No. 15-114153-AS

IN THE SUPREME COURT OF KANSAS

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

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-Petitioners*.**

BRIEF *AMICUS CURIAE* OF THE FAMILY RESEARCH COUNCIL IN SUPPORT OF DEFENDANTS-PETITIONERS

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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Certificate of Service

Interest of the *Amicus*

The Family Research Council (FRC) was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in public policy. Through publications, media appearances, public events, debates and testimony, FRC's team of policy experts reviews data and analyzes legislative and executive branch proposals that affect marriage, the family and human life. FRC also strives to assure that the sanctity of human life is recognized and respected in the decisions of courts. To that end, FRC has submitted *amicus curiae* briefs presenting its views in several Supreme Court cases affecting unborn human life including the challenges to state and federal laws barring partial-birth abortions, *Stenberg v. Carhart* (2000), and *Gonzales v. Carhart* (2007). This case presents a similar issue.

The General Assembly passed and Governor Brownback signed into law Senate Bill 95, which prohibits the performance of dilation and evacuation abortions on live, unborn children. In this procedure, a physician, in deliberately causing the death of an unborn child, dismembers the child. Plaintiffs in this case, two physicians who perform such abortions and their professional association, have challenged the law, claiming that the Kansas Constitution protects such a barbaric procedure. On plaintiffs' motion, the district court temporarily enjoined defendants from enforcing the law and an equally divided court of appeals affirmed. This Court granted defendants' petition for review.

FRC submits that nothing in the Kansas Constitution, properly considered, confers a right to perform an abortion, whether by the dismemberment method at issue in this case, or any other method. This Court has never recognized a state right to abortion. And, as this brief explains, there is no basis for recognizing such a right.

I.

SECTION 1 OF THE BILL OF RIGHTS IS NOT SELF-EXECUTING AND DOES NOT CREATE ANY JUDICIALLY ENFORCEABLE SUBSTANTIVE RIGHTS.

Plaintiffs challenge S.B. 95, which prohibits the performance of dismemberment abortions on live, unborn children, arguing that the prohibition impermissibly interferes with a pregnant woman's fundamental right to obtain an abortion which right, according to plaintiffs, is secured by §§ 1 and 2 of the Kansas Bill of Rights (plaintiffs have raised no federal constitutional claims). The district court granted plaintiffs' motion for a temporary injunction barring enforcement of the law, and the court of appeals, sitting *en banc*, affirmed that injunction by an evenly divided court. *Amicus curiae* submits that neither § 1 nor § 2 of the Kansas Bill of Rights creates a right to abortion.

Section 1 provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 provides, in part: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

Amicus curiae recognizes that this Court, on occasion, has stated that §§ 1 and 2 "are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection." *State ex rel. Tomasic v. Kansas City*, *Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760, 777 (1981).[1] Section 2, however, applies "solely to political privileges, not to the personal or property rights of an individual,"

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[1] As Judge Atcheson noted, however, "Nobody . . . has unearthed a case in which the Kansas Supreme Court has actually relied on § 1 to find and enforce an unenumerated constitutional right to decide a legal controversy. Many of the cases, particularly the early ones, are mishmashes that mention both federal and state constitutional rights and never really explain the bases for their rulings." Op. 52.

Sharples v. Roberts, 249 Kan. 286, 289, 816 P.2d 390, 393 (1991), and thus has no bearing on the constitutionality of an abortion regulation such as S.B. 95. And, as to § 1, *amicus* contends that, properly understood in light of its text and history, § 1 does not, in and of itself, create any judicially enforceable substantive rights. That conclusion is consistent with the interpretation of similar provisions in other state constitutions. Accordingly, there is no basis for deriving a right to abortion from § 1.

