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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.

REPLY 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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This case is about the Kansas Constitution, but only because Hodes & Nauser have adopted a deliberate strategy to force an unnecessary decision on a controversial issue under Kansas law. There is no need for such a decision by the Kansas courts—because federal law already recognizes a right to abortion—and Plaintiffs effectively seek to duplicate that federal right under Kansas law.

Plain and simple, Hodes & Nauser are asking the Kansas courts to read into the Kansas Constitution a right to abortion, a right never recognized under Kansas law. Recognizing such a right would fly in the face of Kansas history and tradition, would contradict numerous Kansas cases and statutes (both past and present), and finds no support in the *text* of the Kansas Constitution.

I. No Kansas court has found that the Kansas Constitution includes a right of substantive due process, much less a state constitutional right to abortion.

The Kansas Constitution contains no reference to abortion, or to any substantive due process right akin to such rights recognized under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Hodes & Nauser acknowledge this indisputable reality. Appellees' Brief, at 14 (citing article that states the language of Section 1 "'has no parallel in the 14th Amendment.'"). Under settled Kansas law, such a complete absence of textual authority in the Kansas Constitution normally ends the constitutional analysis, and no new "right" will be recognized. Accord *State ex rel. Schneider v. Kennedy*, 225 Kan. 13, 21, 587 P.2d 844 (1978).

Yet despite the lack of any reference to abortion in the state's charter, Hodes & Nauser ask this Court to find an "implied" right to abortion, arguing, without authority, that this proposed protection should be construed as broad and evolving—potentially

even more extensive than the federal abortion right.[1] This radical position finds no support in Kansas case law. In fact, Kansas courts have held that Sections 1 and 2 are *not* intended to provide the broad, evolving rights Plaintiffs are advocating, and have held that the Kansas Constitution's reference to "liberty" must be given a much narrower construction than the Fourteenth Amendment's Due Process Clause.

The earliest decision where the Kansas Supreme Court analyzed Section 1 of the Kansas Constitution Bill of Rights in detail appears to be *Schaake v. Dolley*, 85 Kan. 598, 118 Pac. 80 (1911). There, the court considered a challenge to a state banking board's decision to limit the number of bank charters issued in Abilene. The challenger claimed that the denial of the bank charter violated the due process and equal protection guarantees of the Fourteenth Amendment, and also "that the right to engage in banking is a common-law right pertaining equally to every citizen, which the Legislature cannot, under the state Constitution, take away." 85 Kan. at 599-600.

The Kansas Supreme Court considered Section 1 of the Kansas Bill of Rights at length and concluded that its reference to "liberty" did not provide *substantive* protection against rational regulation by the State:

> [T]he only provision of that instrument pertinent to the present discussion is section 1 of the Bill of Rights, which reads as follows:
>
> > "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."
>
> The right ... has never been regarded as absolute by either the English or the American law. While it is properly spoken of as fundamental and inalienable, it is nevertheless qualified to the extent that the sovereign power may interfere with its

[1] At times, Hodes & Nauser appear to advocate for a higher legal standard than the district court adopted. See Appellees' Brief, at 21-22 (strict scrutiny). Because Plaintiffs did not cross-appeal, such issues are not before this Court. *Cooke v. Gillespie*, 285 Kan. 748, 754-55, 176 P.3d 144 (2008). Yet even if the Court were to reach that issue, for the reasons set forth herein, that position finds no support in Kansas law.

> enjoyment through regulations necessary or proper for the mutual good of all the members of the social whole. ... The power to do this is legislative power, and it must necessarily be adequate to meet the need for which it is instituted. *The result is that the declaration of the Bill of Rights, quoted above, is not a prohibition against just restrictions upon the enjoyment of liberty and the pursuit of happiness, in the interest of the public good. It is a political maxim addressed to the wisdom of the Legislature, and not a limitation upon its power.* It ... lacks the definiteness, certainty, and precision of a rule, like the command of the Bill of Rights respecting slavery, or religious freedom, or bail, or trial by jury, and consequently cannot, as those provisions do, furnish a basis for the judicial determination of specific controversies.

