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No. 15-114153-A

IN THE KANSAS COURT OF APPEALS

Hodes & Nauser, M.D., P.A.,
Herbert C. Hodes, M.D., and Traci Lynn Nauser, M.D.,
***Plaintiffs-Appellees*,**

vs.

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*.**

BRIEF *AMICUS CURIAE* OF THE FAMILY RESEARCH COUNCIL IN SUPPORT OF DEFENDANTS-APPELLANTS

Appeal from the District Court of Shawnee County,
Honorable Larry D. Hendricks Judge Presiding,
District Court Case No. 2015-CV-490, Division 6

Kevin M. Smith
Kansas Bar No. 19242
Law Offices of Kevin M. Smith, P.A.
1502 N. Broadway
Wichita, Kansas 67214-1106
(316) 262-2331 (tel)
(316) 272-8862 (fax)
4acelaw@sbcglobal.net

Attorney for the *Amicus Curiae*

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Interest of the *Amicus*

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

The Kansas General Assembly passed and Governor Brownback signed into law Senate Bill 95, which prohibits the performance of dilation and evacuation (D&E) abortions on live, unborn children. In this procedure, a physician, in deliberately causing the death of an unborn child, dismembers the child. Plaintiffs in this case, two physicians who perform such abortions and their professional association, have challenged the law, claiming that the Kansas Constitution protects such a barbaric procedure. On plaintiffs' motion, the district court temporarily enjoined defendants from enforcing the law while the underlying litigation is heard. Defendants have appealed that injunction.

FRC submits that nothing in the Kansas Constitution, properly considered, confers a right to perform an abortion, whether by the dismemberment method at issue in this case or any other method. The Kansas Supreme Court has never recognized a state right to abortion. And, as this brief explains, there is no basis for recognizing such a right.

I.

THIS COURT IS NOT REQUIRED TO RECOGNIZE A RIGHT TO ABORTION UNDER THE KANSAS CONSTITUTION MERELY BECAUSE THE SUPREME COURT HAS DERIVED A RIGHT TO ABORTION FROM THE LIBERTY LANGUAGE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

As a threshold matter, *amici* submit that this Court is *not* required to recognize a right to abortion under the Kansas Bill of Rights merely because, in *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court derived a right to abortion from the liberty language of the Due Process Clause of the Fourteenth Amendment. That a given right is protected by the federal constitution does not require a state court, *as a matter of state law*, to interpret the state constitution to extend protection to the same right, so long as the state constitution is not *applied* in a manner that would deny a federal constitutional right (plaintiffs have presented no federal constitutional claims in their challenge to S.B. 95).

There are two principled approaches in considering the relationship between similar state and federal constitutional guarantees. A state court may conclude, after a careful analysis of the relevant constitutional text, the history of its adoption and its judicial interpretation, that a given state constitutional guarantee should be construed consistently with the corresponding federal guarantee. Under this approach, often referred to as "lockstep" analysis, a state constitutional right would not be recognized unless there is a corresponding federal constitutional right; and, if there is such a right, the state right would be coextensive with the federal right, neither broader nor narrower. Alternatively, a state court may conclude, in light of its text, history and interpretation, that the state guarantee should be construed independently of the federal guarantee. Under this approach, known as independent state constitutionalism, whether a state right

would be recognized (and its scope) would not depend upon whether there is a corresponding federal right. The asserted right might not exist at all under the state constitution and, if it does, it could be broader or narrower than the federal right. What is *not* principled, however, is to *combine* the two approaches and to say, on the one hand, that federal constitutional law will be controlling in determining whether a given right is protected by the state constitution (thereby establishing, as a matter of state law, a federal "floor" of protection), but, on the other hand, that federal law will not be controlling in determining the scope of that same right (allowing for a higher state "ceiling" of protection). That hybrid approach is unprincipled in theory and unsound in practice.