Section 1 cannot plausibly be regarded as a guarantee of due process of law. First, the phrase "due process of law" does not appear anywhere in § 1. Second, in drafting § 1 (and § 2), the delegates of the 1859 Constitutional Convention could not have had in mind the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the Amendment was not proposed until 1865. Third, although the framers *did* include in the state Bill of Rights certain guarantees set forth in the federal Bill of Rights, often borrowing the very language used in the latter, *see*, *e.g*., §§ 9 (cruel and unusual punishment), 14 (quartering of soldiers), 15 (search and seizure), they did *not* include the Fifth Amendment's due process guarantee. Given the fact that the earlier (rejected) Lecompton Constitution *did* contain express due process language, the omission of such language from the Wyandotte Constitution "must be seen as the drafters' exercise of studied consideration rather than the result of inadvertence." Op. 51 (Atcheson, J.).

Entirely apart from the foregoing, § 1 cannot be regarded as creating judicially enforceable substantive rights. First, unlike the language in the federal Due Process Clauses, nothing in § 1 expressly *forbids* the deprivation of the rights identified therein. *Compare* Neb. Const. art. I, § 1 (providing that the "inherent and inalienable rights" listed in § 1 "shall not be denied or infringed by the state or any subdivision thereof").

Second, the specific "inalienable natural rights" identified in § 1 – "life, liberty, and the pursuit of happiness" – are merely illustrative ("among which are"), not exhaustive. For example, there is no mention of "acquiring, possessing, and protecting property" or "seeking and obtaining . . . safety," two other rights identified in the original draft of § 1. Proceedings and Debates of the Kansas Constitutional Convention of 1859 (Topeka, Kansas) (1920 Reprint) 187 ("Proceedings"). It is unreasonable to assume that the drafters of § 1 intended to confer on the judiciary a roving commission to decide from time to time what other unidentified rights would fall within the scope of § 1, guided by nothing more than their own personal preferences and predilections.[2]

Third, nothing in the debates indicates that the drafters intended the rights declared in § 1 to be self-executing and, therefore, judicially enforceable.[3] In presenting the report of the Committee on the Preamble and Bill of Rights, Delegate Hutchinson told the Convention that "[i]t should be the work of *legislation*," not litigation, "to restore the people back to their *natural rights* from which preceding legislation has driven them." Proceedings 185 (emphasis added). Toward the end of the debate over § 1, much of which focused on whether it would preclude enforcement in state courts of the federal Fugitive Slave Act, Delegate Kingman proposed to substitute for the Committee's draft

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[2] In his opinion, Judge Atcheson defined "natural rights" as those rights that "may be thought of as essential for a human being to live in a condition recognizing his or her humanity." Op. 39. And who determines what those rights are under this amorphous and utterly subjective standard, or from what "authority or source," *id*., they are derived? Surely, that determination is in the eyes of the beholder unconstrained by any limits.

[3] If the drafters of the "inalienable natural rights" language of § 1 thought that such language was self-executing, then why did they feel it necessary to include an express prohibition of slavery (§ 6) in the Bill of Rights? After all, it would be hard to imagine a greater interference with one's "liberty" than to be enslaved.

the language that (with a minor stylistic change) became § 1. *Id*. at 282-83. *See also*, *id*., at 460-61, 465. Delegate Kingman expressed his desire to have § 1 track the phrasing in the Declaration of Independence because such phrasing had become "traditional," formed "a part of our political creed" and expressed "the American feeling" in "sentiments" that remained in "their original style of expression . . . ." *Id*. at 283. "They are," he added "as the political Bible of every citizen of the United States." *Id.*

Delegate Kingman argued that his substitute for § 1 was "broad enough for all to stand upon." *Id*. It was precisely because such language "gives room for men of diverse views to stand upon," that Delegate Winchell opposed it, insisting upon language that would render the Fugitive Slave Act unenforceable in Kansas. *Id*. at 283-85. Winchell's opposition to the substituted language, however, was unavailing, and Delegate Kingman's proposal was adopted by an overwhelming vote of 42-6, *id*. at 285. Section 1, in its present form, was adopted because the Convention "could not agree on an unequivocal clause guaranteeing the rights of freed slaves." Francis H. Heller, The Kansas State Constitution 48 (1992) ("Heller"). In light of the foregoing, it is apparent that the substituted language was understood by the delegates as a statement of general political principles, not specific language that would be enforceable in the courts of the State.[4]

