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IN THE SUPREME COURT OF THE STATE OF KANSAS

Case No.15-114153-A

HODES & NAUSER, M.D., 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.

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

Brief of Amici Curiae American Association of Pro-Life Obstetricians & Gynecologists, American College of Pediatricians and Catholic Medical Association In Favor of Defendants-Appellants Seeking Reversal

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Identity and Interest of Amici

Amicus Curiae American Association of Pro-Life Obstetricians & Gynecologists ("AAPLOG") is an organization whose purpose is to affirm the unique value and dignity of individual human life in all stages of growth and development. AAPLOG members have reviewed and continue to review data from around the world regarding abortion-associated complications to provide a realistic appreciation of abortion-related health risks. AAPLOG respectfully submits some of that research to this Court to provide it with critical information pointing to the necessity for the statute.

Amicus Curiae American College of Pediatricians ("ACPeds") is a national organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. The College believes that Kansas' law banning D&E abortions is critically necessary to protecting the health and well-being of young women and respectfully seeks to provide the Court with information that is critical to the Court's analysis.

Amicus Curiae Catholic Medical Association ("CMA") is a non-profit national organization comprised of over 2,200 members representing over 75 medical specialties. The CMA helps to educate the medical profession and society at large about issues in medical ethics, including abortion and maternal health, through its annual conferences and quarterly bioethics journal, *The Linacre Quarterly*. As Catholic physicians and medical professionals, the members of the CMA have a profound interest in providing the best health care to their patients and all Americans, including women and the unborn. The CMA believes that Kansas' law, the "Unborn Child Protection from Dismemberment

Abortion Act," is vitally important for protecting the health and safety of women, and hereby offers information to the Court that is crucial to the analysis of this Act.

ARGUMENT

I. PROHIBITING THE DISMEMBERMENT OF UNBORN CHILDREN WHO CAN FEEL PAIN FURTHERS KANSAS' COMPELLING STATE INTERESTS IN RESPECTING LIFE AND PREVENTING CRUEL AND UNUSUAL PUNISHMENT.

A. The Act Furthers the State's Asserted Compelling Interest in Protecting the Lives of Unborn Children Who Can Feel Pain.

As one of 14 states that have enacted a Pain-Capable Unborn Child Protection Act,[1] Kansas has asserted its "compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain." Kan. Stat. §65-6722(k). Citing "substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization," the Kansas legislature prohibited abortions on unborn children "having reached the gestational age of 22 weeks or more" except when "1) The abortion is necessary to preserve the life of the pregnant woman; or 2) a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman." Kan. Stat. Ann. §§65-6723, 65-6724. The Legislature has again acted in furtherance of that compelling state interest by enacting the Kansas Unborn Child Protection from Dismemberment Abortion Act (the "Act"), Kan Stat. Ann. §§ 65–6741 et seq., to protect unborn children from the unimaginable pain and cruelty of being torn

[1] Alabama, Arkansas, Georgia, Kansas, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, West Virginia and Wisconsin have laws currently in effect. Idaho's law has been determined to be unconstitutional by the Ninth Circuit Court of Appeals. *McCormack v. Herzog,* 788 F.3d 1017 (9th Cir. 2015). National Right to Life Committee, Pain-Capable Unborn Child Protection Act Fact Sheet, May 2016, http://www.nrlc.org/uploads/stateleg/PCUCPAfactsheet.pdf.

limb from limb and removed from the mother's womb piece by piece. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan.App.2d 274, 276 (2016) (describing the procedure). Medical research has shown that unborn children feel pain even before the 20-week threshold described in Kan. Stat. Ann. §65-6723, demonstrating the need for the Legislature to enact even greater protections for the youngest and most vulnerable of its citizens by banning dismemberment abortions in Kan Stat. Ann. §§ 65–6741 et. seq.

