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No. 114153

IN THE SUPREME COURT OF KANSAS

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 KANSANS FOR LIFE IN SUPPORT OF DEFENDANTS-APPELLANTS

On Petition from the Court of Appeals, there heard on appeal from the District Court of Shawnee County, Honorable Larry D. Hendricks Judge Presiding, District Court Case No. 2015-CV-490, Division 6

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Interest of Amicus

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 related bioethical 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. While Kansans for Life strongly disputes the district court ruling that a right to abortion is properly found in the Kansas Bill of Rights, the focus of this brief is to assist this Court in evaluating whether S.B. 95 would violate the putative right as articulated by the district court.

I. THE DISTRICT COURT ERRED IN RULING THAT PROPER INTERPRETATION OF THE KANSAS BILL OF RIGHTS REQUIRES JUDICIAL CREATION OF A RIGHT TO ABORTION.

For purposes of clarity, it is important to restate the holding of the district court with reference to the language of the contested legislation. In both the oral and written order granting the Plaintiffs' (hereinafter "Hodes & Nauser") motion for a temporary injunction, the trial court essentially held that Hodes & Nauser are likely to prevail in the claim that Sections 1 and 2 of the Kansas Bill of Rights require the state of Kansas to allow abortion providers to "knowingly dismember[] a living unborn child and extract[] 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." See transcript of district court oral ruling at 12; written order at 5-6, S.B. 95, § 2(b)(1), 2015 Reg. Sess. (Kan. 2015) (hereinafter "S.B. 95"). [1]

Nothing in the text, history, or previous judicial interpretation of the Kansas Bill of Rights supports the district court's ruling. In fact, the district court's ruling is in direct conflict with the primacy of place given to the right to life in the Kansas Bill of Rights, which declares, "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Bill of Rights § 1 (adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; 1861 Kan. Sess. Laws 47).

This right is protected in a variety of laws (including statutes prohibiting abortion) enacted close in time to the adoption of the above constitutional language. See Act Regulating Crimes and Punishment of Crimes against the persons of Individuals, ch. 28, §§ 9, 10, 37, 1859 Kan. Sess. Laws 232-33, 237. *See also* Act Regulating Crimes and Punishments, art. II, §§ 14, 15, 44, 1868 Kan. Sess. Laws 320-21, 325 and Act Concerning Crimes and the Punishment of Offences Against the Persons of Individuals, ch. 48, § 9, 1855 Kans. Terr. Stat. 238. These statutes refer to the unborn as "unborn quick child", "quick child", or "child", which are all terms of personhood. For example

[1] Kansas Senate Bill 95 identifies this procedure as "dismemberment abortion" (S.B. 95, § 2(b)(1) (Kan. 2015)) while Hodes & Nauser antiseptically call it "dilation and extraction" or "D & E." Interestingly the transcript of the district court's oral order makes almost no reference to the actual procedure at issue, only once referencing "D & E" in the court's brief dismissal of the state's reliance on *Gonzales v. Carhart*, 550 U.S. 124 (2007) for the proposition that the legislation is constitutional due to safe alternative means of abortion that do not involve the cruelty inherent in live dismemberment abortion Tr. 10 [R. IV, 10.]. In the written order subsequently drafted by Hodes & Nauser's counsel and signed by Judge Hendricks the court identified live dismemberment abortion as utilizing dilation and evacuation procedures. "Although "dismemberment abortion" is not a medical term, the parties agree and the Court finds that the Act prohibits Dilation & Evacuation ("D & E") procedures." Order at 2.

the 1859 statute § 10 makes it manslaughter in the second degree to give medicine, drugs or substance "...with intent thereby to destroy such child...."

Contemporary Kansas law makes it even more clear that life is to be protected from the moment of fertilization. Kan. Stat. Ann. § 65-6709 (m)(1) (2014) (For purposes of informed consent "[t]he term 'human being' means an individual living member of the species of homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."). See also Kan. Stat. Ann. § 65-6732 (2013) (Kansas laws to be interpreted and construed to recognize rights, privileges, and immunities of unborn child).

