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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2015-CV-000490

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

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.	)	

REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. Introduction

The State's argument is nothing short of a request for reconsideration of the Kansas Supreme Court's decision in this case. Rather than applying the strict scrutiny standard set by the Court, the State asks this Court to engage in a different analysis—one that would give women's individual rights far less weight than required by the Kansas Supreme Court. This Court should decline the State's invitation.

The State concedes that the Providers have demonstrated that S.B. 95 infringes on the fundamental right to abortion. Defs.' Resp. Pls.' Mot. Summ. J. ("Defs.' Resp.") at 10 (acknowledging that, "[w]ithout question," the Providers "have met the initial burden" of demonstrating that the Act infringes on the right to abortion). Under the strict scrutiny standard, the burden of proof now rests with the State, and the only question for this Court is whether the State has shown a genuine dispute of *material* fact as to whether S.B. 95 is narrowly tailored to further a compelling government interest. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669, 673–74, 440 P.3d 461, 496–97, 499 (2019).

The State has presented no new evidence. Indeed, the same factual record was before the Kansas Supreme Court when it found the Providers were likely to succeed on their claim that S.B. 95 is unconstitutional. Mere assertions cannot create a dispute of material fact. K.S.A. § 60-256(e)(2). Where, as here, the State has failed to meet its heavy burden, the Kansas Supreme Court's decision instructs that the Providers' motion for summary judgment be granted. *See Hodes & Nauser*, 309 Kan. 610, 669, 673–74.

II. Reply to the State's Responses to the Providers' Statement of Undisputed Material Facts

The State's responses fail to raise a genuine dispute of material fact as to whether a ban on the most common method of abortion after 14–15 weeks of gestation as measured from the last menstrual period ("LMP") is narrowly tailored to serve a compelling government interest. To the extent the State purports to dispute or limit the Statement of Undisputed Facts in the Providers' Memorandum, Mem. Supp. Pls.' Mot. Summ. J. ("Pls.' Mem."), the State's assertions should be disregarded because it cites no admissible evidentiary support. *See* Supreme Court Rule 141(b) (West 2019) (requiring party opposing a summary judgment motion to "concisely summarize the conflicting testimony or evidence and any additional genuine issues of material fact that preclude summary judgment" and "provide precise references [to the record]"); *see also* K.S.A. § 60-256(e)(2) (specifying that the State "may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial"); *Hodes & Nauser*, 309 Kan. at 704 (Biles, J., concurring) (". . . [T]he arguments of counsel are not evidence." (citing PIK Civ. 4th 102.04 (2010 Supp.)); *Friesen-Hall v. Colle*, 270 Kan. 611, 612–13, 619, 17 P.3d 349, 351–52, 355 (2001) (affirming trial court's grant of summary judgment based on finding that no admissible evidence supported the opponent's factual claims); *Danes v. St. David's Episcopal Church*, 242 Kan. 822, 830, 833, 752 P.2d 653, 659, 661 (1988) (affirming summary judgment where trial court treated facts as uncontested because nonmoving party "merely alleged that the cited contentions of uncontroverted fact were 'controverted' or 'contested' without any citation to any factual authority").

Without waiving this objection, the Providers respond below to selected assertions from the State's responses:

1. (1) The State has conceded that S.B. 95 bans the Dilation and Evacuation ("D&E") procedure at issue in this action. In the Amended Case Management Order, the Parties stipulated that "[t]he Act prohibits the performance on a living fetus of the procedure referred to by physicians as Dilation & Evacuation ('D&E')." Am. Case Mgmt. Order at 3. (2) The State cites no admissible evidentiary support in its response, and the Court should not consider it per Supreme Court Rule 141. Rule 141; *see also* K.S.A. § 60-256(e)(2); *Hodes & Nauser*, 309 Kan. at 704 (Biles, J., concurring); *Friesen-Hall v. Colle*, 270 Kan. at 612–13; *Danes*, 242 Kan. at 830.

