

FILED

JUL 30 2015

IN THE SUPREME COURT OF THE STATE OF KANSAS

HEATHER L. SMITH
CLERK OF APPELLATE COURTS

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.

Court of Appeals Case # 15-114153-A



MOTION TO TRANSFER TO SUPREME COURT

Appellees ask that this appeal be transferred to the Supreme Court because: 1) the particular legal questions raised have major public significance; and 2) the subject matter of the case has significant public interest. K.S.A. §§ 20-3016(a)(2), (3); 20-3017. The State has also filed a motion to transfer this case to the Supreme Court.

Background

Defendants below, Kansas Attorney General Derek Schmidt and District Attorney for Johnson County Stephen Howe, have appealed a temporary injunction granted by the District Court for Shawnee County enjoining enforcement of Senate Bill 95, 2015 Kan. Sess. Laws 285 ("the Act" or "S.B. 95"), which was scheduled to take effect on July 1, 2015. This motion to

transfer has been filed with the clerk of the appellate courts within 30 days after the service of the appellant's notice of appeal, which was filed on July 1, 2015.

Authority

This case may be transferred to the Kansas Supreme Court pursuant to Supreme Court Rule 8.02 and K.S.A. Sections 20-3016 and 20-3017.

Nature of the Case

This case addresses an appeal from the trial court's grant of a temporary injunction enjoining Kansas Senate Bill 95, the "Kansas unborn child protection from dismemberment act," following a first of its kind ruling recognizing that the Kansas Constitution independently protects the fundamental right to abortion. The District Court further held that Plaintiffs-Appellees were likely to succeed on their claim that the Act's ban on the most common method of second-trimester abortion violates the Kansas Constitution and, if allowed to go into effect, would irreparably harm Plaintiffs-Appellees and their patients.¹ Order Granting Temporary Injunction ("Order"), attached hereto as Exhibit 1.

Jurisdiction

This case is within the authority of the Kansas Supreme Court pursuant to K.S.A. Section 60-2101(b), which states that: "Cases appealed to the court of appeals may be transferred to the supreme court as provided in K.S.A. 20-3016 and 20-3017, and amendments thereto . . ." K.S.A. § 60-2101(b).

¹ The Plaintiffs-Appellees in this case are Hodes & Nauser M.D.s, PA; Dr. Herbert C. Hodes; and Dr. Traci Lynn Nauser, board certified obstetrician-gynecologists who practice in Overland Park, Kansas. They provide pre-viability second-trimester abortions that would be banned by the Act.

Reasons for Transfer

Pursuant to K.S.A. Sections 20-3016 and 20-3017, and Supreme Court Rule 8.02(b)(3)(B) and (C), cases may be transferred to the Kansas Supreme Court where the particular legal question raised has major public significance or where the subject matter of the case has significant public interest. K.S.A. § 20-3016(a)(2), (3).

I. Whether the Right to Abortion is Protected Under the Kansas Constitution Bill of Rights is a Question of Significant Public Importance.

In their challenge to the Act, Plaintiffs-Appellees' Petition raises only state, and no federal, constitutional claims. Plaintiffs-Appellees assert, among other claims, that the Bill of Rights of the Kansas Constitution independently protects the right to abortion and that the Act violates that right by banning the most common method of second-trimester abortion. In seeking a temporary injunction, Plaintiffs-Appellees moved on the grounds that they were likely to succeed on their claims that the Act violates the right to abortion, that the Act was passed for an improper purpose, and that the Act violates the bodily integrity rights of women seeking abortions. District Court Judge Hendricks ruled only on the right to abortion claim, and thus, necessarily, had to determine whether Plaintiffs-Appellees had established a likelihood of success on their claim that the right to abortion is independently protected under the Kansas Constitution. Judge Hendricks held that Sections 1 and 2 of the Bill of Rights of the Kansas Constitution independently protect the fundamental right to abortion, explaining:

While “[t]his court is free to construe our state constitutional provisions independent of federal interpretation of corresponding federal constitutional powers,” *State v. Morris*, 255 Kan. 964, 981 (1994), the Kansas Supreme Court has customarily interpreted the provisions of the Kansas Constitution to “echo federal standards.”

Order at 5 (alteration in original) (citing *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920 (2006)). Judge Hendricks continued:

Although the Kansas Supreme Court has not addressed protection for the right to abortion under the Kansas Constitution, in *Alpha* the Court noted that, “[w]e have not previously recognized—and need not recognize in this case despite petitioners’ invitation to do so—that [rights to privacy protecting abortion] also exist under the Kansas Constitution,” but went on to say, “[b]ut we customarily interpret its provisions to echo federal standards.”

