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CASE NUMBER: 2015-CV-000490

**IN THE THIRD JUDICIAL DISTRICT**
**DISTRICT COURT, SHAWNEE COUNTY, KANSAS**

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| **HODES & NAUSER, MDs, P.A.; and TRACI LYNN NAUSER, M.D.,** | ) | |
| **Plaintiffs,** | ) | **Case No. 2015CV490** |
| | ) | **Division 3** |
| **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.** | ) | |

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## I. Introduction

In their motion, Defendants ("the State") ignore binding Kansas Supreme Court precedent, under which S.B. 95 clearly fails constitutional review. The State's assertion that this law serves a compelling state interest by promoting "dignity and humanity [in] the provision of abortion care in Kansas," Defs.' Mot. Summ. J. ("Defs.' Mot.") at 26, cannot be squared with the Kansas Supreme Court's holding that Kansas women have a fundamental constitutional right to decide whether to continue a pregnancy, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 614, 440 P.3d 461, 466 (2019). The State acknowledges that the strict scrutiny standard applies and that it bears the burden of demonstrating that S.B. 95 ("the Act") is narrowly tailored to further a compelling state interest. Defs.' Mot. at 8. But in its motion, the State fails to meet this burden and ignores S.B. 95's unprecedented harms. As the record establishes, if enforced, S.B. 95 will force some women to either forego an abortion altogether or submit to an additional, invasive medical procedure that provides no medical benefit, involves increased risk and complexity, and is in some circumstances experimental. These uncontroverted facts are dispositive.

The State has failed to controvert any material facts considered by the Kansas Supreme Court when it ruled that Plaintiffs ("the Providers") demonstrated a substantial likelihood of success on their claim that S.B. 95 violates Section 1 of the Kansas Constitution Bill of Rights and cannot withstand strict scrutiny. S.B. 95 imposes "extreme" burdens on access to reproductive healthcare and medical decision-making and thwarts rather than serves the State's asserted interest in regulating and protecting the medical profession and medical care provided in Kansas. *Hodes & Nauser, MDs. P.A. v. Schmidt*, No. 2015CV000490, 2015 WL 13065200, at *4 (Kan. 3d Jud. Dist. Ct. June 30, 2015). Rather than confronting the real impacts of S.B. 95 or addressing the Act's incompatibility with a fundamental right, the State focuses on a Kansas personhood statute

which, if permitted to serve as a basis to uphold S.B. 95, would swallow the right to abortion entirely. Such an outcome would conflict with the Kansas Supreme Court's decision and with decisions issued by every state and federal court to consider a ban on D&E. By failing to controvert the factual and expert testimony demonstrating the Act's serious harms, or to introduce *any* admissible evidence showing the Act is narrowly tailored to serve a compelling interest, the State has failed to meet its burden. The State's inflammatory language cannot controvert the fact and expert evidence in this case or alter the holding of the Kansas Supreme Court. At a minimum, the record evidence demonstrates that the State is not entitled to summary judgment on the fundamental right to terminate a pregnancy claim.

Moreover, the State's arguments regarding the Providers' remaining claims are inapposite. The State relies on no persuasive state or federal case law and disputes no material facts related to these claims. For these reasons, the State has failed to meet is burden at summary judgment, and its motion should be denied.

## II. RESPONSE TO THE STATE'S STATEMENT OF FACTS

1. On January 28, 2015, 25 Kansas Senators introduced a bill to prohibit the performance of a dilation and evacuation (D&E) abortions on a "living unborn child." Specifically, the bill prohibited what it defined as a "dismemberment abortion," meaning "with the purpose of causing the death of an unborn child, knowingly dismembering a living unborn child and extracting such unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors or similar instruments that, through the convergence of two rigid levers, slice, crush or grasp a portion of the unborn child's body in order to cut or rip it off." (Attachment A, Senate Bill 95 or B95").

*Response: Uncontroverted.*

2. The bill included medical emergency and maternal health exceptions to the prohibition. (Attachment A).

*Response: Uncontroverted, with the clarification that these exceptions are extremely limited. The Act's exceptions when "necessary to preserve the life of the pregnant woman" and for "substantial and irreversible physical impairment of a major bodily function of the pregnant woman" do not remedy the Act's limits on the availability of abortion in Kansas. Ex. 2 to Pls.' Mot. Summ. J., Expert & Fact Decl. of Traci Lynn Nauser, M.D. ("Nauser Decl.") ¶ 42 (citing K.S.A. § 65-6743). Though some of Dr. Nauser's patients may fall within the Act's exceptions, the vast majority would not. Id. Furthermore, the Act's exceptions are grossly insufficient to ensure patient safety. Id.*; *Ex. 3 to Pls.' Mot. Summ. J., Expert Decl. of Anne Davis, M.D., M.P.H. ("Davis Decl.") ¶ 56. Withholding care until substantial and irreversible harm to a patient is imminent needlessly puts her health and life at risk. Nauser Decl. ¶ 42. For example, a woman suffering from premature rupture of membranes who is bleeding and shows signs of infection but is not yet hemorrhaging or septic will eventually suffer those consequences if left untreated. Id.*

3. SB95 also included civil and criminal penalties for anyone who performs such a procedure in violation of the law, codified at K.S.A. 65-6745, 6746. (Attachment A).

*Response: Uncontroverted.*

4. While SB95 was in committee, House and Senate legislators heard and read testimony in response to the proposed bill. (Attachments B-H).

*Response: Uncontroverted.*

5. This testimony included written testimony from doctors illustrating the graphic and horrific nature of the D&E procedure, including [a] description from an ob/gyn who had performed over 100 D&E procedures . . . . (Attachment B).[1]

*Response: Object to the characterization of the medical procedure and the quoted testimony to the extent the written testimony quoted by the State is relied upon for the truth of the matter asserted.*

6. Numerous witnesses expressed distress and concern for the horrific nature of the procedure (Attachments C, D, and E).

*Response: Object to the characterization of unquoted testimony and to the extent that it is relied upon for the truth of the matter asserted.*

7. Other medical witnesses expressed concerns for complications associated with D&Es, including fetal parts left behind that require removal through an additional procedure. (Attachments D and F).

*Response: Object to the extent that the testimony is relied upon for the truth of the matter asserted.*

8. Lt. Gov. Colyer, himself a doctor, also decried the lack of respect for life shown by D&Es. (Attachment C).

*Response: Object to the extent that the testimony is relied upon for the truth of the matter asserted.*

9. Dr. Herrick advised the legislature about the implementation of induced fetal demise prior to 2nd trimester abortions in at least one other state. (Attachment G).

[1] The Providers have omitted the block quote and footnote in Part I paragraph 5 of the State's Motion and modified the text of that paragraph as indicated above. Defs.' Mot. at 2–3.

*Response: Object to the extent that the testimony is relied upon for the truth of the matter asserted.*

10. Testimony was also provided by individuals opposed to the bill, including the plaintiff, who indicated the banned procedure was necessary to preserve future fertility, the bill intruded upon the doctor-patient relationship, the law prohibited the "safest and most expeditious way to terminate a second-trimester pregnancy, and the procedure was necessary to preserve patient health. (Attachment H).

*Response: Uncontroverted, with the clarification that Plaintiff provided additional testimony regarding the bill.*

11. In 2015, the Kansas legislature passed SB95, entitled the Kansas Unborn Child Protection From Dismemberment Abortion Act.

*Response: Uncontroverted.*

12. Then-Governor Sam Brownback signed the SB95 into law on April 7, 2015.

*Response: Uncontroverted.*

13. Immediately after the law came into effect, Plaintiff filed the present litigation, challenging SB95 under the Kansas Constitution Bill of Rights. (Attachment I). Specifically the plaintiffs' petition raises eight claims:

a. SB95 violates Sections 1 and 2 of the Bill of Rights "by infringing on the fundamental right of Plaintiffs' patients to terminate a pregnancy by banning the most common method of abortion in the second trimester and by requiring women seeking D&E procedures to undergo more complex and risky procedures"

b. SB95 was passed with the "improper purpose of unconstitutionally burdening women's right to obtain pregnancy termination services."

c. SB95 unconstitutionally infringes on plaintiffs' patients' right of bodily integrity.

d. SB95 denies equal protection to abortion patients by imposing burdens not imposed on other pregnant women.

e. SB95 denies equal protection to plaintiffs' patients by singling out a medical procedure sought only by women, specifically pregnant women, and imposes burdens not placed on men's health care.

f. SB95 denies equal protection to abortion providers by denying them the ability to provide care they believe to be in their patients' best interests and requiring the provision of unnecessary medical procedures.

g. SB95 denies due process to abortion providers by requiring them to either forego providing abortion service at 15 weeks of pregnancy or provide care they do not believe to be in their patient's best interests.

h. SB95 unconstitutionally subjects plaintiffs to "oppressive and unreasonable regulation and government interference that would significantly impair the operation of their medical practice."

*Response: Uncontroverted, with the clarification that S.B. 95 was signed into law on April 7, 2015, and the Providers filed this lawsuit on June 1, 2015, before the law was scheduled to take effect on July 1, 2015.*

14. Plaintiffs sought and received temporary injunctive relief during the pendency of the litigation.

*Response: Uncontroverted.*

15. On appeal of the temporary injunction, four years after passage of this act into law, the Kansas Supreme Court held for the first time that the right to personal autonomy under the Kansas Constitution includes the right to terminate a pregnancy, and that laws regulating abortion are subject to the strict scrutiny test. *Hodes & Nauser, M.D.s, P.A. v. Schmidt*, 309 Kan. 610, 650, 668-69, 440 P.3d 461 (2019).

*Response: Uncontroverted.*

16. Plaintiff and expert witness Dr. Traci Nauser submitted a report in which she stated that being required to induce fetal demise prior to performing D&Es would have the following effects on her provision of abortion care:

> [I]f S.B. 95 goes into effect, there are certain patients for whom I would likely been able to provide care but will be unable to due to the requirement that fetal demise be induced prior to every D&E procedure.
>
> If required to induce fetal demise, it will seriously disrupt patient scheduling at my office. It will impact the times patients are scheduled to receive procedures, will increase the time needed for patient counseling, and will limit the number of days patients can receive treatment per week. Because digoxin can take 24 hours or more to be effective, and because of the potential need for more than one dose of digoxin, I will be forced in some instances to begin providing D&E procedures as a 2-3 day procedure, forcing patients to make multiple trips to my office. Likewise, the 24 hours or more needed for digoxin to take effect and the possibility that more than one dose will be necessary will in turn require that a 48 hour buffer be allotted for each patient. That will limit the days in which a D&E can be scheduled to begin to Monday – Wednesday and, consequently, the number of patients who can be treated per week.
>
> As a result, some patients may be forced to delay their procedure until they can arrange to visit the office for 2 to 3 consecutive days, increasing the length of time a patient must be away from home, work, and other obligations. That will increase the gestational age at which the procedure is scheduled and performed. There will also be increased costs for both the clinic and the patient.
>
> Further, this requirement will prevent me from providing optimal care to my patients or force me to risk prosecution. It will put me in the unethical situation of

> having to choose between being able to evolve with a medical complication and abiding by the law.
>
> (Exhibit J).