> The image of federal constitutional law as a "floor" in state court litigation pervades most commentary on state constitutional law. Commentators contend that in adjudicating cases, state judges must not adopt state constitutional rules which fall below this floor; courts may, however, appeal to the relevant state constitution to establish a higher "ceiling" of rights for individuals . . . .
>
> Certainly, as a matter of federal law, state courts are bound not to apply any rule which is inconsistent with decisions of the Supreme Court; the Supremacy Clause of the Federal Constitution [U.S. Const., art. VI] clearly embodies this mandate. It would be a mistake, however, to view federal law as a floor for state constitutional analysis; principles of federalism prohibit the Supreme Court from dictating the content of state law. In other words, state courts are not required to incorporate federally-created principles into their state constitutional analysis; the only requirement is that in the event of an irreconcilable conflict between federal law and state law principles, the federal principles must prevail.
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> [S]uch courts [that do not employ "lockstep" analysis] must undertake an independent determination of the merits of each claim based solely on principles of state constitutional law. If the state court begins its analysis with the view that the federal practice establishes a "floor," the state court is allowing a federal governmental body–the United States Supreme Court–to define, at least in part, rights guaranteed by the state constitution. Thus, to avoid conflict with fundamental principles of state autonomy, a state court deciding whether to expand federally recognized

> rights as a matter of state law must employ a two-stage process. The court first must determine whether the federally recognized rights themselves are incorporated into the state constitution and *only then* must determine whether those protections are more expansive under state law.

Earl M. Maltz, *False Prophet–Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L. Q. 429, 443-44 (1988) (emphasis in original).

Other commentators have recognized that "[i]ndependent interpretation, as a matter of constitutional principle, must be a two-way street." Ronald K.L. Collins, *Reliance on State Constitutions–Away From a Reactionary Approach*, 9 Hastings Const. L. Q. 1, 10 (1981).

> [T]here is no constitutional impediment preventing state courts from granting a lesser degree of protection under state law, *provided* only that these courts then proceed to apply the command of the Federal Constitution as interpreted by the United States Supreme Court. In other words, the logic of principled interpretation at the state level . . . demands that any given argument be tested on its own merits independently of what level of constitutional protection could result. In some instances, it may well be that the logical scope of a state constitutional premise does not extend so far as to afford an equivalent or greater measure of protection than that allotted under the Bill of Rights.
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> . . . . Considerations of text, logic, history and consistency may prompt [state] judges to reject [certain] federally protected "rights," but only as questions of state law. These federal "rights" would not suffer in that the same state judges would then have to yield to the dictates of federal law and acknowledge the claims presented. Accordingly, the constitutional premises upon which the state law is grounded would not be sacrificed merely because federal decisional law pointed in another direction.

Id. at 15-16 (emphasis in original). A leading expert on state constitutional law concurs:

> Using independent interpretation a court might reach the same or a different result than the federal one, using the same or different standards or theories. An independent opinion may even conclude that a state provision is "less" protective than the federal counterpart is presumed to be. The state court must then reach any federal fourteenth amendment challenges to the alleged deprivation.

Jennifer Friesen, State Constitutional Law[:] Litigating Individual Rights, Claims and Defenses (4th ed. 2008), Vol. I, at pp. 44-45.

State reviewing courts have recognized that, under an independent state constitutional analysis (as opposed to "lockstep" analysis), *federal* constitutional rights are not necessarily incorporated into *state* constitutions. In *Sitz v. Dep't of State Police*, 506 N.W.2d 209 (Mich. 1993), the Michigan Supreme Court explained:

> Where a right is given to a citizen under federal law, it does not follow that the organic instrument of state government must be interpreted as conferring the identical right. Nor does it follow that where a right given by the federal constitution is not given by a state constitution, the state constitution offends the federal constitution. It is only where the organic instrument of government purports to deprive a citizen of a right granted by the federal constitution that the instrument can be said to violate the [federal] constitution.