Order at 5 (alterations in original) (citing *Alpha*, 280 Kan. at 920). Judge Hendricks disagreed with the State’s argument that the right to terminate a pregnancy receives *no* protection under the Kansas Constitution; rather, Judge Hendricks held that “[a]bsent explicit guidance from the Kansas Supreme Court on this issue, this Court is bound to apply the customary rule, which the *Alpha* decision suggests will apply to abortion.” Order at 5 (citing *Morris*, 255 Kan. at 981).²

The issue on appeal—whether the Bill of Rights of the Kansas Constitution independently protects the right to abortion—is quintessentially a legal question “of major public significance,” the ultimate outcome of which is a matter of “significant public interest.” A decision on this issue will impact, perhaps definitively, the validity of Senate Bill 95, and establish whether similar claims will be recognized in other challenges. Indeed, there are two ongoing District Court cases raising the same issue. In *Hodes & Nauser, MDs, P.A. et al. v. Derek Schmidt et al.*, Plaintiffs bring numerous challenges to a bill imposing a number of restrictions related to abortion, including claims that the provisions of the statute individually and collectively violate Sections 1 and 2 of

² The Kansas Supreme Court has recognized that Section 1 of the Kansas Constitution Bill of Rights is given “much the same effect” as the Due Process and Equal Protection Clauses of the Fourteenth Amendment, *Farley v. Engelken*, 241 Kan. 663, 667 (1987); accord *State v. Limon*, 280 Kan. 275, 283 (2005), but in some cases it “affords separate, adequate, and greater rights than the federal Constitution.” *Farley*, 241 Kan. at 671. For the purposes of their motion for a temporary injunction, Plaintiffs-Appellees relied solely on the federal standards, which set the floor of protection applicable to the right to abortion under Kansas law. Plaintiffs-Appellees did not, however, waive the argument that Kansas Constitution Bill of Rights Sections 1 and 2 should be construed to provide even stronger protection to the right to terminate a pregnancy than that afforded under the federal constitution.

the Kansas Constitution Bill of Rights by infringing on the fundamental right to terminate a pregnancy.³ Similarly, in *Hodes & Nausser, MDs, P.A. et al. v. Robert Moser, M.D. et al.*, Plaintiffs challenge a 2011 Kansas statute that targets abortion clinics with onerous licensing requirements, arguing, among other claims, that the statute infringes on the fundamental right to terminate a pregnancy protected under the Kansas Constitution.⁴ The Supreme Court is the ultimate authority on interpretations of the state constitution, and this legal question, hotly contested by the parties, will inevitably come before the Court. As Judge Hendricks' Order suggests, this issue calls for "explicit guidance from the Kansas Supreme Court." Order at 5.

II. Transfer is Appropriate Here, Where the Legal Issues Are Highly Controversial and Address the Constitutionality of a Law Passed by the Legislature

Abortion in general is an issue of significant public interest. Here, the Act addresses a highly controversial issue that calls into question the state legislature's power, in the name of protecting potential life, to force unwanted medical treatment on women as a condition of accessing the fundamental right to abortion. This severe and unwarranted physical intrusion by the state implicates women's personal rights to privacy and dignity, as well as their ability to make decisions about their own medical treatment, issues of clear legal significance and public interest. Moreover, this case requires not only a determination of whether the Kansas Constitution Bill of

³ Plaintiffs were granted a partial temporary injunction during the pendency of the case on June 28, 2013 by District Court Judge Crotty. However, Judge Crotty has yet to address the claim that the Kansas Constitution protects the fundamental right to terminate a pregnancy. See *Hodes & Nausser, MDs v. Schmidt*, No. 2013-CV-705, Dist. Ct. of Shawnee Cnty., Kan., Div. 1, Memorandum Decision and Order on Temporary Injunction (June 28, 2013), Exhibit 2.

⁴ Plaintiffs were granted a restraining order on November 10, 2011 by District Court Judge Theis. However, Judge Theis has yet to address the claim that the Kansas Constitution protects the fundamental right to terminate a pregnancy. See *Hodes & Nausser, MDs v. Robert Moser, M.D.*, No. 2011-CV-1298, 2011 WL 7714069, Dist. Ct. of Shawnee Cnty., Kan., Div. 7, Order Granting Temporary Restraining Order (Nov. 10, 2011), Exhibit 3.

Rights protects the fundamental right to terminate a pregnancy, but also requires the Court to consider the State's interest in fetal life. Thus, because the legal questions and subject matter of the case are heavily debated in the legal and public sphere, they doubtless have major public significance and interest.

In the decision below, Judge Hendricks first held that Plaintiffs-Appellees established a likelihood of success on their claim that the Act imposes an impermissible burden by banning the most common method of second-trimester abortion, pointing to United States Supreme Court precedent holding that a ban on the most common method of second-trimester abortion is unconstitutional. Order at 7 (citing *Gonzales v. Carhart*, 550 U.S. 124, 147, 156–65 (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)). Judge Hendricks further explained that “[t]hrough the State has a legitimate interest in protecting potential life, that interest does not justify S.B. 95’s imposition of an undue burden on a woman’s right to terminate a pre-viability pregnancy.” Order at 7–8 (citing *Stenberg*, 530 U.S. at 945–46; *Gonzales*, 550 U.S. at 146).

