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No. 114,153

IN THE SUPREME COURT OF THE STATE OF KANSAS

Hodes & Nauser, M.D.s, 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.

RESPONDENTS' RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF

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: 30 minutes

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INTRODUCTION

In opposing the Physicians' claim that Sections 1 and 2 of the Bill of Rights of the Kansas Constitution protect access to abortion as a fundamental right, the State goes so far as to suggest that these provisions afford the citizens of Kansas no meaningful due process protection at all. This Court should reject this cramped reading of the Constitution. Instead, this Court should embrace the intent of the drafters, expressed in broad language proclaiming liberty as the first right protected in the Bill of Rights, and afford meaningful protection to Kansas citizens against untoward government interference.

Moreover, this Court should recognize as irrelevant, and therefore disregard, the State's repetitious observation that the Physicians could have raised claims under the Federal Constitution. This Court should not be influenced in deciding the merits of a claim squarely before it by the fact that the Physicians could have raised other claims, whether under the Federal Constitution or other provisions of the Kansas Constitution. The State's suggestion is particularly off point, given that it also asserts that the Physicians cannot succeed under the Federal Constitution.

The first issue for review in the State's petition and supplemental brief asks: "Does the Kansas Constitution create a right to an abortion?" This Court, having granted the petition, should address the question head on and hold that Sections 1 and 2 of the Kansas Constitution protect abortion as a fundamental right.

As to the statute before the Court, S.B. 95 takes the unprecedented step of conditioning access to medical care upon submission to an additional, medically unnecessary and physically invasive procedure, which in some circumstances is nothing short of experimentation on women. Under any standard, the State does not have the

authority to impose such physical and dignitary harms on Kansas women. Moreover, S.B. 95's ban on the most common and safest method of second-trimester abortion flagrantly violates clearly-established precedent. For these reasons, this Court should affirm the temporary injunction issued by the district court to prevent the Act from taking effect.

Respondents believe that this Court could conclude on the record before it that S.B. 95 cannot stand but recognize that the case is before the Court based on the district court's issuance of a temporary injunction. Should the Court conclude that additional proceedings are necessary, it should nevertheless address the threshold issue here—whether the Kansas Constitution protects access to abortion as a fundamental right.

ARGUMENT

I. Consistent With This Court's Precedents, Sections 1 and 2 Protect Substantive Due Process and Abortion Rights.

The State attempts, without acknowledging the gravity of its proposal, to brush aside decades of decisions by this Court holding that Sections 1 and 2 provide at least the same protection for due process as that afforded under the Fourteenth Amendment to the Federal Constitution. With only a passing reference to stare decisis, the State urges this Court to reinterpret the language of these provisions and conclude not only that they do not protect abortion, but also that they provide no protection whatsoever for substantive due process. Appellants' Suppl. Br. at 9–10.

The Court should reject this argument because it would require it to take the momentous step of abandoning its previous decisions, as well as for the reasons previously set forth by the Physicians. Resp'ts' Suppl. Br. at 8–17; Resp. to Pet. for Rev. at 5–8; Appellees' Br. to Court of Appeals at 13–28. The State fails to undertake the analysis adopted by this Court in considering whether to overturn prior holdings, mentioning stare

decisis just once in its brief. Under this analysis, the Court's previous decisions should stand.

"Stare decisis is designed to protect well settled and sound case law from precipitous or impulsive changes." *State v. Marsh*, 278 Kan. 520, 544, 102 P.3d 445, 464 (2004), *vacated in part on other grounds*, 282 Kan. 38, 144 P. 3d 48 (2006). As this Court has explained:

> Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by this court. . . . The application of stare decisis ensures stability and continuity demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law.

Id. at 542, 144 P.3d at 462 (quoting *Samsel v. Wheeler Transp. Servs. Inc.*, 246 Kan. 336, 356, 789 P.2d 541(1990), *overruled on other grounds by Bair v. Peck*, 248 Kan. 824, 811 P.2d (1991)). While stare decisis is not an insurmountable bar, this Court "will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is [sic] not longer sound because of changing conditions and that more good than harm will come by departing from precedent." *Id.* at 542, 144 P. 3d at 463 (quoting *Samsel*, 246 Kan. 356, 789 P.2d at 554).