Medical research has determined that unborn children can experience pain in some capacity from as early as eight weeks of development. Neonatal specialist Dr. Colleen Malloy testified before Congress that:

> There is ample biologic, physiologic, hormonal, and behavioral evidence for fetal and neonatal pain. As early as 8 weeks post-fertilization, face skin receptors appear. At 14 weeks, sensory fibers grow into the spinal cord and connect with the thalamus. At 13-16 weeks, monoamine fibers reach the cerebral cortex, so that by 17-20 weeks the thalamo-cortical relays penetrate the cortex.[2]

Dr. Maureen Condic also testified that "it is entirely uncontested that a fetus experiences pain in some capacity, from as early as 8 weeks of development."[3] She explained that to experience pain, a noxious stimulus must be detected and that "the neural structures necessary to detect noxious stimuli are in place by 8-10 weeks of human development."[4] "The neural circuitry responsible for the most primitive response to pain, the spinal reflex, is in place by 8 weeks of development. This is the earliest point at which the fetus

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[2] Testimony of Colleen A. Malloy, M.D. before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives May 17, 2012, https://judiciary.house.gov/wp-content/uploads/2016/02/Malloy-05172012.pdf.

[3] Testimony of Maureen L. Condic, Ph.D. before the Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, U.S. House of Representatives, 8 May 23, 2013 https://judiciary.house.gov/_files/hearings/113th/05232013/Condic%2005232013.pdf

[4] *Id.* at 4

experiences pain in any capacity."[5] "Connections between the spinal cord and the thalamus, the region of the brain that is largely responsible for pain perception in both the fetus and the adult, begin to form around 12 weeks and are completed by 18 weeks."[6] Fetal pain specialist Dr. Anand wrote, "[o]ur current understanding of development provides the anatomical structures, the physiological mechanisms, and the functional evidence for pain perception developing in the second trimester, certainly not in the first trimester, but well before the third trimester of human gestation."[7]

Dr. Malloy testified that pain transmitters in the spinal cord are abundant early on in development, but pain inhibitors are sparse until later, supporting the conclusion that premature infants have greater pain sensitivity than do full-term infants.[8] "Thus, the fetus and premature infant appear to be even more susceptible to the pain experience."[9] Standards of care provide that fetal anesthesia be used for surgery or invasive diagnostic procedures in utero.[10] In fact, premature babies require greater concentrations of medication to maintain effective anesthesia.[11]

Scientific facts, the observations of medical professionals, "our own experience of pain, and our indirect experience of others' pain," support the conclusion "that there is indeed a compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling

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5 *Id.* at 3

6 *Id.* at 4

7 KJS Anand, *Fetal Pain?* 14 PAIN: CLINICAL UPDATES, 1, 3 (2006).

8 Malloy testimony, *supra* n.2.

9 *Id.*

10 L. Giuntini & G. Amato, *Analgesic Procedures in Newborns*, NEONATAL PAIN 73 (Giuseppe Buonocore & Carlo V. Bellieni ed., 2007)

11 *Id.*

pain."[12] That compelling state interest, specifically referenced in the Pain-Capable Unborn Child Protection Act, is equally applicable to the prohibition against dismemberment abortions in Kan Stat. Ann. §§ 65–6741 et. seq.

B. The Law Fosters an Understanding of the Unborn Child as a Living Human Being Who Should Not Be Subjected to Cruel and Unusual Punishment.

The humanity of the unborn child is well-accepted by scientists who have determined that the unborn child "is not an inert being," akin to the larval stage of insects, but "an active and dynamic creature, responding and even adapting to conditions inside and outside the mother's body as it readies itself for life in the particular world it will soon enter."[13] The unborn child not only perceives flavors from the substances ingested by his mother, but also her other sensory inputs.[14] Scientists have found that the unborn child does more than passively receive these inputs.[15] Instead, the developing child actually uses these inputs as information, "biological postcards from the world outside."[16]

Science's recognition of the inherent humanity of unborn children, and particularly their acute pain sensitivity, illustrates how, as Supreme Court Justice Ruth Bader Ginsburg said, "dismemberment D&E" (dilatation and extraction) abortion is as gruesome as the "intact D&E" or "partial birth abortion" prohibited by the federal law upheld in *Gonzales v. Carhart,* 550 U.S. 124 (2007). "Nonintact D & E could equally be characterized as 'brutal,' … involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs." *Id.* at 182 (Ginsburg, J. dissenting) (citing majority opinion). Indeed, the

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12 Condic testimony, at 8.

