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CASE NUMBER: 114153

No. 15-114153-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Hodes & Nauser, M.D.s, P.A.,
Herbert C. Hodes, M.D., and Traci Lynn Nauser, M.D.,
Plaintiffs-Appellees,

v.

Derek Schmidt, in his official capacity as Attorney General of the State of Kansas, and Stephen M. Howe, in his official capacity as District Attorney for Johnson County,
Defendants-Appellants.

BRIEF OF APPELLEES

Appeal from the District Court of Shawnee County
Honorable Larry D. Hendricks, Judge
District Court Case No. 2015-CV-490

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Oral Argument: 45 Minutes

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NATURE OF THE CASE

Plaintiffs-Appellees challenge Senate Bill 95 (2015 Session) (the "Act") on the grounds that, by banning the most commonly-used method of second-trimester abortion, the Act violates the liberty interests of women seeking to terminate a pregnancy. This case presents a question of first impression—whether the right to access abortion should be recognized as a fundamental right protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights.

The District Court, in issuing a temporary injunction against the Act, correctly concluded that abortion is protected as a fundamental right. This decision is supported by the broad protection that Sections 1 and 2 are intended to afford to individual liberties, and by the fact that the Kansas Supreme Court has stated that provisions of the Kansas Constitution will generally be interpreted to "echo federal standards."

The Fourteenth Amendment of the Federal Constitution protects the right of women seeking to terminate a pregnancy against undue burdens imposed by the government. Here, as the District Court correctly recognized, the United States Supreme Court has already balanced the precise issue before this Court, striking down a ban on D & E, the very procedure banned by the Act, as unconstitutional. Moreover, as the District Court correctly held, alternatives suggested by Defendants-Appellants "are not reasonable, would force unwanted medical treatment on women, and in some instances would operate as a requirement that physicians experiment on women with known and unknown safety risks as a condition [of] accessing the fundamental right to abortion." [R. III, 229 (Order Granting Temporary Injunction ("Order"), 8)].

The District Court's findings of fact, uncontested by Defendants-Appellants, and its well-reasoned conclusions of law, support the issuance of the temporary injunction against the Act. For these reasons, the District Court's Order should be affirmed.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1) Sections 1 and 2 of the Kansas Constitution Bill of Rights provide broad protection to the liberty interests of Kansas citizens and have never been interpreted by the Kansas appellate courts to provide less protection than the Fourteenth Amendment of the United States Constitution. Did the District Court correctly conclude that Sections 1 and 2 of the Bill of Rights of the Kansas Constitution protect the fundamental right to abortion?

2) The Act bans D & E procedures, the most common method of second-trimester abortion. The United States Supreme Court has repeatedly held that a ban on the most commonly-used method of second-trimester abortion is unconstitutional and has specifically held that a ban on the same procedure prohibited by the Act is unconstitutional. *See Gonzales v. Carhart*, 550 U.S. 124, 147, 164–65 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976). Did the District Court abuse its discretion in holding that Plaintiffs-Appellees established a likelihood of success on their claim that the Act is unconstitutional?

3) The District Court, based on substantial competent evidence in the record, found that the alternatives to the D & E procedure proposed by Defendants-Appellants, "are not reasonable, would force unwanted medical treatment on women, and in some instances would operate as a requirement that physicians experiment on women with known and unknown safety risks as a condition [of] accessing the fundamental right to abortion." [R. III, 229 (Order, 8)]. Based on these findings, did the District Court abuse its discretion in holding that Plaintiffs-Appellees established a likelihood of success on their claim that imposition of the alternatives proposed by Defendants-Appellants "would also impose an undue burden on the right to abortion?" [R. III, 229 (Order, 8)].

STATEMENT OF FACTS

The Act prohibits the performance on a living fetus of an abortion procedure described in the Act as "dismemberment abortion." S.B. 95 § 2(b)(1). Although "dismemberment abortion" is not a medical term, the parties agree and the District Court found that "the Act prohibits Dilation and Evacuation ("D & E") procedures." [R. III, 223 (Order, 2)]. The D & E procedure is used for 95% of abortions performed in the second trimester. [*Id.*]. Alternatively, the Act will force women seeking D & E abortions to undergo a more complex medical procedure that carries more risks, with no medical benefit, or forgo abortion entirely. [R. III, 224 (Order, 3)].

The District Court found that: "the Defendants did not dispute . . . the facts outlined in the Plaintiffs' Memorandum in support of th[eir] motion" for a temporary injunction. [R. III, 223 (Order, 2)]. Therefore, the court adopted those facts, as outlined in its opinion. [*Id.*]. In support of the Motion for Temporary Injunction, Plaintiffs-Appellees submitted evidence from Plaintiff Traci Nauser, M.D. In addition, Plaintiffs-Appellees presented evidence from two expert witnesses: Dr. Anne Davis, M.D., M.P.H., a board-certified obstetrician/gynecologist at Columbia University Medical Center; and Dr. David Orentlicher, former director of the division of medical ethics at the American Medical Association and professor of law at Indiana University Robert H. McKinney School of Medicine. [R. I, 35–36 (Affidavit of Anne Davis, M.D., M.P.H. ("Davis Aff.") ¶¶ 1–3; R. I, 71 (Affidavit of David Orentlicher, M.D., J.D. ("Orentlicher Aff.") ¶ 2)].

The Plaintiffs-Appellees in this case (hereinafter "the Physicians"), Dr. Herbert Hodes and Dr. Traci Nauser, are board-certified obstetrician-gynecologists who work together in a private medical practice in Overland Park, Kansas, Hodes and Nauser M.D.s, P.A. [R. III, 224

(Order, 3); R. I, 27–28 (Affidavit of Traci Lynn Nauser, M.D. ("Nauser Aff.") ¶¶ 1, 5–6)]. Drs. Hodes and Nauser provide a full range of obstetrical and gynecological services to their patients, including family planning services, obstetrics, and pre-viability abortion services up to 21.6 weeks as measured from the woman's last menstrual period ("LMP"). [R. I, 28 (Nauser Aff. ¶ 5)]. They challenge the Act both because, on pain of criminal penalties, it bans the most common method of second-trimester abortion, D & E, and because in their medical judgment any alternatives to D & E in the second trimester would subject their patients to increased risk with no medical benefit. [R. I, 30–31 (Nauser Aff. ¶¶ 18, 20, 22–26)].

Legal abortion is one of the safest medical procedures in the United States, and it is quite common. [R. I, 37 (Davis Aff. ¶ 10)]. Approximately 3 in 10 women will obtain an abortion by the age of 45. [*Id.*]. For these reasons, abortion is an important component of comprehensive women's health care. [R. I, 38 (Davis Aff. ¶ 14)].

Women seeking second-trimester abortion account for approximately 11% of women who obtain abortions in Kansas each year. Kan. Dep't of Health & Env't, Abortions in Kansas, 2014 (Preliminary Report) 3 (March 2015), *available at* http://www.kdheks.gov/hci/abortion_sum/2014_Preliminary_Abortion_Report.pdf. Women seek abortions after the first trimester for the same reasons that they seek earlier procedures, including a variety of medical and personal reasons. [R. I, 38 (Davis Aff. ¶ 14)]. Other circumstances that can lead to second-trimester abortions include delays in confirming pregnancy and difficulty obtaining funding for the procedure. [*Id.*]. In addition, the identification of major anatomic or genetic anomalies in the fetus most commonly occurs in the second trimester, and women may choose to terminate their pregnancies for that reason. [*Id.*].

In Kansas, as in many areas of the United States, women have limited access to second-trimester abortion. Eighty-nine percent of all U.S. counties lacked an abortion clinic in 2011. [R. I, 38 (Davis Aff. ¶ 15)]. Not all clinics provide abortions after the first trimester. [*Id.*].

Women's ability to access abortion in Kansas is already impacted by numerous restrictions. Abortions are generally prohibited after viability. K.S.A. § 65-6703(a). Kansas has gone further, however, and also prohibits abortion starting at 22 weeks LMP, except in very narrow circumstances in which the woman's life or health is at risk. *Id.* §§ 65-6724(a), 65-6723(f). Physicians are already restricted in their choice of abortion procedures in the second trimester due to a ban on so-called "partial-birth abortions," which prohibits the performance on a living fetus of a procedure known as Dilation and Extraction ("D & X"), or intact D & E, unless the procedure is necessary to preserve the woman's life. *Id.* § 65-6721. In addition, the state imposes a 24-hour delay on women seeking abortions following receipt of state-mandated information. *Id.* § 65-6709(a), (b), (d). Women reliant on Medicaid can only obtain coverage for abortion if the pregnancy is life-threatening or is the result of rape or incest. *State ex rel. Kline v. Sebelius*, No. 05-C-1050, 2006 WL 237113, at *6 (Kan. Dist. Ct. Jan. 24, 2006). The insurance plan for government employees only covers abortion if the pregnancy threatens the woman's life. *See, e.g.*, Kan. Dep't of Health & Env't, State Employee Health Plan 39 (2015), *available at* http://www.kdheks.gov/hcf/sehp/BenefitDescriptions/2015-Aetna-Plan-A.pdf. Private insurance policies cannot cover abortions not necessary to preserve a woman's life except through a separate and optional rider, and insurance provided in any exchange established pursuant to the Affordable Care Act cannot cover "elective" abortions, even through a rider.

