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UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS,

HODES & NAUSER, MD's, PA,
et al.,

Docket No. 11-2365-CM

Plaintiff,

Kansas City, Kansas

Date: 7/1/11

v.

ROBERT MOSER, et al,

Defendants.

.....

TRANSCRIPT OF
TEMPORARY RESTRAINING ORDER HEARING
BEFORE THE HONORABLE CARLOS MURGUIA,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: Teresa A Woody
Woody Law Firm, PC
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Kansas City, MO 64108

Bonnie Scott Jones
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For the Defendants: Jeffrey A Chanay & Steve R Fabert
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Movant: Cheryl A Pilate
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Olathe, KS 66061

Court Reporter: Nancy Moroney Wiss, CSR, RMR, FCRR
Official Court Reporter
558 US Courthouse
500 State Avenue
Kansas City, KS 66101

15:03:16 1 THE COURT: Give me a moment please just to
15:03:18 2 set up here. Let the record show we're here regarding
15:03:44 3 Case Number 11-2365. It's a case entitled -- may have
15:03:53 4 to help me with the pronunciation of the plaintiffs'
15:03:55 5 names.

15:03:55 6 MS. WOODY: Doctors Hodes and Nauser.

15:03:59 7 THE COURT: Hodes and Nauser versus Moser,
15:04:04 8 et al. Would the parties please enter their appearance?

15:04:06 9 MS. WOODY: Your Honor, Teresa Woody on
15:04:08 10 behalf of the plaintiffs, and here are Doctor Hodes and
15:04:11 11 Doctor Nauser, and with me is Bonnie Scott Jones who's
15:04:14 12 been admitted pro hac vice this morning.

15:04:17 13 THE COURT: Thank you.

15:04:19 14 MR. CHANAY: Your Honor, on behalf of the
15:04:21 15 defendant, it's Jeffrey Chanay, Deputy Attorney General
15:04:24 16 of Kansas, and with me is Steve Fabert, Assistant
15:04:27 17 Attorney General.

15:04:28 18 THE COURT: Thank you. Appreciate the
15:04:29 19 parties accommodating the court with the scheduling of
15:04:32 20 this hearing on very short notice. There is something
15:04:36 21 before and pending at this time, which would be
15:04:40 22 plaintiffs' motion for temporary restraining order
15:04:44 23 and/or preliminary injunction, which is Document Number
15:04:48 24 Four. This morning, the court granted Aid For Women's
15:04:53 25 motion to intervene as well as Aid for Women has filed a

15:04:58 1 motion to join plaintiff's motion for temporary
15:05:01 2 restraining order and/or preliminary injunction, which
15:05:04 3 is Document 27. Upon review of the motion, the court
15:05:09 4 grants Aid for Women's motion. As a result, for our
15:05:14 5 record, Miss Pilate, if you could enter your appearance
15:05:19 6 as well here at this hearing.

15:05:20 7 MS. PILATE: Thank you, Your Honor. Good
15:05:22 8 afternoon. Cheryl Pilate for intervenors Central Family
15:05:27 9 Medical, LLC, doing business as Aid for Women, and also
15:05:31 10 representing Doctor Ronald Yeomans who is present with
15:05:34 11 me at counsel table. Thank you.

15:05:38 12 THE COURT: In regards to our court
15:05:39 13 appearance this afternoon, the court has scheduled this
15:05:43 14 to be heard, but with that, there's some time
15:05:47 15 limitations the court has informed the parties about
15:05:51 16 regarding their arguments or however you want to use
15:05:55 17 your time. Hopefully, you both were -- all of you were
15:05:58 18 informed, and you have 30 minutes per party, and we
15:06:04 19 actually have set up a timer that will be placed in
15:06:09 20 front of the podium that I would trust and ask that you
15:06:14 21 monitor and keep track of, and what I'll do is let you
15:06:19 22 know if you want a warning when you're about to have
15:06:22 23 your time expire. I would request please that when that
15:06:26 24 timer shows that you have zero time remaining, that you
15:06:29 25 stop. If not, I will have to interrupt you with

15:06:33 1 whatever is being presented or being argued. Yes?

15:06:37 2 MS. WOODY: Your Honor, we would like to
15:06:39 3 divide the argument and provide at least a short period
15:06:42 4 of time for intervenors to make a comment to the court
15:06:46 5 with respect to the argument.

15:06:48 6 THE COURT: That's fine. If there's nothing
15:06:50 7 else, we'll start at this time. Miss Woody.

15:06:54 8 MS. WOODY: Good afternoon, Your Honor. May
15:07:03 9 it please the court. We are here on behalf of Doctors
15:07:07 10 Hodes and Nauser requesting injunctive relief of the
15:07:10 11 licensing process and temporary regulations promulgated
15:07:14 12 under Senate Bill 36. Doctor Hodes and Doctor Nauser
15:07:17 13 are very well respected physicians with a clinic located
15:07:21 14 in Overland Park, Kansas where they operate an
15:07:24 15 obstetrics and gynecology practice. Doctor Hodes has
15:07:28 16 been practicing in this field for over 30 years. Doctor
15:07:32 17 Nauser has been practicing with Doctor Hodes for
15:07:35 18 13 years, and he is her father. Doctor Nauser and
15:07:39 19 Doctor Hodes have a full OB/GYN practice which includes
15:07:43 20 a full range of services including gynecological
15:07:47 21 surgeries. They also perform abortions in their
15:07:49 22 practice, and especially are referred to by other
15:07:52 23 physicians in instances where there are complications,
15:07:54 24 medical complications for the woman, or where there is a
15:08:00 25 fetal anomaly that would require an abortion. They have

15:08:06 1 been providing these services at their same clinic in
15:08:09 2 Overland Park for over 24 years without incident. Since
15:08:13 3 2002, their practice like all other practices in the
15:08:16 4 state of Kansas where office surgeries are performed in
15:08:21 5 a physician's office have been regulated by the Kansas
15:08:25 6 Board of Healing Arts, which in 2002 had a panel of some
15:08:28 7 35 doctors who promulgated standards for offices in
15:08:32 8 Kansas where office surgeries were performed. With
15:08:37 9 respect to these regulations which apply to all surgical
15:08:40 10 procedures and offices, whether -- not just abortions,
15:08:43 11 but other procedures for dental procedures,
15:08:49 12 gastroenterology, all those sorts of surgeries that can
15:08:51 13 be performed in an outpatient basis at a doctor's
15:08:54 14 office, many of which are far more risky and invasive
15:08:59 15 than abortion procedures performed at Doctor Hodes and
15:09:02 16 Doctor Nauser's office, they've been regulated under
15:09:04 17 these -- these standards promulgated by the board of
15:09:07 18 healing arts for some eight years, and they are
15:09:10 19 inspected routinely with respect to these procedures by
15:09:13 20 representatives of the Kansas Board of Healing Arts.

15:09:19 21 On May 16th of this year, however, the
15:09:22 22 Kansas legislature enacted Senate Bill 36, and under
15:09:25 23 that bill, said that it would become effective July 1st,
15:09:30 24 and that anyone who was not licensed, any provider who
15:09:33 25 was not licensed as of that date would not be allowed to

15:09:36 1 perform abortions, and that any abortions performed
15:09:39 2 after that date without a license would be considered a
15:09:41 3 crime. KDHE was charged with implementing regulations
15:09:45 4 under that act, and it is those temporary regulations
15:09:49 5 and the licensing procedure that we are asking the court
15:09:52 6 to enjoin today.

15:09:55 7 That occurred on May 16th, the act was
15:09:59 8 enacted. Doctor Hodes and Doctor Nauser immediately
15:10:01 9 reached out to the KDHE to say it's going to be
15:10:04 10 impossible for you to both promulgate regulations and
15:10:08 11 give the providers an opportunity to comply in a very
15:10:11 12 limited time before July 1st. They basically heard
15:10:15 13 nothing until May 26th when they were told that
15:10:18 14 temporary regulations would be forthcoming. On July
15:10:22 15 9th, they did receive a copy of draft regulations from
15:10:26 16 the KDHE.

15:10:26 17 THE COURT: June 9th? June 9th?

15:10:29 18 MS. WOODY: June 9th. I'm sorry, on
15:10:31 19 June 9th, they received -- they received the draft of
15:10:33 20 the temporary regulations from the KDHE, and these
15:10:37 21 imposed stricter regulations, more stringent regulations
15:10:41 22 on their facility than had previously been -- that they
15:10:44 23 had previously been subject to under the standards of
15:10:48 24 the board of healing arts. They were also told that
15:10:52 25 they would have a licensing application, that the

15:10:55 1 licenses would -- application would be available on
15:10:57 2 June 13th, and that they were to have their -- their
15:11:00 3 license application submitted no later than June 17th.
15:11:04 4 On June 13th, in the intervening time-frame, they -- in
15:11:09 5 addition to getting the license application, they also
15:11:11 6 received notice that the regulations, the draft
15:11:14 7 regulations they had initially been provided on June 9th
15:11:17 8 were being revised, and that they would get revised
15:11:20 9 copies of those regulations at some point in the future,
15:11:23 10 those temporary regulations.

