IN THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS

HODES & NAUSER, MDs, P.A.; HERBERT C. HODES, M.D.; and TRACI LYNN NAUSER, M.D.,	)	
Plaintiffs,	)	**Case No. 2015CV490** **Division 6**
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.	)	

ORDER GRANTING TEMPORARY INJUNCTION

K.S.A. 60-905

On the 25th day of June, 2015, the Plaintiffs' Motion For Temporary Injunction and/or Temporary Restraining Order came before the Court. Plaintiffs appeared by counsel Janet Crepps, Robert V. Eye, Genevieve Scott, and Erin Thompson. Defendants appeared by counsel Shon D. Qualseth, Sarah E. Warner, Stephen R. McAllister, Jeffrey A. Chanay, and Dennis D. Depew. There were no other appearances.

Having reviewed the pleadings, heard arguments of counsel, and having been duly advised on the premises, the Court Orders, for the reasons stated from the bench at the hearing on the Motion and as outlined herein, that Plaintiffs' Motion is granted.

This Order is effective as of the date and time shown on the file stamp.

Findings of Fact

The Court finds that the Defendants did not dispute in their Response Opposing Plaintiffs' Motion for Temporary Restraining Order/ and/or Temporary Injunction the facts outlined in the Plaintiffs' Memorandum in support of that motion. Therefore, the Court adopts those facts as outlined below.

Senate Bill 95 prohibits the performance on a living fetus of an abortion procedure described in the Act as "dismemberment abortion," defined as a procedure done:

> 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.

S.B. 95 § 2(b)(1).

Violation of the ban is a criminal offense. *Id.* § 6. In addition, the Act authorizes the Attorney General or any District or County Attorney with appropriate jurisdiction to "bring a cause of action for injunctive relief against a person who has performed or attempted to perform" an abortion in violation of the Act. *Id.* § 4. The Act also creates a cause of action for damages against a person who violates the ban. *Id.* § 5.

Although "dismemberment abortion" is not a medical term, the parties agree and the Court finds that the Act prohibits Dilation & Evacuation ("D & E") procedures. The D & E procedure is used for 95% of the abortions done in the second trimester.

The Plaintiffs in this case are Hodes & Nauser, M.D.s, PA; Dr. Herbert C. Hodes; and Dr. Traci Lynn Nauser, on behalf of themselves and their patients. The Plaintiff physicians are board-certified obstetrician-gynecologists who practice in Overland Park, Kansas. They provide pre-viability second-trimester abortions using D & E procedures. The Plaintiffs do not induce fetal demise prior to their D & E procedures.

The Defendants, both sued in their official capacity, are Derek Schmidt, Attorney General of the State of Kansas, and Stephen M. Howe, District Attorney for Johnson County.

Defendants propose three alternative procedures to D & E: labor induction, induction of fetal demise using an injection, and induction of fetal demise using umbilical cord transection.

Labor induction is used in approximately 2% of second-trimester abortion procedures. It requires an inpatient labor process in a hospital that will last between 5–6 hours up to 2–3 days, includes increased risks of infection when compared to D & E, and is medically contraindicated for some women.

There is no established safety benefit to inducing demise prior to a D & E procedure.

An injection of digoxin may be administered via either transabdominal or transvaginal injection. Injections to induce demise using digoxin prior to D & E are not practiced prior to 18 weeks gestation, and the impact of subsequent doses of digoxin, required in cases where a first dose is not effective, is virtually unstudied. Research studies have shown increased risks of nausea, vomiting, extramural delivery, and hospitalization.

Umbilical cord transection prior to a D & E is not possible in every case. Requiring transection prior to a D & E increases procedure time, makes the procedure more complex, and increases risks of pain, infection, uterine perforation, and bleeding. The use of transection to

induce fetal demise has only been discussed in a single retrospective study, the authors of which note that its main limitation is "a potential lack of generalizability."