*Response: Uncontroverted, with the clarification that this is only an excerpt from Dr. Nauser's disclosure. A full summary of Dr. Nauser's opinions can be found in her Declaration in Support of Plaintiffs' Motion for Summary Judgment. Nauser Decl.; Mem. L. Supp. Pls.' Mot. Summ. J. ("Pls.' Mem.") at 3–18.*

17. Dr. Nauser also stated that induction abortions are not an option for most patients at the hospitals where she practices. (Exhibit J).

*Response: Uncontroverted.*

18. Dr. Thomas Cunningham, plaintiffs' bioethics expert, concluded in his report that SB95 would violate the autonomy of the mother electing an abortion and interfere with the doctor's ability to provide the best care to the mother. (Exhibit K)

*Response: Uncontroverted, with the clarification that this is only an excerpt from Dr. Cunningham's disclosure. A full summary of Dr. Cunningham's opinions can be found in his Declaration in Support of Plaintiffs' Motion for Summary Judgment. Ex. 4 to Pls.' Mot. Summ. J., Expert Decl. of Thomas Cunningham, PhD, M.A., M.S. ("Cunningham Decl."); Pls.' Mem. at 17.*

19. Dr. Cunningham made the following assertion regarding autonomy at the close of his report:

> It is remarkable that the Act gives the State more authority over patients' decisions than medical ethics permits even to parents of minor children. Parents have the legal and ethical authority to make medical decisions on behalf of their children because minors are considered to have not yet developed the competency to make medical decisions and parents are uniquely authorized to assess how the burdens for children relate to their future benefits (Hester 2012). Respect for parental decision making in ethics includes the parents' ability to make decisions for their children based on their cultural or religious beliefs. However, this authority is not absolute.

> When scientific research shows that their chosen course of action would pose a serious risk of harm, parents may be prevented from making such a decision on their children's behalf (Diekema 2004). Yet the Act gives the State the authority to impose a restriction on the treatment options available to women that is demonstrated by sound scientific research to increase risks with no countervailing benefits. It thus creates a category of people— those who seek abortion—who are uniquely, absolutely deprived of the ability to exercise their agency in medical decision making, even though their autonomy must otherwise be respected both before and after pregnancy.

(Exhibit K).

*Response: Uncontroverted, with the clarification that this is only an excerpt from Dr. Cunningham's disclosure. A full summary of Dr. Cunningham's opinions can be found in his Declaration in Support of Plaintiffs' Motion for Summary Judgment. Cunningham Decl.; Pls.' Mem. at 17.*

## III. THE PROVIDERS' ADDITIONAL STATEMENT OF UNDISPUTED FACTS

20. The Providers hereby incorporate paragraphs 1–117 from their memorandum in support of summary judgment ("Memorandum"). Pls' Mem. at 2–18.

21. Requiring providers to postpone care until a patient's condition has deteriorated to the extent that one of the Act's exceptions applies is outside the principles and norms of medical practice and "is entirely unethical and unacceptable under any circumstance in medicine." Davis Decl. ¶ 56; *accord* Nauser Decl. ¶ 42.

22. The American College of Obstetricians and Gynecologists ("ACOG") has taken the position that requiring providers to cause demise prior to a D&E offers no medical benefit and has no sound medical basis. Davis Decl. ¶ 23; Nauser Decl. ¶ 38.

23. The American Medical Association ("AMA") and other major medical associations support the provision of abortion care as part of comprehensive reproductive healthcare and the ability of women to make individual choices about care. Cunningham Decl. ¶ 34–35.

24. ACOG has taken the position that "[f]or situations in which [maternal and fetal] interests diverge, the pregnant woman's autonomous decisions should be respected." *Id.* ¶ 35 (quoting Comm. on Ethics, Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion Number 385*, *The Limits of Conscientious Refusal in Reproductive Medicine* at 3 (2007) (reaffirmed 2019), https://www.acog.org/-/media/committee-opinions/committee-on-ethics/co385.pdf?dmc=1&ts=20191101T1836513839).

25. Notwithstanding its medical emergency exception, the Act operates as an external constraint that restricts the range of treatment options the physician is legally allowed to offer and overrides the physician's clinical judgment and the patient's values and preferences. *Id.* ¶¶ 15–16.

26. Mandating providers to withhold medically appropriate treatment from patients is contrary to medical ethics, erodes patients' trust in providers, and damages the physician-patient relationship. *Id.* ¶ 16.

27. The Providers' bioethics expert explains that there is no bioethical consensus on what constitutes fetal dignity or that certain methods of terminating a pregnancy are more dignified than others. *Id.* ¶¶ 27–31. Individuals hold widely divergent beliefs about the status of developing human life that are informed by religion, culture, and personal experience. *Id.* ¶¶ 17, 27–31.

28. "[I]t is inconsistent with the principles of ethical medical decision making for the State to force a doctor to perform a procedure that she believes confers risks with no benefit or to require a woman to undergo an unnecessary medical procedure." *Id.* ¶ 33.

## IV. ARGUMENT

### A. The State's Motion is Not Properly Supported.

Summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material

fact and that the movant is entitled to judgment as a matter of law." K.S.A. § 60-256(c)(2). Where, as here, the Providers have shown a violation of the fundamental right to abortion, *see* Pls.' Mem. at 27–31, the State bears the burden of showing that the Act is narrowly tailored to serve a compelling interest. When moving for summary judgment, the State bears the even heavier burden of proving there is no genuine dispute of material fact, and "[t]he trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom judgment is sought." *Patterson v. Cowley Cnty*., 307 Kan. 616, 621, 413 P.3d 432, 437 (2018) (quoting *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 622, 345 P.3d 281, 285 (2015)); *Stechschulte v. Jennings*, 297 Kan. 2, 14, 298 P.3d 1083, 1093 (2013). Where the movant fails to meet its burden, summary judgment must be denied. *Patterson*, 307 Kan. at 621; *Rosenquist*, 301 Kan. at 622.

The State has not provided sufficient support for Defendants' Motion for Summary Judgment ("Motion"). The State attached to its Motion: (1) a copy of the Act and the Petition in this litigation, Defs.' Mot. Attachs. A, I; (2) two of the three expert disclosures *the Providers* served in this litigation, Defs.' Mot. Attachs. J–K; and (3) a portion of, but not the complete, testimony presented to the Kansas legislature as it considered S.B. 95, Defs.' Mot. Attachs. B–H. The State does not suggest that either the Act or the Petition supports summary judgment in its favor, and, as discussed *infra* Part III, the testimony of the Providers' three expert witnesses demonstrates that the Act violates the fundamental right to abortion and cannot survive strict scrutiny.

The State's assertion that the Act serves a compelling interest in promoting fetal dignity (*see, e.g*., Defs.' Mot. at 12, 14–16, 19, 20, 22, 26) is unsupported by the record evidence. Plaintiff's medical ethics expert explained that there is no consensus on what constitutes fetal

dignity. Cunningham Decl. ¶¶ 27–31. The legislative history here is irrelevant; an examination of a statute's legislative history is only permissible where its language or text is unclear or ambiguous. *State v. Urban*, 291 Kan. 214, 220, 239 P.3d 837, 841 (2010) (holding court of appeals erred in applying canons of statutory construction to statute where legislature's intent was "manifest"); *Ambrosier v. Brownback*, 304 Kan. 907, 911–12, 375 P.3d 1007, 1010–11 (2016) (turning to legislative history only where interpretation was necessary). "When a statute is plain, the court should not speculate as to the legislative intent behind it and should not read into the statute something not readily found in it." *Urban*, 291 Kan. at 220. Here, the intent is clear and unambiguous—to prohibit a method of abortion—and there is no ambiguity that would necessitate this Court examining the legislative history in the first place. Moreover, legislative deference is not warranted where fundamental constitutional rights are impinged upon. *See Hodes & Nauser*, 309 Kan. at 499. Indeed, Courts have an independent duty to assess the facts and the evidence before it where constitutional rights are at stake and cannot blindly defer to legislative testimony. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016).

Further, the Kansas rules prevent the consideration of inadmissible, out-of-court statements for the truth of the matter stated. K.S.A. § 60-460. The Providers do not dispute that the legislative testimony attached to the State's Motion was in fact before the legislature. To the extent the State relies on this testimony to demonstrate the truth of the statements contained therein, however, the legislative testimony cannot create a dispute of material fact. Hearsay that does not fit into one of the hearsay exceptions cannot be relied on for the purposes of summary judgment. *Schultz v. Schwartz*, 28 Kan. App. 2d 84, 89–90, 11 P.3d 530, 534 (2000) (finding out of court statement was inadmissible and therefore could not create a dispute of material fact that would warrant denial of summary judgment). "It would make no sense to deny summary judgment and proceed to trial on

the basis of [inadmissible hearsay] evidence that could not be presented at trial." *Id.* The State cannot rely on the legislative testimony for the truth of the matter asserted therein in lieu of submitting its own expert testimony in defense of the Act. The State's Motion is not properly supported and should be denied.

### B. The State Has Failed to Meet Its Burden of Demonstrating Its Asserted Interests Are Compelling.

In its interrogatory responses, the State asserted three interests: (1) women's physical and mental health; (2) the preservation and protection of medical ethics, integrity, and wellbeing of the healthcare profession; and (3) the preservation and protection of the value of fetal life and dignity. *See* Pls.' Mot. Ex. 6 at 1. The State has failed to establish that any of these interests—or other interests that it has improperly raised for the first time on summary judgment—are compelling.

First, the State has failed to make any argument in support of its asserted interest in women's health, providing no evidence to support its assertion that its proposed alternatives to D&E are either safe or effective. In any event, as described in the Providers' Memorandum, *see* Pls.' Mem. at 31–32 , by forcing women to either forgo the most common method of abortion after 14–15 weeks as measured from the woman's last menstrual period ("LMP") or be subjected to an unnecessary and invasive procedure with increased risk and no medical benefit, that is in some circumstances completely unstudied, the State undermines rather than serves women's health. *See Hodes & Nauser*, 309 Kan. at 616, 677.