K.S.A. § 40-2,190. If allowed to take effect, the Act will compound the burdens these restrictions already place on abortion access in Kansas.

The D & E procedure is considered a significant advance in safety over earlier methods of second-trimester abortion. [R. I, 38 (Davis Aff. ¶¶ 16–17)]; *see also City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 435–36 (1983) ("Since [1973]. . . , the safety of second-trimester abortions has increased dramatically. The principal reason is that the D & E procedure is now widely and successfully used for second-trimester abortions." (footnote omitted)), *overruled in part on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). D & E not only offers safety advantages, it can be performed on an outpatient basis in a clinical setting at a lower cost than other second-trimester procedures performed after 14 weeks gestation. [R. I, 39 (Davis Aff. ¶ 18)].

Induction of demise in order to avoid criminal liability under the Act would add an additional procedure to the D & E procedure, making it more complex and adding additional risks. Drs. Hodes and Nauser do not intentionally induce fetal demise prior to performing a D & E, and therefore their current practice would violate the ban. [R. III, 224 (Order, 3); R. I, 30 (Nauser Aff. ¶ 19)]. They do not induce demise because in their medical judgment, doing so provides no benefit, but some risks, to their patients. [R. I, 30–32 (Nauser Aff. ¶¶ 20, 22–24, 26)]. The American College of Obstetricians and Gynecologists' Second Trimester Practice Bulletin states: "No evidence currently supports the use of induced fetal demise to increase the safety of second-trimester medical or surgical abortion. Techniques used to cause fetal demise include division of the umbilical cord, intraamniotic or intrafetal digoxin injection, or fetal intracardiac potassium chloride injection." [R. I, 39 (Davis Aff. ¶ 19)].

As the District Court found, Appellants (hereinafter "the State") proposed three alternatives to D & E: "labor induction, induction of fetal demise using an injection, and induction of fetal demise using umbilical cord transection." [R. III, 224 (Order, 3)]. The District Court held that the State's argument that these alternatives did not impose an unconstitutional undue burden was "extreme." [R. III, 229 (Order, 8)]. Rather, the District Court held that these alternatives were "not reasonable, would force unwanted medical treatment on women, and in some instances would also operate as a requirement that physicians experiment on women with known and unknown safety risks as a condition [of] accessing the fundamental right to abortion." [*Id.*].

The District Court found that labor induction, used in approximately 2% of second-trimester abortion procedures, "requires an inpatient labor process in a hospital that will last between 5–6 hours up to 2–3 days, includes increased risks of infection when compared to D & E, and is medically contraindicated for some women." [R. III, 224 (Order, 3); *see also* R. I, 42 (Davis Aff. ¶ 34); R. III, 220 (Supplemental Affidavit of Traci Lynn Nauser, M.D. ("Nauser Suppl. Aff.") ¶ 7)]. Further, the Physicians presented evidence that there may be no hospital willing or able to perform induction abortion, [R. III, 216 (Supplemental Affidavit of Anne Davis, M.D., M.P.H. ("Davis Suppl. Aff.") ¶ 5)], and by law, state facilities can provide abortions only in extremely limited circumstances. *See* K.S.A. § 65-6733 (prohibiting state agencies and employees from providing abortion services); *id.* § 76-3308(i) (prohibiting the performance of abortions at University of Kansas properties except in medical emergencies). The Physicians also established that the cost of an induction procedure will be prohibitive for many women compared to an outpatient D & E procedure. [R. III, 221 (Nauser Suppl. Aff. ¶ 10)].

As to demise induced by injection, a digoxin injection is physically invasive, can be painful, and imposes risks; the limited research has shown no medical benefit. [R. I, 40, 41–42 (Davis Aff. ¶¶ 24, 26, 33); R. I, 31 (Nauser Aff. ¶¶ 22–23)]. The District Court found that an injection of digoxin is administered prior to a D & E via either a transabdominal or transvaginal injection. [R. III, 224 (Order, 3)]. To perform this procedure, physicians, under ultrasound guidance, use a needle to inject digoxin through the woman's abdomen, or through the woman's vagina and cervix, and into the uterus. [*Id.*]. The Physicians' expert established that because digoxin can take up to 24 hours to cause demise, it is usually administered 1–2 days before the D & E procedure. [R. I, 40 (Davis Aff. ¶ 25)]. The District Court found that injections to induce demise using digoxin prior to D & E are not practiced prior to 18 weeks gestation. [R. III, 224 (Order, 3)]. The Physicians presented evidence that demise for D & E procedures prior to 18 weeks is largely unstudied because at that gestational age, there is no potential health benefit hypothesized by physicians to generate a study on its effects. [R. I, 40, 41 (Davis Aff. ¶¶ 27, 32); R. I, 30 (Nauser Aff. ¶ 20)]. The District Court found the impact of a subsequent dose of digoxin, required when a first dose is not effective, is "virtually unstudied." [R. III, 224 (Order, 3)]. The District Court also found that research studies on inducing fetal demise using digoxin show that women experience increased risks of nausea, vomiting, extramural delivery, and hospitalization. [*Id.*].

The Court also considered umbilical cord transection prior to D & E. This procedure requires the physician to break the amniotic sac and begin removing the amniotic fluid. [*Id.*; R. I, 41 (Davis Aff. ¶ 32); R. I, 30 (Nauser Aff. ¶ 20)]. The physician then uses an appropriate surgical instrument or suction to grasp the cord and divide it. [R. I, 41 (Davis Aff. ¶ 32)]. The District Court found that umbilical cord transection is not possible in every case. [R. III, 224

(Order, 3)]. The District Court further found that requiring transection prior to a D & E increases procedure time, makes the procedure more complex, and increases risks of pain, infection, uterine perforation, and bleeding. [*Id.*]. The District Court also found that the use of umbilical cord transection to induce fetal demise has only been discussed in a single retrospective study, the authors of which noted that its main limitation is "a potential lack of generalizability." [R. III, 224–25 (Order, 3–4)]. The Physicians presented evidence that because the use of transection to induce fetal demise is still largely unstudied, the prevalence of risks is unknown. [R. I, 41 (Davis Aff. ¶ 32); R. I, 30 (Nauser Aff. ¶ 20)].

The State now raises another additional procedure not asserted as an alternative to D & E before the District Court—the induction of fetal demise using potassium chloride, also referred to as KCl. Brief of Appellants ("Br. App.") at 42. Induction of demise using KCL is performed via an intracardiac transabdominal injection using ultrasound guidance or via the umbilical cord, which is only possible in a hospital setting where the patient is under deep sedation. [R. I, 40–42 (Davis Aff. ¶¶ 29, 33)]. However, KCl is less commonly used than digoxin and cannot be administered by the vast majority of abortion providers without extensive additional training. [R. I, 40–41 (Davis Aff. ¶ 29]. The Physicians established that KCl is typically only performed by obstetrician/gynecologists with a specialization in Maternal-Fetal Medicine, which requires advanced training during an additional fellowship. [*Id.*]. KCl will not cause fetal demise when injected into the amniotic fluid, due to dilution. [*Id.*]. The Physicians further established that KCl includes a risk of maternal cardiac arrest if inadvertent intravascular injection occurs as well as risks of intraamniotic infection or chorioamnionitis. [*Id.*]. The State provided no evidence to the contrary.