The State makes little effort to show that the long line of cases in which this Court has stated that the Sections 1 and 2 protect the equal protection and due process rights of Kansas citizens are clearly erroneous or no longer sound due to changing conditions. The State's reliance on cases in which this Court has reinterpreted the plain meaning of *statutes* to support its suggestion that Sections 1 and 2 of the Kansas *Constitution* should now be interpreted not to protect due process, is misplaced. Unlike the very specific statutes in the

cases cited, the constitutional provisions at issue here express broad principles. As this Court has explained:

> The essential difference between a constitution and a statute is that a constitution usually states general principles or policies, and establishes a foundation of law and government, whereas a statute must provide the details of the subject of the statute. A constitution, unlike a statute, is intended not merely to meet existing conditions, but to govern future contingencies.

State ex rel. Stephan v. Finney, 254 Kan. 632, 643, 867 P.2d, 1034, 1042 (1994) (citation and internal quotation marks omitted).

The State's simplistic suggestion that because the words "due process" do not appear in Section 1, the Court should reinterpret the provision to offer no substantive protection to the people of Kansas fails to acknowledge this fundamental difference between statutes and constitutional provisions. Indeed, under the State's approach, virtually no legislative enactment would contravene the literal language of the provision. The argument, if accepted, would render Section 1 virtually unenforceable and meaningless. As explained by a member of the Committee that drafted the Bill of Rights, the document was intended to be a check on legislative interference in the lives of Kansas citizens: "It is with th[e] people that the widest liberty is enjoyed. The people are here allowed to the do the nearest what they like—the nearest what they think and act." Kansas Constitutional Convention: A Reprint of the Proceedings and Debates of the Convention Which Framed the Constitution of Kansas at Wyandotte in July 1859, 184–86 (1920).

Far from being "clearly erroneous," or no longer valid due to "changing conditions," this Court's decisions reflect how "changing conditions" have led to a deeper understanding of individual liberties. In *State v. Limon*, 280 Kan. 275, 301–02, 122 P.3d 22, 38 (2005), for example, this Court held that the statute barring voluntary sexual

relations between teenagers of the same sex violated the equal protection guarantees of both the Federal and Kansas Constitutions because there was no rational basis on which to punish voluntary sexual relations between teenagers of the same sex more harshly than relations between teenagers of the opposite sex. Noting that the plaintiffs in *Limon* brought claims under both the Federal Constitution and Section 1 of the Kansas Constitution Bill of Rights, this Court reaffirmed that: "Sections 1 and 2 of the Kansas Constitution Bill of Rights 'are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.'" *Id.* at 283, 122 P.3d at 28 (quoting *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058, 1062 (1987)). The Court adopted the reasoning of the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), rejecting promotion of morality as a legitimate justification for the statute, *Limon*, 280 Kan. at 294–95, 122 P.3d at 34–35, and further rejected the State's proffered justification of protection of the moral and sexual development of minors. *Id.* at 295–97, 122 P.3d at 35. This opinion exemplifies how changing conditions reflect greater, not lesser, protection for individual liberties and support continued reliance on precedents that treat Sections 1 and 2 as providing substantive due process protection.

Similarly, the State's desire to have Section 1 narrowly construed, contrary to the practice of recognizing greater individual rights, dooms its success under the second consideration of stare decisis—"that more good than harm will come by departing from precedent." Indeed, the State has not, nor could it, articulate a good that will come from this Court reversing course and scaling back on the constitutional protection afforded to the citizens of Kansas. Reducing the protection afforded to liberty by excluding substantive due process is a concrete harm for which the State offers no offset, much less

a persuasive argument that the benefits of a narrow construction of Section 1 outweigh the resulting harm.

