IN THE SUPREME COURT
OF THE STATE OF KANSAS

HODES & NAUSER, MDS, P.A.;
HERBERT C. HODES, M.D.; and
TRACI LYNN NAUSER, M.D.,

Plaintiffs/Appellees,

v.

DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; and STEPHEN M. HOWE, in his official capacity as District Attorney for Johnson County,

Defendants/Appellants.

Appellate Case No. 114,153

APPELLANTS' MOTION TO TRANSFER TO THE SUPREME COURT UNDER K.S.A. 20-3017 AND RULE 8.02

This appeal presents an important issue of first impression in this state:

> **Does the Kansas Constitution Bill of Rights include a right to obtain an abortion?**

The district court here made a ground-breaking ruling that the Kansas Constitution includes a "fundamental right to abortion"—a right that incorporates federal law but is distinct from the federal right recognized under the Fourteenth Amendment to the United States Constitution. The district court further enjoined a newly enacted Kansas statute as unconstitutional in light of this freshly recognized Kansas constitutional right. Ordinarily, such a ruling would result in this Court exercising original appellate jurisdiction over this case under K.S.A. 60-2101(b). But because this appeal arises from a *temporary* injunction—not a *final* judgment—the case is now pending before the Court of Appeals.

This Court is charged with interpreting the Kansas Constitution. For the reasons explained in this motion, the State requests that this Court transfer the appeal from the Court of Appeals to this Court under K.S.A. 20-3017 and Rule 8.02.

NATURE OF THE CASE & APPELLATE JURISDICTION

This case presents challenges by an abortion facility and its two physicians ("Hodes & Nauser") to Senate Bill 95 (Kan. 2015), the Kansas Unborn Child Protection from Dismemberment Abortion Act ("the Act"). Hodes & Nauser did not present any federal claims in their Petition, but instead asserted claims only under Kansas state law and the Kansas Constitution.

The Act concerns "dismemberment abortions," which are defined as:

> 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.

S.B. 95, § 2(b)(1) (Kan. 2015). The Act was passed by overwhelming majorities in both chambers, signed by the Governor, and was scheduled to go into effect on July 1, 2015.

The dismemberment abortion procedure is commonly referred to in the medical context as a dilation-and-evacuation ("D & E") abortion. The Act prohibits dismemberment abortions when performed while the unborn child is still alive, except when the procedure is necessary to preserve the life of the pregnant woman or when the continuance of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the woman. S.B. 95, § 3(a). To comply with the Act, Hodes & Nauser must either induce the death of the unborn child before performing

the dismemberment procedure (through one of various means) or perform a medication-induction abortion.

Hodes & Nauser filed a Petition challenging the Act and requesting a temporary injunction to enjoin enforcement of the Act during the pendency of the lawsuit. In their Motion for Temporary Injunction, Hodes & Nauser acknowledged that no Kansas court had ever held that the Kansas Constitution provides separate protection for abortion, but nevertheless asked the district court to find (1) that Sections 1 and 2 of the Kansas Constitution Bill of Rights provide such protection; (2) that the alleged state-law right tracks precisely the federal right identified and defined by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and its progeny; and (3) that such federal constitutional jurisprudence bars any government prohibition of D & E abortions.

In opposing the Motion for Temporary Injunction, the State relied on the language and history of Sections 1 and 2 to argue that there is no independent, state-law right to abortion under the Kansas Constitution. The State also argued that federal constitutional jurisprudence allows the State to voice its profound respect for life and human dignity—and 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.

After a hearing on June 25, 2015, the district court granted Hodes & Nauser's Motion for Temporary Injunction from the bench. The trial court found—for the first time in Kansas history—that Sections 1 and 2 of the Kansas Constitution Bill of Rights include an independent, "fundamental right to abortion," separate from the federal right

but defined by the federal jurisprudence from *Casey* to *Gonzales v. Carhart*, 550 U.S. 124 (2007). The district court further held that the Act "imposes an impermissible burden by banning D & E procedures," ruling that the United States Supreme Court's decision in *Gonzales* established a bright-line rule against any restriction on D & E abortions. The district court directed Hodes & Nauser to draft a Journal Entry memorializing its decision and signed the "Order Granting Temporary Injunction" on June 30, 2015.

The State filed its Notice of Appeal on July 1, 2015, and docketed its appeal under K.S.A. 60-2102(a)(2) on July 22, 2015. This Motion to Transfer is therefore timely under K.S.A. 20-3017 (parties may file motion to transfer to the supreme court within 30 days of service of the notice of appeal). This court has jurisdiction under K.S.A. 60-2101(b) (supreme court may review any case appealed to the court of appeals); K.S.A. 20-3016 and K.S.A. 20-3017 (supreme court may transfer cases pending before the court of appeals for its immediate and final review); and K.S.A. 60-2102(a)(2) (parties may appeal as of right from any order granting an injunction).