15:11:26 11 That occurred after they had actually
15:11:29 12 submitted their application on June 17th, as was
15:11:32 13 required procedurally. They then received on the
15:11:35 14 morning of June 20th new regulations that -- new
15:11:39 15 temporary regulations and were told that these temporary
15:11:42 16 regulations would be the ones that would be applied to
15:11:44 17 determine whether they were able to get a license on
15:11:47 18 July 1st. These new regulations were far more stringent
15:11:51 19 even than the draft regulations that had been provided
15:11:55 20 to them on June 9th. They had extremely strict
15:11:58 21 standards, provided, for instance, for two hours of
15:12:01 22 recovery for any patient of an abortion procedure, an
15:12:05 23 amount of recovery time far in excess of anything
15:12:08 24 required either at the Kansas hospitals or Kansas
15:12:12 25 ambulatory surgical centers for much more invasive and

15:12:16 1 risky surgical procedures. They also imposed extremely
15:12:19 2 strict physical plan regulations mandating the size of
15:12:24 3 the rooms in which procedures could be performed,
15:12:26 4 mandating that each room have its own washing -- hand
15:12:30 5 washing and facilities, sink and a lavatory by itself
15:12:34 6 attached to each procedure room, and standards such as
15:12:37 7 requiring 50 square feet of janitorial storage for each
15:12:41 8 procedure room which for the Hodes practice and Nauser
15:12:45 9 practice would have meant 350 square feet of janitorial
15:12:48 10 storage alone.

15:12:51 11 Upon reviewing these regulations, Doctor
15:12:55 12 Hodes and Doctor Nauser reached out to the KDHE, and
15:12:58 13 asked if there would be waivers available, because it
15:13:01 14 was impossible for them to comply by July 1st. It would
15:13:06 15 have required them essentially to tear down their
15:13:08 16 building and re-build it, totally reconfigure it and --
15:13:12 17 and make it larger. They were told there would be no
15:13:16 18 waivers, and that they -- if they were -- failed to be
15:13:19 19 in compliance by July 1st, their license would be
15:13:22 20 denied. This is inconsistent with the way other Kansas
15:13:25 21 state regulations have been applied, particularly ones
15:13:27 22 for hospitals where when there's a change in the
15:13:29 23 physical plan for a hospital facility, they've been
15:13:32 24 given up to two years to make those changes. But for
15:13:35 25 these providers, and there are only three providers of

15:13:38 1 abortions in the state of Kansas that were affected by
15:13:40 2 these, for these three providers, there was a -- they
15:13:43 3 were to comply with these regulations within nine days
15:13:46 4 of having received these regulations or their license
15:13:49 5 would be denied.

15:13:52 6 Obviously, there was an inspection scheduled
15:13:55 7 for even sooner than that. The original inspection was
15:13:57 8 scheduled for June 27th, and they asked to have that
15:14:02 9 moved until June 29th, but even so, recognized that it
15:14:06 10 would be totally impossible for them to comply with
15:14:08 11 these regulations, come the physical plan status alone,
15:14:14 12 and so, they have moved this court for temporary
15:14:17 13 injunction. They knew there's -- the state has raised
15:14:20 14 an argument that there's some potential waiver because
15:14:23 15 they didn't go through and exhaust their administrative
15:14:27 16 remedies, but there was absolutely no purpose for them
15:14:30 17 going in that manner. They'd all ready been told that
15:14:32 18 they would not get a waiver, and they knew that they
15:14:35 19 would not be able to comply with those regulations by
15:14:37 20 July 1st.

15:14:38 21 And indeed, this morning, even though this
15:14:42 22 motion for temporary restraining order and preliminary
15:14:44 23 injunction was pending before this court, they received
15:14:46 24 from the KDHE notice of intent to deny their license
15:14:50 25 which came in at about 10:15 or 10:30 this morning.

15:15:00 1 It's clear that these regulations -- these temporary
15:15:03 2 regulations and this licensing process infringe on the
15:15:08 3 plaintiff's due process. There is absolutely no way
15:15:13 4 that they could have complied with this -- with these
15:15:16 5 requirements in the very limited, very quick time-frame
15:15:20 6 provided to them, and there was absolutely no way that
15:15:24 7 they were going to be able to continue providing
15:15:28 8 services to women who needed those services without --
15:15:33 9 without -- they simply would have to close, and indeed
15:15:36 10 they were denied a license, and now are unable to
15:15:38 11 provide those -- those abortions at their facility under
15:15:43 12 the licensing today.

15:15:45 13 So, it's clear that there's irreparable harm
15:15:48 14 to them, there's irreparable harm to the women that they
15:15:52 15 serve. For instance, just in the last couple of days --
15:15:55 16 and we've submitted this in our supplemental declaration
15:15:57 17 of Doctor Hodes -- just in the last couple of days, he
15:16:00 18 has been referred patients by referring physicians
15:16:04 19 because of his expertise in this area where there were
15:16:07 20 serious medical conditions for the woman or a medical
15:16:12 21 anomaly for the fetus, in both of those instances, he
15:16:16 22 has been unable to perform the abortions that the
15:16:20 23 referring physician requested because these regulations
15:16:24 24 are now in place. This has put these women in a
15:16:28 25 position where they are unable to get the medical

15:16:31 1 treatment they need in the state of Kansas, and so,
15:16:34 2 despite the -- despite the state's argument that this
15:16:38 3 will heighten medical processes and medical procedures
15:16:45 4 for women in Kansas, it in fact is denying women who
15:16:49 5 very much need these services, the ability to access an
15:16:53 6 abortion in Kansas, because they can't get them at
15:16:56 7 Planned Parenthood, and Doctor Hodes and the referring
15:16:59 8 physicians are unaware of any other abortion provider
15:17:02 9 who can provide those services in the state of Kansas
15:17:05 10 for women who have these kind of complications or these
15:17:08 11 kind of fetal anomalies.

15:17:11 12 So, there is -- there -- you can quickly see
15:17:15 13 that there is an undue burden both on the doctors and on
15:17:18 14 the patients who are unable to access these procedures,
15:17:22 15 even though they need them. In addition, it is clear
15:17:27 16 that these regulations really were designed to make
15:17:32 17 access to abortion more difficult in the state of
15:17:34 18 Kansas.

15:17:35 19 Now, the state tries to argue that because
15:17:37 20 they have granted Planned Parenthood a last minute
15:17:42 21 license, that -- that there is adequate access, and
15:17:46 22 there isn't a problem with the regulations, and they
15:17:48 23 cite to the court the Greenville case, and say that
15:17:51 24 regulations on facilities are okay, and basically imply
15:17:56 25 that anything that the state wants to do, any kind of

15:17:58 1 regulations that the state wants to impose should not be
15:18:04 2 unconstitutional.

15:18:07 3 We've cited to the case -- a case very
15:18:09 4 similar to this in 2007 where Judge Smith in the Western
15:18:13 5 District of Missouri, in examining some regulations
15:18:15 6 very, very similar to those here, only those here are
15:18:18 7 actually even more onerous and more burdensome than the
15:18:22 8 ones that were being addressed by the court with the
15:18:27 9 Missouri regulations, he did find that there was both a
15:18:30 10 likelihood that it violated plaintiff's due process, and
15:18:34 11 that it imposed an undue burden on both the doctors and
15:18:37 12 the women with respect to the constitutionality of those
15:18:41 13 regulations, and granted a preliminary injunction on
15:18:44 14 that matter.

15:18:46 15 If you look at the regulations in the chart
15:18:49 16 that we've provided, you can see that the regulations
15:18:51 17 far exceed anything that is required for Kansas
15:18:56 18 ambulatory surgical centers, for Kansas hospitals, and
15:19:00 19 certainly, even the case that they cite, the Greenville
15:19:03 20 versus South Carolina case, the regulations in those
15:19:07 21 cases -- in that case, the physical regulations were far
15:19:10 22 less stringent, far less onerous, far less specific and
15:19:15 23 particular than we have here in the -- in the case of
15:19:17 24 these temporary regulations with respect to Kansas.

15:19:20 25 So, there clearly is, we believe, a showing

15:19:24 1 of irreparable harm on behalf of the plaintiffs and the
15:19:28 2 doctors and their patients, and that's balanced against
15:19:31 3 any harm to the state in continuing things the way they
15:19:35 4 are, continuing the status quo.

15:19:37 5 And we submit that there really is no -- no
15:19:41 6 injury to the state whatsoever in continuing things the
15:19:44 7 way they were. The facilities are all ready regulated.
15:19:48 8 They're regulated like any other facility that provides
15:19:51 9 surgical procedures at a doctor's office under the
15:19:56 10 standards developed by the Kansas Board of Healing Arts.
15:19:59 11 They have been in compliance with those standards,
15:20:01 12 they've been performing procedures like this at their
15:20:04 13 office for over 24 years. If the injunction is put in
15:20:07 14 place, they will still be subject to those regulations
15:20:10 15 by the board of healing arts, and still be subject to
15:20:13 16 those inspections and still be subject to the high
15:20:16 17 standards of medical care for women that those standards
15:20:19 18 impose on all providers of surgical procedures in a
15:20:23 19 doctor's office. This is -- this has been going on for
15:20:27 20 eight years. They've had no issues with that. And they
15:20:31 21 will continue to have that oversight by the Kansas Board
15:20:36 22 of Healing Arts if this injunction is granted. So,
15:20:41 23 there is really no detriment to the state.

