy).

The Kansas Supreme Court in *Hodes* did not reject these holdings. Instead, it distinguished section 1 of the Kansas Constitution Bill of Rights from the federal Fourteenth Amendment on the basis of its language concerning natural rights, a term which "no provision of the United States Constitution uses." *Hodes*, 309 Kan. at 472. The court's statements about "gender bias" cited by Plaintiffs, (Doc. 35 ¶ 129), support the conclusion that Kansas's constitutionally protected "natural rights" apply to women as well as men. The case does not imply some unique sex-discrimination cause of action against state abortion laws. *See Hodes*, 309 Kan. at 491. And the court

specifically rejected the view that "section 1 should be applied in two different ways—one way for equal protection analysis and another for violation of a substantive right." *Hodes*, 309 Kan. at 495.

Second, Plaintiffs have not pleaded sufficient facts to support their conclusory allegation that the Act "perpetuate[s] sex-based stereotypes," (Doc. 35 ¶ 139). *See generally Weil*, 206 Kan. at 413–14 (explaining that the court is not "required to accept conclusory allegations on the legal effects" of facts "if these allegations do not reasonably follow from" those facts). For example, Plaintiffs' claim that the Act assumes "motherhood is the appropriate role for women," (Doc. 35 ¶ 139), is implausible. On the contrary, it requires providers to specifically inform women that "[t]he father of a child has a legal responsibility to provide for the support, educational, medical and other needs of the child" and that "couples facing an untimely pregnancy who choose not to take on the full responsibilities of parenthood have another option, which is adoption." K.S.A. 65-6710(a)(3). Nor does the Act assume that "women need paternalistic State intervention to guide their decision to continue or terminate a pregnancy." (Doc. 35 ¶ 139). Instead, it specifically provides that "[i]t is against the law for anyone . . . to force you to have an abortion" and that the abortionist "cannot perform an abortion on you unless [he or she] ha[s] your freely given and voluntary consent." K.S.A. 65-6709(k). Thus, the Act is "calculated to inform the woman's free choice, not hinder it." *Planned Parenthood v. Casey*, 505 U.S. 833, 877, 112 S. Ct. 2791, 2820, 120 L. Ed. 2d 674 (1992). Plaintiffs' failure to allege plausible facts supporting a "stereotype" in the Act is fatal to their equal-protection claim. Thus, the Court should dismiss that claim.

III. This Court does not have jurisdiction to decide Plaintiffs' vagueness claim because it is not ripe, and the claim as alleged also fails on its face.

Plaintiffs prematurely challenge as unconstitutionally vague a provision that is not operative and will not be operative until KDHE publishes information to its website and statutory compliance can be assessed. The vagueness allegations also fail to state a claim for relief because the claim is refuted by the face of the statute.

A. Plaintiffs' vagueness claim is hypothetical because the challenged language has not taken final shape.

Plaintiffs present this Court with an unripe vagueness claim that cannot be adjudicated. "Kansas courts are constitutionally without authority to render advisory opinions, and a court's jurisdiction to issue an injunction is dependent upon the existence of an actual case or controversy." *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 165, 210 P.3d 105, 109 (2009). "As part of the Kansas case-or-controversy requirement in an injunction action, courts require [that] . . . issues must be ripe, having taken fixed and final shape rather than remaining nebulous and contingent." *Shipe*, 289 Kan. at 160.

The Act provides that a physician performing medication abortion using mifepristone must "inform[] the woman, in writing, . . . and also either by telephone or in person, at least 24 hours prior to the medication abortion" that "information on reversing the effects of a medication abortion that uses mifepristone is available on the department of health and environment's website, . . . and other relevant telephone and internet resources containing information on where the patient can obtain timely assistance to attempt to reverse the medication abortion." H.B. 2264 § 1(b)(1). Plaintiffs allege that this provision is "unconstitutionally vague" because it "does not specify what constitutes such resources or how to go about identifying them." See Doc. 35 ¶ 141. But this claim is not ripe because it has not "taken shape." *Shipe*, 289 Kan. at 17012.

The language Plaintiffs complain of is not enforceable or analyzable until KDHE actually produces a website and identifies the necessary telephone and internet resources. As long as the requirement is "inoperative," "any questions" about the meaning of the requirement "would not have taken fixed and final shape but would remain hypothetical, nebulous, and contingent." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 912, 179 P.3d 366, 390 (2008); see also *In re Brooks*, 228 Kan. 541, 544–45, 618 P.2d 814, 818–19 (1980) (stating statutory vagueness can be ameliorated by later definitive interpretation). Until Plaintiffs are "required to abide by" the requirement "no rights . . . have been abridged." *Morrison*, 285 Kan. at 912. Therefore, no justiciable controversy has materialized.

B. Plaintiffs' vagueness claim fails on its face because it is refuted by the plain text of the statute.

In addition to not being operative, the statute, on its face, refutes Plaintiffs' allegation that *they* must "identify" the "information" and "relevant . . . resources." H.B. 2264 §§ 1(b)(1), (c)(1)(B); Doc. 35 ¶ 141. Rather, the challenged provision requires KDHE to identify that information.

The language in the recently enacted bill tracks identical text elsewhere in the statute. See H.B. 2264 § 1(e). And the "usual presumption [is] that identical words used in different parts of the same statute carry the same meaning." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85, 137 S. Ct. 1718, 1723, 198 L. Ed. 2d 177 (2017) (cleaned up); *cf. State v. Kleypas*, 305 Kan. 224, 262, 382 P.3d 373, 405 (2016) ("[I]dentical words or terms used in different statutes on a specific subject are [ordinarily] interpreted to have the same meaning in the absence of anything in the context to indicate that a different meaning was intended.") (citation omitted).

The statute's use of identical language makes clear that KDHE is charged with publishing specific materials implementing H.B. 2264's content and providing the "relevant telephone and internet resource containing information." H.B. 2264 1(e).

Plaintiffs' allegation that the Act fails to "specify what constitutes such resources or how to go about identifying them," Doc. 35 ¶ 141, is irrelevant. KDHE will identify them. Plaintiffs merely have to point women to that information.

The Amended Petition, therefore, does not and cannot allege a vagueness claim against the information and resources forthcoming on September 28, 2023, and Plaintiffs' allegation that they are unable to "identify" the certain information that the Act "does not specify" fails on its face.

CONCLUSION

For the foregoing reasons, Defendants, Kansas Attorney General Kris W. Kobach and District Attorneys Stephen M. Howe, Marc Bennett, and Mark A. Dupree, Sr., respectfully request that the Court dismiss Plaintiffs' Amended Petition in part.

Respectfully submitted this 25th day of August, 2023.

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CERTIFICATE OF SERVICE

This is the certify that on this 25th day of August, 2023, I filed the above and foregoing with the Clerk of the Court, and served electronically to all counsel of record:

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