11. The State has no basis to dispute or limit this fact. The Providers demonstrated this fact through uncontroverted expert testimony, and the State cites no admissible evidentiary support to contest it. Per Supreme Court Rule 141, the Court should not consider the State's response. Rule 141; *see also* K.S.A. § 60-256(e)(2); *Hodes & Nauser*, 309 Kan. at 704 (Biles, J., concurring); *Friesen-Hall*, 270 Kan. at 612–13; *Danes*, 242 Kan. at 830.

13. (1) The sources cited in Dr. Davis's disclosure report data collected and assessed nationally, and the data thus encompass Kansas. (2) The State does not contest the cited evidence that 59% of women obtaining abortions already have one child or more. (3) In any event, the fact is not dispositive of the Providers' claim.

15. (1) The State does not dispute the cited evidence that second-trimester abortion is an important component of comprehensive reproductive healthcare. (2) The State does not contest the authority cited in the Providers' Memorandum, which supports the asserted fact and provides

information specific to Kansas published by the Kansas Department of Health and the Environment.[1]

49. The Providers adopt the same reply as in paragraph 11.

55. The Providers adopt the same reply as in paragraph 11.

59. (1) The cited evidence addresses the medical, not legal, basis for the alternative procedures. (2) The State cites no admissible evidentiary support, and the Court should not consider the response per Supreme Court Rule 141. Rule 141; *see also* K.S.A. § 60-256(e)(2); *Hodes & Nauser*, 309 Kan. at 704 (Biles, J., concurring); *Friesen-Hall v. Colle*, 270 Kan. at 612–13; *Danes*, 242 Kan. at 830.

73. The Providers adopt the same reply as in paragraph 11.

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79. The Providers adopt the same reply as in paragraph 11.

80. The Providers adopt the same reply as in paragraph 11.

86. The Providers adopt the same reply as in paragraph 11.

97. (1) The State does not dispute that physicians cannot guarantee they will be able to locate the umbilical cord in utero separately from the fetus. (2) To the extent the State seeks to contest the effect of S.B. 95, it cites no admissible evidentiary support, and the Court should not consider the response per Supreme Court Rule 141. Rule 141; *see also* K.S.A. § 60-256(e)(2); *Hodes & Nauser*, 309 Kan. at 704 (Biles, J., concurring); *Friesen-Hall v. Colle*, 270 Kan. at 612–13; *Danes*, 242 Kan. at 830.

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[1] Pls.' Mem. at 4 (citing *Abortions in Kansas, 2018* (Preliminary Report), Kan. Dep't of Health & Env't (Apr. 2019), http://www.kdheks.gov/phi/abortion_sum/2018_Preliminary_Abortion_Report.pdf)).

102. The Providers adopt the same reply as in paragraph 11.

104. The Providers adopt the same reply as in paragraph 11.

107. The Providers adopt the same reply as in paragraph 11.

110. The Providers adopt the same reply as in paragraph 11.

111. The Providers adopt the same reply as in paragraph 11.

113. The State has no basis to dispute this fact. The Providers demonstrated this fact through uncontroverted expert testimony, and the State cites no admissible evidentiary support to contest it. Per Supreme Court Rule 141, the Court should not consider the State's response. Rule 141; *see also* K.S.A. § 60-256(e)(2); *Hodes & Nauser*, 309 Kan. at 704 (Biles, J., concurring); *Friesen-Hall*, 270 Kan. at 612–13; *Danes*, 242 Kan. at 830. The State's assertions about the materiality and relevance of this fact are legal arguments not factual contentions.

114. The Providers adopt the same reply as in paragraph 11.

115. The Providers adopt the same reply as in paragraph 11.

116. The State cites no admissible evidentiary support, and the Court should not consider the response per Supreme Court Rule 141. Rule 141; *see also* K.S.A. § 60-256(e)(2); *Hodes & Nauser*, 309 Kan. at 704 (Biles, J., concurring); *Friesen-Hall v. Colle*, 270 Kan. at 612–13; *Danes*, 242 Kan. at 830.

