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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-Respondents,

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-Petitioners.

RESPONDENTS' REPLY BRIEF TO BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL IN SUPPORT OF DEFENDANTS-PETITIONERS

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

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TABLE OF CONTENTS

INTRODUCTION **1**

Kan. Const. Bill of Rights §§ 1, 2 1

ARUGMENT **1**

I. Sections 1 and 2 of the Kansas Constitution Bill of Rights Place Enforceable Limits on Interference with Individual Rights **1**

Kan. Const. Bill of Rights §§ 1, 2 ..... 1, 2

II. High Courts in Many States Recognize That Analogous Inalienable-Rights Provisions Create Enforceable Rights **2**

Kan. Const. Bill of Rights § 1 2

A. FRC Misreads the Weight of Authority in States it Categorizes as Not Finding Section 1 Analogs to be Self-Executing **2**

Kan. Const. Bill of Rights § 1 ..... 2, 3

Doe v. O'Connor, 790 N.E.2d 985 (Ind. 2003) 3, 4, 5, 6, 7

Dep't of Fin'l Insts. v. Holt, 108 N.E.2d 629 (Ind. 1952) 3

Dep't of Ins. v. Schoonover, 72 N.E.2d 747 (Ind. 1947) 3

Kirtley v. State, 84 N.E.2d 712 (Ind. 1949) 3

Sheppard v. Dowling, 28 So. 791 (Ala. 1900) 3, 4

Ala. Const. Art. I, §§ 1, 35 4

State ex rel. Galanos v. Mapco Petroleum, Inc., 519 So.2d 1275 (Ala. 1987) 4

Cogan v. State Department of Revenue, 657 P.2d 396 (Alaska 1983) 4

Alaska Const. Art. I, § 1 4

Breese v. Smith, 501 P.2d 159 (Alaska 1972) 4

State v. Planned Parenthood of Alaska, 35 P.3d 30 (Alaska 2001) 4, 5

Nelson v. Boundary County, 706 P.2d 94 (Idaho Ct. App. 1985) 5

Murphy v. Pocatello Sch. Dist. No. 25, 480 P.2d 878 (Idaho 1971) 5

Berry v. Koehler, 369 P.2d 1010 (Idaho 1961) 5

Atteberry v. State, 438 P.2d 789 (Nev. 1968) 5

Nev. Const. art. I, § 1 ..... 5, 6

Norman v. City of Las Vegas, 177 P.2d 442 (Nev. 1947) 6

Blea v. City of Espanola, 870 P.2d 755 (N.M. Ct. App. 1994) 6

N.M. Const. art. II, § 4 6

Reed v. State ex rel. Ortiz, 947 P.2d 86 (N.M. 1997), *rev'd per curiam*, 524 U.S. 151 (1998) 6