Id. at 216-17 (Mich. 1993). "[A]ppropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. . . . As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Id.* at 217. Multiple state courts have agreed with this conclusion. *See Serna v. Superior Court*; 707 P.2d 793, 798-800 (Cal. 1985); *Sanders v. State*, 585 A.2d 117, 147 n. 25 (Del. 1990); *Taylor v. State*, 639 N.E.2d 1052, 1053 (Ind. Ct. App. 1994); *Ex parte Tucci*, 859 S.W.2d 1, 13 (Tex. 1993) (plurality); *West v. Thompson Newspapers*, 872 P.2d 999, 1004 n. 4 (Utah 1994).

In a decision rejecting a state constitutional challenge to Ohio's abortion informed consent statute, the Ohio Court of Appeals noted that although a state court is "not free to find constitutional a statute that violates the United States Constitution, as interpreted by *Planned Parenthood* on the basis that the [state] [c]onstitution is not violated," it need not

"follow the undue burden test of *Planned Parenthood* [in construing] the [state] [c]onstitution." *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 577 n. 9 (Ohio Ct. App. 1993). "Instead, the state may use either a lesser or greater standard." *Id.* at 575 n. 5. In interpreting the Massachusetts Constitution, the Massachusetts Supreme Judicial Court refused to employ the Supreme Court's "rigid formulation" of balancing the interests at stake in the abortion debate, preferring instead a "more flexible approach to the weighing of interests that must take place." *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387, 402-04 (Mass. 1981). Finally, both the Mississippi Supreme Court and the Michigan Court of Appeals have conducted independent analyses of their state constitutions, the former concluding that the Mississippi Constitution confers a state right to abortion, *Pro-Choice Mississippi, v. Fordice*, 716 So.2d 645, 650-54 (Miss. 1998), the latter concluding otherwise under the Michigan Constitution. *Mahaffey v. Attorney General*, 564 N.W.2d 104, 109-11 (Mich. Ct. App. 1997).

In sum, a state court may reasonably either follow Supreme Court precedent construing a federal constitutional guarantee in construing a similar guarantee in the state constitution, with all the limitations that implies, or it may construe the state constitution independently of the federal constitution. But if it chooses the latter course, then Supreme Court precedents should not dictate the interpretation of the state constitution. Depending upon its text, history and interpretation, a right secured by the Kansas Constitution may be broader,[1]

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[1] *See Stinemetz v. Kansas Health Policy Authority*, 45 Kan. App.2d 818, 842-51, 252 P.3d 141, 156-61 (2011) (rejecting application of *Employment Division v. Smith*, 494 U.S. 872 (1990), in construing religious liberty guarantee of § 7 of the Kansas Bill of Rights).

narrower[2] or the same[3] as the corresponding right secured by the United States Constitution.

II.

NOTHING IN THE INALIENABLE RIGHTS GUARANTEE (§ 1) OR THE POLITICAL POWER PROVISION (§ 2) OF THE KANSAS BILL OF RIGHTS CONFERS A RIGHT TO ABORTION.

The district court held that §§ 1 and 2 of the Kansas Bill of Rights "independently protect[] the fundamental right to abortion." Order Granting Temporary Injunction 5. Section 1 provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 provides, in part,

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[2] *Compare City of Salina v. Blaksley*, 72 Kan. 230, 231-32, 83 P. 619, 620 (1905) (former language of § 4 of Kansas Bill of Rights, guaranteeing the right of "[t]he people . . . to bear arms for their defense and security," referred only "to the people as a collective body" and did not confer any "individual rights" to bear arms), *with District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment secures right of individual to keep and bear arms); *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966), *appeal dismissed*, *cert. denied*, 389 U.S. 51 (1967) (religious liberty guarantee of the state constitution, Bill of Rights, § 7, did not entitle the children of a member of the Old Order Amish Mennonite Church to an exemption from the State's compulsory school attendance law), *with Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting exemption under Free Exercise Clause of the First Amendment); *Castle v. Houston*, 19 Kan. 417, 422, 428 (1877) (under free speech provision of state constitution, Bill of Rights, § 11, truth is not a defense in a prosecution for criminal libel unless the "alleged libelous matter was published for justifiable ends"), *with Garrison v. Louisiana*, 379 U.S. 64 (1964) (under Free Speech Clause of First Amendment, truth is a complete defense to a charge of criminal libel, without regard to the reasons for which the allegedly libelous statements were made, with respect to statements made about the official conduct of public officials).

