ELECTRONICALLY FILED
2019 Jul 08 PM 3:03
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2019-CV-000060

Court: Shawnee County District Court

Case Number: 2019-CV-000060

Case Title: Trust Women Foundation Inc vs. Marc Bennett - District Attorney Sedgwick Co KS, et al.

Type: MDO

SO ORDERED.

/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

TRUST WOMEN FOUNDATION, INC.,

Plaintiff

vs. Case No. 19-CV-60

MARC BENNETT, ET AL.,

Defendants

MEMORANDUM DECISION AND ORDER

This lawsuit involves a constitutional challenge to three state statutes. It comes before the Court at this time on Plaintiff Trust Women Foundation, Inc.'s, motion for a temporary restraining order and temporary injunction. Defendants are Marc Bennett, the Sedgwick County District Attorney; Kathleen Selzer Lippert, executive director of the Kansas Board of Healing Arts; Robin D. Durrett, president of the Kansas Board of Healing Arts; and Derek Schmidt, Attorney General of the State of Kansas. Defendants Lippert and Durrett filed a motion to dismiss, and it is also before the Court. The motions have been fully briefed and argued to the Court. The Court is ready to rule.

STATEMENT OF FACTS

Background.

In 2011, the legislature enacted K.S.A. 65-4a10, which in its original form prohibited drug-induced abortions unless the medications were administered in the physical presence of the physician who prescribed the drug. The statute effectively prohibited the performance of

medication abortions by means of telemedicine. It also said that violation of the statute constitutes unprofessional conduct under K.S.A. 65-2837, part of the Kansas Healing Arts Act.

This law was challenged in a 2011 lawsuit filed in Shawnee County District Court, *Hodes v. Moser, et al.,* case no. 2011-CV-1298 (Division 7) (hereinafter "*Hodes 2011"*).[1] Plaintiffs, two physicians who performed abortions, claimed the statute was unconstitutional and asked the court to enjoin defendants Secretary of the Kansas Department of Health and Environment ("KDHE"), the Attorney General, and the Johnson County District Attorney from enforcing K.S.A. 65-4a10. On December 2, 2011, the court approved an Agreed Order ("2011 Agreed Order") in which the parties agreed that "[d]uring the pendency of these proceedings, defendants shall not seek to enforce either the statutory Act [K.S.A. 65-4a10] or the permanent regulations promulgated by the Kansas Department of Health and Environment."

In 2015, with the lawsuit still pending in Shawnee County District Court, the Kansas Legislature amended aspects of K.S.A. 65-4a10, purportedly in an effort to address the potential constitutional issues identified in the lawsuit. The amended statute took effect on June 11, 2015. Plaintiffs in *Hodes 2011* then amended their petition, alleging that the regulations promulgated by KDHE pursuant to the amended statute were unconstitutional. The *Hodes 2011* lawsuit remains pending in Shawnee County District Court.

The Kansas Legislature passed the Telemedicine Act in 2018. It became law on July 1, 2018, but took effect on January 1, 2019. See K.S.A. 40-2,210. The Telemedicine Act addresses health insurance coverage and information privacy standards for care provided by telemedicine. It does not identify what services may or may not be provided by means of telemedicine. The Telemedicine Act contains one reference to abortion. Section 6, now codified at K.S.A. 40-

[1] This is to distinguish the case from a 2015 lawsuit filed in Shawnee County District Court, *Hodes v. Schmidt, et al.,* case no. 2015-CV-490 (now Division 2), which was ultimately decided by the Kansas Supreme Court at 440 P.3d 461 (Kan. 2019), also cited below.

2,215, states that "[n]othing in the Kansas telemedicine act shall be construed to authorize the delivery of any abortion procedure via telemedicine." Section 7, now codified at K.S.A. 40-2,216, states that K.S.A. 40-2,215 is non-severable; in other words, if K.S.A. 40-2,215 is declared unconstitutional and void, the entire Telemedicine Act is void.

More than three months later, in mid-October 2018, Plaintiff began a brief "pilot program" in its Wichita clinic offering telemedicine abortions. The pilot program is described in more detail below.

On November 8, 2018, a new lawsuit was filed in Shawnee County District Court, *Trust Women Foundation v. Schmidt ("Trust Women I"),* case no. 2018-CV-844 (Division 7), alleging that Sections 6 and 7 of the Telemedicine Act were an unconstitutional infringement on access to abortion. The suit was brought on behalf of Trust Women Foundation, Inc., Plaintiff here, and its patients. Attorney General Derek Schmidt was the lone Defendant.

The district court in *Trust Women I* concluded that Sections 6 and 7 of the Telemedicine Act do not contain an independent ban on telemedicine abortions. The court also stated that the 2011 Agreed Order in *Hodes 2011* remained in effect despite the Kansas Legislature's 2015 revisions to K.S.A. 65-4a10. The court said that "all provisions of [K.S.A. 65-4a10] are enjoined from enforcement" by the 2011 Agreed Order. The case was dismissed on December 31, 2018. It is currently pending on appeal.