15:20:44 24 On the other hand, the detriment to the
15:20:45 25 doctors both in having to shut down that part of their

15:20:49 1 practice, to lose the revenue from that part of their
15:20:52 2 practice, to lose patients, and in the patients
15:20:56 3 themselves from their inability to access these
15:20:58 4 services, is -- is very much impacted. And the fact
15:21:02 5 that there's one abortion provider that's licensed in
15:21:09 6 the state of Kansas is not sufficient to meet the needs
15:21:11 7 of those women, and to in effect spirit away the undue
15:21:15 8 burden, Doctors -- Doctor Hodes and Nauser perform some
15:21:20 9 25 percent of the abortions in the state of Kansas.
15:21:23 10 It's -- it is really -- it's imaginary -- it's -- it's
15:21:29 11 imaginary to presume that the women who otherwise were
15:21:32 12 treated by them can simply go to Planned Parenthood just
15:21:36 13 as it would be if -- as we said in our briefs, if there
15:21:39 14 was only -- if you had three hospitals, and went down to
15:21:41 15 one hospital, and said, well, that's fine, because
15:21:43 16 everybody who went to the other two hospitals can just
15:21:45 17 go to the first one. There simply isn't enough --
15:21:49 18 enough, there aren't enough providers, and there simply
15:21:53 19 isn't the expertise at the Planned Parenthood facility
15:21:57 20 for some of the more serious complications that Doctors
15:22:00 21 Hodes and Nauser treat.

15:22:01 22 So, the fact that there's one -- one
15:22:04 23 facility left in the state that's licensed does not take
15:22:07 24 away either the -- does not take away the undue burden
15:22:10 25 for -- for women who are seeking these procedures. So,

15:22:16 1 it's clear that there's irreparable harm to the doctors
15:22:19 2 and to their patients. It's clear that there is not any
15:22:25 3 sort of irreparable harm to the state. Status quo will
15:22:28 4 be maintained. They'll be able to regulate these
15:22:32 5 providers just as they have been doing, and in the --
15:22:35 6 they'll have -- they can go through the regular
15:22:37 7 licensing process and -- and develop what happens there.

15:22:42 8 There's no medical emergency, no health
15:22:46 9 emergency that mandates that these regulations have to
15:22:49 10 go into effect on July 1st as they're currently drafted.
15:22:52 11 There's no reason to believe that they should go into
15:22:55 12 effect without waivers.

15:22:57 13 And there's -- then there's the public
15:23:00 14 interests, and as we've just cited to the court, there's
15:23:02 15 ample interest in the public in having these -- this
15:23:06 16 facility open to the public so that they can obtain
15:23:10 17 abortion procedures there. Abortion is a lawful
15:23:14 18 procedure. And -- and these doctors are highly
15:23:18 19 experienced doctors that provide sophisticated services
15:23:21 20 to some women with the most serious complications that
15:23:26 21 require abortions.

15:23:29 22 Finally, likelihood of success. Clearly, I
15:23:33 23 don't see how there can be any question that there is --
15:23:36 24 that they're likely to prevail on their due process
15:23:42 25 claim. And again, we would draw the court's attention

15:23:45 1 to Judge Smith's opinion in the Planned Parenthood case
15:23:49 2 in the Western District of Missouri where he clearly
15:23:52 3 found that there -- the same kind of thing, where there
15:23:54 4 were no waivers implemented, very strict -- very strict
15:23:58 5 physical plan requirements implemented with no
15:24:01 6 opportunity for waivers and no ample time-frame to meet
15:24:05 7 those, that that was an infringement on the plaintiff's
15:24:10 8 due process, and that he believed it likely that -- that
15:24:14 9 those statute -- those regulations would be
15:24:16 10 unconstitutional under the due process clause.

15:24:20 11 Finally, there is the likelihood of success,
15:24:25 12 the merits of undue burden, and it was -- as we've just
15:24:28 13 outlined, there is an undue burden both to the plaintiff
15:24:30 14 doctors and to plaintiffs seeking abortion in the state
15:24:33 15 of Kansas if these regulations are not enjoined.

15:24:37 16 I'm going to turn my time over now to
15:24:39 17 intervenors to -- to take a -- to explain to the court
15:24:46 18 their position and how it might differ from ours, but we
15:24:49 19 are respectfully asking this court to enter -- to enter
15:24:52 20 injunctive relief, enjoining the licensing process and
15:24:56 21 the temporary regulations currently promulgated under
15:25:00 22 Senate Bill 36. Thank you.

15:25:07 23 MS. PILATE: Thank you, Your Honor. I will
15:25:10 24 be fairly brief. I'd like to say at the outset that we
15:25:13 25 would like to adopt and incorporate into our argument

15:25:18 1 all of the arguments so ably made by Miss Woody and her
15:25:23 2 co-counsel both in their pleadings and in the oral
15:25:26 3 argument. Your Honor, I'd like to say at the outset
15:25:33 4 that my clients are concerned about the health and
15:25:38 5 safety of women, but that's not what these regulations
15:25:42 6 are about. If these regulations were about the health
15:25:46 7 and safety of women, they might contain something to
15:25:51 8 address the one part of the process where this very
15:25:56 9 vulnerable population that my clinic serves might suffer
15:26:01 10 some harm, which is between the parking lot and the
15:26:04 11 front door. And it is during that passage when they
15:26:08 12 suffer the screamers, the shouters, the hecklers who are
15:26:13 13 saying things that I won't repeat. But when they make
15:26:16 14 it to the clinic, that is their safe place. It is the
15:26:21 15 parking lot to the front door that poses the risk, not
15:26:25 16 the clinic. Your Honor, my client is the only provider
15:26:33 17 in Wyandotte County. They serve a vulnerable
15:26:36 18 under-served population that needs access to affordable
15:26:42 19 services. These regulations, like so many decisions by
15:26:48 20 governments, business, and other entities fall most
15:26:54 21 heavily and burden the most poor women. The vast
15:26:59 22 majority, between 90 and 95 percent of the people that
15:27:04 23 my clinic serves are poor women. A good half, maybe a
15:27:08 24 little bit more are African American and Latino. The
15:27:13 25 Latino part is very important, because my clinic has

15:27:16 1 three bilingual staff members, and as far as I know, it
15:27:21 2 is the only place where many members of the Latino
15:27:27 3 population feel like they can communicate and feel
15:27:32 4 comfortable. Our clinic does only first trimester
15:27:36 5 abortions. It is set up to do a very simple, frankly,
15:27:42 6 medical procedure that does not take much time. Many of
15:27:45 7 the regulations are simply inapplicable to our clinic.
15:27:49 8 And so, we would ask the court to take that into account
15:27:53 9 as well. Your Honor, abortions have been safely
15:27:56 10 performed in the building at 7th and Central for
15:27:59 11 21 years. The time line that has been set up in this
15:28:02 12 case is absurd. The final regulations were received on
15:28:09 13 June 20th, and compliance in full was expected by
15:28:13 14 July 1st. Frankly, Your Honor, that would require the
15:28:16 15 skills of a magician, and what my clinic has is a
15:28:20 16 dedicated staff, a registered nurse, and a very
15:28:24 17 dedicated physician. There are no magicians there. So,
15:28:29 18 Your Honor, we respectfully request that you enter the
15:28:34 19 emergency relief requested, and that these clinics and
15:28:41 20 other providers are able to continue providing this very
15:28:45 21 necessary service to the women of Kansas. Again, we
15:28:50 22 don't believe this has anything to do with the health
15:28:53 23 and safety. There has been no time to comply. My
15:28:57 24 client desires to comply, frankly, and was denied even
15:29:01 25 an inspection.

15:29:02 1 Your Honor, I will draw your attention to
15:29:04 2 one fact that we are addressing rapidly. The statute
15:29:08 3 requires the physician to have clinical privileges at a
15:29:12 4 hospital within 30 miles. We anticipate that that issue
15:29:15 5 is going to be resolved within days, perhaps within, you
15:29:19 6 know, the next week or so. We've been working very hard
15:29:22 7 on that. There has been no more need for our physician
15:29:25 8 to have clinical privileges at a hospital than a
15:29:29 9 dermatologist who treats teen-age acne, but we are
15:29:33 10 complying with that, don't seek to litigate that, and do
15:29:38 11 seek Your Honor's order as requested. Thank you.

15:29:50 12 THE COURT: At this time, Mr. Chanay, on
15:29:52 13 behalf of -- Mr. Fabert?

15:29:55 14 MR. CHANAY: Mr. Fabert will be arguing.

15:29:57 15 THE COURT: Mr. Fabert.