85 Kan. at 600-01 (emphasis added). The Kansas Supreme Court, 85 Kan. at 601, readily concluded that Section 1 did not provide a basis for striking down the law:

> To decide that the act in question violates the quoted section of the Bill of Rights would be merely to substitute the court's opinion as to the manner in which a recognized doctrine of political science should be given practical effect for the deliberate judgment of the Legislature upon the subject. This the court is not authorized to do.

As recently as 2006, a Kansas district court relied on *Schaake* to conclude that Section 1 does not provide an independent "substantive" due process claim. *State ex rel. Kline v. Sebelius*, 05C-1050, 2006 WL 237113 (Bruns, J., Jan. 24, 2006). Plaintiffs try to downplay these decisions, arguing that Kansas courts sometimes comment that Sections 1 and 2 have "much the same effect" as the Fourteenth Amendment. Appellees' Brief, at 19 (quoting *State ex rel. Tomasic v. Kan. City, Kan., Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981)). Their argument misses the mark.

First, "much the same effect" is not the same as an "identical construction." It is clear that the provisions of the Kansas Constitution are not automatically given a construction identical to the Fourteenth Amendment. If that were the case, there would have been no need for the Kansas Supreme Court in *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364 (2006), to decline to recognize an abortion right under the

Kansas Constitution. Instead, under Plaintiffs' view, recognition of state law "rights" apparently would be an *automatic* process requiring States to recognize as a matter of state law whatever the United States Supreme Court recognizes as a federal right under the Fourteenth Amendment. That view is not—and has never been—Kansas law, nor is it correct as a matter of federal constitutional law and federalism.

Second, no Kansas case has ever held that the Kansas Constitution includes a state-law equivalent of federal substantive due process rights. In fact, while some Kansas cases make passing reference to "due process" under Sections 1 and 2, the overwhelming majority of those decisions actually turned on questions of *equal protection*, a very different constitutional protection and concept. See, *e.g.*, *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987); *Henry v. Bauder*, 213 Kan. 751, 752-53, 518 P.2d 362 (1974); *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 759-60, 408 P.2d 877 (1965); *Winters v. Myers*, 92 Kan. 414, 421, 140 Pac. 1033 (1914). And several such references were made where the case did not turn on due process *or* equal protection. Such references are the paradigm of "dicta." See *Cent. Kan. Power Co. v. State Corp. Comm'n*, 181 Kan. 817, 828, 316 P.2d 227 (1957) (Contract Clause); *Wichita Railroad & Light Co. v. Court of Ind. Relations*, 113 Kan. 217, 229, 214 Pac. 797 (1923) (same); *Chamberlain v. Missouri Pac. Railway Co.*, 107 Kan. 341, 344, 191 Pac. 261 (1920) (Takings Clause).

In stark contrast to a substantive due process claim such as the one Plaintiffs assert here, it is no surprise that Kansas courts have held that Sections 1 and 2 provide an *equal protection* right coextensive with the federal right. Indeed, *both* Sections 1 and 2 contain *express* references to equal rights or protection. Kan. Const. Bill of Rights, § 1 ("All men are possessed of *equal* and inalienable rights …") (emphasis added); § 2 ("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.") (emphasis added). These provisions were adopted in 1859 when Kansas decided to enter the Union as a free state. The plain language of Sections 1 and 2, as well as the history surrounding their adoption (on the eve of the Civil War and with the issue of slavery front and center), demonstrate those provisions were intended to guarantee equal protection under the law.

The same is not remotely true, however, for "substantive" due process. In sharp contrast to the explicit guarantees of equal protection, the Kansas Constitution does not contain any provision that uses the words "due process." Accordingly, no Kansas court has ever held that either Section 1 or Section 2 creates a "substantive due process" right. Notably, more recent Kansas "due process" decisions do not invoke either of these sections, but instead look to Section 18's "due course of law" clause, a provision that has an entirely different history and purpose than the Fourteenth Amendment's Due Process Clause and for which there is no counterpart in the U.S. Constitution. See, *e.g.*, *Miller v. Johnson*, 295 Kan. 636, 646, 289 P.3d 1098 (2012).

