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Appellate Case No. 114,153

IN THE SUPREME COURT OF THE STATE OF KANSAS

Hodes & Nauser, MDs, 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.

SUPPLEMENTAL BRIEF OF APPELLANTS

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

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Oral Argument: 45 minutes

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INTRODUCTION

This appeal concerns a district court's temporary injunction of the Kansas Unborn Child Protection from Dismemberment Abortion Act ("the Act"). L. 2015, ch. 22, codified at K.S.A. 2015 Supp. 65-6741 *et seq.* At the heart of the case is an important issue of first impression:

Does the Kansas Constitution include a stand-alone, state-law right to abortion?

Thus, this case is about the Kansas Constitution, but only because the plaintiffs ("Hodes & Nauser") have adopted a deliberate strategy to force an unnecessary decision on a controversial issue under Kansas law. Indeed, despite 43 years of federal abortion jurisprudence since *Roe v. Wade*, 410 U.S. 113 (1973), Hodes & Nauser raised no federal claims. Despite their assertion of imminent irreparable harm if the Act were to go into effect, Hodes & Nauser presented no arguments based on established federal rights. Instead, they only asserted claims under the Kansas Constitution—advocating that the Kansas courts should (1) plow new ground to find a state-law right to abortion under Sections 1 and 2 of the Kansas Constitution Bill of Rights and (2) declare the Act unconstitutional under this never-before-recognized right.

As this court has recognized when declining to recognize a state-law abortion right in the recent past, there is no need for such a decision by the Kansas courts. See *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364 (2006). Federal law already recognizes a right to abortion, and Hodes & Nauser merely seek to duplicate that federal right under Kansas law. Recognizing such a right under the Kansas Constitution, however, would fly in the face of Kansas history and tradition, would contradict numerous Kansas cases and statutes, and finds no support in the actual *text* of the Kansas Constitution—the source this court long has recognized to be "the best and only safe rule for ascertaining the intention" of the people of Kansas. *Wright v. Noell*, 16 Kan. 601, 607 (1876); *Gannon v. State*, 298 Kan. 1107, 1143, 319 P.3d 1196 (2014).

ISSUES ON WHICH REVIEW HAS BEEN GRANTED

The State listed the following three issues in its Petition for Review (see Petition for Review, at 2-3):

1. Does the Kansas Constitution create a right to an abortion?

   (See *infra*, at Argument, Issue I.)

2. Even assuming such a right exists, does the applicable standard impose a bright-line rule against any government regulation of dismemberment abortions?

   (See *infra*, at Argument, Issue III.)

3. Even assuming such a right exists, did the six judges in the Court of Appeals plurality err in accepting the district court's factual findings, when the district court expressly rejected the presumption of constitutionality and applied the wrong legal standard?

   (See *infra*, at Argument, Issue II.)

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Kansas Unborn Child Protection from Dismemberment Abortion Act.

The facts and procedural history leading to this court's review are more fully set forth in appellants' brief at 5-13, incorporated here by reference. To quote, in part, that description:

> [The Act] was adopted in 2015 and addresses dismemberment abortions. Specifically, the Act defines "dismemberment abortion" as an abortion performed:
>
> > 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.
>
> L. 2015, ch. 22, § 2(b)(1), *codified as* K.S.A. 2015 Supp. 65-6742(b)(1). Justice Kennedy previously described the procedure Kansas now has prohibited as follows:
>
> > The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while

> its limbs are being torn off. Dr. Carhart [a Nebraska physician who performed abortions, including D&E abortions] agreed that "[w]hen you pull out a piece of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, ... the fetus [is] alive." Dr. Carhart has observed fetal heartbeat via ultrasound with "extensive parts of the fetus removed," and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." At the conclusion of a D&E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with "a tray full of pieces."

Stenberg v. Carhart, 530 U.S. 914, 958-59 (2000) (Kennedy, J., dissenting). As one Kansas senator explained in the *Senate Journal* regarding his vote in favor of the Act:

> To destroy an unborn child by employing the barbaric and immoral practice of dismemberment is deplorable. … Failure to specifically prohibit dismemberment abortion … amounts to the implicit approval of a brutal and inhumane procedure and will further coarsen society to the humanity of the unborn, as well as all vulnerable and innocent human life.

Explanation of Vote, Senate Journal, 29th day, at 141 (Feb. 20, 2015). [R. II, 170.]

The Act prohibits this abortion *method*—when performed while the unborn child is *still alive*—except in instances to preserve the life of the pregnant woman, or if the continuance of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the woman. L. 2015, ch. 22, § 3(a), *codified as* K.S.A. 2015 Supp. 65-6743(a). The Act does not prohibit the dismemberment method when the child already is deceased, or when a physician induces the death of the child by other means before dismembering the parts of the unborn child and removing them from the woman's uterus.

The dismemberment abortion method the Act prohibits is commonly referred to in the medical context as a dilation-and-evacuation ("D&E") abortion. [See R. I, 6; II, 152-53.] To comply with the Act, an abortion provider must either (1) end the child's life through one of various alternative, more humane methods (commonly discussed as "inducing fetal demise") before performing the dismembering procedure or (2) perform an abortion by inducing labor through medication (a "medication-induction abortion"). [R. II, 168-78.]

At present, there are generally three methods of inducing fetal demise before performing a dismemberment abortion: (1) the physician may inject the unborn child, umbilical cord, or amniotic sac with digoxin (a drug used to treat heart disease in adults but which induces a fatal heart attack in an unborn child *in utero*), [R. I, 39 (¶ 20); II, 171-75]; (2) the physician may inject the unborn child or amniotic sac with potassium chloride [R. II, 171-75]; or (3) the physician may sever the umbilical cord (a procedure known as "umbilical cord transection" or "UCT") [R. II, 171-75].