The court in *Trust Women I* observed that the 2011 Agreed Order prevented the Attorney General from enforcing K.S.A. 65-4a10 not only against Plaintiff but against others similarly situated. The court did not state whether non-parties, including the Kansas Board of Healing Arts and other county or district attorneys, were enjoined by the 2011 Agreed Order from investigating and prosecuting cases based on violations of K.S.A. 65-4a10.

After *Trust Women I* was dismissed, Trust Women sought written assurances from the Kansas Board of Healing Arts ("the Board") and Bennett that they would not seek to enforce the medication in-person requirement in K.S.A. 65-4a10 and Section 6 of the Telemedicine Act pending appeal of *Trust Women I.* The Board was not a party to *Trust Women I* or the 2011 Agreed Order. The Board did not provide the requested agreement not to enforce the statutes. Similarly, Bennett was not a party to *Trust Women I* or the 2011 Agreed Order. Bennett did not provide the requested agreement not to enforce the statutes.

Trust Women filed the instant petition, on behalf of itself and its patients, against the Sedgwick County District Attorney, the Attorney General, and Board Defendants Lippert and Durrett in their official capacities, challenging K.S.A. 65-4a10 and Sections 6 and 7 of the Telemedicine Act. Trust Women moved the court to: 1) issue a temporary restraining order prohibiting Defendants from enforcing the challenged laws until the court rules on the merits; and 2) grant a temporary injunction prohibiting Defendants from enforcing the challenged laws.

Board Defendants Lippert and Durrett filed a motion to dismiss, or in the alternative judgment on the pleadings, or for a more definite statement. The Board Defendants also filed a response in opposition to the temporary restraining order and temporary injunction. Bennett and Schmidt filed a response in opposition to the temporary restraining order and temporary injunction. This Court held a hearing on May 22, 2019, on the pending motions. No temporary restraining order was issued prior to the hearing. Thus, the motion for temporary restraining order is moot and the matter before the Court is Plaintiff's request for temporary injunction.

Plaintiff presented the testimony of three witnesses: Julie Burkhart, Dr. Colleen McNicholas, and Dr. Daniel Grossman. Defendants presented no witnesses. The matter was

taken under advisement. After review of the file and the testimony presented at the hearing, the Court is ready to rule.

The Wichita clinic.

Plaintiff Trust Women Foundation, Inc. (d/b/a Southwind Women's Center, d/b/a Trust Women Wichita) performs abortions at a clinic in Wichita, Kansas. Plaintiff operates two other clinics in Oklahoma City, Oklahoma, and Seattle, Washington. The Wichita clinic opened in April 2013; the Oklahoma City clinic opened in September 2016; the Seattle clinic opened in June 2017. Three other clinics perform abortions in Kansas. Two are located in the Kansas City metropolitan area, and the third is Planned Parenthood in Wichita.

Burkhart is the founder and CEO of Trust Women. Dr. Colleen McNicholas, D.O., is the medical director of the Wichita clinic. Dr. McNicholas' role as medical director is performed pursuant to an independent contract with Trust Women. Her clinical work at the Wichita clinic is performed and managed through a contract with her employer, Washington University. Dr. McNicholas has never performed a telemedicine abortion.

Trust Women is not licensed by the Board. The Board has no enforcement authority over Trust Women. Trust Women is licensed as an ambulatory surgical center by KDHE and has been since July 2014.

The Wichita clinic is open Monday through Friday, 8 a.m. to 5 p.m. Plaintiff has contracts with two physicians to perform abortions at the Wichita clinic. Both physicians live out of state. Both physicians are licensed by the Board. Plaintiff flies a physician into Wichita to perform abortions on Thursdays and Fridays and "[a]s a result the clinic is only able to provide abortion services on those two days." The limited number of days abortions are performed at the clinic is due to issues related to physician availability. Burkhart testified that "we are limited on a

number of days that we would be able to offer reproductive healthcare," and "it's dependent upon the physicians' schedule that they have elsewhere. And so we schedule around the availability of those doctors."

Currently, the clinic provides medication and surgical first trimester abortions, and second trimester surgical abortions up until 21 weeks, 6 days of pregnancy, as measured from the first day of the woman's last menstrual period ("LMP"). Plaintiff offers medication abortions up to 10 weeks LMP. Plaintiff charges $650 to $700 for a first trimester medication or surgical abortion. Plaintiff charges $600 to $650 for a telemedicine medication abortion. Plaintiff charges $750 to $2,350 for a second trimester surgical abortion.

Medication abortion involves the use of medications to terminate a pregnancy. In a medication abortion, the patient takes the first tablet of mifepristone, and then 24-48 hours later the patient takes four tablets of misoprostol. Both are usually administered buccally; that is, placed in the cheek pouch, between the gums and the cheek, and allowed to dissolve for 30 minutes before swallowing. Generally speaking, patients take the first medication, mifepristone, in the clinic. According to Dr. Grossman's testimony at the hearing, this medication "starts the process" but the abortion "does not happen at that moment." The patient then takes the second medication, misoprostol, at home. The testimony at the hearing was that the "abortion happens generally after the patient takes the second medication at home, and that's when the cramping and bleeding begin."

