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No. 15-114153-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Hodes & Nauser, MDs, PA,
Herbert C. Hodes, M.D., and Traci Lynn Nauser, M.D.,
Plaintiffs-Appellees,

v.

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

BRIEF OF APPELLANTS

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

THOMPSON RAMSDELL QUALSETH & WARNER, P.A.

Stephen R. McAllister #15845
Solicitor General of Kansas
333 W. 9th Street, Suite B
P.O. Box 1264
Lawrence, Kansas 66044
(785) 841-4554
(785) 841-4499 (fax)
steve.mcallister@trqlaw.com

Attorneys for Defendants-Appellants

Oral Argument: 45 Minutes

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NATURE OF THE CASE

This appeal is taken from the grant of a temporary injunction regarding Senate Bill 95 (Kan. 2015), the Kansas Unborn Child Protection from Dismemberment Abortion Act ("the Act").

The underlying challenge was brought by an abortion facility and its two physicians (collectively, "Hodes & Nauser") who sought a temporary injunction shortly before the Act was to take effect. *Hodes & Nauser, MDs, P.A. v. Schmidt*, Shawnee County District Court Case No. 2015-CV-405. Notably, Hodes & Nauser did not present any *federal* claims; instead, they asserted claims under the Kansas Constitution. In particular, Hodes & Nauser sought recognition of a "fundamental right to abortion" under Sections 1 and 2 of the Kansas Constitution Bill of Rights and a declaration that the Act infringes this never-before-recognized right.

In opposing the plaintiffs' Motion for Temporary Injunction, the State defendants (the attorney general and the district attorney in Johnson County, where Hodes & Nauser's clinic is located) relied on the language and history of Sections 1 and 2, arguing that there is no right to abortion under the Kansas Constitution. The State also argued that, even if Kansas courts adopted federal abortion jurisprudence, federal law allows the State to voice its profound respect for life and human dignity—and to exercise its traditional police power over the medical profession—by limiting or prohibiting particular abortion methods that many find problematic and objectionable when safe alternatives exist.

The district court granted a temporary injunction. Ruling from the bench, the court found, for the first time in Kansas history, that Sections 1 and 2 of the Kansas Constitution Bill of Rights include a "fundamental right to abortion"—a right separate

from and independent of the federal Constitution, yet defined precisely and solely by federal jurisprudence, including *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), as well as other U.S. Supreme Court decisions. The district court further held that the Act "imposes an impermissible burden" by banning dismemberment abortions, ruling that the U.S. Supreme Court's decision in *Gonzales* established a bright-line rule against any restriction on dismemberment abortions (a method of performing the most common second-trimester abortion procedure).

Before the district court's ruling in this case, no court had ever recognized a state-law right to an abortion under the Kansas Constitution or its Bill of Rights. Moreover, when Sections 1 and 2 of the Kansas Constitution Bill of Rights were adopted in 1859, abortion was illegal in Kansas; that remained true until the United States Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113 (1973), preempted longstanding Kansas law. The Kansas Constitution contains no reference to abortion. The Kansas Supreme Court has never recognized a state-law abortion right—in fact, it specifically *declined* to recognize such a right when presented with the opportunity less than a decade ago.

Further, even if this Court were to endorse the district court's stunning recognition of a right to abortion under the Kansas Constitution and to adopt federal abortion jurisprudence to define that right (as the district court did here), *Casey* and its progeny do not create a bright-line rule against limitations on common abortion methods. Indeed, federal law does not turn on whether a statute prohibits one method of performing the most common abortion procedure, but rather on whether a statute or regulation imposes an *undue burden* on a woman's ability to choose whether to have an

abortion. Thus, even assuming for the sake of argument that the Kansas Constitution includes a right to abortion that incorporates federal standards, the district court misinterpreted and misapplied the relevant federal cases.

For these reasons and for those more fully set forth below, the decision of the district court must be reversed.

STATEMENT OF THE ISSUES ON APPEAL

I. INDEPENDENT RIGHT TO ABORTION UNDER THE KANSAS CONSTITUTION. In analyzing alleged rights under the Kansas Constitution, courts consider the relevant provisions' language and the circumstances surrounding their enactment. When Sections 1 and 2 of the Kansas Constitution Bill of Rights were adopted in 1859, and until *Roe v. Wade*, 410 U.S. 113 (1973), preempted longstanding Kansas law, abortion in Kansas was illegal. The Kansas Constitution contains no reference to abortion. The Kansas Supreme Court has never recognized a state-law abortion right. Did the district court err in concluding Sections 1 and 2 contain a right to abortion under Kansas law?

II. *GONZALES*, THE UNDUE-BURDEN STANDARD, AND BRIGHT-LINE RULES. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the U.S. Supreme Court held that a State could prohibit a particular abortion procedure (to further its profound interest in promoting human dignity and respect for life) when reasonable alternative procedures existed. Here, the Kansas Legislature prohibited only *one method* of performing a common second-term abortion procedure, while a number of safe alternative methods remain available. Did the district court misinterpret *Gonzales* when it held that federal law establishes a bright-line rule against a state legislature prohibiting dismemberment abortions?

STATEMENT OF FACTS

The Kansas Unborn Child Protection from Dismemberment Abortion Act ("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]. Even in the absence of the Act, some physicians have chosen to induce fetal demise before performing a D&E

because doing so can provide other medical benefits to the mother, such as assisting with softening of the tissue (to facilitate the abortion) or with cervical ripening. [R. II, 172-73; see also R. I, 39 (¶ 21) (noting that "[a]fter 18 weeks gestation, some physicians believe that digoxin offers safety benefits to patients").] Others choose to induce fetal demise to ensure that the abortion procedure does not result in a live birth:

> By ensuring demise before the termination is begun, live birth cannot occur, thus avoiding entirely the problem that faces the provider, the team of caregivers[,] and the patient undergoing induction or D&E if the patient were to expel the fetus with signs of life. … Patients and members of the medical care team prefer to avoid delivery of a nonviable fetus with signs of life when the original intent was pregnancy termination.

Diedrich, J., Drey, E., Induction of Fetal Demise Before Abortion, SFP Guideline 20101, Contraception 2010, 81:462-73, at 3. [R. II, 173.] Others note that inducing demise before performing a D&E procedure will eliminate the possibility of the unborn child feeling pain or anguish—such as that described by Justice Kennedy: "It is difficult to determine whether or not a fetus has the ability to perceive pain. … By inducing fetal demise the issue of whether the fetus could experience pain during the abortion can be circumvented …, which is another reason feticide may be offered by some providers." Diedrich, at 3. [R. II, 173.]

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. [See R. I, 32.] No evidence was presented regarding the time frame required to induce fetal demise by way of a potassium chloride injection. Performing a UCT during the course of a D&E abortion adds approximately three minutes to the duration of the abortion procedure. [R. II, 171 (citing Tocce, K., Leach, K., Sheeder, J., Nielson, K., Teal, S., Umbilical Cord

Transection to Induce Fetal Demise Prior to Second-Trimester D&E Abortion, Contraception 2013, 88:712-16).]

The parties agree that D&E abortion currently is the most common abortion procedure performed during the second trimester in the United States. There was no evidence presented in the briefing before the district court or at the preliminary injunction hearing as to what proportion of D&E abortions are performed after inducing fetal demise, though Hodes & Nauser acknowledged that some abortion providers choose to use those methods. [See also R. I, 39 (¶¶ 20-21).] No evidence was presented regarding whether other abortion facilities in Kansas induce fetal demise before performing a D&E abortion. It is undisputed that Hodes & Nauser, in their practice, choose not to induce fetal demise before performing D&E abortions. [R. I, 30 (¶ 19).]