13 Annie Murphy Paul, ORIGINS: HOW THE NINE MONTHS BEFORE BIRTH SHAPE THE REST OF OUR LIVES 5 (2010).

14 *Id.*

15 *Id.* at 6.

16 *Id.*

"nonintact D&E," or, as described in the Act, "dismemberment abortion," involves, as the name implies, the surgical dissection and piecemeal removal of an unborn child, *i.e.*, an active and dynamic human being susceptible to pain, from the mother's womb:

> The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Id. at 135-36. As Dr. Condic told Congress:

> Imposing pain on any pain-capable living creature is cruelty. And ignoring the pain experienced by another human individual for any reason is barbaric. We don't need to know if a human fetus is self-reflective or even self-aware to afford it the same consideration we currently afford other pain-capable species. We simply have to decide whether we will choose to ignore the pain of the fetus or not....
>
> Given that fetuses are members of the human species—human beings like us—they deserve the benefit of the doubt regarding their experience of pain and protection from cruelty under the law.[17]

That is precisely what the Legislature has done by enacting the Act, *i.e.*, given unborn children the benefit of the doubt by protecting them from what even Justice Ginsburg characterized as a "brutal" death. *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting). In so doing, the Legislature is furthering not only its compelling state interest in protecting the lives of unborn children capable of feeling pain, but also the "deliberate

[17] Condic Testimony, *supra* n.3 at 8.

extinguishment of human life" that, if it "has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Furman v. Georgia,* 408 U.S. 238, 303 (1972) (Brennan, J. concurring).

In discussing the intent behind the prohibition against cruel and unusual punishment in the Eighth Amendment of the United States Constitution (which is also contained in Section 9 of the Bill of Rights in the Kansas Constitution), Justice Brennan articulated principles that elucidate how the Act's prohibition against dismemberment abortion furthers compelling state interests. "The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment." *Id.* at 271.

> More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, "punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like," [citations omitted] are, of course, "attended with acute pain and suffering." [citations omitted] When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

Id. at 272-73. If even the vilest criminal has common human dignity so as to be protected from degrading treatment and cruel punishment, then how much more should an unborn child, whom science has proven is inherently human and experiences pain, be protected from being torn limb from limb and discarded. If the state's compelling interest in protecting the lives of unborn children "from the stage at which substantial medical evidence indicates that they are capable of feeling pain" means anything, it must mean protecting these children from dismemberment.

II. THE LAW PROTECTS THE HEALTH AND WELFARE OF WOMEN WHO FACE INCREASED RISKS FROM THE DISMEMBERMENT ABORTION PROCEDURE.

From 1973 to today, the Supreme Court has established and consistently re-affirmed that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007). As this Court explained, "[f]or the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." *City of Wichita v. Tilson*, 855 P.2d 911, 915 (Kan. 1993) (citing *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)). That is precisely what the Legislature did when it enacted the ban on dismemberment abortions. Kansas has acted in furtherance of its interest to protect the health of the woman in barring a procedure that, even those who support abortion have agreed, poses dangers to the pregnant woman.

While invalidating as overbroad Nebraska's law against "partial birth abortion," the Supreme Court explained how the dismemberment abortion procedure at issue in this case poses risks to pregnant women:

> The D & E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications. See 11 F.Supp.2d, at 1110; Gynecologic, Obstetric, and Related Surgery 1045 (D. Nichols & D. Clarke–Pearson eds.2d ed.2000); F. Cunningham et al., Williams Obstetrics 598 (20th ed.1997).

