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No. 15-114153-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

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-Appellants.

BRIEF OF *AMICI CURIAE* KANSAS PHYSICIANS IN SUPPORT OF PLAINTIFFS-APPELLEES

Appeal from the District Court of Shawnee County
Honorable Larry D. Hendricks, Judge
District Court Case No. 2015-CV-490, Division 6

Mark P. Johnson
Kansas Bar No. 22289
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2424 (telephone)
(816) 531-7545 (fax)
mark.johnson@dentons.com
Counsel for *Amici Curiae*

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Statement of Interest of *Amici Curiae*

Amici curiae, who are with one exception Kansas City-area based physicians practicing primarily in obstetrics, gynecology, or a related field, submit this brief in support of Plaintiffs. (See list of *amici* in App. A hereto). The *amici* are highly-credentialed physicians with over 250 years of combined specialized medical experience. They have spent the majority of their medical careers practicing in the Kansas City area, dedicating their practices to the advancement of healthcare for women. It is their ethical obligation to promote and abide by medical policies and procedures that are in the best interest of their patients and the medical community. All of the *amici* support the Plaintiffs in their challenge to the enforcement of Kansas Senate Bill 95 ("the Act"), as reflected in a March 9, 2015 letter to the Kansas legislature signed by several of the *amici*. The *amici* are concerned about the adverse impact on the doctor-patient relationship and patient care, through the prospective prohibition of a safe and effective medical procedure, the Dilation & Extraction (D&E) procedure, for which *amici* have referred many patients.

Plaintiffs succeeded in obtaining a temporary injunction preventing the enforcement of the Act, and *amici* urge the Court to affirm that order.

The Act is an undue and unwarranted interference with the doctor-patient relationship, in that the Act has the effect of prohibiting a safe and effective medical procedure

The *amici* are concerned about the intervention of the legislature in the confidential doctor-patient relationship. They believe that the Act is an example of such inappropriate intervention, and its enforcement would interfere with *amicis'* obligation to provide their patients with the best care available. The *amici* wish to express their support for Plaintiffs' challenge to the Act.

The aim of any government regulation of medical care should be to protect the state's interest without jeopardizing the health and well-being of its citizens. A law that imposes risks and interferes with a woman's relationship with her doctor poses an undue burden on the patient. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (holding that states may not unduly interfere with a woman's right to obtain a pre-viability abortion). Legislative efforts that do otherwise, such as the Act, impede medical progress and unjustifiably interfere with a woman's confidential relationship with her physician.[1]

Legislative micromanagement of women's healthcare is not in the best interest of patients or the practice of medicine. The time-honored relationship of trust between a doctor and his or her patient is sacred. Patients divulge their most intimate health worries to their physicians because they know the physician will keep these concerns private and provide treatment with the patient's best interests in mind. *See generally*, *Goheen v. Graber*, 181 Kan. 107, 111-12 (1957). Legislative enactments such as the Act insert

[1] The *amici* adopt the findings of fact of the District Court in its Order Granting Temporary Injunction.

politics into the provision of patient care, a situation that interferes with good medical practice.

Although late abortions only account for "a tiny fraction of all abortions," the women receiving them are "often in the greatest medical need." David A. Grimes, *Who Has Late Abortions -- And Why?*, Huffington Post (Jan. 28, 2015, 12:47 PM), http://www.huffingtonpost.com/david-a-grimes/who-has-late-abortions-and-why_b_6532684.html. The *amici* believe that the Court would benefit from relation of some real-life experiences. These stories are representative of the experiences of patients treated by *amici* and help to demonstrate why the Act would impair the doctor-patient relationship.

In *My Late-term Abortion*, Our Bodies Ourselves (Nov. 2, 2015), http://www.ourbodiesourselves.org/stories/my-late-term-abortion, Gretchen Voss detailed her experience. At 18 weeks gestation, she and her husband learned from an ultrasound that their fetus had an abnormality that would result in a life of paralysis, incontinence, and mental defect - if the fetus survived at all. The parents described the decision to terminate as "our last parental decision." Even their family members, who were known to be anti-abortion supporters, understood their decision to end the pregnancy. This support, the parents explained, demonstrated the substantial distinction between abstract ideology and dealing with such a tragic situation first-hand.