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). [R. II, 152.] The Governor signed the Act on April 7, 2015, and the Act was to take effect on July 1, 2015. [R. II, 152.]

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 intentionally made no claims under federal law. [R. I, 4, 13-15; IV, 44.] Hodes & Nauser also sought a temporary injunction based on two of their Kansas constitutional law claims: (1) an alleged "right to terminate a pregnancy" and (2) an alleged "right to bodily integrity." [R. II, 107, 124-25.]

With regard to the first claim, Hodes & Nauser argued that, despite the fact that Kansas courts had never recognized a right to abortion under the Kansas Constitution,

this purported state-law right *had to exist* solely because such a right is recognized under *federal* law. [R. II, 125-26.] In fact, Hodes & Nauser claimed that, regardless of the language or history of the different charters, the Kansas Constitution is *required* to provide at least as much protection for all federally recognized rights as the U.S. Constitution does. Thus, despite Hodes & Nauser's acknowledgment that they asserted no claims whatsoever under federal law, they claimed they did not have to do so because the Kansas Constitution *must be read to provide at least the same protection* as the U.S Constitution. [See R. II, 125.] For this reason, plaintiffs' discussion of their claims relied entirely on federal case law. [R. II, 125-33.]

Thus, Hodes & Nauser argued that federal jurisprudence—and particularly the United States Supreme Court's decisions in *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Stenberg v. Carhart*, 530 U.S. 914 (2000)—should be interpreted to prevent states from enacting *any* restriction on D&E abortions since that is the most common abortion procedure. [R. II, 127-28.] They also contended that the alternative procedures that exist to dismemberment abortions (particularly inducing fetal demise through use of digoxin, potassium chloride, or UCT before performing a D&E abortion) constituted an undue burden under *Casey* on the woman's right to choose whether to have an abortion. [R. II, 129-33.]

The State responded with the fundamental and self-evident principle 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. Indeed, nothing in the language or history of the Kansas Constitution indicates that the people of Kansas ever intended that charter to

provide a "right to abortion." Before the district court's ruling in the instant 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. Thus, there is no "right to abortion" under the Kansas Constitution. Because Hodes & Nauser knowingly elected—for whatever reason—to bring *only Kansas constitutional claims* in this case, and *not to assert* claims under established *federal* jurisprudence, the State urged the district court to deny Hodes & Nauser's request for a temporary injunction. [R. II, 162-68.]

The State also argued that the various alternative methods that existed to a D&E abortion performed on a live unborn child were safe and reasonable options that a physician may employ as part of the D&E abortion procedure. [R. II, 168-78.] As the United States Supreme Court observed in *Gonzales*, "[p]hysicians 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." 550 U.S. at 163. Rather:

> Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. *When standard medical options are available, mere convenience does not suffice to displace them*; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

550 U.S. at 166-67 (emphasis added). [R. II, 174.] In requesting a temporary injunction, Hodes & Nauser have the burden of demonstrating that the alternative procedures are not workable and that the Act will cause irreparable harm; but Hodes & Nauser did not meet that burden here. [R. II, 174-75.]

The Shawnee County District Court, Hon. Larry D. Hendricks, held a hearing on Hodes & Nauser's temporary injunction motion 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 temporary 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," and that this right precisely mirrors the federal right described in *Casey* and its progeny. [R. IV, 47.] The court made the following conclusions of law:

- *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 576 P.2d 221 (1976), did away with the ordinary deference courts apply to statutes and presumption of constitutional validity. Instead, the district court found that because the instant case involved what the court described as a "fundamental right" to abortion, the "burden of proof to justify the classification falls upon the state." [R. IV, 44 (N.B. Although the transcript from the hearing states that the court described *Liggett* as "eliminated," counsel notes that the court actually used the adjective "illuminating.").]

- Although the Kansas Supreme Court declined the invitation to recognize a right to abortion under Kansas law in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006), the district court was "bound" by *Alpha*'s statement that Kansas constitutional provisions have often been interpreted to "echo federal standards" to interpret the Kansas Constitution as providing identical protections to those recognized under federal Constitution. [R. IV, 45.]

- Thus, based "primarily on *Alpha*," "it appears Section 1 of the Kansas Constitution Bill of Rights provides a fundamental right to terminate a pregnancy, and that such a right exists to the same extent as that which has been recognized by the United States Constitution." [R. IV, 47.]

- Analyzing federal case law on abortion, the Act creates an "undue burden … under the fundamental rights to terminate a pregnancy" because it placed restrictions on D&E abortions, thus "inhibit[ing] the vast majority of pre-viability second-trimester abortions." [R. IV, 50-51.] The court also found that the State had not proven that the alternative procedures were "medically necessary and reasonable." [R. IV, 51.]

Based on these findings, the district court granted the temporary injunction. [R. IV, 54.] These rulings were memorialized, but vastly expanded, in a written Order prepared by Hodes & Nauser at the district court's request, filed June 30, 2015. [R. III, 222-32.]

In granting the injunction, the district court explicitly declined to reach Hodes & Nauser's arguments that the Act was passed with an improper purpose [R. II, 133-37.] and that the Act infringed their patients' right to "bodily integrity"—another provision of federal law never recognized in Kansas that Hodes & Nauser sought to import into Sections 1 and 2 of the Kansas Constitution. [R. IV, 54-55.] The district court ultimately concluded that because it had granted the temporary injunction on the basis of its finding that there was a "right to abortion" under the Kansas Constitution and that the Act violated that right by placing restrictions on D&E abortions, these additional arguments were moot. Thus, the court made no factual findings and drew no legal conclusions regarding these claims. [R. IV, 54-55; accord R. IV, 54 ("I think there's additional areas that the Court would need to examine to go further than that than I have [to resolve those remaining claims].")]. Hodes & Nauser did not cross-appeal this finding, and these additional arguments are not before this Court. *Chesbro v. Bd. of Cnty. Comm'rs of Douglas Cnty.*, 39 Kan. App. 2d 954, 969, 186 P.3d 829 (2008) ("If an appellee does not file a cross-appeal, the issue is not properly before the appellate court and may not be considered.").

The State filed a timely notice of appeal from the district court's grant of the temporary injunction under K.S.A. 60-2102(a)(2). [R. III, 233.] All parties moved that the case be transferred to the Kansas Supreme Court, but those requests were denied on August 31, 2015, by a 4-3 vote of the justices. [Court file.] On September 2, 2015, Chief Judge Malone issued an order retaining jurisdiction over the appeal and expediting briefing in the case. [Court file.] On October 1, 2015, Chief Judge Malone issued an additional order giving the parties notice that the case would be heard by this Court *en banc*. [Court file.]

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain a preliminary injunction (also called a temporary injunction) under Kansas law, the movant bears the burden of showing: (1) a substantial likelihood of success on the merits; (2) a reasonable probability of irreparable future injury to the movant; (3) that an action at law will not provide an adequate remedy; (4) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause an opposing party; and (5) that the injunction, if issued, would not be adverse to the public interest. *Downtown Bar & Grill v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). The United States Supreme Court has described the movant's burden for a temporary injunction in the abortion context as "a clear showing" "much higher" than the summary judgment standard. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The Tenth Circuit similarly has observed that "the right to relief must be clear and unequivocal." *Schrier v. University of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005).