Second, the State now asserts a new interest not included in its interrogatory responses, namely an asserted interest in protecting third parties. By failing to include this asserted interest in its interrogatory responses, this argument is waived. *See* K.S.A.§ 60-237(c)(1) ("If a party fails to provide information or identify a witness as required by K.S.A. 60-226(b)(6) or (e), and

amendments thereto, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing or at a trial, unless the failure was substantially justified or is harmless."); *Unified Sch. Dist. No. 232, Johnson Cnty. v. CWD Invs., LLC.*, 288 Kan. 536, 563–67, 205 P.3d 1245, 1262–64 (Kan. 2009) (affirming trial court order granting motion *in limine* to exclude damages evidence not timely submitted in the party's interrogatory responses).

### 1. The State Has Not Met Its Burden of Demonstrating Its Asserted Interest in Promoting Respect for, the Value of, and the Dignity of Human Life, Born or Unborn, is Compelling

The State asserts that S.B. 95 promotes respect for, the value of, and the dignity of fetal life. To meet its heavy burden of demonstrating that this asserted interest is compelling, the State relies on a different Kansas statute, which declares that "the life of each human being begins at fertilization" and "unborn children" have "all the rights, privileges, and immunities available to other persons." K.S.A. § 65-6732. The State seeks to distinguish *Roe v. Wade*, 410 U.S. 113 (1973), based on this Kansas personhood statute, arguing that when the U.S. Supreme Court addressed whether life begins at conception in *Roe*, a fetus was not considered a person under the law.[2] The State's argument fails for multiple reasons. First, the State misrepresents the holding of *Roe*, arguing that the Court based its viability threshold on the "idea" that "the unborn have never been

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[2] The State claims that the bases for the right to abortion under the U.S. Constitution and the Kansas Constitution are distinguishable, in an attempt to argue that Kansas' constitutional protections for personal liberty and autonomy should be extended to "unborn children." Defs.' Mot. at 12–13. But the Kansas Supreme Court itself "compar[ed] the text of section 1 and the Fourteenth Amendment," highlighting that the "inalienable natural rights" to "life and liberty" contained in the Kansas Constitution are "mirrored" in the federal constitution. *Hodes & Nauser*, 309 Kan. at 623, 626. Likewise, the Court held the protections afforded pregnant women under the Kansas constitution to decide whether to continue a pregnancy are "consistent" with other state court decisions that have recognized the right to abortion under both privacy and autonomy principles. *Id.* at 650. To the extent the Kansas Supreme Court diverges from these opinions, it affords even greater protection to women's fundamental rights.

recognized in the law as persons in the whole sense." Defs.' Mot. at 11. But the State cites this quote out of context. In the cited passage, *Roe* addressed only "areas other than criminal abortion," *Roe*, 410 U.S. at 161, having already acknowledged earlier in its opinion that, at the time, restrictive criminal abortion laws were in effect "in a majority of States," *id*. at 129. Further, the Court looked to tort law and inheritance law as examples of the "reluctan[ce]" under the law to "endorse any theory that life [] begins before live birth"; it nowhere suggests that a single civil law such as a personhood statute would alter its holding. *Id*. at 161. Indeed, the State's argument that its personhood statute transforms its asserted interest into a compelling one ignores that the *Roe* Court itself recognized numerous state criminal laws asserting life begins at conception when it held that an asserted interest in life is not compelling prior to viability. *Id*. at 159 n.55, 163.

Second, the State fails to distinguish between its asserted interest in "promoting respect for, the value of, and the dignity of fetal life" and the interest asserted in *Roe*, which was an interest in potential life. *Id.* at 159, 163. Unlike the criminal ban at issue in *Roe*, the State does not assert that S.B. 95 promotes potential life by preventing pregnancy termination.[3] To the contrary, the State argues that the Providers may comply with S.B. 95 by terminating a pregnancy using a separate, fetal demise procedure, prior to performing a D&E. *See* Defs.' Mot. at 15, 17.

Third, the State ignores that the *Roe* Court's primary reason for holding an asserted interest in protecting fetal life was not compelling prior to viability was that those "trained in the respective disciplines of medicine, philosophy, and theology" could not " arrive at any consensus" on the

[3] The State's reliance on *In re Delio v. Westchester County Medical Center*, a case dealing with refusal of medical treatment, is inapposite. *See* 129 A.D.2d 1, 24, 516 N.Y.S.2d 677 (N.Y. App. Div.1987) (holding the state's interest in preserving life was not a compelling factor in continuing treatment of patient that could override the patient's "bodily self-determination" right to decline medical treatment).

question of when life begins. *Roe*, 410 U.S. at 159. Accordingly, the judiciary was "not in a position to speculate as to the answer." *Id*. Likewise, the State has failed to produce any evidence that its proposed methods of inducing fetal demise actually serve any interest in "promoting respect for, the value of, and the dignity of fetal life" or to controvert the expert opinions provided by the Providers. As in *Roe*, the Kansas personhood statute on its own does not demonstrate such consensus. The uncontroverted record evidence demonstrates that there is no medical, theological, or bioethical consensus on what constitutes fetal dignity, or that certain methods of terminating a pregnancy are more dignified than others. Cunningham Decl. ¶¶ 27–31. Individuals hold widely divergent beliefs about the status of developing human life that are informed by religion, science, culture, and personal experience. *See Id*. ¶¶ 17, 27–31; *Roe*, 410 U.S. at 159–60 ("It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.").

The State contends that "[a] sufficient portion of the State of Kansas, acting through a duly-elected legislature, sees the killing of unborn persons as an affront to the dignity of life." Defs.' Mot. at 19. But a secondary statute cannot rescue another statute from unconstitutionality. The belief of certain Kansas legislators that life begins at conception cannot trump the fundamental right of all Kansans to make their own decisions about the medical care they receive and the Kansas Constitution's guarantee of personal liberty to act in accordance with one's own beliefs about

developing human life. *Cf. Roe*, 410 U.S. at 162 ("[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.").

The State has no legitimate interest in privileging one set of beliefs about developing human life over others, taking sides in a religious debate, or stigmatizing people whose personal belief systems differ from those of the majority. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("[I]t is not . . . the role of the State or its officials to prescribe what shall be offensive."); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."); *Casey*, 505 U.S. at 850 ("Our obligation is to define the liberty of all, not to mandate our own moral code."); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) ("[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."). The State's attempt to prescribe for all Kansans what constitutes "dignified" or "respectful treatment" of fetuses is anathema to liberty guarantees of both the Kansas and U.S. Constitutions. Defs.' Mot. at 17.

Further, the State fails to reconcile the sweeping language of its personhood statute with the requirement articulated by the Kansas Supreme Court that a compelling interest be not only extremely weighty, "but also rare." *Hodes & Nauser*, 309 Kan. at 663. If Kansas' recognition of the unborn beginning at "fertilization" can be used to justify a ban on the most common method of abortion after 14–15 weeks, it would likewise support a ban on any other method of abortion. Defs.' Mot at 10, 17, 21. As discussed in the Providers' Memorandum, *see* Pls.' Mem. at 35, the

State could just as easily argue that other means of terminating a pregnancy—including suction curettage and the fetal demise methods proposed by the State in this litigation—are "brutal" or "inhumane" and should likewise be banned. Defs.' Mot. at 12; *cf., e.g.*, *Bernard v. Individual Members of Ind. Med. Licensing Bd.*, 392 F. Supp. 3d 935, 957 (S.D. Ind. 2019) (granting preliminary injunction against Indiana's D&E ban and explaining that "[i]t is difficult to see how any respect of life is even arguably expressed by the choice to ban dismemberment by the convergence of two rigid levers while permitting dismemberment by suction").

The State's articulation of its interest would swallow the liberty right recognized by the Kansas Supreme Court entirely. The Kansas Constitution Bill of Rights is designed to act as a limit on the legislature. *See* Pls.' Mem. at 29. The State's argument that a legislative enactment can serve as a basis to undermine a fundamental right is inconsistent with the purpose of the Kansas Constitution and the holding of the Kansas Supreme Court recognizing the "supremacy" of individual rights. *Hodes & Nauser*, 309 Kan. at 660–61. "The judiciary has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people." *Id*. at 638, 682 (quotation omitted). Indeed, the text of the Kansas personhood statute itself states that it is subject to the Kansas Constitution. K.S.A. § 65-6732(b). For these reasons, the Kansas personhood statute cannot provide the State with an end run around the Kansas Constitution under strict scrutiny.

Finally, the State's reliance on the U.S. Supreme Court's decision in *Gonzales v. Carhart* is inapposite. 550 U.S. 124 (2007). The State fails to contend with the fact that each of its asserted interests were before the U.S. Supreme Court when the Court struck down a ban on D&E. *See Stenberg v. Carhart*, 530 U.S. 914, 930–31 (2000). There, although the state asserted interests in "show[ing] concern for the life of the unborn, prevent[ing] cruelty to partially born children, and

preserv[ing] the integrity of the medical profession," *id.* (quotation omitted), the Court held that a ban on D&E was unconstitutional under the less exacting undue burden standard, *id.* at 945–46. That ruling was upheld in *Gonzales*, a case that dealt directly with state's ability to ban certain methods of abortion. *See* 550 U.S. at 151–54.

Applying *Stenberg* to the instant case, the Kansas Supreme Court held that by combining its existing ban on intact D&E with S.B. 95's ban on D&E, "Kansas has simply attempted to do in two statutes what the United States Supreme Court [in *Stenberg*] held Nebraska could not do in one—ban both D&E and intact D&E abortions." *Hodes & Nauser*, 309 Kan. at 676–77. The Kansas Supreme Court also distinguished *Gonzales*, explaining that there, the U.S. Supreme Court permitted a ban on an uncommon procedure based on the continued availability of the most common and generally safety abortion method. *Id.*; *see also Gonzales*, 550 U.S. at 165. Here, however, "the State has done the opposite, banning the most common, safest procedure and leaving only uncommon and often unstudied options available." *Id* (citation omitted). Also citing to *Stenberg* and *Gonzalez*, the Kansas Supreme Court further held that the right to abortion must permit access to abortion "whenever it is necessary to protect [] health." *Id.* at 676. The State fails to address the Kansas Supreme Court's binding interpretation of *Stenberg* or its application here.