Stenberg v. Carhart, 530 U.S. 914, 926–27 (2000). The *Stenberg* court referenced the health risks posed by dismemberment abortions, including uterine perforation, cervical lacerations, blood loss, trauma and maternal death from infection caused by retained fetal

tissue. *Id.* at 936. Among the "other complications" referenced by the Court is the potential for secondary infertility due to the presence of fetal bone fragments left behind in a dismemberment abortion.[18]

In seeking a similar result in a challenge to the federal partial birth abortion ban, the American College of Obstetricians and Gynecologists ("ACOG") submitted an amicus curiae brief in which it described the risks posed by dismemberment abortions to support its argument that "intact D&E" abortions were safer and should not be banned.[19]

> Fewer instrument passes and fewer fetal-bone fragments means less risk of uterine perforation - the most serious and feared complication of D&E. "[A] perforation occurring with second-trimester D&E may lead to bowel injury and will likely require laparotomy [open abdominal surgery]." Stubblefield et al., supra, at 180. A perforation that reaches the uterine artery, which is engorged during pregnancy, may cause catastrophic hemorrhage. "Uterine perforations that involve injury to major blood vessels or other organs ... require in-hospital surgical management." Clinician's Guide, supra, at 178. Some uterine perforations can also reach the gastrointestinal tract, risking contamination of the abdominal cavity with bacteria (peritonitis) or entry of bacteria into the blood stream (sepsis). By causing tissue and organ damage, including damage to the brain and other vital organs, both hemorrhage and sepsis can have long term effects on the woman's health. Second, removing the fetus intact also eliminates the possibility that fetal tissue will be retained in the uterus, a cause of hemorrhage or infection in non-intact D&E procedures. See Stubblefield, et al., supra, at 180 ("[h]emorrhage during or after D&E can be caused by an incomplete procedure"); Clinician's Guide, supra, at 201 (retained fetal tissue can cause bleeding, infection of the uterus and fallopian tubes, and sepsis). Long-term complications of retained fetal tissue also include infertility. Third, intact removal increases the physician's control over the procedure. Increased control minimizes the likelihood of complications that are present in other forms of D&E. For example, removing the fetus intact reduces the likelihood that the physician will have to locate the last piece of fetal tissue remaining in the

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[18] William D. Winkelman et al., *Secondary Infertility and Retained Fetal Bone Fragments,* 122 OBSTETRICS & GYNECOLOGY, 458 (2013).

[19] Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, *Gonzales v. Carhart,* 550 U.S. 124 (2007) (Nos. 05–380, 05–1382), 2006 WL 2867888.

> uterus by grasping repeatedly with the forceps–a process that risks injuring the woman.

ACOG further noted that:

> Obstetric hemorrhage can be of a volume large enough to precipitate a state of generalized circulatory failure, resulting in … irreversible tissue damage." Am. Acad. of Pediatrics & ACOG, Guidelines for Perinatal Care 180 (5th ed. 2002). Lungs, kidneys, and the pituitary gland are particularly susceptible to damage from hemorrhagic shock during pregnancy. See Critical Care Obstetrics 555 (Gary A. Dildy et al. eds., 4th ed. 2004). Sepsis can result in lung, liver, and kidney failure, damage to the brain and other organs, and even death. See id. at 329-31; Williams Obstetrics 2005, supra, at 994-95.[20]

A leading study on risk factors for abortion-related mortality revealed that hemorrhage is the leading cause of abortion-related death associated with "Dilatation and Evacuation," or "D&E" abortions at 13 weeks or more of gestation.[21] The study explained that the risks were due to the "inherently greater technical complexity of later abortions related to the anatomical and physiologic changes that occur as pregnancy advances. The increased amount of fetal and placental tissue requires a greater degree of cervical dilation, the increased blood flow predisposes to hemorrhage, and the relaxed myometrium is more subject to mechanical perforation."[22] Overall, the study found that the risk of maternal death increased at the rate of 38 percent for each additional week of gestation.[23]

A physician experienced in performing abortions, although supporting second trimester abortions, agreed that complications of D&E or dismemberment abortions using "large forceps with destructive teeth to remove the fetus, generally in parts" can be

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20 *Id.*

21 Linda Bartlett, et. al., *Risk Factors for Legal Induced Abortion–Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 733 (2004).

22 *Id.* at 735.

23 *Id.* at 731.

significant.[24] "Of 68 abortion-related deaths in the US in a recent ten-year period, 49 were in the second trimester."[25] These significant risks to pregnant women illustrate that the Legislature acted in furtherance of its interest in protecting maternal health, even in the abortion context, *Gonzales,* 550 U.S. at 145, when it enacted the dismemberment abortion ban.