Ordinarily, a district court's grant or denial of a temporary injunction is reviewed for abuse of discretion. *Downtown Bar*, 294 Kan. at 191. But "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, when a party alleges that a court's injunction is based on an error of law, as the State does here, an appellate court looks at the legal question before it with fresh eyes and reviews the issue *de novo*. *Downtown Bar*, 294 Kan. at 191.

Here, the district court plowed unbroken ground and ruled—for the first time in Kansas history—that Section 1 (or perhaps Sections 1 and 2) of the Kansas Constitution Bill of Rights includes a "fundamental right to terminate a pregnancy" that is coextensive with the federal right defined by the line of United States Supreme Court decisions from *Roe* to *Casey* to *Gonzales*. [R. IV, 47.] The district court then misread federal case law to stand for the proposition that states cannot restrict or limit D&E abortions, the most common abortion procedure performed in the second trimester.

The State appeals both of these purely legal conclusions, which are erroneous as a matter of law. First, nothing in the language or history of the Kansas Constitution supports the court's finding that there is a right to abortion under Kansas law. In fact, the opposite is true. The Kansas Constitution makes no reference to abortion. When the Kansas Constitution was ratified, abortion was illegal in Kansas, and it continued to be illegal until the Supreme Court's decision in *Roe v. Wade* in 1973 preempted longstanding Kansas law. The Kansas Constitution provides no right to an abortion, either explicitly or implicitly; the district court's ruling must be reversed and the temporary injunction vacated on this basis alone.

Second, the district court erred in its analysis of the federal case law from *Roe* to *Casey* through *Gonzales*. In particular, *Gonzales* recognized that governments are free to prohibit abortion procedures they find particularly inhumane, even before viability. "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Gonzales*, 550 U.S. at 166. Even "if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations." 550 U.S. at 166. The district court's contrary conclusion was based on an error of law. Either of these errors requires reversal.

I. There is no right to abortion under the Kansas Constitution.

The district court ruled that Section 1 (or alternatively, Section 1 and 2 [compare R. IV, 47 (Section 1) with R. IV, 54 (Sections 1 and 2)]) of the Kansas Constitution Bill of Rights includes a "fundamental" right to abortion coextensive with the right defined in federal case law. [R. IV, 47.] The basis for the district court's decision was not the language or history of the constitutional provisions at issue, but rather an oblique observation by the Kansas Supreme Court that the court "customarily" interprets similar provisions of the Kansas Constitution to "echo" federal standards. [R. IV, 45, 47.] The district court's ultimate conclusion is unsupported and legally erroneous. Instead, analysis of the Kansas Constitution's language and history, as well as the case law interpreting the provisions in question, demonstrates that there is no right to an abortion under the Kansas Constitution Bill of Rights.

The district court's ruling flies in the face of the Kansas Supreme Court's direction that courts evaluating the existence of constitutional rights must consider the constitution's language and the circumstances surrounding the relevant provisions'

enactment. When Sections 1 and 2 of the Kansas Constitution Bill of Rights were adopted in 1859, abortion was illegal in Kansas. The Kansas Constitution contains no reference to abortion, and the Kansas Supreme Court has never recognized a state-law privacy right (outside of the search-and-seizure context), much less an abortion right. The federal right to an abortion was not recognized until 1973, and is based on language and facts that did not exist when the Kansas Constitution Bill of Rights was adopted.

Kansas history makes 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." The district court's decision must be reversed.

A. The Kansas Constitution is not merely a mirror image of federal law. Rather, the Kansas Constitution and its protections must be interpreted according to the spirit and intent of its framers, as well as the circumstances surrounding its drafting and ratification.

Sections 1 and 2 of the Kansas Constitution Bill of Rights state:

> **1. Equal rights.** All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.
>
> **2. Political power; privileges.** All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.

As a preliminary matter, Hodes & Nauser asserted below that "[t]he Kansas Constitution must, at a minimum, protect the right to terminate a pregnancy to the same extent as the federal constitution." [R. II, 125.] The district court acknowledged that this statement is inaccurate—in fact, a court is "free to construe the State constitutional provisions independent of federal interpretation and corresponding federal constitutional provisions." [R. IV, 45.] Yet the court nevertheless held that because Kansas

"customarily" interprets the Kansas Constitution to "echo federal standards," it was "bound" to find that the Kansas Constitution contains a fundamental right to an abortion *identical to* the federal right. [R. IV, 45 (relying on dicta in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364 (2006)).]

Hodes & Nauser's initial constitutional supposition—their allegation that the federal Constitution establishes a minimum number of rights that all state *constitutions* must also protect—is simply wrong. State laws that violate federal law or federal constitutional rights are, of course, invalid, by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2. Thus, a person claiming that his or her federal rights have been violated by a state law may seek recourse for that violation *under federal law*. See, *e.g.*, 42 U.S.C. § 1983. This principle, however, in no way requires that each state's *constitution*—regardless of its language or history—must be read to import every protection found in the United States Constitution. Rather, state constitutions are charters adopted at different times by different people to suit different purposes; they may cover more territory than the U.S. Constitution, the same territory, or sometimes less territory.

Contrary to the district court's statements, Kansas constitutional jurisprudence relies on a more sophisticated analysis than reflexively mirroring federal standards. Instead, in analyzing the existence and extent of an alleged right under the Kansas Constitution, the Kansas Supreme Court has explained that generally it will analyze a provision's language and its constitutional history, including the circumstances surrounding the provision's drafting and ratification. See *Bd. of Cnty. Comm'rs of Wyandotte Cnty. v. Kansas Ave. Properties*, 246 Kan. 161, Syl. ¶ 3, 786 P.2d 1141 (1990) ("In interpreting and construing a constitutional amendment, the court must examine the language used and consider it in connection with the general surrounding facts and circumstances that cause[d] the amendment to be submitted.").

The Kansas Supreme Court repeatedly has held that when construing a provision of the Kansas Constitution, a court must look to the intention of the makers of the provision (the Legislature) and the intention of the adopters (Kansas voters). See *In re Application of Kaul*, 261 Kan. 755, 765, 933 P.2d 717 (1997) ("In ascertaining the meaning of a constitutional provision, the primary duty of the courts is to look to the intention of the makers (the legislature) and the adopters (the voters) of that provision."); *State ex rel. Stephan v. Parrish*, 256 Kan. 746, Syl. ¶ 3, 887 P.2d 127 (1994) ("The Kansas Constitution must be interpreted and given effect as the paramount law of the state, according to the spirit and intent of its framers."); *State ex rel. Stephan v. Finney*, 254 Kan. 632, 654, 867 P.2d 1034 (1994) ("In 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. Schneider v. Kennedy*, 225 Kan. 13, 21, 587 P.2d 844 (1978) ("The test is rather whether the legislation conforms with the common understanding of the masses at the time they adopted such provisions and the presumption is in favor of the natural and popular meaning in which the words were understood by the adopters."); see also *Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 315-16 *supplemented*, 279 Kan. 817, 112 P.3d 923 (2005) (Beier, J., concurring) (noting that Kansas courts in interpreting the provisions of the state constitution must look to the provisions' "language" and "constitutional history").

Applying these standards to Sections 1 and 2 of the Kansas Constitution Bill of Rights, it is clear that Kansans never intended these sections to provide a distinct, state-law right to abortion. The language of Sections 1 and 2 differs from (and predates) the language of the Fourteenth Amendment to the United States Constitution, on which the federal right to abortion is premised. The surrounding facts and circumstances of the respective constitutions and amendments are quite different. Most notably, abortion was

illegal in Kansas for more than a century after Sections 1 and 2 were ratified, and though Kansans have added protections under the state constitution in other areas, they have never added a state-law abortion right. In short, the Kansas Constitution does not provide protection for abortion under state law.