In fact, the State defendants were able to find only one decision where a Kansas court specifically considered the reference in Section 1 to "liberty." In *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917), the defendant challenged his conviction for illegal use of trade stamps, in part, by claiming the criminal prohibition violated the state and federal constitutions. 101 Kan. at 794-95. Instead of taking the robotic position Hodes & Nauser advocate in this case (*i.e.*, that Sections 1 and 2 provide the same protection as the Fourteenth Amendment), the Kansas Supreme Court took the opposite view. In particular, the court observed that while *Winters* (Kan. 1914, cited above) found a

similarity between state and federal law for *equal protection* purposes, the Kansas Constitution provided narrower (*i.e.* less) protection than federal law in other contexts:

> If ... any distinction is to be made between the scope of the mandate which forbids a state to deprive an individual of his liberty without due process of law [the Fourteenth Amendment], and that which declares liberty to be a natural right [Section 1 of the Kansas Constitution Bill of Rights], *the latter should doubtless be confined to a narrower field, since the privileges which it protects are described as inalienable, and must therefore be not only fundamental, but such as could not be abrogated by the people themselves in framing a government.*

101 Kan. at 796 (emphasis added).

Because the *Wilson* court ultimately found that the law did not violate the federal Constitution, it had no need to consider the issue under the Kansas Constitution. But *Wilson*'s interpretation of Section 1's reference to "liberty" is consistent with the court's previous holding in *Schaake*: Section 1 was never intended to be a restriction on otherwise permissible government regulation.

Thus, contrary to Plaintiffs' arguments and the district court's finding here, neither the plain language of Sections 1 and 2 nor century-old Kansas case law lends any support to Plaintiffs' claim in this case. Instead, Kansas law is clear that those provisions were never intended to authorize Kansas courts to create evolving, amorphous rights. Kansans, being populist by tradition, intended to leave such policy questions to the "deliberate judgment of the Legislature." *Schaake*, 85 Kan. at 601.

II. Kansas history underscores that Kansans never intended the people's Kansas Constitution to include a right to abortion.

In spite of the lack of *any* textual support for a right to abortion in the language of the Kansas Constitution, and in spite of the lack of *any* Kansas case law interpreting that charter to recognize such a right, Hodes & Nauser argue this Court should find such a right because Kansas historically has provided broader rights for women in general than

some States, and because "We know much more now than in 1859" about abortion and women's rights. Appellees' Brief, at 16.

These arguments are without merit in this case because they conflate women's equality as a general matter with state regulation of abortion in particular—a purported connection that finds no support in Kansas history or reason. Further, Hodes & Nauser conveniently ignore the ability of Kansans to amend the state constitution in the event Kansans wished to provide a right not previously recognized, something Kansans have in fact done over the years since 1859. Perhaps most fundamentally, Plaintiffs' historical arguments fail utterly because abortion was *illegal* in Kansas until the Supreme Court's decision in *Roe v. Wade* in 1973 preempted Kansas law.

The State defendants agree with Plaintiffs that in many respects Kansas has a proud history of recognizing women's rights and providing women the opportunity to participate equally in government and society. When the Kansas Constitution was originally drafted in 1859, it included provisions protecting the property rights of married women (as well as child custody rights). See Kan. Const. art. 15, §§ 6, 9. From the very beginning of Kansas's statehood, women were able to vote in school board elections. In 1886, the people of Kansas amended the Kansas Constitution to allow women to vote in municipal elections. In 1912, the Kansas Constitution was amended again, this time to provide women full and equal voting rights, several years before such rights were recognized under federal law. Kansas Historical Society, *Women's Suffrage*, *available at* https://www.kshs.org/kansapedia/women-s-suffrage/14524.

This history, however, by no means indicates that Kansans intended to adopt a right to abortion under that same Kansas Constitution. Indeed, Kansans of the 19th and

most of the 20th centuries would have been shocked by such a proposition. Although those Kansans amended the constitution to recognize voting rights for women, *abortion was—and remained—illegal.* See Appellants' Brief, at 20-22. And even after the recognition of a federal abortion right, the Kansas Legislature on multiple occasions has noted that "[n]othing" in Kansas law "shall be construed as creating or recognizing a right to abortion." See K.S.A. 65-4a11; K.S.A. 65-6715; K.S.A. 65-6748.