As evidenced by these statutes and their subsequent judicial enforcement,[2] the authors of the Kansas Bill of Rights understood that the "right to life" included life within the womb. Given the text and history of section 1 of the Kansas Bill of Rights, it defies every recognized canon of constitutional interpretation to imply a right to abortion, and more particularly the right to dismember a living unborn child.

Additional historical and legal support for reversal of the district court's ruling that a right to abortion exists in the Kansas Constitution is presented in the brief of amicus curia Family Research Council. Kansans for Life supports and incorporates by reference the arguments made by Family Research Council and urges this Court to reverse the district court's ruling.

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[2] *See e.g.*, *State v. Darling*, 208 Kan. 469, 493 P.2d 216 (1972); *State v. Darling*, 197 Kan. 471, 419 P.2d 836 (1966); *State v. Brown*, 171 Kan. 557, 236 P.2d 59 (1951); *State v. Keester*, 134 Kan. 64, 4 P.2d 679 (1931); *State v. Harris*, 90 Kan. 807, 136 Pac. 264 (1913); *State v. Watson*, 30 Kan. 281, 1 Pac. 770 (1883) (all involving appeals from convictions for performing abortions).

II. THE DISTRICT COURT ORDER SHOULD BE REVERSED BASED ON THE COURT'S MISINTERPRETATION OF *GONZALES V. CARHART* AND S.B. 95.

The district court's ruling that Hodes & Nauser were likely to prevail in this case is based on a misreading of *Gonzales v. Carhart*, 550 U.S. 124 (2007) and S.B. 95. During the hearing on the temporary injunction Judge Hendricks noted that the federal partial-birth abortion ban was upheld constitutionally "only after determining that the most common method of second-trimester abortion [D&E abortion], which the parties did not contest, were [sic] safe and reliable, was not banned." Tr.9-10 [R. IV, 9-10]. As a statement of fact, this is correct.

The first issue *Gonzales* addressed was whether the federal partial-birth abortion ban was void for vagueness. The plaintiff, Dr. Carhart, had argued that the law could be read as banning all abortions involving dilation and evacuation, while the government argued that the language of the act applied only to partial birth-abortions, also identified in the opinion as "intact D& E" (*Gonzales*, 550 U.S. at 136), a limited subset of abortions involving dilation and evacuation. *Gonzales* held that the act's prohibition was sufficiently clear in its limitation to intact D & E only, *Gonzales*, 550 U.S. at 147, and therefore constitutional. The error of the district court in this case is failing to recognize that S.B. 95's live dismemberment abortion ban, because of its limited nature, is directly analogous to the partial-birth abortion ban in the *Gonzales* case, and not to the ill-defined prohibition in *Stenberg v. Carhart*, 530 U.S. 914 (2000) that was held to encompass all D

& E abortions and contained no life-of-the-mother exception. *Stenberg*, 530 U.S. at 538-44.

The written order prepared by Hodes and Nauser's counsel, and signed by the district court, makes the district court's errors clear.

> The United States Supreme Court has held that a ban on the most commonly-used method of second-trimester abortion is unconstitutional. See *Gonzales v. Carhart*, 550 U.S. 124, 147, 164-65 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976). The Act bans the most common method of second-trimester abortion, a D & E, *which does not involve a separate procedure to induce fetal demise*. Thus, the Supreme Court has already balanced the State interests asserted here against a ban on the most common method of second-trimester abortion and determined that it is unconstitutional.

Order at 7 (emphasis added).