The Act passed both chambers of the legislature by significant margins: 31-9 in the Senate and 98-26 in the House. Senate Journal, 29th day, at 141 (Feb. 20, 2015); House Journal, 49th day, at 547 (Mar. 25, 2015). The governor signed the Act on April 7, 2015, and the Act was scheduled to take effect on July 1, 2015. [R. II, 152.]

II. The district court granted a temporary injunction, becoming the first court in Kansas history to find a right to abortion under the Kansas Constitution.

In June 2015, Hodes & Nauser challenged the Act in Shawnee County District Court, asserting several facial challenges based entirely and solely on Kansas law; they asserted no federal claims. Hodes & Nauser also sought a temporary injunction, primarily under their assertion that the Act violated a new "right to terminate a pregnancy" under Sections 1 and 2 of the Kansas Constitution Bill of Rights. [R. II, 107.]

The State responded that while Kansas—like any other state—may not enact laws that violate the United States Constitution, nothing in the U.S. Constitution requires States such as Kansas to *import federal rights* into its state constitution. In fact, nothing in the language or history of the Kansas Constitution indicates that the people of Kansas ever intended for the state constitution to provide a "right to abortion." Indeed, before the district court's ruling in this case, no Kansas court had ever held that a right to abortion exists under the Kansas Constitution. The term "abortion" does not appear anywhere in the Kansas Constitution; this is not surprising, as abortion was illegal in Kansas until the United States Supreme Court's 1973 decision in *Roe v. Wade* preempted longstanding Kansas law. The fact that Hodes & Nauser knowingly elected—for whatever reason—to bring *only Kansas constitutional claims* in this case, and *to forego* claims under established *federal* jurisprudence does not change the fact that these recognized

claims exist and could have been asserted. Thus, the State urged the district court to deny Hodes & Nauser's request for a temporary injunction. [R. II, 162-68.]

The State also presented findings from numerous peer-reviewed, scientific journals demonstrating that the various alternative methods to a D&E abortion performed on a live unborn child were safe and reasonable options that a physician could employ as part of the D&E abortion procedure. [R. II, 168-78.] "Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). In their Reply, Hodes & Nauser did not dispute that other doctors had performed steps to induce fetal demise, but instead argued that (1) Hodes & Nauser do not usually induce fetal demise before performing D&E abortions; (2) some of the alternative procedures (such as UCT) proposed by the State could not be performed in every instance and could add 3 to 11 minutes per abortion procedure; and (3) some additional steps (such as digoxin injections) could potentially require multiple trips to the abortion facility or might lead to an increased cost (though no evidence was provided as to what the cost might be).

The Shawnee County District Court held a hearing on Hodes & Nauser's temporary-injunction request on June 25, 2015. The parties did not present live testimony or other evidence, but limited their arguments to the legal issues presented in the case. After argument, the district court ruled from the bench and granted the injunction. The district court found, for the first time in Kansas history, that Sections 1 and 2 of the Kansas Constitution Bill of Rights provide for an independent, "fundamental right to terminate a pregnancy"—a right that precisely mirrors the federal right described in *Planned Parenthood of Southeast Pennsylvania v. Casey,* 505 U.S. 833 (1992), and its progeny but that is separate from the federal right. [R. IV, 47.] The district court

then placed the burden on the State to "justify" the Act under the newly minted Kansas constitutional right. [R. IV, 44.] The court noted that it was basing its decision "primarily on *Alpha*," where this court declined to recognize a state-law abortion right but noted that Kansas constitutional provisions often have been interpreted to "echo federal standards." [R. IV, 45, 47.]

At the close of the hearing, the district court directed the plaintiffs to draft a Journal Entry. Over the State's objection, Hodes & Nauser submitted a lengthy Order including factual findings never made in the district court's bench ruling. [See R. III, 222-32.]

The State appealed the district court's ruling under K.S.A. 60-2102(a)(2), and all parties moved to transfer the case to the Kansas Supreme Court, noting that this court is the final arbiter when interpreting the Kansas Constitution. This court denied the motion to transfer on a 4-3 vote, with Justices Beier, Rosen, and Stegall dissenting. [Court file.]

III. The Court of Appeals heard the case *en banc* and affirmed in a 6-1-7 split decision that has no precedential value.

Following the denial of transfer, the Court of Appeals took the unprecedented action of *sua sponte* ordering that the case be heard *en banc*, allowing all fourteen judges to participate in the decision. The full Court of Appeals heard oral argument on December 9, 2015.

On January 22, 2016, the court issued a 6-1-7 split opinion, affirming the district court by an equally divided vote. *Hodes & Nauser, MDs, P.A. v. Schmidt*, __ Kan. App. 2d __, 368 P.3d 667, 679 (2016). Six judges found that Sections 1 and 2 of the Kansas Constitution Bill of Rights are functionally a mirror of any protections the United States Supreme Court recognizes under the Due Process Clause of the Fourteenth Amendment, and thus incorporate into Kansas constitutional law the same right to abortion recognized under federal law—regardless of the text of those provisions, the intent of the Kansans adopting them, or their history. 368 P.3d at 668 (Leben, J.) (plurality opinion). One concurring judge, who provided the seventh vote for

recognizing an abortion right, concluded that Section 2 has no bearing on the question, but that Section 1 creates a "natural law" constitutional protection that is broader than federal law and that has no federal counterpart. 368 P.3d at 680, 691 (Atcheson, J., concurring). Seven judges concluded, based on the history and text of the Kansas Constitution, that the Kansas Constitution does not create a right to an abortion. 368 P.3d at 698 (Malone, C.J., dissenting).