**2. The State Has Failed to Demonstrate that Its Asserted Interest in Protecting Third Parties is Compelling or Distinct from Its Other Asserted Interests.**

The State raises for the first time in its motion an asserted state interest in protecting third parties. As discussed above, this interest was not asserted in the State's interrogatory responses and is therefore waived. *See supra* Part IV.B. Even assuming this interest was properly disclosed, it is not distinguishable from the State's asserted interest in fetal life and dignity.

Although courts have recognized a state interest in protecting third parties, none of the cases cited by the State support its application here. Those cases address separate areas of law, such as child welfare. *See, e.g.*, *PJ ex rel Jensen v. Wagner*, 603 F.3d 1182, 1197–98 (10th Cir. 2010) (acknowledging state's interest in protecting the health and safety of minor children).[4] But the interest in protecting children has never been extended to the abortion context other than to the extent—and with the limitations—discussed above regarding the State's asserted interest in fetal life and dignity. *See supra* Part IV.B.1. Indeed, the State relies on *In Re Application of Jamaica Hospital*, but that case framed the State's interest not as one in third parties, but as one in "the potential of human life represented by an unborn fetus," citing *Roe*'s holding that the state's interest in protecting a previability fetus is "less than 'compelling' in the context of the abortion cases." 128 Misc. 2d 1006, 1007–8, 491 N.Y.S.2d 898, 899–00 (N.Y. Sup. Ct. 1985). The State invokes *Tucson Woman's Clinic v. Eden,* which likewise did not address an interest in "protecting third parties" and is inapposite. 379 F.3d 531, 539 (9th Cir. 2004) (citing *Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.")).[5]

The State has failed to demonstrate that its asserted interest in third parties is either compelling or that it is distinct from its asserted interest in "promoting respect for, the value of,

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[4] The State relies on the dissenting opinion in *Stockwell v. State*, but the majority there held that a person in state custody had a right to refuse medical treatment; the court required a hospital to use reasonable efforts to accommodate a person's exercise of that right where the state failed to demonstrate, among other things, that its failure to do so furthered some significant governmental interest. 54 Kan. App. 2d 325, 329, 399 P.3d 873, 876 (2017).

[5] The State's reliance on *England v. Louisiana State Board of Medical Examiners*, 259 F.2d 626, 629 (5th Cir. 1958), is inapposite. There, the Fifth Circuit upheld a medical practice eligibility statute requiring medical training; it did not hold that a state may force physicians to subject their patients to unnecessary and invasive procedures with increased risk and no medical benefit, that are in some circumstances experimental, as a condition of exercising a constitutional right. *Id.*

and the dignity of fetal life." As discussed above, the Providers have produced expert testimony demonstrating that in both medicine and bioethics, there is no consensus on the moral status of the fetus or on what constitutes dignified treatment of fetal tissue. Cunningham Decl. ¶¶ 28–31. The State cites no case law that supports its argument and proffers no testimony to controvert the expert opinions in this case. The State's argument amounts to nothing more than the opinion of State's counsel, which is insufficient to meet its burden of demonstrating a compelling interest. *See* Pls.' Mem. at 24–27; *see, e.g.*, *City of Ark. City v. Bruton*, 284 Kan. 815, 843, 166 P.3d 992, 1009 (2007) (holding opinions of counsel were insufficient to controvert expert testimony on technical matter).

These gaps in the State's argument are underscored by its failure to address the unprecedented burdens on women's autonomy imposed by S.B. 95. The State sees "no legal reason" why Kansas' recognition of fetal life from fertilization should not be applied to abortion laws. Defs.' Mot. at 17. But the State can reach that flawed conclusion only by excluding women—and their fundamental rights to physical and decisional autonomy—from its analysis. This Court must reject the State's deliberate disregard of binding Kansas Supreme Court precedent recognizing the fundamental right of women to terminate a pregnancy. *See* Pls.' Mem. at 27–29.

**3. The State Fails to Establish a Compelling Interest in the Regulation and Protection of the Medical Profession and the Medical Care Provided to Kansans.**

The State asserts that it has a compelling interest in regulating and protecting the medical profession and the medical care given by in-state providers. Defs.' Mot. at 20. But the State fails to establish that this asserted interest is compelling or that S.B. 95 serves it. To the contrary, the record evidence shows that S.B. 95 would undermine medical ethics, the wellbeing of the medical profession, and the safety of the public by forcing physicians to subject patients to harmful, experimental, and invasive medical procedures without any medical benefit. Pls.' Mem. at 9–17.

The Kansas Supreme Court made clear that the State has a high burden here, to present evidence that its asserted interest is "not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." *Hodes & Nauser*, 309 Kan. at 663 (citation omitted). But the State has presented "not a *shred* of evidence" regarding this interest, rendering it "entirely speculative." *Cf. Bernard*, 392 F. Supp. 3d at 958 (emphasis added); *see also Hodes & Nauser*, 309 Kan. at 702 (Biles, J., concurring) (questioning the State's lack of testimony from "actual medical professionals . . . given the pivotal role expert testimony typically plays in medically related litigation"). Instead, without pointing to any evidence or caselaw, the State invokes its "general interest" in regulating "barbers, lawyers, and other professions" and contends that it extends to regulating healthcare providers. Defs.' Mot. at 20. Such unfounded assertions of authority are woefully inadequate to justify the State's curtailment of a fundamental right.

In *Bernard*, for example, Indiana's Medical Licensing Board similarly argued that a D&E ban "protects the integrity of the medical profession by ensuring that doctors do not participate in such a brutal and inhumane procedure" that can cause patients to "lose faith in the medical profession." 392 F. Supp. 3d at 958. The district court rejected this rationale, as the Board had failed to provide any evidence for this proposition, and it was "at least as probable[] that a patient will lose faith in the medical profession when she discovers that she will be denied a procedure (D&E), or subjected to additional procedures (fetal-demise procedures), for no medical reason whatsoever but rather for reasons of pure paternalism." *Id.* at 958–59. That conclusion, where the court applied the less-exacting undue burden standard, is likewise compelled under strict scrutiny.

Although other courts have recognized a state interest in regulating the medical profession in certain contexts, the cases relied on by the State are inapposite. For example, the State cites

*Washington v. Glucksberg,* 521 U.S. 702, 731(1997), for the proposition that the U.S. Supreme Court has recognized a "state's interest in protecting 'the integrity and ethics of the medical profession' opposite an asserted fundamental right." Defs.' Mot. at 20. But in *Washington*, the Court concluded that "the asserted 'right' to assistance in committing suicide is *not* a fundamental liberty interest." *Id*. at 728 (emphasis added). And because no fundamental right was implicated, the Court did not apply strict scrutiny, and thus required a showing only that the "suicide ban be *rationally related* to *legitimate* government interests." *Id*. (emphases added). Moreover, in evaluating whether the state has "an interest in protecting the integrity and ethics of the medical profession," the Court based its decision on the opinion of the AMA, which had determined that "[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer." *Id*. at 731. In contrast, here the AMA and ACOG support the provision of abortion care as part of comprehensive reproductive healthcare and the ability of women to make individual choices about care. Cunningham Decl. ¶¶ 34–35.[6]

Having failed to put forth evidence of its own, the State turns the testimony of the Providers' expert on its head by contending that Dr. Cunningham "[does not] recognize that an abortion provider has two human patients in any given procedure." Defs.' Mot. at 21. The State's maneuver fails on at least two grounds. First, Dr. Cunningham does address the ethical implications of the fetus in his report. He explains that, while "there is no universal agreement about the application of the concept of human dignity to the termination of a fetus prior to

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[6] The remaining cases upon which the State relies, Defs.' Mot. at 20, are likewise inapt. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), addressed the regulation of lawyers and evaluated a potential violation of the Sherman Act, and *Varandani v. Bowen*, 824 F.2d 307 (4th Cir. 1987), addressed a physician who had been suspended for one year from seeking reimbursements for treating Medicare patients. Neither of these cases implicate fundamental rights.

viability," Cunningham Decl. ¶ 28, "[t]he mainstream view is that when it comes to treatment decisions in clinical medicine, an individual has the capacity to determine for herself the moral status of a fetus," particularly prior to viability, *id.* ¶ 31 (citation omitted). Moreover, "[i]t is inconsistent with the opinions of leading medical organizations and ethical principles to force a patient to assume a risk to her health for the potential benefit of the fetus inside her." *Id.* ¶ 33. The State has failed to controvert the expert opinions offered by Dr. Cunningham. *Supra* Part I.

Second, the State erroneously implies that the Kansas personhood statute gives a fetus the same rights as pregnant women for purposes of the strict scrutiny analysis. As discussed above, the State cannot use the statute as an end-run around constitutional rights. *See supra* Part IV.B.1. In any event, those considerations are distinct from an interest in regulating the medical profession. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 313 (1990) (Brennan, J., dissenting) (acknowledging in case about withdrawing medical treatment from patient in persistent vegetative state that "[t]he only state interest asserted here is a general interest in the preservation of life").

Finally, the State ignores the fact that the only record evidence here—evidence provided by the Providers' experts—shows that S.B. 95 would *harm* rather than serve the medical profession, and would *compromise* rather than strengthen medical ethics. The State does not present any evidence of its own, or indeed any argument, that controverts this evidence. As the Kansas Supreme Court held, "S.B. 95's requirement that doctors perform procedures for which there are no known health advantages and subject their patients to the aforementioned risks, uncertainty, and hardship—especially when safe, effective, and less intrusive means exist—will undoubtedly test the boundaries of medical ethics." *Hodes & Nauser*, 309 Kan. at 672.

Accordingly, the State has failed to show it has a compelling interest in regulating and protecting the medical profession and medical care, or that S.B. 95 serves any such interest.

### C. The State Has Failed to Meet Its Burden of Demonstrating that the Act is Narrowly Tailored.

As they did at the preliminary injunction stage, the Providers have demonstrated through fact and expert testimony that S.B. 95 violates the right to abortion by imposing unprecedented burdens on women seeking constitutionally protected medical care. If enforced, the Act will force some women to either forego an abortion altogether or submit to an additional, invasive medical procedure that provides no medical benefit, involves increased risk and complexity, and is in some circumstances experimental. *See* Pls.' Mem. at 9–16. The State declines to address this evidence—which it does not dispute—and inaccurately describes the impact on patients as nothing more than potential delay. *See* Defs.' Mot. at 13. But S.B. 95's grave harms are dispositive. Neither the U.S. Supreme Court nor any Kansas court has ever held that the government-mandated imposition of a medically unnecessary and invasive procedure—with no medical benefits and increased complications and risk—or a longer, painful, and less predictable procedure, is a permissible means of regulating previability abortion, let alone a narrowly-tailored approach. Based on binding precedent from the Kansas Supreme Court, S.B. 95's imposition of these harms on Kansas women cannot survive strict scrutiny. *See* Pls.' Mem. at 23.

