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No. 114,153

IN THE SUPREME COURT OF THE STATE OF KANSAS

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

v.

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

RESPONDENTS' SUPPLEMENTAL BRIEF

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

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INTRODUCTION

This case presents the Court with an opportunity to recognize that Sections 1 and 2 of the Kansas Constitution Bill of Rights protect the right to access abortion as a fundamental right, consistent with the strong protection for liberty manifested in the broad language of these provisions and as intended by the framers of the Kansas Constitution. Given this Court's recognition of evolving standards of liberty, and the privacy, self-determination, and bodily integrity interests at stake, this right should not only be recognized, but also afforded the highest level of constitutional protection.

As this case exemplifies, the right to abortion is inextricably related to decisional autonomy and bodily integrity in general and the right to make decisions about medical treatment, family formation, and childbearing in particular. Senate Bill 95 (S.B. 95 or the "Act") represents the most egregious type of government overreach into these most personal and private spheres of citizens' lives. If enforced, the Act will ban the most common method of second-trimester abortion, forcing women to forego abortion altogether, or, regardless of medical advice, submit to an additional, physically invasive medical procedure that provides no medical benefit, is in some circumstances still experimental, and involves increased risk and complexity.

For these reasons, Plaintiffs-Appellees, board-certified physicians who have served the women of Kansas for decades ("the Physicians"), respectfully request that this Court uphold the district court's grant of a temporary injunction, and recognize that Sections 1 and 2 of the Kansas Bill of Rights protect the fundamental right of women to terminate a pregnancy, and that restrictions on that right are subject to strict scrutiny.

THE COURT OF APPEALS' DECISION

Recognizing the importance of the issues raised in this appeal, the Court of Appeals ordered *sua sponte* that this case be heard *en banc*. Six judges (hereafter referred to as the "six judge opinion") found a right to abortion under the Kansas Constitution, protected to the same extent as the Federal Constitution, and held that the district court properly enjoined the statute. One judge, concurring, agreed that the right to abortion is protected under the State Constitution, but that the fundamental nature of the right demands the highest level of constitutional protection—strict scrutiny. Seven judges dissented. Given the equally divided opinion, the district court's order granting a temporary injunction was affirmed. Mem. Op. of the Court of Appeals ("Mem. Op."), App. A to Pet. for Review, at 25.

The six judge opinion notes at the outset that the State did not properly challenge any of the factual findings of the district court, and even if it had, such a challenge would have been rejected. Mem. Op. at 6. The district court's findings were accepted as "fully supported by the written testimony submitted by the plaintiffs." *Id.* at 6–7. The concurring judge did not explicitly address this issue, but accepted the district court's findings of fact in determining that it "acted properly in temporarily enjoining Senate Bill 95." Mem. Op. at 63 (Atcheson, J., concurring); *see also id.* 56–63 (discussing district court record). The dissent did not address whether the State properly appealed any of the district court's findings, but did note that the State presented "no evidence." Mem. Op. at 67 (Malone, C.J., dissenting).

On the threshold legal question of whether the Kansas Constitution protects the right to abortion, the six judge opinion noted that Sections 1 and 2 of the Bill of Rights, as

interpreted in a line of decisions from this Court, protect the right to liberty, which includes the substantive due process rights developed in federal constitutional law. *Id.* at 16–17 ("[T]he Kansas Supreme Court has explicitly recognized a substantive-due-process right under the Kansas Constitution and has applied a substantive-due-process legal standard equivalent to the one applicable under the Fourteenth Amendment at the time of these Kansas decisions."). The six judge opinion held that these provisions provide the same protection for the abortion right as that provided by the Fourteenth Amendment. While noting that this Court has yet to decide whether the Kansas Constitution protects abortion, because this Court "has consistently interpreted sections 1 and 2 . . . as equivalent to the Due Process and Equal Protection Clauses of the Fourteenth Amendment," and because the right to abortion is part of the liberty protected by federal law, the six judge opinion held it is likewise protected by the Kansas Constitution. *Id.* at 17–18.

The six judge opinion explicitly rejected the assertion that the right to abortion should not be recognized because, according to the State, the framers did not intend to protect it when the constitution was adopted, noting that this Court has not "limited its interpretation of broadly worded . . . state constitutional provisions only to what was intended" in 1859. *Id.* at 18; *see also id.* at 19 (quoting *Markham v. Cornell*, 136 Kan. 884, 18 P.2d 158, 163 (1933) ("[C]onstitutions and their interpretation should march abreast of the times. Words must yield to the pressure of changed social conditions, more enlightened ideals . . . and the general march of progress.")).

In assessing whether the Act violates the right to abortion under the Kansas Constitution, the six judge opinion applied the federal undue burden test after concluding "that Kansas would apply the same due-process standards that the United States Supreme

Court applies under the Fourteenth Amendment." Mem. Op. at 20; *see also id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (an undue burden "is a shorthand for the conclusion that a state regulation has the purpose of effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus")).