1. Neither the language nor history of Sections 1 and 2 supports a conclusion that those provisions provide protection for abortion under Kansas law.

Sections 1 and 2 of the Kansas Constitution Bill of Rights make no reference to "abortion" or to "privacy," nor do they use the phrase "due process of law." As Judge Bruns observed when serving as a Shawnee County district judge, Section 1 was "intended to be a statement of the 'natural rights' to which all human beings have been endowed" akin to the Declaration of Independence; it was "not intended to 'furnish a basis for the judicial determination of specific controversies.'" *State ex rel. Kline v. Sebelius*, Shawnee County Case No. 05C-1050, 2006 WL 237113, at *11, *12 (Bruns, J., filed Jan. 24, 2006).

Section 1 refers to "equal rights;" thus, it is no surprise that courts have often cited Section 1 as acting as the Kansas equivalent to the Fourteenth Amendment's Equal Protection Clause. See *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364 (2006) ("Section 1 of Kansas Constitution's Bill of Rights [is] given [the] same effect as Equal Protection Clause of Fourteenth Amendment of [the] federal Constitution."). But the language of these sections does not point a court inexorably toward adopting federal "substantive due process" principles. Compare U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

To place these provisions in historical context, Sections 1 and 2 were part of the original Kansas Constitution—commonly called the Wyandotte (or Wyandot) Constitution—drafted and ratified in 1859. See Kansas Organic Act and Act for Admission into the Union, Kansas Constitution. Thus, they were drafted and ratified *before* the Fourteenth Amendment even existed. Further, at no point was abortion ever mentioned while Sections 1 and 2 were discussed and debated during the Kansas Constitutional Convention. Drapier, *Proceedings and Debates of the Kansas Constitutional Convention,* 271-86 (1859).

Kansas history similarly makes 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: abortion was illegal in Kansas in 1859. After Kansas became a U.S. territory in 1854, the Territorial Legislature enacted statutes making abortion illegal in the state:

> Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug, or substance whatsoever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree.

Kan. Terr. Stat. 1855, ch. 48, § 10. (A "quick child" is one whose fetal movements are recognizable, usually appearing at 16-20 weeks gestation. PDR Medical Dictionary, 3d Ed. 2006.)

> Every physician or other person who shall wilfully administer to any pregnant woman any medicine, drug or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon

> conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Kan. Terr. Stat. 1855, ch. 48, § 39.

> The wilful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Kan. Terr. Stat. 1855, ch. 48, § 9. The punishment for manslaughter in the second degree was confinement and hard labor for not less than three years, nor more than five years. Kan. Terr. Stat. 1855, ch. 48, § 23. The punishment for manslaughter in the first degree was "confinement and hard labor" of not less than five years. Kan. Terr. Stat. 1855, ch. 48, § 23.

After Kansas became a state in 1861, the same criminal abortion statutes remained in effect, see G.S. 1862, ch. 33, §§ 9-10, 37, and were controlling Kansas law when the Fourteenth Amendment to the United States Constitution was ratified in 1868. See G.S. 1868, ch. 31, §§ 14-15, 44. The earliest reported case involving an appeal from a conviction for performing an abortion is *State v. Watson*, 30 Kan. 281, 1 Pac. 770 (1883)—just 15 years after the ratification of the Fourteenth Amendment. Kansas continued to prosecute people who performed abortions until the Supreme Court's decision in *Roe v. Wade* in 1973 preempted these longstanding Kansas laws. See, *e.g.*, *State v. Harris*, 90 Kan. 807, 136 Pac. 264 (1913); *State v. Keester*, 134 Kan. 64, P.2d 679 (1931); *State v. Brown*, 171 Kan. 557, 236 P.2d 59 (1951); *State v. Darling*, 197 Kan. 471, 419 P.2d 836 (1966); and *State v. Darling*, 208 Kan. 469, 493 P.2d 216 (1972) (all involving appeals from convictions for performing abortions). Indeed, at the time *Roe* was decided, criminal abortion was defined as a class-D felony in Kansas. See K.S.A. 1969 Supp. 21-3407; L. 1969, ch. 180, § 21-3407.

The court discussed the Kansas Legislature's purpose in adopting these criminal provisions in *Joy v. Brown*, 173 Kan. 833, 252 P.2d 869 (1953). There, the plaintiff brought a wrongful death action against the defendant for negligence in performing an abortion that caused the death of the mother. The defendant abortion provider argued there was no cause of action for wrongful death because the mother consented to the abortion. The court found that a cause of action existed. In particular, the court noted "that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." 173 Kan. at 839-40. The court also took "brief note of our crimes act." 173 Kan. at 838. The court recited the criminal abortion statutes in effect at the time, which mirrored the 1855 territorial statutes and noted that those statutes were adopted "for the purpose of protecting the life … of the unborn child":

> On their face, the above statutes do not condemn the woman nor does any other statute make her an accomplice. She has no criminal liability unless it be as an accessory under G.S.1949, 21-105 or 21-106, which we need not here determine. *It need not be elaborated that the above statutes are for the purpose of protecting the life not only of the unborn child,* but that of the mother, and that the state has a vital interest therein.

173 Kan. at 838-39 (emphasis added).

At the time the Kansas Constitution—including Bill of Rights Sections 1 and 2—was drafted and ratified, abortion was *illegal* in Kansas. The Kansas Supreme Court has stated that the same criminal abortion statutes that were in effect in 1855 as those in effect decades later were "for the purpose of protecting the life … of the unborn child." 173 Kan. at 839. It is unfathomable that in 1859, the Legislature and the voters intended for those sections to include a right to an abortion—the exact opposite of protecting the life of the unborn child.

2. Before the district court's ruling at the temporary injunction hearing, no Kansas court had ever recognized a state-law right to privacy or to abortion in Kansas. In fact, the Kansas Supreme Court has specifically and explicitly declined the opportunity to recognize such a right.

In *Roe*, the United States Supreme Court observed that its decisions had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." 410 U.S. at 152. The Court went on to hold that this right of privacy encompasses "a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. In contrast, no Kansas court has ever found an independent, state-law right to privacy under the Kansas Constitution Bill of Rights. See *State v. Edwards*, 48 Kan. App. 2d 264, 275, 288 P.3d 494 (2012) ("In Kansas, no court has ever construed our state constitution" to include an implicit, fundamental right to privacy.).

Similarly, before the district court's ruling in this case, no Kansas court had found a right to abortion under the Kansas Constitution Bill of Rights. At least one district court had ruled that Section 1 of the Kansas Constitution does *not* provide such a right. *State ex rel. Kline v. Sebelius*, Shawnee County Case No. 05C-1050, 2006 WL 237113, at *11-*12 (Bruns, J., filed Jan. 24, 2006). In fact, in 2006 when the Kansas Supreme Court was presented with the very same invitation and an opportunity to recognize a Kansas constitutional right to abortion that Hodes & Nauser advocate in this case, that court *specifically declined to do so*, and with good reason: well-recognized principles of Kansas law demonstrate that a Kansas constitutional right to abortion does not exist.

In *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006), the Kansas Supreme Court explicitly declined to recognize the existence of an independent right to abortion or privacy under the Kansas Constitution. *Alpha* involved a challenge to

grand-jury subpoenas that were directed to abortion providers and sought medical records. Unlike Hodes & Nauser in the instant case, the plaintiffs in *Alpha*—two abortion providers in Kansas—brought claims under *both* the United States Constitution *and* the Kansas Constitution, alleging that the subpoenas violated the rights of the providers and their patients under federal and state law.