The State also misstates its burden. Although the State correctly recognizes that it "bears the burden to show that the challenged law is narrowly tailored to serve at least one compelling state interest," Defs.' Mot. at 8 (citing *Hodes & Nauser*, 309 Kan. at 669), it misapplies the test for narrow tailoring. The State argues that its burden is to demonstrate that S.B. 95 is a narrowly tailored version of a ban on D&E. However, the question before this Court is not whether the Act is the least restrictive means of banning D&E; the State's burden is to demonstrate that a ban on D&E is the least restrictive means of furthering the State's asserted interests. Indeed, the State's

articulation assumes that banning D&E is itself a compelling state interest, which the State has not asserted and could not demonstrate. For example, when applying narrow tailoring to a 72-hour mandatory delay law, the Iowa Supreme Court assessed the fit of the delay to the state's identified interests in "promoting potential life and in helping people make informed choices in life"; it did not look to whether the delay was the least restrictive version of a 72-hour mandatory delay. *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 241 (Iowa 2018); *see also* Pls.' Mem. at 39 (listing cases striking down abortion restrictions that were not narrowly tailored to further the asserted state interests).

Narrow tailoring requires a fit "between the government's objective and its chosen means." *Planned Parenthood of the Heartland*, 915 N.W.2d at 240. Under the standard the State seeks to apply here, however, it could argue that any type of abortion restriction is narrowly tailored so long as it has a limited health exception or is not the most extreme form of that restriction. The State's distorted view of narrow tailoring would permit the "largely unrestrained" exercise of state power to swallow the fundamental right at issue, mirroring the less searching standard that the Kansas Supreme Court expressly rejected. *Hodes & Nauser*, 309 Kan. at 679.

**1. The Extremely Limited Medical Emergency Exception Does Not Demonstrate Narrow Tailoring.**

The State's claim that the Act's extremely limited medical emergency exception satisfies narrow tailoring demonstrates its fundamental misunderstanding of its burden under strict scrutiny. The Act's exception is only triggered when D&E abortion is "necessary to preserve the life of the pregnant woman" or "continuation of the pregnancy will cause substantial and irreversible physical impairment of a major bodily function of the pregnant woman." S.B. 95 § 3(a), Pls.' Mot. Ex. 1. First, the State fails to support its narrow tailoring argument with any evidence that the

exception minimizes the Act's burden on the fundamental right to choose abortion prior to viability. Counsel's bare assertion that the Act's medical emergency exception preserves women's health is insufficient to rescue it from unconstitutionality. *See* Pls.' Mem. at 24–27; *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1052, 1066 (E.D. Ark. 2017) (dismissing state's argument that D&E ban's exception for abortion necessary to avert death or "serious risk of substantial and irreversible impairment of a major bodily function" protected women's health when the state presented no evidence that women who needed D&E for medical reasons would still be able to obtain one).

Second, the Providers' fact and expert testimony demonstrates that the medical emergency exception does not alleviate the Act's extraordinary interference with the Section 1 rights of Kansans. The record shows that the exception is grossly insufficient to ensure patient safety. Davis Decl. ¶ 56; Nauser Decl. ¶ 42. Despite the exception, the Act would preclude the overwhelming majority of Kansans seeking abortion from obtaining a D&E procedure without first inducing fetal demise. Nauser Decl. ¶ 42. Nor does the exception suffice to protect against the increased risks of harm posed by additional and otherwise unnecessary procedures, as established by the Providers' fact and expert testimony. *See* Pls.' Mem. at 9–16. As established by the Providers' fact and expert witnesses, the exception is vastly under-inclusive of the numerous health conditions that can result in severe consequences. Nauser Decl. ¶ 42.

Further, withholding treatment until a patient deteriorates to the extent that the Act's exception applies needlessly endangers her life and health and violates the norms and ethics of medicine. *Id.* Davis Decl. ¶ 56. There is no dispute that medical ethics require a physician to act for the purpose of benefiting and reducing harms to their patients. Cunningham Decl. ¶ 18. The Act interferes with abortion providers' ability to exercise their clinical judgment, and its medical emergency exception only exacerbates this conflict. Permitting D&E only when an abortion

provider determines that death or substantial and irreversible impairment of a major bodily function would result requires the provider to wait until a patient has developed complications that put her life or health at risk before providing medically appropriate care. Nauser Decl. ¶ 42. Mandating that abortion providers withhold medically appropriate treatment from patients is contrary to medical ethics, erodes patients' trust in providers, and damages the physician-patient relationship. Cunningham Decl. ¶ 16. As a matter of law, legislation that thwarts the State's asserted interest cannot survive strict scrutiny. *See Hodes & Nauser*, 309 Kan. at 677 (citing *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 79 (1976).

Virtually identical medical emergency exceptions have not saved D&E bans considered by state or federal courts from being uniformly preliminarily or permanently enjoined.[7] Indeed, the

[7] *See, e.g.*, *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1328–30 (11th Cir. 2018) (holding that the health exception when abortion is necessary to avert the death or "serious risk of substantial and irreversible physical impairment of a major bodily function" did not resolve the D&E ban's constitutional infirmities), *cert. denied sub nom. Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606 (2019) (Mem.); *Bernard*, 392 F. Supp. 3d at 939, 963 (preliminarily enjoining Indiana's D&E ban despite exception for abortion "necessary to prevent any serious health risk" to the woman or to save the woman's life); *EMW Women's Surgical Ctr., P.S.C. v. Meier,* 373 F. Supp. 3d 807, 813, 825–26 (W.D. Ky. 2019) (permanently enjoining Kentucky's D&E ban despite its exception for a condition where "immediate abortion of [the] pregnancy" is necessary to "avert" death or "for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function"), *appeal docketed*, No. 19-5516 (6th Cir. May 15, 2019); *Planned Parenthood Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848, 868, 872 (S.D. Ohio 2019) (preliminarily enjoining a D&E ban in part and holding that its exceptions for abortion necessary to "preserve the life or physical health of the [woman] as a result of [her] life or physical health being endangered by serious risk of the substantial and irreversible physical impairment of a major bodily function" were insufficient); *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938, 942, 953–54 (W.D. Tex. 2017) (permanently enjoining Texas' D&E ban despite its exception for conditions that place the woman in danger of "death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed"), *appeal stayed*, No. 17-51060 (5th Cir. Mar. 13, 2019); *Hopkins*, 267 F. Supp. at 1066, 1069 (preliminarily enjoining a D&E ban and rejecting the state's attempt to salvage the law's constitutionality by pointing to medical emergency exception), *appeal docketed*, No. 17-2879 (8th Cir. Aug. 28, 2017) (supplemental briefing in light of *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019), completed July 12, 2019); *Tulsa*

U.S. Supreme Court recently denied certiorari on an appeal from the opinion of the Eleventh Circuit affirming the permanent injunction against Alabama's ban. *Harris*, 139 S. Ct. at 2606.

The Eleventh Circuit's reasoning in *West Alabama Women's Center* is instructive. Like S.B. 95, the D&E ban at issue provided exceptions only when abortion is necessary to avert death or substantial and irreversible physical impairment of a major bodily function. 900 F. 3d at 1328. Applying the less exacting undue burden standard, the Court nevertheless rejected the state's argument that the medical emergency exception cured the D&E ban's constitutional defects because it "does not apply to all threats to a woman's health." *Id.* For instance, the Court observed that the medical emergency exception would not apply when a woman is at serious risk of substantial but reversible impairment of a major bodily function or of substantial and irreversible impairment of a minor bodily function. *Id.*

The Eleventh Circuit further reasoned that the exception "is cold comfort to practitioners and women" because it forces the practitioner to decide "as [the woman] lies bleeding on the table…whether to wait for her to bleed even more in order to trigger the health exception, or to start" the D&E abortion and "risk having a jury second guess his judgment that the risk to the woman's health justified doing so." *Id.* at 1329. Another federal court similarly held that an identical exception to a D&E ban "does not adequately resolve the quandary faced by physicians presented with the failure of a demise procedure," who are in the position of questioning "at what point in the process" the exception's requirements can be deemed satisfied. *Planned Parenthood*

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*Women's Reprod. Clinic, LLC v. Hunter*, No. 118,292 (Okla. Nov. 4, 2019) (temporarily enjoining Oklahoma's D&E ban, H.B. 1721, 55th Leg., 2015 Okla. Sess. Laws 59, which includes a "serious health risk" exception for conditions that necessitate abortion to "avert death" or "serious risk of substantial and irreversible physical impairment of a major bodily function" pending appeal of the constitutionality of the D&E ban and a 72-hour mandatory delay).

*Sw. Ohio Region*, 395 F. Supp. 3d at 868–69. As the Court explained, "[d]octors who take early action will be the subject of opinionated second-guessing (and potential prosecution), while procrastination increases the risk of harm to the patient." *Id*. at 869.

Finally, the State has offered no evidence that the extremely limited medical emergency exception limits the Act's extraordinary burden on abortion access after approximately 14–15 weeks LMP in Kansas. Even under the less-exacting undue burden standard, the medical emergency exception was not sufficient to save similar laws from unconstitutionality on this basis. *See Bernard*, 392 F. Supp. 3d at 939, 963 (holding that despite medical emergency exception, D&E ban would prohibit access "for a large fraction of" women); *Hopkins*, 267 F. Supp. 3d at 1066 (holding "health exception did not save the D&E [ban]" because "nothing in the record" supported the state's assertion that "women who need a D&E for medical reasons would still be able to obtain one" nor controverted the provider's argument that the health exception was insufficient). Despite the exception, the Act would preclude the majority of Kansans seeking abortion from obtaining a D&E procedure without first inducing fetal demise. Nauser Decl. ¶ 42.

