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January 30, 2018

VIA ELECTRONIC FILING

The Clerk of the Appellate Courts
Kansas Judicial Center
301 S.W. 10th Ave.
Topeka, KS 66612-1507

Re: *Hodes & Nauser, M.D.s, P.A., et al. v. Derek Schmidt, et al.*
Appellate Case No. 15-114153-S
Response to Rule 6.09(b) Letter

Dear Clerk of the Appellate Courts:

The recent Rule 6.09(b) letter filed by Hodes & Nauser, MDs, P.A., lists three federal district court cases. In each of these cases, federal courts sustained challenges under the federal Constitution to statutes in Alabama, Arkansas, and Texas that limited the ability of abortion providers to perform dismemberment abortions without first euthanizing the unborn child, except in the cases of a medical emergency.

These federal cases underscore the State of Kansas's position in this case that there is no need for this Court to plow new ground and search for a right to abortion within the Kansas Constitution—a position warranted by neither the constitution's text nor history, and which is directly contrary to the will of Kansans in ratifying the Kansas charter. If the abortion providers here believed that Kansas's decision to regulate dismemberment abortions violated their rights, they were free to bring actions challenging the Act under established federal law—as the plaintiffs did in Alabama, Arkansas, and Texas. The decision to forego these claims entirely and focus instead on attempting to change our state constitution does not render the federal constitutional claims nonexistent. Nor does it support the providers' claimed exigency in this case.

Further, the instant case is an appeal from the grant of a preliminary injunction. Two of the three federal cases cited in the recent Rule 6.09(b) letter involve permanent injunctions after evidentiary development, briefing thereon, and a bench trial or oral argument based on the respective evidentiary records. Thus, the procedural posture of these cases is substantially different from the case now before the Court in terms of both the claims and the evidence presented.

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If the abortion providers here believe they would prevail under federal law, they should have asserted those claims in this case. They did not, however. The three federal district court cases cited provide no resolution of the issue before this Court—whether the text and history of the Kansas Constitution provide a separate and independent abortion right under Kansas law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, the above response was filed by electronic means, which will effect service on registered Kansas counsel, and that the foregoing was also electronically served on the following:

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