Plaintiff complied with the physician-in-person requirement of K.S.A. 65-4a10 until October 2018. On October 13, 2018, the Wichita clinic began offering telemedicine abortions as a pilot program. Burkhart said telemedicine abortions at the Wichita clinic were deemed a "pilot program" because they were a new service.

Plaintiff adopted a protocol for the provision of medication abortions via telemedicine. When a woman calls Plaintiff seeking a medication abortion, an appointment is scheduled. The patient arrives at the clinic for the appointment and completes the intake process. She is then taken to a room for recording of vital signs. A staff member performs an ultrasound. The doctor accesses a videoconference platform to review the patient's chart and evaluate the ultrasound results. The doctor speaks to the patient via videoconference. The patient then leaves to meet with a staff person to talk about the procedure and other options. If the patient decides to proceed with the abortion, she schedules a follow up appointment at the clinic 14-21 days later. The patient then returns to videoconference with the doctor. The doctor confirms the patient's eligibility for a medication abortion. At the doctor's direction, the staff person gives the patient one tablet of mifepristone, and the patient takes the tablet within sight of the doctor through the videoconference platform. The patient receives instruction on the second set of pills to take at home.

The patient returns to Plaintiff's clinic for the scheduled follow up visit 14-21 days later. The patient takes a pregnancy test and sees a doctor in person. Burkhart testified that this occurs because if the patient is still pregnant at the second appointment "we want to give an opportunity for the physician to evaluate that patient at that time."

Under the pilot program, patients still had to travel to the Wichita clinic for both the first and second appointments. Under Plaintiff's protocols for in-person and telemedicine abortions, the patient must return to the clinic for a follow up appointment 14-21 days later to see a doctor in person. Thus, all medication abortion follow up appointments are scheduled for days when a physician is physically present in the clinic. The only difference in Plaintiff's protocol for in-

person medication abortions and telemedicine medication abortions is that the doctor is not present in person for the first visit.

Burkhart testified that, for the two and a half months Plaintiff provided telemedicine medication abortions, Plaintiff was able to offer an additional 8 to 12 hour per week of abortions through one of the out-of-state doctors who already contracted with Plaintiff. She testified that in-clinic wait times were reduced for telemedicine abortion patients.

Plaintiff stopped providing telemedicine abortions on December 31, 2018. Burkhart testified that Plaintiff stopped providing telemedicine abortions at that point due to her perception that the Telemedicine Act, which went into effect on January 1, 2019, banned telemedicine abortions.

Burkhart testified that because of the gestational limit for medication abortions, some of Plaintiff's patients obtained a surgical abortion rather than a medication abortion. Burkhart testified that there are any number of reasons—unrelated to the State's ban on telemedicine abortions in K.S.A. 65-4a10—that can result in Plaintiff's patients falling outside the 10-week window for a medication abortion, including that the patient did not realize she was pregnant right away or that she failed to call to make an appointment in time. At the hearing, Plaintiff did not offer evidence of any patient that was not able to obtain a medication abortion because of the ban on telemedicine abortion.

Burkhart testified that Plaintiff is exploring options to rent medical office space to expand into remote areas of Kansas in order to improve access to telemedicine abortions. However, Plaintiff has not reviewed any real estate listings or visited any potential sites for possible medical office space. Plaintiff has not hired a commercial real estate agent to look for possible medical office space in western Kansas. Burkhart testified that such an undertaking requires a

significant amount of time and financial resources, and Plaintiff has made a strategic decision to expand its reach in Kansas only incrementally.

Plaintiff's expert, Dr. Grossman, testified that providing medication abortions by telemedicine can increase access to medication abortions. He based this testimony primarily on a study he helped conduct of Planned Parenthood's network of 17 clinics in Iowa. But he admitted that because the Iowa study involved "many more clinics," the "improvements in access" in Kansas "would be of a smaller magnitude given that telemedicine is being used at a single site."

Plaintiff provided no evidence that providing medication abortions by telemedicine from a single clinic in Wichita, using protocols that require women to travel to the clinic even when the medication abortion is performed by telemedicine, and require women to travel back to the clinic for a follow-up appointment with a physician in person, expands access to abortion for women in remote rural areas of Kansas.

Kansas Board of Healing Arts.

The Board's general duties and responsibilities are set forth in K.S.A. 65-2801 *et seq.* and regulations contained in K.A.R. 100-1-1 *et seq.,* known generally as the Kansas Healing Arts Act. The Board was created by statute and is required to fulfill its statutory mission of protecting the public. The Board fulfills its statutory mission by investigating complaints related to a medical professional's compliance with the applicable practice act.

When the Board receives a complaint with allegations of a violation of the Kansas Healing Arts Act, it triggers a process of evaluation, investigation, internal review, and hearings. See K.S.A. 65-2836; K.S.A. 65-2838; K.S.A. 65-2838a; K.S.A. 65-2839a; K.S.A. 65-2840a; K.S.A. 65-2840c; K.S.A. 65-2851a. An investigation is opened only if the complaint alleges facts that, if true, may indicate a potentially actionable violation.

Investigations involve collecting records, interviewing patients or witnesses, and other standard investigative processes. The licensee is directly notified that an investigation has been opened. After the investigation is complete, the matter is subject to an internal review process. The results of the investigation are reviewed by a staff attorney. Then the investigation may go to a peer review committee.