Shields v. Gerhart, 658 A.2d 924 (Vt. 1995) 6

In re G.K., 514 A.2d 1031 (Vt. 1986) 6

Vt. Const. ch. I, art. 1 ..... 6, 7

State v. Williams, 728 N.E.2d 342 (Ohio 2000) 7

Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993) 7

Kunkel v. Walton, 689 N.E.2d 1047 (Ill. 1997) 7

Eick v. Perk Dog Food Co., 106 N.E.2d 742 (Ill. Ct. App. 1952) 7

People v. Brown, 95 N.E.2d 888 (Ill. 1950) 7

Paris v. Commonwealth, 545 S.E.2d 557 (Va. Ct. App. 2001) 7

B. Enforceable Provisions in Other State Constitutions that FRC Characterizes as Analogous are Not Distinguishable 8

Kan. Const. Bill of Rights §§ 1, 2 ..... 8, 9

State ex rel. Stephan v. Parrish, 257 Kan. 294, 891 P.2d 445 (1995) 8

Jensen ex rel. Jensen v. Cunningham, 250 P.3d 465 (Utah 2011) 9

Treants Ent. v. Onslow Cty., 360 S.E.2d 783 (N.C. 1987) 9

City of Watertown v. Christnacht, 164 N.W. 62 (S.D. 1917) 9

S.D. Const. art. VI, § 1 9

State v. Limon, 280 Kan. 275, 122 P.3d 22 (2005) 9

III. The Kansas Constitution Should Be Interpreted to Protect Abortion as a Fundamental Right 10

Kan. Const. Bill of Rights §§ 1, 2 10

CONCLUSION 10

Kan. Const. Bill of Rights §§ 1, 2 10

INTRODUCTION

Although this Court has previously invalidated legislation based on a violation of rights secured by Sections 1 and 2 of the Kansas Constitution Bill of Rights, *Amicus* Family Research Council ("FRC") argues not only that Section 1 encompasses no right to abortion, but also that it creates no substantive rights. This argument is inconsistent with this Court's jurisprudence, and, despite FRC's claim to the contrary, is inconsistent with the weight of authority in other states. This Court should reject FRC's suggestion, which would render Section 1 of the Kansas Bill of Rights virtually meaningless, and hold that Sections 1 and 2 afford strong protection that includes the fundamental right to abortion.

ARUGMENT

I. Sections 1 and 2 of the Kansas Constitution Bill of Rights Place Enforceable Limits on Interference with Individual Rights.

FRC ignores decades of this Court's cases evaluating the constitutionality of laws under Sections 1 and 2 by first urging the Court to reverse course on a question it has already decided: whether Sections 1 creates enforceable rights. Accepting FRC's troubling assertion that Section 1 creates no substantive rights, however, would require overturning decades of this Court's precedent, resulting in an unprecedented diminution of the rights of Kansas citizens.

Far from "on occasion" stating that Sections 1 and 2 are given "much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection," *see* Br. of Family Research Council as Amicus Curiae at 2, this Court has recognized repeatedly that Sections 1 and 2 afford such protections. *See* Resp'ts' Suppl. Br. at 9; Appellees' Br. to Ct. of Appeals at 18–19. In each instance in which a Kansas

court analyzes a claim under Sections 1 and 2, by result and implication, it is clear that these provisions are self-executing.

FRC's emphasis on whether Section 1, or its analogs in other states, create enforceable rights standing alone misses the point. A court's reliance on other constitutional provisions in conjunction with an inalienable-rights clause does not indicate, as FRC would have it, that the inalienable-rights clause places no constraints on government interference with individual rights. Contrary to FRC's argument, then, this Court's nearly century-long history of recognizing that Sections 1 and 2 have much the same effect as the Fourteenth Amendment does not suggest that Section 1 is unenforceable. FRC's argument that Section 1 is not self-executing, if accepted, would, moreover, lead to the conclusion that there are no due process rights under the State Constitution. This Court's precedent forecloses such an extreme suggestion.

II. High Courts in Many States Recognize That Analogous Inalienable-Rights Provisions Create Enforceable Rights.

FRC relies on what it characterizes as holdings or implications from case law in twenty-eight states with constitutional analogs to argue that Section 1 does not create enforceable rights. But FRC's reading of these cases is largely mistaken, and the weight of authority supports the conclusion that Section 1 places enforceable limits on government interference with individual rights.

A. FRC Misreads the Weight of Authority in States it Categorizes as Not Finding Section 1 Analogs to be Self-Executing.

FRC asserts that courts in at least ten states with provisions similar to Section 1 "have held or strongly implied that such language, in and of itself, is not self-executing." Br. of FRC as Amicus Curiae at 7 (citing three cases and listing seven states). However,

the weight of authority in these states suggests that their analogous constitutional provisions are enforceable.

FRC relies heavily on *Doe v. O'Connor*, 790 N.E.2d 985, 990–91 (Ind. 2003), using that case as the sole authority to suggest that analogous provisions in numerous other states are not self-executing. Br. of FRC as Amicus Curiae at 7 (referring to *Doe* as citing cases from Alabama, Alaska, Idaho, Nevada, New Mexico, Ohio, and Vermont). In *Doe*, the Indiana Supreme Court observed that a number of states had determined that their constitutional provisions similar to Section 1 did not create enforceable rights. *See* 790 N.E.2d at 990–91. However, as explained below, a number of these states have, in fact, held that their Section 1 analog creates enforceable rights. *Doe* itself left open the question of whether Indiana's inalienable-rights clause is judicially-enforceable, *see id.* at 991, and in other cases, the Indiana Supreme Court has relied on this provision in invalidating statutes. *See e.g.*, *Dep't of Fin'l Insts. v. Holt*, 108 N.E.2d 629, 633, 637 (Ind. 1952) (invalidating statute limiting amount that buyers of retail installment contracts could agree to pay because it was impermissible exercise of police power under Section 1 of Indiana Constitution); *Dep't of Ins. v. Schoonover*, 72 N.E.2d 747, 750 (Ind. 1947) ("The rights guaranteed by Art. I, § 1, are cherished rights and not to be surrendered lightly."). *See also, e.g.*, *Kirtley v. State*, 84 N.E.2d 712, 715 (Ind. 1949) (finding that statute prohibiting ticket "scalping" violated Section 1 liberty right). *Doe* did not disturb these holdings to the extent they relied on the inalienable-rights clause.