117. The Providers adopt the same reply as in paragraph 116.

III. The Uncontested Facts Support Granting the Providers' Motion for Summary Judgment.

The State has failed to "set out specific facts showing a genuine issue for trial" or controvert any material facts considered by the Kansas Supreme Court when it ruled that the Providers demonstrated a substantial likelihood of success on their claim. K.S.A. § 60-256(e)(2)

("When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or by declarations . . . set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."); *Hodes & Nauser*, 309 Kan. at 678; *see also* Pls.' Mem. at 24–27. Rather than controvert the Providers' strong evidentiary record, the State dramatically oversimplifies the Providers' evidence, misleadingly characterizing the violations of the fundamental right to abortion as limited to delay and inconvenience in providing care. *See* Defs.' Resp. at 11.

The State fails to acknowledge or address the myriad harms caused by S.B. 95 that formed the basis of the Kansas Supreme Court's decision and which the Providers have further developed through admissible evidence in support of their Motion. For example, the State does not controvert any of the following material facts: i) each of its proposed alternatives would increase the risks to patients' health without any corresponding benefit; ii) the State's proposed alternatives are tantamount to experimentation on patients prior to 18 weeks LMP; and iii) it is impossible to reliably perform a separate demise procedure in every case. Ex. 2 to Pls.' Mot. Summ. J., Expert & Fact Decl. of Traci Lynn Nauser, M.D. ("Nauser Decl.") ¶¶ 16–31, 35; Ex. 3 to Pls.' Mot. Summ. J., Expert Decl. of Anne Davis, M.D., M.P.H. ("Davis. Decl.") ¶¶ 23–50.[2] Further, the State summarily dismisses the effect S.B. 95 would have on limiting patient access to providers. Defs.' Resp. at 11. The State misapprehends its burden on this point too and

[2] *See also, e.g.*, *Hodes & Nauser*, 309 Kan. at 616–17 (citing specific record evidence regarding the Act's harms, including that "[u]mbilical cord transection prior to a D&E . . . increases procedure time, makes the procedure more complex, and increases risks of pain, infection, uterine perforation, and bleeding").

presents no evidence whatsoever to show that patients would have access to providers in Kansas.[3]

Finally, the State contends that the Providers' claim fails because they have not provided evidence regarding fetal interests. *Id.* Here, too, the State ignores the record. The Providers' bioethics expert addressed this directly, explaining that there is no universal consensus regarding what constitutes dignified treatment of a fetus or fetal tissue, or whether certain methods of terminating a pregnancy are more dignified or humane than others—testimony that is unrebutted by the State. Ex. 4 to Pls.' Mot. Summ. J., Expert Decl. of Thomas Cunningham, PhD, M.A., M.S. ("Cunningham Decl.") ¶¶ 17, 27–36; *see also* Nauser Decl. ¶¶ 28–29, 42–43; Davis Decl. ¶¶ 55–57. Further, the challenged Act would force Kansas providers to subject patients to medically unnecessary, invasive, and in some cases experimental procedures. Nauser Decl. ¶¶ 16, 19–21, 24–25, 30, 41, 43; Davis Decl. ¶¶ 23, 28, 30, 37–38, 41, 43–46, 48, 55. The State has no response to this evidence, which clearly demonstrates that S.B. 95 conflicts with foundational principles of medical ethics and undermines the integrity of the medical profession. Cunningham ¶¶ 9, 13–26, 32–36. Accordingly, S.B. 95 fails to actually advance the State's asserted interests.

In short, try as it might to trivialize the evidence here, the State cannot avoid the conclusion that the uncontested facts overwhelmingly support granting the Providers' motion.

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[3] Indeed, the State's refusal to consider the impacts on women reflects the very gender bias that the Kansas Supreme Court "[could] not ignore." *Hodes & Nauser*, 309 Kan. at 659; *see also id.* at 650 ("By avoiding any other aspect of the lives of pregnant women, the dissent appears to maintain that upon becoming pregnant, women relinquish virtually all rights of personal sovereignty in favor of the Legislature's determination of what is in the common good.").