Based on the uncontested record that the Act bans dilation and evacuation ("D & E") procedures, and established federal precedent, the six judge opinion had little trouble concluding that the Physicians are substantially likely to succeed on their claim that the Act violates the Kansas Constitution. Mem. Op. at 21–24 (citing *Stenberg v. Carhart*, 530 U.S. 914 (2000); and *Gonzales v. Carhart*, 550 U.S. 124 (2007)). The Act's ban on D & E procedures does "what the United States Supreme Court held [in *Stenberg*] Nebraska could not do": "ban[] the most common, safest procedure" in the second trimester. *Id.* at 21–22. Further, the six judge opinion held that "[g]iven the additional risk, inconvenience, discomfort, and potential pain associated with [] alternatives [to the standard D & E procedure], some of which are virtually untested," banning D & E is an undue burden on the right to abortion. *Id.* at 23.

The concurring opinion reached the same legal conclusion as the six judge opinion, that the Kansas Constitution protects a right to abortion, but located the right only in Section 1. Recounting in detail the history of the adoption of Section 1, the concurrence concluded that:

> Section 1 [] offers a profound declaration of a set of rights to be universally embraced across the artificial boundaries of nations and their governments and unburdened by some constricted sense of humanity drawn from a time past. The drafters, thus, constitutionalized a principle transcending institutional forms and temporal limitations to touch something more basic in defining the condition of living as a human being. Moreover, they acted with the hope, and, indeed the understanding that deep into the future, society would be better and fairer in ways they could not foresee, thus

> clarifying and even enhancing the definition. So the principle they captured in § 1 would be no less profound and no less necessary in that future time, which is to say our time.

Mem Op. at 38 (Atcheson, J., concurring); *see also id.* at 49 (While the drafters "did not consider reproductive freedom," "[t]he circumstances strongly indicate" that they "meant to provide a constitutional protection that would grow to take account of maturing societal values they recognized they could not necessarily foresee.").

Recognizing that the rights protected under Section 1 include the "right of self-determination," the concurrence found the right to reproductive freedom "is an essential quality of self-determination," and thus shielded "against excessive governmental encroachment." *Id.* at 41. As the concurrence further explained:

> Consistent with the drafters' overarching vision for § 1, women cannot now be permitted only a half-measure of self-determination. Accordingly, women have a right protected in § 1 to exercise reproductive freedom as an essential component of their self-determination. To suggest otherwise ignores the promise of § 1 as a forward-looking right and denigrates women as human beings lacking the capacity to make to make decisions for themselves. . . . But the notion has no place in assessing the scope of § 1 in the modern world—a world the drafters of the Kansas Constitution anticipated, even though they understood they could not envision its particular contours. In short, § 1 cannot now be constrained by a definition of a woman's right to self-determination dependent upon mid-19th Century social and political conventions.

Id. at 42.

As to the legal standard applicable to restrictions on reproductive freedom, the concurrence noted that: "[t]he right by its very description in § 1 has to be considered fundamental—an inalienable right embracing life and liberty could hardly be something less." *Id.* at 62. Therefore, courts reviewing laws such as S.B. 95 "must subject government action impairing the right to exacting review without deference to any legislative prerogative or presumption of constitutionality," and regulations must be

"carefully circumscribed and do[] no more than required to advance [an essential government] interest." *Id.* at 62.

The dissent found that the Kansas Constitution does not protect the right to abortion, based on its analysis of the text and history, and therefore did not reach the question of whether the Act hinders the exercise of that right. In the dissent's view, Kansas citizens have only narrow rights under the State Constitution, and perhaps no substantive due process protections at all under Sections 1 and 2 of the Bill of Rights. Mem. Op. at 73 (Malone, C.J., dissenting) ("Arguably, the Kansas Constitution contains no clearly identified substantive due process clause."). The dissent rejected the relevance of a series of constitutional precedents of this Court, including *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006) (relying on federal, but not state constitutional protection for abortion in evaluating the privacy rights of abortion patients, but noting, "we customarily interpret its provisions to echo federal standards"). *See* Mem. Op. at 69–70 (Malone, C.J., dissenting). Concluding therefore that it was free from any "binding precedent," *id.* at 69, the dissent noted that Sections 1 and 2 of the Kansas Constitution are worded differently than the Fourteenth Amendment, and do not contain the words "due process." *Id.* at 73. The dissent thus found that the plain language of Sections 1 and 2 is "not similar enough" to the Fourteenth Amendment to "justify coextensive interpretation." *Id.* at 74. The dissent also asserted that the framers of the Kansas Constitution did not consciously intend to create rights coextensive with the Fourteenth Amendment because it didn't exist at the time. *Id.* at 75. The dissent therefore concluded that "[b]ecause the Kansas Constitution provides no substantive due process right to abortion, our legislature

is free to restrict abortion procedures to the extent it finds appropriate" consistent with the Federal Constitution. *Id.* at 77.

ARGUMENT

I. This Court Should Decide the State Constitutional Claims Presented by the Physicians.

As this Court has explained:

> [T]he Constitution of Kansas distributes the powers of government to three distinct and separate departments, i.e., the Executive, Legislature, and Judicial. The judiciary interprets, explains and applies the law to controversies concerning rights, wrongs, duties and obligations arising under the law and has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people. . . . [W]hen legislative action exceeds the boundaries of authority limited by our Constitution, and transgresses a sacred right guaranteed or reserved to a citizen, final decision as to invalidity of such action must rest exclusively with the courts. In the final analysis, this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas.