[3] *See State v. Daniel*, 291 Kan. 490, 498, 242 P.3d 1186, 1191 (2010) (construing state search and seizure provision, Bill of Rights, § 15, consistently with the Fourth Amendment); *State v. Mertz*, 258 Kan. 745, 749, 907 P.2d 847, 851 (1995) (construing state double jeopardy provision, Bill of Rights, § 10 (last sentence), consistently with the Fifth Amendment); *State v. Scott*, 265 Kan. 1, 5, 961 P.2d 667, 670 (1998) (construing state prohibition of cruel and unusual punishment, Bill of Rights, § 9, consistently with the Eighth Amendment).

that "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Neither § 1 nor § 2 supports a right to abortion.

Section 2, as the Kansas Supreme Court has noted, applies "solely to political privileges, not to the personal or property rights of an individual." *Sharples v. Roberts*, 249 Kan. 286, 289, 816 P.2d 390, 393 (1991). *See also Samuel v. Wheeler Transport Services*, 246 Kan. 336, 354, 789 P.2d 541, 553 (1990) (same); *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058, 1061 (1987) ("[w]hen an equal protection challenge is raised involving individual personal or property rights, not political rights, the proper constitutional section to be considered is Section 1 of the Kansas Bill of Rights"). Accordingly, § 2 has no bearing on the constitutionality of an abortion regulation.

The court has referred to § 1 as guaranteeing due process of law, *see State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760, 777 (1981) (citing § 1), even though § 1 does not actually refer to due process of law, as such.[4] The court has said that state due process (and equal protection principles) do not "differ" from those under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *In re K.M.H.*, 285 Kan. 53, 62, 169 P.3d 1025, 1033 (2007). Nevertheless,

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[4] The court has also cited § 18 of the Kansas Bill of Rights as a guarantor of due process of law. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1273, 136 P.3d 457, 463 (2006). Properly understood, however, § 18, which provides, in part, that "[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law," is concerned only with preserving civil remedies for private injuries and thus cannot be considered an independent source of rights. *See Prager v. State of Kansas, Dep't of Revenue*, 271 Kan. 1, 40, 20 P.3d 39, 66 (2001) ("Section 18 does not create any new rights of action; it merely requires the Kansas courts to be open and to afford a remedy for such rights as are recognized by law").

in a case presenting both state and federal constitutional privacy claims, the court declined to decide whether "the fundamental [federal] right of a pregnant woman to obtain a lawful abortion without government imposition of an undue burden on that right . . . . also exist[s] under the Kansas Constitution." *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 376-77 (2006).

In *City of Wichita v. Tilson*, 253 Kan. 285, 855 P.2d 911 (1993), the Kansas Supreme Court held that the necessity defense could not be raised in a prosecution for criminal trespass at an abortion clinic where the harm sought to be avoided (abortion) is a constitutionally protected legal activity and the harm incurred (trespass) is in violation of the law. In stating that abortion was "constitutionally protected," however, the court relied *solely* upon the federal constitutional right to abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973), not upon § 1 or any other provision of the Kansas Bill of Rights. *Tilson*, 253 Kan. at 291-96, 855 P.2d at 915-18.[5] It would be particularly inappropriate for this Court to adopt, *as a matter of state constitutional law*, either the "strict scrutiny" standard of review applied to abortion regulation by the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (recognizing abortion as a "fundamental" right) or the "undue burden" standard formulated by the authors of the Joint Opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 869-79 (1992) (Joint Op. of O'Connor, Kennedy and Souter, JJ.) (tacitly rejecting the characterization of abortion as a "fundament" right and allowing for a broader measure of abortion regulation that would have been permitted

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[5] The court has referred to the right to abortion as one rooted in the *federal,* not the *state*, constitution. *See Johnston v. Elkins*, 241 Kan. 407, 412, 736 P.2d 935, 939 (1987); *Arche v. U.S. Dep't of the Army*, 247 Kan. 276, 280, 798 P.2d 477, 480 (1990).