IV. The State's Compelling Interest Argument is Contrary to the Kansas Supreme Court's Mandate.

The State's compelling interest argument is nothing more than an attempt to relitigate issues already decided by the Kansas Supreme Court. The State asserts that a Kansas personhood statute, K.S.A. §§ 65-6732(a)(1)–(2), (b), is sufficient to establish a compelling interest, and that any ban on abortion is narrowly tailored so long as it contains an emergency exception. Defs' Resp. at 16–19. This is quite simply inconsistent with the decision of the Kansas Supreme Court in this case and prohibited by the mandate rule and the law of the case doctrine. *See, e.g., State v. Collier*, 263 Kan. 629, 636, 952 P.2d 1326, 1332 (1998) ("It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal." (quoting *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 857 (3d Cir. 1994)); *see also* K.S.A. § 60-2106(c) (specifying that a mandate of an appellate court "shall be controlling in the conduct of any further proceedings necessary in the district court").

The Kansas Supreme Court expressly considered and rejected a standard that would have given women's individual rights less weight than the State's asserted interest in protecting and preserving the value and dignity of fetal life. *Hodes & Nauser*, 309 Kan. at 669–71. The Court reviewed the U.S. Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), explaining that under U.S. Supreme Court precedent, states may not restrict women's access to abortion prior to viability, other than to ensure the woman's safety, and, even after viability, may not enact restrictions that "put the woman's life or health in danger." *Hodes & Nauser*, 309 Kan. at 663–64 (citing *Casey*, 505 U.S. at 872).

Under the applicable federal standard, states have a "legitimate" interest "in the protection of potential life," meaning states may enact regulations to inform a woman's decision, so long as they do not inhibit access to abortion. *Casey*, 505 U.S. at 871. But the Kansas Supreme Court declined to adopt the federal undue burden standard and instead applied strict scrutiny based, "most importantly," on its obligation to protect "the intent of the Wyandotte Convention and voters who ratified the Kansas Constitution" and "the inalienable natural rights of all Kansans." *Hodes & Nauser*, 309 Kan. at 665–69.

In so doing, the Court emphasized that, while the undue burden standard requires only that the government interest be "*legitimate*," strict scrutiny "start[s] with an emphasis on the individual's rights" and "require[es] the government to establish its *compelling* interest and to prove its action is narrowly tailored to serve that interest—even if the infringement is slight." *Id*. at 670 (emphases added). The Court clearly understood that this greater protection implicated the fetus—discussing, for example, how restrictions on access to abortion would hamper the treatment of conditions such a cancer, because of damage to the fetus. *Id*. at 647 (citing *N.M. Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 875 P.2d 841, 855 (1998)).

In short, the Kansas Supreme Court considered and rejected a standard with less rigorous protection for the fundamental right to abortion. *Id*. at 665–659. The State's reliance on a separate Kansas personhood statute—which is nothing more than another legislative enactment—is misplaced. First, the State has failed to explain how its articulation of this interest meets the requirement that a compelling interest be "rare." *Id*. at 663. On the contrary, if the State can use the personhood statute as a basis to assert a compelling interest, it would swallow right entirely. *See* Pls.' Mem. at 35; Pls.' Resp. Opp'n Defs.' Mot. Summ. J. ("Pls.' Resp.") at 1–2, 17–18. Indeed, the State's argument that it is "logically irrelevant whether one is in the womb

or out" is essentially an argument that the woman—and her right to bodily integrity and decisional autonomy—is irrelevant, completely subverting the decision of Kansas Supreme Court. *See* Defs.' Resp. at 14.

Second, the personhood statute is a legislative enactment that cannot supersede the Constitution. The Kansas Constitution protects individual rights regardless of legislative majority. "While the legislature is vested with a wide discretion . . ., it cannot, under the guise of the police power, enact unequal, unreasonable or oppressive legislation or *that which violates the Constitution*." *Hodes & Nauser*, 309 Kan. at 671 (quoting *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 760, 408 P.2d 877, 888 (1965)). Indeed, the concurrence in the Kansas Court of Appeals decision in this case addressed the very statute the State relies upon, K.S.A. § 65-6732. As Judge Atcheson explained, K.S.A. § 65-6732 "cannot, however, alter the constitutional rights secured in § 1[] because the legislature cannot mandate how the courts construe constitutional protections." *Hodes & Nauser v, MDs, P.A. v. Schmidt*, 52 Kan. App. 2d 274, 311–12, 368 P.3d. 667, 688 (2016) (Atcheson, J. concurring), *aff'd*, 309 Kan. at 610. Thus, the State's exclusive reliance on the personhood statute for establishing its interest is misplaced, and the State has not demonstrated that S.B. 95 serves a compelling interest.

