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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.

RESPONDENTS' REPLY BRIEF TO BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, ET AL., IN SUPPORT OF DEFENDANTS-APPELLANTS

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

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ARGUMENT

The unprecedented burdens that Senate Bill 95 imposes on women seeking abortions render the law unconstitutional, and nothing in the American Association of Pro-Life Obstetricians & Gynecologists, et al. (hereinafter "AAPLOG")'s amicus brief aids this Court's analysis or overcomes this conclusion.

Senate Bill 95 would ban D & E procedures, used for 95% of second trimester abortions. Order Granting Temporary Inj. at 2, *Hodes and Nauser, MDs, P.A. v. Schmidt*, No. 2015-CV-490, (Kan. Dist. Ct. June 30, 2015) (hereinafter "Order"); Mem. Op. at 7 (six judge opinion), *Hodes & Nauser, MDs, P.A. v. Schmidt*, 368 P.3d 667, 678 (Kan. App. 2016) (accepting this finding of fact) (hereinafter "Mem. Op."). As explained in the amicus brief of the American College of Obstetricians and Gynecologists ("ACOG"), and contrary to AAPLOG's assertions, D & E "is the safest method of second-trimester abortion." Br. for Amicus Curiae American College of Obstetricians and Gynecologists in Supp. of Plaintiffs-Appellees (hereinafter "ACOG Br.") at 6.

As to the alternatives suggested by Defendants-Appellants (labor induction or demise by injection or umbilical cord transection), the evidence established that labor induction, used for only 2% of second-trimester procedures, requires women to go through both the physical and emotional pain of labor, requires hospitalization lasting up to three days, and carries a higher risk of infection than the D & E procedure. Mem. Op. at 7, 22-23 (adopting District Court's findings); *see also* ACOG Br. at 8 ("to the extent the Act's ban on D & E procedures effectively causes physicians to resort to labor induction, that alternative may pose greater risks to women"). While there is "no established safety benefit to inducing demise prior to a D & E procedure," an injection to cause demise must be administered transabdominally or transvaginally, carries increased risk of extramural delivery and hospitalization, and is not practiced prior to 18 weeks. Mem. Op. at 8. Similarly, umbilical cord transection "is not possible in every case," and "makes the procedure

more complex, and increases risk of pain, infection, uterine perforation and bleeding." Mem. Op. at 8. *See also* ACOG Br. at 9 ("no evidence currently supports the use of induced fetal demise to increase the safety of second-trimester medical or surgical abortion," but requiring demise fails to "ensure a physician's ability to treat patients in accordance with his or her best medical judgment") (internal quotations and citations omitted).

The District Court concluded that:

> 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 [sic] accessing the fundamental right to abortion.

Order at 8 ("The Defendants' view that these alternatives do not impose an undue burden is extreme and not supported by Supreme Court precedent."); *see also West Alabama Women's Ctr. v. Miller*, No. 2:15cv497-MHT, 2016 WL 6395904, at *17, *24 (M.D. Ala. Oct. 27, 2016) (concluding that the proposed fetal demise methods are not feasible and amount to "unnecessary and potentially harmful medical procedure[s] with no counterbalancing medical benefit for the patient," and granting a preliminary injunction).

As Plaintiffs-Appellees have explained, the United States Supreme Court has never countenanced such burdens. Under either strict scrutiny, the standard that Plaintiffs-Appellees assert applies to abortion restrictions under the Kansas Constitution, or the undue burden standard, the minimum protection that should apply, S.B. 95 goes too far. *See* Mem. of Law In Supp. of Pls.' Mot. for a Temporary Inj. and/or TRO at 14–15, *Hodes v. Nauser, MDs, P.A. v. Schmidt*, No. 2015-CV-490 (Kan. Dist. Ct. June 1, 2015); Resp'ts' Supplemental Br. at 8–17, *Hodes v. Nauser, MDs, P.A. v. Schmidt*, No. 114153 (Kan. May 25, 2016). If allowed to take effect, S.B. 95 would impose an unprecedented violation of Kansas women's physical and decisional autonomy. No

court has ever found that an asserted interest could be sufficiently compelling to justify the government-mandated imposition of a medically unnecessary, physically invasive procedure that increases medical risk with no medical benefit. The Defendants–Appellants' proposed alternatives represent the most invasive type of government overreach.

With these facts and principles in mind, it is clear that AAPLOG's brief adds nothing to this Court's analysis. While the interests asserted by AAPLOG are unsupported as a matter of fact, as explained in brief below, they are in any event unpersuasive in light of the harsh burdens that S.B. 95 would impose on women seeking second-trimester abortions.