Drs. Hodes and Nauser cannot continue to provide D & E procedures and comply with the Act without altering their practice in a way that increases the complexity and risk of the abortion. [R. I, 30–32 (Nauser Aff. ¶¶ 20, 22–23, 25–26)]. In order to continue providing abortions after 15 weeks, and in spite of the fact that they have been providing safe abortion care to women in Kansas for decades, they would be forced to follow a state mandate rather than provide the care that they believe is best for their patients. [R. I, 28, 30, 32–33 (Nauser Aff. ¶¶ 6, 18, 29–30, 33)]. Any means they would undertake to ensure that fetal demise occurs in every case will subject their patients to the risk of extra procedures, including a possible digoxin injection. [R. I, 30, 32, 33 (Nauser Aff. ¶¶ 18, 29–30, 33]. In their medical judgment, no reliable evidence supports the claim that causing demise prior to D & E will improve the safety of abortion procedures or promote women's health at any stage of pregnancy, and any purported benefits do not outweigh the risks. [R. I, 30–32 (Nauser Aff. ¶¶ 20, 22–23, 29–30)]. As to induction of demise using digoxin prior to 18 weeks in particular, it is their medical judgment that, given the dearth of research at that gestational age, performing such procedures amounts to experimenting on their patients. [R. I, 31–32 (Nauser Aff. ¶ 26)].

Because Drs. Hodes and Nauser see some risks, but no benefits from causing demise, compliance with the Act raises serious ethical concerns. [R. I, 37, 40 (Davis Aff. ¶¶ 9, 26); R. I, 32–33 (Nauser Aff. ¶¶ 29, 33)]. Under fundamental principles of medical ethics, physicians should not require patients to undergo procedures that the physicians believe impose more harm than benefit in order to obtain other health care. [R. I, 32–33 (Nauser Aff. ¶¶ 29, 33); R. I, 73–74 (Orentlicher Aff. ¶¶ 8–12)]. Similarly, women seeking D & E procedures prior to 18 weeks should not be subjected to an untested and unstudied procedure. [R. I, 40, 42 (Davis Aff. ¶¶ 27, 35); R. I, 31–32 (Nauser Aff. ¶ 26); R. I, 74–76 (Orentlicher Aff. ¶¶ 13–17)]. The

Physicians feel that the Act will interfere with the informed consent process by denying them and their patients the ability to freely choose among treatment options, and will undermine the physician-patient relationship by forcing them to comply with a government mandate that they do not believe is in the patient's best interest. [R. I, 31, 32, 33 (Nauser Aff. ¶¶ 23, 30, 33); R. I, 76–79 (Orentlicher Aff. ¶¶ 18–25)]. The Act thus places Dr. Hodes and Dr. Nauser in the untenable position of having to either violate their medical ethics or stop providing D & E procedures to their patients. [R. I, 31, 32, 33 (Nauser Aff. ¶¶ 23, 30, 33)].

Enforcement of the Act will impose unprecedented harms on women seeking D & E procedures, the most common method of second-trimester abortions. For these reasons, Physicians sought and were granted an injunction to enjoin the Act before its enforcement.

STANDARD OF REVIEW OF PRELIMINARY INJUCTION

The grant or denial of an injunction is reviewed for abuse of discretion. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709, 713 (2012). A district court abuses its discretion only when no reasonable person would take the view adopted by the district court. *State v. Gonzalez*, 290 Kan. 747, 757, 234 P.3d 1, 9 (2010). The party asserting the error has the burden of showing that the action was an abuse of discretion. *Steffes v. City of Lawrence*, 284 Kan. 380, 393, 160 P.3d 843, 853 (2007). The appellate court reviews *de novo* the legal conclusions upon which the discretionary decision is based. *Downtown Bar & Grill*, 294 Kan. at 191–92, 273 P.3d at 713; *Gonzalez*, 290 Kan. at 755, 234 P.3d at 9. The underlying findings of fact are reviewed under the "substantial competent evidence standard." *Gonzalez*, 290 Kan. at 756, 234 P.3d at 9. The substantial competent evidence standard provides "a great deal of deference to a district court's decision made within a zone of reasonableness." *Id.*

On appeal, the State challenges only the District Court's ruling regarding the first

injunctive relief factor, "a substantial likelihood of eventually prevailing on the merits," and does not address the remaining factors. Although the State does not appeal the remaining temporary injunction factors, it incorrectly attempts to increase the burden on the Physicians to establish those factors by citing to federal law and arguing that the showing on the remaining factors must be "clear and unequivocal." See Br. App. at 13. That is not the law in Kansas. *See, e.g.*, *Bd. of Cty. Comm'rs of Leavenworth Cty. v. Whitson*, 281 Kan. 678, 684, 132 P.3d 920, 925 (2006) (rejecting "proof of the *certainty* of irreparable harm rather than the mere probability" as setting "too high a standard for parties seeking injunctions").

ARGUMENT

I. The Protection of Liberty and Natural Rights Afforded Under Sections 1 and 2 of the Kansas Bill of Rights Extend to Women Seeking to Terminate a Pregnancy

A. The Kansas Constitution Affords Independent Protection to Individual Rights

It is beyond dispute that Kansas courts may interpret provisions of the Kansas Constitution independently of the federal constitution and customarily do so to afford equal or greater protection for individual liberties. *State v. Schultz*, 252 Kan. 819, 829, 850 P.2d 818, 834 (1993) (acknowledging the Court's authority to interpret sections of the Kansas Bill of Rights "independently of its federal counterpart and to heighten the protection available to Kansas citizens"); *see also State v. Morris*, 255 Kan. 964, 981, 880 P.2d 1244, 1256 (1994) ("This court is free to construe our state constitutional provisions independent of federal interpretation of corresponding federal constitutional provisions."); *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058, 1063 (1987) (In some cases, "the Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution."); Stephen R. McAllister, *Individual Rights Under a System of Dual Sovereignty: The Right To Keep And Bear Arms*, 59

U. Kan. L. Rev. 867, 871–72 (2011) ("[I]f the U.S. Constitution does not . . . guarantee a woman's right to terminate a pregnancy, nothing in American law or tradition precludes the states from recognizing . . . [this right] under their state constitutions."); Daniel E. Monnat & Paige A. Nichols, *The Loneliness of the Kansas Constitution*, 34 J. Kan. Ass'n for Just. 10, 10 (2010) (The Kansas Framers intended to "create a forward-looking state constitution—a collection of rights that would have independent force apart from the federal constitution as interpreted by the United States Supreme Court.").

B. Sections 1 and 2 of the Kansas Bill of Rights Encompass Women's Right to Terminate a Pregnancy

1. Sections 1 and 2 Are Intended To Protect Against Foreseen and Unforeseen Governmental Intrusions Into Liberty and Equality

Sections 1 and 2 of the Kansas Bill of Rights were adopted with the intent that they provide broad protection to individual liberties. The language of Section 1, for example, is more expansive than the language of the Fourteenth Amendment, expressly recognizing liberty as an "inalienable natural right[]." *Compare* Kan. Const. Bill of Rights, § 1, *with* U.S. Const. amend. XIV, § 1; *see generally* Kirk Redmond & David Miller, *The Kansas Bill of Rights: "Glittering Generalities" or Legal Authority*, 69 J. Kan. B. Ass'n 18, 21 (2000) ("Section 1 of the Kansas Bill of Rights states that all 'are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.' This language, which was lifted from the Declaration of Independence, has no parallel in the 14th Amendment of the federal Constitution, which was adopted nine years later.").

The open-ended language of Section 1 indicates that it was intended to protect against challenges to liberty not necessarily foreseen when it was ratified. *E.g.*, *State v. Limon*, 280 Kan. 275, 294–95, 301–302, 122 P.3d 22, 34–35, 38 (2005) (affirming that Kansas's

"traditional . . . moral disapproval of homosexuality" does not determine whether laws penalizing homosexuality violate Section 1 in our own time). When nineteenth-century jurists drafted constitutional protections for "inalienable natural rights" such as "liberty" and the "pursuit of happiness," they understood that these were not concepts intended to protect only a certain set of rights frozen in time. *See, e.g.*, *Hurtado v. California*, 110 U.S. 516, 529 (1884) (rejecting the view that concepts such as due process are fixed by the founders' understandings of their scope, because that "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."); Henry Campbell Black, *Handbook of American Constitutional Law* § 145, at 404–05 (1st ed. 1895) (describing the "natural, inherent, and inalienable right to the pursuit of happiness" as a guarantee "not capable of specific . . . limitation" and "one of the most indefinite . . . [and] most comprehensive to be found in the constitutions"); *cf.* Joseph Story, III *Commentaries on the Constitution of the United States* § 981, at 696 (1st ed. 1833) ("It is not always possible to foresee the extent of the actual reach of certain [government] powers, which are given in general terms. They may be construed to extend (and perhaps fairly) to certain classes of cases, which did not at first appear to be within them. A bill of rights, then, operates, as a guard upon any extravagant or undue extension of such powers.").

Reflecting this understanding, the Kansas Supreme Court has explained:

> The essential difference between a constitution and a statute is that a constitution usually states general principles or policies, and establishes a foundation of law and government, whereas a statute must provide the details of the subject of the statute. A constitution, unlike a statute, is intended not merely to meet existing conditions, but to govern future contingencies.