The language of § 1 is, in Judge Atcheson's word, "aspirational," Op. 27, 41, 45, but aspirational language, like the Declaration of Independence itself, does not provide a workable rule for judicial enforcement. It strains credulity, therefore, to read into the debate over § 1 an intent to establish a fundamental right, enforceable in the courts, of

[4] In light of the foregoing, Judge Atcheson's conclusion that § 1, *as adopted*, was meant to create "enforceable constitutional rights," Op. 47, is simply untenable.

"self-determination," *id*. at 27, 39, much less "a right to reproductive freedom that entails deciding whether to continue a pregnancy, *id*. at 41.[5] Such an intent would have been entirely foreign to the delegates who drafted § 1, as Judge Atcheson himself recognized, *id*. at 49 ("the delegates . . . did not consider reproductive freedom or abortion in drafting the Kansas Constitution"). Moreover, predicating a fundamental right of "self-determination" would subject *all* laws interfering with such a right, including laws prohibiting assisted suicide, prostitution or the use of controlled substances, as well as laws prohibiting abortion, to the strict scrutiny standard of review, under which the challenged law would be regarded as presumptively invalid and could be upheld only if the State proved that it was the least restrictive means to promote a compelling state interest. *Id*. at 42 ("any impairment must be carefully circumscribed to further an essential governmental interest"). That cannot have been the intent of the framers of § 1.

Neither the text nor the history of its adoption supports the conclusion that § 1, by itself, was intended to create self-executing, judicially enforceable rights. Nor, contrary to Judge Atcheson's view, Op. 46-47, does the fact that a recitation of "inalienable natural rights" has been placed in a bill of rights, rather than a preamble, mean that it is self-executing.[6] *See State v. Carruth*, 81 A. 922, 923 (Vt. 1911) ("[m]any things contained in

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[5] Judge Atcheson conceded that "a natural right, if exercised, cannot diminish another person's rights." Op. 45. On what basis does he assume that the unborn child does not enjoy the fundamental right to life, also identified in § 1? It cannot be because "the fetus is . . . incapable of free-will or self-determination," *id*. at 43, for neither are infants, patients in a coma or persistent vegetative state or the severely mentally disabled. And infants are no more "independent" of others for their continued "existence," *id*., as unborn children, before or after viability.

[6] As Judge Atcheson himself acknowledged with respect to the first clause of § 2 of the Bill of Rights. *Id*. at 46.

the Bill of Rights found in our state Constitutions are not, and from the very nature of the case cannot be, so certain and definite in character as to form rules for judicial decisions; and they are declared rather as guides to the legislative judgment than as marking an absolute limitation of power") (citation and internal quotation marks omitted).

Twenty-eight other States declare certain rights, including "liberty," to be "natural," "inalienable," "unalienable," "indefeasible," "inherent" or "essential."[7] The courts in at least ten of these States have held or strongly implied that such language, in and of itself, is not self-executing and does not create any judicially enforceable rights. *See Day v. O'Connor*, 790 N.E.2d 985, 990-91 (Ind. 2003) (citing cases from Alabama, Alaska, Idaho, Nevada, New Mexico, Ohio and Vermont); *Kunkel v. Walton*, 689 N.E.2d 1047, 1056-57 (Ill. 1997); *Paris v. Commonwealth*, 545 S.E.2d 557, 558 n. 4 (Va. Ct. App. 2001) (describing language as "ideological . . . rather than literal"). In another five States, such language has been held to be enforceable only through an *express* due process guarantee,[8] or, alternatively, has been construed in conjunction with the State's due process guarantee.[9] The Kansas Bill of Rights has no such guarantee.

