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No. 15-114153-A
IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HODES & NAUSER, M.D., P.A. *et al., 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.

APPEAL FROM DISTRICT COURT OF SHAWNEE COUNTY, HONORABLE. LARRY D. HENDRICKS, JUDGE, DISTRICT COURT CASE NO. 2015-CV-490

BRIEF OF AMICUS CURIAE KANSANS FOR LIFE IN SUPPORT OF DEFENDANT AND REVERSAL

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Summary of Argument

The Kansas Unborn Child Protection from Dismemberment Abortion Act prevents a particularly 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, the unborn child in a D&E "dismemberment abortion", *"dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."* *Stenberg v. Carhart,* 350 U.S. 914, 958-59 (2000) (Kennedy, J., dissenting).

When state constitutional provisions contain rights similar to those found in the U.S. Constitution, they are typically construed similarly to their federal analogues. Although this case involves a challenge based on the Kansas Constitution, the Court should be influenced by the fact that the Kansas Unborn Child Protection from Dismemberment Abortion Act would be highly likely to be upheld as constitutional by the current U.S. Supreme Court in light of its decision upholding the Partial-Birth Abortion Ban Act of 2003, *Gonzales v. Carhart,* 550 U.S. 124 (2007).

The *Gonzales* standard is that "Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158.

Applying the rational basis test, *Gonzales* justified the federal law protecting unborn children from partial-birth abortions based on the government's legitimate "interest in protecting the integrity and ethics of the medical profession," as well as "from the inception of the pregnancy, . . . in protecting the life of the fetus that may become a child. *Id.* at 157-58. The same principle applies to dismemberment abortions, in which a sharp instrument is used to slice

up a living unborn child.

In judging whether the law preventing partial-birth abortions imposed an "undue burden" the Court found that it did not impose a "substantial obstacle" because of the availability of "reasonable alternative procedures," including the possibility of giving the unborn child a fatal injection preceding the partial-birth procedure. Similarly, such a fatal injection could be, and in some dilatation and evacuation (D&E) abortions is, given a day or two before the dismemberment procedure – an alternative that remains legal because the dismemberment abortions the Kansas law prevents are defined to include only cases in which the unborn child is "living" when dismembered. Studies have found this alternative to be comparable in maternal safety to dismemberment D&Es. Because of the close resemblance of the constitutional issues settled in the Partial Birth Abortion Ban Act case to those applying to the Kansas Unborn Child Protection from Dismemberment Abortion Act, it is highly likely that the U.S. Supreme Court would uphold it against federal constitutional attack.

The Appellee seeks to rely on an implied right which is incongruent with the express language of the Kansas Constitution.

Argument

I. KANSAS CONSTITUTIONAL STANDARDS SHOULD TAKE INTO ACCOUNT FEDERAL CONSTITUTIONAL STANDARDS.

When construing State Constitutions concerning rights similar to those found in federal constitutional law "...these rights have been approached similarly to their federal court analogues." Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 Geo. Mason L. Rev. 301, 365 (2011). See also F. Williams, *The Law of American State Constitutions (2009)*. Therefore, while the pending action

invokes state constitutional grounds for invalidating the Act, the Court's evaluation of those claims should be influenced by a consideration of the Act's constitutionality under cognate provisions of the federal constitution.

II. *GONZALES V. CARHART* AND *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY* ESTABLISH THE STANDARD FOR DETERMINING THE FEDERAL CONSTITUTIONALITY OF STATUES THAT BAR CERTAIN ABORTION PROCEDURES WHILE ALLOWING OTHERS AS SUBSTITUTES.

The Kansas Unborn Child Protection from Dismemberment Abortion Act, 2015 Kan. Sess. Laws 22, is highly likely to be upheld as constitutional under the U.S. Constitution by the current U.S. Supreme Court in light of its decision upholding the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. §1531, in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

Gonzales, 550 U.S. at 158, established the following standard:

> "Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."

Regarding the first prong ("rational basis to act"), *Gonzales* specifically deemed the federal law protecting unborn children from partial-birth abortions rationally related to the government's legitimate "interest in protecting the integrity and ethics of the medical profession," quoting *Washington v. Glucksberg*, 521 U. S. 702, 731(1997) and to the "premise . . . that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child . . . ." *Gonzales*, 550 U.S. at 158.

The *Gonzales* Court noted with approval this finding in the Partial Birth Abortion Ban Act: "Congress stated as follows: 'Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such

life.'" *Gonzales*, 550 U.S. at 157.

