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No. 114,153

IN THE SUPREME COURT OF THE STATE OF KANSAS

Hodes & Nauser, M.D.s, P.A.,
Herbert C. Hodes, M.D., and Traci Lynn Nauser, M.D.,
Plaintiffs-Respondents,

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-Petitioners.

RESPONSE TO PETITION FOR REVIEW

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

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INTRODUCTION

This case presents a question of first impression—whether the right to access abortion should be recognized as a fundamental right protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights. This case also addresses significant questions regarding the state legislature's power to intrude upon fundamental rights. Plaintiffs-Respondents challenge Senate Bill 95 (2015 Session) (the "Act") on the grounds that, by banning the most commonly-used method of second-trimester abortion, the Act violates the liberty interests of women seeking to terminate a pregnancy.

The *en banc* Court of Appeals, in an evenly split decision, with six judges voting to uphold the District Court's grant of a temporary injunction (hereinafter "the six judge opinion") and one judge concurring, correctly concluded that the Kansas Constitution independently protects the fundamental right to abortion. The six judge opinion accepted the District Court's finding of fact, which were not contested by Defendants-Petitioners on appeal, and held that Plaintiffs were likely to succeed on their claim that the Act's ban on the most common method of second-trimester abortion violates the Kansas Constitution and, if allowed to go into effect, would irreparably harm Plaintiffs and their patients.[1] Mem. Op. of the Court of Appeals, App. A to Pet. for Review.

While the result of the decision by the six judge opinion and concurring opinion, upholding the District Court's issuance of a temporary injunction against the Act, is correct, in light of the evenly divided Court of Appeals' ruling that the Kansas Constitution Bill of Rights

[1] Plaintiffs in this case are Hodes & Nauser M.D.s, P.A.; Dr. Herbert C. Hodes; and Dr. Traci Lynn Nauser, board-certified obstetrician-gynecologists who practice in Overland Park, Kansas. They provide pre-viability second-trimester abortions that would be banned by the Act.

protects the right to abortion, review by this Court is warranted. For these reasons, Plaintiffs do not oppose Defendants' Petition for Review.

ISSUES FOR WHICH REVIEW IS SOUGHT

1. Sections 1 and 2 of the Kansas Constitution Bill of Rights provide broad protection to the liberty interests of Kansas citizens and have never been interpreted by the Kansas appellate courts to provide less protection than the Fourteenth Amendment of the United States Constitution. Does the Kansas Constitution protect the fundamental right to abortion?

2. The Act bans D & E procedures, the most common method of second-trimester abortion. The United States Supreme Court has repeatedly held that a ban on the most commonly-used method of second-trimester abortion is unconstitutional and has specifically held that a ban on the same procedure prohibited by the Act 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 Cent. Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976). Moreover, the six judge opinion upheld the District Court's finding of fact, supported by substantial competent evidence, and held that the alternatives to the D & E procedure proposed by Defendants independently impose an undue burden on women's access to abortion. The concurring opinion agreed that there was no reasonable justification for the ban. Was the Court of Appeals correct in affirming the District Court's temporary injunction?

STATEMENT OF FACTS

S.B. 95 is an unprecedented intrusion upon Kansas women's right to access abortion. The parties agree that with limited exceptions, the statute bans a procedure called "dilation and evacuation" or "D & E," the most common method of second-trimester abortion in the United States. The D & E procedure is used for 95% of abortions performed in the second trimester. District Court Order, App. B to Pet. for Review, at 2. Alternatively, the Act will force women

seeking D & E abortions to undergo a more complex medical procedure that carries more risks, with no medical benefit, or forgo abortion entirely. *See id.* at 3–4.

While Defendants argued below that its proposed alternatives do not unduly burden women's access to abortion, the District Court found to the contrary. *See id.* at 8 (holding 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 Plaintiffs experiment on women with known and unknown safety risks as a condition [of] accessing the fundamental right to abortion."). The six judge opinion found that Defendants had not properly challenged the District Court's factual findings, and that the findings are fully supported by the record below.

ARGUMENT

The parties agree that the issue on appeal—whether the Bill of Rights of the Kansas Constitution provides protection for the right to abortion—is quintessentially a legal question. The Supreme Court is the ultimate authority on interpretations of the State Constitution, and this legal question, hotly contested by the parties and the subject of an equally divided decision from the Court of Appeals, will inevitably come before this Court. As District Court Judge Hendricks' Order suggests, this case calls for "explicit guidance from the Kansas Supreme Court." District Court Order, App. B to Pet. for Review, at 5.