Harris v. Shanahan, 192 Kan. 183, 206–07, 387 P.2d 771, 790–91 (1963).

Contrary to this recognized duty, the dissent asserts that an additional reason to decline to find a right to abortion in the Kansas Constitution is that it is "unnecessary" to do so, given the federal constitutional protection for the right. Mem. Op. at 78 (Malone, C.J., dissenting). "For the sake of consistency," the dissent claims, the Kansas courts should leave abortion to federal law "rather than entangling our state courts into this arena which has divided our nation for over 40 years." *Id.*

The dissent's suggestion that this Court should avoid the state constitutional issues based on the availability of federal claims, not present in this case, should be rejected. As the six judge opinion notes, "[a] plaintiff has the procedural right to choose the legal theories he or she will pursue; we cannot force the plaintiffs here to choose another legal

avenue." Mem. Op. at 25. The fact that other legal theories may be available, however, does not affect the duty of the courts to decide the claims before it.

Moreover, as the dissent itself argues, there are some areas in which the Kansas and federal constitutions "provide the same rights and protections," and some in which they do not. *Id.* at 71–72 (Malone, C.J., dissenting). But for each, the Kansas courts have decided the state constitutional question presented, regardless of the divisiveness of the issue involved. *See id.* at 70–72 (citing, as examples, Section 15 of the Kansas Bill of Rights on search and seizure and Section 9 on cruel or unusual punishment). Indeed, this is the unique and essential province of the judiciary, which, without regard to protections offered by federal law or the nature of the issue at hand, has "the obligation of interpreting the Constitution and of safeguarding the basic rights" of the citizens of Kansas. *Harris*, 192 Kan. at 206, 387 P.2d at 791.

II. The Kansas Constitution Protects the Right to Abortion.

A. Sections 1 and 2 of the Kansas Bill of Rights Should be Broadly Construed to Protect Individual Liberty.

As this Court has recognized "a constitution usually states general principles or policies, and establishes a foundation of law and government;" it is intended not merely to meet existing conditions, but to "govern future contingencies." *State ex rel. Stephan v. Finney*, 254 Kan. 632, 643, 867 P.2d 1034, 1042 (1994) (internal quotation marks and citation omitted). Constitutional rights reflect a deeper set of values, the recognized contours of which change over time. Among those changes is an evolving understanding of how the rights identified in the Kansas Constitution apply to women and their ability to participate equally in society. This Court has not limited the protections afforded under Sections 1 and 2 to those that were explicitly recognized in statute or common law at the

time the Constitution was adopted. Rather, this Court has relied on the evolving understanding of liberty, as well as the recognition of rights under the Fourteenth Amendment, to guide its decisions under Sections 1 and 2. *See State v. Limon*, 280 Kan. 275, 294–95, 122 P.3d 22, 34–35 (2005).

This Court has held for nearly a century that Sections 1 and 2 of the Kansas Constitution Bill of Rights have "much the same effect" as the Due Process and Equal Protection Clauses of the United States Constitution. *Id.* at 283, 122 P.3d at 28; *State ex rel. Stephan v. Parrish*, 257 Kan. 294, Syl. ¶ 5, 891 P.2d 445, 447 (1995); *State ex rel. Tomasic v. Kan. City, Kan. Port Auth.*, 230 Kan. 404, 426, 636 P.2d 760, 777 (1981); *Manzanares v. Bell*, 214 Kan. 589, 602, 522 P.2d 1291, 1303 (1974); *Henry v. Bauder*, 213 Kan. 751, 752–53, 518 P.2d 362, 364–65 (1974); *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, Syl. ¶ 1, 408 P.2d 877, 879 (1965); *State v. Wilson*, 101 Kan. 789, 168 P. 679, 682 (1917). Under this well-established precedent of this Court, the right to abortion should be afforded at least the same protection under Sections 1 and 2 as that afforded under the Fourteenth Amendment. Given the fundamental nature of the right at stake, the broad wording of these provisions, and the intent of the framers that Section 1 be a "profound declaration" of rights, intended to be "forward-looking," Mem. Op. at 38, 42 (Atcheson, J., concurring), this Court should not only recognize protection for reproductive freedom under the Kansas Bill of Rights, but afford it the highest level of protection, subjecting restrictions on that right to strict scrutiny.

B. Courts in States with Analogous Constitutional Provisions Recognize Strong Protection for Liberty, Including the Interests of Bodily Integrity and Autonomous Decision-Making.