By adding the phrase "which does not involve a separate procedure to induce fetal demise" the written order redefines what the *Gonzales* Court characterized as "the most commonly-used method of second-trimester abortion." D & E abortions as described by Justice Kennedy in *Gonzales* included the entire universe of abortions utilizing dilation and evacuation procedures. This universe of procedures, which includes live dismemberment abortion as well as partial-birth abortion (aka intact D & E abortion), is substantially broader than the conduct prohibited by S.B. 95. As understood by the *Gonzales* court, a ban on all D & E abortion procedures would include a ban on intact D & E abortion, live dismemberment abortion, and abortions where fetal demise is induced after dilation but before evacuation of the fetal remains.

> Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D & E" is the usual abortion method in this trimester. *Planned Parenthood, supra,* at 960–961. Although individual techniques for performing D & E differ, the general steps are the same.
>
> . . .
>
> After sufficient dilation the surgical operation can commence. 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. See, *e.g., National Abortion Federation, supra,* at 465; *Planned Parenthood,* 320 F.Supp.2d, at 962.
>
> *Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit. Carhart, supra, at 907–912; National Abortion Federation, supra, at 474–475.*
>
> The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D & E.

Gonzales, 550 U.S. at 135–36 (U.S. 2007) (emphasis added). Just as a ban on the narrower category of "intact D & E" or partial-birth abortion is constitutional, S.B. 95's limited ban on live dismemberment abortion is constitutional. Only if Kansas lawmakers

attempted to prohibit ***all*** abortions involving dilation and evacuation would the law be unconstitutional under *Gonzales* and its predecessor *Stenberg v. Carhart*, 530 U.S. 914 (2000). This is not what S.B. 95 does.

The written order misleadingly characterizes S.B. 95 as "banning D & E procedures," implying that the legislation prohibits performance of all procedures involving dilation and evacuation. (Order at 7). This simply is not true. An accurate statement would be that "S.B. 95 bans a single "variation" of standard D & E procedures, more specifically those performed on a live unborn child."

As acknowledged by the U.S. Supreme Court in both *Gonzales* and *Stenberg*, D & E is merely the use of dilation of the cervix and surgical removal of fetal body parts after fetal size and structure have developed to the point that removal by aspiration and curettage is no longer possible. The Centers for Disease Control and Prevention's *Handbook on Reporting of Induced Termination of Pregnancies* (1998) defines D & E as a procedure that "involves opening the cervix (dilation) and primarily using sharp instrument techniques, but also suction and other instrumentation such as forceps for evacuation." *Id.* at 17 (*available at* https://www.cdc.gov/nchs/data/misc/hb_itop.pdf). See also Affidavit of Traci Lynn Nauser, ¶ 15 [hereinafter Nauser Aff.] ("A D & E abortion is a surgical procedure, which is performed in two steps: dilation of the cervix and surgical removal of the fetus."). This point typically occurs around sixteen weeks' gestation. F. Gary Cunningham et al., *Williams Obstetrics* 367 (24th ed. 2014). *Cf.* Nauser Aff. ¶ 13 (noting plaintiffs begin using D & E abortions at approximately 15 weeks gestation).

D & E is not exclusively used for induced abortions; it also is used as a means of surgically managing spontaneous abortions (commonly known as miscarriages or failed pregnancies). "D & E for the indication of fetal demise is performed in the same way as D & E for second-trimester pregnancy termination . . . ."[3] This procedure remains lawful under S.B. 95 §2(a). D & E is also used to surgically remove fetal remains in cases in which fetal demise has been induced by injection of digoxin or potassium chloride (as noted by Justice Kennedy in *Gonzales,* 550 U.S. at 135) or by cord transection.[4] These D & E procedures remain lawful under S.B. 95 since the legislation is limited to cases of live dismemberment and in cases involving injection or transection the child would be dead when the dismemberment occurs. Finally D & E remains lawful when there has been a failure to expel the child's remains after drugs administered during a medical abortion have caused the child's death.[5] The legislation also exempts procedures performed in cases where the live D & E is necessary to preserve the life of the pregnant woman or to avoid a serious risk of substantial and irreversible physical impairment of a major bodily function. S.B. 95 § 3.