Nearly every state referenced by FRC through its citation to *Doe* is inapposite. The Alabama Supreme Court, in *Sheppard v. Dowling*, 28 So. 791 (Ala. 1900), for example, suggests, contrary to FRC's reading, that the Alabama analog to Section 1 places limits on

government power. *See Sheppard*, 28 So. at 795 (noting that while "[p]ursuit of happiness is one of the citizen's inalienable rights[,] . . . the lines of such pursuit are not unlimited;" government has power to regulate in this area consistent with general police power without violating inalienable rights). The Alabama Supreme Court has also held that the inalienable-rights clause, Ala. Const. Art. I, § 1, along with another, similar clause, Ala. Const. Art. I, § 35, creates liberty interests that extend to economic concerns. *See State ex rel. Galanos v. Mapco Petroleum, Inc.*, 519 So.2d 1275 (Ala. 1987).

Cogan v. State Department of Revenue, 657 P.2d 396 (Alaska 1983), cited in *Doe*, says nothing about whether Alaska's inalienable-rights clause is self-executing. *See id.* at 398 (holding right to life, liberty, and pursuit of happiness, Alaska Const. Art. I, § 1, did not prohibit imposition of an income tax). In fact, the Alaska Supreme Court has held that the right to liberty in the Alaska Constitution includes the right to be left alone, thus concluding that the provision is self-executing. *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972) (holding, under state constitution's "affirmative grant to all persons of the natural right to 'liberty,' students attending public educational institutions in Alaska possess a constitutional right to wear their hair in accordance with their personal tastes").

The Alaska Supreme Court has also held that the state constitution's explicit privacy guarantee is self-executing, despite a provision stating: "The legislature shall implement this section." *See State v. Planned Parenthood of Alaska*, 35 P.3d 30, 35 (Alaska 2001). Accepting the argument that the clause was not enforceable would have required the court to "nullify almost three decades of case law enforcing Alaska's constitutional guarantee of privacy." *Id.* at 35–36 (citing cases from variety of areas

implicating right to privacy, including abortion, medical records, and against unreasonable search and seizure and self-incrimination). Thus,

> With or without legislative action, this guarantee has the usual attributes of a constitutional provision: its broad contours and particular applications fall within the judiciary's province and are subject to definition, interpretation, and refinement through the traditional course of adjudication, case by case.

Id. at 38–39.

Nelson v. Boundary County, 706 P.2d 94 (Idaho Ct. App. 1985), also cited by *Doe*, states only that the pursuit of happiness protected by the state's Section 1 analog "has been intertwined with a person's right to follow his chosen occupation, [but it] does not stretch as far as to prohibit the otherwise proper termination of a public employee." *Nelson*, 706 P.2d at 100 (citation omitted). The court did not indicate that the provision was not enforceable; rather, it declined to find that the "pursuit of happiness" clause encompassed a right not to be fired from one's job. *See id.* The Idaho Supreme Court, has, however, held the inalienable rights and unenumerated powers sections create a privacy right. *Murphy v. Pocatello Sch. Dist. No. 25*, 480 P.2d 878, 884 (Idaho 1971) (striking down a school hair-length regulation). *See also Berry v. Koehler*, 369 P.2d 1010, 1016 (Idaho 1961) (suggesting enforceability of Section 1 analog with observation that individual's right to follow chosen profession "is property within the meaning of the constitutional provision as to due process of law, and is also included in the right to liberty and the pursuit of happiness" that "cannot be arbitrarily taken away" (internal quotation marks and citation omitted)).

