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CASE NUMBER: 114153

IN THE SUPREME COURT OF THE STATE OF KANSAS

HODES & NAUSER, MDS, MDs, P.A.; HERBERT C. HODES, M.D.; and TRACI LYNN NAUSER, M.D., Plaintiff-Appellees, vs. DEREK SCHMIDT, in his official capacity as capacity as Attorney General of the State of Kansas, and STEPHEN M. HOWE, in his official capacity as District Attorney for Johnson County Defendant-Appellants.	Case No. 114153

APPLICATION TO FILE AMICUS BRIEF

COMES NOW, Kansans for Life, Inc., through its attorney, Frederick J. Patton II, and respectfully moves this court for leave to file an amicus brief.

Background.

Kansans for Life is a grassroots pro-life organization committed to speaking up for the defenseless in Kansas on the issues of abortion, euthanasia, assisted suicide, and bioethics issues such as human embryonic stem cell (hESC) research, human cloning, fetal experimentation, and eugenics. Kansans for Life is the state affiliate of the nation's largest pro-life organization, the National Right to Life Committee, Inc. On March 25, 2015, the Kansas House overwhelmingly passed SB 95 (2015 Kan. Sess. Laws 22) or the "Unborn

Child Protection from Dismemberment Abortion Act," by 98-26 after the Senate had passed the measure, 31-9, on Feb 20, 2015. SB 95 bans a gruesome abortion method in which a living unborn child in her mother's womb is ripped apart into pieces by an abortionist using sharp metal tools. In the words of U.S. Supreme Court Justice Anthony Kennedy, in the dilatation and evacuation (D & E) abortion which uses dismemberment to cause death, the unborn child *"dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."* Stenberg v. Carhart, 530 U.S. 914, 958-959 (2000). Records released on April 1, 2016 by the Kansas Health & Environment Department show that in 2015 the D & E method was used in 629 abortions. This is 9% of the total 6,974 Kansas abortions reported. The bulk of the 629 abortions are presumed to be dismemberment abortions performed on a living unborn child, and these D & E abortions would be prevented by the challenged Act.

The underlying challenge to SB 95 was brought by an abortion facility and its two physicians (collectively, "Hodes & Nauser") who claimed that the Act violated an implied right to abortion under the Kansas Constitution. Hodes & Nauser, MDs, P.A. v. Schmidt, Shawnee County District Court Case No. 2015-CV-405. Before the law's effective date of July 1, 2016, a state district court entered a temporary injunction that kept the law from taking effect. The district court based its order on provisions of the Kansas Constitution Bill of Rights, concluding that they provisions provide the same right to abortion as the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The State appealed on the basis that there is no abortion right under the Kansas Constitution, and that even if such a right were found to exist, SB 95 does not unduly burden that right. On January 22, 2016 the Kansas Court of Appeals announced its 6-1-7 ruling in favor

of Plaintiffs-Appellees. On April 11, 2016 this Court granted review. The questions before this Court as presented in the State's Petition for Review are:

1. Does the Kansas Constitution create a right to abortion?
2. Even assuming such a right exists, does the applicable standard impose a bright-line rule against any government regulation of dismemberment abortions?
3. Even assuming such a right exists, did the six judges in the Court of Appeals plurality err in accepting the district court's factual findings, when the district court expressly reject the presumption of constitutionality and applied the wrong legal standard?

Authority. Under Rule 6.06 of the Rules of this Court, Kansans for Life, Inc. applies for leave to file an amicus brief in the above matter. Rule 6.06 provides in material part that a brief of an amicus curiae may be filed when:

> "(1) an application to file the brief is served on all parties and filed with the clerk of the appellate courts; and
>
> (2) the appellate court enters an order granting the application."

Reasons.

1. While Kansans for Life strongly disputes the district court ruling that a right to abortion is properly found in the Kansas Constitution, the focus of the proposed *amicus curiae* brief is to assist this Court in evaluating whether SB 95 would violate the putative right as articulated by the lower courts.
2. Neither the district court nor the court of appeals address the medical testimony provided to state legislative committees in their consideration of SB 95. This testimony establishes

the facts relied upon by the legislature in evaluating whether to enact SB 95, the "Unborn Child Protection from Dismemberment Abortion Act." In its proposed *amicus curiae* brief, Kansans for Life would address the legislative record in detail to allow this Court to evaluate the legislative facts contained therein.

3. This case presents a facial challenge to the constitutionality of SB 95. In order to prevail on the merits, "the plaintiffs must establish that no set of circumstances exist under which [the challenged law] would be valid." *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 942 P2d 591 (1997). In its proposed *amicus curiae* brief, Kansans for Life will show that that lower courts failed to properly apply this standard in evaluating the Plaintiffs/Appellees Motion for the Temporary Injunction.

4. Even if this Court were to embrace a *sui generis* requirement for establishing the facial invalidity of a statute regulating abortion, the proposed *amicus curiae* brief argues that Plaintiffs-Appellees have failed to show they are likely to prevail on the question of whether SB 95 will operate as a substantial obstacle to a woman's choice to undergo an abortion in a "large fraction of the cases in which [the provision] is relevant." *Compare Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (plurality opinion).

5. The Kansans for Life brief would argue that a speculative increase in cost or difficulty associated with employing digoxin injections to kill the unborn child before dismembering him or her (instead of the dismemberment itself killing the child) does not itself render the Act unduly burdensome. In *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S.833, 874 (1992), the Supreme Court established that "Numerous forms of state regulation might have the incidental effect of increasing

the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law that serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."

6. Kansans for Life's brief would argue that the same interests recognized by the U.S. Supreme Court as legitimate in upholding the constitutionality of the Partial-Birth Abortion Ban Act provide a sound constitutional basis for Kansas acting to protect unborn children from the brutality of dismemberment abortion. *Gonzales* itself described the gruesome nature of dismemberment abortions: "[F]riction causes the fetus to tear apart. For example, a leg might be ripped off the fetus ...." *Id.* at 135. Contrasting the partial birth or "intact D & E" abortion, the Court said, "In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart." *Id.* at 137; see also *id.* at 152. "No one would dispute," the Court wrote, "that, for many, D & E is a procedure itself laden with the power to devalue human life." *Id.* at 158. Even the dissent in *Gonzales, id.* at 182 (Ginsburg, J., dissenting) stated:

> Nonintact D & E could equally be characterized as "brutal," ... involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs... [Internal citations to majority opinion omitted.] "[T]he notion that either of these two equally gruesome procedures ... is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply

irrational."

Quoting Stenberg v. Carhart, 530 U.S. 914, 946-947 (2000) (Stevens, J., concurring).

7. Kansans for Life's proposed amicus brief would provide research and analysis that assist this Court to evaluate the relevance of federal constitutional precedent in addressing the issues raised.

Kansans for Life, Inc. applies to file a friend of the court brief.

Dated: December 15, 2016.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this application to file amicus brief was sent by United States Mail, postage prepaid, on 15th of December, 2016 to:

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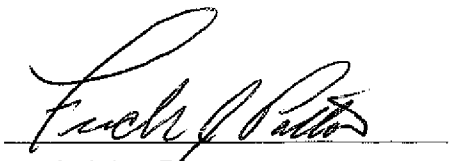

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