In two States, the courts have held that the "liberty" language is judicially

[7] The text of those provisions is set forth in the Appendix.

[8] *State v. Cromwell*, 9 N.W.2d 914, 918, 919 (N.D. 1943) ("the [state] due process clause protects and insures the use and enjoyment of the rights declared by section 1 of the Constitution [declaring certain rights to be "inalienable"]); *State v. Nuss*, 114 N.W.2d 633, 635 (S.D. 1962) (stating that "economic freedom is one of the inherent rights guaranteed to all men by [art. VI, § 1] of the South Dakota Constitution *and protected by* the [state] due process clause") (emphasis added).

[9] *Treants Enterprises v. Onslow County*, 360 S.E.2d 783, 785 (N.C. 1987); *Wood v. University of Utah Medical Center*, 67 P.3d 436, 447-48 (Utah 2003); *State v. Morrison*, 127 S.E. 75, 79-80 (W.Va. 1925). These provisions have seldom been cited.

enforceable, but only to the extent that it concerns "common law rights that pre-existed" the adoption of the state constitution, *Atwood v. Vilsack*, 725 N.W.2d 641, 651 (Iowa 2006), or an interest that is "both fundamental and traditionally protected by our society," *In the Interest of Angel Lace M.*, 516 N.W.2d 678, 685 (Wis. 1994). In four other States where "natural," "inalienable," "unalienable," "inherent" or "essential" rights language has been treated as self-executing, state courts, without articulating a formal methodology for evaluating such claims, have recognized only those rights that, in the words of the Supreme Court, are well-established in our "history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).[10] For the reasons set forth in Argument II, *infra*, however, abortion could not be considered to be an "inalienable natural" right in Kansas even if § 1 were determined to be self-executing.

In two States where the "liberty" language in a provision declaring certain rights to be "inherent," "inalienable" or "indefeasible" has been invoked to strike down a state statute, other provisions in the state constitution were also cited. *See*, *e.g*., *Jegley v. Picado*, 80 S.W.3d 332, 343-50 (Ark. 2002) (striking down state sodomy statute); *Commonwealth v. Wasson*, 842 S.W.2d 487, 492-98 (Ky. 1992) (same). *See also In re B*., 394 A.2d 410, 424-25 (Pa. 1978) (deriving an implied right of privacy from twelve

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[10] *See People in Interest of J.M.*, 768 P.2d 219, 221 (Colo. 1989) ("the rights of freedom of movement and to use the public streets and facilities in a manner that does not interfere with the liberty of others"); *In re L.F.*, 121 P.3d 267, 270 (Colo. Ct. App. 2005) ("fundamental right" of parents "to make decisions concerning the care, custody, and control of their children"); *National Hearing Aid Centers*, *Inc. v. Smith*, 376 A.2d 456, 460 & n. 2 (Me. 1977) (determining what constitutes a "fundamental interest"); *Danforth v. State Dep't of Health & Welfare*, 303 A.2d 794, 800 (Me. 1973) (Maine Constitution "recognizes [the] right of the parent to custody of his child"); *Doe v. Phillips*, 194 S.W.2d 833, 842-43 (Mo. 2006); *In re R.A.*, 891 A.2d 564, 572 (N.H. 2005) (recognizing fundamental "right of parents to raise and care for their children").

provisions of the state Declaration of Rights). In the absence of a history and tradition protecting an asserted right, courts have relied exclusively upon general "liberty" language in a state constitution (apart from a specific due process guarantee) to strike down statutes in only four States.[11]