Moreover, as the State concedes, its proposed alternatives to D&E would not prevent fetal life from being extinguished. Thus, the State's argument rests entirely on its unsupported assertion that the alternatives proposed by the State further fetal dignity. Defs.' Resp. at 16–17. There is absolutely no evidence in the record that they do so, and the State has failed to controvert expert testimony from the Providers that there is no universally accepted consensus that certain methods of terminating a pregnancy are more dignified than others. Cunningham Decl. ¶¶ 27–31; *see also Roe*, 410 U.S. at 159 (declining to recognize that life begins at

conception where those "trained in the respective disciplines of medicine, philosophy, and theology" could not "arrive at any consensus" on the question of when life begins). The State's argument is tantamount to complete deference to the legislature. As discussed above, courts are obligated to protect individuals' rights against legislative interference, and the existence of a governmental interest in a law is the beginning, not the end, of the inquiry. *Hodes & Nauser*, 309 Kan. at 671. "[A] legislative recitation of compelling interest alone has little legal significance for constitutional purposes. Whether an asserted governmental interest is compelling requires an independent judicial determination." *Hodes & Nauser*, 52 Kan. App. 2d at 324 (Atcheson, J., concurring) (citing *Shaw v. Hunt*, 517 U.S. 899, 908 & n.4 (1996) (state "must show" its action furthers a compelling interest); *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994) (whether evidence establishes a compelling interest presents a question of law))). "Otherwise, legislatures could heavily insulate their enactments from judicial review simply by labeling every statute as serving a 'compelling interest' in solving some problem or advancing some policy." *Id.*

The State also reasserts its interest in protecting the medical profession. But this argument rises and falls with the State's dignity argument because it assumes that the Act actually furthers dignity and that this in turn serves the medical profession. Again failing to cite any supporting facts, the State asserts: "[n]o expert opinions undermine the fact that the State sees what it has deemed 'dismemberment abortions' as unnecessarily brutal and inhumane." Defs.' Resp. at 20. But the opinion of counsel for the State is not enough to render the State's interest compelling. First, the State is incorrect that no expert opinion from the State is necessary. That is not the law in Kansas. "[W]hen the resolution of a case turns on facts that are highly technical or scientific or requires expertise outside the scope of common knowledge, expert

testimony on such subjects may not be controverted except by the opinions of other experts." *City of Ark. City v. Bruton*, 284 Kan. 815, 838, 166 P.3d 992, 1007 (2007); *see also* K.S.A. § 60-456(a); Pls.' Mem. 25–27. Further, the State argues that the Providers have ignored a physician's ethical obligations towards the fetus. However, the undisputed facts show that S.B. 95 harms the medical profession and undermines ethics and do not support the State's assertion that the State's proposed alternatives further any interest in dignity. *See* Pls.' Mem. at 17–18; 34–36.

Finally, the State argues that the Providers "have not shown that SB95 fails to meet the strict scrutiny standard," Defs.' Resp. at 10, but it is the State that bears the burden of demonstrating that S.B. 95 can withstand strict scrutiny. As discussed at greater length below, *see infra* Part V.A, the State fails to address that identical state interests were raised to justify a ban on D&E in *Stenberg v. Carhart*, 530 U.S. 914 (2000), and could not save the statute even under the less rigorous undue burden standard, *id.* at 945–46.

V. The State Has Not Carried its Burden of Demonstrating that the Act is Narrowly Tailored to Further its Asserted Interests.