**2. The Availability of D&E Following Fetal Demise Does Not Save the Statute from Unconstitutionality.**

The State's argument that the Act is narrowly tailored because it permits D&E "in incidences of unplanned fetal demise" or where fetal demise is induced prior to a D&E also fails. Defs.' Mot. at 15. As a threshold matter, that the Act does not reach incidences of unplanned fetal demise does not remedy the fact that, as the State concedes, the Act bans D&E. *See supra* Part IV.C. As detailed in the Providers' Memorandum, banning D&E violates the right to abortion. Pls.' Mem. at 30. The State's argument that S.B. 95 is narrowly tailored because fetal demise may be induced prior to a D&E also fails. The Providers have put forward detailed testimony

demonstrating that the proposed fetal demise methods impose additional risks without any medical benefit; are not always feasible; and, in some instances, would constitute experimentation on patients. *Id*. at 9–16. Moreover, as discussed above, these purported alternatives have been put forward in other challenges to D&E bans, and no court has ever held that they cure the constitutional violation imposed by such bans. *See, e.g.*, *EMW Women's Surgical Ctr.*, 373 F. Supp. 3d at 823 (concluding "proposed fetal-demise methods are not feasible for inducing fetal-demise before standard D&E"); *see also Paxton*, 280 F. Supp. 3d at 948 (permanently enjoining D&E ban where "the State's reliance on adding an additional step to an otherwise safe and commonly used procedure in and of itself leads the court to the conclusion that the State has erected an undue burden on a woman's right to terminate her pregnancy prior to fetal viability").

Rather than assessing whether the Act is the least restrictive means of banning D&E, to demonstrate narrow tailoring, the State must demonstrate that banning D&E is the least restrictive means of furthering its asserted interests. But there are less restrictive means of furthering these interests. For example, the State's asserted interest in "the value of life," Defs.' Mot. at 9, could be furthered by providing care and treatment to pregnant women and children. By addressing only ways in which S.B. 95 is not the most restrictive possible version of D&E ban, and failing to address why less restrictive means cannot be taken to serve its asserted interests, the State has failed to carry its burden.

**3. The State's Remaining Narrow Tailoring Arguments Fail.**

First, the fact that the ban does not reach D&C does not save it. This has been true of every D&E ban preliminarily or permanently enjoined by courts throughout the nation. *See* Pls.' Mem. at 42–43; *Planned Parenthood Sw. Ohio Region*, 375 F. Supp. 3d at 850 n.1, 872 (preliminarily enjoining D&E ban that explicitly excluded D&C from the ban, Ohio Rev. Code § 2919.15(E)).

Likewise, the State's arguments regarding the scope of liability for violations S.B. 95 are unavailing. Courts have consistently struck down D&E bans with limits on liability, even under the undue burden standard. For instance, like S.B. 95, the law challenged in *Stenberg*, 530 U.S. at 945, excluded from liability a pregnant person receiving an "unlawful" abortion, Neb. Rev. Stat. § 28-328(3). Nevertheless, the U.S. Supreme Court held the ban constituted an undue burden because it prohibited D&E, "the most commonly used method for performing previability second trimester abortions." *Stenberg*, 530 U.S. 945–46; *id.* at 939–40. Limitations on liability have also been insufficient to save other D&E bans, including those that excluded pregnant women and other employees. *See, e.g.*, *Planned Parenthood Sw. Ohio Region*, 375 F. Supp. 3d at 872 (preliminarily enjoining D&E ban that excluded from liability a woman who obtains a D&E ); *see also Bernard*, 392 F. Supp. 3d at 939, 964 (same); *Paxton*, 280 F. Supp. 3d at 942.

The possibility of attorneys' fees and anonymity is likewise unavailing. Indeed, provisions like these have not rescued other restrictions from unconstitutionality. For example, the D&E ban permanently enjoined in *Hopkins*, 267 F. Supp. 3d at 1064–69, provided for the possibility of attorneys' fees and the anonymity of the pregnant person in proceedings, Ark. Code Ann. §§ 20-16-1804, 20-16-1806, in addition to limiting liability for pregnant women and other employees, *id.* § 20-16-1803; *see also Tulsa Women's Reprod. Clinic*, No. 118,292; *cf. W. Alabama Women's Ctr.*, 900 F.3d at 1314, 1330.

**D. The State Has Failed to Demonstrate It is Entitled to Summary Judgment on the Providers' Equal Protection Claims.**

In addition to violating a woman's fundamental right to obtain a lawful abortion, *Hodes & Nauser*, 309 Kan. at 659, 672, the Act denies both Dr. Nauser and her patients the right to equal protection. Pet. at 12 (Counts Four and Five). Section 1 of the Kansas Constitution Bill of Rights

states: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights § 1. In determining that Section 1 protects a woman's right to make a decision about whether she will continue a pregnancy, the Court held that Section 1's declaration of natural rights specifically includes "the rights to liberty and the pursuit of happiness, protect[ing] the core right of personal autonomy—which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." *Hodes & Nauser*, 309 Kan. at 660. Acknowledging the equal protection dimensions of its decisions, the Court held that "[p]regnant women, like men, possess these rights." *Id*; *see also id.* at 685 (Biles, J., concurring) ("Pregnant women, like the rest of us, have protected liberty interests fully rooted in our Kansas Constitution.").

The Court explained that though many do not view abortion "through a lens of gender bias," it could not ignore "the prevailing views justifying widespread legal differentiation between the sexes during territorial times and the reality that these views were reflected in policies impacting women's ability to exercise their rights of personal autonomy, including their right to decide whether to continue a pregnancy." *Id.* at 659 (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulations and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992)). However, as the Court acknowledged, "[w]e no longer live in a world of separate spheres for men and women." *Id.* "[T]rue equality of opportunity in the full range of human endeavor is a Kansas constitutional value," which "cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago." *Id*. That is why, rather than relying on "historical prejudices," the Court looked to natural rights and applied them "equally to protect all individuals." *Id*. at 659–660; *see also Planned Parenthood of the Heartland*, 915

N.W.2d at 245 ("Profoundly linked to the liberty interest in reproductive autonomy is the right of women to be equal participants in society.").

Section 1 of the Kansas Constitution Bill of Rights applies in cases where an equal protection challenge involves individual rights. *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22, 28 (2005) (citing *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987)). Section 1 has "much the same effect" as the Equal Protection Clauses found in the Fourteenth Amendment to the United States Constitution. *Hodes & Nauser*, 309 Kan. at 620. The Fourteenth Amendment to the United States Constitution provides that "no state can 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" *Id.* at 624 (quoting U.S. Const. amend. XIV.). Under both constitutions, "[t]he guiding principle of the Equal Protection Clause is that similarly situated individuals should be treated alike." *Limon*, 280 Kan. at 283 (citing *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 440 (1985)). Where similarly-situated individuals are treated differently, Kansas courts employ three levels of scrutiny to determine whether the disparate treatment is constitutional under the equal protection guarantee: strict scrutiny, intermediate scrutiny, and rational basis scrutiny. *Id.* "The level of scrutiny applied by the court[s] depends on the nature of the legislative classification and the rights affected by that classification." *Id*. In general, these provisions "echo federal standards," *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006), but in some instances, including in the instant case, they may afford "greater rights than the federal Constitution." *Hodes & Nauser*, 309 Kan. at 669–71; *Farley*, 241 Kan. at 671. Here, the Act violates the Kansas guarantee of equal protection in two ways: (1) it treats women who seek abortion care differently than all other persons who seek medical care and infringes upon their

fundamental right to obtain a previability abortion and (2) it discriminates between qualified healthcare providers without any rational basis.

### 1. S.B. 95 Infringes on the Fundamental Right to Abortion and Discriminates Against Women.

First, S.B. 95 establishes an unconstitutional classification based on the exercise of a fundamental right. Women who seek abortion care are similarly situated to patients who seek other forms of medical care. By forcing only women seeking to access D&E abortion to forgo medical care or be subjected to unnecessary, additional, and invasive medical procedures—with no established health benefit but increased risk—that are in some instances experimental, the State is effectively singling out women seeking D&E abortion and treating them differently than all other persons who wish to access medical care, including other pregnant women who do not seek abortion services, based on their exercise of a fundamental right.

As discussed *supra* Part IV.B., the right to end a pregnancy before viability is a fundamental right under the Kansas Constitution, and, by banning the most common method of abortion after approximately 14–15 weeks, S.B. 95 violates this fundamental right. In an equal protection challenge, "strict . . . scrutiny applies when fundamental rights are affected or when suspect classifications are involved." *Jurado v. Popejoy Const*. Co., 253 Kan. 116, 124 853 P.2d 669, 676 (1993) (citations omitted); *accord Limon*, 280 Kan. at 284; *see also Hodes & Nauser*, 309 Kan. at 669–671 ("[T]he strict scrutiny test best protects those natural rights that we today hold to be fundamental."). Because the State's classification infringes on a fundamental right, the burden is on the State to demonstrate a compelling state interest furthered by S.B. 95, "including a direct relationship between the classification and the state's goal." *Farley*, 241 Kan. at 669; *see also Simat Corp. v. Ariz. Health Care Cost Containment Sys*., 203 Ariz. 454, 458, 56 P.3d 28, 32

(Ariz. 2002) (applying strict scrutiny under state constitution's equal protection guarantee based on recognition of the fundamental right to terminate a pregnancy); *Women's Ctr. of W. Va., Inc. v. Panepinto*, 191 W.Va. 436, 447 n.2, 446 S.E.2d 658, 669 n.2 (W. Va. 1993). Accordingly, a classification that affects a woman's ability to access abortion services violates equal protection unless the State can show it is narrowly tailored to serve a compelling state interest. *Hodes & Nauser*, 309 Kan. at 671.[8]

There is no rational, let alone compelling, reason to force women to forgo access to constitutionally protected medical care or be subjected to additional and unnecessary medical treatment, that is in some instances still experimental. There is no analogous restriction for any other form of healthcare in Kansas. S.B. 95 targets a procedure sought only by women, while not imposing similar burdens on procedures also sought by men. Moreover, a law that disadvantages women who choose abortion solely for the purpose of expressing moral disapproval of it, or burdening access to it, will violate Kansas' equal protection guarantee even under the less-stringent rational basis test. *Limon*, 280 Kan. at 290 (citation omitted). S.B. 95 is a transparent attempt to make abortion more difficult to access, but making abortion care more difficult to secure is not a legitimate goal. *See Casey*, 505 U.S. at 877 ("A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."). Because the classification established by S.B. 95 classifies individuals on the basis of their exercise of a fundamental right without furthering any legitimate

[8] The State argues that under *Tucson Women's Clinic*, 379 F.3d at 548–49, the undue burden standard should be applied to the Providers' equal protection claim. Defs' Mot. at 23. But *Tucson Women's Clinic* held that both federal due process and equal protection challenges to restrictions on abortion should be subject to the same test. *Id.* at 549. By that logic, the Providers' equal protection claim, like their due process claim, is subject to strict scrutiny.

governmental purpose, it cannot survive any level of scrutiny. *See Jurado*, 253 Kan. at 124; *Planned Parenthood of the Heartland*, 915 N.W.2d at 245 (holding law that diminishes women's control over their reproductive futures violated Iowa Constitution's equal protection guarantee).