III. THE KANSAS LAW FURTHERS THE HEALTH AND WELL-BEING OF PROVIDERS, FURTHERING THE STATE'S INTEREST IN PROTECTING THE INTEGRITY OF THE MEDICAL PROFESSION.

Kansas' ban on dismemberment abortions also furthers the state's interest in protecting the integrity of the medical profession. The Supreme Court noted with approval Congress' statement that "intact D&E" or "Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." *Gonzales,* 550 U.S. at 157. "There can be no doubt that the government has an interest in protecting the integrity and ethics of the medical profession." *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). *See also Barsky v. Board of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). In the abortion context as well as other medical contexts, "it is clear the State has a significant role to play in regulating the medical profession." *Gonzales,* 550 U.S. at 157. That is the role that the

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[24] Lisa H Harris, *Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse* 16 REPRODUCTIVE HEALTH MATTERS 74, 75 (2008).

[25] *Id.*

Kansas Legislature is furthering by banning a procedure that has shown to have detrimental effects on practitioners.

Studies and anecdotal reports from those who have performed dismemberment abortions show that, despite support for the availability of the procedure, those who participate in it suffer significant psychological and emotional consequences.

> Abortion is different from other surgical procedures. Even when the fetus has no legal status, its moral status is reasonably the subject of much disagreement. It is disingenuous to argue that removing a fetus from a uterus is no different from removing a fibroid. Pregnancy itself is different from other bodily states. It is an ambiguous, liminal border-state that is neither one nor two people. Doing second trimester abortions is clinical care at the boundary between life and death and in the context of political and social controversy and, likewise, commitment.[26]

One practitioner described the life-altering psychological trauma of participating in a dismemberment abortion:

> Seeing an arm being pulled through the vaginal canal was shocking. One of the nurses in the room escorted me out when the colour left my face. . .Not only was it a visceral shock; this was something I had to think deeply about. . . Confronting a 21-week fetus is very different. It. . . cannot feel pain or think or have any sense of being, but the reality is, this cannot be called 'tissue'. It was not something I could be comfortable with. From that moment, I chose to limit my abortion practice to the first trimester: 14 weeks or less.[27]

Another physician who continued to do dismemberment abortions recounted the "visceral" reaction she experienced when she was pregnant and the long-term psychological effects that reaction created:

> With my first pass of the forceps, I grasped an extremity and began to pull it down. I could see a small foot hanging from the teeth of my forceps. With a quick tug, I separated the leg. Precisely at that moment, I felt a kick – a fluttery ''thump, thump'' in my own uterus. It was one of the first times I felt fetal movement. There was a leg and foot in my forceps, and a ''thump, thump'' in my abdomen. Instantly, tears were streaming from my

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[26] Harris, *Second Trimester Abortion Provision,* at 75.

[27] Susan Wicklund, THIS COMMON SECRET: MY JOURNEY AS AN ABORTION DOCTOR, 28 (2007).

> eyes – without me – meaning my conscious brain - even being aware of what was going on. I felt as if my response had come entirely from my body, bypassing my usual cognitive processing completely. A message seemed to travel from my hand and my uterus to my tear ducts. It was an overwhelming feeling – a brutally visceral response – heartfelt and unmediated by my training or my feminist pro-choice politics. It was one of the more raw moments in my life. Doing second trimester abortions did not get easier after my pregnancy; in fact, dealing with little infant parts of my born baby only made dealing with dismembered fetal parts sadder.[28]

A study of the effects of "mid-trimester abortion procedures" on professional staff revealed similar reactions. "The D and E procedure was described as distasteful and many nurses preferred noninvolvement."[29]

> A physician who did amnios but not D and Es said, "Killing a baby is not a way I want to think about myself." The two physicians who have done all the D and E procedures in our study support each other and rely on a strong sense of social conscience focused on the health and desires of the women. They feel technically competent but note strong emotional reactions during or following the procedures and occasional disquieting dreams.[30]

The authors said that despite perceived advantages of the procedure, "physicians seem to be slow in changing to the D and E method. Their hesitation may be related to difficulty with the psychological problems raised by the fetal dismemberment in the procedure."[31] "Moreover, the technique requires the invasion of the pregnant uterus at a time when conventional wisdom has suggested that serious complications would ensue."[32] As discussed above, these complications include perforation of the uterus, infection, hemorrhage and even death.