These exemptions illustrate the narrow scope of S.B. 95, which is strictly limited to live dismemberment abortions that are not necessary to preserve the life or physical

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[3] Alisa B. Goldberg et al., Pregnancy Loss *in* Maureen Paul et al., *Management of Unintended and Abnormal Pregnancy: Comprehensive Abortion Care* 272 (2009). Dr. Paul's text is the leading medical textbook on abortion and published in cooperation with the National Abortion Federation. *See also* Lee P. Shulman, et al., Management of Abnormal Pregnancies *in* Maureen Paul et al., *A Clinician's Guide to Medical and Surgical Abortion* 158 (1999).
[4] *See* Cassing Hammond & Stephen Chasen, Dilation and Evacuation *in* Maureen Paul et al., *Management of Unintended and Abnormal Pregnancy: Comprehensive Abortion Care* 166 (2009).
[5] See 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: Comprehensive Abortion Care* 186 (2009).

health of the woman. The exemptions also establish that the prohibition at issue in this case is directly analogous to the federal partial-birth abortion ban upheld in *Gonzales*, and not the vague ban at issue in *Stenberg* which had no exemptions. As evidenced by the lengthy list of circumstances in which a physician may continue to legally perform a D & E procedure, both the oral and written order of the district court are clearly erroneous in describing S.B. 95 as a general ban of D & E procedures leading to misapplication of U.S. Supreme Court precedent. The order of the district court should be reversed.

III. THE DISTRICT COURT ORDER SHOULD BE REVERSED FOR FAILURE TO APPLY THE PROPER STANDARD OF REVIEW FOR FACIAL CHALLENGES.

This case involves a facial challenge to S.B. 95. Neither the oral or written order notes this critical procedural point. In the context of a motion for a preliminary injunction based on a facial challenge to the constitutionality of a state law, the plaintiffs are required to show a substantial likelihood of establishing that there is **no set of circumstances** in which the law could be constitutionally applied. *See State v. Ryce*, 368 P.3d 342, 303 Kan. 899 (Kan., 2016) (emphasis added) citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

Notwithstanding Hodes & Nauser's heavy burden of proof, the oral order of the district court found that plaintiffs were likely to prevail in establishing that S.B. 95's prohibition of live dismemberment abortion "serves to inhibit *the vast majority* of pre-viability second-trimester abortions" (Tr. 12 [R. IV, 12]) (emphasis added). This finding is not supported by the evidence, but even if it was, the finding on its face is insufficient

to support the district court's order. In order to prevail Hodes & Nauser must establish that there is no set of circumstances in which S.B. 95 could be constitutionally applied. By finding that the law inhibits only a majority of pre-viability second-trimester abortions, the district court acknowledges that its inquiry did not extend to all applications of S.B. 95. The order of the district court cannot be sustained in light of the court's failure to find that there are no constitutional applications of S.B. 95. Given that S.B. 95 could be constitutionally applied in some cases Hodes & Nauser cannot prevail in their facial challenge to S.B. 95.

Moreover, the affidavit evidence presented by Hodes & Nauser shows that there are constitutional applications of S.B. 95. In paragraph 20 of her affidavit Dr. Nauser states, "Though *I am sometimes able to transect the cord when rupturing the amniotic sac and removing the amniotic fluid using suction, or by using suction after removal of amniotic fluid*, in some cases, I am unable to transect the umbilical cord." Nauser Aff. ¶ 20 (emphasis added). S.B. 95 could be applied constitutionally in the cases where Dr. Nauser concedes she is able to transect the cord, thus inducing fetal demise. Later in paragraph 31 of his affidavit, Dr. Nauser identifies another set of circumstances in which S.B. 95 could be constitutionally applied – in cases involving selective reduction of a multiple gestational pregnancy. Nauser Aff. ¶ 31.