A. S.B. 95 Imposes Unprecedented Harms and Fails Narrow Tailoring.

The State had an opportunity to "raise to the trial court any interests it claims are compelling" and "show why S.B. 95 is narrowly tailored to those interests," *Hodes & Nauser*, 309 Kan. at 678, but failed to do so. Even assuming that (1) any of the State's asserted interests could be compelling and (2) that the Act furthers those interests, the State has failed to demonstrate that the Act is narrowly tailored. As the Kansas Supreme Court recognized, strict scrutiny is a rigorous form of review—one more demanding than the undue burden standard. *Id.* at 675 ("The trial court and the Court of Appeals plurality held there was a substantial likelihood S.B. 95 could not survive *Casey*'s undue burden test," which would lead to the same result).

Under strict scrutiny, the State carries the burden of showing narrow tailoring. *Id.* at 669. Narrow tailoring requires that the law be "precise enough" and that it burden the fundamental right no more than is necessary to advance the State's asserted interest. *State v. Ryce*, 303 Kan. 899, 963, 368 P.3d 342, 278–79 (2016); *see also* Pls.' Mem. at 37–40 (describing standard).

The State asserts that the Act's "exceptions" and "allowance of induced fetal demise" demonstrate it is narrowly tailored to further the State's asserted interest in "promoting respect for the value and dignity of life." Defs.' Resp. at 17–18. However, the State does not address, or even acknowledge, the undisputed harms that served as the basis for the Kansas Supreme Court's holding that the Providers demonstrated a substantial likelihood of success on the merits, *Hodes & Nauser*, 309 Kan. at 672, or how these harms factor into the narrow tailoring assessment, *see* Pls.' Mem. at 42–43 (citing federal and state cases striking down bans on D&E, despite identical exceptions and the states' assertion that the same fetal demise methods were available).

The Providers' fact and expert testimony further establishes that the Act's medical emergency exception is woefully inadequate to protect women's health and safety and that its criteria undermine medical ethics by requiring providers to withhold medically appropriate care until a patient has developed complications that put her life or health at risk. *See* Pls.' Resp. at 9–10, 26–30. The State has not disputed these material facts or provided proper support for its arguments, which are comprised solely of counsel's opinions. *See supra* Part III.

Unable to controvert the Providers' evidence, the State makes two unavailing arguments. First, it argues the Providers "have overstated the Kansas Supreme Court's reliance on or deference to federal abortion jurisprudence." Defs.' Resp. at 12. However, the State fails to address the Kansas Supreme Court's reliance in this very case on well-settled federal law prohibiting a ban on D&E and the Court's holding that the Providers were substantially likely to

succeed on the merits of their claim that the Act is unconstitutional.[4] The Kansas Supreme Court preliminarily enjoined S.B. 95, primarily based on the holdings of *Stenberg*, 530 U.S. 914, and *Gonzales v. Carhart*, 550 U.S. 124 (2007), holding they have "particular significance in this case," 309 Kan. at 676, and finding that Kansas cannot "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 (quoting *Hodes & Nauser*, 52 Kan. App. 2d at 291–92 (plurality opinion) (concluding that the Providers met the temporary injunction standard "primarily based on the holdings of *Stenberg* and *Gonzalez*")). Following this holding, the State has not produced any evidence that was not before the Kansas Supreme Court at the time of its decision, and the Kansas Supreme Court's interpretation of this federal case law is binding.

Second, the State asserts that S.B. 95 "serve[s] a compelling interest to promote respect for life through enhanced dignity *in as narrow a manner as could ever be possible*." Defs.' Resp. at 15 (emphasis added). In so arguing, the State asserts that a law is narrowly tailored so long as

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[4] Despite the State's assertion that the Providers place too much reliance on federal jurisprudence, *id.* at 14, the State relies on federal Eighth Amendment jurisprudence as a purported basis for narrow tailoring. The State's only support, from a *dissent* to a U.S. Supreme Court *denial of certiorari*, lacks precedential value and is inapplicable. *Id.* (quoting *Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting)). Eighth Amendment jurisprudence has no bearing on the fundamental right at issue here. *See Browning-Ferris Inds. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (explaining that the Eighth Amendment is concerned only "with direct actions initiated by government to inflict punishment"); *Ingraham v. Wright*, 430 U.S. 651, 667–68 (1977) (explaining that the Eighth Amendment's "cruel and unusual punishment" clause is "inapplicable" outside the "criminal process"). Likewise, other cases relied on by the State are inapposite because they also do not address fact patterns that implicated women's fundamental right to autonomy. *See* Defs.' Resp. at 13 (citing *Washington v. Glucksberg*, 521 U.S. 702, 728–32 (1997); *Vacco v. Quill*, 521 U.S. 793, 801–02 (1997)). Here, where those interests are implicated, the applicable test has already been set by the Kansas Supreme Court. *Hodes & Nauser*, 309 Kan. at 663–69, 671.