In sum, the majority of state constitutional provisions declaring certain rights to be "natural," "inalienable," "unalienable," "indefeasible," "inherent" or "essential" have been interpreted not to be self-executing by their own terms and, therefore, not judicially enforceable. A minority of such provisions have been construed to be judicially enforceable, but only with respect to rights that traditionally have been protected in our history and legal practices. Abortion would not qualify as such a right in Kansas. And, finally, a handful of such provisions have been given effect, even with respect to rights that have not been traditionally protected. Those provisions, however, bear little resemblance to the brevity or language of § 1 of the Kansas Bill of Rights, which was "drawn from the Declaration of Independence and somewhat more concise in form, but not substance, than the corresponding Ohio section [art. I, § 1]," Heller at 48, which has been held *not* to be self-executing, *see State v. Williams*, 728 N.E.2d 342, 354 (Ohio 2000). Section 1 is *not* self-executing and creates no judicially enforceable rights.

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[11] *See American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 812-16 (Cal. 1997) (privacy); *North Florida Women's Health & Counseling Services*, *Inc. v. State of Florida*, 866 So.2d 612, 635 (Fla. 2003) ("each of the personal liberties enunciated in the Declaration of Rights is a fundamental right" and "[l]egislation intruding on a fundamental right is presumptively invalid"); *Wadsworth v. State*, 911 P.2d 1165, 1171-72 (Mont. 1996) (right to pursue "life's basic necessities"); *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620, 631 (N.J. 2000) (art. I, ¶ 1, of the state constitution "incorporates within its terms the right of privacy and its concomitant rights, including a woman's right to make certain fundamental choices"). Three of these cases were decided on the basis of a state right to privacy, which Kansas has not recognized.

II.

THE "INALIENABLE NATURAL RIGHTS" LANGUAGE OF § 1 DOES NOT CREATE A "LIBERTY" RIGHT TO OBTAIN AN ABORTION.

Assuming, contrary to Argument I, that § 1 of the Kansas Bill of Rights is self-executing and creates judicially enforceable "inalienable natural rights," *amicus curiae* submits that such rights do not include a "liberty" right to obtain an abortion.

As a threshold matter, *amicus* emphasizes that this Court is *not* required to recognize a right to abortion under the Kansas Bill of Rights merely because, in *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court derived a right to abortion from the liberty language of the Due Process Clause of the Fourteenth Amendment. As Chief Judge Malone noted, that a given right is protected by the federal constitution does not require a state court*, as a matter of state law*, to interpret the state constitution to extend protection to the same right, so long as the state constitution is not *applied* in a manner that would deny a federal constitutional right (plaintiffs have presented no federal claims in their challenge to S.B. 95). Op. 72. That principle is supported by a wealth of judicial opinion,[12] as well as legal commentary,[13] and applies to abortion jurisprudence as it does

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[12] *See*, *e.g*., *Sitz v. Dep't of State Police*, 506 N.W.2d 209, 216-17 (Mich. 1993); *Serna v. Superior Court*; 707 P.2d 793, 798-800 (Cal. 1985); *Sanders v. State*, 585 A.2d 117, 147 n. 25 (Del. 1990); *Taylor v. State*, 639 N.E.2d 1052, 1053 (Ind. Ct. App. 1994); *Ex parte Tucci*, 859 S.W.2d 1, 13 (Tex. 1993) (plurality); *West v. Thompson Newspapers*, 872 P.2d 999, 1004 n. 4 (Utah 1994).

[13] *See*, *e.g*., Earl M. Maltz, *False Prophet–Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L. Q. 429, 443-44 (1988); Ronald K.L. Collins, *Reliance on State Constitutions–Away From a Reactionary Approach*, 9 Hastings Const. L. Q. 1, 10, 15-16 (1981); Jennifer Friesen, State Constitutional Law[:] Litigating Individual Rights, Claims and Defenses (4th ed. 2006), Vol. I, at pp. 44-45.

to other areas of law.[14]