Also unconvincing is the State's suggestion that this Court's jurisprudence does not actually establish the principle that Sections 1 and 2 provide at least the same protection as the due process and equal protection provisions of the Federal Constitution. Appellees' Suppl. Br. at 11–13. Although the State seeks to distinguish certain cases cited by the six judge opinion, this Court has established and reaffirmed this principle time and again. *See, e.g.*, *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006) (recognizing that the Kansas Supreme Court "customarily interpret[s] [Kansas constitutional] provisions to echo federal standards"); *State v. Schoonover*, 281 Kan. 453, 493, 133 P.3d 48, 77 (2006) ("Generally, provisions of the Kansas Constitution which are similar to the Constitution of the United States have been applied in a similar manner."); *Limon*, 280 Kan. at 283, 122 P.3d at 28 ("Sections 1 and 2 of the Kansas Constitution Bill of Rights are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." (citation and internal quotations omitted)); *State v. Morris*, 255 Kan. 964, 981, 880 P.2d 1244, 1256 (1994) ("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 Constitution); *Farley*, 241 Kan. at 667, 740 P.2d 1061; *State ex rel. Tomasic v. Kan. City, Kan. Port Auth.*, 230 Kan. 404, 426, 636 P.2d 760, 777 (1981) ("The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution finds its counterpart in Sections 1 and 2 of the Bill of Rights of the Kansas Constitution . . . . These two

provisions are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." (citing *Henry v. Bauder*, 213 Kan. 751, 752–53, 518 P.2d 362, 364–65 (1974))). *See also* Stephen R. McAllister, *Individual Rights Under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 U. Kan. L. Rev. 867, 871 (2011) (Traditionally, "the Federal Constitution always has been viewed as a 'floor' of rights, not a 'ceiling.'" (citing Dorothy Toth Beasley, Essay, *Federalism and the Protection of Individual Rights: The American State Constitutional Perspective*, 11 Ga. St. U. L. Rev. 681, 695–96 (1995)).

The three cases singled out by the State do not cast doubt on the continued validity of this well-established precedent. For example, in *Coffeyville Vitrified Brick & Title Co. v. Perry*, 69 Kan. 297, 76 P. 848 (1904), this Court cited to both the Federal Constitution and Section 1, and subsequently declared a statute unconstitutional without explicitly stating whether its decision was under the State or Federal Constitution or both. The State would read this decision as providing no support for enforceable due process rights under Section 1, but there is simply no basis for this conclusion. To the contrary, *Coffeyville* is an early exemplar of this Court's approach, which has solidified over time, of treating Section 1 as protecting enforceable due process rights.

Although the State describes *Manzanares v. Bell*, 214 Kan. 589, 522 P.2d 1291 (1974) as stating "without further explanation or elaboration," that the Kansas Constitution's counterpart of the Fourteenth Amendment is Sections 1 and 2 of our Bill of Rights," Appellants' Suppl. Br. at 12, the Court had earlier in the opinion explained the framework by which it would decide the due process issues raised in the case:

> In view of the foregoing conclusion, we shall apply the 'reasonable relation' test in determining whether Senate Bill 918 violates due process and equal

protection principles.

> In *Henry v. Bauder*, [213 Kan. 751, 752–53, 518 P.2d 362, 364–65], we discussed those constitutional guaranties and said: ". . . The equal protection clause of the Fourteenth amendment to the United States Constitution finds its counterpart in Section 1 and 2 of the Bill of Rights of the Kansas Constitution. . . . While these two provisions of our Bill of Rights declare a political truth, they are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law . . ."

Manzanares, 214 Kan. at 602, 522 P.2d at 1302–03. Thus, the Court not only recognized, but applied its established approach to deciding due process claims under Sections 1 and 2. Finally, *State v. Wilson*, 101 Kan. 789, 168 P. 679, 682 (1917), relied on by the State, notes that Sections 1 and 2 have "much the same effect" as the clauses of the Fourteenth Amendment of the United States Constitution relating to due process, and it has been cited for this proposition by subsequent cases. *See, e.g.*, *Tri-State Hotel Co. Inc. v. Londerholm*, 195 Kan. 748, 759–60, 408 P.2d 877, 887 (1965).

In the end, the State has no support for its argument that Section 1 of the Bill of Rights of the Kansas Constitution be interpreted to extend no protection to due process or abortion. This assertion should be rejected as contrary to the strong protection afforded under this provision as recognized by this Court. Indeed, as Respondents have argued, the strong protection for liberty encompassed by Sections 1 and 2 calls for this Court to evaluate restrictions on the right to abortion under strict scrutiny. *See* Resp'ts' Suppl. Br. at 14–17; Appellees' Br. to Court of Appeals at 21–22.