15:29:59 16 MR. FABERT: Thank you, Your Honor. I want
15:30:08 17 to distinguish here today the statute and the
15:30:15 18 regulations. As I understand their motion and the
15:30:18 19 argument, the challenge is to the regulations, but there
15:30:21 20 is no challenge being made to the statute. I don't read
15:30:31 21 the statute the same way the plaintiffs do. And I'm not
15:30:35 22 sure I read the primary case that they rely on the same
15:30:38 23 way either. We have a statute here whose most important
15:30:43 24 provision is the Statute Seven that relates to the
15:30:47 25 limitation on lawfully performed abortions. It starts

15:30:52 1 with an exemption for all true medical emergencies. If
15:30:58 2 we have any women who are suffering from true medical
15:31:02 3 emergency, those abortions can go forward unregulated
15:31:06 4 without the requirement of the license for the facility.
15:31:12 5 The statute creates a regimen of facilities licensing.
15:31:18 6 That is different from the board of healing arts which
15:31:22 7 has regulatory authority over physicians, and which
15:31:26 8 regulates the conduct of the doctors. The facilities
15:31:30 9 are going to have separate licensing, and separate
15:31:35 10 oversight by the department of health and environment.
15:31:38 11 And that's why it misses the point to talk about the
15:31:43 12 extent to which the doctors are all ready subject to
15:31:46 13 regulations by the board of healing arts. They always
15:31:50 14 have been subject to regulation by the board of healing
15:31:52 15 arts. They're going to continue to be subject to that
15:31:54 16 regulation. Those regulations and that agency have
15:31:58 17 nothing to do with overseeing the facilities. It just
15:32:03 18 so happens, coincidentally, the plaintiffs in this case
15:32:07 19 are both the physicians who perform the abortions and
15:32:10 20 the owners of the facilities. That could be otherwise.
15:32:14 21 We could have a circumstance where a new applicant for
15:32:19 22 licensing does not have the coincidence where the
15:32:24 23 physicians performing the abortion are also the owners
15:32:26 24 and operators of the facility. The regulations that
15:32:31 25 have to be adopted by the department of health and

15:32:34 1 environment have to address not just the specialized
15:32:39 2 concerns of these plaintiffs, they have to also address
15:32:44 3 the issue of any and all future applicant for licensing
15:32:48 4 under the statute. We need sufficiently explicit,
15:32:53 5 clear, understandable regulations that can be complied
15:32:57 6 with not just by these individuals but also by all
15:33:01 7 future applicants. We are, of course, caught coming and
15:33:06 8 going between a potential objection that the regulations
15:33:10 9 are too vague and objection that the regulations are too
15:33:15 10 specific. If the regulations did not include
15:33:20 11 definitions of what the facilities ought to look like,
15:33:22 12 they would be challenged as unreasonably vague. Because
15:33:28 13 the temporary regulations do specify what the facilities
15:33:31 14 ought to look like, they're now challenged as being too
15:33:34 15 specific. I think the fact that these plaintiffs are
15:33:39 16 not pursuing their administrative remedies in front of
15:33:44 17 the KDHE is proof that the real grievance here is
15:33:49 18 against the statute, not against the regulations. There
15:33:53 19 is no grievance that arises from the lack of sufficient
15:34:00 20 time to comply with this statute. They do not want to
15:34:04 21 comply with the statute ever. They do not want
15:34:08 22 additional time to comply with the statute. They want
15:34:12 23 to be permanently relieved of the obligation ever to
15:34:16 24 comply with the statute. That is something the
15:34:20 25 department of health and environment cannot do for them

15:34:23 1 under any circumstances.

15:34:28 2 There is no fair reading of this statute
15:34:31 3 that would authorize the department of health and
15:34:34 4 environment to create out of thin air a process for
15:34:37 5 granting case by case exceptions and waivers. No such
15:34:42 6 waiver provision has been included in the statute. And
15:34:46 7 for that reason, you can't criticize KDHE for failing to
15:34:50 8 grant waivers and exception. The ultimate question,
15:34:55 9 because we are in US District Court and the state of
15:34:59 10 Kansas is the defendant, is whether there is a
15:35:02 11 constitutional violation, not merely is there an
15:35:08 12 arguable harm that could be addressed in a court case.
15:35:12 13 Court does not have jurisdiction to award tort damages
15:35:14 14 under the Eleventh Amendment. We're here solely for
15:35:19 15 injunctive relief consistent with the Eleventh
15:35:23 16 Amendment, and the question is whether the state is
15:35:26 17 acting unconstitutionally, enacting and enforcing this
15:35:32 18 statute.

15:35:33 19 Now, as I read the Planned Parenthood versus
15:35:38 20 Drummond case, the Missouri case that's been relied on,
15:35:43 21 Judge Smith specifically held that he believed those
15:35:46 22 plaintiffs would fail in their facial challenge to the
15:35:51 23 statute. That statute required all abortion providers
15:35:56 24 in the state of Missouri to comply with the standard for
15:36:00 25 ambulatory surgical centers. I'm looking at the

15:36:09 1 September 24, 2007 decision in that case, 2007 Westlaw
15:36:15 2 2811407. The fourth page of that opinion states, the
15:36:22 3 court holds that PPK does not have a probability of
15:36:28 4 success of establishing these facial claims. It goes on
15:36:34 5 further to say, for plaintiffs to succeed, the court
15:36:36 6 would have to determine the statute, and intended
15:36:40 7 regulations cannot be justified as a legitimate health
15:36:43 8 or safety measure. The court does not believe
15:36:46 9 plaintiffs will carry their heavy burden. Further into
15:36:50 10 that opinion, the judge pointed out that it is
15:36:54 11 reasonable to have regulations that require all
15:36:59 12 facilities where surgery is performed to abide by the
15:37:03 13 same regulations. What we're really here today about is
15:37:09 14 an argument that these plaintiffs are entitled to a
15:37:13 15 grandfather provision that is not in the statute, that
15:37:17 16 they are constitutionally entitled to a grandfather
15:37:19 17 provision that tells them that they are never, ever
15:37:23 18 going to be required to comply with current law, that
15:37:27 19 the law cannot be updated in any way that would restrict
15:37:32 20 their ability to keep performing their day to day
15:37:35 21 activities in the way they've been accustomed to.
15:37:39 22 Kansas law has never recognized a right protected by law
15:37:45 23 to perform medicine the way these plaintiffs have been
15:37:48 24 performing it. To the extent they've been lawfully
15:37:52 25 performing it, that's been primarily as a result of

15:37:54 1 judicial decisions that restrict past statutes that made
15:37:59 2 abortion illegal. We don't have a protected property
15:38:04 3 interest here in the business that these plaintiffs are
15:38:08 4 engaging in. They do not have existing licenses that
15:38:11 5 tell them that they have a -- a state guaranteed right
15:38:15 6 to engage in the business of providing abortions. The
15:38:24 7 state of Kansas does have the right to regulate
15:38:26 8 abortions. Judge Smith noted that in his decision.

15:38:30 9 The only question is whether they're going
15:38:33 10 to regulate abortions under a uniform rule applicable
15:38:37 11 both to these plaintiffs and to ambulatory surgical
15:38:41 12 centers, or whether instead, this court is going to
15:38:44 13 compel the state to create exceptions that apply only to
15:38:51 14 these plaintiffs and to no one else, to let them operate
15:38:53 15 the way they want to, free of all oversight and
15:38:58 16 regulation of the way their facilities are structured,
15:39:01 17 maintained and operated.

15:39:06 18 The standard for a temporary injunction, the
15:39:10 19 standard for temporary restraining order require there
15:39:15 20 to be a finding of irreparable harm, not just some harm,
15:39:18 21 but irreparable harm. The statute says that all medical
15:39:23 22 emergencies can go forward unlicensed. Statute also
15:39:27 23 says that unlicensed facilities can perform five first
15:39:33 24 trimester abortions every month without transgressing
15:39:36 25 the regulations or the statute. I think I have a

15:39:40 1 different idea of what irreparable harm is than the
15:39:43 2 plaintiffs have put forward. It is not enough to show
15:39:48 3 that there is some harm. The harm must be a harm that
15:39:53 4 cannot be remedied in any other way other than the
15:39:57 5 issuance of the temporary restraining order, and that
15:40:01 6 simply is not true in this case.

15:40:04 7 We cited the court to the case of State, ex
15:40:08 8 rel, Schneider versus Liggett. One of the key holdings
15:40:11 9 of that case from 1976 was the Kansas administrative
15:40:15 10 agencies have no jurisdiction to decide constitutional
15:40:18 11 challenges. The constitutional challenges must be
15:40:21 12 brought for the first time when an administrative case
15:40:25 13 has first been transferred to the district court on
15:40:27 14 appeal. That's what ought to be done in this case.
15:40:31 15 These plaintiffs should proceed to exhaust their
15:40:35 16 administrative remedies, and then if they don't get a
15:40:38 17 license, they should appeal to the district court. The
15:40:44 18 district court can then entertain their constitutional
15:40:46 19 challenges and decide whether this statute needs to have
15:40:52 20 a grandfather clause read into it in order to comply
15:40:55 21 with due process. KDHE cannot do that for them. It
15:41:00 22 lacks the authority to do it.

15:41:07 23 I have never heard of a regulated industry
15:41:13 24 being granted a due process right to craft the
15:41:17 25 regulations that apply to them, which is what I see in

15:41:21 1 the motion, that due process would require that these
15:41:25 2 regulations actually result from a meet and confer of
15:41:31 3 some kind with the regulated businesses. That is not my
15:41:35 4 understanding of due process. Due process comes when
15:41:44 5 the protected interest, whether it's the liberty
15:41:47 6 interest or property interest, is threatened, or the
15:41:50 7 government takes action, the government affords due
15:41:54 8 process at that time.