If not closed after the peer review committee, the investigation goes to the disciplinary panel to determine what action, if any, to take. If the disciplinary panel believes there is admissible evidence of a violation, and action is necessary, there are multiple resolutions available, including non-public and public measures. Or, in the alternative, the case may be closed.

Public disciplinary action can include one, or a combination, of the following: fine, public censure, probationary conditions, or limiting, suspending or revoking a license. See K.S.A. 65-2836. Such adverse action is initiated by a disciplinary panel of the Board filing a petition for discipline with the Board. See K.S.A. 65-2836; K.S.A. 65-2838; K.S.A. 65-2839a; K.S.A. 65-2840a; K.S.A. 65-2851a.

If an action seeking an adverse order is initiated, the proceedings are governed by the Kansas Administrative Procedures Act ("KAPA") and the Kansas Judicial Review Act ("KJRA"). K.S.A. 65-2851a. KAPA provides due process to those against whom the Board seeks to take adverse action, including notice, formal hearing(s), and the right to immediately appeal to the district court. See K.S.A. 77-501 *et. seq.* and K.S.A. 77-601 *et. seq.* The KJRA provides a broad range of authority for the reviewing district court to provide relief to a licensee facing an adverse administrative order from the Board, including an immediate stay of the Board order,

vacating the Board order, and/or issuing a remand order to the Board with further directions. *See, e.g.,* K.S.A. 77-622(b).

Board complaint.

Burkhart testified that a complaint has been filed with the Board concerning the provision of telemedicine abortions at Plaintiff's Wichita clinic. She testified that the complaint was filed against an independent contractor and not against an employee of Plaintiff. She testified that to her knowledge the complaint is "pending." There was no allegation or evidence that the Board has ever taken adverse action against any Board licensee for violation of K.S.A. 65-4a10.

Plaintiff filed this lawsuit "on behalf of itself and its patients" challenging K.S.A. 65-4a10 and Sections 6 and 7 of the Telemedicine Act. Plaintiff did not sue on behalf of its contracted physicians.

CONCLUSIONS OF LAW

Plaintiff seeks a temporary injunction preventing enforcement of K.S.A. 65-4a10 and Sections 6 and 7 of the Telemedicine Act. Plaintiff asserts that these statutes are facially unconstitutional because they impair Plaintiff's ability to perform medication abortions by telemedicine, thus infringing upon a woman's right to an abortion.

The statutes at issue.

K.S.A. 65-4a10 was adopted by the Kansas Legislature in 2011 and amended in 2015. In its current form, it says:

> "(a) No abortion shall be performed or induced by any person other than a physician licensed to practice medicine in the state of Kansas.
>
> (b)(1) Except in the case of an abortion performed in a hospital through inducing labor: (A) When RU-486 (mifepristone) is used for the purpose of inducing an abortion, the drug shall initially be administered by or in the same room and in the physical presence of the physician who prescribed, dispensed or otherwise provided the drug to the patient; and (B) when any other drug is used

> for the purpose of inducing an abortion, the drug or the prescription for such drug shall be given to the patient by or in the same room and in the physical presence of the physician who prescribed, dispensed or otherwise provided the drug or prescription to the patient.
>
> (2) The provisions of this subsection shall not apply in the case of a medical emergency.
>
> (c) The physician inducing the abortion, or a person acting on behalf of the physician inducing the abortion, shall make all reasonable efforts to ensure that the patient returns 12 to 18 days after the administration or use of such drug for a subsequent examination so that the physician can confirm that the pregnancy has been terminated and assess the patient's medical condition. A brief description of the efforts made to comply with this subsection, including the date, time and identification by name of the person making such efforts, shall be included in the patient's medical record.
>
> (d) A violation of this section shall constitute unprofessional conduct under K.S.A. 65-2837, and amendments thereto."

The 2015 amendments added an exception for abortions performed in a hospital through inducing labor. The 2015 amendments also added the language in subsection (b)(1)(B) and (b)(2).

Section 6 of the Telemedicine Act says: "Nothing in the Kansas telemedicine act shall be construed to authorize the delivery of any abortion procedure via telemedicine." Section 7 of the Telemedicine Act says:

> "If any provision of the Kansas telemedicine act, or the application thereof to any person or circumstance, is held invalid or unconstitutional by court order, then the remainder of the Kansas telemedicine act and the application of such provision to other persons or circumstances shall not be affected thereby and it shall be conclusively presumed that the legislature would have enacted the remainder of the Kansas telemedicine act without such invalid or unconstitutional provision, except that the provisions of K.S.A. 40-2,215, and amendments thereto, are expressly declared to be nonseverable."

Plaintiff claims that K.S.A. 65-4a10 and Sections 6 and 7 of the Telemedicine Act violate Sections 1 and 2 of the Kansas Constitution's Bill of Rights because they impose an impermissible restriction on the right to an abortion. Section 1 says: "All men are possessed of

equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 says:

> "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency."