Moreover, each time the people of Kansas wished to grant greater protections to women under the state constitution, that charter was specifically amended. In fact, Kansans have amended the Kansas Constitution dozens of times over the course of statehood. In recent years, Kansans have amended their constitution to include provisions on taxation of personal watercraft and protection for raffles conducted by charitable organizations. See Kan. Const. art. 11, § 1; Kan. Const. art. 15, § 3d. Since *Roe v. Wade* was decided in 1973, Kansas has amended its constitution 29 times, which on average is more than once in every election cycle for more than 40 years. Yet Kansans have *never* amended the Kansas Constitution to include a state-law right to abortion, nor even put such a proposal on the ballot.

The premise of Plaintiffs' historical argument (regulation of abortion necessarily equals discrimination against women) also misses the mark. The United States Supreme Court has made clear that opposition to abortion is not gender-motivated, and regulation of abortion is not viewed constitutionally as discrimination against women as a class:

> [O]pposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that

> men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations.

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993). There is no support in Kansas history for a right to abortion under Kansas law.

III. Decisions of courts in other states interpreting their constitutional provisions have no bearing on ascertaining the intent of the Kansans who adopted the Kansas Constitution.

Ultimately, Hodes & Nauser's primary argument supporting their invitation to the Kansas courts to plow new ground by creating a Kansas abortion right is that, because some courts in other states have interpreted their own state constitutions to provide protection for abortion, Kansas should follow suit.

But what other courts may do when interpreting their own state constitutions is irrelevant: The Kansas Supreme Court long and repeatedly has held that the Kansas Constitution is to be interpreted by focusing on its language and history in order to give effect to the intent of its framers. See *State ex rel. Stephan v. Finney*, 254 Kan. 632, 654, 867 P.2d 1034 (1994). This Court is "duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its earlier position." *State v. Waggoner*, 51 Kan. App. 2d 144, 158, 343 P.3d 530 (2015). The Kansas Supreme Court has given *no* indication that it is departing—or ever intends to depart—from its well-established approach to constitutional interpretation.

Nevertheless, Plaintiffs rely heavily on roughly a dozen states around the country that have decided, based on their own constitutional language, history, and analysis, that their constitutions provide protection for abortion. Those cases simply provide no insight into interpreting the Kansas Constitution.

- As one example, a number of the states referenced in Plaintiffs' brief have constitutions with provisions specifically addressing a "right to privacy." See, *e.g.*, Alaska, *Valley Hospital Ass'n v. Mat-Su Coalition For Choice*, 948 P.2d 963 (Alaska 1997); California, *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 66 Cal. Rptr. 2d 210 (Cal. 1997); Florida, *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003); and Montana, *Armstrong v. State*, 989 P.2d 364 (Mont. 1999).

- Other states, such as Missouri and Ohio, merely followed federal law without any analysis as to whether their state constitutions actually provided identical protection. See *Reproductive Health Services of Planned Parenthood of the St. Louis Region v. Nixon*, 185 S.W.3d 685 (Mo. 2006); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993).[2] And in the case of Ohio, that state's highest court has since held that Section 1 of the Ohio Constitution "is not an independent source of [judicially enforceable] self-executing protections. Rather, it is a statement of fundamental ideas upon which a limited government is created." *State v. Williams*, 728 N.E.2d 342, 354 (Ohio 2000).