As to the assertion that the legislature passed S.B. 95 out of concern for fetal pain, nothing in the record supports that claim, and indeed, Defendants-Appellants have not adopted this argument. *See* Mem. Op. at 58 (Atcheson, J., concurring) ("[T]he State has neither argued prevention of fetal pain as a legislative purpose for S.B. 95 nor presented evidence on this issue."). The best that AAPLOG can do to support this argument is to attempt to graft the legislative findings in a wholly different enactment onto S.B. 95. These findings, codified in K.S.A. 65-6722(b), assert the possibility of fetal pain around "20 weeks after fertilization," in support of a ban on abortion beginning at that point in pregnancy. As Judge Atcheson noted: "The legislature presumably respects its own findings, and the State [or AAPLOG] cannot jettison that finding in arguing the legislative purpose for or government interest advanced in Senate Bill 95." Mem. Op. at 57 (Atcheson, J., concurring). Moreover, while AAPLOG cites little more than anecdotal testimony in support of its argument, Plaintiffs-Appellees introduced unrebutted expert testimony, citing highly credible sources, to the contrary. Supplemental Aff. of Anne Davis, M.D., M.P.H., at 3, ¶ 8, citing, Lee, et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947 (2005) (concluding that fetuses probably do not have the capacity to experience

pain prior to 29 weeks); Royal College of Obstetricians and Gynaecologists, *Fetal Awareness: Review of Research and Recommendations for Practice*, 11 (Mar. 2010) ("The lack of cortical connections before 24 weeks . . . implies that pain is not possible until after 24 weeks"). *See also West Alabama Women's Ctr.*, 2016 WL 6395904, at *16 n.21 (noting that the State did not argue that concern for fetal pain justified a ban on D & E procedures not preceded by demise, and further noting that "[f]etal pain is not a biological possibility until 29 weeks").

Furthermore, contrary to Defendants-Appellants' unsupported assertions, banning D & E would harm rather than promote women's health. As ACOG explains in its brief, it is "well-established" that D & E is "the safest and most common method of second trimester abortion," and is performed on approximately 600 women in Kansas each year. ACOG Br. at 3, 5-6. "Indeed, by the late 1970s, researchers had documented the safety of D & E and . . . the procedure continues to be the safest method of second-trimester abortion in modern medical practice." *Id.* at 6 (citing ACOG Bulletin, 121 Obstetrics & Gynecology at 1395; David A. Grimes et al., *Mid-Trimester Abortion by Dilation and Evacuation: A Safe and Practical Alternative*, 296 New Eng. J. Med. 1141 (1977)). To ban D & E is to "disregard[] nearly four decades of medical understanding." *Id.*

The consensus regarding the safety of D & E in second trimester abortion care has also been recognized by the U.S. Supreme Court. In *Gonzales v. Carhart*, the Supreme Court relied on the safety of D & E as an alternative to "intact" D & E, explaining that "[o]ne District Court found D & E to have extremely low rates of medical complications" and another "indicated D & E was generally the safest method of abortion during the second trimester." 550 U.S. 124, 164 (2007) (internal quotations and citations omitted). The Court also noted that in a lower court, experts testifying for both sides "agreed D & E was safe." *Id.* (citation omitted); *see also West Alabama Women's Ctr.*, 2016 WL 6395904 at *16 ("D & E is considered an extremely safe abortion

method," and "[d]ue to its low risk of complications, relative simplicity, and short duration, it is the most common method of second-trimester abortions in Alabama").

To argue that banning D & E protects women's health, AAPLOG recites some of the risks associated with D & E and the potential complications. The fact that the D & E procedure, like any medical procedure, carries some risk, or that complications can occur on rare occasions, does not make it unsafe, and certainly does not establish that banning D & E would protect women's health. ACOG – and the rest of the medical community – has accounted for those risks in reaching the conclusion that D & E is a safe procedure. That D & E is the most common method of abortion in the second trimester further demonstrates the medical consensus regarding its safety record. AAPLOG's apparent argument that it is safer for Kansas women to be denied access to the most common method of second trimester abortion altogether simply cannot be squared with decades of medical evidence, the consensus among medical experts, and key legal authority regarding the safety of D & E. Indeed, according to ACOG, enjoining the ban on D & E in Kansas is "crucial to ensuring the health and safety of women who seek a second-trimester abortion." ACOG Br. at 4.

As to the assertion that the legislature passed S.B. 95 out of concern for the health and wellbeing of providers and the integrity of the medical profession, AAPLOG mischaracterizes the Court's discussion of medical ethics in *Gonzales*, seeking to impermissibly extend the holding in that case. The *Gonzales* Court upheld a ban on intact D & E based on its finding that "additional ethical and moral concerns" "justif[ied] a special prohibition." 550 U.S. at 158. The Court explained that intact D & E raised exceptional concerns that did not apply to D & E and reiterated that a ban on both intact D & E and D & E is unconstitutional. *Id.* at 158, 160. Further, the Court made clear that its ruling on the constitutionality of the intact D & E ban was premised upon the

continued availability of the most common method of second trimester abortion, D & E. *Id.* at 164. As the Court of Appeals correctly held, the circumstances here are quite unlike *Gonzales* and in fact present the inverse situation: the State has banned "the most common, safest procedure leaving only uncommon and often unstudied options available," in clear violation of *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Gonzales*. *See* Mem. Op. at 21–22.