Thus, the Court of Appeals split evenly on whether the Kansas Constitution includes a state-law abortion right, resulting in an affirmance with no precedential value. To describe the reasoning underlying the three opinions as fractured is a mastery of understatement. In fact, the opinion garnering the most votes was the seven-judge dissent, which would have found that there is no right to abortion under the Kansas Constitution. Highly summarized:

- Eight Court of Appeals judges (out of 14) concluded that Sections 1 and 2 of the Kansas Constitution Bill of Rights do *not* provide identical protection to the Fourteenth Amendment of the United States Constitution. [Malone Dissent + Atcheson Concurrence]

- Eight Court of Appeals judges concluded that Section 2 of the Kansas Constitution Bill of Rights is an equal-protection guarantee and is not relevant to a due-process analysis. [Malone Dissent + Atcheson Concurrence]

- Seven Court of Appeals judges agreed that the language and history of the Kansas Constitution demonstrate that there is no state-law constitutional right to abortion. [Malone Dissent]

- Six Court of Appeals judges concluded they were bound by Kansas Supreme Court cases that generally opined that Sections 1 and 2 of the Kansas Bill of Rights are given "much the same effect" as the Fourteenth Amendment. [Leben Plurality]

- One Court of Appeals judge believed that Section 1 of the Kansas Constitution should be read to provide greater protection for abortion than federal law. [Atcheson Concurrence]

This court granted the State's Petition for Review on April 11, 2016.

ARGUMENT

I. Neither the text nor the history of the Kansas Constitution supports the Court of Appeals plurality's conclusion that the state constitution provides a stand-alone, state-law right to abortion.

In deciding to affirm the district court's temporary injunction, the Court of Appeals plurality opinion recognized that

> this is the first case in which a Kansas appellate court has been required to decide whether the Kansas Constitution provides a right to abortion. That's because this is the first time a plaintiff has brought such a claim solely under the state constitution—even though the federal Constitution provides an abortion right.

Hodes & Nauser, MDs, P.A. v. Schmidt, __ Kan. App. 2d __, 368 P.3d 667, 679 (2016) (Leben, J., for 6-judge plurality). The plurality determined that this strategic decision by Hodes & Nauser—to bring only never-before-recognized state-law arguments, rather than established federal claims—did not affect the outcome of the case, however, because "[a] plaintiff has the procedural right to choose the legal theories he or she will pursue," and the court "cannot force the plaintiffs to choose another legal venue." 368 P.3d at 679.

The seven dissenting judges disagreed:

> In addition to the fact that our state constitution does not speak directly to the subject of abortion, another reason Kansas courts should decline the plaintiffs' request to find a right to abortion in the Kansas Constitution is simply because it is unnecessary for Kansas courts to do so. The citizens of Kansas, including Hodes and Nauser and their patients, are unequivocally protected by the Due Process Clause of the Fourteenth Amendment, as interpreted by the United States Supreme Court. For the sake of consistency alone, we should leave it there rather than entangling our state courts into this arena which has divided our nation for over 40 years.

368 P.3d at 705 (Malone, C.J., for 7-judge dissent).

As the State has set forth at length in its opening and reply briefs, the language of the Kansas Constitution and Kansas history make clear that the people of Kansas did not intend for or understand Sections 1 and 2 to create any kind of protection for obtaining an abortion, much

less a "fundamental right" to obtain an abortion. Instead of reiterating those arguments here, the State uses this supplemental brief to address three aspects of the Court of Appeals' plurality and dissenting opinions.

First, it is clear the six judges of the plurality opinion felt constrained by previous Kansas Supreme Court case law that generally had indicated Sections 1 and 2 of the Kansas Constitution Bill of Rights are given an interpretation "equivalent to the Due Process and Equal Protection Clause[s] [of] the Fourteenth Amendment." 368 P.3d at 675 (Leben, J., plurality). Those general statements, of course, have never been accompanied by this court recognizing a Kansas right to an abortion, and such general statements are not binding on this court. See *Hoesli v. Triplett, Inc.*, 303 Kan. 358, Syl. ¶ 4, 361 P.3d 504 (2015) ("The doctrine of stare decisis is not unyielding" for a "court of last resort.").

Instead, this court has emphasized on numerous occasions that its interpretation of state constitutional provisions must be guided by "the 'common understanding of the masses' at the time they adopted the constitutional provisions," favoring "the natural and popular meaning in which the words were understood by the adopters." *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 562, 186 P.3d 183 (2008) (internal citations omitted). See also *Gannon v. State*, 298 Kan. 1107, 1141-42, 319 P.3d 1196 (2014) (relying on the "plain language" of Article 6, and comparing and contrasting the constitutional language used in Sections 1 and 6(b) of that Article). This is because "constitutions are the work of the people." 298 Kan. at 1142. Thus, as this court explained less than 20 years into Kansas's statehood:

> We understand the correct rule to be … that the legislature may enact any law that they may think proper, unless it appears affirmatively that the framers of the constitution intended that such a law should not be passed. And the best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume

> that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing.

Wright v. Noell, 16 Kan. 601, 606-07 (1876). Or, as this court repeatedly has held since that time, "[i]n ascertaining the meaning of a constitutional provision, the primary duty of the courts is to look to the intention of the makers and adopters of that provision." *State ex rel. Stephan v. Finney,* 254 Kan. 632, 654, 867 P.2d 1034 (1994).