Similarly the affidavit of Dr. Anne Davis concedes that induction of fetal demise during a D & E is common during selective reduction of a multiple gestational pregnancy. Davis Aff. ¶ 30. Interestingly one of the sources cited in footnote 7 of Dr. Davis' affidavit states:

> Injections to cause fetal demise prior to operative evacuation may have certain benefits. At gestational ages when a live birth is possible, these injections avoid that possibility, including the patients who experience labor following cervical preparation. Some clinicians believe that the process of cortical bone softening, which begins within 24 hours of fetal death and makes fetal tissue more pliable, may facilitate evacuation and avoid lacerations caused by sharp fragments of fetal bone. *Some patients may find solace in knowing that fetal death occurred prior to operative evacuation.*[6]

This undercuts her opinion that inducing fetal demise prior to evacuation "can be . . . both physically and emotionally painful for the patient." Davis Aff. ¶ 23.

The third affidavit submitted by Hodes & Nauser in support of their motion for temporary injunction provides little independent support for the district court opinion. Dr. Orentlichner candidly admits that his opinion regarding the induction of fetal demise in the context of D & E is based on his review of the affidavit of Dr. Davis and "conversations with plaintiffs' attorneys." Orentlichner Aff. ¶ 5. Dr. Orentlichner is a law professor. He teaches trusts and estates, professional responsibility, constitutional law,

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[6] Cassing Hammond & Stephen Chasen, Dilation and Evacuation *in* Maureen Paul et al., *Management of Unintended and Abnormal Pregnancy: Comprehensive Abortion Care* 166 (2009). *See also* W. Martin Haskell et al., Surgical Abortion After the First Trimester *in* Maureen Paul et al., *A Clinician's Guide to Medical and Surgical Abortion* 150 (1999).

> Wright and Watson reported successful use of 1 mg digoxin as a fetocidal agent for 5000 D&E abortions at 19 weeks' gestation or more. They injected the drug transabdominally into the fetus or amniotic fluid without ultrasonographic guidance. Apart from a few transient episodes of maternal bradycardia that resolved spontaneously, no adverse effects occurred despite instance of inadvertent intramyometrial and systemic injection. Fetal death was confirmed in all cases by ultrasonography within 30 minutes. Another provider of late abortions reported success in inducing demise without serious complications using the same dose of digoxin and a similar injection protocol in more than 10,000 induction/D&E procedures at or beyond 18 weeks' gestation. (G.R. Tiller, personal communication, 1994). In both series, digoxin was withheld until osmotic dilators were successfully inserted into the cervix.

Id. See also Paul Blumenthal et al, Abortion by Labor Induction *in* Maureen Paul et al., *A Clinician's Guide to Medical and Surgical Abortion* 150 (1999) ("To prevent livebirths [sic], many institutions perform a fetocidal procedure prior to or concomitantly with the abortion [by labor induction].").

and bioethics at the Indiana University Robert H. McKinney School of Law. While he is an adjunct professor of medicine at Indiana University School of Medicine, he is not licensed to practice medicine in Indiana. According to his resume it has been more than three decades since Dr. Orentlichner last practiced medicine. His affidavit appears to offer no independent expert analysis of the variants of D & E and the methods of inducing fetal demise, instead merely parroting arguments provided by Dr. Davis and counsel for Hodes & Nauser. For example, Dr. Orentlichner fails to address the routine induction of fetal demise as part of selective reduction of multiple gestational pregnancies.

Given this evidentiary record the district court clearly failed to apply the proper standard of review for facial challenges to the constitutionality of S.B. 95. The affidavits submitted by Hodes & Nauser identify several circumstances in which the law could be constitutionally applied including cases of selective abortion due to multiple gestational pregnancy and cases in which Dr. Nauser is "able to transect the cord when rupturing the amniotic sac and removing the amniotic fluid using suction, or by using suction after removal of amniotic fluid." Nauser Aff. ¶ 31. The erroneous finding of the district court that plaintiffs had shown that S.B. 95 would impair a majority of D & E procedures in not supported by the evidence and does not fulfill this Court's requirement for a facial challenge. Hodes & Nauser have failed to show, and the district court did not find, that there is no set of circumstances in which the law could be constitutionally applied. *See State v. Ryce*, 368 P.3d 342, 303 Kan. 899 (2016) citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). The district court order must be reversed.