Moreover, there is no support in the record for AAPLOG's assertion. Citing only anecdotal evidence of the harm S.B. 95 will allegedly cause healthcare providers, AAPLOG fails to recognize that with one exception, the providers cited continued to provide abortion services and most certainly did not advocate a ban that would have the effect of increasing medical risks for women. *See, e.g.,* Lisa H. Harris, S*econd Trimester Abortion Provision: Breaking the Silence and Changing the Discourse*, 16(31 Supplement) Reproductive Health Matters, 74–81 (2008) (discussing the goal of expanding access to second trimester D & E procedures where the author practiced); Nancy B. Kaltreider, M.D. et al., *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 American Journal of Obstetrics and Gynecology, 235, 238 (1979) ("Ethically speaking, once the difficult decision is made to terminate a pregnancy in the midtrimester, the means of carrying it out do not differ except in relation to the safety and comfort of the patient."); Susan Wicklund, This Common Secret: My Journey as An Abortion Doctor, 29 (2007) ("By the end of six weeks I had become steadfast in my belief that abortion has to be legal and available for all women, even when the pregnancy is into the second trimester. . . . What struck me more than anything during that rotation was how drastic and tragic it would be to have this choice taken away from women."). *See also,* Lisa H. Harris, *Recognizing Conscience in Abortion Provision*, N. Engl J Med 367:981-983 (2012) ("[Doctors . . . continue to offer abortion care because deeply held, core ethical beliefs compel them to do so. They see women's reproductive

autonomy as the linchpin of full personhood and self-determination . . . . [and] continue to describe their work in moral terms, as 'right and good and important,' and articulate their sense that the failure to offer abortion care generates a crisis of conscience.") (internal citations omitted).

In contrast, Plaintiffs-Appellees presented their unrebutted testimony, and that of experts, including an expert in medical ethics, showing that a ban on D & E would harm abortion providers by requiring them to choose between violating medical ethics and felony liability. Decl. of Traci Lynn Nauser, M.D., ¶ 29 ("[T]his requirement will prevent me from providing optimal care to my patients or forces me to risk prosecution. It will put Dr. Hodes and me in the unethical situation of having to choose between being able to evolve with a medical complication and abiding by the law."); Aff. of David Orentlicher, M.D., J.D., ¶¶ 7, 8-26 (explaining that the Act violates several fundamental principles of medical ethics by forcing physicians to expose patients to a more complex and risky medical procedure, including untested and unstudied practices, and to comply with a government mandate that denies the ability to choose medically appropriate treatment and requires procedures that are not in the patient's best interest as a prerequisite to providing care); Aff. of Anne Davis, M.D., M.P.H., ¶¶ 9, 36 (explaining that enforcement of the Act would raise serious ethical concerns by forcing physicians to no longer provide care they deem to be in their patients' best interests and to choose between providing a procedure to cause fetal demise or withholding the D & E procedure altogether); *see also* ACOG Br. at 10–11 (citing Amer. Med. Ass'n, *Principles of Medical Ethics: Preamble* (June 2001) (explaining that S.B. 95 "unconscionably" compels physicians to choose between their ethical duties to "recognize responsibility to patients first and foremost" and "respect the law").

As ACOG explains, "[S.B. 95] creates a number of ethical conflicts of interest that fundamentally disrupt the patient-physician relationship and the very foundation of medical

practice." ACOG Br. at 11–12 ("Permitting a legislature to restrict– and criminalize– a common and safe medical procedure that is in the best interest of particular patients undermines the very nature of a physician's duty to his or her patients. The Act sets a dangerous precedent of government intervention into the practice of medicine that is harmful to the public health and to modern medical practice"); *see also West Alabama Women's Ctr.*, 2016 WL 6395904, at *19 (finding that Alabama physicians facing ban on D & E were unlikely to continue performing abortions after 15 weeks if required to use fetal demise procedures where "[p]hysicians have an ethical obligation not to subject patients to potentially harmful procedures without any medical benefit").

CONCLUSION

AAPLOG's brief fails to account for facts that have a dispositive impact on the outcome of this case: the increased medical risks women face as a result of losing access to the most common method of second trimester abortion; women's exposure to a medically unnecessary and physically invasive procedure that is still experimental prior to 18 weeks; women's autonomy to make medical decisions; and women's core rights to reproductive freedom and bodily integrity. AAPLOG's suggestion that the State be permitted to visit unprecedented harms on women is chilling. Their arguments, based on partial information and misrepresentations of both medical literature and legal precedent, reveal a transparent desire to make safe abortion care more difficult to access regardless of the costs to women. Their brief offers nothing to alter the conclusion that S.B. 95 is an extreme violation of women's constitutional rights that should not be permitted under the Kansas Constitution.

Respectfully submitted,

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