



FILED

SEP 28 2015

HEATHER L. SMITH
CLERK OF APPELLATE COURTS

No. 15-114153-A

IN THE KANSAS COURT OF APPEALS

HODES & NAUSER, M.D., P.A. *et al.*, *Plaintiffs-Appellees*,

vs.

DEREK SCHMIDT, in his official capacity as Attorney General
of the State of Kansas, *et al.*, *Defendants-Appellants*.

MOTION FOR LEAVE TO FILE BRIEF OF THE FAMILY RESEARCH COUNCIL,
AS *AMICUS CURIAE*, IN SUPPORT OF DEFENDANTS-APPELLANTS.

NOW COMES the Family Research Council, through its attorney, Kevin M. Smith, and respectfully moves this Honorable Court for leave to file its brief *amicus curiae* in support of the defendants-appellants, and in support of said motion states as follows:

(1) 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, most recently, the challenges to state

and federal laws barring partial-birth abortions, *Stenberg v. Carhart* (2000), and *Gonzales v. Carhart* (2007).

(2) FRC has also submitted *amicus curiae* briefs in state courts in defense of statutes regulating the practice of abortion when those statutes have been challenged on state constitutional grounds. See, e.g., *Oklahoma Coalition for Reproductive Justice v. Cline*, 2012 OK 102, 292 P.3d 27.

(3) This case concerns the constitutionality of Senate Bill 95, which prohibits the performance of dilation and evacuation (D&E) abortions on live, unborn children. In this procedure, a physician, in deliberately causing the death of an unborn child, dismembers the child. Plaintiffs challenged the law, claiming that the Kansas Constitution protects such a barbaric procedure (plaintiffs have brought no federal claims against S.B. 95). On their motion, the district court temporarily enjoined defendants from enforcing the law while the underlying litigation is heard. Defendants have appealed.

(4) The threshold, and potentially dispositive, issue in this case is whether the Kansas Bill of Rights, more specifically §§ 1 and 2, confer a right to abortion. The district court held that §§ 1 and 2 creates a right to abortion that is separate from, and independent of, the right to abortion recognized by the Supreme Court in *Roe v. Wade* (1973), as modified by *Planned Parenthood v. Casey* (1992).

(5) In its proposed *amicus curiae* brief, FRC addresses two issues: First, whether this Court must recognize a state constitutional right to abortion merely because the

United States Supreme Court has recognized a federal constitutional right to abortion; and, second, whether anything in the text, history or interpretation of §§ 1 and 2 of the Kansas Bill of Rights confers a right to abortion.

With respect to the first issue, FRC submits that, under any principled methodology for independent state constitutional analysis, the fact that a right is recognized under a particular guarantee of the federal constitution does not require the same right to be recognized under a corresponding or similar guarantee of the state constitution. Indeed, as FRC's proposed brief explains, there have been several instances in which the Kansas Supreme Court did *not* recognize a state constitutional right that *has* been recognized as a federal constitutional right. Although, under the federal Supremacy Clause (U.S. Const., art. VI), an invalid state claim will not defeat a valid federal claim, that does not mean that the state constitution must be interpreted in a manner that incorporates federal constitutional principles, only that federal rights, if asserted, will be enforced. In the case at bar, however, no federal rights have been asserted.

With respect to the second issue, FRC submits that nothing in the text, history or interpretation of §§ 1 and 2 of the Kansas Bill of Rights supports recognition of a state right to abortion. Neither § 1 nor § 2 addresses the subject of abortion – directly or indirectly – and nothing in the history of their adoption suggests that the drafters or ratifiers intended in any way to limit or restrict the legislature's authority to regulate or prohibit abortion. Indeed, the fact that abortion, except to save the life of the mother, was

a criminal offense from territorial days until Kansas enacted a version of the Model Penal Code's abortion provision in 1969, militates against that conclusion, as does the treatment of unborn children (outside the context of abortion) in criminal law, tort law, property law, health care law and guardianship law.

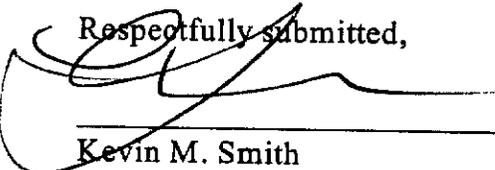
Unlike a number of other States, whose supreme courts have derived a right to abortion from an express or implied right of privacy, Kansas does not have an *express* right of privacy in its Bill of Rights. And, apart from the specific privacy interests protected by the search and seizure provision of the state Bill of Rights (§ 15), the Kansas Supreme Court has not recognized an *implied* right of privacy from which a subsidiary right to abortion might be derived. Moreover, although the supreme court has not adopted a formal methodology for assessing the relative merits of state constitutional claims, it has consistently applied an historical approach for evaluating such claims, for example, in determining the right of parents to the custody, control and care of their children, whether there is a right to present an insanity defense and the scope and limitations of the right to trial by jury. Given the legal traditions of the State, there is no basis for deriving a right to abortion from any provision of the Kansas Bill of Rights. And the court has declined to hold that the Kansas Bill of Rights confers a right to abortion. *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 376-77 (2006).

(6) FRC's proposed *amicus* brief is intended to present original research and analysis that may assist this Court in addressing the issues presented in this appeal.

For the foregoing reasons, the Family Research Council respectfully requests this Honorable Court to grant its motion for leave to file its brief *amicus curiae* in support of the defendants-appellants.

Dated: 23 September , 2015

Respectfully submitted,



Kevin M. Smith
Kansas Bar No. 19242
Law Offices of Kevin M. Smith, P.A.
1502 N. Broadway
Wichita, Kansas 67214-1106
(316) 262-2331 (tel)
(316) 262-8862 (fax)
4acelaw@sbcglobal.net

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing motion for admission of out-of-state attorney *pro hac vice*, supported by the verified application of out-of-state attorney for admission *pro hac vice*, was served, via first class mail, postage prepaid, on September , 2015, on the following counsel of record and the out-of-state attorney's client, the Family Research Council:

Robert V. Eye
Brett A. Jarmer
Robert V. Eye Law Office, LLC
123 S.E. 6th Avenue, Suite 200
Topeka, Kansas 66603

Jeffrey A. Chanay
Chief Deputy Attorney General
Office of the Attorney General
Memorial Building 3rd Floor
120 S.W. Tenth Avenue
Topeka, Kansas 66612-1597

Erin Thompson
Thompson Law Firm, LLC
106 E. 2nd Street
Wichita, Kansas 67202

Shon D. Qualseth
Stephen R. McAllister
Sarah E. Warner
333 West 9th Street
P.O. Box 1264
Lawrence, Kansas 66044-2803

Janet Crepps
Genevieve Scott
Zoe Levine
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, New York, 10038

Christopher Gacek
Counsel
Family Research Council
801 G Street, N.W.
Washington, D.C. 20001

Teresa A. Woody
The Woody Law Firm, P.C.
1621 Baltimore Avenue
Kansas City, Missouri 64108



Kevin M. Smith
Counsel for the *Amicus*