Regarding the second prong ("does not impose an undue burden"), the *Gonzales*'s Court relied upon and interpreted the standards set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992):

> [An] undue burden . . . exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[citing *Casey*] *Id.*, at 878. On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.*, at 877.
>
> *Gonzales*, 550 U.S. at 146.

The Court's critical inquiry was whether "reasonable alternative procedures" remained available. *Id.* at 163. It stated, "Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right." *Id.* at 165.

III. KANSAS HAD A "RATIONAL BASIS TO ACT" IN PROTECTING LIVING UNBORN CHILDREN FROM DISMEMBERMENT ABORTIONS.

The challenged Kansas statute defines the abortion procedure it prevents as follows:

> (1)"Dismemberment abortion" means, with the purpose of causing the death of an unborn child, knowingly dismembering a living unborn child and extracting such unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors or similar instruments that, through the convergence of two rigid levers, slice, crush or grasp a portion of the unborn child's body in order to cut or rip it off.
>
> (2) The term "dismemberment abortion" does not include an abortion which uses suction to dismember the body of the unborn child by sucking fetal parts into a collection container, although it does include an abortion in which a dismemberment abortion, as defined in subsection (b)(1), is used to cause the death of an unborn child but suction is subsequently used to extract fetal parts after the death of the unborn child.
>
> Kansas Unborn Child Protection from Dismemberment Abortion Act, 2015 Kan. Sess. Laws 22, Sec. 2(b).

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 . . . ." 550 U.S. 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," it wrote, "that, for many, D&E is a procedure itself laden with the power to devalue human life." *Id.* at 158. The author of the *Gonzales* opinion, Justice Anthony Kennedy, used an even more graphic description in his dissent in *Stenberg v. Carhart*, 350 U.S. 914, 958-59 (2000) (Kennedy, J., dissenting) stating, "The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."

It deserves emphasis that the dismemberment procedures prevented by the Kansas statute are performed on a living unborn child, and that it is "ripping it apart" that kills. As has been observed outside the context of abortion, "Fetal stress in response to painful stimuli is shown by increased cortisol and â-endorphin concentrations, and vigorous movements and breathing. . . ." This independent stress response in the fetus occurs from 18 weeks gestation." R. Gupta *et al.*, "Fetal surgery and anaesthetic implications," 8 *Continuing Education in Anaesthesia, Critical Care & Pain* (2008) 71, 74."Fetuses undergoing intrauterine invasive procedures, definitely illustrative of pain signaling, were reported to show coordinated responses signaling the avoidance of tissue injury." C. L. Lowery *et al.*, "Neurodevelopmental Changes of Fetal Pain," 31 *Seminars in Perinatology*. (2007) 275, 276.

Indeed, the *dissent* in *Gonzales*, 550 U.S. 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).[1]

Even some abortion practitioners describing dismemberment abortion acknowledge that "The procedure . . . may be more difficult . . . emotionally for some clinicians." Nathalie Kapp & Helena von Hertzen, "Medical Methods to Induce Abortion in the Second Trimester" in Maureen Paul et al., *Management of Unintended and Abnormal Pregnancy* 179 (1st ed. 2009) (Hereinafter cited as Kapp and Hertzen).

The same legitimate interests to which the *Gonzales* Court found the Partial Birth Abortion Ban Act to be rationally related apply equally to the Kansas Unborn Child Protection from Dismemberment Abortion Act: "protecting the integrity and ethics of the medical profession," *Gonzales*, 550 U.S. at 157, and "protecting the life of the fetus that may become a child," *id.* at 158.

What the Court wrote of the rationality, in relation to these interests, of preventing partial birth abortions is equally applicable to the rationality of preventing dismemberment abortions:

> "It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."
>
> *Gonzales*, 550 U.S. at 160.

The dissent's argument was that it was irrational for Congress to single out partial birth

abortions when "nonintact D & E" – dismemberment - is "equally gruesome." To this the majority replied, "The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned." The Court by no means argued that partial birth abortions were uniquely the subject of rational objection; as noted, it agreed that, "No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life." *Gonzales*, 550 U.S. at 158.

IV. THE KANSAS ACT PROTECTING LIVING UNBORN CHILDREN FROM DISMEMBERMENT ABORTIONS DOES NOT IMPOSE AN "UNDUE BURDEN" BECAUSE REASONABLE ALTERNATIVE ABORTION PROCEDURES EXIST

The Kansas Unborn Child Protection from Dismemberment Abortion Act does not "place a substantial obstacle in the path of a woman seeking an abortion," *Casey*, 505 U.S. at 878, because "reasonable alternative procedures" exist, *Gonzales*, 550 U.S. at 146.