In particular, this court's recent decisions have demonstrated a willingness to revisit previous decisions where Kansas courts—including the Kansas Supreme Court—had perpetuated an interpretation that was not grounded in the language of the written law. See, *e.g.*, *Hoesli*, 303 Kan. at 362-63 (rejecting previous case law interpreting workers compensation statute and applying plain language); *Whaley v. Sharp*, 301 Kan. 192, 200-02, 343 P.3d 63 (2014) (rejecting previous interpretation of municipal notice requirements in K.S.A. 12-105b, and holding that the Court of Appeals ignored "a natural reading of the statute"); *Robinson v. City of Wichita Employees' Retirement Bd. of Trustees*, 291 Kan. 266, 280, 283, 241 P.3d 15 (2010) (reversing district court's overlay of common law, common-fund attorney fees over workers compensation award when incompatible with "the plain language of [the ordinance]"); *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 609, 214 P.3d 676 (2009) (overruling line of cases that had imposed a judicially created "good-faith effort" requirement for a worker's compensation claimant to seek alternative employment).

The language and history of the Kansas Constitution demonstrate that Sections 1 and 2 were never meant to incorporate federal substantive due-process law, let alone a right to abortion. Not only is the language of the Kansas constitutional provisions—modeled after the Declaration of Independence and adopted almost a decade before the Fourteenth Amendment was proposed—devoid of any reference to "due process" or abortion, but abortion was illegal in

Kansas at the time the constitution was ratified, and it remained illegal in Kansas until the Supreme Court's 1973 decision in *Roe* preempted Kansas law. Since 1973, the Kansas Constitution has been amended 29 times, but never have the people of Kansas amended their constitution to include a right to an abortion. Further, the people's duly elected representatives in the legislature continue to enact laws that can only be understood to indicate that the people of Kansas do not wish to create a state-law right to abortion. See K.S.A. 65-4a11; K.S.A. 65-6715; K.S.A. 65-6748. See also *Hodes & Nauser*, 368 P.3d at 702-04 (Malone, C.J., dissent) (concluding that neither the language nor the history of the Kansas Constitution support importing federal substantive due process rights in general or abortion rights in particular).

Second, the cases the Court of Appeals plurality cites in an effort to demonstrate a trend of incorporating substantive due-process principles into Sections 1 and 2 of the Kansas Bill of Rights do not support the plurality's argument; instead, to use the plurality's parlance, its reliance on those cases is "simply wrong." See 368 P.3d at 674-75.

The plurality purported to read three decisions of this court as supporting the proposition that this court historically has used Sections 1 and 2 to incorporate federal substantive due process principles into Kansas state law. These cases do not stand for that proposition, however. For instance, the plurality cited *Brick Co v. Perry*, 69 Kan. 297, 76 Pac. 848 (1904), as early evidence of using Section 1 in a manner akin to substantive due process. But while the Kansas Supreme Court in that case noted that one of the *parties* had argued that a Kansas statute violated his rights under the Kansas Constitution (as well as the federal Constitution), 76 Pac. at 848, the court did not state whether its analysis was under the state or federal charter—instead, it summarily declared the law "unconstitutional." 76 Pac. at 850. This can hardly be interpreted as a ringing endorsement of Hodes & Nauser's position.

The other decisions the plurality cites are no more helpful. *Manzanares v. Bell*, 214 Kan. 589, 522 P.2d 1281 (1974), considered various challenges to Kansas's new no-fault insurance law under the state and federal constitutions. Quoting its previous decision in *Henry v. Bauder*, 213 Kan. 751, 752, 518 P.2d 362 (1974), the court explained that "'*The equal protection clause* of the Fourteenth amendment to the United States Constitution finds its counterpart in Section 1 and 2 of the Bill of Rights of the Kansas Constitution.'" *Manzanares*, 214 Kan. at 602 (emphasis added). Later in the same opinion, the court noted—without further explanation or elaboration:

> Apparently the parties consider that Section 18 of our Bill of Rights is the complement of the due process and equal protection clauses of the Fourteenth Amendment. In this they are in error. As previously indicated, the Kansas Constitution's counterpart of the Fourteenth Amendment is Sections 1 and 2 of our Bill of Rights.

214 Kan. at 610. Finally, the third decision the plurality relied upon, *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917), actually concluded that Section 1 affords *less extensive* protection than the Fourteenth Amendment. See Reply Brief, at 5-6.

None of these decisions undermines the powerful arguments rooted in the language and history of the Kansas Constitution—or of the early case law discussed by the State in its Reply Brief emphasizing that Section 2 provides an equal protection guarantee (not due process)—that Section 1 was never intended to provide positive rights or protection.

Third, this court's decision in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364 (2006), demonstrates that this court does not consider Sections 1 and 2 of the Kansas Constitution Bill of Rights to be an automatic reflection of federal due-process law. Indeed, if that were the case, this court would merely have held—as it has in other instances—that the same principles apply to both state and federal constitutional claims. It did not, however. Instead, despite the plaintiffs' request in *Alpha* that the court find an *independent right* under the Kansas

Constitution, the court rejected the invitation to do so: "We have not previously recognized—and need not recognize in this case despite petitioners' invitation to do so—that such rights also exist under the Kansas Constitution." 280 Kan. at 920.