The Kansas Supreme Court analyzed the plaintiffs' claims at length under federal constitutional law relating to privacy and abortion. 280 Kan. at 919-24; see 280 Kan. at 919 (noting the relevance of "three federal constitutional privacy interests"). Notably, 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.

In the nine years between *Alpha* and the district court's ruling in this case, no Kansas court deemed such an action to be appropriate or warranted—though not for lack of trying on abortion providers' part. In fact, the same plaintiffs here have filed at least two other pending challenges to Kansas abortion laws since 2011, in each case asserting claims only under Kansas (not federal) law and in each case arguing that the courts should recognize a new abortion right in Kansas. See *Hodes & Nauser, MDs, P.A. et al. v. Robert Moser, M.D., et al.*, Shawnee County Case No. 2011-CV-1298 (Division 7); *Hodes & Nauser, MDs, P.A. et al. v. Derek Schmidt, et al.*, Shawnee County Case No. 2013-CV-705 (Division 1).

Instead of taking the Kansas Supreme Court's language in *Alpha* at face value—that court has never found an abortion right under Kansas law—the district court read the

Alpha language as actually signaling that such a right *does* exist. [R. IV, 45.] In particular, the district court relied on the following sentence after the *Alpha* court explicitly had declined to recognize a state-law abortion right:

> 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. *But we customarily interpret its provisions to echo federal standards.* See, *e.g., State v. Morris,* 255 Kan. 964, 979–81, 880 P.2d 1244 (1994) (double jeopardy provisions of federal, Kansas constitutions "co-equal"); *State v. Schultz,* 252 Kan. 819, 824, 850 P.2d 818 (1993) (Section 15 of Kansas Constitution's Bill of Rights identical in scope to Fourth Amendment of federal Constitution); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority,* 230 Kan. 404, 426, 636 P.2d 760 (1981) (Section 1 of Kansas Constitution's Bill of Rights given same effect as Equal Protection Clause of Fourteenth Amendment of federal Constitution).

280 Kan. at 920 (emphasis added).

Based on this observation that the Kansas Supreme Court "customarily interpret[s]" the provisions of the Kansas Constitution to "echo federal standards," Hodes & Nauser argued—and the district court agreed—that the district court was "bound" to find a right to abortion under Kansas law and to define that right as coextensive with federal law. [R. IV, 45.] The district court took this position despite the fact that no Kansas court had ever recognized a right to "substantive due process" under the Kansas Constitution (the basis for the federal right articulated in *Casey*), no Kansas court had ever recognized a right to privacy (the starting point for the Court's discussion in *Roe*), and no Kansas court—including *Alpha*—had ever found a Kansas right to abortion. The position adopted by the district court is wrong for a number of reasons.

First, the notion that the language in *Alpha* "binds" courts to find an independent state-law right is logically untenable in light of the fact that *Alpha explicitly declined to recognize such a right* in that case. In essence, the district court interpreted *Alpha* to state,

"we are not going to recognize a Kansas right to abortion exists in this case, but we are advising future courts to do so." Such a position is illogical, unsupported, and irreconcilable with Kansas courts' lack of jurisdiction to issue advisory opinions. Accord *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, Syl. ¶ 11, 179 P.3d 366 (2008) ("Courts do not have the constitutional power to issue advisory opinions.").

Second, the *Alpha* court's observation that Kansas courts sometimes equate Kansas and federal constitutional provisions is a vast oversimplification of the proper analysis of rights under the Kansas Constitution. As the above discussion demonstrates, Kansas courts look to the text and history surrounding a constitutional provision's enactment before determining its scope. In cases where courts have found state and federal rights to be coextensive, Kansas courts have analyzed Kansas constitutional provisions individually, and only when the courts have determined a Kansas provision is literally or effectively identical to a federal counterpart have Kansas courts embraced federal case law as controlling for Kansas constitutional purposes. *Cf. State v. Schoonover*, 281 Kan. 453, 493, 133 P.3d 48 (2006) (including a list of federal and state provisions that have been treated similarly).

Third, a more natural reading of the court's statement in *Alpha* is not that the court was covertly signaling a future recognition of a constitutional right, but rather was indicating that the court would not provide *greater protection* in the abortion context than what was warranted under federal law. This reading is not without basis, particularly considering Hodes & Nauser's argument in this case that courts should not merely find a new right to abortion under the Kansas Constitution, but that such a new right should actually be more extensive than that provided by federal law. [See R. II, 125.] Rather

than signaling that future courts should recognize a new abortion right, it is at least as (if not more) plausible the *Alpha* court was indicating its reluctance to provide additional protection to that which already existed under federal jurisprudence.

Regardless, one thing is clear: The Kansas Supreme Court did not recognize a state-law abortion right in *Alpha*. Instead the court declined to recognize that such a right exists at all. The *Alpha* court certainly did not compare the *language* of the Kansas Constitution Bill of Rights to the Fourteenth Amendment. The *Alpha* court also did not compare the *history* of either the Kansas Constitution Bill of Rights or the Fourteenth Amendment, nor did the *Alpha* court conduct any inquiry whether the makers and adopters of the Kansas Constitution Bill of Rights *intended* to include a fundamental right to abortion. Instead, *Alpha* simply stated that the court was not accepting the plaintiffs' invitation in that case to identify a right to abortion under the Kansas Constitution.

Nothing in *Alpha* (or any other case, constitutional provision, or statute) "bound" the district court to find a right to abortion under Kansas law.

B. There is no legal or logical reason why the Kansas Constitution must provide at least as much protection for abortion rights as does the U.S. Constitution.

For all of the reasons stated above, there is no independent, state-law right to an abortion under the Kansas Constitution Bill of Rights. Courts must consider the constitution's language and the circumstances surrounding the relevant provision's enactment. When Sections 1 and 2 of the Kansas Constitution were adopted in 1859, abortion was illegal in Kansas. The Kansas Constitution contains no reference to abortion, and the Kansas Supreme Court has never recognized a state-law abortion right.

Further, the Kansas Supreme Court has stated that the same criminal abortion statutes that were in effect in 1855 as well as those in effect decades later were "for the purpose of protecting the life ... of the unborn child." *Joy v. Brown*, 173 Kan. 833, 839, 252 P.2d 869 (1953). It is simply illogical to conclude that in 1859, the Legislature and the voters intended for Sections 1 and 2 to include a right to an abortion.

In holding that there is no independent, state-law right to abortion, Kansas would not be alone. In *Mahaffey v. Attorney General*, 222 Mich. App. 325, 564 N.W.2d 104 (1997), the Michigan Court of Appeals concluded that the Michigan Constitution does not contain independent, state-law protection for abortion. In *Mahaffey*, the plaintiffs brought an action for declaratory judgment challenging Michigan's informed-consent requirements to obtain an abortion. Akin to Hodes & Nauser in this case, the *Mahaffey* plaintiffs brought their challenge solely under Michigan state law (no claims under federal law). Thus, the Michigan Court of Appeals had to determine whether there was "a right to abortion under the Michigan Constitution." 222 Mich. App. at 333.

Considering the plaintiffs' claim, the *Mahaffey* court noted "as an initial matter" that because the plaintiffs had brought only state-law claims, "the existence of a federal constitutional right to abortion [was] not necessarily relevant" to an assessment of whether the Michigan Constitution contained independent protection for abortion. 222 Mich. App. at 334. Rather:

> "[A]ppropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. ... As a matter of simple logic, because texts were written at different times by different people, the protection afforded may be greater, lesser, or the same."