TRANSFER TO THE KANSAS SUPREME COURT IS APPROPRIATE FOR SEVERAL REASONS

This case warrants this Court's transfer and immediate review for several significant and persuasive reasons. In particular:

1. Laws regulating abortion are of considerable public interest.

Since at least 1973, when *Roe v. Wade*, 410 U.S. 113 (1973), was decided, the subject matter of abortion has been of significant public interest and provoked significant public debate. As the Court explained in *Casey*, 505 U.S. at 852:

> 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.

Likewise, the particular law challenged in this case—a law prohibiting dismemberment abortions on live unborn children except in the case of a medical emergency—is of significant import. This law is the first of its kind across the United States; a similar law is slated to take effect in Oklahoma in November. 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.)) One Kansas senator, joined by 10 others, explained that he voted in favor of the Act because "To destroy an unborn child by employing the barbaric and immoral practice of dismemberment is deplorable." Senators also described dismemberment abortion as "a brutal and inhumane procedure." (Explanation of Vote, Senate Journal, 29th day, at 141 (Feb. 20, 2015).)

2. The issue on appeal—whether the Kansas Constitution provides a state-law right to abortion—is also of major public significance.

Over the past 40 years, the United States Supreme Court has developed a federal abortion jurisprudence, a jurisprudence that currently uses an "undue burden" test to define a woman's right to choose an abortion without certain governmental regulation. See *Roe v. Wade*, 410 U.S. 113 (1973); *Casey*, 505 U.S. 833 (1992); *Gonzales*, 550 U.S. 124 (2007). But Hodes & Nauser have not brought a claim under

federal law. Instead, the question presented is whether the Kansas Constitution creates a state-law right to obtain an abortion, a claim distinct from any federal right.

When Sections 1 and 2 of the Kansas Constitution were adopted in 1859, and indeed until the U.S. Supreme Court's decision in *Roe* in 1973, abortion was illegal in Kansas except in the case of a medical emergency. The Kansas Constitution contains no reference to abortion, and this court has never recognized or held that the Kansas Constitution creates a state-law right to obtain an abortion.

All parties in this case point to language in this Court's decision in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006), for their respective positions. *Alpha* involved a challenge to grand-jury subpoenas that were directed to abortion providers. Unlike Hodes & Nauser here, the plaintiffs in *Alpha*—two abortion providers in Kansas—brought claims under *both* the United States Constitution *and* the Kansas Constitution. This court analyzed the plaintiffs' claims at length under federal constitutional law relating to privacy and abortion. 280 Kan. at 919-24. But despite the plaintiffs' request in *Alpha* that the court also find an independent right under the Kansas Constitution, the court declined 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. 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. Hodes & Nauser argue, and the district court agreed, that the second sentence above—indicating a tendency in other contexts to track federal rights under the Kansas Constitution—was a signal this Court would take that approach in this case with respect to a claim of a state-law right to abortion, even though the Court in *Alpha* did not do so. The appeal should be transferred so that this Court can determine Kansas law on this issue.

3. **The question presented in this appeal is clearly repeatable, as it has been raised in at least two other cases pending in Shawnee County District Court.**

Hodes & Nauser have brought two other challenges to Kansas abortion laws in Shawnee County and have pleaded only state-law claims in those cases: *Hodes & Nauser, MDs, P.A. et al. v. Robert Moser, M.D., et al.*, Case No. 2011-CV-1298 (Division 7); and *Hodes & Nauser, MDs, P.A. et al. v. Derek Schmidt, et al.*, Case No. 2013-CV-705 (Division 1). Those cases involve challenges to different statutes and regulatory frameworks adopted at different times than the law here, but they raise the exact same question whether the Kansas Constitution provides a right to abortion independent and distinct from the federal Constitution. A ruling by this Court would provide guidance to the district courts in these other cases and in future challenges.

4. **The procedural posture of this appeal—arising from an order granting a temporary injunction—is the only reason this Court did not have original appellate jurisdiction over the case.**

Under K.S.A. 60-2101(b), the Kansas Supreme Court has original appellate jurisdiction over "[a]n appeal from a final judgment of a district court in any civil action in which a statute of this state or of the United States has been held unconstitutional."

Here, the district court essentially found S.B. 95 unconstitutional, ruling that there was a substantial likelihood that Hodes & Nauser would prevail on the merits of their Kansas constitutional challenge. If the district court's ruling were a final judgment, there would be no need for a transfer; the appeal would have been docketed directly in this Court. The district court's ruling, however, is not based on a lack of factual development, or a simple desire to maintain the "status quo" pending litigation, or any uncertainty about the underlying law. Instead, the district court issued the temporary injunction on the basis of its purely legal determination that the Kansas Constitution includes a right to obtain an abortion, and the Act necessarily violated that state-law right by prohibiting certain D & E abortions. Thus, judicial economy weighs strongly in favor of transferring the case now.

For all of these reasons, defendants respectfully request that the appeal be transferred to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by electronic mail on the 28th day of July, 2015, addressed to:

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