The Kansas Supreme Court recently decided that Section 1 of the Kansas Constitution's Bill of Rights "acknowledges rights that are distinct from and broader than the United States Constitution," and that it ensures "the inalienable natural right of personal autonomy," which includes a woman's right to abortion. The court decided that only the application of strict scrutiny would properly protect this fundamental right in the face of a law that might impair it. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 471, 497-98 (Kan. 2019).

Sections 6 and 7 of the Telemedicine Act.

Plaintiff argues that Sections 6 and 7 of the Telemedicine Act infringe upon a woman's right to an abortion by prohibiting telemedicine abortions. This Court disagrees. While K.S.A. 65-4a10 purports to regulate the provision of telemedicine abortions in Kansas, Sections 6 and 7 of the Telemedicine Act clearly do not. Statutory interpretation is a question of law for the court. The fundamental rule of statutory interpretation is that the intent of the legislature governs. "And the best avenue for discerning that intent is to read the language of the statute, giving common words their ordinary meaning. If the statute contains plain and unambiguous language, we do not look to extrinsic aids for guidance on legislative intent because the statutory language is 'the best and only safe rule for determining the intent of the creators of written law.'" *Matter of Bowman*, 441 P.3d 451, 458 (Kan. 2019).

The Telemedicine Act does not authorize or prohibit any specific medical procedure. Rather, it clarifies that the same federal privacy protections afforded patients apply equally to care provided in person and via telemedicine, K.S.A. 40-2,2212(a); it applies the same professional standards of practice and conduct equally to care provided in person and via telemedicine, K.S.A. 40-2,2212(c); and it prohibits exclusion of telemedicine care from insurance coverage simply because it is provided via telemedicine, K.S.A. 40-2,2213(b).

Section 6 says nothing in the Telemedicine Act authorizes telemedicine abortion. But nothing in the Telemedicine Act prohibits it, either, or limits it in any possible way. The fact that Section 7 denotes Section 6 as non-severable does not transform the Telemedicine Act into an indirect restriction on abortion. Because the Telemedicine Act does not limit or prohibit abortion in this state, Plaintiff's constitutional challenge to Sections 6 and 7 of the Telemedicine Act in this context fails as a matter of law. Plaintiff's only surviving challenge is to the constitutionality of K.S.A. 65-4a10.

Justiciability of the claims against Lippert and Durrett.

Plaintiff's constitutional claims against Defendants Lippert and Durrett are grounded in the notion that violations of K.S.A. 65-4a10 constitute unprofessional conduct under the Kansas Healing Arts Act, the Board is charged with investigating and punishing such violations, and the Board should be enjoined from doing so because the statute is unconstitutional. The Board Defendants argue that Plaintiff does not have standing to make constitutional claims against them, and the claims against them are not ripe for review. These arguments raise the issue of justiciability of the claims against Lippert and Durrett.

> "Kansas courts do not render advisory opinions. The federal courts' prohibition against advisory opinions is imposed by Article III, Section 2 of the United States Constitution, which expressly limits the judicial power to 'Cases' or 'Controversies.'

> But because Article 3 of the Kansas Constitution does not include any 'case' or 'controversy' language, our case-or-controversy requirement stems from the separation of powers doctrine embodied in the Kansas constitutional framework. That doctrine recognizes that of the three departments or branches of government, '[g]enerally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws in actual controversies.' And Kansas, not federal, law determines the existence of a case or controversy, i.e., justiciability. But this court is not prohibited from considering federal law when analyzing justiciability.
>
> Under the Kansas case-or-controversy requirement, courts require that (a) parties have standing; (b) issues not be moot; (c) issues be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) issues not present a political question." *Gannon v. State,* 298 Kan. 1107, 1119, 319 P.3d 1196 (2014) (internal citations omitted).

Challenges to standing or ripeness call into question this Court's subject matter jurisdiction, which may be raised at any time by a party or by this Court on its own motion. *Stechschulte v. Jennings,* 297 Kan. 2, 29, 298 P.3d 1083 (2013). Ripeness was raised by Lippert and Durrett in their motion to dismiss the amended petition. Standing was raised by Lippert and Durrett at the May 22, 2019, hearing. Plaintiff addressed the issues of ripeness and standing in its response to Lippert and Durrett's motion to dismiss, and at the May 22, 2019, hearing.

A. Standing.

"Standing is a jurisdictional question in which courts determine whether a party has alleged a sufficient stake in the controversy to warrant invocation of jurisdiction and to justify the exercise of the court's remedial powers on that party's behalf." *Board of Johnson County Comm'rs v. Jordan,* 303 Kan. 844, 854, 370 P.3d 1170 (2016). To establish standing, a plaintiff must show that it has suffered a cognizable injury and that there is a causal connection between the injury and the challenged laws. *Peterson v. Ferrell,* 302 Kan. 99, 103, 349 P.3d 1269 (2015).

A cognizable injury must be particularlized; it must affect the plaintiff in a personal and individual way. This is also known as "injury in fact." Indeed, "'a party must present an injury that is concrete, particularized, and actual or imminent.'" *Gannon,* 298 Kan. at 1123. The causal connection requirement means the injury must be "'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 1130–31, citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

The burden is on Plaintiff to establish standing. *Gannon,* 298 Kan. at 1123. Because this Court opted to decide the issue after rather than before the hearing, it will be considered not on the face of the pleadings alone, but on the evidence adduced at the temporary injunction hearing. As such, Plaintiff must establish standing by a preponderance of the evidence. *Id.* at 1123-24.