Women seeking second trimester abortions often have very little time to digest a birth defect diagnosis, do their own research, get a second opinion, and then decide what to do. They need the benefit of experienced counsel from their physicians, to determine the safest and most effective option to deal with their situation. Learning at the 20-week

mark that her fetus would not live more than a few minutes after birth due to a fatal defect, a woman decided to abort. She explained how she could not imagine continuing her pregnancy to term and then watching her son suffocate. Parker Malloy, *A Mom's Moving Story Perfectly Illustrates Why a 20-week Abortion Ban is a Bad Idea*, (Sept. 24, 2015), http://www.upworthy.com/a-moms-moving-story-perfectly-illustrates-why-a-20-week-abortion-ban-is-a-bad-idea.

Under the Act, women and their physicians in these and similar situations would be denied the safest and most effective means of abortion and, as the District Court found, would be forced to utilize a procedure that is more complex and carries greater risk.

Dr. David Grimes, a leading scholar in the reproductive rights field, has described the Act as "misogynistic" because it "condemn[s] second-trimester abortion patients in the state to substandard medical care." David A. Grimes, *Medical Misogyny: Kansas Mandates Substandard Abortion Care*, Huffington Post (Apr. 14, 2015 3:09 PM), http://www.huffingtonost.com/david-a-grimes/medical-misogyny-kansas-mandates-substandard-abortion-care _b_7050502.html. He notes that while "physicians are sued for providing substandard care . . . Kansas plans to prosecute physicians for meeting national standards of care in second-trimester abortion." The Act "punish[es] women by relegating them to obsolete care." Dr. Grimes concludes that the Act "is an unwarranted and dangerous intrusion into the patient-physician relationship."

Many of the *amici* expressed the same sentiment in a March 9, 2015 letter to the Chair of the Kansas House Committee considering the Act. (See Appendix B hereto). They expressed concern that the Act would disrupt the sanctity of the relationship

between doctor and patient, and urged legislators to consider that "doctors must be able to make [patient care] decisions according to the best medical evidence and their best medical and professional judgment, without political interference." As experts in obstetrics and gynecology, these physicians strongly objected to the Act's departure from a standard of care based on current medical evidence. The physicians expressed alarm over "the unprecedented attempt of Kansas legislators to dictate how physicians should perform a safe, common, and evidence-based surgical procedure."

The goal of medical legislation should be to decrease risk for patients and improve patient care. Doctors should not be forced to recommend or perform medical procedures that go against their best professional judgment. Decisions about the safest and most effective way to end a pregnancy should be left to women and the highly-qualified specialists who provide their medical care, such as the *amici* and Plaintiffs.

Conclusion

The *amici curiae* respectfully ask this Court to affirm the District Court's injunction prohibiting enforcement of the Act.

/s/Mark P. Johnson
Mark P. Johnson
Kansas Bar No. 22289
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2424 (telephone)
(816) 531-7545 (fax)
mark.johnson@dentons.com

Counsel for *Amici Curiae*

APPENDIX A

The *amici* are:

Alisha Ash, M.D., Independence, MO

Peter Caruso, M.D., Overland Park, KS

Tracey Cowles, M.D., Overland Park, KS

Margaret A. Estrin, M.D., Overland Park/Shawnee Mission/Lawrence, KS

Bret Gordon, D.O., Overland Park, KS

Stephen Gordon, D.O., Overland Park, KS

Carrie Grounds, M.D., Leawood, KS

Amanda N. Healy, M.D., Overland Park, KS

Harry Jonas, M.D., Lees Summit, MO

Susan Mou, M.D., Overland Park, MO

William Ramos, M.D., Las Vegas, NV

Hal Younglove, M.D., Overland Park/Shawnee Mission/Lawrence, KS

APPENDIX B

The Honorable Steve Brunk
Chair, House Federal and State Affairs Committee
Kansas House of Representatives Kansas State Capitol, Room 285-N
300 SW 10th Street Topeka, KS 66612