II. The Presumption of Constitutionality Does Not Alter the Outcome of This Case.

The State's argument that the district court erred in disregarding the presumption of constitutionality, which improperly shifted the burden of proof to the State and colored

its factual findings, is a red herring. The presumption has no bearing on the outcome of this case because the Physicians have overcome the presumption and established that S.B. 95 is unconstitutional. Indeed, the six judge opinion of the Court of Appeals applied the presumption of constitutionality and nevertheless held that the Physicians "had shown a substantial likelihood of prevailing on the merits in this lawsuit." *See infra* Section IV; Mem. Op. at 24 (six judge opinion), *Hodes & Nauser, MDs, P.A. v. Schmidt*, 368 P.3d 667, 678 (Kan. App. 2016). While the Physicians assert that the Act should be subjected to strict scrutiny because it infringes upon a fundamental right, which would have the effect of "peel[ing] away" the presumption of its constitutionality, *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221, 227 (1978), they prevail under either strict scrutiny or the federal undue burden standard, regardless of the presumption.

Not only is the State's claim on the presumption of constitutionality ultimately inconsequential, it is also demonstrably wrong. In order to make its argument that the district court committed reversible error, the State's brief confuses and collapses distinct legal principles, namely the presumption of constitutionality; the levels of scrutiny for alleged constitutional infringements; the standard of appellate review of trial court findings of fact; and the burden placed on a party moving for a preliminary injunction. When these principles are untangled, the flaws in the State's argument are manifest.

The presumption of constitutionality refers to the deference that courts generally owe to legislative enactments when analyzing them for consistency with the Kansas Constitution. *See Tri-State Hotel Co.*, 195 Kan. at 760, 408 P.2d at 888. The presumption of constitutionality "continues until the Act under review clearly appears to contravene some provision of the Constitution." *Id.*

The level of scrutiny to which a legislative enactment should be subjected is a separate question, but one that does have implications for the applicability of the presumption of constitutionality. Restrictions on fundamental rights should be reviewed under strict scrutiny. *See State v. Risjord*, 249 Kan. 497, 501, 819 P.2d 638, 642 (1991) (strict scrutiny "applies in cases involving . . . 'fundamental rights'" (quoting *Farley*, 241 Kan. at 669, 740 P.2d at 1063)); *see also* Resp'ts' Suppl. Br. at 14–17. In undertaking a strict scrutiny analysis, the presumption of constitutionality—which would ordinarily require a degree of judicial deference to the legislature's enactment—is inappropriate. When the legislature chooses to restrict a fundamental right, it is the State that must show that the law furthers a compelling state interest. *Jurado v. Popejoy Const. Co.*, 253 Kan. 116, 124, 853 P.2d 669, 676 (1993); *Farley*, 241 Kan. at 670, 740 P.2d at 1063.

The State takes a very different view from the Physicians on the appropriate level of scrutiny, but the basis of its argument is that there is no right to abortion in the Kansas Constitution at all, so no constitutional scrutiny is required. But the presumption of constitutionality has no role in the central question of whether the Kansas Constitution protects the right to abortion, and what level of scrutiny is appropriate to apply. To argue that the presumption of constitutionality always applies in favor of the State—even when the threshold question before the Court is one of pure constitutional interpretation—completely inverts the analysis.

The State's efforts to undermine the district court's reliance on *Liggett* fundamentally misconstrues that case and the levels of constitutional scrutiny. First, contrary to the State's assertion, *Liggett* involved due process and equal protection challenges under both the Federal and Kansas Constitutions, and thus is relevant to the

claims before the Court. *Liggett*, 223 Kan. at Syl. ¶¶ 2, 3, 576 P.3d at 223 (the challenged statute "does not violate the due process clause of the state and federal Constitutions" or the "equal protection clause of the state and federal Constitutions"); *see also id.* at 614–15, 576 P.3d at 226 (citing state and federal cases on due process). Second, the language quoted by the district court on the heightened scrutiny owed to classifications that implicate a fundamental right under the equal protection clause applies with equal force to infringements on due process. *See Risjord*, 249 Kan. at 501, 819 P.2d at 642 ("The most critical level of analysis is 'strict scrutiny,' which applies in cases involving . . . fundamental rights expressly or implicitly guaranteed by the Constitution."). The Court in *Liggett* ultimately did not apply heightened scrutiny in either the due process or equal protection analysis because it found that the challenged medical malpractice insurance requirement did not implicate a fundamental right, 223 Kan. at 618, 576 P.2d at 228, but that does not undermine the application of the analysis adopted by the Court where, as here, fundamental rights are implicated. And, in any event, the Physicians have overcome the presumption of constitutionality by establishing that S.B. 95 is unconstitutional, thereby rendering the application of *Liggett* academic.