222 Mich. App. at 334 (quoting *Sitz v. Dep't of State Police*, 443 Mich. 744, 761-62, 506 N.W.2d 209 (1993)).

Applying these principles, the Michigan court concluded that "neither application of traditional rules of constitutional interpretation nor examination of [Michigan] Supreme Court precedent supports the conclusion that there is a right to abortion under the Michigan Constitution." 222 Mich. App. at 334. In particular, the court noted both that the state constitution had no textual reference to abortion and that when the Michigan Constitution was adopted in 1963, "abortion was a criminal offense." 222 Mich. App. at 335. In light of this history, the court opined that "we cannot conclude that the intent of the people that adopted the 1963 constitution was to establish a constitutional right to abortion." 222 Mich. App. at 336. Instead, the court held that the Michigan Constitution did not provide independent protection for abortion.

Like the plaintiffs in *Mahaffey*, Hodes & Nauser assert *no* federal claims in this case—only claims under the Kansas Constitution. But Hodes & Nauser's strategic decision not to rely on existing federal law in asserting their claims does not create the urgency that they have professed in this case. Indeed, their decision to pursue only Kansas-law challenges does not mean that they have no possible claim under the federal Constitution, but only that they chose not to pursue any federal claims and instead asked the Kansas courts to recognize a new state-law right. In short, they have chosen deliberately to roll the dice on a previously nonexistent state-constitutional claim in the hope of enticing the Kansas courts to change longstanding Kansas law.

The vast majority of states have followed the approach our supreme court took in *Alpha* and have not taken any position on whether their state constitution provides protection for abortion rights independent of federal law. There is both logical and legal reason not to interpret state constitutions to recognize a new right in this regard: *federal*

law already recognizes a right to abortion, and creates an elaborate legal regime to govern that right.

Thus, it is unnecessary to create a state-law right. Moreover, the Kansas Constitution's text and history do not support any such claim. The district court erred in finding an independent right to abortion under Kansas law, and the temporary injunction issued based on that error of law must be vacated.

II. Even if an abortion right were to be found, the district court analyzed Hodes & Nauser's claims based on an incorrect analysis of federal case law. The test under *Casey* and *Gonzales* is whether a statute constitutes an undue burden on a woman's ability to choose whether to have an abortion, not whether a statute restricts the most common abortion procedure. Laws restricting D&E abortions are not *per se* unconstitutional.

As the above discussion demonstrates, the Kansas Constitution does not include an independent, state-law right to abortion. But even if there were such a right—a right the district court found to be coextensive with and defined by federal abortion jurisprudence—the court applied the wrong standard to assess the Act's constitutionality. In particular, the district court held that a ban on the most common *method* of second-trimester abortion *automatically* constitutes an undue burden on a woman's ability to choose whether to have an abortion. In other words, the district court equated commonality with constitutionality. That is not, however, the standard articulated in the Supreme Court's line of cases from *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), to *Gonzales v. Carhart*, 550 U.S. 124 (2007).

In granting the temporary injunction, the district court ruled that Hodes & Nauser had "established a likelihood of success on the merits of their claim that the Act imposes an impermissible burden by banning D&E procedures." [R. III, 228.] The district court explained its reasoning that Kansas could not restrict D&E abortions as follows:

> The United States Supreme Court has held that a ban on the most commonly-used method of second-trimester abortion is unconstitutional. See *Gonzales v. Carhart*, 550 U.S. 124, 147, 164-65 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976). The Act bans the most common method of second-trimester abortion, a D&E, which does not involve a separate procedure to induce fetal demise. Thus, the Supreme Court has already balanced the State interests asserted here against a ban on the most common method of second-trimester abortion and determined that it is unconstitutional.

[R. III, 228.]

In short, the district court's analysis misapplied *Casey*'s undue-burden test by holding that a prohibition on the most common method of second-trimester abortion automatically constitutes an undue burden. Rather, the proper application of the undue-burden test is to determine whether Hodes & Nauser have carried their burden to demonstrate that the alternatives to the banned abortion *method* come with such significant health risks to the mother so as to create a burden that is "undue."

A. The district court incorrectly interpreted federal abortion cases to command that any restriction on D&E abortions—the most common abortion procedure—would constitute an undue burden.

The district court in this case ruled, relying on its interpretation of federal law, that the Kansas Constitution Bill of Rights had a "fundamental right" to abortion "to the same extent as has been recognized by the United States Constitution." [R. I, 228.] Even looking beyond the faulty constitutional interpretation discussed previously, the district court's reasoning is flawed because there is no "fundamental" abortion right under federal law. "Fundamental rights" are analyzed under strict scrutiny. See *Miller v. Johnson*, 295 Kan. 636, 667, 289 P.3d 1098 (2012). The United States Supreme Court's analysis of abortion regulations, however, turns not on strict or even intermediate scrutiny, but rather on an undue-burden standard designed to respect the State's important

and profound role in voicing its respect for human life and dignity, as well as its longstanding role in regulating the medical profession.

In its landmark decision in *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court rejected the previous trimester-based abortion analysis adopted by *Roe*, finding that its previous cases had not accorded sufficient recognition to a State's "profound interest in potential life." 505 U.S. at 871. The Court explained that

> it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases.

505 U.S. at 871 (internal citations omitted). *Casey* similarly noted the State's inherent interest in regulating the abortion procedure given abortion's impact on our society:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; *for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.*

505 U.S. at 852 (emphasis added).

Thus, *Casey* did away with the trimester-based framework in *Roe*, which courts often had interpreted as requiring strict scrutiny of laws regulating abortion, and instead adopted an "undue burden" standard when evaluating abortion regulations. "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878. Under this analysis, a statute is unconstitutional if it

has the effect of placing a substantial obstacle in the path of a woman's choice of whether to have an abortion, even if furthering the State's interest in potential life or other valid state interest. 505 U.S. at 877. Regulations that express the State's profound respect for the life of the unborn child are permitted "if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877.

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. *Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.*

505 U.S. at 874 (emphasis added).

In applying the undue-burden standard in *Casey*, the Court considered—among other challenged statutory provisions—Pennsylvania's 24-hour waiting period between the provision of informed-consent materials and the performance of an abortion. While *Casey* acknowledged that the 24-hour waiting period might increase the "risk of delay" of an abortion, the Court held "a 24–hour delay does not create any *appreciable* health risk." 505 U.S. at 885 (emphasis added). Rather, *Casey* held that the 24-hour waiting period did not impose a substantial obstacle to a woman seeking an abortion, and therefore was not an undue burden, because "we cannot say that the waiting period imposes a *real health risk*." 505 U.S. at 886 (emphasis added).

The Court reaffirmed *Casey*'s holding that "a State may promote but not endanger a woman's health when it regulates the methods of abortion" in *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000). There, the 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 alternative to a second-trimester abortion and would expose 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.'").

In its analysis of the Nebraska law, the Court repeatedly emphasized that a statute's constitutionality must be evaluated in light of any "significant risks" to women's health—not whether the method prohibited was the most commonly used:

> The cited cases, reaffirmed in *Casey*, recognize that a State cannot subject women's health to *significant* health risks both in that context, and also where state regulations force women to use riskier methods of abortion. Our cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed *significant* health risks. They make clear that a risk to a woman's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely.

530 U.S. at 931 (emphasis added). Therefore, *Stenberg* held that a State cannot prohibit an abortion method that, in its absence, would require women to undergo an abortion procedure that imposes "significant health risks" for the woman. 530 U.S. at 931.