State ex rel. Stephan v. Finney, 254 Kan. 632, 643, 867 P.2d 1034, 1042 (1994) (internal

quotation marks omitted).

Were the Kansas Constitution Bill of Rights frozen in time at the time of its adoption in 1859, then a host of other nineteenth-century laws would clearly be constitutional today, including the indigent servitude of children, 79 Kan. Gen. Stat. § 28 (Price, et al. 1868); a criminal ban on paid work on Sundays, 31 Kan. Gen. Stat. § 255 (Price, et al. 1868); and a prohibition on homosexuality; 31 Kan. Gen. Stat. § 231 (Price, et al. 1868). Similarly, sex discrimination would still be legal. *Cf. Thoman v. Farmers & Bankers Life Ins. Co.*, 155 Kan. 806, 130 P.2d 551, 555 (1942) (affirming power of state commission of labor and industry to set different wage, hour, and labor laws for men and women).

We know much more now than in 1859 about the legal and moral equality of women and men, and about abortion's importance to women's autonomy and dignity. These are the pillars upon which the right to abortion rests. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S., 851 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.). Sections 1 and 2 of the Kansas Constitution Bill of Rights protects these principles just as the Constitution of the United States does.

The State is correct that the Court must, "[i]n ascertaining the meaning of a constitutional provision . . . look to the intention of the makers and adopters of that provision." *State ex rel. Stephan v. Parrish*, 256 Kan. 746, 751, 887 P.2d 127, 130 (1994) (internal quotation marks omitted); *see also id.* ("A constitutional provision is not to be narrowly or technically construed, but its language should be interpreted to mean what the words imply to men of common understanding." (internal quotation marks omitted)). This principle does not, however, support the State's assertion that because abortion was not discussed at the Wyandotte Constitutional Convention, the framers intended that it be excluded from the

protections afforded by Sections 1 and 2. During the debate on Section 1, the framers did not address their intent as to any specific application of the provision. If anything can be gleaned from the discussion, it is that the framers intended that Section 1 provide expansive protection. *See, e.g.*, Kansas Constitutional Convention: A Reprint of the Proceedings and Debates of the Convention which Framed the Constitution of Kansas at Wyandotte in July 1859, 281–82 (1920) ("[Section 1] is the first section of our bill of rights. . . . in summing up these rights, it is not to be supposed that we will come down to any narrow, contracted conception of them . . . .").

It is notable that, from the time of its adoption, the Kansas Constitution provided greater protections for the rights of women than the U.S. Constitution. *See* Redmond & Miller, 69 J. Kan. B. Ass'n at 20. For example, Article 15, Section 6 of the Kansas Constitution provided for protection of the rights of women in acquiring and possessing property apart from their husbands. *Id.* This provision also granted women equal rights in the custody of their children. *Id.* Women's rights were further protected in Article 15, Section 9, which required the wife's consent before the homestead exemption from forced sale could be alienated. *Id.* Moreover, the Kansas Constitution was only the second state constitution to grant women the right to vote in school board elections. *Id.* It was amended in 1886 to grant women the right to vote in municipal elections. *Id.* And it gave women full voting rights in 1912, seven years before the Nineteenth Amendment to the U.S. Constitution was ratified. *Id.* Thus, to the extent the proceedings of the convention provide guidance, the intent that the Bill of Rights would provide broad protection, combined with the progressive attitude towards women's rights, support a finding that the right to abortion is protected under Sections 1 and 2.

The State relies heavily on the fact that abortion was prohibited at the time of the Wyandotte Constitution to support its claim that Sections 1 and 2 do not encompass a woman's right to terminate a pregnancy. As discussed, the framers intended these Sections to provide broad protection, but did not enumerate their application in specific circumstances.

Notably, the U.S. Supreme Court in *Roe v. Wade* found abortion protected under the Fourteenth Amendment, even though at the time the Amendment was adopted, many states were moving to make abortion illegal. *See* 410 U.S. 113, 129 (1973) (noting that laws criminalizing abortion "are not of ancient or even of common-law origin" but "derive from statutory changes effected, for the most part, in the latter half of the 19th century"); *see also Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 651 (Miss. 1998) (rejecting the argument that no right to abortion exists under the state constitution based on claim that abortion was illegal when the constitution was adopted).

The State also incorrectly suggests that Sections 1 and 2 cannot be interpreted to protect abortion because the Fourteenth Amendment had not been ratified at the time that these sections were adopted. *See* Br. App. at 18. The Kansas Supreme Court has implicitly rejected this contention by holding in numerous cases that the Kansas provisions are "given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." *Farley*, 241 Kan. at 667, 740 P.2d at 1061; *see Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006); *see also Casey*, 505 U.S. at 847 (rejecting the notion that the Due Process clause "protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified").

2. *Sections 1 and 2 Provide at Least the Same Protection to Abortion as the Fourteenth Amendment to the Federal Constitution*

"The liberal construction which must be placed upon [Kansas] constitutional provisions for the protection of personal rights requires that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation." *Morris*, 255 Kan. at 981, 880 P.2d at 1256. The Kansas Supreme Court has consistently held that the liberty and due process protections of Sections 1 and 2 encompass the same rights protected under the Fourteenth Amendment of the Federal Constitution. *Alpha Med. Clinic*, 280 Kan. at 920, 128 P.3d at 377 (recognizing that the Kansas Supreme Court "customarily interpret its provisions to echo federal standards."); *State ex rel. Tomasic v. Kan. City, Kan. Port Auth.*, 230 Kan. 404, 426, 636 P.2d 760 (1981) ("The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution finds its counterpart in Sections 1 and 2 of the Bill of Rights of the Kansas Constitution . . . . These two provisions are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.") (citing *Henry v. Bauder*, 213 Kan. 751, 752–53, 518 P.2d 362, 364–65 (1974)); *see also* Kan. Const. Ordinance and Preamble (The Kansas Constitution is explicitly written "to insure the full enjoyment of our rights as American citizens.").[1]

[1]Amicus Family Research Council incorrectly asserts that Section 2 has no application in this context. *See* Brief Amicus Curiae of the Family Research Council at 8. The cases relied on, however, were all decided in the context of equal protection challenges; the Kansas Supreme Court has considered due process claims under Section 2. *Compare Sharples v. Roberts*, 249 Kan. 286, 289, 816 P.2d 390, 393 (1991) (rejecting equal protection claim under Section 2), *and Farley*, 241 Kan. at 667, 740 P.2d at 1061 (same), *with In re K.M.H.*, 285 Kan. 53, 62, 169 P.3d 1025, 1033 (2007) (deciding due process claims under Sections 2 and 18 of the Kansas Constitution Bill of Rights), *and Bd. of Cty. Comm'rs of Reno Cty. v. Akins*, 271 Kan. 192, 197, 21 P.3d 535, 540 (2001) ("Where the names and addresses of adverse parties are known or easily ascertainable, notice of pending proceedings by publication service, alone, is not sufficient to satisfy the requirements of due process under the 14th Amendment to the federal Constitution or § 2 of the Bill of Rights of the Kansas Constitution." (internal quotation marks omitted)).

"Generally, provisions of the Kansas Constitution which are similar to the Constitution of the United States have been applied in a similar manner." *State v. Schoonover*, 281 Kan. 453, 493, 133 P.3d 48, 77 (2006); *see also* McAllister, 59 U. Kan. L. Rev. at 871 (citing Dorothy Toth Beasley, Essay, *Federalism and the Protection of Individual Rights: The American State Constitutional Perspective*, 11 Ga. St. U.L. Rev. 681, 695–96 (1995)) (Traditionally, "the Federal Constitution always has been viewed as a 'floor' of rights, not a 'ceiling.'").

It is well-settled that a woman's choice to terminate her pregnancy is a liberty protected by the Due Process Clause of the Fourteenth Amendment. *See Casey*, 505 U.S. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."). Here, the reasoning underlying the protection provided by the Fourteenth Amendment is consistent with the liberty interests protected by Sections 1 and 2. In reaffirming Fourteenth Amendment protection for the right to terminate a pregnancy, the *Casey* Court applied the foundational principle that: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 847. As the Court explained:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 851 (citations omitted). The Court further recognized that, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856.