This approach is consistent with the court's "textual" and "intent of the adopters" approach to the Kansas Constitution. The mere fact that the plaintiffs in this case deliberately have chosen not to assert claims based on their established federal rights does not change the reality that these claims exist—the court "need not recognize" a state-law right when it is unwarranted under the language and history of the state constitution. Put simply, the Kansas Constitution does not provide a right to abortion. To the contrary, the district court and the Court of Appeals "created" such a right. Because the district court's grant of the temporary injunction was based on an error of law, that decision must be reversed and the injunction vacated.

II. The district court applied the wrong legal standard in evaluating the facts presented by placing the burden on the State to affirmatively prove the constitutionality of the Act rather than reviewing the parties' factual and legal arguments in light of the presumption of constitutional validity.

The argument before the district court on Hodes & Nauser's temporary-injunction motion was a purely legal argument, an argument which focused on the merits-prong of the injunction analysis. Neither party presented live testimony or documentary evidence for the court's review. In the briefing leading up to the argument, however, the parties cast notably different factual depictions of the steps that must be taken to induce fetal demise before performing a D&E in order to comply with the Act.

To that end, Hodes & Nauser attached to their Motion for Temporary Injunction two declarations—one from plaintiff Traci Nauser and one from a New York physician—criticizing the Act's medical requirements. [R. I, 26-68.] The State, in its Response, cited numerous articles published and studies reported in peer-reviewed scientific journals concerning the relative safety

of UCT and digoxin injections from a medical perspective, as well as physicians' growing use of each option even in the absence of dismemberment bans. [R. II, 147-89.] Hodes & Nauser then presented two short affidavits by the same two physicians stating they disagreed with the outcome of the studies and would not choose to perform UCT or administer digoxin injections in the absence of the Act. [R. III, 214-21.]

The party requesting injunctive relief bears the burden to demonstrate that the requirements for an injunction have been met, including *inter alia* "a substantial likelihood of success on the merits" and "a reasonable probability of irreparable future injury." *Downtown Bar & Grill v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). Yet during the hearing on the temporary injunction, the district court appeared perplexed as to how it should weigh these factual disputes—whether Hodes & Nauser should bear the burden of demonstrating the need for an injunction, or whether that burden should somehow be shifted to the State to "justify" the Act under the Kansas Constitution.

The court posed this inquiry to both parties during the oral argument. First, it addressed the following question to plaintiffs' counsel at the close of her opening argument:

> My next question has to do with the standard of review. And the starting point, of course, in this kind of case always is: The statute is presented to be constitutional and all doubts must be resolved in favor of that type of finding. But is there any Kansas law that would apply if a fundamental interest or a fundamental right is at issue? [R. IV, 19.]

The court then continued this same line of questioning at the beginning of the defense argument:

> I saw in both of your briefs that the starting point, my query is, the statute is presumed to be constitutional and all doubts must resolve in favor of its validity. It must clearly violate the Constitution before it may be struck down. However, in *State Ex Rel Schneider v. Liggett*, 223 Kan. 617, I believe our Supreme Court said, if a case presents an issue of fundamental interest or fundamental rights, the Court's usual deference owed to the legislature's enactments is eliminated. [R. IV, 20.]

The court again returned to this position as it announced its ruling from the bench, explaining from the outset:

> So my starting point here—and the starting point in my inquiry I believe is to look at the law that says that a statute—and I talked about this earlier—is presumed constitutional, and all doubts must be resolved in favor of its validity. I have the authority and duty to construe the statute as constitutional and valid if there's a reasonable way to do so. And the statute must clearly violate the Constitution before it may be struck down. That's the starting point.
>
> But as I asked questions of both Counsel before, the—and the defendants point out that a Court of law, the Constitution is not made the critic of the legislature, but rather the guardian of the Constitution and constitutionality. A party attacking the statute bears the burden of proving it's unconstitutional.
>
> In *State ex rel. Schneider v. Liggett,* 223 Kan. 610, the Kansas Supreme Court noted: A more stringent test emerged in cases involving "suspect classifications" or "fundamental interests." Here the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny. The burden of proof to justify the classification falls upon the State. If a case presents an issue of the fundamental interests or fundamental rights, the Court's usual deference … owed to the legislature's enactment … is eliminated. [R. IV, 43-44.]

Finally, the district court's order memorializing its temporary-injunction decision makes this same point, emphasizing that the court concluded that the burden shifted to the State to prove that an injunction should *not* issue, rather than requiring the plaintiffs to prove necessity:

> In determining whether the Act violates the right to abortion, the Court recognizes that "[a] statute comes before the court cloaked in a presumption of constitutionality and it is the duty of the one attacking the statute to sustain the burden of proof." *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 616[, 576 P.2d 221] (1978) (citations omitted). As the Court explained in *Schneider*, however, "[a] more stringent test has emerged," where, as here, the case involves suspect classifications or fundamental rights or interests. *Id.* at 617 (citations omitted). In such cases, "the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny. The burden of proof to justify the classification falls upon the state." *Id.* (citations omitted).
>
> Having concluded the Act implicates the fundamental right to abortion protective under the Kansas Constitution, this Court cannot presume that the Act is constitutional, but must instead subject it to active and critical analysis. [R. III, 227.]

This explanation, provided in the context of explaining the district court's reasoning and ultimate conclusions, demonstrates that the court's reliance on the strict-scrutiny language from *Liggett*— that "[t]he burden of proof to justify [the Act] falls upon the state"—was an error of law, and that this error improperly and necessarily colored the court's analysis of the disputed facts and legal arguments.