Atteberry v. State, 438 P.2d 789, 791 (Nev. 1968), cited by *Doe*, neither held nor implied that the state's Section 1 analog was not enforceable; it said only that the appellant "failed to demonstrate by authority or argument how his rights under Article 1, section 1,

of the Nevada Constitution have been violated by the enactment." In other instances though, the court has suggested that the provision may be enforceable. *See, e.g.*, *Norman v. City of Las Vegas*, 177 P.2d 442, 446–48 (Nev. 1947) (focusing on whether facts demonstrated a violation of "right of privacy, the right to be let alone," under inalienable-rights clause, without addressing the uncontested existence of such a right).

Doe also references *Blea v. City of Espanola*, 870 P.2d 755, 759 (N.M. Ct. App. 1994), in which the New Mexico Court of Appeals concluded that references to "safety and happiness" under New Mexico's inalienable-rights clause, Art. II, § 4 (stating rights to "life, liberty, property, and to seek and obtain safety and happiness"), were insufficient to state a claim for purposes of waiver of sovereign immunity. In a more recent case, however, the New Mexico Supreme Court treated as enforceable the state constitution's right of "seeking and obtaining safety" under Article II, Section 4. *See Reed v. State ex rel. Ortiz*, 947 P.2d 86, 107, 112 (N.M. 1997) (holding clause prohibited extradition of individuals threatened with bodily harm or death by government officials of another state who had no recourse within threatening state), *rev'd per curiam*, 524 U.S. 151, 154 (1998) (reversing on grounds that state supreme court holding went beyond what was permitted under Extradition Clause of the U.S. Constitution).

Although some of the Vermont cases cited by *Doe* indicate that the state's Section 1 analog is not self-executing, *see, e.g.*, *Shields v. Gerhart*, 658 A.2d 924, 928–29 (Vt. 1995), other decisions by the Vermont Supreme Court rely on the provision to define enforceable limits on the government's power to interfere with the liberty rights of mentally ill individuals. *See, e.g.*, *In re G.K.*, 514 A.2d 1031, 1032 (Vt. 1986) (the Vermont Constitution "explicitly states that people are born free and enjoy freedom from restraint

as a natural, inherent and unalienable right. Vt. Const. ch. I, art. 1. To place the burden on the patient to assert his right to liberty seems at odds with this fundamental constitutional principle," and rights to travel and "to be free from unwarranted intrusions of one's bodily integrity are clearly impinged upon" where mentally ill individuals are committed).

In addition, while *State v. Williams*, 728 N.E.2d 342, 354 (Ohio 2000), cited in *Doe*, holds that Ohio's Section 1 does not alone provide sufficient guidance as to how courts should afford protection to the rights it declares, Ohio courts have construed it with the state constitution's privileges and immunities clause (an analog to Kansas's Section 2) to "make it quite clear that, under the Ohio Constitution's Bill of Rights, every person has inalienable rights under natural law which cannot be unduly restricted by government." *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 574 (Ohio Ct. App. 1993) (holding abortion restriction violated liberty right under Article I, Section 1 of the Ohio Constitution).

Case law from two other states cited by FRC likewise fails to support its point. While *Kunkel v. Walton*, 689 N.E.2d 1047, 1056–57 (Ill. 1997) observed that the state's inalienable-rights clause had not been understood by itself to be enforceable, Illinois courts have relied on it in conjunction with the state's due process clause to find an enforceable right to privacy, *see Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 748 (Ill. Ct. App. 1952), and to protect economic interests. *See, e.g.*, *People v. Brown*, 95 N.E.2d 888, 893–94 (Ill. 1950). And, *Paris v. Commonwealth*, 545 S.E.2d 557, 559–60 (Va. Ct. App. 2001), ruled only that the state constitution's inalienable-rights clause was not without boundaries, not that it provided no enforceable limits on government interference with individual rights.

FRC thus misperceives the import of case law in nearly all of the states it categorizes as having no judicially enforceable analog to Section 1.

B. Enforceable Provisions in Other State Constitutions that FRC Characterizes as Analogous are Not Distinguishable.

FRC also unsuccessfully attempts to distinguish several other states on the ground that their Section 1 analogs are enforceable only with various qualifications not applicable in Kansas. For example, FRC argues that several states that recognize as enforceable provisions similar to Section 1 nevertheless differ from Kansas because courts in those states have found such provisions enforceable only in connection with an express due process guarantee. This assertion has little relevance to this Court's interpretation of Section 1, and, further, is simply mistaken.