Of course, the vast majority of states have not considered the question at all because such a determination is unnecessary. Federal law provides protection for abortion under *Casey* and its progeny; any law passed by a state legislature is already subject to that analysis. But the fact that States cannot refuse to apply federal constitutional jurisprudence (by virtue of the Supremacy Clause of Article VI of the U.S. Constitution) by no means changes the indisputable principle that "state constitutions also can provide

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[2] Plaintiffs cite *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993), arguing that "the Kansas Constitution was modeled on the Ohio Constitution," and that "a provision of the Ohio Constitution that is identical to Section 1 encompasses a woman's right to obtain an abortion." Appellees' Brief, at 27. This argument is incorrect in at least two respects. *First*, although some provisions of the Kansas Constitution relate to the Ohio Constitution, Section 1 was based on the federal Declaration of Independence, not the Ohio charter. See Drapier, *Proceedings and Debates of the Kansas Constitutional Convention,* 283 (1859) ("These terms, Mr. President, are fixed in the minds of the American people—they have become traditional. … our national Declaration of Independence is of this class of truth. That Declaration of Rights forms a part of our national creed."). *Second*, the Ohio Constitution contains different—and broader—language than Section 1 of the Kansas Bill of Rights. Ohio Const. art. 1, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."); Kan. Const. Bill of Rights, § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."). *Preterm Cleveland* thus is based on much broader constitutional language.

less protection of a particular right than the Federal Constitution provides." Stephen R. McAllister, *Individual Rights Under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 U. Kan. L. Rev. 867, 876 (2011); see also 59 U. Kan. L. Rev. at 877-78 (specifically discussing abortion).

Regardless of what other states may have done, Kansas courts have indicated that they respect the will of the Kansas people as expressed in their constitution. To ensure that respect is given the people's constitution, the Kansas courts interpret the Kansas Constitution using a textual and historical approach. Nothing in the language of the Kansas Constitution or in Kansas history indicates that the people intended to join a minority of the States in creating a right to abortion under state law.

IV. Plaintiffs' remaining allegations are without merit.

At bottom, this case is resolved by a pure question of law: does the Kansas Constitution include a right to abortion? The answer is resoundingly "No," and thus Hodes & Nauser's claims fail as a matter of law. Nevertheless, the State defendants respond briefly to misstatements and incorrect inferences in Plaintiffs' brief.

First, Plaintiffs imply the Act is somehow questionable because the State *already* regulates some aspects of abortion. See Appellees' Brief, at 6-7 (arguing that the ability to maintain an abortion practice is "already impacted by numerous restrictions" and stating, without explanation, that "the Act will compound the burdens these restrictions already impose"). What Hodes & Nauser fail to acknowledge, however, is that the regulations they describe as "burdens" have been upheld by the courts. For example, the State may prohibit abortions after viability. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 879 (1992). The government may ban partial-birth abortions, even

in the absence of a health exception. *Gonzales v. Carhart*, 550 U.S. 124, 163-65 (2007). The State may require that women receive informed-consent materials at least 24 hours before undergoing an abortion. *Casey*, 505 U.S. at 885-86. And the government—state or federal—is not required to provide funding for abortion by way of Medicaid. *Maher v. Roe,* 432 U.S. 464, 480 (1977); *Harris v. McRae,* 448 U.S. 297, 326-27 (1980). Any attempt to imply that these constitutional exercises of legislative prerogative in any way limit the State's ability to further voice its profound respect for life and human dignity through prohibiting a dismemberment abortion on a live unborn child is misplaced.

Second, Plaintiffs ask the Court to disregard the studies and journal articles the State defendants cite to illustrate that numerous abortion providers already choose to induce fetal demise before performing a dismemberment abortion (i.e., such physicians would be in compliance with the Act). Instead, Plaintiffs urge that this medical literature be disregarded, purportedly because the district court found "'the Defendants did not dispute … the facts outlined in the Plaintiffs' Memorandum in support of [their] motion' for a temporary injunction." Appellees' Brief, at 4 (quoting R. III, 223). Even a cursory review of the record demonstrates that this statement is inaccurate.

Both in the Response to the Motion for Temporary Injunction and before this Court, the State defendants have cited numerous medical studies and journals to contradict Plaintiffs' assertions. Indeed, Plaintiffs' argument is belied by the bulk of their brief—pages 4-12 and 28-40—which extensively argues their version of the medical "facts" in response to the medical literature the State defendants presented. (The two amicus briefs filed by the Kansas Physicians and the American College of Obstetricians

and Gynecologists seek to bolster Hodes & Nauser's arguments by presenting *different* and *new* factual allegations never submitted to the district court and never litigated.)