under *Roe*). Although a clear majority of the Court has rejected the "strict scrutiny" standard of review, no emerging majority (in *Casey* or in any subsequent case) has coalesced around the "undue burden" standard. Moreover, to the extent that a majority of the Court in *Casey* reaffirmed the core principles of *Roe*, the Court relied principally upon the doctrine of *stare decisis* and the (perceived) need to maintain its institutional integrity in the face of continued opposition to its ruling in *Roe*, *Casey*, 505 U.S. at 855-69, considerations which obviously have no place in the resolution of an issue of first impression in *this* Court. Significantly, a majority of the Court in *Casey* did *not* hold that *Roe* has been decided correctly as an original matter. Nor has a majority so held since *Casey* was decided.

The Kansas Supreme Court has not developed a formal methodology for determining whether an asserted liberty interest is protected by the inalienable rights guarantee of § 1, but it has stated that the primary guide in determining whether a principle in question is fundamental for purposes of due process analysis is historical practice. *State v. Bethel*, 275 Kan. 456, 464-73, 66 P.3d 840, 846-51 (2003) (refusing to recognize a state due process right to raise an insanity defense where no such right existed when the state constitution was adopted).[6] So, for example, "a natural parent's right to the custody of his or her children is a fundamental right which may not be disturbed by

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[6] In a similar vein, the supreme court has repeatedly held that the right to jury trial guaranteed by §§ 5 and 10 of the Kansas Bill of Rights was intended "only to secure a jury trial as it existed at the time of the adoption of the constitution." *City of Fort Scott v. Arbuckle*, 165 Kan. 374, 385, 196 P.2d 217, 225 (1948) (no state constitutional right to a jury trial in municipal ordinance prosecutions). *See also In re Inquiry Relating to Rome*, 218 Kan. 198, 204, 542 P.2d 676, 683 (1975) (no right to a jury trial in disciplinary proceedings); *Craig v. Hamilton*, 213 Kan. 665, 670, 518 P.2d 539, 544 (1974) (no right to a jury trial in equity proceedings).

the state or by third parties, absent a showing that the natural parent is unfit." *Sheppard v. Sheppard*, 230 Kan. 146, 152, 630 P.2d 1121, 1127 (1981). That right is, of course, of ancient vintage. "The history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972). But there is no historical practice of recognizing a right to abortion in Kansas law, nor, in light of the State's legal history and traditions, could abortion plausibly be described as a "natural right" within the meaning of § 1 of the Kansas Bill of Rights.

Kansas enacted its first abortion statutes in 1855, four years before it adopted the present constitution and joined the Union. One statute prohibited the performance of an abortion upon a woman, "pregnant with a quick child," unless the procedure was "necessary to preserve the life of [the] mother, or shall have been advised by a physician to be necessary for that purpose," and punished the offense as manslaughter in the second degree. Kan. (Terr.) Stat. ch. 48, § 10 (1855). Another statute prohibited performance of an abortion upon a pregnant woman at any stage of pregnancy (subject to the same exception) and punished the offense as a misdemeanor. *Id.* ch. 48, § 39. A third statute made the "wilful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother," manslaughter in the first degree. *Id.* ch. 48, § 9. These statutes remained essentially unchanged (except for an increase in the offense for aborting a "quick" child from second to first degree manslaughter) until they were repealed and replaced with a provision based upon the

Model Penal Code in 1969.[7]

Prior to *Roe v. Wade*, the Kansas Supreme Court regularly affirmed convictions for abortion (and manslaughter convictions based upon the death of the woman resulting from an illegal abortion) without any hint that the prosecutions or convictions were barred by the Kansas Constitution.[8] In an early decision, the supreme court held that the principal abortion statute had been enacted "to protect the pregnant woman and the unborn child." *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913).[9] *See also Joy v. Brown*, 173 Kan. 833, 839, 252 P.2d 889, 892 (1953) (same). In *Joy*, the court held that the next of kin of a woman who had died as a result of a negligently performed illegal abortion could sue the abortionist for damages. Rejecting the defendant's argument that the deceased's consent to an illegal act barred recovery, the court said, "We are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." *Id.* at 839-40, 252 P.2d at 892.