S.B. 95 also perpetuates stereotypes about women, including that women need special protections and are foreordained to be mothers. Legislative classifications perpetuating gender-based stereotypes are subject to heightened scrutiny. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (holding that reliance on "stereotypes" about women in the workforce "cannot justify the States' gender discrimination in this area"); *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (holding that state justifications for gender-based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females" (citations omitted)). The application of heightened scrutiny to laws that have a disparate impact on women, including laws regulating pregnancy or abortion, requires evaluating whether "a gender-based discriminatory purpose has, at least in some measure, shaped the . . . legislation." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 276 (1979); *see also Miller v. Johnson*, 295 Kan. 636, 666–67, 289 P.3d 1098, 1119 (2012), *abrogated on other grounds by Hilburn v. Enerpipe Ltd.*, 309 Kan 1127, 1128, 442 P.3d 509, 511 (2019). The discriminatory purpose need not be the sole reason for the legislation, but "a motivating factor." *Feeney*, 442 U.S. at 283 (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977)). Evidence of such discriminatory purpose means that "'judicial deference is no longer justified.'" *Id*. (quoting *Vill. of Arlington Heights*, 429 U.S. at 265–66).

To satisfy heightened scrutiny under the Kansas Constitution's equal protection provision, the State must show that the classification embodied in S.B. 95 is supported by "an 'exceedingly persuasive justification'"; that it "'serves important governmental objectives[;] and that the

discriminatory means employed are substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 524 (quoting *Miss. Univ. for Women v. Hogan*, 485 U.S. 718, 724 (1982)); *accord In re K.M.H.*, 285 Kan. 53, 73 169 P.3d 1025, 1039 (explaining that gender-based classifications "must substantially further a legitimate legislative purpose; the government's objective must be important, and the classification substantially related to achievement of it" (citation omitted)). S.B. 95 unquestionably has a disparate impact on women: it targets abortion, a procedure needed only by women, for the imposition of burdensome requirements not imposed on medically-comparable procedures that are gender-neutral or needed only by men. The impact of S.B. 95 on women demonstrates that it was adopted with a discriminatory purpose. *See Feeney*, 442 U.S. at 279 (explaining that a discriminatory purpose is evident when a challenged law is adopted "at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group"). As a result of S.B. 95, only women will be subjected to unnecessary, invasive, and experimental medical treatment as a condition of accessing a fundamental right. S.B. 95 therefore does not merely "refuse[] to extend to women a benefit that men cannot and do not receive, but . . . imposes on women a substantial burden that men need not suffer." *Nashville Gas Co. v. Satty*, 434 U.S. 136, 141–42 (1977) (holding that a facially-neutral seniority policy violated Title VII because it had a disparate impact on women returning from pregnancy leave). Moreover, it demeans and stigmatizes women seeking to exercise a constitutional right. *See Limon*, 280 Kan. at 286 (holding the demeaning and stigmatizing effect of sodomy statute contributed to conclusion that it was a discriminatory classification).

Citing no support for its argument, the State argues that regulation of abortion fails, as a matter of law, to constitute sex discrimination in any circumstance. The State's categorical assertion is simply incorrect: regulation of pregnancy or abortion may constitute gender-based

discrimination where, as here, the constitutional criteria for such discrimination are satisfied. *Hodes & Nauser*, 309 Kan. at 660; *cf. N.M. Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841, 854–55 (N.M. 1998) (holding that an abortion restriction violated the New Mexico Constitution's prohibition against sex discrimination). For all these reasons, the State has failed to meet its burden of demonstrating that it is entitled to summary judgment on this claim.

**2. S.B. 95 Violates the Equal Protection Rights of Physicians.**

S.B. 95 also impermissibly discriminates against abortion providers by treating them differently than providers who offer all other forms of medical care. Pet. at 12 (Count Six). Abortion providers are similarly situated to physicians who provide other types of healthcare with respect to their ability to provide safe and effective care, yet only abortion providers are prohibited from providing healthcare services to their patients in accordance with their medical judgment.

Because S.B. 95 treats similarly situated healthcare providers differently, this Court should analyze it under the rational basis test. *See Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 194, 273 P.3d 709, 714–5 (2012). Under the rational basis test, "the proffered rational basis must both explain the distinction drawn by the statute between two classes of individuals *and* be a legitimate legislative objective." *State v. Cheeks*, 298 Kan. 1, 8, 310 P.3d 346, 353 (2013) (overruled on other grounds). "Although the rational basis standard is a 'very lenient standard,' it is not a 'toothless' one." *Cheeks*, 298 Kan. at 8 (quoting *Downtown Bar*, 294 Kan. at 194–95). Here, there is no evidence that S.B. 95 bears a rational relationship to a legitimate goal. The State simply has no legitimate reason to discriminate between qualified healthcare providers in this way. In light of the demonstrated safety record of D&E, the Act's prohibition of the most commonly-used procedure in favor of those with increased risk, that are in some circumstances experimental, is designed solely for the improper purpose of restricting the right to access abortion. *See State v.*

*Risjord*, 249 Kan. 497, 503, 819 P.2d 638, 643 (1991) (stating that while, under rational basis, a classification "need not be an exact exclusion or inclusion of persons or things…[it] may not be created arbitrarily, discriminatorily, or unreasonably" (citation omitted)). As stated above, animus towards abortion providers is not a permissible basis for legislation. *See Limon*, 280 Kan. at 288 (rational basis review requires "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law") (quoting *Romer*, 517 U.S. at 633). Indeed, the Kansas Supreme Court has squarely held that "moral disapproval of a group cannot be a legitimate governmental interest." *Limon*, 280 Kan. at 295.

The Kansas Supreme Court has struck down numerous statutes pursuant to this standard. *See, e.g.*, *Limon*, 280 Kan. at 298–300 (holding that the State's interest in public health, inter alia, was not rationally related to excluding gay teenagers from the protections of its Romeo and Juliet law) *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1022, 850 P.2d 773, 781–82 (holding that the State's interest in reducing the costs of liability insurance was not rationally related to the abrogation of the collateral source rule for claims in excess of $150,000) ("Even assuming the objective of cutting insurance costs is a legitimate legislative goal, we do not find the classification in the present case will reasonably further that purpose."); *Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 779–82, 830 P.2d 41, 49–50 (1992) (holding that the State's interest in reducing insurance premiums for industry was not rationally related to the disparate treatment under the Workers Compensation Act of workers with injuries resulting from repetitive trauma and those with injuries resulting from a single trauma) ("These classifications of workers are similarly situated with respect to the goal of cost cutting, but they do not receive like treatment."); *Farley*, 241 Kan. at 680 (Lockett, J., concurring) (holding that the State's interest in insuring the availability of quality healthcare was not rationally related to excluding victims of medical

malpractice from the benefits of the collateral source rule) ("We are not correcting the legislature[;] we are simply performing our constitutional duty by deciding that the creation of separate classes of tort victims based on the classification of the tortfeasor is unconstitutional."); *Ernest v. Faler*, 237 Kan. 125, 137–38, 697 P.2d 870, 878 (holding that the State's interest in public safety, inter alia, was not rationally related to the disparate application of a notice of claim requirement to persons injured by pesticides and persons injured by fertilizers) ("This situation [] smacks of unreasonableness and invidious discrimination as between injured citizens."); *Henry v. Bauder*, 213 Kan. 751, 752, 754, 518 P.2d 362, 364, 366 (1974) (holding that the State's interests in promoting hospitality and reducing the likelihood of collusive lawsuits were not rationally related to the imposition on non-paying guest passengers of a heightened standard for recovering damages from a negligent automobile driver) ("In reaching this conclusion we do not do so on the basis of the wisdom of the statute but solely on the basis that the classifications provided in the statute as interpreted by our judicial decisions are arbitrary and discriminatory and have no rational basis.").[9]

Further, legislation resulting in classes that are over-inclusive, under-inclusive, or both, is likely to fail rational basis scrutiny. *See Limon*, 280 Kan. at 288 ("Over-inclusiveness, where the

[9] The U.S. Supreme Court has likewise struck down numerous statutes under rational basis scrutiny. *See, e.g.*, *Romer*, 517 U.S. at 635 (holding that the State's interest in respect for its citizens' freedom of association was not rationally related to the exclusion of gay, lesbian, and bisexual persons from the protections of anti-discrimination laws); *City of Cleburne*, 473 U.S. at 448–50 (holding that the State's interest in public safety was not rationally related to requirement that a group home for the mentally disabled obtain a special permit); *Plyler v. Doe*, 457 U.S. 202, 227–30 (1982) (holding that the State's interest in preserving its limited resources for the education of lawful residents was not rationally related to exclusion of undocumented immigrant children from the public school system); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535–38 (1973) (holding that the government's interest in preventing fraud was not rationally related to exclusion of households containing one or more unrelated persons from the food stamp program); *Eisenstadt v. Baird*, 405 U.S. 438, 450–52 (1972) (holding that the State's interest in public health was not rationally related to ban on distribution of contraceptives to unmarried people).

legislation burdens a wider range of individuals than necessary given the State's interest, may be particularly invidious and unconstitutional. Likewise, a failure to create a classification which is sufficiently broad to effectively accommodate the State's interest, *i.e.*, the creation of an under-inclusive class, may evidence an animus toward those burdened. Paradoxically, a class may be both under- and over-inclusive . . . ." (citations omitted)). For example, in *Limon*, the Kansas Supreme Court rejected the State's argument that the statutory classification, which treated teens differently on the basis of their sexual orientation, was rationally related to any legitimate state interest, including an interest in public health. *Id.* at 293–302. The Court explained that, "for this justification to be rational, the prohibited sexual activities would have to be more likely to transmit disease when engaged in by homosexuals than by heterosexuals; however, this proposition is not grounded in fact." *Id.* at 299. The Court went on to explain that the class burdened by the Romeo and Juliet statute was both over-inclusive and under-inclusive: "In essence, the Romeo and Juliet statute is over-inclusive because it increases penalties for sexual relations which are unlikely to transmit HIV and other sexually transmitted diseases . . . . Simultaneously, the provision is under-inclusive because it lowers the penalty for heterosexuals engaging in high-risk activities." *Id.* at 300 ("In other words, the statute proscribes conduct unrelated to a public health purpose and does not proscribe conduct which is detrimental to public health."). Ultimately, the Court concluded that "[t]he 'statute's superficial earmarks as a health measure' do not satisfy scrutiny under the rational basis test." *Id.* (quoting *Eisenstadt*, 405 U.S. at 452). Like the statute at issue in *Limon*, S.B. 95 is both over-inclusive and under-inclusive. It is over-inclusive because it applies to all D&E procedures without adequate protection for women's health. *See supra* Parts III, IV.C.1. And it is under-inclusive because it does not extend to procedures such as suction curettage that also terminate a pregnancy by disarticulating fetal tissue.