Conclusions of Law

"[T]he purpose of a temporary or preliminary injunction is not to determine any controverted right, but to prevent injury to a claimed right *pending a final determination of the controversy on its merits*," and to maintain the *status quo*. *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 491 (2007) (quoting *Steffes v. City of Lawrence*, 284 Kan. 380, 394 (2007)). A moving party may obtain a temporary injunction if it shows that: (1) it has a substantial likelihood of success on the merits; (2) there is a reasonable probability that it will suffer irreparable future injury; (3) it cannot obtain an adequate remedy at law; (4) the threat of injury to itself outweighs any injury that the injunction may cause opposing parties; and (5) the injunction will not harm the public interest. *Id.*

Plaintiffs are not required to establish to a certainty that they will prevail on the merits or that their patients will suffer irreparable harm, but only that they are substantially likely to prevail and that there is a reasonable probability of harm. *See Bd. of Cnty Comm'rs of Leavenworth Cnty v. Whitson*, 281 Kan. 678, 684 (2006) (rejecting "proof of the *certainty* of irreparable harm rather than the mere probability" as setting "too high a standard for parties seeking injunctions").

The Court finds that the Plaintiffs have standing to assert the rights of their patients. *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 921 (2006) (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)).

I. Likelihood of Success on the Merits

Plaintiffs' claims are brought under Sections 1 and 2 of the Bill of Rights of the Kansas

Constitution,[1] and therefore the Court must address the threshold question of whether these provisions afford protection to the right to abortion.

While "[t]his court is free to construe our state constitutional provisions independent of federal interpretation of corresponding federal constitutional provisions," *State v. Morris*, 255 Kan. 964, 981 (1994), the Kansas Supreme Court has customarily interpreted the provisions of the Kansas Constitution to "echo federal standards." *Alpha Med. Clinic*, 280 Kan. at 920 (citations omitted).

Although the Kansas Supreme Court has not addressed protection for the right to abortion under the Kansas Constitution, in *Alpha* the Court noted that, "[w]e have not previously recognized—and need not recognize in this case despite petitioners' invitation to do so—that [rights to privacy protecting abortion] also exist under the Kansas Constitution," but went on to say, "[b]ut we customarily interpret its provisions to echo federal standards." *Id.*

Absent explicit guidance from the Kansas Supreme Court on this issue, this Court is bound to apply the customary rule, which the *Alpha* decision suggests will apply to abortion. *See also Morris*, 255 Kan. at 981 ("The liberal construction which must be placed upon [Kansas] constitutional provisions for the protection of personal rights requires that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation [as the federal provisions].").

The Court therefore concludes that Sections 1 and 2 of the Bill of Rights of the Kansas Constitution independently protects the fundamental right to abortion.

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[1] Section 1 of the Kansas Constitution Bill of Rights states: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 provides: "All political powers inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body, and this power shall be exercised by no other tribunal or agency."

In determining whether the Act violates the right to abortion, the Court recognizes that "[a] statute comes before the court cloaked in a presumption of constitutionality and it is the duty of the one attacking the statute to sustain the burden of proof." *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 616 (1978) (citations omitted). As the Court explained in *Schneider*, however, "[a] more stringent test has emerged," where, as here, the case involves suspect classifications or fundamental rights or interests. *Id.* at 617 (citations omitted). In such cases, "the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny. The burden of proof to justify the classification falls upon the state." *Id.* (citation omitted).

Having concluded that the Act implicates the fundamental right to abortion protected under the Kansas Constitution, this Court cannot presume that the Act is constitutional, but must instead subject it to active and critical analysis.

Turning to the merits, Plaintiffs have established a substantial likelihood of success on their claims that the Act violates their patients' right to abortion protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights.

Under applicable federal law, the State is prohibited from enacting laws that impose an undue burden on access to abortion services. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992). The Kansas Supreme Court has applied the undue burden standard set out in *Casey* when analyzing challenges based on the federal right to terminate a pregnancy. *See Alpha Med. Clinic*, 280 Kan. at 920. Thus, the Court will apply *Casey*'s undue burden test in deciding whether Plaintiffs have established a likelihood of success on this claim.

"A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion

of a nonviable fetus." *Casey*, 505 U.S. at 877. "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* "And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.*

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.

Defendants' reliance on *Gonzales* for the proposition that the ban is constitutional based on the availability of alternative procedures is misplaced. Though the *Gonzales* Court ultimately upheld the ban on the "intact D & E" procedure, it only did so after determining that the most common method of second-trimester abortion—D & E—which the parties did not contest was safe and reliable, was not banned. *Gonzales*, 550 U.S. at 150–54.

Plaintiffs have therefore established a likelihood of success on the merits of their claim that the Act imposes an impermissible burden by banning D & E procedures. Though the State has legitimate interest in protecting potential life, that interest does not justify S.B. 95's

imposition of an undue burden on a woman's right to terminate a pre-viability pregnancy. *Stenberg*, 530 U.S. at 945–46. *See also Gonzales*, 550 U.S. at 146.