Moreover, the application of the presumption of constitutionality is distinct from, and does not alter, the five-factor test that a plaintiff must meet to establish entitlement to a temporary injunction in the district court. The State repeatedly refers to that test, citing *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709, 713 (2012), to suggest that the district court's decision not to apply the presumption of constitutionality somehow meant that it had relieved Physicians of their burden to establish each temporary injunction factor. The district court did no such thing. It properly assessed each of the five

temporary injunction factors and determined that Physicians had established all of them. *See* [R. III, 229–31, (Dist. Ct. Order Granting Temp. Inj. at 8–10)].

In addition, on appeal, this Court's review of the issuance of a temporary injunction is for abuse of discretion. *Downtown Bar & Grill, LLC*, 294 Kan. at 191, 273 P.3d at 713. The State, as the party asserting the error, bears the burden of showing that the district court abused its discretion in granting a temporary injunction. *Steffes v. City of Lawrence*, 284 Kan. 380, 393, 160 P.3d 843, 853 (2007). Here, where there is a likelihood of success on the merits based on clearly-established case law, the State has not met that burden.

The State further confuses the issues by suggesting that the district court's conclusions with regard to the presumption of constitutionality "skewed" its analysis and "color[ed]" its view of the facts, attempting to use the presumption of constitutionality to undermine the findings of the district court. The State has created this novel claim of legal error while failing to properly challenge the findings of fact on appeal. Before this Court, findings of fact made by the district court should be accepted if supported by "substantial competent evidence," a standard which gives "a great deal of deference to a district court's decision made within a zone of reasonableness." *State v. Gonzalez*, 290 Kan. 747, 756, 234 P.3d 1, 9 (2010); *see also Gannon v. State*, 298 Kan. 1107, 1175–76, 319 P.3d 1196, 1240 (2014). It is simply incorrect to invoke the presumption of constitutionality in order to overturn findings of fact made by a trial court.

Indeed, the State cannot offer any support for its position that a legal error related to the presumption of constitutionality affects appellate review of findings of fact. The cases it cites have nothing to do with the presumption of constitutionality, but rather affirm the substantial competent evidence standard for findings of fact or that legal error by the

district court merits reversal. In *Wiles v. American Family Life Assurance Company of Columbus*, for example, this Court held that findings of fact will not be disturbed on appeal "[s]o long as there is substantial competent evidence to support the finding." 302 Kan. 66, 73, 350 P.3d 1071, 1077 (2015) (internal quotation marks and citation omitted)). In *State v. Cheatham*, the Court again applied the substantial competent evidence rule. 296 Kan. 417, 430, 444, 292 P.3d 318, 328 (2013). Nor are the other cases cited by the state relevant to its argument. *See Coulter v. Anadarko Petroleum Corp.*, 296 Kan. 336, 351, 292 P.3d 289, 300 (2013) (explaining that a district court necessarily abuses its discretion when it makes an error of law); *State v. Garcia*, 295 Kan. 53, 64, 283 P.3d 165 (2012) (reversing and remanding due to application of the wrong legal standard in a criminal matter without addressing either the presumption of constitutionality or the standard of review for findings of fact).

Ultimately, as discussed above, this issue of the presumption of constitutionality is not dispositive of the central questions in this appeal. While the Physicians maintain that the Act in fact merits strict scrutiny, given the liberty interests at stake, they have also established as a matter of fact and law that the Act imposes an unconstitutional undue burden on the right to abortion. *See infra* Section IV; Mem. Op. at 21–24, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 677–78 (six judge opinion). The State's arguments about the presumption of constitutionality are therefore both incorrect and inconsequential.

III. The State Did Not Appeal the District Court's Findings of Fact, Which are Supported by Substantial Competent Evidence.