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[7] *Id.* ch. 48, §§ 9, 10, 39 (1855), *recodified at* Kan. Gen. Laws ch. 28, §§ 9, 10, 37 (1859), *recodified at* Kan. Gen. Stat. ch. 31, §§ 14, 15, 44 (1868), *recodified at* Kan. Gen. Stat. §§ 1952, 1953, 1982 (1899), *recodified at* Kan. Gen. Stat. §§ 1999, 2000, 2029 (1901), *recodified at* Kan. Gen. Stat. §§ 2090, 2091, 2120 (1905), *recodified at* Kan. Gen. Stat. §§ 3375, 3376, 3405 (1915), *recodified at* Kan. Gen. Stat. §§ 21-409, 21-410, 21-437 (1923), *carried forward as* Kan. Stat. Ann. §§ 21-409, 21-410, 21-437 (1964), *repealed by* 1969 Kan. Sess. Laws 503, ch. 180.

[8] *See State v. Watson*, 30 Kan. 281, 1 P. 770 (1883); *State v. Hatch*, 83 Kan. 613, 112 P. 149 (1910); *State v. Harris*, 90 Kan. 807, 136 P. 264 (1913); *State v. Patterson*, 105 Kan. 9, 181 P. 609 (1919); *State v. Nossaman*, 120 Kan. 177, 243 P. 326 (1926); *State v. Keester*, 134 Kan. 64, 4 P.2d 679 (1931); *State v. Brown*, 171 Kan. 557, 236 P.2d 59 (1951); *State v. Ledbetter*, 183 Kan. 302, 327 P.2d 1039 (1958); *State v. Darling*, 208 Kan. 469, 493 P.2d 216 (1972).

[9] Six years later, the court stated that "[a]ny human embryo which is not dead. . . . is no less endowed with life before reaching the stage of development known as quickening than after." *State v. Patterson*, 105 Kan. at 10, 181 P. at 610.

Kansas recognizes the rights of unborn children in several areas outside of abortion. In criminal law, killing or injuring an unborn child (outside the context of abortion or other medical or surgical procedure to which the pregnant woman has consented) may be prosecuted as a homicide or battery. Kan. Stat. Ann. § 21-5419 (West 2012) (defining "person" and "human being" for purposes of the homicide and battery statutes to include an unborn child "at any stage of gestation from fertilization to birth"). And a woman convicted of a capital offense may not be executed while she is pregnant. *Id.* § 22-4009 (West 2008).

In tort law, a statutory cause of action for wrongful death may be brought on behalf of an unborn child whose death, "at any stage of gestation from fertilization to birth," was caused by the wrongful act of another. Kan. Stat. Ann. § 60-1901(a)-(c) (West Supp. 2014). A common law cause of action for (nonlethal) prenatal injuries may be brought without regard to the state of pregnancy when the injuries were inflicted. *Humes v. Clinton*, 246 Kan. 590, 596, 792 P.2d 1032, 1037 (1990) (*dicta*). More recently, the supreme court held that "a physician who has a doctor-patient relationship with a pregnant woman who intends to carry her fetus to term and deliver a healthy baby also has a doctor-patient relationship with the fetus," and may be held liable in negligence for injuries caused by failing to provide the pregnant woman and her unborn child with proper medical care during pregnancy. *Nold ex rel. Nold v. Binyon*, 272 Kan. 87, 111, 31 P.3d 274, 289 (2000). And the court has refused to recognize a cause of action for "wrongful life." *Bruggemann by and through Bruggemann v. Schimke*, 239 Kan. 245, 718 P.2d 635 (1986). The court explained:

It has long been a fundamental principle of our law that human life is

> precious. Whether the person is in perfect health, in ill health, or has or does not have impairments or disabilities, the person's life is valuable, precious and worth of protection. A legal right not to be born — to be dead, rather than to be alive with deformities — is completely contradictory to our law.