In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court's most recent decision addressing a law that prohibited one abortion *method*, the Court again underscored that the State's interest in respect for the life of the unborn child must be balanced against a woman's ability to make the abortion decision. In so doing, the Court reiterated that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman." 550 U.S. at 157.

Gonzales upheld a federal ban on partial-birth abortion. 550 U.S. at 136. In upholding the prohibition against physicians employing this particular abortion method, the Court stated that the prohibition furthered the government interest of respect for potential life. "No 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 with the abortion method at issue in the present action, 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 Court held that it was reasonable for Congress to conclude that "additional ethical and moral concerns ... justify a special prohibition." 550 U.S. at 158.

Pointedly, *Gonzales* did *not* establish a bright-line rule that a ban on the most common method of abortion *automatically* constituted an undue burden. That question was not before the Court. Instead, *Gonzales* reiterated that when construing a prohibition on an abortion method, a court is required to engage in an undue-burden analysis:

> Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Casey*, in short, struck a balance. The balance was central to its holding.

550 U.S. at 146 (citations omitted).

The *Gonzales* Court cited two important governmental interests relevant to the challenged partial-birth abortion ban. *First*, the Court stated that the partial-birth abortion ban "expresses respect for the dignity of human life." 550 U.S. at 157. The Court observed that the Congressional findings surrounding the adoption of the challenged law

described partial-birth abortion as "a brutal and inhumane procedure," and argued that allowing the abortion procedure to continue would "further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life." 550 U.S. at 157. *Second*, the Court recognized that the government has an interest in protecting the integrity and ethics of the medical profession, noting that Congress found that partial-birth abortion "confuses the medical, legal, and ethical duties of physicians to preserve and promote life." 550 U.S. at 157.

In light of the State's interest in protecting the life of the unborn child, and its interest in regulating the medical profession, the Court rejected the plaintiffs' argument in that case that *Casey* should be read to allow for "a doctor to choose the abortion method he or she might prefer." 550 U.S. at 158. Rather:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interest in regulating the medical profession in order to promote respect for life, including life of the unborn.

550 U.S. at 158. The Court further acknowledged that as medicine evolves, certain abortion methods, such as saline amniocentesis that was 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:

> The medical profession, furthermore, 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.

Gonzales, 550 U.S. at 160.

Ultimately, *Gonzales* found that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. at 163.

> This traditional rule is consistent with *Casey*, which confirms the State's interest in promoting respect for human life at all stages in the pregnancy. 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, nor should it elevate their status above other physicians in the medical community.

550 U.S. at 163. Because there was "medical uncertainty over whether the Act's prohibition [of the partial-birth abortion method] create[d] significant health risks," the *Gonzales* Court found that the plaintiffs had not proven the challenged act violated the undue-burden standard. 550 U.S. at 164.

Importantly, the Court indicated that part of its conclusion that the partial-birth abortion ban did not impose an undue burden was based on the fact that reasonable alternative abortion methods were available. For example, an abortion provider could perform a D&E abortion or could induce fetal demise before performing the partial-birth abortion. 550 U.S. at 164. The plaintiffs in *Gonzales* had argued that those procedures—including the D&E procedure at issue in this case—were less safe and riskier than a partial-birth abortion because they either added a step to the abortion (in the case of inducing fetal demise) or required multiple passes with various instruments into the uterus (in the case of a D&E abortion). 550 U.S. at 136, 161-62. The Court rejected these arguments, however:

> Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred

> procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

550 U.S. at 166-67.

As in *Gonzales*, the Act challenged here only prohibits one *method* of performing a second-trimester abortion. Federal constitutional law does not demand that a State allow "a doctor to choose the abortion method he or she might prefer." 550 U.S. at 158. "Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures;" "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice." 550 U.S. at 163.

Thus, even if Kansas courts were to incorporate federal abortion jurisprudence as the measure of a newfound Kansas abortion right, the proper constitutional analysis is whether the Act constitutes an undue burden on a woman's ability to choose whether to have an abortion, not whether the Act prohibits the most common method of abortion. A prohibition of the most common method may be a factor in considering whether there is an undue burden, but it is not the lone factor.

B. The district court's analysis in this case cannot be reconciled with federal abortion jurisprudence and must be reversed.

Under the federal undue burden standard, a court is required to weigh whether there are reasonable alternatives to dismemberment abortions, whether those alternatives pose any significant health risks to the mother, and ultimately, whether any lack of alternatives to dismemberment abortion constitute an undue burden. 550 U.S. at 166-67. The district court did not undertake this analysis. Instead, the court: (1) ruled that it was the State's burden to demonstrate the Act's constitutionality, not the converse (accord 550 U.S. at 153 (noting the "elementary rule that every reasonable construction must be

resorted to, in order to save a statute from unconstitutionality"); (2) accepted at face value Hodes & Nauser's position that the alternative methods of performing D&E abortions left available under the Act were not acceptable, even in the face of medical developments and literature in the field; and (3) ruled the Act was unconstitutional because it implicated the D&E procedures. These positions cannot be reconciled with *Gonzales* and *Casey*. Thus, the temporary injunction issued under the Court's faulty legal reasoning must be vacated.

In particular, the district court's analysis of federal abortion jurisprudence suffered from two fatal errors of law. First, the court concluded that *Gonzales* turned on the proposition that states could not enact any restriction of D&E abortions because that procedure is "the most commonly-used method of second-trimester abortion"—not that *Gonzales* noted that dismemberment abortions were an available *alternative method* to partial-birth abortions. [R. III, 228.] Second, despite countless directives by the Kansas appellate courts and the United States Supreme Court, the court made clear that it was placing the burden *on the State to prove the Act's constitutionality*. Any factual assessment is tainted by this fundamental misunderstanding and misapplication of the appropriate burden of proof.

To the first point, the Court's central holding in *Gonzales* was that the government could prohibit the partial-birth abortion (intact D&E) procedure, which Congress found inhumane. *Gonzales*, 550 U.S. at 168. This conclusion was not based on the fact that dismemberment abortions were more common than partial-birth abortions—in fact, the Court observed that "[t]here are no comprehensive statistics indicating what percentage of all D&Es are performed as [partial-birth abortions]." 550 U.S. at 137.

While the Court did observe that D&E abortions were an alternative method to the procedure banned there, 550 U.S. at 150-54, the decision cannot be read as providing dismemberment abortions total insulation from regulation. In fact, the Court noted that the medical field is ever evolving, noting that "[t]he medical profession ... may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand." 550 U.S. at 160. *Gonzales* turned on the existence of reasonable alternative methods to account for a particular restriction—not whether the restriction leaves doctors absolute discretion to perform a D&E abortion. The district court's finding to the contrary is legal error; and the court's temporary injunction hinged on that error of law.

Second, the *Gonzales* Court reached its decision in spite of the fact that there was disagreement in the medical community regarding the alternative methods. In fact, the plaintiffs in *Gonzales* argued, and there was some support in the medical field supporting their view, that the intact D&E procedure "may be the safest method of abortion." 550 U.S. at 161. Acknowledging these arguments, the Court also 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. Thus, "[t]he question becomes whether the Act can stand when this medical uncertainty persists." 550 U.S. at 163.

The Court ultimately concluded that medical uncertainty does not act as a bar to legislative action in the abortion context:

> Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

550 U.S. at 164. Thus, *Gonzales* reversed the Eighth Circuit's reasoning that "'when lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women's health by including a health exception.'" 550 U.S. at 143 (quoting *Gonzales v. Carhart*, 413 F.3d 791, 796 (8th Cir. 2005)). Instead, the Court concluded that its "precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. at 163.