Judge Hendricks went on to hold that alternative procedures suggested by Defendants-Appellants for Plaintiffs-Appellees to comply with the Act would also violate the right to abortion, explaining that the alternatives “are not reasonable, would force unwanted medical treatment on women, and in some instances would also operate as a requirement that physicians experiment on women with known and unknown safety risks as a condition of accessing the fundamental right to abortion.” Order at 8. Judge Hendricks referred to Defendants-Appellants’ view that these alternatives did not violate the fundamental right to abortion as “extreme” and unsupported by Supreme Court precedent, finding that “forcing women to accept the possibility of having to

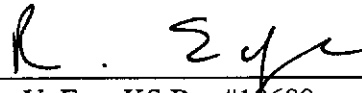
undergo an unnecessary medical procedure in order to effectuate their abortion decision independently constitutes” a violation of the right to abortion. *Id.*

Thus, this case addresses significant questions regarding the scope of the state legislature’s power to limit access to a fundamental right. This is exactly the type of complex legal question with serious public impact that warrants consideration by the Supreme Court under the transfer rule.

CONCLUSION

The legal question raised in this case addresses the fundamental constitutional rights of Kansas citizens under the state constitution, and the legislature’s power to restrict those rights, a question in dispute in three cases before Kansas courts that will profoundly impact women’s access to abortion. This case calls into question the validity of a restriction enacted by the Legislature, and the right of Kansas women to be free from government intrusion into their medical decision-making and to be free from unwanted medical treatment. These issues are legal questions of major public significance and address subjects of significant public interest. *See* K.S.A. § 20-3016(a)(2),(3). For these reasons, Plaintiffs-Appellees ask the Supreme Court to transfer this case for determination.

Respectfully submitted, this 30th day of July, 2015.



Robert V. Eye, KS Bar #10689
Brett A. Jarmer, KS Bar #23283
Robert V. Eye Law Office, LLC
123 SE 6th Avenue, Suite 200
Topeka, KS 66603
(785) 234-4040
(785) 234-4260 Fax
bob@kauffmaneye.com
brett@kauffmaneye.com

Erin Thompson, KS Bar #22117
Thompson Law Firm, LLC
106 E. 2nd Street
Wichita, KS 67202
(316) 267-3933
(316) 267-3901 Fax
ethompson@tslawfirm.com

Teresa A. Woody, KS Bar #16949
The Woody Law Firm PC
1621 Baltimore Avenue
Kansas City, MO 64108
(816) 421-4246
(816) 471-4883 Fax
teresa@woodylawfirm.com

Janet Crepps, AK Bar #8407062, SC Bar #15902*
(864) 962-8519
jcrepps@reprorights.org

Genevieve Scott, NY Bar #4922811*
(917) 637-3605
gscott@reprorights.org

Zoe Levine, NY Bar #4813705*
(917) 637-3639
zlevine@reprorights.org

Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3666 Fax

**Pro Hac Vice* Application Pending

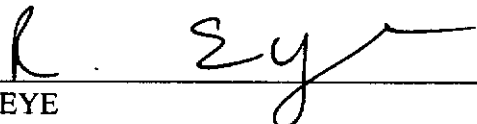
COUNSEL FOR PLAINTIFFS-APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via electronic mail on the 30th day of July, 2015, addressed to the following:

Shon D. Qualseth
Stephen R. McAllister
Sarah E. Warner
Thompson Ramsdell Qualseth & Warner PA
333 W. 9th Street
P.O. Box 1264
Lawrence, KS 66044-2803
(785) 841-4554
(785) 841-4499 Fax
shon.qualseth@trqlaw.com
stevermac@fastmail.fm
sarah.warner@trqlaw.com

Jeffrey A. Chanay
Chief Deputy Attorney General
Dennis D. Depew
Deputy Attorney General, Civil Lit. Div.
Office of KS AG Derek Schmidt
Memorial Building, 3rd Floor
120 SW Tenth Avenue
Topeka, KS 66612-1597
(785) 368-8435 Phone
(785) 291-3767 Fax
jeff.chanay@ag.ks.gov
dennis.depew@ag.ks.gov



BOB EYE
ATTORNEY FOR PLAINTIFFS-APPELLEES

Exhibit 1

Having reviewed the pleadings, heard arguments of counsel, and having been duly advised on the premises, the Court Orders, for the reasons stated from the bench at the hearing on the Motion and as outlined herein, that Plaintiffs' Motion is granted.

This Order is effective as of the date and time shown on the file stamp.

Findings of Fact

The Court finds that the Defendants did not dispute in their Response Opposing Plaintiffs' Motion for Temporary Restraining Order/ and/or Temporary Injunction the facts outlined in the Plaintiffs' Memorandum in support of that motion. Therefore, the Court adopts those facts as outlined below.

Senate Bill 95 prohibits the performance on a living fetus of an abortion procedure described in the Act as "dismemberment abortion," defined as a procedure done:

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).