A decision on this issue will impact, perhaps definitively, the validity of S.B. 95, and establish the applicable legal framework for evaluating the validity of other abortion restrictions under the Kansas Constitution. Indeed, there are two ongoing district court cases raising the same issue: *Hodes & Nauser, M.D.s, P.A. et al. v. Schmidt et al.*, No. 2013-CV-705 (Dist. Ct. Shawnee Cty., Kan., Div. 1, June 28, 2013), and *Hodes & Nauser, M.D.s, P.A.*

et al. v. Moser, M.D. et al., No. 2011-CV-1298, 2011 WL 7714069 (Dist. Ct. Shawnee Cty., Kan., Div. 7, Nov. 10, 2011).

For these reasons, this Court should grant review and 1) recognize that the Kansas Constitution Bill of Rights protects the right to abortion; and 2) affirm the District Court's issuance of a temporary injunction against S.B. 95.

I. This Court Should Grant Review to Address Whether the Kansas Constitution Protects the Right to Abortion.

The scope of protection afforded to the rights of Kansas citizens under the State Constitution is one of fundamental importance. Here, the recognition of the right to abortion under the Kansas Constitution Bill of Rights is supported by both the text of the Constitution and clearly established Kansas precedent. The Kansas Constitution is explicitly written "to insure the full enjoyment of our rights as American citizens." Kan. Const. Ordinance & Preamble. Under Defendants' view, apparently shared by the dissenting judges on the Court of Appeals, Kansas citizens would be afforded only narrow rights, and perhaps no substantive due process protections at all under Sections 1 and 2 of the Kansas Constitution. Mem. Op. of the Court of Appeals, App. A. to Pet. for Review, at 73 (Malone, C. J., dissenting) ("Arguably, the Kansas Constitution contains no clearly identified substantive due process clause."). By contrast, as the six judge opinion correctly held, there is a long line of Kansas case law explicitly recognizing a substantive due process right under the Kansas Constitution. *See* Mem. Op. of the Court of Appeals, App. A to Pet. for Review, at 15–17 (citing cases).

Likewise, the six judge opinion correctly recognized that for nearly a century, Kansas courts have held that Sections 1 and 2 of the Kansas Constitution Bill of Rights have "much the same effect" as the Due Process and Equal Protection Clauses of the United States Constitution. *See id.* at 2 (citing cases). Consistent with this reasoning, in this Court's *Alpha*

decision, though this Court declined to address whether there is a right to abortion under the Kansas Constitution, it recognized that the Kansas Supreme Court "customarily interpret[s] its provisions to echo federal standards." *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006).

Given the long-standing protection of rights recognized under the Fourteenth Amendment of the United States Constitution, the six judge opinion was correct in concluding that Sections 1 and 2 of the Kansas Constitution Bill of Rights protect the right to abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court reaffirmed that the constitutional protection for a woman's decision to terminate a pregnancy derives from the Due Process Clause of the Fourteenth Amendment. 505 U.S. 833 (1992). The *Casey* Court explained that the "*controlling word*," in the Due Process Clause is "liberty," which furnishes a substantive protection against certain government actions. *See id.* at 846–47. *Casey* found that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter," *id.* at 847, recognizing the right to "physical autonomy," *id.* at 884, and holding that under the Fourteenth Amendment, states are prohibited from banning abortion prior to viability or imposing an undue burden on women's access to pre-viability abortion. *Id.* at 877. *See also id.*at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.") Defendants' argument, and the position of the dissenting judges on the Court of Appeals, that this Court should afford no protection for a right that is clearly protected under the Fourteenth Amendment, represents a sharp break from a long line of this Court's precedent and underscores the need for this Court to grant the petition.

Further, based on the broad language of Sections 1 and 2, this Court should recognize women's liberty interest in terminating a pregnancy as a fundamental right protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights, and that these provisions provide even stronger protection than that afforded under the Federal Constitution. *See State v. Risjord*, 249 Kan. 497, 501, 819 P.2d 638, 642 (1991) (The "most critical level of analysis"—"strict scrutiny"—"applies in cases involving . . . 'fundamental rights expressly or implicitly guaranteed by the Constitution.'" (quoting *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058, 1063 (1987)).

Judge Atcheson agreed, concluding that Section 1 defines a right of self-determination that arose independently of the liberty protections in the federal Due Process Clause and precludes the government from dictating fundamental decisions regarding reproduction, and holding that courts must subject government action impairing the right to abortion to "exacting review without deference to any legislative prerogative or presumption of constitutionality." Mem. Op. of the Court of Appeals, App. A to Pet. for Review, at 27, 42, 62 (Atcheson, J., concurring) (citing *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 194, 273 P.3d 709 (2012)).