15:41:56 9 The government does not afford due process
15:41:58 10 to everyone by inviting their lobbyists into the
15:42:03 11 legislative process. That is not where due process
15:42:06 12 applies. Likewise, due process does not mandate that
15:42:11 13 there be a -- a prior comment period before a regulation
15:42:16 14 is made effective. I see no evidence whatever to
15:42:28 15 support the contention that either the statute or the
15:42:32 16 regulation was designed to make access more difficult.
15:42:37 17 In fact, the reply brief that was filed today agrees
15:42:42 18 with my own reading of the statute that the real purpose
15:42:46 19 is to try to bring all abortion clinics under a single
15:42:50 20 standard of professionalism, that being the standard of
15:42:55 21 professionalism historically present in ambulatory
15:42:59 22 surgical centers. If there is no medical emergency in
15:43:09 23 this case, there is no irreparable harm. If there were
15:43:18 24 a true medical emergency, the statute would not even
15:43:21 25 apply.

15:43:29 1 This statute, these regulations, have
15:43:33 2 nothing whatever to do with abortion protesters at all.
15:43:38 3 The fact that this statute does not address that
15:43:42 4 completely distinct and separate subject has nothing to
15:43:45 5 do with the lawfulness of these regulations. I think if
15:44:00 6 the purpose here is to avoid any potential risk of
15:44:04 7 prosecution for violation of the statute, we're probably
15:44:09 8 missing at least one party. That would, I assume, be
15:44:13 9 the prosecutor in Wyandotte County. But again, I don't
15:44:19 10 really think that that's why we're here today. What
15:44:22 11 we're here today is to address whether the department of
15:44:25 12 health and environment ought to be restrained and
15:44:28 13 prevented from going forward with the administrative
15:44:30 14 process of hearing the administrative appeal from denial
15:44:35 15 of the application for permits. I think that would be a
15:44:39 16 mistake. I think it would be an unnecessary
15:44:42 17 complication in the procedural posture of this case. I
15:44:46 18 think the right thing to do is not to restrain the
15:44:51 19 department of health and environment, to go ahead and
15:44:55 20 have the appeals prosecuted in the normal course so that
15:44:59 21 we can see what the outcome of those administrative
15:45:02 22 appeals are. Then whichever party feels aggrieved by
15:45:08 23 the outcome of the administrative appeal can pursue
15:45:12 24 additional relief in the district court, presumably the
15:45:17 25 District Court of Shawnee County, and at that time,

15:45:21 1 constitutional challenges to the interpretation and
15:45:23 2 application of the statute can properly be raised, and
15:45:27 3 the court can hear what a Kansas judge thinks this
15:45:32 4 statute really means.

15:45:37 5 If I read the -- the factual materials
15:45:42 6 correctly, I think the witnesses that are being offered
15:45:46 7 in support of this motion are in agreement with me. If
15:45:49 8 I read the contractor's affidavit, it's the first
15:45:53 9 attachment, the contractor says he's looked at the
15:45:56 10 regulations, and they -- he says these regulations
15:45:59 11 appear to him to be perfectly ordinary and normal
15:46:03 12 requirements for an ambulatory surgical center. He
15:46:09 13 said, that's right. That's -- that means they've done
15:46:12 14 their job correctly. The purpose of the regulations is
15:46:16 15 essentially to bring into alignment the practice in
15:46:22 16 individual doctor's offices with the practice in
15:46:25 17 ambulatory surgical centers, that that's the level of
15:46:31 18 health care that the legislature of the state wants to
15:46:35 19 see afforded in every abortion facility operating in
15:46:40 20 this state. To the extent that is inconsistent with
15:46:48 21 operating a comparatively small doctor's office, that
15:46:54 22 grievance would have to be taken up with the Kansas
15:46:56 23 legislature, not with the department of health and
15:46:59 24 environment.

15:47:01 25 There is no way for the KDHE to draft and

15:47:05 1 adopt regulations that carry out the orders of the
15:47:10 2 Kansas legislature without having substantially what
15:47:17 3 these regulations say. If there is any wiggle room
15:47:21 4 there, I'm sure that all the proceedings in this case
15:47:24 5 will be taken into account in drafting any changes of
15:47:31 6 the permanent regulations that will take the place of
15:47:33 7 the temporary regulation. But the notion that this is
15:47:37 8 somehow a facially obvious due process violation, I
15:47:45 9 think is clearly erroneous. There is not a single case
15:47:50 10 that has been offered up here that holds that this kind
15:47:55 11 of statute and these regulations, regulations similar to
15:47:59 12 this, are due process violations. I might point out
15:48:04 13 that what the Planned Parenthood case really held was
15:48:08 14 that to the extent non-surgical abortions were being
15:48:11 15 performed in one of those plaintiffs' facilities, those
15:48:15 16 would not appropriately be subject to the same rules and
15:48:17 17 regulations as the -- the rules applicable to surgical
15:48:21 18 facilities. But in the course of that holding, Judge
15:48:25 19 Smith specifically included that everyone who performs
15:48:29 20 surgical abortions deserves to be subjected to the same
15:48:33 21 rules and regulations as every other surgical facility
15:48:37 22 in the state of Missouri.

15:48:39 23 I don't know how that case can be cited for
15:48:42 24 the proposition that there is some sort of property
15:48:46 25 right in continuing to operate a private medical office

15:48:55 1 that falls far short of the requirements of an
15:48:59 2 ambulatory surgical center as an abortion facility. We
15:49:09 3 have a lot of speculation about patients who might or
15:49:13 4 might not be allowed to go to the place they would
15:49:20 5 prefer to go for their abortion.

15:49:23 6 I am not aware of any irreparable harm that
15:49:26 7 is suffered by being required to go to an ambulatory
15:49:31 8 surgical center rather than going to a doctor's office
15:49:35 9 for an abortion. I do not know that one facility is any
15:49:42 10 more subject to the potential for screaming protesters
15:49:46 11 as opposed to the other.

15:49:52 12 The standard in the Tenth Circuit for the
15:49:56 13 issuance of temporary restraining order is plain, and it
15:50:02 14 is what we've cited the court to, the Aid for Women case
15:50:06 15 from 1996. It is not enough to just say that some
15:50:14 16 privacy interest is implicated in the enforcement of the
15:50:18 17 statute. Considerably more detailed showing is required
15:50:25 18 before the TRO can be issued by a US District Court here
15:50:28 19 in the state of Kansas, unlike apparently, the standard
15:50:32 20 they're applying in Missouri.

15:50:36 21 We think it would be a mistake to bring to a
15:50:40 22 halt the administrative process at the state level. We
15:50:44 23 think it's extremely important that this administrative
15:50:46 24 process be allowed to play itself out. I am aware of no
15:50:50 25 threat of prosecution of any of these plaintiffs. We

15:50:55 1 have nothing from any of the interested prosecutorial
15:51:00 2 agencies suggesting that they're waiting to swoop down
15:51:03 3 on someone, close their building, arrest them and throw
15:51:06 4 them in jail. Kansas courts are perfectly competent to
15:51:14 5 address due process concerns. If there really are
15:51:19 6 grandfather clause concerns under the statute, they can
15:51:25 7 be addressed by the Shawnee County District Court. They
15:51:28 8 don't have to be addressed first and foremost here in
15:51:32 9 this court.

15:51:34 10 Without a fully developed administrative
15:51:38 11 record, we will never know whether either of the
15:51:42 12 facilities operated by these plaintiffs has any hope
15:51:45 13 ever of being licensed consistent with the statute and
15:51:49 14 the regulations. They have outlined what they consider
15:51:54 15 the reasons that they think would probably impose a
15:52:01 16 burden on them in seeking to be licensed, but we will
15:52:05 17 never know until we've seen the entire administrative
15:52:08 18 record filled out whether the real reason they don't
15:52:13 19 have a license issued, assuming there is no license
15:52:18 20 issued, is because they didn't have enough time, or
15:52:21 21 whether instead, their grievance is that no matter how
15:52:24 22 much time they're allowed, they have no intention of
15:52:27 23 complying with the statute.

15:52:34 24 I'd like to see this case resolved in as
15:52:39 25 expeditious and final a way as possible, I think it

15:52:42 1 would be a mistake to shut down the administrative
15:52:45 2 process prematurely, and that's why I think that because
15:52:50 3 there is no threat of eminent enforcement, no one is
15:52:55 4 being threatened with going to jail, medical emergencies
15:52:59 5 are all ready addressed in the statute, we do not have
15:53:05 6 any reason to believe that irreparable harm will follow
15:53:09 7 if we let the administrative process play out, that
15:53:12 8 that's the right course. And if expedited hearings are
15:53:16 9 needed, all plaintiffs need do is ask for them. We have
15:53:20 10 a highly cooperative office of administrative hearings,
15:53:23 11 and we can do what it takes to get the issues resolved
15:53:29 12 as quickly as possible, and then come back to this
15:53:32 13 court, if necessary, with a fully developed
15:53:35 14 administrative record. Thank you.

15:53:39 15 THE COURT: Court had given 30 minutes per
15:53:42 16 side. In light of the time that we've used, I am going
15:53:46 17 to ask the parties if they wish, they can respond to
15:53:49 18 each other's arguments at this time. Give you some
15:53:52 19 additional time. Five minutes.