Based on the broad language of Sections 1 and 2, the reasoning underlying federal constitutional protection for access to abortion, and the protection historically afforded to women's rights, this Court should recognize women's liberty interest in terminating a pregnancy as a fundamental right protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights, and that these provisions provide even stronger protection than that afforded under the federal constitution. The Kansas Supreme Court has, in some cases, recognized greater protection for individual rights under the Kansas Constitution than under the U.S. Constitution. *See generally* McAllister, 59 U. Kan. L. Rev. at 872–74. For example, the Kansas Supreme Court has held that the Kansas Constitution protects freedom of religion to a greater extent than the U.S. Constitution. *See State v. Smith*, 155 Kan. 588, 127 P.2d 518, 522 (1942); *Stinemetz v. Kan. Health Policy Auth.*, 45 Kan. App. 2d 818, 852, 252 P.3d 141, 161 (Ct. App. 2011) ("Stinemetz has even greater protections concerning the free exercise of religious beliefs under § 7 of the Kansas Constitution Bill of Rights than under the federal Constitution.").

As the District Court correctly found, abortion is a fundamental right. [R. III, 226 (Order, 5)]. Laws that restrict abortion should, therefore, be analyzed under strict scrutiny. *See State v. Risjord*, 249 Kan. 497, 501, 819 P.2d 638, 642 (1991) (The most critical level of analysis—"strict scrutiny"—"applies in cases involving . . . 'fundamental rights expressly or implicitly guaranteed by the Constitution.'" (quoting *Farley*, 241 Kan. at 669, 740 P.2d at 1063)); *see also* Br. App. at 31 (conceding that fundamental rights are analyzed under strict

scrutiny, citing *Miller v. Johnson*, 295 Kan. 636, 667, 289 P.3d 1098, 1119 (2012)).

Here, as explained below, the District Court's conclusion that the Act clearly violates the undue burden standard under established federal constitutional precedent can be affirmed without undertaking a strict scrutiny analysis. As the Kansas Supreme Court indicated in *Alpha Medical Clinic v. Anderson*, it is not necessary to apply strict scrutiny where the legal claims can be resolved under federal constitutional standards, because those standards serve as a floor for the rights afforded by the Kansas Constitution. 280 Kan. at 920, 128 P.3d at 377 (applying federal standards to resolve federal claims brought by abortion providers seeking to protect the privacy interests of their patients).

While characterizing the right to abortion as "fundamental," the District Court concluded that the *Alpha* decision suggests that the Kansas Supreme Court will follow its usual course and recognize that the right to terminate a pregnancy is protected under the Kansas Constitution at least to the extent that it is protected under federal law. [R. III, 226 (Order, 5)]. The *Alpha* Court noted that "[w]e have not previously recognized—and need not recognize in this case despite petitioners' invitation to do so—that [rights to privacy protecting abortion] also exist under the Kansas Constitution. But we customarily interpret its provisions to echo federal standards." *Alpha Med. Clinic*, 280 Kan. at 920, 128 P.3d at 377.

The State's criticism of the *Alpha* decision, and its attempt to interpret it to avoid the conclusion that Sections 1 and 2 will protect abortion at least to the same extent as the Fourteenth Amendment, are unpersuasive. On its face, the *Alpha* decision simply makes the straightforward suggestion that should the need arise to consider protection of abortion under the Kansas Constitution, the Kansas Supreme Court may well follow its normal course and afford protection similar to that provided by the Fourteenth Amendment. This suggestion,

while not definitive, provides this Court with some guidance in deciding this question of first impression under the Kansas Constitution.

Moreover, the State's suggestion that the Kansas Supreme Court only applies federal law where the Kansas provisions are "literally or effectively identical to a federal counterpart," Br. App. at 26, is not supported. The sole case cited by the State stands only for the unremarkable proposition that "[g]enerally, provisions of the Kansas Constitution which are similar to the Constitution of the United States have been applied in a similar manner." *Schoonover*, 218 Kan. at 493, 133 P.3d at 77.

In spite of the State's insistence, the fact that no Kansas court has previously recognized that Sections 1 and 2 extend protection to women seeking abortions is irrelevant to the existence of that right—it simply underscores that this is a question of first impression. The State cites no case in which a Kansas court has reached this question, and therefore, while no case has previously recognized this right, nor has any court rejected it.

The cases relied on by the State do not support their argument that no protection for abortion should be recognized. For example, the State cites *State v. Edwards*, 48 Kan. App. 2d 264, 288 P.3d 494 (Ct. App. 2012), Br. App. at 23, but the *Edwards* court considered only a narrow proposition—whether the Kansas Constitution has been construed in the same manner as the Arkansas Constitution to protect "all private, consensual, noncommercial acts of sexual intimacy between adults." 48 Kan. App. 2d at 274–75, 288 P.3d at 501–02. Notably, while the *Edwards* court concluded that the right of high school teachers to have consensual sex with students was not a recognized fundamental right, *id.* at 276, 502, it cited *Roe v. Wade* and *Planned Parenthood v. Casey* as protecting *identified liberties*, *id.* at 267–68; 497–98.

The State relies on *State ex. rel. Kline v. Sebelius*, No. 05-C-1050, 2006 WL 237113 (Kan. Dist. Ct. Jan. 24, 2006) to argue that Section 1 does not provide a vehicle for "the judicial determination of specific controversies." *Id.* at *12 (internal quotation marks omitted). However, the State fails to acknowledge any of the cases in which the Kansas Supreme Court has relied on Section 1 to resolve "specific controversies." *See, e.g.*, *Farley*, 241 Kan. at 678, 740 P.2d at 1068 (invalidating a tort reform statute under Section 1).

Accordingly, while strict scrutiny is the appropriate standard, at a minimum, the Kansas Constitution provides the same level of protection to the right to terminate a pregnancy as the U.S. Constitution. Under federal law, it is well-settled that a woman's choice to terminate her pregnancy is a liberty protected by the due process clause of the Fourteenth Amendment. *See Casey*, 505 U.S. at 846. Prior to viability, states may not impose an undue burden on this right. *See id.* at 876; *see infra* Section II.

3. The Majority of State Supreme Courts to Reach the Issue Have Concluded that its State Constitution Protects the Right to Terminate a Pregnancy Independently of the U.S. Constitution

In interpreting the Kansas Constitution, Kansas courts frequently look to decisions from other states both for analysis and to see where the weight of authority lies. *See, e.g.*, *Parrish*, 256 Kan. at 757, 887 P.2d at 134 ("As the issue now before us is one of first impression in Kansas, a review of relevant case law from other jurisdictions is appropriate."); *see also Schultz*, 252 Kan. at 828, 850 P.2d at 825–26 (reviewing opinions from other states on warrantless seizures of financial records).

Here, the overwhelming weight of authority from other states supports the conclusion that the Kansas Constitution protects the right to terminate a pregnancy. In particular, the highest courts of at least ten states have recognized that their state constitutions protect the

right to terminate a pregnancy independently of the U.S. Constitution: Alaska; California; Florida; Massachusetts; Minnesota; Mississippi; Montana; New Jersey; New York; and Tennessee. *See State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581–82 (Alaska 2007); *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) ("[R]eproductive rights are fundamental, and . . . they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. . . . These fundamental reproductive rights include the right to an abortion."); *Am. Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 809 (Cal. 1997) ("[T]he state Constitution has been interpreted to provide greater protection of a woman's right of choice than that provided by the federal Constitution as interpreted by the United States Supreme Court."); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 784 (Cal. 1981) (citing *People v. Belous*, 458 P.2d 194 (Cal. 1969)); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 634–36 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) ("The Florida Constitution embodies the principle that few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision whether to end her pregnancy. A woman's right to make that choice freely is fundamental." (alterations omitted) (internal quotation marks omitted)); *Planned Parenthood League of Mass., Inc. v. Attorney Gen.*, 677 N.E.2d 101, 103–04 (Mass. 1997); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 400 (Mass. 1981) ("We think our Declaration of Rights affords a greater degree of protection to the right asserted here than does the Federal Constitution as interpreted by [the U.S. Supreme Court]."); *Women of the State of Minn. ex rel. Doe v. Gomez,* 542 N.W.2d 17, 31 (Minn. 1995) ("It is critical to note that the right of privacy under our constitution protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort; any legislation infringing on

the decision-making process, then, violates this fundamental right."); *Fordice*, 716 So.2d at 654 ("[W]e find that the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion."); *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999) ("Implicit in this right of procreative autonomy [protected by the Montana Constitution] is a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation."); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 629 (N.J. 2000); *Right to Choose v. Byrne*, 450 A.2d 925, 303–04 (N.J. 1982) ("[A] body of law has developed in New Jersey acknowledging a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion."); *Hope v. Perales*, 634 N.E.2d 183, 186 (N.Y. 1994) ("[T]he fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right."); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000) ("The concept of ordered liberty embodied in our constitution requires our finding that a woman's right to legally terminate her pregnancy is fundamental."), *abrogated by constitutional amendment*.

