

No. 15-114153-AS

IN THE SUPREME COURT OF KANSAS

HODES & NAUSER, M.D., P.A. *et al.*, *Plaintiffs-Respondents*,

vs.

DEREK SCHMIDT, in his official capacity as Attorney General
of the State of Kansas, *et al.*, *Defendants-Petitioners*.

MOTION FOR LEAVE TO FILE BRIEF OF THE FAMILY RESEARCH COUNCIL,
AS *AMICUS CURIAE*, IN SUPPORT OF DEFENDANTS-PETITIONERS.

NOW COMES the Family Research Council, through its attorney, Mary Ellen Rose, and respectfully moves this Honorable Court for leave to file its brief *amicus curiae* in support of the defendants-petitioners, and in support of said motion states as follows:

(1) The Family Research Council (FRC) was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in public policy. Through publications, media appearances, public events, debates and testimony, FRC's team of policy experts reviews data and analyzes legislative and executive branch proposals that affect marriage, the family and human life. FRC also strives to assure that the sanctity of human life is recognized and respected in the decisions of courts. To that end, FRC has submitted *amicus curiae* briefs presenting its views in several Supreme Court cases affecting unborn human life including, most recently, the challenges to state and federal laws barring partial-birth abortions, *Stenberg v. Carhart* (2000), and *Gonzales v. Carhart* (2007).

(2) FRC has also submitted *amicus curiae* briefs in state courts in defense of statutes

regulating the practice of abortion when those statutes have been challenged on state constitutional grounds. *See, e.g., Oklahoma Coalition for Reproductive Justice v. Cline*, 2012 OK 102, 292 P.3d 27.

(3) FRC was granted leave to file an *amicus curiae* brief in support of the defendants in this case in the court of appeals.

(4) This case concerns the constitutionality of Senate Bill 95, which prohibits the performance of dilation and evacuation (D&E) abortions on live, unborn children. In this procedure, a physician, in deliberately causing the death of an unborn child, dismembers the child. Plaintiffs challenged the law, claiming that the Kansas Constitution protects such a barbaric procedure (plaintiffs have brought no federal claims against S.B. 95). On their motion, the district court temporarily enjoined defendants from enforcing the law while the underlying litigation is heard. The court of appeals, sitting *en banc*, affirmed the district court's order by an equally-divided vote. On April 11, 2016, this Court granted defendants' petition for review.

(5) The threshold and potentially dispositive issue in this case is whether the Kansas Bill of Rights, more specifically §§ 1 and 2, confer a right to abortion. The district court held that §§ 1 and 2 create a right to abortion that is separate from, and independent of, the right to abortion recognized by the Supreme Court in *Roe v. Wade* (1973), as modified by *Planned Parenthood v. Casey* (1992).

(6) In its proposed *amicus curiae* brief, FRC addresses two issues: First, whether the “inalienable natural rights” language of § 1 of the Kansas Bill of Rights creates any self-executing, judicially enforceable substantive rights (under this Court's precedents, § 2 applies solely to political privileges, not to personal or property rights); and, second, whether anything in

the text, history or interpretation of § 1 creates a right to abortion.

With respect to the first issue, FRC submits that the “inalienable natural rights” language of § 1 is not self-executing and, therefore, creates no judicially enforceable substantive rights. Section 1 cannot plausibly be regarded as a guarantee of substantive due process rights where the phrase “due process of law” appears nowhere therein; where the drafters of the 1859 Kansas Constitution clearly could have, but failed to include such language in § 1; and where the drafters knew how to include specific protections from the federal Bill of Rights in the state Bill of Rights when they chose to do so. Unlike the language in § 1 of the Fourteenth Amendment, nothing in § 1 of the Kansas Bill of Rights expressly forbids the deprivation of the “inalienable natural rights” identified therein. The rights identified in § 1 are merely illustrative, not exhaustive, which suggests that their recitation was not intended to be judicially enforceable. Finally, a careful examination of the convention debate over § 1 reveals that the aspirational language ultimately adopted as § 1 was understood by the delegates as a statement of general political principles – by tracking the language in the Declaration of Independence – not specific language that would be enforceable in the courts of the State.

With respect to the second issue, FRC submits that, under any principled methodology for independent state constitutional analysis, the fact that a right is recognized under a particular guarantee of the federal constitution does not require the same right to be recognized under a corresponding or similar guarantee of the state constitution. Indeed, as FRC’s proposed brief explains, there have been several instances in which this Court did *not* recognize a state constitutional right that *has* been recognized as a federal constitutional right. Although, under the federal Supremacy Clause, an invalid state claim will not defeat a valid federal claim, that

does not mean that the state constitution must be interpreted in a manner that incorporates federal constitutional principles, only that federal rights, if asserted, will be enforced. In the case at bar, however, no federal rights have been asserted.

Moreover, nothing in the text, history or interpretation of § 1 the Kansas Bill of Rights supports recognition of a state right to abortion. Section 1 does not address the subject of abortion – directly or indirectly – and nothing in the history of its adoption suggests that the drafters or ratifiers intended in any way to limit or restrict the legislature’s authority to regulate or prohibit abortion. Indeed, the fact that abortion, except to save the life of the mother, was a criminal offense from territorial days until Kansas enacted a version of the Model Penal Code’s abortion provision in 1969, militates against that conclusion, as does the treatment of unborn children (outside the context of abortion) in criminal law, tort law, property law, health care law and guardianship law.

Unlike a number of other States, whose supreme courts have derived a right to abortion from an express or implied right of privacy, Kansas does not have an *express* right of privacy in its Bill of Rights. And, apart from the specific privacy interests protected by the search and seizure provision of the state Bill of Rights (§ 15), this Court has not recognized an *implied* right of privacy from which a subsidiary right to abortion might be derived. Significantly, in their court of appeals briefing, plaintiffs-respondents did not claim that the Kansas Bill of Rights creates a right of privacy. Furthermore, although this Court has not adopted a formal methodology for assessing the relative merits of state constitutional claims, it has consistently applied an historical approach for evaluating such claims, for example, in determining the right of parents to the custody, control and care of their children, whether there is a right to present an

insanity defense and the scope and limitations of the right to trial by jury. Given the legal traditions of the State, there is no basis for deriving a right to abortion from § 1 (or any other) provision of the Kansas Bill of Rights. And this Court has never held otherwise.

(7) FRC's proposed *amicus* brief presents original research and analysis that may assist this Court in addressing the issues presented in this appeal.

For the foregoing reasons, the Family Research Council respectfully requests this Honorable Court to grant its motion for leave to file its brief *amicus curiae* in support of the defendants-petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion of the Family Research Council for leave to file its brief *amicus curiae* in support of the defendants-petitioners were served, via e-mail, on April 19, 2016, to the following counsel:

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