it does not completely prevent women from accessing abortion, regardless of the draconian requirements the State may impose as a condition of exercising a fundamental right. This argument is chilling. The alternatives proposed by the State would require women to undergo physically invasive and unnecessary medical procedures that impose increased medical risks with no medical benefit and are in some circumstances still experimental, or to forgo obtaining an abortion and be subjected to the additional risks associated with childbirth. Pls.' Mem. at 9–18. According to the State's logic, these unprecedented infringements on bodily integrity and decisional autonomy are not even factors in the relevant analysis. Such a confined framing of the standard conflicts with the narrow tailoring test set forth by the Kansas Supreme Court. *See* Pls.' Resp. at 25–32 (articulating narrow tailoring standard and applying it to the Act). Further, the State fails to consider legitimate alternatives to the D&E ban that the State could employ to further its asserted interests in the value and dignity of life and the medical profession, without imposing the types of harms that the Act does, such as providing prenatal care to pregnant people carrying a pregnancy to term.

B. The Uncontroverted Harms the Act Imposes on the Health and Safety of Women Seeking Abortion Cannot Survive Strict Scrutiny.

The Kansas Supreme Court has made clear that a regulation that prevents a woman from accessing "the safest method of abortion for her" cannot survive strict scrutiny. *Hodes & Nauser*, 309 Kan. at 676; *see also id.* at 677 (adding that the U.S. Supreme Court recently reiterated that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient" (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct 2292, 2309 (2016))). The Kansas Supreme Court relied on *Stenberg*'s holdings that "the federal constitutional right to access an abortion[]

include[es] whenever it is necessary to protect her health" and that "[a] regulation that prevents [a woman] from accessing *the safest method of abortion for her* places an undue burden on that right." *Id.* at 676 (emphases added). The Court explicitly held that applying "the more demanding strict scrutiny standard . . . would *not* change the conclusions reached by the trial court." *Id*. at 677 (emphasis added).

As the Kansas Supreme Court has already concluded from the same facts now before this Court, the State has "bann[ed] the most common, safest procedure and [left] only uncommon and often unstudied options available." *Id.* at 677 (quotation omitted). The Act's medical emergency exception fails to ensure access to abortion "whenever it is necessary to protect" the pregnant person's health. *Id.* at 676. As discussed in the Provider's Response, the medical emergency exception is "grossly insufficient to ensure patient safety," Davis Decl. ¶ 56, because it "does not apply to all threats to a woman's health" and forces providers to withhold medically appropriate care while a patient's condition deteriorates until her complications expose her to serious health consequences. *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1328–29 (11th Cir. 2018); *accord* Pls.' Resp. at 26–30. Because the exception does not apply to the vast majority of women seeking abortion and—as the State concedes—the purported demise methods impose increased risks, the Act prevents many women from accessing the safest method of abortion for them in contravention of the Kansas Supreme Court's opinion. *Hodes & Nauser*, 309 Kan. at 676–77; *see also* Pls.' Mem. at 9–16; Pls.' Resp. at 9–10, 27–30, 32, 40–43.

Accordingly, the State has not carried its burden of demonstrating that the Act is narrowly tailored to further its asserted interests.

VI. Conclusion

For all these reasons, the Providers respectfully request that this Court grant their Motion for Summary Judgement and permanently enjoin S.B. 95.

Respectfully submitted,

/s Genevieve Scott Date: March 6, 2020

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The undersigned hereby certifies that on March 6, 2020, the foregoing was served on the following by electronic mail pursuant to an agreement of the parties:

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