In particular, the *Gonzales* Court noted that there was some medical disagreement regarding the health benefits of inducing fetal demise before performing an abortion:

> Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

Gonzales, 550 U.S. at 136. In spite of this lack of agreement, *Gonzales* noted that inducing fetal demise remained an available alternative method to performing a partial-birth abortion on a living unborn child. 550 U.S. at 164 ("If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.").

Applying these principles here, it is clear that the district court's grant of the temporary injunction in this case cannot be reconciled with Supreme Court case law. Rather, a proper application of the undue-burden test requires a court to determine whether Hodes & Nauser carried their burden to show that the acknowledged alternatives

that exist to dismemberment abortions performed while the fetus is alive come with such significant health risks to the mother so as to create a burden that is "undue."

There was evidence before the district court that safe alternatives to dismemberment abortion exist. Some doctors 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 time frame required to induce fetal demise by way of a potassium chloride injection. Performing a UCT during the course of a dismemberment abortion adds approximately three 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 constitutes such a significant health risk to the mother so as to create an undue burden. There was no evidence presented to the district court that performing a UCT, and the addition of approximately three minutes to the abortion procedure, is such a significant health risk that it creates an undue burden. Hodes & Nauser offered no evidence that they cannot induce fetal demise prior to second-trimester abortions. It is undisputed that Hodes & Nauser, in their practice, simply choose not to induce fetal demise before performing D&E abortions. [R. I, 30 (¶ 19).] And there was no evidence that medication-induction abortion created a significant health risk to the mother, or that any increased time and expense of a medication-induction abortion created a burden that was "undue."

The district court's finding that a temporary injunction was warranted in this case is akin to the Eighth Circuit's decision that the Court reversed in *Gonzales* that, when faced with medical disagreement, the State's regulations must yield to the preferences of abortion providers. That is not the law, however. Rather, states are free to enact reasonable abortion regulations even in the face of medical uncertainty, and in such instances, the presumption of a statute's constitutionality will prevail unless a court is presented with overwhelming evidence to the contrary.

The district court's ruling in this case also unabashedly disregarded Kansas law that "[t]he constitutionality of a statute is presumed, and all doubts must be resolved in favor of its validity." *Bair v. Peck*, 248 Kan. 824, Syl. ¶ 1, 811 P.2d 1176 (1991). Instead, the court relied on language from *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221 (1978), and ruled that in the case of "fundamental rights," the "burden of proof to justify the classification falls upon the state." [R. IV, 44.]

This reasoning is wrong for a number of reasons. First, this language in *Liggett* is used in the context of discussing strict-scrutiny analysis under the Equal Protection Clause, when a legislative classification involves a suspect class and a state must come forward to show the law is narrowly tailored to further a compelling government interest. 223 Kan. at 617. (Though irrelevant to this discussion, *Liggett* ended up employing a rational-basis standard, not strict scrutiny.) The questions before the district court in this case, however, did not involve the Equal Protection Clause, or strict scrutiny, or fundamental rights. Rather, the question here is the constitutionality—under the Kansas Constitution Bill of Rights—of the Act's restriction on dismemberment abortions.

Second, the district court's analysis is directly contrary to the Court's decision in *Gonzales*, which specifically relied on the "elementary rule that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales*, 550 U.S. at 153. The district court's rejection of this principle is particularly grave here because it irrevocably colors any balancing the court may have performed regarding the available safe alternatives to the procedure prohibited by the Act. Indeed, *Gonzales* noted that the existence of medical uncertainty does not render an Act unconstitutional.

There was evidence before the district court that the medical profession has, in fact, found "different and less shocking methods" of safely performing second-trimester abortions without using dismemberment abortion. Hodes & Nauser choose not to use those alternative methods. However, as set forth in *Gonzales*, physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. Even if there is medical uncertainty regarding "marginal safety, including the balance of risks" between abortion methods, it is within the legislature's prerogative to impose reasonable regulations regarding one abortion method instead of another. *Gonzales*, 550 U.S. at 166-67. The district court's errors of law cannot stand, and the temporary injunction must be vacated.

CONCLUSION

It is a fundamental tenet of Kansas law that a challenged statute "comes before the court cloaked in a presumption of constitutionality." *Leiker v. Gafford*, 245 Kan. 325, 363-64, 778 P.2d 823 (1989). Indeed, 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). "Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt." *State ex rel. Schneider v. Kennedy*, 225 Kan. 13, 20, 587 P.2d 844 (1978). The burden on the party attacking the statute is "a 'weighty' one." *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 192, 273 P.3d 709 (2012). In short, "[c]ourts are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments." *Miller*, 295 Kan. at 646.

The district court's analysis in granting the temporary injunction in this case turned this fundamental axiom on its head:

- Instead of analyzing the Act with a presumption of constitutionality, the court ruled that the State had to prove the Act's validity.

- Rather than apply well-established principles of constitutional interpretation or examine Kansas history and case law, the court found that one sentence in *Alpha* (unrelated to the court's holding in that case) signaled a command to the lower courts to recognize a "fundamental right to abortion" under the Kansas Constitution.

- Despite the directive in *Casey* and its progeny that the undue-burden standard applies when evaluating abortion legislation, the court did not apply that standard, but instead invalidated the Act merely because it imposed a restriction on D&E abortions.

- Despite clear language in *Gonzales* and *Casey* that the State may enact reasonable abortion regulations even in the face of medical uncertainty, the court found that the abortion providers' disagreement with some medical literature was sufficient to invalidate the Act.

These errors of law require the reversal of the district court's ruling. The temporary injunction must be vacated.

Respectfully submitted,

THOMPSON RAMSDELL QUALSETH & WARNER, P.A.

/s/ Shon D. Qualseth

Stephen R. McAllister #15845
Solicitor General of Kansas
Shon D. Qualseth #18369
Sarah E. Warner #22788
333 West 9th Street
P.O. Box 1264
Lawrence, Kansas 66044-2803
Phone: (785) 841-4554
Fax: (785) 841-4499
steve.mcallister@trqlaw.com
shon.qualseth@trqlaw.com
sarah.warner@trqlaw.com

OFFICE OF KANSAS ATTORNEY GENERAL
DEREK SCHMIDT

/s/ Jeffrey A. Chanay

Jeffrey A. Chanay #12056
Chief Deputy Attorney General
Dennis D. Depew #11605
Deputy Attorney General, Civil Litigation Division
Memorial Building 3rd Floor
120 SW Tenth Avenue
Topeka, KS 66612-1597
Phone: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov
dennis.depew@ag.ks.gov

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by electronic mail, according to previous agreement of the parties, on October 5, 2015, addressed to:

Robert V. Eye
Brett A. Jarmer
Robert V. Eye Law Office, LLC
123 SE 6th Avenue, Suite 200
Topeka, KS 66603
bob@kauffmaneye.com
brett@kauffmaneye.com

Janet Crepps
Genevieve Scott
Zoe Levine
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
jcrepps@reprorights.org
gscott@reprorights.org
zlevine@reprorights.org

Erin Thompson
Thompson Law Firm, LLC
106 E. 2nd Street
Wichita, KS 67202
ethompson@tslawfirm.com

Teresa A. Woody
The Woody Law Firm PC
1621 Baltimore Avenue
Kansas City, MO 64108
teresa@woodylawfirm.com

/s/ Shon D. Qualseth
Shon D. Qualseth