Regardless of the level of scrutiny applied, this Court should recognize women's liberty interest in terminating a pregnancy as a fundamental right protected under Sections 1 and 2 of the Kansas Constitution Bill of Rights. Whatever rights may have been afforded to women at the time the Kansas Constitution Bill of Rights was passed, it should now be applied to ensure women's basic rights to make decisions about their bodies and lives, and, as the U.S. Supreme Court puts it, "[t]he ability of women to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856.

The petition should be granted so that this Court can provide a definitive answer as to whether Sections 1 and 2 of the Kansas Constitution Bill of Rights encompass a right to abortion, and, if so, the level of scrutiny that must be applied to restrictions on that right.

II. This Court Should Grant the Petition and Affirm the District Court's Temporary Injunction.

In addition to addressing the question of whether the Kansas Constitution protects women's right to abortion, the constitutionality of the Act itself also raises issues of significant public importance. The validity of the Act's ban on D & E, the most common method of second-trimester abortion, and the question of whether women can be subjected to an additional and unnecessary medical procedure, which in some circumstances is still experimental, as a condition of exercising a fundamental right, are important questions of first impression for this Court.

The Act's ban on D & E violates clearly-established precedent striking down bans on the most common method of second-trimester abortion. In *Stenberg v. Carhart*, the U.S Supreme Court struck down a Nebraska statute that prohibited not only intact D & E but also D & E, explaining that the prohibition of both intact D & E and D & E imposed an unconstitutional undue burden under *Casey*. *Stenberg*, 530 U.S. at 945–46. Subsequently, in *Gonzales v. Carhart*, the U.S. Supreme Court interpreted a federal statute to ban only intact D & E procedures, not the more common D & E procedure, and held that the constitutionality of the ban rested on the continued availability of D & E. 550 U.S. at 164, 166–67. The Court explicitly and clearly distinguished *Stenberg*, explaining that although the statute in *Stenberg* operated as a ban on *both* intact D & E and D & E, the law at issue in *Gonzales* banned only intact D & E and did not affect D & E, the most common method of second-trimester abortion. *Id.* at 165–66. *See also Nova Health Sys. v. Pruitt, et al.*, No. CV-2015-1838, at 5 (Okla. Cty.

Dist. Ct. Oct. 28, 2015, www.oscn.net/dockets/GetDocument.aspx?ct=oklahoma&bc=1031376872&cn=CV-2015-1838&fmt=pdf) (granting a temporary injunction against the only other D & E ban in the country, explaining: "The U.S. Supreme Court has previously balanced the competing interests at stake here . . . and found that a previous ban on D & E abortions was unconstitutional.").

The six judge opinion correctly held that under clearly-established Supreme Court precedent, the Act is unconstitutional: "By combining [a ban on intact D & E abortion procedures in place since 1998] with a new one on the D & E abortion procedure, Kansas has simply attempted to do in two statutes what the United States Supreme Court held Nebraska could not do in one—ban both D & E and intact D & E abortions." Mem. Op. of the Court of Appeals, App. A to Pet. for Review, at 21. While Defendants concede that the Act bans the very same commonly-used method of abortion, they nonetheless argue, in spite of the U.S. Supreme Court's rulings to the contrary, that the Act should not have been enjoined.

Given the "additional risk, inconvenience, discomfort, and potential pain associated with the[] alternatives" proposed by Defendants, some of which are "virtually untested," the six judge opinion and concurring opinion also correctly concluded that banning D & E is an unconstitutional violation of the right to abortion. *Id.* at 23; *see also id.* at 63 (Atcheson, J., concurring). Defendants' alarming suggestion that the State is empowered to visit these harms on Kansas women seeking abortion merits this Court's immediate review.

CONCLUSION

The legal question raised in this case addresses the fundamental rights of Kansas citizens under the State Constitution, and the legislature's power to restrict those rights, a question in dispute in three cases before Kansas courts that will profoundly impact women's

access to abortion. This case implicates the rights of Kansas women to be free from government intrusion into their medical decision-making and to be free from unwanted medical treatment. For these reasons, Plaintiffs respectfully request that this Court grant the Petition for Review, recognize that Sections 1 and 2 of the Kansas Constitution Bill of Rights protect women's right to abortion, and affirm the District Court's issuance of a temporary injunction against S.B. 95.

Respectfully submitted,

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I hereby certify that on February 16, 2016, electronic copies of the foregoing were electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and copies were electronically mailed to:

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