15:53:56 20 MS. WOODY: Sure. Your Honor, I just want
15:54:27 21 to address a couple of things that Mr. Fabert mentioned.
15:54:30 22 First of all, the defendants cannot prevail in this case
15:54:33 23 by mischaracterizing the plaintiff's claims. This is
15:54:35 24 not a facial challenge to the statute. This is an as
15:54:38 25 applied statute to the -- the particular way the KDHE

15:54:42 1 has implemented the licensing provisions of the act and
15:54:45 2 the temporary regulations as adopted. Secondly,
15:54:50 3 Mr. Fabert argues that there's no irreparable harm to
15:54:53 4 patients because they can simply choose another abortion
15:54:56 5 facility or they can get a medical emergency exception,
15:54:59 6 and implies somehow that the two women that we discussed
15:55:02 7 in the first part of the argument could somehow get some
15:55:04 8 kind of a waiver in that respect. But if you look at
15:55:07 9 the statute, it says only where there's -- the woman is
15:55:10 10 in danger of eminent death or impairment of a major
15:55:14 11 bodily function could she get a waiver for an emergency
15:55:19 12 abortion.

15:55:20 13 In this instance, these abortions are
15:55:22 14 medically indicated, but would not fall within the
15:55:25 15 definition of the regulations, and therefore, would not
15:55:30 16 be able to -- she would not able to get an abortion --
15:55:38 17 would not be able to get an abortion on a medical
15:55:40 18 emergency basis.

15:55:43 19 I want to take issue with the idea that the
15:55:45 20 board of healing arts does not regulate the facilities.
15:55:48 21 As the court looks at the chart that we've given the
15:55:51 22 court, clearly it does. That's the reason for the
15:55:53 23 inspections coming out. If you look at the -- for
15:55:56 24 instance, at the issue of procedure room size, you can
15:55:58 25 see that the procedure room size is spoken to in the

15:56:03 1 Kansas regulations for office space surgery. It is, of
15:56:06 2 course, not nearly as stringent as the 150 square feet
15:56:09 3 requirement that's in the -- the temporary regulations,
15:56:12 4 but nor is that as stringent as -- nor is the one for
15:56:18 5 hospitals as stringent. There's nothing about that
15:56:21 6 regulation that is appropriate in this case, and there's
15:56:24 7 nothing that would mandate such a regulation in light of
15:56:28 8 the other regulations specifically for office space
15:56:31 9 surgeries.

15:56:32 10 With respect to the argument that there's no
15:56:38 11 due process argument here, and that we should go through
15:56:41 12 the administrative route, it is the court's obligation
15:56:44 13 to address the constitutional issues under due process.
15:56:48 14 The idea that the plaintiffs here are seeking some
15:56:51 15 special treatment is not -- is not true. Here you have
15:56:54 16 regulations that were adopted that gave the providers
15:56:59 17 nine days to come in compliance with regulations that
15:57:02 18 would have totally meant total remodeling of their
15:57:06 19 facilities. There is no due process in that. The
15:57:09 20 regular -- the regular procedure for adopting
15:57:12 21 regulations, with public comment going forward with
15:57:17 22 that, and then having permanent regulations entered at
15:57:21 23 some time in the future, that's the regulations that we
15:57:24 24 are asking the court to have the Kansas -- the state of
15:57:27 25 Kansas follow, not that they adopt some temporary

15:57:30 1 regulations that in effect shut these folks down.

15:57:34 2 There is irreparable harm to the doctors.
15:57:36 3 If you look at Judge Smith's opinion, he clearly says
15:57:39 4 that because of the Eleventh Amendment, as it's stated
15:57:41 5 -- as stated, they don't have an opportunity to come in
15:57:44 6 here for tort damages. So, for instance, any lost
15:57:47 7 revenues to the -- to the doctors are irreparable harm
15:57:50 8 because they can never recoup those while they go
15:57:53 9 through the administrative procedures that the state is
15:57:55 10 talking about. So, clearly there is irreparable harm
15:57:58 11 there. There clearly is irreparable harm to women
15:58:02 12 seeking abortions and access to abortions in this state
15:58:05 13 by way of the temporary regulations. And as we've said,
15:58:08 14 there is absolutely no reason for the court to let
15:58:14 15 them -- to not give injunction in this case and let the
15:58:17 16 case go forward, if there is any other information the
15:58:20 17 court needs, that it will be developed throughout --
15:58:23 18 throughout this procedure, it's clear, and plaintiff
15:58:27 19 stated in their brief, this court has discretion to
15:58:31 20 enter injunctive relief when it's appropriate. If ever
15:58:35 21 there was a case where injunctive relief is appropriate,
15:58:37 22 where the state should be restrained from enforcing
15:58:41 23 these temporary regulations in nine days when it's
15:58:46 24 impossible for the plaintiffs to comply, this is such a
15:58:49 25 case. If you look at Judge Smith's opinion, it doesn't

15:58:52 1 say what the state said. There, he found that the same
15:58:55 2 kinds of regulations, the same kinds of restrictions,
15:58:59 3 because they didn't provide for ample time for the
15:59:01 4 plaintiffs to comply and because they didn't provide for
15:59:06 5 an opportunity for them to seek waivers, likely would be
15:59:10 6 unconstitutional.

15:59:10 7 There's no difference between the
15:59:12 8 regulations at issue here and those that were at issue
15:59:16 9 in front of the Western District of Missouri with
15:59:18 10 respect to the -- the constitutionality of those --
15:59:23 11 those issues.

15:59:23 12 Clearly, we believe that there is likelihood
15:59:27 13 of success on both the due process and the undue burden
15:59:30 14 issues, and we respectfully request that the court grant
15:59:33 15 injunctive relief.

15:59:35 16 THE COURT: Mr. Fabert?

15:59:38 17 MR. FABERT: Well, I just want to address
15:59:51 18 this notion that we are mischaracterizing the relief
15:59:54 19 that was being requested here. Umm, the relief that's
15:59:59 20 being requested here is permanent, permanent,
16:00:05 21 non-enforcement of the statute. Plaintiffs are not
16:00:09 22 asking for a schedule, for a reasonable length of time
16:00:14 23 for the KDHE to tell them exactly what they need to do
16:00:18 24 to come into compliance and to get licenses. They have
16:00:22 25 made it very plain that the reason they consider their

16:00:24 1 harm to be irreparable is the fact that they cannot
16:00:28 2 under any reasonable circumstances comply with any
16:00:32 3 anticipated version of the regulations. This nine day
16:00:37 4 argument is, therefore, a red herring. We could have
16:00:40 5 given them nine months, and their objection would be
16:00:43 6 identical.

16:00:44 7 They do not care how much time they're
16:00:47 8 allowed. They do not want to come into compliance ever.
16:00:52 9 They want this court to tell them they don't ever have
16:00:54 10 to remodel their facilities to make them look more like
16:00:59 11 an ambulatory surgical center.

16:01:07 12 The only reason -- the only reason damages
16:01:11 13 are not available is because these plaintiffs have
16:01:14 14 chosen the forum of US District Court. If they thought
16:01:18 15 they needed a money damages remedy, all they needed to
16:01:22 16 do was to start the proceedings in state court, because
16:01:25 17 there is no Eleventh Amendment immunity in state court.
16:01:29 18 It is their decision to choose this forum of limited
16:01:33 19 jurisdiction that limits the extent of their remedy, not
16:01:38 20 anything the state has done.

16:01:42 21 Once more, if the issue is the regulations
16:01:46 22 and the behavior of the Kansas Department of Health and
16:01:49 23 Environment, there can be no criticism of their conduct.
16:01:55 24 It is not due process for them to overstep the authority
16:01:59 25 entrusted them by the legislature of the state of

16:02:02 1 Kansas. They have no power to grant waivers. They have
16:02:04 2 no power to grant grandfather clauses. They have no
16:02:10 3 power to entertain constitutional challenges to this
16:02:13 4 statute. Only the District Court of Shawnee County can
16:02:18 5 entertain the constitutional challenges in the first
16:02:22 6 instance. That is what needs to occur here to give
16:02:25 7 these plaintiffs all the remedy that they're entitled
16:02:29 8 to, and the sooner we reach that point, then they will
16:02:33 9 get all the remedy the law will ever allow them. Thank
16:02:38 10 you.

16:02:41 11 THE COURT: What the court would like to do
16:02:43 12 at this time is then -- appreciate the parties
16:02:46 13 accommodating the court's schedule -- if I could take a
16:02:49 14 recess to consider the arguments that have been made
16:02:51 15 this afternoon, and then return and give you the court's
16:02:55 16 ruling. Thank you.

16:02:56 17 (Whereupon court took a recess. Proceedings
16:38:36 18 then continued as follows:)

16:38:36 19 THE COURT: We're back on the record. I
16:38:59 20 want to thank the parties, counsel, for again
16:39:02 21 accommodating the court in regards to our schedule for
16:39:07 22 this afternoon, and also in regards to the expedited
16:39:13 23 briefing that the court made a request of the parties.
16:39:16 24 So, thank you for that. As I begin with the court's
16:39:20 25 ruling, I will mention this for the record. We're at a

16:39:27 1 very early stage of these proceedings. The record has
16:39:31 2 not been fully developed, and what is before the court
16:39:37 3 is a request for preliminary relief. The court has
16:39:44 4 reviewed the briefs, the evidence, and the relevant law.
16:39:49 5 Court has heard the parties' arguments, and again, is
16:39:52 6 now prepared to rule. I'd ask the parties to follow
16:39:57 7 along. This will take me a little while here to get
16:40:01 8 through.