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28 Harris, *Second Trimester Abortion Provision,* at 76.

29 Nancy B. Kaltreider, M.D., Sadja Goldsmith, M.D., M.P.H., Alan J. Margolis, M.D., *The impact of midtrimester abortion techniques on patients and staff*,135 AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY, 235, 237 (1979).

30 *Id.*

31 *Id.*

32 *Id.*

A study by the director of a Planned Parenthood clinic revealed psychological and emotional trauma resulting from participating in dismemberment abortions.[33]

> The stress experienced by the staff is different from that experienced by the patient and is at its highest during the D & E itself. Failing to recognize the symptoms and signs of this stress may have important consequences for continuation of the service. We discerned that the following psychological defenses were used by staff members at various times to handle the traumatic impact of the destructive part of the operation: denial, sometimes shown by the distance a person keeps from viewing D & E; projection, as evidenced by excessive concern or anguish for other staff members assisting with or performing D & E; and rationalization. The last popularly took the form of discussing the pros and cons of performing D & E and its value.[34]

The authors referred to an "unusual dilemma" created by the dismemberment abortion procedure: "A procedure is rapidly becoming recognized as the procedure of choice in late abortion, but those capable of performing or assisting with it are having strong personal reservations about participating in an operation that they view as destructive and violent."[35]

> We have reached a point in this particular technology where there is no possibility of denying an act of destruction. It is before one's eyes. The sensations of dismemberment flow through the forceps like an electric current. It is the crucible of a raging controversy, the confrontation of a modern existential dilemma. The more we seem to solve the problem, the more intractable it becomes.[36]

That existential dilemma was described by a former abortion doctor who espoused the incongruity between the physician's commitment to preserving life and the destruction of life inherent in a dismemberment abortion:

> As for elective second trimester abortions, I believe that they should be illegal. I understand that for some women this would be a terrible

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[33] Warren M. Hern, M.D., M.P.H. & Billie Corrigan, R.N., M.S., *What about us? Staff reactions to D & E,* 15 ADVANCES IN PLANNED PARENTHOOD, 3 (1980).

[34] *Id.* at 6-7.

[35] *Id.* at 7.

[36] *Id.*

> burden....But I believe that tearing a developed fetus apart, limb by limb, simply at the mother's request is an act of depravity that society should not permit. We cannot afford such a devaluation of human life, nor the desensitization of medical personnel that it requires. This is not based on what the fetus might feel, but on what we should feel in watching an exquisite, partly formed human being dismembered, whether one believes that man is created in God's image or not. I wish everybody could witness a second trimester abortion before developing an opinion about it.[37]

These first person accounts of the psychological and emotional trauma experienced by doctors and nurses who participate in dismemberment abortions, even those who advocate for the procedure, evidence the adverse effects the procedure has on the integrity of the medical profession. Indeed, as was true of the "partial birth abortion" procedure in *Gonzales*, the dismemberment abortion procedure here "confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child" to rip it apart and remove it piecemeal from the mother's womb. *Gonzales,* 550 U.S. at 157. As the Supreme Court affirmed in *Gonzales*, the state, in this case, Kansas, has a significant role to play in regulating the medical profession, including prohibiting of procedures that diminish the integrity of the profession and detrimentally affect the practitioners. That is what the Legislature has done in enacting Kan Stat. Ann. §§ 65–6741 et. seq.

CONCLUSION

Based upon the foregoing, Amici respectfully request that this Court reverse the lower courts and uphold the validity of Kan Stat. Ann. §§ 65–6741 et. seq. to protect the most vulnerable citizens, their mothers and their physicians.

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[37] George Flesh, *Perspective On Human Life: Why I No Longer Do Abortions: Tearing A Second Trimester Fetus Apart Simply At A Mother's Request Is Depravity That Should Not Be Permitted,* LOS ANGELES TIMES, September 12, 1991.

Dated: February 14, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was deposited in the United States Mail, first class, postage prepaid, on the 14th day of February, 2017, addressed as follows:

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