Liggett involved a challenge by a physician under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment (not the Kansas Constitution) to the statutory requirement that doctors carry medical malpractice insurance. The court first summarily dismissed the due-process claim, which was based on long-rejected economic due-process law:

> The standard of review in a due process case has fluctuated in response to society's changing attitudes concerning the proper role of the judiciary in the examination of social and economic regulations imposed pursuant to the state's police power. In the past courts often struck down laws with which they disagreed on the basis that due process was violated. This practice fell into disrepute, however, beginning with the case of *Nebbia v. New York*, 291 U.S. 502 [(1934)]. There the court retreated from its previous attitude and declared the test for due process to be whether the legislative means selected had a real and substantial relation to the objective sought. The rule has been restated in terms of whether the regulation is reasonable in relation to its subject and is adopted in the interest of the community. Courts can no longer sit as a "super legislature" and throw out laws they feel may be unwise, improvident or inappropriate. That view remains valid today.

223 Kan. at 613-14 (internal citations, all referencing United States Supreme Court cases, omitted). The *Liggett* court therefore upheld the mandatory malpractice insurance because it was rationally related to the State's interest in regulating the medical profession.

The portion of *Liggett* that the district court continually referenced in this case is not found in the court's due-process analysis, but instead is part of the court's discussion of the various levels of scrutiny recognized in federal equal-protection analysis. There, the court explained:

> A statute comes before the court cloaked in a presumption of constitutionality and it is the duty of the one attacking the statute to sustain the burden of proof.
>
> A more stringent test has emerged, however, in cases involving "suspect classifications" or "fundamental interests." Here the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny. The burden of proof to justify the classification falls upon the state.

223 Kan. at 616-17 (internal citations omitted). In the end, however, the *Liggett* court did not apply strict scrutiny and instead upheld the challenged law under the rational-basis test.

The district court's reliance on the *Liggett* dicta regarding strict-scrutiny analysis for equal-protection claims was an error of law for a number of reasons. First and foremost, under Kansas law, the constitutionality of a statute is

> presumed, and all doubts must be resolved in favor of its validity. Before a statute may be stricken down, it must clearly appear the statute violates the Constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and, if there is any reasonable way to construe the statute as constitutionally valid, that should be done.

Bair v. Peck, 248 Kan. 824, Syl. ¶ 1, 811 P.2d 1176 (1991); see also *Miller v. Johnson*, 295 Kan. 636, Syl. ¶ 1, 289 P.3d 1098 (2012) (presumption of constitutionality is part and parcel of Kansas separation of powers). "Courts are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments." 295 Kan. at 646. The burden on the party attacking the statute is "a 'weighty' one." *Downtown Bar & Grill*, 294 Kan. at 192. The district court's decision shifting the burden to the State to "justify" the constitutionality of the Act is incompatible with these fundamental principles.

Second, the district court's premise for engaging in such burden-shifting is a clear error of law: abortion is not a fundamental right triggering strict scrutiny, even under federal law. The United States Supreme Court has never identified abortion as a "fundamental" right, nor has this court. In fact, this court specifically has rejected the argument that even rights expressly

enumerated (unlike any purported right to abortion, which is not explicit) in the Kansas Constitution are necessarily "fundamental" for purposes of invoking strict scrutiny under equal-protection principles. In *Miller*, the plaintiff made this very same argument in raising an equal-protection challenge to the statutory cap on noneconomic damages, but this court rejected it:

> Miller contends the noneconomic damages cap should be evaluated under the strict scrutiny standard because it affects her fundamental rights of trial by jury and remedy by due course of law. But the problem with this strict scrutiny argument is that the jury trial right under Section 5 and the right to remedy under Section 18 have never been held to be fundamental rights for equal protection purposes. … Thus, Miller's rationale for applying strict scrutiny is not persuasive.

295 Kan. at 667.

Applying the *Miller* rationale here, the district court's reliance on *Liggett*'s strict-scrutiny standard was clearly improper. Despite nearly half a century of case law concerning abortion, neither the Kansas Supreme Court nor the United States Supreme Court has ever held that obtaining an abortion is a fundamental right for purposes of equal-protection analysis—in fact, the United States Supreme Court has held the opposite. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-73 (1993); *Harris v. McRae*, 448 U.S. 297, 322-24 (1980); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977). Federal due-process law does not apply strict scrutiny to cases implicating abortion, but rather applies the undue-burden standard set forth in *Casey*—a decision that specifically rejected strict scrutiny in the abortion context. See *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 875-76 (1992). Although the district court purported to recognize that federal law applies the undue-burden test, not strict scrutiny [see R. IV, 54 "The question is whether the statute violates a right as the undue burden analysis articulated in *Casey* and expanded on in *Steinberg* and *Gonzalez*")], the district court nonetheless inconsistently described the Kansas abortion right the court was recognizing as "fundamental" and in turn put the burden to prove constitutionality on the State.

The district court's legal error was far from harmless. The district court's notion that heightened scrutiny applied because a "fundamental" right was at stake seriously skewed its subsequent analysis by improperly shifting the burden of proof to the State, and coloring the court's view of the facts and the parties' legal arguments. Thus, even though the parties presented conflicting views regarding the requirements of the Act, the court made its factual findings with the understanding that there was no need to presume the constitutionality of the Act or to construe the facts and law to uphold it if possible. In so doing, the district court erroneously accepted Hodes & Nauser's factual *assertions* at face value and required the State to *disprove* those allegations. The same error infected the Court of Appeals plurality opinion, because that opinion relied heavily on the district court's factual findings in affirming the temporary injunction. *Hodes & Nauser*, 368 P.3d at 677-78 (Leben, J., plurality).