The issue before this Court is whether the Kansas Constitution protects the right to abortion. Arguments raised by the State, and the reasoning of the dissent suggest however, that the Kansas Constitution affords no substantive due process protection at all. This troubling assertion, if accepted, is not only inconsistent with the broad language of the constitution, but would make Kansas an outlier among states with similar provisions. In interpreting the provisions of the Kansas Bill of Rights, this Court regularly looks to the decisions of other states. *See, e.g.*, *State ex rel. Stephan v. Parrish*, 256 Kan. 746, 757, 887 P.2d 127, 134 (1994) ("As the issue now before us is one of first impression in Kansas, a review of relevant case law from other jurisdictions is appropriate."); *State v. Schultz*, 252 Kan. 819, 828, 850 P.3d 818, 825–26 (1993) (reviewing opinions from other states addressing warrantless seizure of financial records). The weight of authority in other states with similar provisions supports strong protection for the liberty interests of privacy, bodily integrity and autonomous decision making—all of which are implicated in a woman's decisions about childbearing.

For example, the Supreme Court of New Jersey has construed that state's "natural and unalienable rights" clause, N. J. Const. Art. 1, ¶ 1, which declares "the right to life, liberty and the pursuit of happiness," to protect "the right of privacy." *Right to Choose v. Byrne*, 450 A.2d 925, 933 (N.J. 1982) (the right of privacy "was implicit in the 1844 Constitution"). (The text of constitutional provisions cited in this section is set forth in Appendix A). This right encompasses a "variety of areas, including sexual conduct between consenting adults; the right to sterilization; and even the right to terminate life itself." *Id.* (citations omitted). *See also In re Grady*, 426 A.2d 467, 475 (N.J. 1981) (right

to privacy includes the "right to choose among procreation, sterilization and other methods of contraception").

As this Court has done, *see, e.g.*, *Limon*, 280 Kan. at 283, 122 P.3d at 28–29 (noting that Sections 1 and 2 collectively provide the basis for equal protection and due process in the Kansas Bill of Rights), other state supreme courts often rely simultaneously on numerous provisions of the constitution in assessing the scope of protection. Thus, the Supreme Court of Arkansas, relying on an "individual liberty" clause recognizing "inherent and inalienable rights," Ark. Const. Art. 2, § 2, a privileges and immunity clause, Ark. Const. Art. 2, § 18; other provisions of the Arkansas Constitution; and state statutes and jurisprudence, has recognized a "fundamental right to privacy," and explained:

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Jegley v. Picado, 80 S.W.3d 332, 349–50 (Ark. 2002) (quoting *Wolf v. Colorado*, 338 U.S. 25 (1949) (Frankfurter, J.)) (applying strict scrutiny and holding "the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults"). *See also Ark. Dep't of Human Servs. v. Cole*, 380 S.W.3d 429, 437 (Ark. 2011) (act prohibiting cohabitating sexual partners from adopting or fostering children violates the fundamental right of sexual privacy); *Carroll v. Johnson*, 565 S.W.2d 10, 17 (Ark. 1978) ("Among the inherent and inalienable rights protected, when the scope of 'life, liberty, or property' is thus measured is the right to establish and maintain a home and family relations.").

The Pennsylvania Supreme Court has recognized that the state's "inherent rights" clause, Pa. Const. Art. I, § 1, protects fundamental rights including "the right to privacy,

the right to marry, and the right to procreate," and that infringements of those rights require courts to apply strict scrutiny. *Nixon v. Commonwealth*, 839 A.2d 277, 287 (Pa. 2003). The Court has also explained that the right to privacy encompasses both an "interest in avoiding disclosure of personal matters," and "independence in making certain kinds of important decisions." *Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796, 800 (Pa. 1992) (internal quotation marks and citation omitted); *see also id.* at 802 ("Under the law of this Commonwealth only a compelling state interest will override one's privacy rights.").

Notably, two states that now explicitly protect the right to privacy in their constitutions provided strong protection under provisions similar to Section 1 even before the privacy amendments were adopted. In *People v. Belous*, 458 P.2d 194, 199–200 (Cal. 1969), the California Supreme Court interpreted the "inalienable rights," provision, which explicitly identifies liberty as among those rights, Cal. Const. Art. I, § 1 (1969), to protect the fundamental right of procreative choice. The Court noted: "That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right." *Id.* at 200.

In *Breese v. Smith*, 501 P.2d 159 (Alaska 1972), decided under Alaska's "inherent rights" provision, Ak. Const. Art. I, § 1, the Alaska Supreme Court explained that at the core of the concept of liberty is "the notion of total personal immunity from governmental control: the right 'to be let alone.'" *Id.* at 168, 172 (students attending public school have a fundamental constitutional right to wear their hair "in accordance with their personal tastes" that can only be overcome by a compelling state interest).

Other courts have similarly protected implicit rights of privacy, bodily integrity, and personal autonomy. In *Davis v. Davis*, 842 S.W.2d 588, 598–601 (Tenn. 1992), the

Tennessee Supreme Court, relying on numerous provisions of the state constitution, recognized the right to privacy, and specifically the right to procreational autonomy as "inherent in the constitutional concept of liberty." The issue before the court was the disposition of frozen embryos created by a subsequently divorced couple. *See id.* at 589. Noting that the drafters of the constitution could not have foreseen the issue before the Court, it observed:

> But there can be little doubt that they foresaw the need to protect individuals from unwarranted governmental intrusion into matters such as the one now before us, involving intimate questions of personal and family concern. Based on both the language and the development of our state constitution, we have no hesitation in drawing the conclusion that there is a right of individual privacy guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights.