The cases cited above instruct us that, for a classification to be sustained, there must be evidence in the record from which the Court may conclude that the classification is reasonable. Here, the State has cited no evidence whatsoever to show that S.B. 95's disparate treatment of abortion providers is relevant to the State's interests. The Providers, on the other hand, have submitted unrebutted evidence demonstrating the irrationality from a public health perspective of forcing abortion providers to provide medical care that is not in accordance with their medical judgment and medical ethics and demonstrating that the State's narrow view of what constitutes dignified treatment of a fetus does not represent the views of all Kansans. *See supra* Part III.

In sum, the State has cited no evidence from which the Court may conclude that it is reasonable for S.B. 95 to target abortion providers, and the State has not satisfied its burden of proving that it is entitled to summary judgment on the Providers' equal protection claims.

### E. The State Has Failed to Demonstrate It is Entitled to Summary Judgment on the Due Process Claims the Providers Brought on Behalf of Themselves.

In contravention of their own Due Process rights under Section 1 of the Kansas Constitution Bill of Rights, the Act requires the Providers to either provide care they believe is not in line with their patients' bests interests or stop providing abortions after approximately 14–15 weeks LMP. Pet. at 13 (Count Seven). The State asserts, however, that because there is no "unfettered right for doctors to practice medicine in whatever manner they choose," Defs.' Mot. at 24, the Act does not violate the Providers' own due process rights. Further, the State asserts that, "[i]f any such right does exist," the State is entitled to summary judgment because the Act survives rational basis. *Id.* at 25. This once again misses the point.

The State does not have unlimited power to regulate the practice of medicine by requiring clinicians to engage in medical care that goes against their judgment. As the Kansas Supreme Court

concluded in its landmark decision in this case, the Kansas Bill of Rights contains due process rights that are judicially enforceable and "broader than and distinct from the rights described in the Fourteenth Amendment [to the U.S. Constitution]." *Hodes & Nauser*, 309 Kan. at 638. The language of the Kansas Bill of Rights "demonstrates an emphasis on substantive rights—not procedural rights." *Id.* at 627.[10]

The U.S. Supreme Court has found that "the touchstone of due process is protection of the individual against arbitrary action of government." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974)), *abrogation on other grounds recognized by Manion v. N.C. Med. Bd.*, 693 F. App'x 178, 181 (4th Cir. 2017). The "substantive component" of the Due Process Clause requires that legislation must "bear a rational relationship to a legitimate government interest." *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009) (citation omitted). Where the State imposes a targeted and onerous prohibition in the absence of evidence justifying that prohibition's extent or scope, a violation of substantive due process may be found. *See id.* at 1183–84 (holding plaintiffs stated a substantive due process claim against a ban on pit bull ownership where they alleged "a lack of evidence that pit bulls as breed pose a threat to public safety or constitute a public nuisance"). The Kansas Supreme Court has also recognized the right of physicians to exercise their medical judgment. *State v. Hughes*, 246 Kan. 607, 619, 792 P.2d 1023, 1032 (1990) ("We note the [obscenity] statute also restricts a

[10] The State's reliance upon *England*, 259 F.2d at 629*,* is misplaced here as well. Defs.' Mot. at 24; *see also supra* Part IV.B.2, n.5. In *England*, the Fifth Circuit dismissed a challenge to a prohibition on the practice of medicine without a license. *Id.* at 628, 636. The Providers are not arguing it is impermissible for the State to require a license to practice. Here, the Providers challenge the Act's constitutionality because, as the fact and expert testimony shows, the Act irrationally limits the manner in which they practice medicine.

doctor's freedom to exercise his or her medical judgment in providing medical services." (citing *State ex rel. Stephan v. Harder*, 230 Kan. 573, 588, 641 P.2d 366 (1982)).

In contravention of these rights, the Act requires the Providers to either provide care they believe is not in line with their patients' bests interests or stop providing abortions after approximately 14–15 weeks LMP. Pls.' Mem. at 17–18. The Act bears no rational relationship to the State's asserted interests. Instead, the Act serves only to limit the Providers' ability to practice medicine by preventing them from providing care that is in the best interests of their patients and in accordance with their ethical obligations.

**F. The State Has Failed to Demonstrate It is Entitled to Summary Judgment on the Unreasonable and Oppressive Regulation Claims.**

In response to the Providers' allegations that the Act is unreasonable and oppressive, the State asserts (1) that the Act's impact on the Providers' practice falls "well short" of a significant impairment and (2) that the Act "was enacted in service of numerous legitimate and compelling state interests." Defs.' Mot. at 25. The State misconstrues, however, the nature and scope of the burdens imposed by the Act and is not entitled to summary judgment based solely on its unsupported assertion that the Act furthers the State's asserted interests. Where, as here, the Providers put forward sworn fact and expert testimony demonstrating the burdens imposed by the Act and the State has put forward no factual evidence or legal authority establishing that there is no genuine dispute of material fact, the State is not entitled to summary judgment.

The Providers' eighth claim for relief is that the Act violates the Providers' rights under the Kansas Constitution to be free of oppressive and unreasonable government interference that

would significantly impair the operation of their medical practice. Pet. at 13 (Count Eight). These rights are well established under the Kansas Constitution. Kan. Const. Bill of Rights §§ 1–2, 17.[11]

Whether the Act constitutes a significant impairment on the operation of the Providers' medical practice and whether it in fact furthers asserted interests are precisely the questions at issue in this case. The State is not entitled to summary judgment merely on the basis of its assertions. First, the State's Motion misconstrues the scope of the harms imposed by the Act. Contrary to the State's assertion, the Act's impacts are not limited to a likelihood that "some patients would not be able to seek care" with the Providers, the need to restructure scheduling, and taking additional days to complete the same number of procedures the Providers can complete now. Defs.' Mot. at 25. As detailed in the Providers' Memorandum, the Providers have established—and the State does not dispute—the following facts: (1) the Act bans D&E, a safe and standard procedure that is the most common abortion method after 14–15 weeks LMP, *see*

[11] *See, e.g.*, *Delight Wholesale Co. v. City of Prairie Vill.*, 208 Kan. 246, 249–50, 491 P.2d 910, 913 (1971) (explaining that state may not "pass legislation which is arbitrary, oppressive, or so capricious that it has no reasonable basis" and affirming injunction of ordinance on that basis); *Delight Wholesale Co. v. City of Overland Park*, 203 Kan. 99, 102–05, 453 P.2d 82, 85–87 (1969) (considering case under, *inter alia*, Section 1 of the Kansas Bill of Rights and holding that the state "cannot under the guise of the police power enact unreasonable and oppressive legislation"); *Sunflower Tip Top Dairies Co. v. City of Russell*, 188 Kan. 238, 243–4, 362 P.2d 76, 80 (1961) (considering due process challenge based on regulation of dairy business and holding that the regulation constituted "unlawful discrimination against the lawful business of the plaintiff and thus deprive[d] plaintiff of due process in violation of state and federal constitutions"); *Gilbert v. Mathews*, 186 Kan. 672, 677, 352 P.2d 58, 64 (1960) (relying on Sections 1 and 17 of the Kansas Bill of Rights and holding that the state is prohibited from "under the guise of the police power[,] enact[ing] unequal, unreasonable, and oppressive legislation" (citation omitted)); *see also Hodes & Nauser*, 309 Kan. at 671 (acknowledging that the State cannot "enact unequal, unreasonable or oppressive legislation" (quoting *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 760, 408 P.2d 877, 888 (1965)). "The question . . . is not the general power of the legislature, but *whether this particular enactment was a lawful and constitutional exercise of the power to regulate*." *Gilbert*, 186 Kan. at 678.

Nauser Decl. ¶ 15; Davis Decl. ¶¶ 19–22; (2) the alternatives proposed by the State impose increased risks with no medical benefits, Nauser Decl. ¶¶ 18, 21, 31, 34–35, 38–39; Davis Decl. ¶¶ 23, 26, 30, 39, 41, 43, 47, 50; and (3) these alternatives are untested in some circumstances and are not always feasible, *see* Nauser Decl. ¶¶ 24–25, Davis Decl. ¶¶ 28–29, 32, 35, 38, 45–47.[12] Indeed, the fact and expert disclosure upon which the State relies in its Motion makes this clear. Attach. J. to Defs.' Mot., Expert Disclosure of Traci Lynn Nauser, M.D. ¶ 17 ("It is my understanding that the Act will operate to ban the provision of the standard D&E procedure . . . ."); *id.* ¶ 18 ("I strongly disagree that [the alternatives proposed by the State] are reasonable or feasible alternatives to the safe D&E procedure that I currently provide . . . .").

Moreover, as discussed *supra* Part IV.B., the State has not demonstrated that the Act furthers any of its asserted interests. *See also* Pls.' Mem. at 31–36. Merely asserting that the Act "is an exercise of the lawful power of the State" to further asserted interests and that "[i]t is never unreasonable nor oppressive," Defs.' Mot. at 25–26, without any legal or factual support, does not make it so.

The State has failed to provide any factual or legal authority to support its position that the Act is not unreasonable and oppressive. The State is not entitled to summary judgment merely on the basis of its assertions.

[12] The Providers' argument that S.B. 95 violates the fundamental right to abortion is detailed in the Providers' Memorandum, Pls.' Mem. at 2–16, 27–31; the fact and expert testimony attached thereto; and the Providers' fact and expert disclosures attached to the State's Motion, Defs.' Mot. Attachs. J, K.

## V. CONCLUSION

For these reasons, the Providers respectfully request that the Court deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

/s Genevieve Scott Date: February 21, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 21st, 2020 the foregoing was served on the following by electronic mail pursuant to an agreement of the parties:

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