Violation of the ban is a criminal offense. *Id.* § 6. In addition, the Act authorizes the Attorney General or any District or County Attorney with appropriate jurisdiction to "bring a cause of action for injunctive relief against a person who has performed or attempted to perform" an abortion in violation of the Act. *Id.* § 4. The Act also creates a cause of action for damages against a person who violates the ban. *Id.* § 5.

Although "dismemberment abortion" is not a medical term, the parties agree and the Court finds that the Act prohibits Dilation & Evacuation ("D & E") procedures. The D & E procedure is used for 95% of the abortions done in the second trimester.

The Plaintiffs in this case are Hodes & Nauser, M.D.s, PA; Dr. Herbert C. Hodes; and Dr. Traci Lynn Nauser, on behalf of themselves and their patients. The Plaintiff physicians are board-certified obstetrician-gynecologists who practice in Overland Park, Kansas. They provide pre-viability second-trimester abortions using D & E procedures. The Plaintiffs do not induce fetal demise prior to their D & E procedures.

The Defendants, both sued in their official capacity, are Derek Schmidt, Attorney General of the State of Kansas, and Stephen M. Howe, District Attorney for Johnson County.

Defendants propose three alternative procedures to D & E: labor induction, induction of fetal demise using an injection, and induction of fetal demise using umbilical cord transection.

Labor induction is used in approximately 2% of second-trimester abortion procedures. It requires an inpatient labor process in a hospital that will last between 5–6 hours up to 2–3 days, includes increased risks of infection when compared to D & E, and is medically contraindicated for some women.

There is no established safety benefit to inducing demise prior to a D & E procedure.

An injection of digoxin may be administered via either transabdominal or transvaginal injection. Injections to induce demise using digoxin prior to D & E are not practiced prior to 18 weeks gestation, and the impact of subsequent doses of digoxin, required in cases where a first dose is not effective, is virtually unstudied. Research studies have shown increased risks of nausea, vomiting, extramural delivery, and hospitalization.

Umbilical cord transection prior to a D & E is not possible in every case. Requiring transection prior to a D & E increases procedure time, makes the procedure more complex, and increases risks of pain, infection, uterine perforation, and bleeding. The use of transection to

induce fetal demise has only been discussed in a single retrospective study, the authors of which note that its main limitation is “a potential lack of generalizability.”

Conclusions of Law

“[T]he purpose of a temporary or preliminary injunction is not to determine any controverted right, but to prevent injury to a claimed right *pending a final determination of the controversy on its merits*,” and to maintain the *status quo*. *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 491 (2007) (quoting *Steffes v. City of Lawrence*, 284 Kan. 380, 394 (2007)). A moving party may obtain a temporary injunction if it shows that: (1) it has a substantial likelihood of success on the merits; (2) there is a reasonable probability that it will suffer irreparable future injury; (3) it cannot obtain an adequate remedy at law; (4) the threat of injury to itself outweighs any injury that the injunction may cause opposing parties; and (5) the injunction will not harm the public interest. *Id.*

Plaintiffs are not required to establish to a certainty that they will prevail on the merits or that their patients will suffer irreparable harm, but only that they are substantially likely to prevail and that there is a reasonable probability of harm. *See Bd. of Cnty Comm'rs of Leavenworth Cnty v. Whitson*, 281 Kan. 678, 684 (2006) (rejecting “proof of the *certainty* of irreparable harm rather than the mere probability” as setting “too high a standard for parties seeking injunctions”).

The Court finds that the Plaintiffs have standing to assert the rights of their patients. *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 921 (2006) (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)).

I. Likelihood of Success on the Merits

Plaintiffs’ claims are brought under Sections 1 and 2 of the Bill of Rights of the Kansas

Constitution,¹ and therefore the Court must address the threshold question of whether these provisions afford protection to the right to abortion.

While “[t]his court is free to construe our state constitutional provisions independent of federal interpretation of corresponding federal constitutional provisions,” *State v. Morris*, 255 Kan. 964, 981 (1994), the Kansas Supreme Court has customarily interpreted the provisions of the Kansas Constitution to “echo federal standards.” *Alpha Med. Clinic*, 280 Kan. at 920 (citations omitted).

Although the Kansas Supreme Court has not addressed protection for the right to abortion under the Kansas Constitution, in *Alpha* the Court noted that, “[w]e have not previously recognized—and need not recognize in this case despite petitioners’ invitation to do so—that [rights to privacy protecting abortion] also exist under the Kansas Constitution,” but went on to say, “[b]ut we customarily interpret its provisions to echo federal standards.” *Id.*

Absent explicit guidance from the Kansas Supreme Court on this issue, this Court is bound to apply the customary rule, which the *Alpha* decision suggests will apply to abortion. *See also Morris*, 255 Kan. at 981 (“The liberal construction which must be placed upon [Kansas] constitutional provisions for the protection of personal rights requires that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation [as the federal provisions].”).