Alternative procedures suggested by Defendants for Plaintiffs to comply with the Act would also impose an undue burden on the right to abortion. The alternatives proposed by Defendants include labor induction, a transabdominal or transvaginal injection to induce fetal demise prior to D & E, or umbilical cord transection to induce fetal demise prior to D & E.

Based on the evidence presented, the Court finds that the alternatives proposed by Defendants are not reasonable, would force unwanted medical treatment on women, and in some instances would also operate as a requirement that physicians experiment on women with known and unknown safety risks as a condition accessing the fundamental right to abortion.

The Defendants' view that these alternatives do not impose an undue burden is extreme and not supported by Supreme Court precedent. Plaintiffs have established that based on the threat of injury to their patients, their patients' right to terminate a pre-viable pregnancy outweighs the Defendants' asserted interests. Therefore, I find that forcing women to accept the possibility of having to undergo an unnecessary medical procedure in order to effectuate their abortion decision independently constitutes an undue burden.

Accordingly, the Court concludes that Plaintiffs have established a likelihood of success on the merits of their claim that enforcement of the Act will violate the abortion rights of their patients protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights.

Because I find that Plaintiffs prevail on the likelihood of success of this claim and, as discussed below, the other temporary injunction factors weigh in their favor, I need not reach Plaintiffs' improper purpose claim or Plaintiffs' claim that S.B. 95 violates women's fundamental right to bodily integrity.

II. Irreparable Injury/ Adequate Remedy at Law

Plaintiffs have shown a reasonable probability that their patients will suffer irreparable future injury and that they lack an adequate remedy at law should the Act be enforced. *Idbeis*, 285 Kan. at 491. The federal standards for temporary injunctive relief are similar to those in Kansas. *See, e.g., Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229*, 32 Kan. App. 2d 1104, 1118 (2004). The federal decisions establish that if a constitutional right will be abridged, no further showing of irreparable harm is required; a deprivation of a constitutional right is in and of itself irreparable harm. *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996). Because Plaintiffs have established a substantial likelihood of success as to their constitutional claim that the Act will deprive women seeking second-trimester abortions of their constitutional right to abortion, they have demonstrated a reasonable probability of irreparable future harm without adequate remedy at law.

III. Balance of Hardships

Plaintiffs have also established that the threat to their patients outweighs any harm that might inure to the Defendants. *Idbeis*, 285 Kan. at 491. The balance of hardships in this case is in lockstep with irreparable harm. Plaintiffs have shown a likelihood of success that their patients' fundamental right to terminate a pregnancy will be unduly burdened if S.B. 95 goes into effect. In contrast, Defendants face little, if any, injury from issuance of an injunction, which will impose no affirmative obligations and will preserve the *status quo*. The same logic applies to the State's interest in regulating the medical profession because, at this point, the injunction will do nothing more than maintain the *status quo* until the issues can be resolved on the merits.

34117820, at *5–6 (Kan. Dist. Ct. 2001) (holding threatened injury to plaintiffs' constitutional rights "outweighs whatever damage there may be to [defendants']" inability to enforce "what appears to be an unconstitutional ordinance") (citing *Johnson*, 194 F.3d at 1163). For these reasons, Plaintiffs have demonstrated that the balance of hardships weighs in their favor.

IV. Public Interest

Finally, Plaintiffs have established that a temporary injunction would not be adverse to the public interest. *Idbeis*, 285 Kan. at 491. The public's interest in not suffering a potential constitutional limitation is served more by maintaining the *status quo* than by permitting a law which may be unconstitutional to go into effect. *See Adams*, 919 F. Supp. at 1505.

Order

The Court hereby grants the Temporary Injunction: Senate Bill 95 shall not be enforced until further order of this Court or until final judgment is entered in this matter. Pursuant to Kansas Statute 60-905(b), the Court further orders that Plaintiffs shall not be required to post a bond.[2]

IT IS SO ORDERED.

Dated this 3 OTA of June,2015

Larry D. Hendricks
District Court Judge

[2] The Court having issued a temporary injunction need not rule on Plaintiffs' alternative request for a temporary restraining order.

CERTIFICATE OF MAILING

I herby certify that a copy of the above and foregoing ORDER was mailed this 30th day of June, 2015, by United States mail, postage prepaid thereon, to the following:

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