Id. at 600, 604 (holding that "ordinarily, the party wishing to avoid procreation should prevail," if "the other party has a reasonable possibility of achieving parenthood by [other] means"). *See also Commonwealth v. Wasson*, 842 S.W.2d 487, 491, 494–95 (Ky. 1993) (right of privacy, although not explicitly mentioned, "has been recognized as an integral part of the guarantee of liberty," citing Ky. Const. § 1; striking down the state's criminal sodomy statute); *Jarvis v. Levine*, 418 N.W.2d 139, 148–49 (Minn. 1988) (recognizing under several provisions of the constitution, an implicit right to privacy, which "begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent," and requiring court approval before the non-consensual administration of certain medications); *In re Brown*, 478 So.2d 1033, 1039–41 (Miss. 1985) (finding a right to privacy, protecting "the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination," under Article 3, Section 32 of the Mississippi Constitution, which provides that "[t]he enumeration of rights in this

constitution shall not be construed to deny and impair others retained by, and inherent in, the people"; holding that the State failed to establish a compelling interest sufficient to overcome an objecting patient's refusal to accept a blood transfusion); *Tex. State Emps. Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205–06 (Tex. 1987) (relying on the provisions of the Texas Bill of Rights to find a right of privacy, "implicit among those 'general, great, and essential principles of liberty and free government,'" and applying strict scrutiny to strike down mandatory polygraph testing for public employees); *Campbell v. Sundquist*, 926 S.W.2d 250, 261–62 (Tenn. Ct. App. 1996) (recognizing state constitution protects right "to engage in consensual and noncommercial sexual activities in the privacy of [an] adult's home [as] a matter of intimate personal concern," and invalidating under strict scrutiny statute criminalizing same-sex sexual activity), *abrogated on unrelated grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008).

These decisions give meaning to the values embodied in Sections 1 and 2 of the Kansas Bill of Rights. Specifically, the concept of liberty embodied in Section 1 should protect core values, including the right of the individual to exercise personal autonomy and make decisions about issues that affect one's physical health, family life, and place in society. This Court should embrace the reasoning of these cases, applying provisions similar to Sections 1 and 2, and afford strong protection to liberty under the Kansas Constitution Bill of Rights.

C. The Protection of Individual Liberty Under Sections 1 and 2 of the Kansas Bill of Rights Includes the Fundamental Right to Abortion.

If Sections 1 and 2 of the Kansas Bill of Rights are construed, as they should be, to provide strong protection to individual liberties, the nature of those liberty interests dictates that the right to abortion should be recognized as a fundamental right, and restrictions on that right should be subjected to strict scrutiny.

As the California Supreme Court has explained, "the right of choice is essential to [a woman's] ability to retain personal control over her own body." *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 792 (Cal. 1981). Restrictions on that right implicate one's "health, [] personal bodily autonomy," and the liberty interest in choosing "whether or not to bear a child." *Id.* at 785, 792 (internal quotation marks and citation omitted). "Thus, the constitutional rights at issue here are clearly among the most intimate and fundamental of all constitutional rights." *Id.* at 793 (requiring "the most compelling of state interests" to justify a restriction affecting access to abortion).

The Minnesota Supreme Court, in finding an implicit right to terminate a pregnancy under the state's constitution, has similarly noted:

> We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities.

Women of the State of Minn. v. Gomez, 542 N.W.2d 17, 27, 30–31 (Minn. 1995) (affording the right to abortion greater protection than afforded under the Federal Constitution and applying strict scrutiny).

The New Jersey Supreme Court, "keenly aware of the principle of individual autonomy that lies at the heart of a woman's right to make reproductive decisions," applies "the most exacting scrutiny" to classifications affecting the right to abortion. *Planned*

Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 633 (N.J. 2000). The *Farmer* Court acknowledges, but implicitly rejects, the undue burden standard adopted by United States Supreme Court in *Casey*, holding that "the State may not affirmatively tip the scale against the right to choose an abortion absent compelling reasons to do so." *Id.* at 622.

Similarly, the Tennessee Supreme Court has recognized that "a woman's right to obtain a legal termination of her pregnancy" is "of the utmost personal and intimate concern," and that the right to procreate "is a vital part of an individual's right to privacy." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 10–11 (Tenn. 2000) (internal quotation marks and citation omitted), *abrogated by constitutional amendment*. The Court further explained:

> The concept of ordered liberty embodied in our constitution requires our finding that a woman's right to legally terminate her pregnancy is fundamental. The provisions of the Tennessee Constitution imply protection of an individual's right to make inherently personal decisions, and to act on those decisions, without government interference. A woman's termination of her pregnancy is just such an inherently intimate and personal enterprise. This privacy interest is closely aligned with matters of marriage, child rearing, and other procreational interests that have previously been held to be fundamental. To distinguish it as somehow non-fundamental would require this Court to ignore the obvious corollary.