As noted, the district court's findings of fact must be accepted unless the State shows that they are not supported by substantial competent evidence. *Gonzalez*, 290 Kan. at 755, 234 P.2d at 9. Here, as the six judge opinion correctly noted, the State presented

no evidence before the district court to dispute the facts established by the Physicians and did not properly challenge the district court's findings of fact on appeal. Mem. Op. at 6, 22–23, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 677–78 (six judge opinion); *id.* at 57, 368 P.3d at 694 (Atcheson, J., concurring) (adopting the district court's findings). *See also* [R. III, 223–24, (Dist. Ct. Order, 2–3)]. In its Supplemental Brief, however, the State refers to articles not properly presented to the district court, Appellants' Suppl. Br. at 5, as if these materials were evidence. *See* Mem. Op. at 6, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 669 (six judge opinion) (noting that State submitted no written testimony, instead citing "some articles from medical literature in its brief to the district court" and "again on appeal"). Moreover, the State ignores that the six judge opinion held that the district court's findings were supported by substantial competent evidence. *Id.* at 22, 368 P.3d at 377; *see also id.* at 6–8, 368 P.3d at 669–71. The State has waived any argument to the contrary.

Further, the State presents an inaccurate picture of the facts presented to the district court, in some instances directly contradicting that court's findings, even though the State offered no evidence of its own. Significantly, the State does not dispute the fact that D & E is used for 95% of second-trimester abortions and is the safest and most common method of second-trimester abortion. *Id.* at 7, 23–24, 368 P.3d at 670 (six judge opinion); *id.* at 57, 368 P.3d at 694 (Atcheson, J., concurring). Rather, it proposes three alternatives to D & E: induction of fetal demise using an injection, induction of fetal demise using umbilical cord transection, and labor induction, which it asserts provide reasonable alternatives that make the ban permissible. The availability of these alternatives does not validate a ban on the most common method of second-trimester abortion. *See id.* at 23, 368 P.3d at 678 (six judge opinion). Additionally, in proposing these alternatives, the State

fails to address crucial uncontested facts, including the experimental nature of the suggested alternatives, their lack of availability and reliability, as well as the unprecedented physical and dignitary burdens they impose on patients.

The State concedes that *some* of the alternatives proposed could not be accomplished in every instance and notes a potential increased treatment time with umbilical cord transection. Appellants' Suppl. Br. at 5. But it obscures facts showing that *each* of the alternatives suggested either cannot be reliably performed in every circumstance or may be medically contraindicated for some women, and that each of the proposed alternatives could increase treatment time, including increased times of 24 hours or more or up to three days. *See* Mem. Op. at 7–8, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 670–71 (six judge opinion); *see also* [R. III, 224 (Dist. Ct. Order, 3); R. I, 37, 38, 40 (Davis Aff. ¶¶ 12, 16, 25); R. I, 32 (Nauser Decl. ¶¶ 27–28); R. III, 217 (Davis Suppl. Aff. ¶ 6)].

The State argues that digoxin is safe and cites to its increased use, Appellants' Suppl. Br. at 13–14, but it does not dispute that digoxin is not used to induce demise prior to 18 weeks gestation, or that the studies contain virtually no information on the effect of a second injection of digoxin should the first injection fail. *See* Mem. Op. at 8, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 670 (six judge opinion). The State also ignores the district court's finding that even after 18 weeks, induction of demise adds increased risks, including extramural delivery and hospitalization. *See id.*

Likewise, the State bases its argument regarding the safety and "growing use" of umbilical cord transection, Appellants' Suppl. Br. at 13–14, on a single study, which it did not properly present below, failing to acknowledge the dearth of research on this procedure,

or that the one retrospective study upon which it relies exclusively contains a disclaimer stating that it may not be generalizable. *See* Mem. Op. at 8, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 670–71 (six judge opinion). Further, the State does not address facts showing that umbilical cord transection is not possible in every case and that it adds complexity, with increased risks of uterine perforation, infection, and bleeding. *See id.*