This Court has not developed a formal methodology for determining whether an asserted liberty interest is protected by the "inalienable natural rights" language of § 1, but it has stated that the primary guide in determining whether a principle in question is fundamental for purposes of due process analysis is historical practice. *State v. Bethel*, 275 Kan. 456, 464-73, 66 P.3d 840, 846-51 (2003) (refusing to recognize a state due process right to raise an insanity defense where no such right existed when the state constitution was adopted).[15] So, for example, "a natural parent's right to the custody of his or her children is a fundamental right which may not be disturbed by the state or by third parties, absent a showing that the natural parent is unfit." *Sheppard v. Sheppard*, 230 Kan. 146, 152, 630 P.2d 1121, 1127 (1981). That right is, of course, of ancient vintage. "The history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972). But

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[14] *See Mahaffey v. Attorney General*, 564 N.W.2d 104, 109-11 (Mich. Ct. App. 1997) (state constitution does not confer a right to abortion); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 575 n. 5, 577 n. 9 (Ohio Ct. App. 1993) (federal abortion jurisprudence does not control interpretation of state constitution); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387, 402-04 (Mass. 1981) (same).

[15] In a similar vein, this Court has repeatedly held that the right to jury trial guaranteed by §§ 5 and 10 of the Kansas Bill of Rights was intended "only to secure a jury trial as it existed at the time of the adoption of the constitution." *City of Fort Scott v. Arbuckle*, 165 Kan. 374, 385, 196 P.2d 217, 225 (1948) (no state constitutional right to a jury trial in municipal ordinance prosecutions). *See also In re Inquiry Relating to Rome*, 218 Kan. 198, 204, 542 P.2d 676, 683 (1975) (no right to a jury trial in disciplinary proceedings); *Craig v. Hamilton*, 213 Kan. 665, 670, 518 P.2d 539, 544 (1974) (no right to a jury trial in equity proceedings).

there is no historical practice of recognizing a right to abortion in Kansas law, nor, in light of the State's legal history and traditions, could abortion plausibly be described as a "liberty" protected by the "inalienable natural rights" language of § 1.

Kansas enacted its first abortion statutes in 1855, four years before it adopted the present constitution and joined the Union. One statute prohibited the performance of an abortion upon a woman, "pregnant with a quick child," unless the procedure was "necessary to preserve the life of [the] mother, or shall have been advised by a physician to be necessary for that purpose," and punished the offense as manslaughter in the second degree. Kan. (Terr.) Stat. ch. 48, § 10 (1855). Another statute prohibited performance of an abortion upon a pregnant woman at any stage of pregnancy (subject to the same exception) and punished the offense as a misdemeanor. *Id*. ch. 48, § 39. A third statute made the "wilful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother," manslaughter in the first degree. *Id*. ch. 48, § 9. These statutes remained essentially unchanged until they were repealed and replaced with a provision based upon the Model Penal Code in 1969.[16]

Prior to *Roe v. Wade*, this Court regularly affirmed convictions for abortion (and manslaughter convictions based upon the death of the woman resulting from an illegal abortion) without any hint that the prosecutions or convictions were barred by the Kansas

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[16] *Id*. ch. 48, §§ 9, 10, 39 (1855), *recodified at* Kan. Gen. Laws ch. 28, §§ 9, 10, 37 (1859), *recodified at* Kan. Gen. Stat. ch. 31, §§ 14, 15, 44 (1868), *recodified at* Kan. Gen. Stat. §§ 1952, 1953, 1982 (1899), *recodified at* Kan. Gen. Stat. §§ 1999, 2000, 2029 (1901), *recodified at* Kan. Gen. Stat. §§ 2090, 2091, 2120 (1905), *recodified at* Kan. Gen. Stat. §§ 3375, 3376, 3405 (1915), *recodified at* Kan. Gen. Stat. §§ 21-409, 21-410, 21-437 (1923), *carried forward as* Kan. Stat. Ann. §§ 21-409, 21-410, 21-437 (1964), *repealed by* 1969 Kan. Sess. Laws 503, ch. 180.