First, this Court has construed Sections 1 and 2 as having much the same effect as the due process guarantee of the Fourteenth Amendment. *E.g.*, *State ex rel. Stephan v. Parrish*, 257 Kan. 294, Syl. ¶ 5, 891 P.2d 445, 447 (1995). It is thus incorrect to assert, as FRC does, that the "Kansas Bill of Rights has no such guarantee." *See* Br. of FRC as Amicus Curiae at 7. Given that interpretation, cases from other states that rely on both an inalienable-rights clause and an express due process guarantee more closely align with this Court's interpretation of the Kansas Constitution than FRC would have it. Second, that some states construe their inalienable-rights clauses as enforceable in connection with an explicit due process guarantee does not mean that Section 1 is unenforceable because the Kansas Constitution lacks such an explicit clause. As observed *supra* and in Respondents' prior briefing, this Court has never doubted that Section 1 is enforceable. *See* Resp'ts' Suppl. Br. at 9; Appellees' Br. to Ct. of Appeals at 18–19.

In any event, cases from several of the states FRC cites have treated their inalienable-rights clause as enforceable without the aid of an explicit due process guarantee. For example, although FRC cites a Utah case construing its Section 1 analog with an express due process guarantee, *see* Br. of FRC as Amicus Curiae at 7 n.9, the Utah Supreme Court has plainly held the state constitution's inalienable rights "provision is self-executing." *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 480–82. (Utah 2011) ("By its terms," the provision "prohibits government from infringing upon citizens' 'inherent and inalienable rights.'"). *See also Treants Ent. v. Onslow Cty.*, 360 S.E.2d 783, 785 (N.C. 1987) (relying on both inalienable rights and explicit due process clauses, but appearing to treat them as imposing the same—but separate—requirements); *City of Watertown v. Christnacht*, 164 N.W. 62, 62 (S.D. 1917) (striking down ordinance criminalizing the association of any male person with females known or reputed to be sex workers as "violat[ing] the personal liberty guaranteed by article 6, § 1, of our Constitution," including right to associate with whom one pleases, and not citing explicit due process guarantee).

FRC's attempts to cast aside another group of states as holding their Section 1 analogs enforceable only with respect to historically-protected rights, or only when cited alongside other constitutional provisions, are likewise misplaced. As Respondents have explained, this Court has not limited the protections under Sections 1 and 2 to those that were clearly recognized when the Constitution was adopted; rather, it has relied on the evolving understanding of liberty to guide its interpretation of Sections 1 and 2. *See State v. Limon*, 280 Kan. 275, 294–95, 122 P.3d 22, 34–35 (2005); Resp'ts' Suppl. Br. at 8–9; Appellees' Br. to Ct. of Appeals at 14–18. In addition, a court's reliance on more than

one constitutional provision—including this Court's practice of doing so—does not imply that one of those provisions is unenforceable.

III. The Kansas Constitution Should Be Interpreted to Protect Abortion as a Fundamental Right.

Respondents have established that Sections 1 and 2 of the Kansas Bill of Rights were intended to and should be interpreted to provide broad protection to individual rights, including the fundamental right to abortion. *See* Resp'ts' Suppl. Br. at 8–17; Br. of Appellees' to Ct. of Appeals at 13–28. Respondents incorporate those arguments by reference and in response to FRC's additional argument that, even if Section 1 is self-executing, it does not protect the right to access abortion.

CONCLUSION

This Court should reject FRC's argument that Section 1 of the Kansas Constitution Bill of Rights creates no substantive rights, and thus does not encompass the right to access abortion. The assertion that Section 1 sets no enforceable limits on government interference with individual rights is foreclosed by decades of this Court's holdings to the contrary. FRC presents no reason why this Court should stray from that course, which is also consistent with the weight of authority in other states with analogous constitutional provisions. Given this Court's case law, and the case law of its sister states, the Court should hold that Sections 1 and 2 set enforceable constraints on interference with individual rights, including the fundamental right to abortion.

Respectfully submitted,

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