The Court therefore concludes that Sections 1 and 2 of the Bill of Rights of the Kansas Constitution independently protects the fundamental right to abortion.

¹ Section 1 of the Kansas Constitution Bill of Rights states: “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” Section 2 provides: “All political powers 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.”

In determining whether the Act violates the right to abortion, the Court recognizes that “[a] statute comes before the court cloaked in a presumption of constitutionality and it is the duty of the one attacking the statute to sustain the burden of proof.” *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 616 (1978) (citations omitted). As the Court explained in *Schneider*, however, “[a] more stringent test has emerged,” where, as here, the case involves suspect classifications or fundamental rights or interests. *Id.* at 617 (citations omitted). In such cases, “the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny. The burden of proof to justify the classification falls upon the state.” *Id.* (citation omitted).

Having concluded that the Act implicates the fundamental right to abortion protected under the Kansas Constitution, this Court cannot presume that the Act is constitutional, but must instead subject it to active and critical analysis.

Turning to the merits, Plaintiffs have established a substantial likelihood of success on their claims that the Act violates their patients’ right to abortion protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights.

Under applicable federal law, the State is prohibited from enacting laws that impose an undue burden on access to abortion services. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992). The Kansas Supreme Court has applied the undue burden standard set out in *Casey* when analyzing challenges based on the federal right to terminate a pregnancy. *See Alpha Med. Clinic*, 280 Kan. at 920. Thus, the Court will apply *Casey*’s undue burden test in deciding whether Plaintiffs have established a likelihood of success on this claim.

“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion

of a nonviable fetus.” *Casey*, 505 U.S. at 877. “A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.” *Id.* “And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” *Id.*

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.

Defendants’ reliance on *Gonzales* for the proposition that the ban is constitutional based on the availability of alternative procedures is misplaced. Though the *Gonzales* Court ultimately upheld the ban on the “intact D & E” procedure, it only did so after determining that the most common method of second-trimester abortion—D & E—which the parties did not contest was safe and reliable, was not banned. *Gonzales*, 550 U.S. at 150–54.

Plaintiffs have therefore established a likelihood of success on the merits of their claim that the Act imposes an impermissible burden by banning D & E procedures. Though the State has legitimate interest in protecting potential life, that interest does not justify S.B. 95’s

imposition of an undue burden on a woman's right to terminate a pre-viability pregnancy. *Stenberg*, 530 U.S. at 945–46. *See also Gonzales*, 550 U.S. at 146.

Alternative procedures suggested by Defendants for Plaintiffs to comply with the Act would also impose an undue burden on the right to abortion. The alternatives proposed by Defendants include labor induction, a transabdominal or transvaginal injection to induce fetal demise prior to D & E, or umbilical cord transection to induce fetal demise prior to D & E.

Based on the evidence presented, the Court finds that the alternatives proposed by Defendants are not reasonable, would force unwanted medical treatment on women, and in some instances would also operate as a requirement that physicians experiment on women with known and unknown safety risks as a condition accessing the fundamental right to abortion.

The Defendants' view that these alternatives do not impose an undue burden is extreme and not supported by Supreme Court precedent. Plaintiffs have established that based on the threat of injury to their patients, their patients' right to terminate a pre-viable pregnancy outweighs the Defendants' asserted interests. Therefore, I find that forcing women to accept the possibility of having to undergo an unnecessary medical procedure in order to effectuate their abortion decision independently constitutes an undue burden.

Accordingly, the Court concludes that Plaintiffs have established a likelihood of success on the merits of their claim that enforcement of the Act will violate the abortion rights of their patients protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights.

Because I find that Plaintiffs prevail on the likelihood of success of this claim and, as discussed below, the other temporary injunction factors weigh in their favor, I need not reach Plaintiffs' improper purpose claim or Plaintiffs' claim that S.B. 95 violates women's fundamental right to bodily integrity.

II. Irreparable Injury/ Adequate Remedy at Law

Plaintiffs have shown a reasonable probability that their patients will suffer irreparable future injury and that they lack an adequate remedy at law should the Act be enforced. *Idbeis*, 285 Kan. at 491. The federal standards for temporary injunctive relief are similar to those in Kansas. See, e.g., *Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229*, 32 Kan. App. 2d 1104, 1118 (2004). The federal decisions establish that if a constitutional right will be abridged, no further showing of irreparable harm is required; a deprivation of a constitutional right is in and of itself irreparable harm. See *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996). Because Plaintiffs have established a substantial likelihood of success as to their constitutional claim that the Act will deprive women seeking second-trimester abortions of their constitutional right to abortion, they have demonstrated a reasonable probability of irreparable future harm without adequate remedy at law.