When a district court applies an incorrect legal standard, its analysis of the facts cannot be given deference. See, *e.g.*, *Wiles v. Am. Family Life Assur. Co. of Columbus*, 302 Kan. 66, 83, 350 P.3d 1071 (2015) (reversing an award of attorney fees when the district court had "applied the wrong legal standard"); *State v. Cheatham*, 296 Kan. 417, 444, 292 P.3d 318 (2013) (reversing the district court's evidentiary findings in a *Van Cleave* hearing because the "court applied the wrong legal standard" to the defendant's claim of ineffective assistance of counsel); *State v. Garcia*, 295 Kan. 53, 64, 283 P.3d 165 (2012) (reversing the district court's denial of a motion to withdraw a plea and remanding "for another hearing and apply the appropriate legal standards"). Likewise, although a district court's grant or denial of a temporary injunction is reviewed for abuse of discretion, *Downtown Bar*, 294 Kan. at 191, "a district court necessarily abuses its discretion when it makes an error of law." *Coulter v. Anadarko Petroleum Corp.*, 296 Kan. 336, Syl. ¶ 1, 292 P.3d 289 (2013).

Thus, even if this court disagreed with the State's position on Issue I, the court nevertheless must vacate the district court's temporary injunction and remand this case to that court for review under the correct legal principles and with a proper assessment of the facts, all in light of the presumption of constitutional validity and the proper burden of proof.

III. Federal abortion jurisprudence does not establish a bright-line rule absolutely insulating all *methods* of dismemberment procedures for all time from reasonable State oversight and regulation.

If this court concludes that the Kansas Constitution does not include a state-law abortion right, the court's analysis is at an end: Hodes & Nauser cannot prevail on their claims that rely on the recognition of such a right under the state constitution. This court cannot analyze the Act under the federal Constitution because the plaintiffs have not presented any federal claims. Accord *State v. Torres*, 293 Kan. 790, 792, 268 P.3d 1197 (2012) (an appellate court does not render advisory opinions). If, however, the court follows the six-judge plurality by creating a state law right to an abortion and importing federal-law standards to implement the newly-created right, the court then may choose to determine whether the Act is valid under the federal undue-burden analysis.

Because eight Kansas Court of Appeals judges (the dissenting judges and Judge Atcheson) ultimately concluded that federal abortion jurisprudence did not govern the plaintiffs' state law claims, only the six judges in the plurality applied the undue-burden analysis. In finding the Act unconstitutional, the plurality (1) relied heavily on the district court's factual findings, which were based on an error of law and improper shifting of the burden of proof (see previous discussion in Issue II, *supra*), and (2) interpreted the Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), decided over 15 years ago, to establish a bright-line rule against *any* regulation of D&E abortion methods.

In *Stenberg*, 530 U.S. at 931, the Supreme Court analyzed and ultimately struck down a Nebraska statute banning partial-birth abortion because the statute prohibited both partial-birth abortions (also known as dilation-and-extraction ("D&X") abortion and "intact D&E") and dismemberment (D&E) abortions without leaving any safe alternative methods. In other words, prohibiting those two abortion methods left women with no safe alternatives for second-trimester abortions, and thus would have exposed women to "significant health risks" if another method was used. Accord 530 U.S. at 951 (O'Connor, J., concurring) ("If there were adequate alternative methods for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D&X procedure alone would 'amount in practical terms to a substantial obstacle to a woman seeking an abortion.'").

Seven years later, the court upheld a federal ban on partial-birth abortion in *Gonzales v. Carhart*, 550 U.S. 124, 136 (2007). The Supreme Court there observed that "[n]o one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life." 550 U.S. at 158. In comparing partial-birth abortion banned by the federal law with the abortion method at issue in this case, Justice Ginsburg observed that "[n]onintact D&E could equally be characterized as 'brutal' … involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs." 550 U.S. at 182 (Ginsburg, J., dissenting). The Supreme Court held that it was reasonable for Congress to conclude that "additional ethical and moral concerns … justify a special prohibition" of D&X abortions. 550 U.S. at 158.

Furthermore, the *Gonzales* Court explicitly rejected the plaintiffs' argument that *Casey* should be read to allow "a doctor to choose the abortion method he or she might prefer." 550 U.S. at 158. *Gonzales* did note that the ordinary D&E abortion method was unaffected by the federal D&X ban, but *Gonzales* did not purport to establish a bright-line rule that *any* ban on or

restriction of D&E abortions *automatically* constitutes an undue burden. (That question was not before the Court.) The *Gonzales* Court further recognized that, because medical and scientific knowledge are not static, judicial decisions should not constitutionalize particular medical procedures or practices because doing so will preclude possible regulation of such procedures and practices even as they may become outdated and superseded by newer and better options as medical science advances. For example, as medicine evolves, certain abortion methods—such as saline amniocentesis, previously the most common method of abortion and the subject of the Court's pre-*Casey* decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976)—may become obsolete, or other preferable and more humane methods of performing a procedure may arise:

> The medical profession … may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

550 U.S. at 160.

The Court of Appeals plurality failed to recognize these important nuances, however. Instead, it equated the Act, when combined with Kansas's previous (and constitutional) ban on partial-birth abortions, as "simply attempt[ing] 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*, 368 P.3d at 677.