The other alternative suggested by the State—induction of labor—is equally unreasonable. It requires women to go through a painful in-patient labor and delivery process that can last up to three days, includes increased risks of infection, and is medically contraindicated for some women. *See id.* at 7–8, 368 P.3d at 670. Indeed, the Supreme Court in *Stenberg v. Carhart*, 530 U.S. 914, 929 (2007), noted that induction is particularly dangerous for some women, and the Court of Appeals observed that it accounts for only 2 % of second-trimester abortions in this country. Mem. Op. at 7, *Hodes & Nauser MDs, P.A.*, 368 P.3d at 670 (six judge opinion). It is absurd to suggest that labor induction could replace D & E, used in 95% of cases, particularly in light of the possibility, obfuscated by the State, *see* Appellants' Suppl. Br. at 5, that there may be no hospital willing or able to perform induction abortion. *See* [R. 3, 224 (Order, 3); R I 42 (Davis Aff. ¶ 34); R. III, 216 (Davis Suppl. Aff. ¶ 5); R. III, 220 (Nauser Suppl. Aff. ¶ 7)].

The uncontested evidence before the district court established that if the Act takes effect, all women seeking abortions after 15 weeks will potentially be subjected to a transvaginal or transabdominal injection of digoxin at least 24 hours prior to the D & E procedure, an additional physically-invasive procedure that is medically unnecessary. Rather than dispute these facts, the State simply ignores them. The record before this Court demonstrates that Drs. Hodes and Nauser cannot continue to provide D & E procedures

and comply with the Act without altering their practice in a way that increases the complexity and risk of the abortion, amounting in some circumstances to forced experimentation on women with known and unknown risks. *See* Mem. Op. at 7–8, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 670–71; *see also* [R. I, 30–32 (Nauser Decl. ¶¶ 20, 22–23, 25–26)]. The State's attempt to undermine or avoid these facts is wholly without foundation, and should be rejected.

IV. The Act is Unconstitutional Under Clearly-Established Precedent.

The State presents this Court with an irrelevant hypothetical, arguing that there is no bright-line rule insulating any restriction on D & E from judicial oversight. *See* Appellants' Suppl. Br. at 20. But that is not the question before this Court. The question is whether the State may enforce a total ban on the most common method of second-trimester abortion. As discussed in Respondents' Supplemental Brief, this Court should apply strict scrutiny and find that the ban violates women's fundamental right to abortion under the Kansas Constitution. *See* Resp'ts' Suppl. Br. at 21–23. However, even under the standard applied by federal courts, federal precedent holds that banning the D & E procedure imposes an undue burden, regardless of any alternatives that may be available. *See Gonzales v. Carhart*, 550 U.S. 124, 164–65 (2007); *Stenberg*, 530 U.S. at 945–46; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976). No factual distinctions warrant a different outcome here. Since the Court's ruling in *Stenberg*, D & E remains the most common and safest method of second-trimester abortion. *See* Mem. Op. at 7, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 670 (six judge opinion); *see also* Resp'ts' Suppl. Br. at 23–25; Br. of Appellees to Court of Appeals at 28–32.

The State's argument boils down to its reliance on the alternatives it asserts are available to women seeking D & E procedures. Even assuming the Act did not ban the most common and safest method of second-trimester abortion, the extreme alternatives suggested by the State are unreasonable and independently impose an undue burden on women seeking abortion. *See* Resp'ts' Suppl. Br. at 23–25; Br. of Appellees to Court of Appeals at 32–40. Rather than presenting any facts to distinguish this case from *Stenberg* or performing an undue burden analysis of the alternatives suggested, the State seeks to avoid clearly-established law by citing passages from Supreme Court's decisions out of context to achieve a result that is clearly foreclosed by those decisions.

First, the State argues that the alternatives proposed make S.B. 95 constitutional because they do not impose a significant health risk. However, that is not the standard. The *Gonzales* and *Stenberg* Courts addressed whether the bans at issue would impose significant health risks in response to a claim that they lacked *an adequate health exception*. The Physicians have not raised that claim here. Here, the Physicians have claimed that the Act imposes an undue burden on their patients, and they have met their burden of showing that it does. *See* Appellees' Br. to Court of Appeals at 28–32.