Lower courts in at least three additional states have done the same: Connecticut; Ohio; and Oklahoma. *See Doe v. Maher*, 515 A.2d 134, 150 (Conn. Super. Ct. 1986); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 575–76 (Ohio Ct. App. 1993); *Okla. Coal. for Reprod. Justice v. Cline*, No. CV-2011-1722 (Okla. Cty. Dist. Ct. May 11, 2012), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_OK_MedAbortion_FF_CL.pdf, *aff'd on other grounds*, 292 P.3d 27 (Okla. 2012).

Because the Kansas Constitution was modeled on the Ohio Constitution, of particular relevance is the decision by the Ohio Court of Appeals in *Preterm Cleveland v. Voinovich*, 627 N.E. 2d 570, in which the Court held that a provision of the Ohio Constitution that is identical to Section 1 encompasses a woman's right to obtain an abortion. Stephen McAllister, Comment, *Interpreting the State Constitution: A Survey and Assessment of Current Methodology*, 35 U. Kan. L. Rev. 593, 614 n.134 (1987) (noting that the Kansas Constitution was modeled on the Ohio Constitution). The Court noted that Sections 1 and 2 of Article I of the Ohio Constitution (which are identical to Sections 1 and 2 of the Kansas Bill of Rights):

> make it quite clear that, under the Ohio Constitution's Bill of Rights, every person has inalienable rights under natural law which cannot be unduly restricted by government, which is formed for the purpose of securing and protecting those rights, and that all governmental power depends upon the consent of the people. Thus, the Ohio constitutional provision is broader in that it appears to recognize so-called "natural law," which is not expressly recognized by the Bill of Rights or any other provision of the United States Constitution, although it is recognized in the Declaration of Independence.

Voinovich, 627 N.E.2d at 574–75.

The Court went on to find:

> In light of the broad scope of "liberty" as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection. This necessarily includes the right of a woman to choose to have an abortion so long as there is no valid and constitutional statute restricting or limiting that right. . . . Although Ohio recognizes a common-law right of privacy, it is not necessary to find a constitutional right of privacy in order to reach the conclusion that the choice of a woman whether to bear a child is one of the liberties guaranteed by Section 1, Article I, Ohio Constitution.

Id. at 575 (citation omitted).

Ignoring the numerous cases to the contrary, the State relies on a single decision from an intermediate appellate court in Michigan, *Mahaffey v. Attorney General*, 564 N.W.2d 104, 111 (Mich. Ct. App. 1997), *appeal denied*, 616 N.W.2d 168 (Mich. 1998). The *Mahaffey* court

cited no precedent indicating that, in Michigan, state constitutional provisions are generally interpreted to "echo federal standards," *Alpha Med. Clinic*, 280 Kan. at 920, 128 P.3d at 377, and therefore the court started from the premise, inapplicable in Kansas, that the existence of a federal constitutional right to abortion was "not necessarily relevant." *Mahaffey*, 564 N.W.2d at 109; *see also id.* at 111.

The overwhelming weight of persuasive authority lends further support to the conclusion that the Kansas Constitution affords "separate, adequate, and greater" protection to the right to terminate a pregnancy than the U.S. Constitution. *Farley*, 241 Kan. at 671, 740 P.2d at 1063.

For all of the foregoing reasons, the District Court correctly concluded that "Sections 1 and 2 of the Bill of Rights of the Kansas Constitution independently protects the fundamental right to abortion." [R. III, 226 (Order, 5)].

II. <u>The Physicians Are Substantially Likely to Succeed on the Merits of their Claim that the Act Imposes an Unconstitutional Undue Burden on Access to Abortion</u>

A. Bans on the Most Common Method of Second-Trimester Abortion, Including Bans on D & E, Have Been Struck Down as Unconstitutional Under *Casey*'s Undue Burden Standard

The District Court correctly found that the Act bans the most common method of second-trimester abortion, D & E, which does not involve a separate procedure to induce fetal demise. [R. III, 228 (Order, 7)]. The Act's ban on D & E, used in 95% of second-trimester procedures, violates clearly-established precedent striking down bans on the most common method of second-trimester abortion. *See Gonzales*, 550 U.S. at 135; *Stenberg*, 530 U.S. at 945–46; *Danforth*, 428 U.S. at 77–79; *see also Nova Health Sys. v. Pruitt, et al.*, No. CV-2015-1838 (Okla. Cty. Dist. Ct. Oct. 28, 2015 *available at* www.oscn.net/dockets/GetDocument.aspx?ct=oklahoma&bc=1031376872&cn=CV-2015-

1838&fmt=pdf) (granting a temporary injunction against the only other D & E ban in the country, explaining: "The U.S. Supreme Court has previously balanced the competing interests at stake here . . . and found that a previous ban on D & E abortions was unconstitutional."). In arguing that the District Court erred, the State ignores U.S. Supreme Court rulings that applied the undue burden test to a ban on D & E, the very procedure banned by the Act, and balanced the precise issue before this Court.

In the decision below, the District Court applied the undue burden test set out in *Casey*: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," and "a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877.

The District Court correctly relied on several decisions from the U.S. Supreme Court interpreting the Due Process Clause of the Fourteenth Amendment, which provides a floor for the rights afforded by Sections 1 and 2 of the Kansas Constitution Bill of Rights. *See supra* at Section 1. In *Danforth*, the U.S. Supreme Court held that a law banning the most commonly-used method of second-trimester abortion was unconstitutional. 428 U.S. at 77–79. In that case, the Supreme Court struck down a prohibition on the use of saline amniocentesis as a method of abortion after the first 12 weeks of pregnancy, the most common method of abortion at that time, where alternative methods were significantly more invasive or not yet widely used. *Id.* at 75–76.

Following *Danforth*, in *Stenberg v. Carhart*, the U.S Supreme Court struck down a Nebraska statute that prohibited not only D & X, so called "partial birth abortion," but also D & E. It explained that D & E is the most common abortion procedure in the second trimester and held that the prohibition of both D & X and D & E was unconstitutional under *Casey*, stating that the threat of prosecution for the potential performance of D & E procedures imposed an undue burden. *Stenberg*, 530 U.S. at 945–46.

Subsequently, in *Gonzales v. Carhart*, the U.S. Supreme Court addressed a federal ban on so-called "partial birth abortions." 550 U.S. 124. The Court interpreted the statute to ban only D & X procedures, not the more common D & E procedure, and held that the constitutionality of the ban rested on the continued availability of D & E. *Id.* at 164, 166–67. In so holding, the Court distinguished *Danforth*, 428 U.S. at 77–79, *because* it involved a ban on the then-dominant second-trimester method, whereas a ban on D & X still allowed "a commonly used and generally accepted method." *Gonzales*, 550 U.S. at 165. The Court distinguished *Stenberg* on the same grounds, explaining that although the statute in *Stenberg* operated as a ban on *both* D & X and D & E, the law at issue in *Gonzales* banned only D & X and did not affect D & E, the most common method of second-trimester abortion. *Id.* at 165–66.

The State ignores that the *Stenberg* Court addressed the same set of competing interests before this Court and struck down a ban on the exact procedure banned by the Act—D & E—as an unconstitutional undue burden. The U.S. Supreme Court's holding in *Gonzales* reinforced its ruling in *Stenberg*, explicitly and clearly distinguishing the ban on D & X in *Gonzales* from the ban on both D & X and D & E in *Stenberg*. The State concedes that the Act bans the very same commonly-used method of second-trimester abortion—D & E—that

the Supreme Court held could not be banned in *Stenberg* and left in place in *Gonzales*. In balancing the state's interest in potential life against a woman's right to pre-viability abortion, the U.S. Supreme Court has made clear that a ban on the most common method of second-trimester abortion, and specifically a ban on D & E, fails *Casey*'s undue burden test. Therefore, the District Court did not err in holding that the Act is unconstitutional under U.S. Supreme Court precedent.

As the District Court explained, the availability of alternative or additional procedures does not save the Act. [R. III, 228 (Order, 7)]. The *Gonzales* Court upheld the ban on "D & X" only after determining that the most common method of second-trimester abortion—D & E—which the parties did not contest was safe and reliable, was still permitted. [*Id.* (citing *Gonzales*, 550 U.S. at 150–54)]. Therefore, the Supreme Court's discussion of an injection to induce fetal demise was addressed in the context of the continued availability of D & E. *Gonzales*, 550 U.S. at 164.