The plurality opinion also relied heavily on the district court's factual findings to conclude that the Act had the effect of "banning the most common, safest procedure and leaving only uncommon and often unstudied options available." 368 P.3d at 677. In reaching this conclusion, the plurality erred by glossing over several important tenets of *Gonzales*. First, the

plaintiffs in *Gonzales* argued, and there was some support in the medical field for their view, that the partial-birth abortion procedure "may be the safest method of abortion." 550 U.S. at 161. Acknowledging these arguments, the Court observed that "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women." 550 U.S. at 162. Yet the Court ultimately concluded that legislatures remain free to act and to regulate when medical uncertainty exists. 550 U.S. at 164.

Here, there was evidence before the district court that safe alternatives to dismemberment abortion exist. Some doctors already induce fetal demise prior to performing a dismemberment abortion by injecting the unborn child with digoxin or potassium chloride, or by performing a UCT. [R. I, 39 (¶ 21); II, 172-32.] Inducing fetal demise by way of an injection of digoxin may require a woman seeking an abortion to visit the abortion provider roughly 24 hours before the abortion procedure is performed so the injection may be administered. [R. I, 32.] No evidence was presented regarding the timeframe required to induce fetal demise by way of a potassium chloride injection. Performing a UCT during the course of a dismemberment abortion adds approximately 3 to 11 minutes to the duration of the abortion procedure. [R. II, 171.]

There was *no* evidence presented to the district court that the injection of digoxin or potassium chloride prior to a dismemberment abortion creates a health risk to the mother that could rise to the level of an "undue burden" under federal law—only that such methods would add a step (either an injection or first transecting the umbilical cord) to the procedure and that injections, as in any case, might carry side effects for some people. Nor was there evidence presented to the district court that performing a UCT creates an undue burden—only that Dr. Nauser claims the procedure cannot be performed in every case. In short, Hodes & Nauser offered no evidence that they *cannot* induce fetal demise (through at least three different

methods) before performing second-trimester abortions; the evidence only showed that Hodes & Nauser choose not to induce fetal demise before performing D&E abortions in their practice and likely would not perform that step in the absence of the Act. [R. I, 30 (¶ 19).]

The district court erred by simply accepting Hodes & Nauser's claims at face value in a truncated proceeding, and by disregarding evidence that contradicted those claims or called the plaintiffs' positions into question. The Court of Appeals plurality completely deferred to the district court with regard to the factual issues and thus committed the same errors.

In *Gonzales*, the Supreme Court upheld the federal partial-birth abortion ban while reversing the factual assessments of the federal district court and the Eighth Circuit Court of Appeals. This court certainly could do the same here, and ultimately reaffirm the legislature's ability to take reasonable action in areas where medical uncertainty exists in order to express the people's profound respect for life. At a minimum, this court should remand the case to the district court for further proceedings to determine the facts and apply the proper legal standards.

CONCLUSION

The concluding paragraphs of the Kansas Court of Appeals dissenting opinion eloquently summarize the law and equities that govern the analysis in this case:

> Simply put, there is nothing within the text or history of §§ 1 and 2 of the Kansas Constitution Bill of Rights to lead this court to conclude that these provisions were intended to guarantee a right to abortion. Kansas courts are authorized to interpret our state constitution in a manner different than the United States Constitution has been construed, and we should do so when appropriate. Our state's founders held sacred the basic concepts of life, liberty, and the pursuit of happiness, and they expressed those sentiments in that order in § 1 of our Bill of Rights. Even if Kansas courts were to find substantive due process rights under § 1, as opposed to a mere expression of traditional beliefs, we would not find a substantive due process right to abortion.
>
> The subject of abortion places the pregnant woman's liberty interest directly at odds with the unborn child's right to life. The balancing of these interests is a question of public policy. Our state legislature, not an intermediate

> court of appeals, is the branch of government charged with the development of public policy on behalf of Kansas citizens. Because the Kansas Constitution provides no substantive due process right to abortion, our legislature is free to restrict abortion procedures to the extent it finds it appropriate—as long as the legislative act does not violate our federal Constitution. This is consistent with the democratic process by which we govern ourselves.
>
> Hodes and Nauser are asking this court to amend the Kansas Constitution to include by inference a right to abortion that is not expressly found in the text of the document. Article 14 of our state constitution provides a process for amendments to be proposed by the legislature and approved by the electors, and our constitution has been amended many times since it was originally adopted. "The Kansas Constitution is the work of the people." *Gannon,* 298 Kan. 1107, Syl. ¶ 1, 319 P.3d 1196. If Kansans want to amend our constitution to include a state-law right to abortion, they may do so properly under Article 14; it should not be done by judicial decree.
>
> As Hodes and Nauser are fully aware, if they desire to seek judicial relief from the Act for themselves and their patients, they are free to invoke the protections of the federal Constitution. The plaintiffs are not without a legal remedy even if Kansas courts deny their request to find a state-law right to abortion.

Hodes & Nauser, 368 P.3d at 705 (Malone, C.J., dissenting).

The Kansas Constitution is not merely a mirror that duplicates rights already recognized under federal law. The state constitution—the work of the people of Kansas—provides specific rights and protections Kansans have deemed appropriate throughout our history, from the basic structure of state government to substantive issues like taxation, education, and suffrage. And when the people of Kansas have wished to add additional constitutional protections, they have not hesitated to do so through the state constitution's amendment process.

This court should hold—based on the language and history of that Kansas Constitution—that there is no state-law right to abortion in Kansas. As such, Hodes & Nauser could not and cannot prevail on the merits of their request for an injunction. And at a minimum, this court should remand the case to the district court for an evaluation of the disputed facts under the correct legal standard and proper burden of proof. The State respectfully requests that this court reverse the district court's temporary injunction.

Respectfully submitted,

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