Second, the State mischaracterizes the *Gonzales* Court's discussion of medical uncertainty. The State argues that following *Gonzales*, "legislatures remain free to act and regulate when medical uncertainty exists." Appellants' Suppl. Br. at 23. However, as the Supreme Court of the United States recently explained in *Whole Woman's Health v. Hellerstedt*, the notion that "legislatures, and not courts, must resolve questions of medical uncertainty is . . . . inconsistent with [the] Court's case law." No. 15-274, 2016 WL 3461560, at *16 (U.S. June 27, 2016). Rather, citing to its decision in *Gonzales*, the Court

reiterated that courts "*retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake*" and that "uncritical deference to [legislative] factual findings . . . is inappropriate." *Id.* (quoting *Gonzales*, 550 U.S. at 165); *see also id.* ("[T]he Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence . . . presented in judicial proceedings").

Moreover, the State impermissibly seeks to extend *Gonzales* beyond the Court's fact-based holding. *Gonzales* reaffirmed that the State could not ban D & E but could ban a less common alternative when there was medical uncertainty about the safety advantages of the less common banned procedure. 550 U.S. at 166. Moreover, neither of the parties in *Gonzales* questioned the safety of the remaining alternative, D & E. *Id.* at 166–67. Here, however, the State seeks to apply *Gonzales* to the inverse scenario, by banning the standard medical option of D & E and advancing three unreliable alternatives that impose additional risks. As the six judge opinion explained, *Gonzales* does not support this argument:

> [In *Gonzales*,] the Court considered a ban on an *uncommon* procedure and noted that the most common and generally safest abortion method remained available. Here, the State has done the opposite, banning the most common, safest procedure and leaving only uncommon and often unstudied options available.

Mem. Op. at 22, *Hodes & Nauser, MDs, P.A.*, 368 P.3d at 677 (six judge opinion). Moreover, the State ignores that the medical uncertainty to which it refers exists in large part because of the experimental nature of the alternatives proposed. The State's application of *Gonzales* is therefore inapposite: *Gonzales* did not sanction the imposition of additional unnecessary procedures with no established medical benefit, or medical experimentation on women seeking abortions.

In sum, balancing the same interests advanced by the State, the Supreme Court held in *Stenberg* that a ban on D & E poses an undue burden because it is a ban on the most common method. *Gonzales* does not disturb this holding. The State has offered no justification for striking a different balance here. In fact, in this case, the evidence of the burdens that the Act places on women is even more stark than in *Stenberg* or *Gonzales*. Those facts, as found by the district court and supported by substantial competent evidence, establish that the alternatives suggested by the State are extreme and unreasonable. *See* Br. of Appellees to Court of Appeals at 32–40; *see also* [R. III, 229, (Dist. Ct. Order at 8)].

CONCLUSION

The Kansas Constitution protects the fundamental liberty of the citizens of this State from unlawful infringement by the legislature. "[C]onstitutions march, aided by judicial interpretation necessarily employed to give full force and effect to the rights and privileges guaranteed by their general terms." *Postlethwaite v. Edson*, 102 Kan. 619, 171 P. 769, 783 (1918). This case involves an unprecedented intrusion by the legislature into the core liberty interests of Kansas women. A woman's right to choose abortion is fundamental to her autonomy and dignity: it enables her to make the most profound of personal decisions and to determine for herself the course of her own life. There can be no doubt that reproductive decision-making lies at the heart of liberty as enshrined in the Kansas Bill of Rights. The Act infringes and undermines the right to abortion, and exposes women to a level of bodily and dignitary harms that cannot stand.

To defend this intrusion on liberty, the State asks this Court hold that the expansive, robust protections for individual liberties in the Kansas Constitution do not encompass due process rights at all. This will have grave consequences for the rights of women in Kansas

and for the liberty of all Kansas citizens, on the issue of abortion and far beyond. The State has offered little in the way of support for its position, aside from the suggestion that this Court overturn its precedents, erode constitutional liberty protections, and make Kansas an outlier among states with similarly strong constitutional history and jurisprudence. In short, the State has asked this Court to strip from the Constitution its central function, to protect the citizens of Kansas from unlawful infringements upon liberty. This Court should fulfill the quintessential function of the judiciary to interpret and enforce the Constitution, and hold that the Kansas Constitution protects the right to abortion as a fundamental right, and any legislative interference with that right must be scrutinized zealously. Without such a check on legislative power, the women of Kansas will suffer unprecedented harm to their fundamental dignity and personal autonomy.

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