Most notably, sometimes digoxin or potassium chloride are injected into the unborn child to kill her or him one or two days prior to performing a dilatation and evacuation abortion. Maureen Paul *et al.*, *Management of Unintended and Abnormal Pregnancy: Comprehensive Abortion Care* (2009)166-69. When this is done, the dismembering actions are performed only after the unborn child is already dead. This type of dilatation and evacuation abortion remains legal, since the Kansas statute prevents only "knowingly dismembering a **living** unborn child," Kansas Unborn Child Protection from Dismemberment Abortion Act, 2015 Kan. Sess. Laws 22, Sec. 2(b) (emphasis added).

In *Gonzales*, the U.S. Supreme Court held that preventing partial birth abortions did not impose an unconstitutional "undue burden" on abortion because other methods could be used. In particular, it noted that "the Act's prohibition only applies to the delivery of 'a living fetus.' If the intact D&E procedure is truly necessary in some circumstances, it appears likely an

injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure." *Gonzales*, 550 U.S. at 164, *quoting* 18 U.S.C. § 1531(b)(1)(A).

One study has found no difference in complications between those women injected with a feticidal agent prior to a dilatation and evacuation abortion and those injected with a placebo. Patricia A. Lohr, "Surgical Abortion in the Second Trimester," 16 *Reproductive Health Matters* 151, 152 (2006). The article noted that "women in this study did . . . report a strong preference for fetal death prior to the abortion (92% in both groups)." Other studies found either no or low side effects as a result of using a feticidal agent prior to abortion. Kapp & Hertzen at 185.

Even should there be a diversity of medical opinion on the comparative safety for the mother of the forms of D&E abortions in which the unborn child is dismembered alive and the form of D&E in which dismemberment occurs only after the unborn child has previously been killed by injection, the U.S. Supreme Court has emphasized,

"The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. . . . Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice. . . . Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Gonzales*, 550 U.S. at 163-64.

Nor can a putative 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) render the Act unduly burdensome. In *Casey*, 505 U.S. at 874, 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."

V. THE KANSAS CONSTITUTION INCLUDES LANGUAGE REFERRING TO THE RIGHT TO LIFE.

The Kansas constitution in its Bill of Rights has an express and preeminent placement of the right to life declaring its source as part of natural rights:

"Section 1. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." (Adopted by convention, July 29, 1859, Ratified by electors, Oct. 4, 1859: L. 1861, p. 47)

Kansas adopted abortion prohibition by statutory enactment close to the time of the adoption of the above constitutional language. See Kansas General and Private Laws, 1859, Kansas Session Laws, Act of Feb 3, 1859, in Chapter 28, A Chapter entitled "An Act regulating Crimes of Punishment of Crimes against the Person of Individuals." Sec. 9, 10, 37, 1859, Kansas Laws p. 232-33, 237. Also see the General Statutes of the State of Kansas under Article II, Offenses against the Persons of Individuals, Act of Mar. 3, 1868, ch. 31, art. 2, secs. 14,15,44, 1868 Kans. Laws p. 320-21, 325. Also see Kansas Laws, ch. 48, sec 9, 1855 Kans. Terr. Stat. 238. These statutes refer to the unborn as "unborn quick child", "quick child", or "child" all terms of personhood. For example the 1859 statute sec. 10 makes it manslaughter in the second degree to give medicine, drugs or substance " ...with intent thereby to destroy such child...". The American Medical Association took its stand against abortion during this period of time. See Roe v. Wade, 410 U.S. 113, 141-42, (1973) 93 S.Ct. 705, also see *The History of Abortion: Technology, Morality, and Law*, Joseph W. Dellapenna, Univ. of Pittsburg Law Review, *Vol. 35: 359, 402.*

Also see *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, James S. Witherspoon, 17 St. Mary's L.J. 29 1985-1986.

There is recognition in current Kansas jurisprudence that life begins at fertilization K.S.A. 65-6732; K.S.A. 65-6709 (m)(1).

Therefore, because the authors of the Kansas Constitution would have understood that the "right to life" included life within the womb, a right to an abortion, which is the destruction of life in the womb, cannot be implied under the Kansas Constitution.

VI.CONCLUSION

Because of the close resemblance of the constitutional issues settled in the Partial Birth Abortion Ban Act case to those applying to the Kansas Unborn Child Protection from Dismemberment Abortion Act, it is highly likely that the U.S. Supreme Court would uphold it against federal constitutional attack. The Appellee seeks to rely on an implied right which is incongruent with the express language of the Kansas Constitution.

Dated: November 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing

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