Id. at 15. The Court went on to hold that strict scrutiny was the appropriate standard, rejecting *Casey*'s undue burden standard and holding that it is "essentially no standard at all, and, in effect, allows judges to impose their own subjective views of the propriety of the legislation in question." *Id.* at 16. That the Tennessee Constitution has subsequently been amended by referendum to reduce the protection afforded to abortion to that which is provided under the Federal Constitution does nothing to undermine the Court's analysis. *See also Valley Hosp. Assoc., Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968–69 (Alaska 1997) (holding reproductive rights, including abortion, are fundamental under the

state's explicit privacy provision, adopting strict scrutiny as the applicable standard and rejecting "the narrower definition of that right promulgated in . . . *Casey*"); *N. Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So.2d 612, 634–36 (Fla. 2003) (retaining strict scrutiny as the appropriate standard for reviewing restrictions on the fundamental right to abortion protected under the state's explicit privacy provision, and rejecting the undue burden standard).

The interests of health, bodily integrity, decisional autonomy, and privacy implicated by the right to abortion are fundamental liberty interests deserving of the highest level of protection. *See* Mem. Op. at 62 (Atcheson, J., concurring) ("The right, by its very description . . . has to be considered fundamental."). Restrictions on fundamental rights should be reviewed under strict scrutiny. *See State v. Risjord*, 249 Kan. 497, 501, 819 P.2d 638, 642 (1991) ("The most critical level of analysis is 'strict scrutiny,' which applies in cases involving . . . 'fundamental rights expressly or implicitly guaranteed by the Constitution.'" (quoting *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058, 1063 (1987))); *see also* Br. of Appellants to Ct. of Appeals at 31 (conceding that fundamental rights are analyzed under strict scrutiny, citing *Miller v. Johnson*, 295 Kan. 636, 667, 289 P.3d 1098, 1119 (2012)); *State v. Voyles*, 284 Kan. 239, 257, 160 P.3d 794, 807 (2007) (identifying reproductive privacy as an implicit fundamental right)).

III. The Physicians Are Substantially Likely to Succeed on the Merits of Their Claim that the Act is Unconstitutional.

A. The Findings of Fact were Not Properly Challenged on Appeal and Are Supported by Substantial Competent Evidence.

As the six judge opinion correctly held, the State did not properly challenge the district court's factual findings before the Court of Appeals. Mem. Op. at 6, 22–23. The

State's appellate brief raised only legal issues and did not argue that the district court's findings were not supported by substantial competent evidence, thereby waiving that claim. *Id.* at 6. In its Petition for Review, however, the State attempts to raise this issue by conflating two separate inquiries, arguing that the Court of Appeals erred in accepting the district court's findings of fact because the district court rejected the presumption of constitutionality. *See* Pet. for Review at 3. The State argues that rather than presuming the Act to be constitutional and resolving all doubts in favor of its validity, the district court found that the burden of proof to justify the Act falls on the State. Reply Br. of Appellants to Court of Appeals at 13. Therefore, according to the State, because the district court applied the incorrect legal standard, its findings of fact "cannot be given any deference." *Id.*

The State offers no authority for this novel legal argument. The cases it relies on are inapposite and do not address the application of the presumption of constitutionality to findings of fact. *See, e.g.*, *Wiles v. Am. Family Life Assur. Co. of Columbus*, 302 Kan. 66, 73, 83–84, 350 P.3d 1071, 1077, 1082 (2015) (affirming that findings of fact will not be disturbed on appeal "[s]o long as there is substantial competent evidence to support the finding," and, separately, reversing an award of attorney's fees based on the district court's application of the incorrect legal standard (internal quotation marks and citation omitted)); *State v. Cheatham*, 296 Kan. 417, 430, 444, 292 P.3d 318, 328, 335 (2013) (upholding the substantial competent evidence standard and reversing district court's determination based on application of the incorrect legal standard).

This Court should reject the State's attempt to use the presumption of constitutionality to avoid adverse findings of fact. Under the State's incorrect formulation,

the presumption would become an insurmountable bar in any case in which the State simply alleges that it disputes the facts. However, the standard of review of a trial court's findings of *fact* does not change merely because the issues of *law* in the case are constitutional.

As the six judge opinion correctly held: "In cases in which a trial court's decision regarding an injunction is based on disputed facts, . . . we . . . look at whether the factual basis for its decision is supported by sufficient evidence." Mem. Op. at 6 (quoting *State Bd. of Nursing v. Ruebke*, 259 Kan. 599, 611, 913 P.2d 142, 152 (1996)). A district court's factual findings are reviewed under the "substantial competent evidence" standard, which provides "a great deal of deference to a district court's decision made within a zone of reasonableness." *State v. Gonzalez*, 290 Kan. 747, 756, 234 P.3d 1, 9 (2010). In determining whether substantial competent evidence supports the district court findings, appellate courts disregard any conflicting evidence or other inferences that might be drawn from the evidence. *Gannon v. State*, 298 Kan. 1107, 1175–76, 319 P.3d 1196, 1240 (2014).