Likewise, the State mischaracterizes the *Gonzales* Court's discussion of medical uncertainty. In *Gonzales*, the Court addressed medical uncertainty about whether the banned D & X procedure provided any safety benefits over D & E. The question it asked was whether there was medical consensus that D & X—an innovation used in limited circumstances later in pregnancy—offered safety benefits over D & E such that it would be unconstitutional to bar its use without a health exception. *Id.* at 161–64. In the face of medical uncertainty about the safety advantages of D & X, a new and uncommon procedure, the Court upheld its prohibition. *Id.* at 166–68. The state now seeks to apply the Court's language to the inverse scenario, arguing it is within the State's power to ban D & E itself because there is medical uncertainty about the remaining alternatives. This, *Gonzales* does not allow.

The fact that the *Gonzales* Court found that a law adequately furthered the state's asserted interests in potential life and medical ethics so as to justify a ban on a procedure done under limited circumstances later in pregnancy in no way undermines the rule that the State cannot ban the most common method of abortion. When addressing a ban on the exact procedure banned by the Act, D & E, the Court struck down the law as an undue burden. *Stenberg*, 530 U.S. at 945–46. Subsequently, the Court made clear in *Gonzales* that a ban on D & E remains unconstitutional. 550 U.S. at 164, 166–67. Accordingly, under the Court's holdings, which establish the baseline of protection afforded under the Kansas Constitution, the Act is unconstitutional.

B. Alternatives Proposed by the State Independently Impose an Undue Burden by Forcing Women to Undergo an Additional Procedure that is Riskier, More Complicated, and Has No Established Medical Benefit

If the Act is enforced, the Physicians will have no choice but to subject all of their patients to a riskier and more complicated medical procedure, with no established medical benefits, in order to provide second-trimester abortions after 15 weeks. The District Court correctly concluded that the Physicians established a likelihood of success on the merits of their claim for the independent reason that "[a]lternative procedures suggested by Defendants for Plaintiffs to comply with the Act would also impose an undue burden on the right to abortion." [R. III, 229 (Order, 8)]. The State's arguments to the contrary ignore the District Court's factual findings and misconstrue the relevant law.

The District Court made a series of factual findings, and the State does not assert, nor could it, that any of these findings are not supported by "substantial competent evidence." *Gonzalez*, 290 Kan. at 756, 234 P.3d at 9. The District Court correctly found, based on the affidavits of Dr. Nauser and of the Physicians' expert witness, Dr. Anne Davis, that the

alternatives proposed by the State, including labor induction, a transvaginal or transabdominal injection, or umbilical cord transection to induce fetal demise prior to a D & E, are "not reasonable, would force unwanted medical treatment on women, and in some instances would also operate as a requirement that physicians experiment on women with known and unknown safety risks as a condition [of] accessing the fundamental right to abortion." [R. III, 229 (Order, 8)]. The State misrepresents the record below when it asserts that there was no evidence presented to the District Court that the alternatives proposed by the State create an undue burden. Br. App. at 42.

As to the first alternative, the Physicians demonstrated below that if the Act takes effect, all women seeking abortions after 15 weeks will potentially be subjected to a transvaginal or transabdominal injection of digoxin at least 24 hours prior to the D & E procedure, an additional, invasive procedure that the Physicians believe is medically unnecessary. [*See* R. III, 224 (Order, 3); R. I, 40 (Davis Aff. ¶ 25); R. I, 32 (Nauser Aff. ¶ 28)]. The State does not contest that digoxin injections to induce demise prior to D & E are not practiced at all prior to 18 weeks gestation or that the impact of subsequent doses of digoxin, required in cases where a first dose is not effective, is virtually unstudied. [*See* R. I, 40 (Davis Aff. ¶¶ 27–28); R. I, 31–32 (Nauser Aff. ¶¶ 25–26)].

Further, the Physicians established that after 18 weeks, while there are no established benefits from the digoxin injection in the medical literature, several studies establish that causing demise with digoxin does pose risks. [*See* R. I, 39-40 (Davis Aff. ¶¶ 22, 24); R. III, 220 (Nauser Suppl. Aff. ¶ 5)]. The State ignores this research and fails to acknowledge, much less engage in any analysis of the burden associated with these methods, including requiring women to undergo medically unnecessary and more complex procedures, or the uncontested

digoxin side-effects of vomiting, nausea, as well as increased risks of infection and hospital admissions. [*See* R. I, 40 (Davis Aff. ¶ 24)]. Likewise, the State completely ignores the burdens created by forcing patients to undergo an additional and physically invasive transvaginal or transabdominal injection with known and unknown safety risks. [*See* R. I, 39 (Davis Aff. ¶ 23)].

Digoxin injection takes up to 24 hours to cause demise and may require a second dose. The addition of a procedure to induce fetal demise using digoxin prior to D & E may therefore extend the time it takes to complete a D & E procedure, from several hours to two or even three days to complete, and require multiple trips to the clinic to receive services. Although abortion is extremely safe, the risks increase as the pregnancy advances. [R I, 43 (Davis Aff. ¶ 37)]; *cf. Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 917 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014) (noting that the U.S. Supreme Court has never held that a burden must be absolute to be undue, and that courts may take into account increased costs, delay, and that a law will deter women from obtaining abortions).

As to the second alternative, the District Court found that umbilical cord transection is not possible in every case, and requiring transection would increase procedure time, make the procedure more complex, and increase risks. [R. III, 224 (Order, 3); *see also* R. III, 219–20 (Nauser Suppl. Aff. ¶¶ 3–4); R. I, 41 (Davis Aff. ¶ 32)]. To achieve transection prior to 18 weeks gestation, a physician would have to dilate the patient's cervix more than is necessary for the D & E procedure, and requiring transection would lengthen the abortion procedure, potentially doubling procedure time. [R. III, 216 (Davis Suppl. Aff. ¶¶ 3–4); R. III, 219–20 (Nauser Suppl. Aff ¶ 3–4 (citing Tocce, K., Leach, K. Sheeder, J., Nielson, K., Teal, S. Umbilical Cord Transection To Induce Fetal Demise Prior to Second-Trimester D & E

Abortion. Contraception 2013; 88:712-716) (Though the State asserts that transection increases procedure time by three minutes, the study cited actually recorded procedure time as between 3–11 minutes.))]. Requiring transection would also lead to potential injury for the patient, including uterine perforation. [R. III, 216 (Davis Suppl. Aff. ¶¶ 3–4); R. III, 219–20 (Nauser Suppl. Aff. ¶ 3)]. Due to the limited research, [*see* R. III, 215–16 (Davis Suppl. Aff. ¶ 2)], requiring umbilical cord transection prior to D & E amounts to little more than forced experimentation on women, with no guarantee of efficacy, with risks of bleeding and uterine perforation, and with no known medical benefit. [R. I, 41 (Davis Aff. ¶ 32); R. III, 219–20 (Nauser Suppl. Aff. ¶ 3)].

The State rests its entire argument related to umbilical cord transection on a single retrospective study, which did not identify any benefit to patients and did not make clear the lowest gestational age at which it is feasible to conduct cord transection. [*See* R. III, 224–25 (Order, 3–4); R. III, 215–16 (Davis Suppl. Aff. ¶¶ 2, 4); R. III, 220 (Nauser Suppl. Aff. ¶ 4)]. A study such as this does not provide a basis to conclude that umbilical cord transection can be safely achieved in every case and does not justify a change in practice. [R. III, 215–16 (Davis Suppl. Aff. ¶¶ 2–4); R. III, 220 (Nauser Suppl. Aff. ¶ 4)]. The study's authors themselves note that its main limitation is "a potential lack of generalizability." [R. III, 224–25 (Order, 3–4); R. III, 220 (Nauser Suppl. Aff. ¶ 4)].

As to the third alternative, the State's suggestion that labor induction is a reasonable alternative to D & E cannot be taken seriously when labor induction and D & E procedures are compared. [R. III, 220 (Nauser Suppl. Aff. ¶ 6)]. It is absurd to suggest that induction, which represents only 2% of second-trimester abortion procedures in the United States, could replace D & E, used in 95% of cases. [R. III, 224 (Order, 3); R. I, 38 (Davis Aff. ¶ 17); R. III, 216

(Davis Suppl. Aff. ¶ 5)]. Suggesting that induction is a reasonable alternative cannot be credited given that there may be no hospital willing or able to perform induction abortion and that women will go through an inpatient labor process in a hospital that will last from between 5–6 hours up to 2–3 days. [R. III, 224 (Order, 3); R. I, 42 (Davis Aff. ¶ 34); R. III, 216 (Davis Suppl. Aff. ¶ 5); R. 3, 220 (Nauser Suppl. Aff. ¶ 7)]. The induction process is both physically and psychologically challenging, [R. III, 216–17 (Davis Suppl. Aff. ¶¶ 5–6); R. III, 220–21 (Nauser Suppl. Aff. ¶ 9)], and patients face an increased risk of infection, [R. III, 220–21 (Nauser Suppl. Aff. ¶ 9)]. *See Stenberg*, 530 U.S. at 929 (noting that induction is particularly dangerous for some women).