Trust Women states in its amended petition that it sues "on behalf of itself and its patients," and does name or include any of its contracted physicians as parties to the lawsuit. It does not state that it sues on behalf of any physicians. Trust Women at this juncture seeks a temporary injunction preventing the Board Defendants from enforcing K.S.A. 65-4a10 through its subsection (d), which says a violation of the statute shall constitute unprofessional conduct under K.S.A. 65-2837, part of the Kansas Healing Arts Act. In other words, Trust Women seeks a temporary injunction preventing the Board of Healing Arts from taking any action against the license of a physician for violation of K.S.A. 65-4a10.

Trust Women is licensed as an ambulatory surgical center by KDHE and has been since July 2014. Trust Women is not licensed by the Board of Healing Arts. The Board has no enforcement authority over Trust Women. Likewise, there was no allegation or evidence presented at the hearing that Trust Women's patients are licensed by the Board of Healing Arts or that the Board has enforcement authority over patients. Trust Women argues that, in regard to

its claims against Defendants Lippert and Durrett, it suffers injury in fact under K.S.A. 65-4a10 because its contracting physicians face discipline from the Board of Healing Arts for providing telemedicine abortions. By Plaintiff's own admission, it is the physicians who face discipline from the Board of Healing Arts, not Plaintiff, but no physician is a party to this lawsuit.

Nonetheless, Trust Women argues that it and its patients suffer injury in fact because Trust Women's contracting physicians "are unwilling to provide telemedicine abortion" at the clinic because the challenged laws threaten their licenses. Trust Women argues that these unnamed physicians made a "decision to cease providing this care" because of the challenged laws. There is no such evidence in the record.

The evidence cited by Trust Women includes Burkhart's testimony that after the passage of the Telemedicine Act in 2018 she "was just fearful that the clinic and our physicians could be penalized for providing telemedicine medication abortions so therefore we ceased." Plaintiff cited a similar sentiment from Dr. McNicholas. Dr. McNicholas said that she would not continue to provide telemedicine abortions if she thought her license was in jeopardy, but Dr. McNicholas also testified that she has never performed a telemedicine abortion. There was no testimony that a physician performing telemedicine abortions made a decision to stop doing so because of the challenged laws, or for any other reason.

The timing of the pilot project undermines the existence of a causal connection between the challenged laws and any alleged injury to Plaintiff. K.S.A. 65-4a10 prohibited telemedicine abortions effective July 1, 2011. Enforcement of the law, at least by the parties to the *Hodes 2011* case, was and has been enjoined since 2011 subject to the terms of the 2011 Agreed Order. Plaintiff opened its doors in April 2013, but did not offer telemedicine abortion until October

2018. Thus, it appears that K.S.A. 65-4a10 was not a barrier to Plaintiff performing telemedicine abortions.

Instead, Plaintiff posits that unnamed physicians made a decision to stop performing telemedicine abortions because of the passage of the Telemedicine Act. First, the Telemedicine Act does not prohibit telemedicine abortions. Second, there was no evidence that physicians performing telemedicine abortions decided to stop. Third, Plaintiff's pilot program began months *after* the passage of the Telemedicine Act. The pilot program ceased immediately prior to the effective date of the Telemedicine Act based, according to Burkhart and Dr. McNicholas, on "advice of counsel."

These unique circumstances lead the Court to conclude that, in terms of its claims against the Board Defendants, Plaintiff has not proven an injury in fact to itself or its patients and it cannot satisfy the causal connection requirement. Thus, its claim to individual standing fails.

Though it did not say so explicitly in its first amended petition, Trust Women seems to assert third party standing on behalf of independent contractor physicians. "A party generally must assert its own legal rights and interests and may not base its claim to relief on the legal rights or interests of third parties." *Ternes v. Galichia,* 297 Kan. 918, 922, 305 P.3d 617 (2013). One exception to this rule is associational standing, which has not been asserted and does not apply here. *See, e.g., NEA–Coffeyville v. U.S.D. No. 445,* 268 Kan. 384, 387, 996 P.2d 821 (2000) (stating elements of associational standing). Another exception is third party standing, which requires that a plaintiff show that it: "(1) 'must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute'; (2) 'must have a close relation to the third party'; and (3) 'there must exist some hindrance to the

third party's ability to protect his or her own interests.'" *Landrith v. Jordan,* 2014 WL 1302623, *4 (Kan.App. 2014), citing *Powers v. Ohio,* 499 U.S. 400, 411 (1991).

