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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HODES & NAUSER, MDS, P.A. et al.,	)	
	)	
Plaintiffs-Appellees,	)	Case No.15-114153-A
vs.	)	
	)	
DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

APPLICATION TO FILE *AMICUS* BRIEF

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

Background.

Kansans for Life is a grassroots pro-life organization committed to speaking up for the defenseless in Kansas on the issues of abortion, euthanasia, assisted suicide, and bioethics issues such as human embryonic stem cell (hESC) research, human cloning, fetal experimentation, and eugenics. Kansans for Life is the state affiliate of the nation's largest pro-life organization, the National Right to Life Committee, Inc. On March 25, 2015, the Kansas House overwhelmingly passed SB 95 (2015 Kan. Sess. Laws 22) or the "Unborn Child Protection from Dismemberment Abortion Act," by 98-26 after the Senate had passed the measure, 31-9, on Feb 20, 2015. SB 95

bans a gruesome abortion method in which a living unborn child in her mother's womb is ripped apart into pieces by an abortionist using sharp metal tools. In the words of U.S. Supreme Court Justice Anthony Kennedy, in the dilatation and evacuation (D & E) abortion which uses dismemberment to cause death, the unborn child *"dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."* Stenberg v. Carhart, 530 U.S. 914, 958-959 (2000). Records released on April 1, 2015 by the Kansas Health & Environment Department show that in 2014 the D & E method was used in 637 abortions. This is 8.8% of the total 7,263 Kansas abortions reported. The bulk of the 637 abortions are presumed to be dismemberment abortions performed on a living unborn child , and these D & E abortions would be prevented by the challenged Act.

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

"(1) an application to file the brief is served on all parties and filed with the clerk of the appellate courts; and

(2) the appellate court enters an order granting the application."

Reasons.

(1) Testimony provided to state legislative committees by Kansans for Life emphasized that the U.S. Supreme Court would be likely to uphold the "Unborn Child Protection from Dismemberment Abortion Act" based on recent Court precedent.

(2) 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 Robert 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.

(3) Kansans for Life has particular knowledge and experience concerning the federal constitutionality of the "Unborn Child Protection from Dismemberment Abortion Act" and its perspective and analysis would be helpful to the court.

(4) In its proposed *amicus curiae* brief, Kansans for Life would evaluate the federal constitutionality of the Unborn Child Protection from Dismemberment Abortion Act under the controlling standard articulated in *Gonzales v. Carhart*, 550 U. S. 124, 158 (2007), namely:

> "Where it has a rational basis to act, and does not impose an undue burden, the State may use its regulatory power to bar certain [abortion] 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."

(5) Regarding the first prong of this standard, Kansans for Life's brief would argue that the same interests recognized by the U.S. Supreme Court as legitimate in upholding the constitutionality of the Partial-Birth Abortion Ban Act provide a rational basis for Kansas acting to protect unborn children from the brutality of dismemberment abortion. *Gonzales* itself described the gruesome nature of dismemberment abortions: "[F]riction causes the fetus to tear apart. For example, a leg might be ripped off the fetus . . . ." *Id.* at 135. Contrasting the partial

birth or "intact D & E" abortion, the Court said, "In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart." *Id.* at 137; see also *id.* at 152. "No one would dispute," it wrote, "that, for many, D & E is a procedure itself laden with the power to devalue human life." *Id.* at 158. Even the dissent in *Gonzales*, *id.* at 182 (Ginsburg, J., dissenting) stated:

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

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

(6) Regarding the second prong of the standard, whether the Act imposes an "undue burden," Kansans for Life's brief would seek to demonstrate that the same factual and analytic basis for the U.S. Supreme Court's conclusion that protection of unborn children from partial birth abortions imposes no undue burden equally applies to their protection from dismemberment abortions as defined by the Act. In *Gonzales*, the Court noted that since the federal Partial Birth Abortion Ban Act applies only to a living unborn child, "it appears likely that an injection that kills the fetus is an alternative under the Act." *Id.* at 164. Similarly, since the Kansas Unborn Child Protection from Dismemberment Abortion Act also applies only to dismembering a *living* unborn child [Section 2(b)(1)], the same alternative method – using a digoxin injection to induce a fatal heart attack that kills the child before the child is dismembered – remains available. "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.

(7) The brief would show, as stated by Maureen Paul *et al.*, *Management of Unintended and Abnormal Pregnancy: Comprehensive Abortion Care* 169 (2009), that "causing fetal demise" in this manner "appears to be a safe procedure [for the mother] with low complication rates based on the limited data available." Even if there is a diversity of medical opinion on this point,

> "[s]tate and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty. . . . Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. . . . The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."
>
> *Gonzales*, 550 U.S. at 163,164.

(8) The Kansans for Life brief would argue that 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) does not itself render the Act unduly burdensome. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992), the Supreme Court established that "Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law that serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."

(9) Kansans for Life's proposed amicus brief would provide research and analysis that

may assist this Court to evaluate the relevance of federal constitutional precedent in addressing the issues raised.

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

Dated: October 23, 2015

Respectfully submitted,

/s/Frederick J. Patton

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was deposited in the United States Mail, first class, postage prepaid, at Topeka, Kansas, on the 23rd day of October, 2015, addressed as follows:

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