III. Balance of Hardships

Plaintiffs have also established that the threat to their patients outweighs any harm that might inure to the Defendants. *Idbeis*, 285 Kan. at 491. The balance of hardships in this case is in lockstep with irreparable harm. Plaintiffs have shown a likelihood of success that their patients' fundamental right to terminate a pregnancy will be unduly burdened if S.B. 95 goes into effect. In contrast, Defendants face little, if any, injury from issuance of an injunction, which will impose no affirmative obligations and will preserve the *status quo*. The same logic applies to the State's interest in regulating the medical profession because, at this point, the injunction will do nothing more than maintain the *status quo* until the issues can be resolved on the merits.

34117820, at *5-6 (Kan. Dist. Ct. 2001) (holding threatened injury to plaintiffs' constitutional rights "outweighs whatever damage there may be to [defendants']" inability to enforce "what appears to be an unconstitutional ordinance") (citing *Johnson*, 194 F.3d at 1163). For these reasons, Plaintiffs have demonstrated that the balance of hardships weighs in their favor.

IV. Public Interest

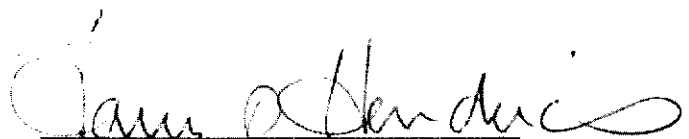
Finally, Plaintiffs have established that a temporary injunction would not be adverse to the public interest. *Idbeis*, 285 Kan. at 491. The public's interest in not suffering a potential constitutional limitation is served more by maintaining the *status quo* than by permitting a law which may be unconstitutional to go into effect. *See Adams*, 919 F. Supp. at 1505.

Order

The Court hereby grants the Temporary Injunction: Senate Bill 95 shall not be enforced until further order of this Court or until final judgment is entered in this matter. Pursuant to Kansas Statute 60-905(b), the Court further orders that Plaintiffs shall not be required to post a bond.²

IT IS SO ORDERED.

Dated this 30th of June, 2015


Larry D. Hendricks
District Court Judge

² The Court having issued a temporary injunction need not rule on Plaintiffs' alternative request for a temporary restraining order.

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing ORDER was mailed this 30th day of June, 2015, by United States mail, postage prepaid thereon, to the following:

Robert V Eye
Robert V Eye Law Office, LLC
123 SE 6th Avenue, Suite 200
Topeka, Kansas 66603

Janet Crepps
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038

Shon D Qualseth
333 West 9th Street
P.O. Box 1264
Lawrence, Kansas 66044

Jeffrey A Chanay
Chief Deputy Attorney General
Memorial Building 3rd Floor
120 SW Tenth Avenue
Topeka, Kansas 66612

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

Erin Thompson
Thompson Law Firm LLC
106 E. 2nd Street
Wichita, Kansas 67202

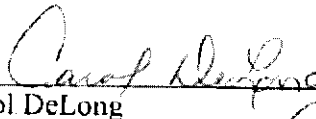

Carol DeLong
Administrative Assistant
Division Six (785) 251-4375

Exhibit 2

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION ONE

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS.

2013 JUN 28 P 3:59

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

v.

Case No. 13C705

DEREK SCHMIDT, in his official capacity
as Attorney General of the State of Kansas;
ROBERT MOSER, M.D., in his official
capacity as Kansas Secretary of Health and
Environment; and NICK JORDAN, in his
official capacity as Kansas Secretary of
Revenue
Defendants.

MEMORANDUM DECISION AND ORDER

The above matter comes before the Court on Plaintiffs' Motion for Temporary Restraining Order and Temporary Injunction to enjoin the Defendants, their agents, and their successors in office from enforcing Kansas House Bill 2253 (2013). After careful consideration of the evidence, the relevant law, and the arguments of the parties, the Court finds and concludes as follows.

NATURE OF THE CASE

This case arises out of Plaintiffs' petition seeking declaratory and injunctive relief from Kansas House Bill 2253 (2013) ("the Act"), which was signed into law on April 19, 2013. The Act is scheduled to take effect July 1, 2013. Plaintiffs assert that the Act imposes punitive and discriminatory requirements on women seeking abortions and abortion providers, which Plaintiffs allege to be in violation of the Kansas Constitution.

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy that is not awarded as a matter of right. *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Granting temporary injunctive relief is appropriate when four prerequisites are met: (1) substantial likelihood exists that the movant will eventually prevail on the merits; (2) the Court is satisfied the movant will suffer irreparable injury unless the injunction issues; (3) the movant proves the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) the movant makes a showing that the injunction, if issued, would not be adverse to the public interest. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 462, 726 P.2d 287 (1986). The main purpose of a temporary injunction is to maintain the status quo until such time that the court can render a meaningful decision. *Waste Connections of Kansas, Inc. v. City of Bel Aire, Kan.*, 191 F. Supp. 2d 1238, 1241 (D. Kan. 2002). It is not to determine any controverted right, but merely to prevent injury to a claimed right pending final determination of the controversy on its merits. *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007).

DISCUSSION AND CONCLUSION OF LAW

Plaintiffs have not met their burden to establish the four required elements for granting a temporary injunction in respect to the Act in its entirety. Rather, due to the severability clause contained in section 23 of the Act, this Court must review each individual provision of the Act challenged and determine individually if any of the challenges substantiate injunctive relief.