Again, even assuming Plaintiff could prove injury in fact and close relation to its independent contractor physicians, Plaintiff has offered no proof at this stage of any hindrance to the physicians' ability to protect their own interests. Plaintiff correctly asserts that abortion clinics and physicians have been allowed to assert third party standing on behalf of their patients. See, e.g., *Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Kline,* 287 Kan. 372, 406, 197 P.3d 370 (2008) (abortion providers can assert third-party standing to champion patients' rights to informational privacy); *Alpha Med. Clinic v. Anderson,* 280 Kan. 903, 921, 128 P.3d 364 (2006); *Singleton v. Wulff,* 428 U.S. 106, 117, (1976) (physician had standing to assert rights of patients seeking abortions; patient "may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit"). But Plaintiff offers no legal authority for the proposition that clinics may assert third-party standing on behalf of physicians, nor does Plaintiff explain how independent contractor physicians (or any other physicians) are hindered from joining this lawsuit as plaintiffs or bringing suit in their own right. For these reasons, any third party standing claim fails.

The Court concludes that Plaintiff does not have standing to assert its claims against Board Defendants Lippert and Durrett. As such, this Court lacks subject matter jurisdiction over these particular claims, and they are dismissed.

B. Ripeness.

Because the Court concludes that Plaintiff lacks standing to sue Lippert and Durrett, it need not address the additional issue of ripeness.

Temporary injunction standard.

Plaintiff's remaining claims are against Bennett and Schmidt.[2] Plaintiff seeks a temporary injunction prohibiting the remaining Defendants' enforcement of K.S.A. 65-4a10 pending this Court's final decision on the constitutional challenge. A temporary injunction is an "extraordinary remedy." *Idbeis v. Wichita Surgical Specialists, P.A.,* 285 Kan. 485, 499, 173 P.3d 642 (2007); see also *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (describing a preliminary injunction as "an extraordinary and drastic remedy"). A temporary injunction merely preserves the relative positions of the parties until a full decision on the merits can be made. *Steffes v. City of Lawrence,* 284 Kan. 380, 394, 160 P.3d 843 (2007). It should never be awarded as a matter of right. See *Winter v. National Resources Defense Council, Inc.,* 555 U.S. 7, 24 (2008).

"An injunction is an equitable remedy and its grant or denial in each case is governed by principles of equity." *Wichita Wire, Inc. v. Lenox,* 11 Kan. App. 2d 459, 461–62, 726 P.2d 287, 289–90 (1986). The grant or denial of a temporary injunction is entrusted to the sound discretion of the district court. *Id.*

Plaintiff, as the party requesting the temporary injunction, bears the burden of proving that:

> "(1) The plaintiff has a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest." *Hodes,* 440 P.3d at 469.

[2] This Court takes judicial notice of the court files in *Hodes 2011* and *Trust Women I.* This Court is cognizant of the 2011 Agreed Order and the orders of Division 7 in those cases. However, this Court expresses no opinion at this time regarding the enforceability of the 2011 Agreed Order as against any of the named Defendants here.

The first element of the temporary injunction analysis requires that Plaintiff show a substantial likelihood of eventually prevailing on the merits. This requirement exists not to determine the controverted right, but to "prevent injury to a claimed right pending a final determination of the controversy on its merits." *Idbeis,* 285 Kan. at 491 (internal quotation marks omitted).

The Kansas Supreme Court has resolved that Section 1 of the Kansas Constitution provides a fundamental right to abortion that is to be guarded with the application of strict scrutiny to any law that might impair it. This Court is duty bound to apply the precedent of this state's highest court. *State v. Meyer,* 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015).

The strict scrutiny test begins with "determining how governmental action burdens or infringes on a right." *Hodes,* 440 P.3d at 496.

> "[B]efore a court considers whether a governmental action survives this test, it must be sure the action actually impairs the right. In some cases, it will be obvious that an action has such effect. Imprisonment, for example, obviously impairs the right to liberty. In other cases, the court may need to assess preliminarily whether the action only appears to contravene a protected right without creating any actual impairment. See *Casey,* 505 U.S. at 873, 112 S.Ct. 2791 (plurality opinion) (noting that "not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right")." *Hodes,* 440 P.3d at 498.

The second step of the strict scrutiny analysis is described as follows: "once a plaintiff proves an infringement—regardless of degree—the government's action is presumed unconstitutional. Then, the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it." *Id.* at 496.

Defendants assert that the State has several compelling interests at stake, including protecting the health and safety of the woman seeking an abortion and ensuring that abortions are performed under safe circumstances. Defendants also argue that the State has a compelling

interest in "promoting potential life" and in "helping people make informed choices in life." See *Planned Parenthood of the Heartland v. Reynolds,* 915 N.W.2d 206, 241 (Iowa 2018). Defendants raise arguments in regard to narrow tailoring of the law, notably in light of the 2015 amendments to K.S.A. 65-4a10.

These issues will not be analyzed in great detail here because Plaintiff's motion for temporary injunction fails on the second issue – irreparable injury. Suffice it to say that application of strict scrutiny analysis is not necessarily "fatal in fact" to all legislative efforts. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 202 (1995). But for purposes of this motion only, the Court will assume the existence of some constitutional violation which would provide Plaintiff a substantial likelihood of prevailing on the merits. This assumption is made only because Plaintiff has, at this stage, failed to prove the necessary element of irreparable injury.