The District Court correctly found that the alternatives proposed by the State are not reasonable and would impose an undue burden on women's access to pre-viability abortion. [R. III, 229 (Order, 8)]. As explained above, "a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877.

The District Court's fact-based holding correctly adheres to *Casey*'s recognition that the liberty interest at stake implicates women's physical and decisional autonomy. The U.S. Supreme Court does not sanction forced medical procedures on women in any context and has explicitly recognized the significant physical autonomy and bodily integrity interests of women seeking abortion. As the Court explained in *Casey*, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter," *Casey*, 505 U.S. at 847, recognizing the right to "physical autonomy," *id.* at 884, and explaining that "*Roe* . . . may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and

bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection," *id.* at 857 (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); *Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30 (1905)). "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Casey*, 505 U.S. at 852.

In arguing that its proposed alternatives are acceptable, the State ignores the District Court's findings and simply asserts that the proposed alternatives are reasonable. The State provides no meaningful analysis of the physical, dignitary, and medical harms women will endure if the Act goes into effect, discussing only its asserted interests. The State fails to balance women's interests against those of the State, as required under U.S. Supreme Court precedent and the Constitution, treating women's physical and decisional autonomy as negligible and women themselves as virtually invisible.

The fact that the State has proposed three unreasonable alternatives does not overcome the fact that the Act creates an undue burden. The State's reliance on *Gonzales* to argue in favor of its proposed alternatives is wholly misplaced. Though induction of fetal demise using an injection was referenced in the *Gonzales* decision, it was discussed in addition to, rather than as an alternative to, D & E. 550 U.S. at 164. The uncontested burdens imposed by the Act—that women be subjected to an additional medical procedure or undergo labor induction—distinguishes this case from *Gonzales*. The *Gonzales* Court clearly did not sanction

exclusive reliance on an invasive, additional procedure, with known and unknown risks that in some instances is still only experimental. Rather, the widespread availability of D & E, a procedure that the parties agreed was safe, formed the basis for the Court's decision. To apply the Court's language to a ban on the very procedure that ensured the constitutionality of the ban at issue in *Gonzales* would be a significant and unconstitutional departure from U.S. Supreme Court precedent.

In arguing that the District Court's ruling should be overturned, the State further misconstrues the *Gonzales* decision on which it primarily relies in two key ways. First, the State argues that the *Gonzales* Court's determination —that inducing demise using an injection remained an available alternative method to performing a partial-birth abortion— can be used to justify a ban on D & E. In *Gonzales*, the Court upheld a ban on D & X, a procedure Plaintiffs argued had safety advantages over D & E. The *Gonzales* Court explained that if the D & X procedure were truly necessary in some circumstances, an injection to induce fetal demise would allow the physician to perform a D & X procedure. That is, if a case were to arise where the balance of risks weighed so strongly in favor of D & X over D & E as to warrant the use of an additional procedure to induce fetal demise, that alternative remained available. However, that holding does not extend to a ban on D & E itself, which would require the imposition of a forced injection procedure on every patient after 15 weeks gestation.

Second, the State misstates the undue burden test, conflating it with the test applied by the U.S. Supreme Court to determine whether an Act has an adequate health exception. Br. App. at 31, 38, 41–42. The Court has not held, as the State argues, that to impose an undue burden, any restriction on abortion must create "significant health risks." Rather, that language was discussed as part of the controlling legal test to determine whether the bans at issue in

Stenberg and *Gonzales* lacked an adequate health exception—a claim that has not been brought in this case. Thus, because the Physicians in this case have not alleged that the Act is unconstitutional on the grounds that it lacks an adequate health exception, the *Stenberg* and *Gonzales* Courts' application of the "significant health risks" test, and the *Gonzales* Court's discussion of the role of disputed medical opinion regarding whether the banned procedure is necessary to preserve a woman's health, has no application here.

This case demonstrates the absurdity of the State's argument. The State argues that it may ban or impose any method of abortion on women if there is any medical uncertainty about whether there are "significant health risks" associated with that restriction. Br. App. at 37, 41–42. According to that reading, states may ban a method of abortion even if the only alternative procedures are completely untested and experimental, because it is possible that the experimental procedures might not impose significant additional risks. This suggestion is chilling. *Gonzales* did not sanction experimentation on women as a condition of accessing abortion. Rather, the Court held that where a commonly-used method of abortion remained available, which the parties did not contest was safe and reliable, a less commonly-used method could be banned on a showing that it would further the state's asserted interest and contained an exception for life-threatening health conditions. The Court did not hold that the inverse scenario, a ban on a method that parties agree is safe and reliable, and that leaves only less commonly-used procedures with known and unknown risks, could withstand constitutional scrutiny. The State is attempting to apply *Gonzales* to reach a result that is not only foreclosed by *Gonzales* itself, but also by both *Danforth* and *Stenberg*. Finding to the contrary would undermine the principles underlying *Casey* which protect women's dignity and autonomy.

In sum, government-mandated imposition of an additional procedure, that is more complicated and risky, with no demonstrated medical benefits, is not a permissible means of regulating abortion. *See A Woman's Choice-E. Side Women's Clinic v. Newman*, 980 F. Supp. 962, 970 (S.D. Ind. 1997), *aff'd in part, rev'd in part on other grounds*, 305 F.3d 684 (7th Cir. 2002) ("[T]he [U.S.] Supreme Court has not held or even suggested that a State may require a woman, as a condition of exercising her constitutional right to choose to terminate her pregnancy, to consent to some other form of medical treatment that she would otherwise refuse.").

For these reasons, the District Court's characterization of the State's alternatives as "extreme" is well-founded, as is its conclusion that "forcing women to accept the possibility of having to undergo an unnecessary medical procedure in order to effectuate their abortion decision independently constitutes an undue burden." [R. III, 229 (Order, 8)]. The District Court did not err in holding that the Physicians established a likelihood of success on the merits of their claim that the Act imposes an unconstitutional undue burden on women's access to pre-viable abortion. [*Id.*].

III. The Physicians and Their Patients Face a Reasonable Probability of Suffering Irreparable Future Injury if the Act is Permitted to Take Effect, They Have No Adequate Remedy at Law, and Both the Balance of Hardships and the Public Interest Favor Entry of a Temporary Injunction

The State has not challenged the District Court's holding that the Physicians showed a reasonable probability that their patients would suffer irreparable future injury, that they lack an adequate remedy at law, and that the threat to their patients outweighs any harm that might inure to the State. [R. III, 230–31; (Order, 9–10)]. *See Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 491, 173 P.3d 642, 647 (2007). As the District Court explained, because enforcement of the Act will deprive women seeking second-trimester abortion of their

constitutional right to abortion, they face a reasonable probability of irreparable future harm without adequate remedy at law. [R. III, 230 (Order, 9) (citing *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996))].

The District Court further held that the balance of hardships in this case is "in lockstep with irreparable harm," holding that because the Physicians showed a likelihood of success on their claim that their patients' constitutional right to terminate a pregnancy will be unduly burdened by the Act, and the State faces little, if any, injury from the issuance of an injunction, the balance of the hardships weighed in favor of granting an injunction to maintain the *status quo*. [R. III, 230 (Order, 9–10) (citing *Raven Dev. Co., L.L.C. v. Bd. of Cty. Comm'rs of Shawnee Cty.*, No. 01C-1306, 2001 WL 34117820, at *5–6 (Kan. Dist. Ct. Nov. 1, 2001) (holding threatened injury to the plaintiffs' constitutional rights "outweighs whatever damage there may be to [the State's']" inability to enforce "what appears to be an unconstitutional ordinance"); *Johnson*, 194 F.3d at 1163)]. Finally, the District Court correctly ruled that the public's interest is served more by maintaining the *status quo* than by permitting a law which may be unconstitutional to go into effect. [R. III, 231 (Order, 10) (citing *Adams*, 919 F. Supp. at 1505)].

CONCLUSION

For the foregoing reasons, the Physicians respectfully request that this Court hold that the liberty interests protected by Sections 1 and 2 of the Kansas Bill of Rights extend to women seeking abortions, and uphold the District Court's issuance of a temporary injunction on the grounds that the Act's ban on D & E procedures is unconstitutional and that enforcement of the Act would impose an undue burden on women seeking abortions in Kansas.

Respectfully submitted,

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