Constitution.[17] In an early decision, the Court held that the principal abortion statute had been enacted "to protect the pregnant woman and the unborn child." *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913).[18] *See also Joy v. Brown*, 173 Kan. 833, 839, 252 P.2d 889, 892 (1953) (same). In *Joy*, the Court held that the next of kin of a woman who had died as a result of a negligently performed illegal abortion could sue the abortionist for damages. Rejecting the defendant's argument that the deceased's consent to an illegal act barred recovery, this Court said, "We are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." *Id*. at 839-40, 252 P.2d at 892.

Kansas recognizes the rights of unborn children in other areas. In criminal law, killing or injuring an unborn child (outside the context of abortion or other medical or surgical procedure to which the pregnant woman has consented) may be prosecuted as a homicide or battery. Kan. Stat. Ann. § 21-5419 (West 2012) (defining "person" and "human being" for purposes of the homicide and battery statutes to include an unborn child "at any stage of gestation from fertilization to birth"). And a woman convicted of a capital offense may not be executed while she is pregnant. *Id*. § 22-4009 (West 2008).

In tort law, a statutory cause of action for wrongful death may be brought on

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[17] *See State v. Watson*, 30 Kan. 281, 1 P. 770 (1883); *State v. Hatch*, 83 Kan. 613, 112 P. 149 (1910); *State v. Harris*, 90 Kan. 807, 136 P. 264 (1913); *State v. Patterson*, 105 Kan. 9, 181 P. 609 (1919); *State v. Nossaman*, 120 Kan. 177, 243 P. 326 (1926); *State v. Keester*, 134 Kan. 64, 4 P.2d 679 (1931); *State v. Brown*, 171 Kan. 557, 236 P.2d 59 (1951); *State v. Ledbetter*, 183 Kan. 302, 327 P.2d 1039 (1958); *State v. Darling*, 208 Kan. 469, 493 P.2d 216 (1972).

[18] Six years later, the Court stated, "Any human embryo which is not dead . . . . is no less endowed with life before reaching the stage of development known as quickening than after." *State v. Patterson*, 105 Kan. at 10, 181 P. at 610.

behalf of an unborn child whose death, "at any stage of gestation from fertilization to birth," was caused by the wrongful act of another. Kan. Stat. Ann. § 60-1901(a)-(c) (West Supp. 2014). A common law cause of action for (nonlethal) prenatal injuries may be brought without regard to the state of pregnancy when the injuries were inflicted. *Humes v. Clinton*, 246 Kan. 590, 596, 792 P.2d 1032, 1037 (1990) (*dicta*). And this Court has refused to recognize a cause of action for "wrongful life." *Bruggemann by and through Bruggemann v. Schimke*, 239 Kan. 245, 718 P.2d 635 (1986). In explaining its holding, the Court stated:

> It has long been a fundamental principle of our law that human life is precious. Whether the person is in perfect health, in ill health, or has or does not have impairments or disabilities, the person's life is valuable, precious and worthy of protection. A legal right not to be born — to be dead, rather than to be alive with deformities — is completely contradictory to our law.

Id. at 254, 718 P.2d at 642.

In health care law, a living will may not direct the withholding or withdrawal of life-sustaining medical treatment from a woman who is known to be pregnant. Kan. Stat. Ann. § 65-28,103(a) (last sentence) (West 2008). In property law, posthumous children are considered as living at the death of their parents for purposes of inheritance. *Id.* § 59-501(a). And in guardianship law, a guardian *ad litem* may be appointed to represent the interests of "[a]ll possible unborn . . . beneficiaries." *Id.* § 59-2205.