As Plaintiff points out, federal courts within the Tenth Circuit have usually presumed irreparable harm when dealing with the alleged violation of a constitutional right. This is so because irreparable injury is defined in part by whether any alleged harm may be adequately compensated after the fact with money damages. *Schrier v. University of Co.,* 427 F.3d 1253, 1267 (10th Cir. 2005). But this is not the only consideration. If the alleged harm is speculative in nature it does not equate to irreparable injury. *Id.* Conclusory statements are not sufficient to demonstrate irreparable harm. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.,* 356 F.3d 1256, 1261 (10th Cir. 2004). Further, lack of diligence in seeking an injunction undermines the notion that an injury is irreparable. *Benisek v. Lamone,* 138 S. Ct. 1942, 1944 (2018).

Defendants argue that Plaintiff's claims of irreparable harm are speculative and conclusory because there is no evidence the challenged laws decrease access to abortion. Regardless of K.S.A. 65-4a10's requirements for telemedicine abortion, under Plaintiff's own

protocol the Plaintiff's patients must still travel to the Wichita clinic for both the first and second appointments in a telemedicine abortion. Plaintiff would like to open more clinics in remote parts of the state but has not taken even preliminary steps to do so. Burkhart's testimony indicated that the availability of telemedicine abortions has as much to do with securing resources to open new clinics and finding physicians to staff them, whether in person or remotely.

Defendants also highlight Plaintiff's delay in bringing this lawsuit. Indeed, "a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek,* 138 S. Ct. at 1944. A plaintiff's "delay in seeking an injunction undermines their argument that they will suffer irreparable harm if an injunction does not issue." *Utah Gospel Mission v. Salt Lake City Corp.,* 316 F. Supp. 2d 1201, 1221 (D. Utah 2004), *aff'd* 425 F.3d 1249 (10th Cir. 2005). "A delay in seeking an injunction has been viewed as a concession or an indication that the alleged harm does not rise to a level that merits an injunction." *Texas v. United States,* 328 F. Supp. 3d 662, 738 (S.D. Tex. 2018), citing 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 ("A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction.").

K.S.A. 65-4a10 prohibited telemedicine abortions effective July 1, 2011. Enforcement of the law, at least by the parties to the *Hodes 2011* case, has been enjoined by agreement of the parties since late 2011, but Bennett and the Board Defendants were not parties. Plaintiff opened its doors in April 2013. K.S.A. 65-4a10 was amended in 2015. Plaintiff did not challenge the law until January 2019. This is a significant delay.

Plaintiff claims that there was no need for a challenge until the Telemedicine Act went into effect on January 1, 2019. But as set forth above, the Telemedicine Act does not restrict abortion. Even so, it is odd that Plaintiff did not offer telemedicine abortion until several months

after the passage of the Telemedicine Act, which Plaintiff believed to be a new ban on telemedicine abortions, albeit not effective until January 1, 2019.

"In determining whether a preliminary injunction is warranted, a court must be guided by normal equitable principles and must weigh the practicalities of the situation." *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984). "As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek,* 138 S. Ct. at 1943–44.

The circumstances of this particular case are somewhat unusual and require consideration of equitable principles. There was a challenge to K.S.A. 65-4a10 in 2011. The parties to that lawsuit agreed not to enforce the law or resultant regulations. The Attorney General is the only party to both that lawsuit and the instant one. There are questions about whether the 2011 Agreed Order somehow binds others who were not parties to it. There are questions about whether and how the 2011 Agreed Order applies in light of 2015 amendments to the statute. Further, Plaintiff challenged Sections 6 and 7 of the Telemedicine Act in a suit filed November 8, 2018 (*Trust Women I*), but the Attorney General was the only defendant. That suit was dismissed, only to be reincarnated here a few weeks later with additional claims and additional defendants.

The instant suit is the latest addition to a growing procedural backwater. The shift in parties and the framing of the issues from case to case has hindered the court's ability to resolve the underlying merits of the telemedicine abortion issue. If this Court is to reach the merits in the instant case, it requires the parties to present additional evidence and more probing legal analysis than has occurred at this early stage. The bottom line is that Plaintiff has failed to demonstrate here that it or its patients will suffer irreparable injury in the absence of a temporary injunction

for the period of time between now and a decision on the merits. Because Plaintiff's motion for temporary injunction fails on this element, the Court need not explore the others at this time.

CONCLUSION

For the reasons set forth above, Plaintiff's claims against Board Defendants Lippert and Durrett are dismissed for lack of standing. Plaintiff's motion for temporary injunction against the remaining Defendants is denied. The amended case management order filed April 30, 2019, remains in effect until further order of the Court.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to the following:

Robert Eye
4840 Bob Billings Pkwy, Suite 1010
Lawrence, KS. 66049-4092
Attorney for Plaintiff

Leah Wiederhorn
Jessica Sklarsky
199 Water St. 22nd Floor
New York, NY. 10038
Attorney for Plaintiff

Tucker Poling
Kansas Board of Healing Arts
800 SW Jackson, Lower Level A
Topeka, KS. 66612
Attorney for Defendants Lippert and Durrett

Bryan Clark
Jeffrey Chanay
Shon Qualseth
Brant Laue
Kansas Attorney General's Office
120 SW 10th St., 2nd Floor
Topeka, KS. 66612
Attorneys for Defendants Schmidt and Bennett

/s Angela Cox
Administrative Assistant