Even assuming the State had properly challenged the district court's findings of fact, those findings are supported by substantial competent evidence, including declarations from Plaintiff-Appellee Dr. Traci Nauser, a board-certified ob-gyn, and two expert witnesses, Dr. Anne Davis, M.D., M.P.H., a board-certified obstetrician/gynecologist at Columbia University Medical Center, and Dr. David Orentlicher, a professor at Indiana University Robert H. McKinney School of Law, who relied on learned treatises to support their opinions. The State introduced no evidence to counter that provided by the Physicians, and the six judge opinion and concurrence were

therefore correct to adopt the district court's findings. Mem. Op. at 6 (six judge opinion); *see also id.* at 57 (Atcheson, J., concurring).

B. The Presumption of Constitutionality Does Not Apply to Laws that Infringe on Fundamental Rights.

The presumption of constitutionality does not inform the question of whether the Kansas Constitution protects the right to abortion or the level of scrutiny that should be applied to a violation of that right. Rather, it reflects the appropriate deference courts should accord to actions by the legislative branch. As this Court has explained, the presumption of constitutionality gives way when the legislature enacts legislation that is unreasonable or oppressive. *See Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 760, 408 P.2d 877, 888 (1965) (while legislative enactments are presumed to be constitutional, the legislature "cannot, under the guise of the police power, enact unequal, unreasonable or oppressive legislation or that which violates the constitution"). Here, because the Act infringes on a fundamental right, courts "peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny," *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221, 227 (1978), and the burden of proof shifts to the State to demonstrate that the Act furthers a compelling state interest. *Jurado v. Popejoy Const. Co.*, 253 Kan. 116, 124, 853 P.2d 669, 676 (1993); *Farley*, 241 Kan. at 670, 740 P.2d at 1063.

However, even assuming the Physicians are not entitled to strict scrutiny and must sustain the burden of proof under the federal undue burden standard, they have met that burden. The six judge opinion applied the presumption of constitutionality to its review of S.B. 95, holding that the Physicians overcame the presumption by meeting their burden of proof that the Act imposes an undue burden. As explained below, the Physicians

established as a matter of fact and law the Act imposes an unconstitutional undue burden by banning the most common method of second-trimester abortion and because alternatives proposed by the State are unreasonable and would subject women to unnecessary medical procedures with known and unknown risks.

C. The Act Fails Strict Scrutiny Because it is an Unprecedented Governmental Intrusion upon the Fundamental Right to Abortion.

The Act bans, with extremely narrow exceptions, D & E procedures, the most common method of second-trimester abortion in the United States, used for 95% of abortions performed in the second trimester. District Court Order Granting Temp. Inj. at 2; Mem. Op. at 23–24 (six judge opinion); *see also id.* at 57 (Atcheson, J, concurring). The D & E method is the result of decades of medical practice establishing and reaffirming that it the safest form of second trimester abortion. *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 435–36 (1983) (recognizing D & E as the principle reason for the dramatic increase in the safety of second-trimester abortion) *overruled in part on other grounds by Casey*, 505 U.S. 833. As a matter of law, it is clearly established that a ban on D & E *without demise* constitutes a ban on the most common method of second-trimester abortion. *See Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (referring to an injection to cause demise as an alternative distinct from the D & E procedure); *Stenberg v. Carhart*, 530 U.S. 914, 985 n.4 (2000) (describing induction of fetal demise as a procedure performed, in certain narrow circumstances, "prior to beginning the [D & E] procedure").

The State frames its question presented as whether any restrictions on D & E are permissible, but that is not the question at issue in this case. The question is whether S.B. 95's ban on D & E is permissible. The Physicians do not argue that *any* restriction on D & E would be unconstitutional; rather, they argue that such a restriction would be subject

to strict scrutiny under the Kansas Constitution, or at a minimum the federal undue burden standard. As explained below, under either test, the Act is unconstitutional.

Application of strict scrutiny requires the State to show that a compelling interest supports the legislation and that it "is narrowly tailored to meet that compelling interest." *Bd. of Educ. of Unified Sch. Dist. No. 443, Ford Cty. v. Kan. State Bd. of Educ.*, 266 Kan. 75, 88, 966 P.2d 68, 80 (1998); *see also Jurado*, 253 Kan. at 123–24, 853 P.2d at 675 (The highest level of scrutiny requires that the defendant demonstrate "that the classification is necessary to serve a compelling state interest." (internal quotation marks and citation omitted)); *Farley*, 241 Kan. at 670, 740 P.2d at 1063 (same).

The state asserts an interest in voicing its respect for human life and dignity as well as its role in regulating the medical profession. As the concurrence explains, however, "the legislature has simply dictated how D & E abortions must be performed for a reason wholly disassociated from an appropriate governmental objective." *See* Mem. Op. at 63 (Atcheson, J., concurring). Even accepting, therefore, the questionable proposition that the State's interests in enforcing S.B. 95 are compelling, the burdens imposed on women seeking abortions are clearly impermissible, thus establishing that the Act is not narrowly tailored. *See id.* at 62–63 (applying strict scrutiny and concluding that it is not "really even debatable" that S.B. 95 violates Section 1).