Defendants admit, and this Court agrees, that the State has a vested interest in preserving human life. The U.S. Supreme Court has reviewed the States' power to regulate abortion and has held the States possess certain power to regulate abortions so long as the law contains

exceptions for pregnancies that endanger the woman's life or health. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Without an adequate medical emergency provision, the health and lives of pregnant women are endangered. Plaintiffs are board-certified physicians in the field of Obstetrics and Gynecology. They have asserted and supported that provisions of the Act effectively eliminate any meaningful exception for medical emergencies from the requirement that women seeking abortions observe a 24-hour waiting period. The Kansas Supreme Court has not taken the occasion to recognize the Due Process considerations of *Casey* as applied to the Kansas Constitution. However, it indicated, "we customarily interpret its provisions to echo federal standards." *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006). Further, Defendants have failed to cite any instance of a state refusing to recognize the *Casey* standard.

In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. ____, 133 S. Ct. 2321 (2013), the U.S. Supreme Court recently addressed compelled speech. In analyzing a policy statement that was required for obtaining federal funding, the Supreme Court held that compelling speech as a condition for receiving funds was unacceptable. In authoring the majority opinion, Chief Justice Roberts remarked, "Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment." *Agcy. for Int'l. Dev.* 570 U.S. ____, 133 S. Ct. 2321 (2013). Here, the State attempts to mandate that the Plaintiffs certify the material found on a state-maintained website as "objective, nonjudgmental, [and] scientifically accurate." The Plaintiffs have established a substantial likelihood that this certification is a direct regulation of speech, in violation of the First Amendment of the U.S. Constitution. The Kansas Constitution protects freedom of speech in a

manner coextensive with the U.S. Constitution through Section 11 of the Kansas Bill of Rights.

State v. Russell, 227 Kan. 897, 899, 610 P.2d 1122, 1126 (1980).

Absent injunctive relief, the Act will take effect on July 1, 2013. The Court finds that the threatened harm to Plaintiffs and their patients outweighs any potential harm to Defendants because the injunction imposes no affirmative obligation, administrative burden, or cost upon Defendants and will merely maintain the status quo pending further hearings on the merits of the case. The Court further finds that absent injunctive relief, irreparable harm to Plaintiffs and their patients will occur and monetary damages would be inadequate to compensate them. Further, granting injunctive relief is not adverse to the public interest in that: it will protect the Plaintiffs' current practice, it will protect patients' access to the health services provided in that practice, and in that Plaintiffs' practice is already subject to government regulation and oversight by the Kansas state agencies referenced above.

The Court does not grant injunctive relief only as an adjudication on the merits; rather, it is only necessary that plaintiffs establish a reasonable probability of success, and not an overwhelming likelihood of success, in order for a preliminary injunction to issue.

Atchison, T. & S. F. Ry. Co. v. Lennen, 640 F.2d 255, 261 (10th Cir. 1981). Therefore, the Court determines, for the issues involving the medical emergency exception and compelled speech, there is a substantial likelihood of success and enjoins section 12(g), and any other relevant provisions pertaining to medical emergencies, and section 14(l) of the Act.

In respect to the remaining challenges to the Act, the Plaintiffs have not met the burden of proving the four elements to establish that injunctive relief is appropriate at this time. The Court, therefore, denies temporary injunction in respect to the remaining portions not specifically

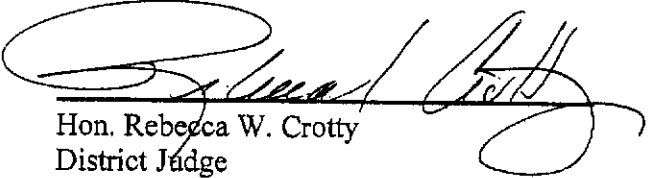
addressed herein. The Court, however, grants a temporary injunction to the sections and provisions as described above.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Temporary Injunction is GRANTED in part and DENIED in part. This Memorandum Decision and Order shall serve as the journal entry of judgment. No further journal entry is required.

IT IS SO ORDERED.

Dated this 28 day of June, 2013.


Hon. Rebecca W. Crotty
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this 15th day of July, 2013, to the following:

COUNSEL FOR PLAINTIFFS

Rene Netherton
1508 S.W. Topeka Blvd., Ste. 101
Topeka, KS 66612

Teresa A. Woody
The Woody Law Firm, P.C.
1621 Baltimore Avenue
Kansas City, MO 64108

Stephanie Toti
David Brown
Natasha Lycia Ora Bannan
Center for Reproductive Rights
120 Wall Street, 14TH Floor
New York, NY 10005

Kent A. Yalowitz
Laura W. Tejada
Meredith B. Esser
Arnold & Porter LLC
399 Park Avenue
New York, NY 10022

COUNSEL FOR DEFENDANTS

Sarah E. Warner
Shon D. Qualseth
Stephen R. McAllister
Thompson, Ramsdell & Qualseth, P.A.
333 W. 9TH Street
P.O. Box 1264
Lawrence, KS 66044

Jeffrey A. Chanay
Deputy Attorney General, Civil Litigation Division
Memorial Building, 3RD Floor
120 SW Tenth Avenue
Topeka, KS 66612


Shelby Swafford
Administrative Assistant

Exhibit 3

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 7

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

2011 NOV 10 P 5:14

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

Plaintiffs,

v.