IV. S.B. 95 ADVANCES THE STATE'S INTEREST IN PREVENTING CRUELTY AND INHUMANITY.

Senate Bill 95 is based on the simple proposition that causing gratuitous pain to other human beings is fundamentally wrong. This is the principle that underlies the prohibition on "cruel and unusual" punishment in the Kansas Bill of Rights, § 9,[7] United States Constitution, amend. VIII,[8] and the International Convention against Torture and Other Cruel or Inhuman and Degrading Treatment or Punishment.[9]

It also is the foundation of the Kansas statutory prohibition of torture and enhanced penalties for crimes involving torture. For example, Kan. Stat. Ann. § 21-6624(f) provides for enhanced criminal penalties when "[t]he defendant committed the crime in an especially heinous, atrocious or cruel manner." Whether or not the victim is conscious during the crime is legally irrelevant. "A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel."[10] *Id.* Thus any debate regarding when unborn children experience pain would be legally irrelevant in the application of this statute.

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[7] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."
[8] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
[9] "The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 1, § 1.
[10] Kan. Stat. Ann. § 21-6402(d)(2)(7) also provides for enhanced penalties when cruelty is involved.

The protection against cruelty also extends to animals. *See* Kan. Stat. Ann. §21-6412 (2017). Kansas law recognizes the legality of killing farm animals, but restricts such killings to those conducted in accord with "normal or accepted practices of animal husbandry". Kan. Stat. Ann. §21-6412(c)(6) (2017). The practices of animal husbandry are subject to the Humane Methods of Slaughter Act, 7 U.S.C § 1901 *et seq.* (2012), which requires that livestock by "rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut." *Id.* at § 1902. In other words, federal law forbids live dismemberment of a cow, horse, calf, hog, mule, or sheep unless it is rendered incapable of feeling pain.

It is simply inconceivable that the Kansas Bill of Rights forecloses the ability of the state legislature to afford similar human protection to unborn human beings,[11] yet that is the ruling of the district court. It must be reversed.

CONCLUSION

The Kansas Bill of Rights was intended to reflect the equality of all Kansans and protect them from abusive exercise of power. From the establishment of this state, the people understood that the unborn child is among the most vulnerable members of our community. For that reason state legislation has consistently recognized and protected them. The district court order creating a state constitutional right of abortion ignores the will of the people and 150 years of state law and jurisprudence. It should be reversed.

[11] *See Planned Parenthood of Minnesota v. Rounds*, 653 F.3d 662, 667 (8th Cir. 2011) (finding that South Dakota's requirement that abortion providers tell women that "abortion will terminate the life of a whole, separate, unique, living human being" is truthful speech).

The right created by the order is extreme and erroneous. There simply is no basis in the Kansas Bill of Rights for a ruling that requires the state to tolerate live dismemberment abortion – a ruling that affords unborn children less protection than afforded by state statute to the livestock in this state.

Even if the Kansas Bill of Rights must be read to afford some right to abortion, the plaintiffs in this case have not presented sufficient evidence to show that they will prevail in establishing that S.B. 95 is unconstitutional in every application of the law. Plaintiffs' own experts identify at least two applications where the law is constitutional. For this reason alone, the district court erred in granting the injunction.

For all the reasons presented above, Amicus respectfully prays that this Court reverse the ruling of the district court and declare that no right to abortion can be implied or created based on the text, history, and jurisprudence of this state.

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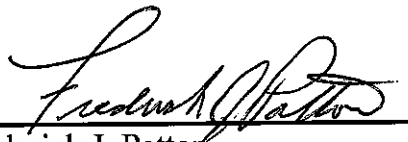

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