There is no evidence that either the framers or ratifiers of the Kansas Constitution intended § 1 or any other provision of the Bill of Rights to limit the Legislature's authority to prohibit abortion, *see* Proceedings 184–89 (Report of the Committee on the Preamble and Bill of Rights), 271–91, 460–65, 535–37 (debate on Bill of Rights in

Convention), as Judge Atcheson acknowledged in his opinion below. Op. 49. Such an intent would have been remarkable in light of the contemporaneous prohibition of abortion except to save the life of the pregnant woman. Because there is no right to obtain an abortion under the Kansas Bill of Rights, the regulation of abortion is subject to rational basis review under the state constitution. For a statute to pass constitutional muster under that standard, "[i]t must implicate legitimate goals, and . . . the means chosen by the legislature must bear a rational relationship to those goals." *Mudd v. Neosho*, 275 Kan. 187, 198, 62 P.3d 236, 244 (2003). In prohibiting a barbaric method of abortion, the challenged legislation easily meets that standard.

Conclusion

For the foregoing reasons, *amicus curiae* respectfully request that this Honorable Court reverse the judgment of the court of appeals affirming (by an equally divided court) the order of the district court temporarily enjoining enforcement of Kansas Senate Bill 95.

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Appendix[*]

Ala. Const. art. I, § 1 (LexisNexis 2006):

> That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

Alaska Const. art. I, § 1 (2014):

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Ark. Const. art. I, § 2 (2004):

> All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

Cal. Const. art. I, § 1 (West 2002):

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Colo. Const. art. II, § 3 (West 2010):

> All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.

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[*] Nebraska is excluded from the foregoing list because, unlike art. I, §, of the Kansas Bill of Rights and all the other provisions cited herein, art. I, § 1, of the Nebraska Constitution specifically provides that the identified rights "shall not be denied or infringed by the state or any subdivision thereof."

Fla. Const. art. I, § 2 (West 2004):

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Idaho Const. art. I, § 1 (2004):

> All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

Ill. Const. art. I, § 1 (West 2006):

> All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

Ind. Const. art. I, § 1 (West 2007):

> WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety and well-being. For the advancement of these ends, the *people* have, at all times, an indefeasible right to alter and reform their government.

Iowa Const. art. 1, § 1 (West 2013):

> All men and women are, by nature, free and equal, and have certain inalienable rights–among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Ky. Const. § 1 (LexisNexis 2014) (in part):

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned
>
> First. The right of enjoying and defending their lives and liberties.
> . . .
>
> Third. The right of seeking and pursuing their safety and happiness.

Me. Const. art. I, § 1 (Supp. 2010):

> All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Mo. Const. art. I, § 2 (West 2003):

> That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

Mont. Const. art. II, § 3 (West 2015):

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Nev. Const. art. 1, § 1 (2008):

> All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty, Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness[.]

N.H. Const. Part I, art. 2 (2014):

> All men have certain natural, essential, and inherent rights–among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of face, creed, color, sex or national origin.

N.J. Const. art. I, ¶ 1 (2008):

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring possessing, and protecting property, and of pursuing and obtaining safety and happiness.

N.M. Const. art. II, § 4 (Michie 2014):

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and seeking and obtaining safety and happiness.

N.C. Const. art. I, § 1 (2013):

> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

N.D. Const. art. I, § 1 (2008) (in part):

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; [and] pursuing and obtaining safety and happiness . . . .

Ohio Const. art. I, § 1 (LexisNexis 2015):

> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.

Pa. Const. art. I, § 1 (2011):

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

S.D. Const. art. VI, § 1 (2004):

> All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property and the pursuit of happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

Utah Const. art. I, § 1 (LexisNexis 1991):

> All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assembly peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Vt. Const. ch. I, art. 1 (2010) (in part):

> That all persons are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness . . . .

Va. Const. art. I, § 1 (2013):

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

W.Va. Const. art. III, § 1 (LexisNexis 2013):

> All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

Wis. Const. art. I, § 1 (West 2002):

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

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I hereby certify that copies of the foregoing brief *amicus curiae* of the Family Research Council were served, via e-mail, on May 20, 2016, to the following counsel of record:

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