16:40:02 9 To begin with, because defendants had notice
16:40:05 10 of this hearing, filed written arguments and authorities
16:40:10 11 regarding their position and are present, the court will
16:40:16 12 consider plaintiff's motion which was entitled motion
16:40:19 13 for a temporary restraining order and/or preliminary
16:40:24 14 injunction, the court will consider it as one for a
16:40:28 15 preliminary injunction.

16:40:30 16 The purpose of a preliminary injunction is
16:40:32 17 to maintain the status quo pending the outcome of the
16:40:37 18 case. Plaintiffs as the parties seeking the preliminary
16:40:42 19 injunction bear the burden to establish, number one, a
16:40:45 20 substantial likelihood of prevailing on the merits.
16:40:49 21 Number two, irreparable harm unless the injunction is
16:40:53 22 issued. Number three, the threatened injury outweighs
16:40:57 23 the harm that the injunction may cause the opposing
16:41:03 24 party. And number four, an injunction, if issued, will
16:41:07 25 not adversely affect the public interest.

16:41:11 1 First, the court looks at the likelihood
16:41:13 2 that plaintiffs will succeed on the merits of their
16:41:15 3 claims. Plaintiffs base their injunction request on
16:41:21 4 their claims that defendants violated plaintiffs'
16:41:24 5 procedural and substantive due process rights and their
16:41:30 6 patient's right to privacy. To succeed on the
16:41:34 7 procedural due process claim under the Fourteenth
16:41:38 8 Amendment, plaintiffs must establish that they possessed
16:41:43 9 a protected interest such that the due process
16:41:46 10 protections were applicable. If they make such showing,
16:41:50 11 then they must show that they were not afforded an
16:41:53 12 appropriate level of process. It's a case of Farthing
16:41:58 13 versus City of Shawnee at 39 Fed 3rd 1131, an 1135, a
16:42:04 14 Tenth Circuit case from 1994. Plaintiffs argue they
16:42:09 15 have a property and liberty interest in the continued
16:42:12 16 operation of their medical practice. The right to
16:42:16 17 pursue a lawful business has long been recognized as a
16:42:20 18 property right within the protection of the Fourteenth
16:42:22 19 Amendment. Plaintiffs have provided evidence that their
16:42:26 20 medical practice has been in operation, that they have
16:42:29 21 been providing abortion services for approximately
16:42:32 22 24 years. Based on the record presented, it appears
16:42:38 23 plaintiffs have a protected interest in maintaining
16:42:41 24 their business. Procedural due process requires notice
16:42:45 25 and a pre-deprivation hearing before property interests

16:42:51 1 are negatively affected by governmental actors. At this
16:42:55 2 stage of the litigation, plaintiffs have also provided
16:43:00 3 the court with evidence to suggest that defendants did
16:43:02 4 not afford them an appropriate level of process
16:43:06 5 implementing the temporary regulations and licensing
16:43:11 6 process. On the record presented, it appears defendants
16:43:17 7 failed to provide plaintiffs with, arguably, any
16:43:21 8 process, let alone adequate process. According to the
16:43:25 9 record presented, plaintiffs wrote to KDHE regarding the
16:43:31 10 act on May 17th, 2011, the day after the act was
16:43:37 11 enacted. KDHE responded on May 26th, informing
16:43:43 12 plaintiffs that the new regulations and licenses would
16:43:47 13 become effective July 1st, which is today's date.
16:43:52 14 Plaintiffs did not receive regulations until June 9th
16:43:56 15 when they were given until Friday, June 17th to become
16:44:00 16 familiar with the regulations, confirm compliance, and
16:44:06 17 apply for a license. After the close of business on
16:44:10 18 June 17th, KDHE sent plaintiffs a copy of the final
16:44:14 19 temporary regulations and licensing process. These
16:44:20 20 regulations imposed more, arguably, onerous requirements
16:44:27 21 than the June 9th draft regulations. Plaintiffs asked
16:44:34 22 for waivers, but were told no waivers would be given.
16:44:40 23 There's no evidence in the record that plaintiffs were
16:44:42 24 provided a meaningful notice or opportunity to be heard
16:44:47 25 or give comment on the regulations. In addition to

16:44:51 1 guaranteeing fair procedures, the due process clause of
16:44:54 2 the Fourteenth Amendment, quote, covers a substantive
16:44:58 3 sphere as well, barring certain government actions,
16:45:01 4 regardless of the fairness of the procedures used to
16:45:04 5 implement them, end quote, case of Diaz versus City and
16:45:09 6 County of Denver at 567 Fed 3rd 1169, at 1181, a Tenth
16:45:16 7 Circuit case from 2009 which is quoting County of
16:45:21 8 Sacramento versus Lewis at 523 U S 833 at 845, 1998
16:45:26 9 Supreme Court case. In this case, the legislative
16:45:31 10 enactment is required to bear a rational relation to the
16:45:34 11 legitimate government interest. Plaintiffs argue the
16:45:38 12 temporary regulations and licensing process requirements
16:45:42 13 are medically unnecessary, unattainable and harmful to
16:45:47 14 public health. Plaintiffs further argue that defendants
16:45:50 15 have violated their substantive due process rights by
16:45:53 16 implementing the requirements in a manner that prohibits
16:45:57 17 plaintiffs from continuing to provide abortion services
16:46:00 18 unless they meet onerous standards on a short amount of
16:46:04 19 time. Plaintiffs contend number one, there's no medical
16:46:08 20 need for the physical facility requirements; number two,
16:46:13 21 it's impossible for them to comply with the physical
16:46:16 22 facility requirements in time to obtain a license before
16:46:21 23 the effective date of the act; number three, the
16:46:24 24 physical facility requirements directly undermine public
16:46:28 25 health by substantially impeding access to a lawful and

16:46:33 1 necessary medical procedure. Through affidavits,
16:46:38 2 plaintiffs have presented evidence that the temporary
16:46:41 3 regulations and licensing process requirements regarding
16:46:45 4 the physical facilities where abortion services are
16:46:49 5 performed are unique to those facilities, that the
16:46:52 6 regulations for facilities to handle more complex and
16:46:56 7 riskier procedures like hospitals do not contain
16:46:59 8 physical facility requirements as strict and/or onerous
16:47:04 9 as the temporary regulations and licensing process, and
16:47:09 10 that the temporary regulations and licensing process
16:47:13 11 physical facility requirements are not medically
16:47:15 12 necessary. Defendants have not presented evidence that
16:47:20 13 the additional requirements for the facilities where
16:47:23 14 abortion services are provided are rationally related to
16:47:27 15 a legitimate governmental interest. The evidence
16:47:34 16 presented to the court is sufficient at this early stage
16:47:39 17 of the proceedings to show a likelihood that plaintiffs
16:47:43 18 will succeed on the merits of their due process claims.
16:47:47 19 Because the court has found that plaintiffs have shown a
16:47:51 20 likelihood that they will succeed on the merits of their
16:47:53 21 due process claims, the court need not address
16:47:57 22 plaintiff's right to privacy claim.

16:47:59 23 The court next considers whether plaintiffs
16:48:01 24 will suffer irreparable harm if the court denies a
16:48:04 25 preliminary injunction. The irreparable harm

16:48:06 1 requirement is satisfied if plaintiff shows a
16:48:09 2 significant risk that it will experience harm that
16:48:14 3 cannot be compensated after the fact by monetary
16:48:17 4 damages. Irreparable harm can occur through loss of
16:48:21 5 customer or good will as well as threats to a business's
16:48:26 6 viability. Here, plaintiffs argue that absent an
16:48:29 7 injunction, defendants will enforce the temporary
16:48:32 8 regulations and licensing process immediately, harming
16:48:36 9 plaintiffs by number one, forcing them to shut down
16:48:38 10 their ongoing abortion services; number two, subjecting
16:48:43 11 them to loss of revenues; number three, subjecting them
16:48:46 12 to loss of future patients; and number four, damaging
16:48:50 13 the professional standing. Plaintiffs also allege, in
16:48:54 14 the absence of the requested injunction, their patients
16:48:57 15 will be exposed to unnecessary health risks. The Kansas
16:49:02 16 women will be unable to obtain abortion services in the
16:49:05 17 state and/or in a private medical office setting, and
16:49:09 18 public health will be threatened. Yesterday, KDHE
16:49:16 19 issued a one year license to Comprehensive Health of
16:49:19 20 Planned Parenthood of Kansas and Mid-Missouri, one of
16:49:23 21 only two other facilities in Kansas that provides
16:49:26 22 abortion services. Defendants argue that because
16:49:30 23 Planned Parenthood was licensed, women will still be
16:49:33 24 able to obtain abortion services in Kansas. They also
16:49:37 25 argue that plaintiffs can seek to get a license to

16:49:40 1 perform abortion services at another facility. Thus,
16:49:46 2 the defendants argue, the only remaining harm of
16:49:49 3 plaintiffs is the speculative harm that plaintiffs will
16:49:52 4 lose revenue and future clients, receive damage to the
16:49:58 5 professional standing, and that there will be a threat
16:50:00 6 to public health. Plaintiffs presented evidence that
16:50:03 7 without an injunction, they would have to cease
16:50:08 8 providing medical services today. KDHE informed
16:50:12 9 plaintiffs this morning that they would be denied a
16:50:15 10 license. They have patients scheduled to receive these
16:50:19 11 services within the next week. According to the
16:50:23 12 affidavit submitted, these services are often medically
16:50:26 13 necessary, and a delay in the services creates a health
16:50:30 14 risk for patients. There is evidence in the record of
16:50:34 15 at least two women with fetal anomalies and serious
16:50:38 16 medical complications that will suffer irreparable harm
16:50:42 17 if an injunction is not issued. At least one of the
16:50:47 18 plaintiffs performs 25 percent of these services in the
16:50:51 19 state of Kansas. One plaintiff has been licensed, but
16:50:55 20 the record indicates that that clinic does not have the
16:50:59 21 specific expertise of plaintiffs Hodes and Nausser in
16:51:06 22 performing certain complicated procedures, and is
16:51:10 23 unlikely to be able to absorb the patients of both
16:51:13 24 plaintiffs in the manner that will address the health
16:51:15 25 concerns involved with dealing with delaying the

16:51:18 1 services to patients. There's also evidence that
16:51:24 2 plaintiffs will lose revenue through future clients, and
16:51:28 3 good will, and suffer harm to their professional
16:51:31 4 reputation if they are forced to stop providing legal
16:51:35 5 medical services. Based on the record presented, the
16:51:38 6 court finds that plaintiffs have sufficiently shown that
16:51:41 7 they will suffer irreparable harm unless a temporary
16:51:45 8 restraining order is issued.