No court has ever suggested that a government interest could be sufficiently compelling to impose a violation of physical and decisional autonomy of the magnitude that would befall Kansas women seeking D & E procedures if the Act is allowed to take effect. 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, a

more complicated and risky medical procedure with no medical benefits, or a significantly longer, more painful, and less predictable procedure is a permissible means of regulating pre-viability abortion, let alone a narrowly-tailored approach. Such an unprecedented physical burden on women has never been countenanced in any case dealing with abortion, or indeed in any other context. Where, as here, each of the alternatives proposed by the State would force every D & E patient to undergo an unnecessary, invasive procedure, the statute is unquestionably an unconstitutional violation of their fundamental right. *See Casey*, 505 U.S. at 847, 857 (recognizing the right to abortion encapsulates the rights to physical autonomy, personal autonomy, and bodily integrity, as well as limits on governmental power to mandate medical treatment) (citing *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); *Washington v. Harper*, 494 U.S. 210 (1990); *Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30 (1905)).

D. A Ban on D & E Violates the Undue Burden Standard, and Alternatives Proposed by the State Independently Impose an Undue Burden on the Right to Abortion.

As discussed above, at a minimum, the Kansas Constitution provides the same level of protection to the right to terminate a pregnancy as the U.S. Constitution. Under federal precedents, it is well-settled that a ban on D & E is unconstitutional. *Stenberg*, 530 U.S. at 945–46 (concluding that a ban on D & E—"the most commonly used method for performing previability second trimester abortions"—imposed an undue burden). There is no basis on which to reach a different conclusion here. The six judge opinion, concurrence, and dissent agreed that under a line of clear Supreme Court precedent, a ban on D & E imposes an unconstitutional undue burden. Mem. Op. at 21–22 (six judge opinion), 50

(Atcheson, J., concurring), 66–67 (Malone, C.J, dissenting); *see also Gonzales*, 550 U.S. at 147, 164–65; *Stenberg*, 530 U.S. at 945–46.

Although the State relies almost exclusively on the *Gonzales* decision to argue in favor of the validity of S.B. 95, that case strongly supports the Physicians' claim that the Act is unconstitutional. The *Gonzales* Court clearly distinguished *Stenberg*, holding that a critical factor in its decision to uphold a ban on the less-commonly used intact D & E procedure was the continued availability of D & E—the very procedure prohibited by S.B. 95. *Gonzales*, 550 U.S. at 164, 166–67.

The facts here establish even more clearly than in *Stenberg* why a ban on D & E imposes an undue burden. The alternatives proposed by the State, including labor induction, a transvaginal or transabdominal injection, or umbilical cord transection to induce fetal demise prior to a D & E, independently violate the undue burden standard because they are extreme and unreasonable. If the Act is enforced, in order to continue providing abortion services, the Physicians will have no choice but to subject all of their patients seeking abortions after 15 weeks to a physically painful, riskier and more complicated medical procedure, with no established medical benefits. *See* Mem. Op. at 7–8. Citing to *Gonzales*, the State argues that "[w]hen *standard medical options* are available, mere convenience does not suffice to replace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing *reasonable* regulations." Br. of Appellants to Court of Appeals 37–38 (quoting *Gonzales*, 550 U.S. at 166 (emphasis added)). However, this excerpt only serves to highlight the State's extreme position in this case, where it seeks to ban the *standard medical procedure* and replace it with *unreasonable* alternatives. By advocating these alternatives, the State

argues that women, as a consequence of exercising their fundamental constitutional rights, must be subjected to unprecedented physical burdens and experimental medical procedures. Such an extreme governmental intrusion has never been countenanced by any court. For these reasons, the six judge opinion correctly held that the additional risk, inconvenience, discomfort, and potential pain associated with the alternatives, some of which are virtually untested, would impose an unconstitutional undue burden on access to abortion. Mem. Op. at 23.

CONCLUSION

The Kansas Constitution protects citizens against government overreach into their private decision-making and physical autonomy. Nowhere are these decisions more personal and significant than in the context of reproductive freedom and the ability to refuse unnecessary and physically invasive medical treatment. This Court should recognize that Sections 1 and 2 of the Kansas Bill of Rights protect the fundamental right of women to terminate a pregnancy, and should hold that restrictions on that right are subject to strict scrutiny. Further, given that Senate Bill 95 violates the right of women seeking abortions under any measure, this Court should affirm the temporary injunction issued by the district court.

Respectfully submitted,

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APPENDIX A

Cited State Constitutional Provisions

Ak. Const. Art. 1, § 1: "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

Ark. Const. Art. 2, § 2: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

Ark. Const. Art. 2, § 18: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Cal. Const. Art. I, § 1 (1969): "All men are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, and happiness."

Ky. Const. § 1 provides in relevant part: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. . . . Third: The right of seeking and pursuing their safety and happiness."

Miss. Const. Art. 3, § 32: "The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people."

N.J. Const. Art. I, ¶ 1: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Pa. Const. Art. I, § 1: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via electronic mail on the 25th day of May, 2016, addressed to the following:

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