The most fundamental problem with the district court's assessment of the facts is that it disregarded entirely the Act's presumption of constitutionality. Rather than "presum[ing]" the Act to be "constitutional" and "resolv[ing]" "all doubts … in favor of its validity," *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629-30, 176 P.3d 938 (2008), the district court found the "burden of proof to justify [the Act] falls upon the state." [R. IV, 44 (improperly relying on *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221 (1978)); see Appellants' Brief, at 43-44.] When a district court applies an incorrect legal standard, its analysis of the facts cannot be given any deference. See, *e.g.*, *Wiles v. Am. Family Life Assur. Co. of Columbus*, __ Kan. __, 350 P.3d 1071, 1082 (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").

There is no question here that the district court applied the wrong standard in assessing the parties' factual arguments, nor is there any question this incorrect standard played a role in the court's analysis. During oral argument, the district court relied on its misreading of *Liggett* to place the burden of justifying the Act on the State multiple times. [See R. IV, 19, 20, 43-44.] In its written Order, the court relied on *Liggett* again

when it made the same error: "this Court cannot presume that the Act is constitutional, but must instead subject it to active and critical analysis." [R. III, 227.] Ultimately, there is no basis in the law or the record to support the district court's assertion that "the Defendants did not dispute" Plaintiffs' version of the facts. [R. III, 223.]

As this Court well knows, it generally does not sit to reevaluate facts determined by a trial court or a jury. Here, the district court committed errors of law and purported to find facts that were never tested by the adversary process. Were this Court to find a Kansas constitutional right to abortion, the Court should (1) articulate the legal standard applicable to such a right (*e.g.*, is it "undue burden" or something else?), (2) reverse the district court's ultimate ruling on the merits, and (3) remand the case for discovery and further litigation in which all factual assertions made at this stage can be tested by the usual adversary process under the correct legal standard. Accord *Garcia*, 295 Kan. at 64.

Third, Hodes & Nauser's argument that *all methods* of performing D&E abortions are necessarily immune for all time from government regulation cannot be squared with the federal law upon which they necessarily rely. Putting aside for the moment Plaintiffs' complete failure to offer any evidence showing what proportion of D&E abortions—or even abortions generally—they perform using the particular method the Kansas Act prohibits (and thus what proportion of the abortions Plaintiffs perform could be affected by the Act's requirements *at all*), the U.S. Supreme Court has soundly rejected their legal contention. See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007). Federal abortion jurisprudence does not freeze or immunize any procedure indefinitely. "The 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.

CONCLUSION

If Hodes & Nauser truly believe that the Kansas Unborn Child Protection from Dismemberment Abortion Act imposes an "undue burden" on the right to abortion, they easily and readily could have brought a federal claim—a claim that would be based on 42 years of federal case law since the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). Indeed, Plaintiffs assert that "the United States Supreme Court effectively already has resolved the precise issue before this Court." Appellees' Brief, at 1. Plaintiffs' assertion begs fundamental questions this Court might well be asking itself as it prepares for the oral argument in this case: Why did Plaintiffs file a lawsuit relying *solely* on an unrecognized Kansas constitutional right and not instead (1) pursue federal claims or, at a minimum, (2) assert *both* federal and state law claims? Honestly, why do Hodes & Nauser so assiduously *avoid* asserting potentially meritorious (in the Plaintiffs' view) federal claims, and instead argue *only* that Kansas courts should *discover* a new Kansas law right to abortion (not recognized in over 150 years) that effectively mirrors and parrots existing federal law?

The only plausible answer is that this case is not so much about precluding application of the Act to Hodes & Nauser on the facts presented here as it is about inviting Kansas courts to take on a long rejected activist role: to change the people's Constitution of the past 150 years in order to recognize "rights" that Plaintiffs may deem politically or morally expedient, but which an overwhelming majority of Kansans do not support. This Court should decline Plaintiffs' invitation. Under longstanding traditional constitutional analysis employed by the Kansas courts, the Kansas Constitution does not include a right to abortion. Thus, as a matter of law Plaintiffs cannot succeed on their novel claim. The district court must be reversed and the temporary injunction vacated.

Respectfully submitted,

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