16:51:47 9 Next, the court looks at whether the
16:51:49 10 threatened injury outweighs the harm that the temporary
16:51:54 11 restraining order may cause defendants. If the court
16:51:56 12 were to issue the requested orders, defendants would be
16:51:58 13 prohibited, at least temporarily, from enforcing the
16:52:01 14 temporary regulations and licensing process. There's no
16:52:05 15 evidence that an injunction will impose any affirmative
16:52:10 16 obligations, administrative burden or cost to
16:52:13 17 defendants. The delay in enforcing the state's laws
16:52:17 18 that might result from an injunction is not as great as
16:52:20 19 the threatened harm to plaintiffs and their patients.
16:52:23 20 An injunction would not prevent the regulation of
16:52:26 21 plaintiff's medical services entirely. Plaintiffs would
16:52:30 22 remain subject to existing regulatory requirements and
16:52:34 23 government oversight. Any delay or interruption from
16:52:38 24 the issuance of an injunction will be temporary pending
16:52:42 25 the resolution of this action. The court finds that the

16:52:47 1 significance, certainty and reparability of the
16:52:52 2 threatened harm outweigh any potential harm to
16:52:56 3 defendants.

16:52:57 4 Finally, court will consider whether the
16:52:59 5 injunction, if issued, would adversely affect the public
16:53:02 6 interest. This action involves access to and regulation
16:53:06 7 of medical services that directly affect the public
16:53:09 8 interest. Although regulation of medical services is a
16:53:13 9 recognizable public interest that would be affected by
16:53:17 10 issuing the requested injunction, the court believes
16:53:20 11 that the public's interest lies in preserving the status
16:53:24 12 quo pending resolution of this case. As the court
16:53:30 13 mentioned, if an injunction is issued, plaintiffs would
16:53:33 14 remain subject to the existing regulatory requirements
16:53:36 15 and government oversight. The court finds that
16:53:40 16 restraining action on the temporary regulations and
16:53:43 17 licensing process until the merits of this action can be
16:53:48 18 resolved would not adversely affect the public interest.
16:53:52 19 As a result of considering these factors, the court
16:53:56 20 finds plaintiffs have established entitlement to the
16:54:00 21 requested preliminary injunction. Plaintiff's motion is
16:54:04 22 granted. Defendants and their agents and successors and
16:54:09 23 office are temporarily restrained from enforcing the
16:54:13 24 licensing requirements of Senate Bill Number 36, 2011
16:54:18 25 bill, at Sections 2, 8 -- 2 and 8, and also enforcing

16:54:26 1 the temporary regulations and licensing procedures until
16:54:30 2 a resolution of this action.

16:54:34 3 I would direct the parties to, in light of
16:54:37 4 the court's ruling, contact the magistrate judge
16:54:41 5 assigned to this case to request that a scheduling order
16:54:46 6 regarding this case be set as soon as possible. Based
16:54:53 7 on the court's ruling, at this time, is there any
16:54:59 8 request or argument for a bond to be issued?

16:55:09 9 MR. FABERT: If it please the court, I think
16:55:11 10 Federal Rule 65 C makes a posting of some bond
16:55:19 11 mandatory, and there is no discretion to completely
16:55:21 12 waive and dispense with the posting of a security bond.

16:55:27 13 THE COURT: Is there a request for a bond
16:55:29 14 amount?

16:55:38 15 MR. FABERT: Umm, we think a nominal figure
16:55:44 16 of \$25,000 would be sufficient.

16:55:46 17 THE COURT: In regards to your statement
16:55:49 18 that the bond is mandatory, is that based on your
16:55:55 19 reading of the rule or some other source?

16:56:01 20 MR. FABERT: I think the language of the
16:56:03 21 rule states the court may issue a preliminary injunction
16:56:06 22 or a temporary restraining order only if the movant --
16:56:10 23 if the movant gives surety in an amount that the court
16:56:15 24 considers proper. And so, the black letter language of
16:56:17 25 the rule, I think, makes it obligatory to impose some

16:56:21 1 requirement on the security bond.

16:56:27 2 THE COURT: Thank you. Plaintiffs want to
16:56:30 3 be heard in regards to a request that a bond be set at
16:56:33 4 this time?

16:56:33 5 MS. WOODY: Yes, Your Honor. It's
16:56:34 6 plaintiff's position that Rule 65 provides the court
16:56:36 7 with discretion as to whether or not to enter a bond.
16:56:39 8 Based on the court's finding that there is no
16:56:41 9 affirmative action required by the state in this matter,
16:56:44 10 and no damages -- that there would be no damages to the
16:56:48 11 state from proceeding under the injunction, and as I
16:56:51 12 believe that injunctions of this nature have been
16:56:53 13 granted without bond as evidenced by the case that we
16:57:00 14 have cited to you, which is Judge Smith in the Western
16:57:02 15 District granted an injunction without a bond, and we
16:57:07 16 would draw the court's attention to the Tenth Circuit
16:57:10 17 case of Coquina Oil Corp versus Transwestern Pipeline
16:57:14 18 Company, there's no bond necessary absent the proof of
16:57:17 19 showing of likelihood of harm to the state.

16:57:21 20 THE COURT: Anything else?

16:57:23 21 MS. WOODY: No.

16:57:25 22 MR. FABERT: I don't believe so.

16:57:27 23 THE COURT: In regards to the rule, the rule
16:57:29 24 has the language that you've put on the record,
16:57:33 25 Mr. Fabert. I would tell you that courts have actually

16:57:37 1 weighed in, in regards to that language. I refer the
16:57:41 2 record to a case of RoDa Drilling Company versus Siegal
16:57:45 3 at 552 Fed 3rd 1203, at 1215, a Tenth Circuit case from
16:57:51 4 2009, noting wide latitude of trial courts in
16:57:56 5 determining whether to require a bond, despite what
16:58:00 6 appears to be the plain reading of the rule. It appears
16:58:07 7 to be something which this court has discretion based on
16:58:12 8 the court's interpretation of the rule. Again, the
16:58:15 9 court made its ruling. I believe in good faith the
16:58:23 10 state has asked for a bond to be imposed. At this time,
16:58:29 11 again, it's an early stage of these proceedings. The
16:58:32 12 record's not fully developed. The court under these
16:58:36 13 circumstances does not believe that a bond should be
16:58:40 14 required. I don't believe that there's been a
16:58:45 15 sufficient showing of likelihood of harm by the court
16:58:49 16 not issuing the bond. Bond request has been considered
16:58:52 17 by the court. At this time, at this hearing, that
16:58:56 18 request is denied. If there's nothing else from the
16:58:59 19 parties, this hearing's adjourned. Thank you.

16:59:08 20 MR. CHANAY: I'm sorry, Your Honor, I just
16:59:10 21 had one question. Is the state free to continue under
16:59:13 22 process of developing its permanent regulations by
16:59:16 23 taking evidence from the public and comment on the
16:59:18 24 regulations as they have intended for the -- for the
16:59:22 25 permanent application? I would certainly understand

16:59:25 1 your ruling to keep them from implementing them, but may
16:59:28 2 they at least continue on in the development process and
16:59:32 3 taking public comment and information for those
16:59:34 4 regulations?

16:59:38 5 THE COURT: I don't know if I need to hear
16:59:39 6 from plaintiffs in regards to that, because I would find
16:59:42 7 the plaintiffs have specifically addressed what relief
16:59:46 8 they were requesting. I don't think the relief the
16:59:48 9 court has granted in any way would interrupt or
16:59:52 10 interfere with that part of the process from continuing.

16:59:56 11 MR. CHANAY: All right. Very good.

16:59:57 12 THE COURT: Anything else?

16:59:57 13 MR. CHANAY: No, Your Honor.

16:59:58 14 THE COURT: If there's nothing else, this
17:00:00 15 hearing's adjourned. Thank you.

16 (Whereupon court recessed proceedings.)

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C E R T I F I C A T E

I, Nancy Moroney Wiss, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 52 typewritten pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED July 12, 2011.

S/ _____
Nancy Moroney Wiss, CSR, CM, FCRR