Id. at 254, 718 P.2d at 642.

In health care law, a living will may not direct the withholding or withdrawal of life-sustaining medical treatment from a woman who is known to be pregnant. Kan. Stat. Ann. § 65-28,103(a) (last sentence) (West 2008). In property law, posthumous children are considered as living at the death of their parents for purposes of inheritance. *Id.* § 59-501(a). And in guardianship law, a guardian *ad litem* may be appointed to represent the interests of "[a]ll possible unborn . . . beneficiaries." *Id.* § 59-2205.

There is no evidence that either the framers or ratifiers of the Kansas Constitution intended the Bill of Rights to limit the Legislature's authority to prohibit abortion. *See* Wyandotte (Kansas) Constitutional Convention (1859) 184–89 (Report of the Committee on the Preamble and Bill of Rights), 271–91, 460–65, 535–37 (debate on Bill of Rights in Convention) (Topeka, Kansas 1920). Such an intent would have been remarkable in light of the contemporaneous prohibition of abortion except to save the life of the pregnant woman. Because there is no right—fundamental or otherwise—to obtain an abortion under the Kansas Bill of Rights, the regulation of abortion is subject to rational basis review under the state constitution. For a statute to pass constitutional muster under that standard, "[i]t must implicate legitimate goals, and . . . the means chosen by the legislature must bear a rational relationship to those goals." *Mudd v. Neosho*, 275 Kan. 187, 198, 62 P.3d 236, 244 (2003). In prohibiting a barbaric method of abortion, the challenged legislation easily meets that standard.

Conclusion

For the foregoing reasons, *amicus curiae* respectfully request that this Honorable Court reverse the order of the district court temporarily enjoining enforcement of Kansas Senate Bill 95.

/s/Kevin M. Smith
Kevin M. Smith
Kansas Bar No. 19242
Law Offices of Kevin M. Smith, P.A.
1502 N. Broadway
Wichita, Kansas 67214-1106
(316) 262-2331 (tel)
(316) 262-8862 (fax)
4acelaw@sbcglobal.net

/s/Paul Benjamin Linton*
Paul Benjamin Linton
Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, Illinois 60062
(847) 291-3848 (tel)
(847) 412-1594 (fax)
PBLCONLAW@AOL.COM

* Application for *Pro Hac Vice* Admission Granted

Attorneys for the *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief *amicus curiae* of the Family Research Council were sent, via electronic mail, on October 20. 2015, to the following counsel of record:

Robert V. Eye
Brett A. Jarmer
Robert V. Eye Law Office, LLC
123 S.E. 6th Avenue, Suite 200
Topeka, Kansas 66603
bob@kauffman.eye.com
brett@kauffmaneye.com

Teresa A. Woody
The Woody Law Firm, P.C.
1621 Baltimore Avenue
Kansas City, Missouri 64108
teresa@woodylawfirm.com

Erin Thompson
Thompson Law Firm, LLC
106 E. 2nd Street
Wichita, Kansas 67202
ethompson@tslawfirm.com

Janet Crepps
Genevieve Scott
Zoe Levine
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, New York, 10038
jcrepps@reprorights.org
gscott@reprorights.org
zlevine@reprorights.org

Jeffrey A. Chanay
Chief Deputy Attorney General
Dennis D. Depew
Deputy Attorney General,
Civil Litigation Division
Office of the Attorney General
Memorial Building 3rd Floor
120 S.W. Tenth Avenue
Topeka, Kansas 66612-1597
jeff.chanay@ag.ks.gov
dennis.depew@ag.ks.gov

Shon D. Qualseth
Stephen R. McAllister
Solicitor General of Kansas
Sarah E. Warner
333 West 9th Street
P.O. Box 1264
Lawrence, Kansas 66044-2803
shon.qualseth@trqlaw.com
steve.mcallister@trqlaw.com
sarah.warner@trqlaw.com

/s/Kevin M. Smith
Kevin M. Smith
Counsel for the *Amicus Curiae*