Case No. 11 C 1298

ROBERT MOSER, M.D., in his official
capacity as Secretary of the Kansas
Department of Health and Environment;
STEPHEN HOWE, in his official capacity
as District Attorney for Johnson County,
Kansas; and DEREK SCHMIDT, in his
official capacity as Attorney General for
the State of Kansas,

Defendants.

Order Granting Temporary Restraining Order
Pending Hearing on Application for Restraining Order
(Pursuant to K.S.A. Chapter 60)

Temporary Injunction

On this 10th day of November, 2011, this matter comes before the Court on Plaintiffs' Verified Petition and Application for Restraining Order. Plaintiffs seek a Restraining Order on behalf of themselves and their patients, restraining, enjoining and prohibiting Defendants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment ("KDHE"), Stephen Howe, District Attorney of Johnson County, and Derek Schmidt, Kansas Attorney General, along with their offices, agencies, agents and successors, from enforcing K.A.R. § 28-34-126 - 144 (2011) (the "Permanent Regulations") regarding the licensing of facilities performing abortion, until such time as this Court rules on Plaintiffs' Application for a Temporary Injunction. The Court having reviewed Plaintiffs' Verified Petition and Application

via telephone conference of records

for Restraining Order, and being fully advised in the premises, finds that Plaintiffs would sustain irreparable harm were this Order not entered, and that Plaintiffs have no other adequate remedy at law/ Based on review of Plaintiffs' Verified Petition and Application for Restraining Order, the Court also concludes that the issuance of this Order will merely maintain the status quo, and that Plaintiffs have alleged sufficient facts to make an initial showing that they are likely to succeed on the merits on one or more of their claims. The Court makes the following findings based on review of the Verified Petition and Application for Restraining Order.

potentially
or they presently
because the administrative process is incomplete of
restricted by time
including the opportunity of review through the administrative process of any licensure decision

Findings of Fact

1. The Restraining Order is sought by Plaintiffs Hodes & Nauser, MDs, PA; Dr. Herbert Hodes; and Dr. Traci Nauser, who seek, on behalf of themselves and their patients, to temporarily restrain Defendants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment, Stephen Howe, District Attorney of Johnson County, and Derek Schmidt, Kansas Attorney General, along with their offices, agencies, agents and successors, from enforcing K.A.R. § 28-34-126 - 144 (2011) (the "Permanent Regulations") until such time as this Court rules on Plaintiffs' Application for a Temporary Injunction.

on any question of its non-licensure

2. Based on the allegations contained in the Verified Petition, the Court finds that absent immediate injunctive relief, the Permanent Regulations will take effect on November 14, 2011, and will cause irreparable harm to Plaintiffs and their patients. Specifically, the Permanent Regulations will force Plaintiffs to cease provide abortion services in their private obstetrics-gynecology practice, in which they have provided such services for decades. This cessation of services will cause irreparable harm to both Plaintiffs and women seeking abortion services from Plaintiffs, and monetary damages are inadequate to compensate Plaintiffs or their patients for harms that will ensue absent relief.

3. Based on the allegations contained in the Verified Petition, the Court finds that the threatened harm to Plaintiffs and their patients outweighs any potential harm to Defendants because the Restraining Order imposes no affirmative obligation, administrative burden, or cost upon Defendants and will merely maintain the status quo, allowing Plaintiffs to continue providing abortion services in their medical office, subject to multiple layers of government regulation and oversight (including by the Kansas Board of Healing Arts and KDHE), as they have for many years.

4. This Restraining Order is not adverse to the public interest in that it will protect Plaintiffs' current practice, and patients' access to the health services provided in that practice, and in that Plaintiffs' practice is already subject to government regulation and oversight by the Kansas state agencies referenced above.

Restraining Order

Based on the foregoing findings and for good cause shown, the Court does hereby enter a Restraining Order that:

Defendants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment, Stephen Howe, District Attorney of Johnson County, and Derek Schmidt, Kansas Attorney General, along with their offices, agencies, agents and successors, are hereby restrained, enjoined and prohibited from enforcing the Permanent Regulations, K.A.R. § 28-34-126 - 144 (2011) until further order of this Court. This Order will issue without bond as allowed pursuant to K.S.A. §§ 60-902 and 903. A hearing on Plaintiffs' Application for Temporary Injunction is scheduled for December 6, 2011 at 9:30 a.m.


DISTRICT COURT JUDGE