March 9, 2015

Dear Chairman Brunk:

The undersigned are physicians in Kansas, or physicians who refer patients to obtain care in Kansas, who write to express our strong objections to Senate Bill 95. We are experts in obstetrics and gynecology and are specialists in women's health care. We are alarmed at the unprecedented attempt of Kansas legislators to dictate how physicians should perform a safe, common, and evidence-based surgical procedure.

Senate Bill 95 represents unwarranted intrusion in the doctor-patient relationship. The bill would restrict the safest and most expeditious way to terminate a second-trimester pregnancy. In many cases, these terminations are necessary for the patient to protect her health or future fertility, and the bill lacks an adequate health exception that would allow physicians to exercise their medical judgment in these circumstances. This legislation could also force physicians to provide substandard care to second-trimester abortion patients.

The undersigned urge this Committee to consider the effects of this legislation on the doctor-patient relationship, if enacted. We urge you to enact laws that reflect the standard of care based on current medical evidence and preserve the doctor-patient relationship—not laws that jeopardize the sanctity of that relationship and threaten women's health.

It is our strong belief that the laws in Kansas should not be changed in this way. We serve our patients—who are often struggling with difficult decisions—the best when we respect their autonomy, dignity and their right to the safest care possible. Doctors must be able to make these kinds of decisions according to the best medical evidence and their best medical and professional judgment, without political interference. We therefore urge you to reject this harmful measure.

Thank you for your time and consideration.

Sincerely,

Tara Chettiar, M.D.

Robert Corder, M.D.

Tracy Cowles, M.D

Erin T. Carey, M.D.

Cynthia Eckert, M.D.

Mark S. Finkelston, D.O.

Amy Giedt, M.D.

Bret Gordon, D.O.

Amanda N. Healy, M.D.

Herbert Hodes, M.D.

Jessie D. Holmes, M.D.

Gene Lee, M.D.

Gerald Miller Jr, M.D.

James Mirabile, M.D.

Orin Moore, M.D.

Susan Marie Mou, M.D.

Traci Nauser, M.D.

Margaret Nickell, M.D.

Leah D. Ridgway, M.D.

Sharla Shipman, M.D.

Emily Steinbis, M.D.

Ronald Yeomans, M.D.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing *amici curiae* brief for Kansas Physicians were sent by electronic mail on November 9, 2015 to:

Robert V. Eye
Brett Allen Jarmer
Robert V. Eye Law Office, LLC
123 S.E. 6th Avenue, Suite 200
Topeka, KS 66603
bob@kauffman.eye.com
brett@kauffman.eye.com

Erin C. Thompson
Thompson Law Firm, LLC
106 E. 2nd Street
Wichita, KS 67202
ethompson@tslawfirm.com

Janet Crepps
Genevieve Scott
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
jcrepps@reprorights.org
gscott@reprorights.org

Frederick J. Patton II
Patton & Patton Chtd
534 S. Kansas Avenue, Suite 1120
Topeka, KS 66603
joe@joepatton.com

Kevin Mark Smith
Law Offices of Kevin M. Smith, P.A.
1502 N. Broadway Street
Wichita, KS 67214
4acelaw@sbcglobal.net

Teresa A. Woody
The Woody Law Firm PC
1621 Baltimore Avenue
Kansas City, MO 64102
teresa@woodylawfirm.com

Jeffrey A. Chanay
Chief Deputy Attorney General
Dennis D. Depew
Deputy Attorney General,
Civil Litigation Division
Office of the Attorney General
Memorial Building 3rd Floor
120 S.W. Tenth Avenue
Topeka, KS 66612-1597
jeff.chanay@ag.ks.gov
dennis.depew@ag.ks.gov

Shon D. Qualseth
Stephen R. McAllister
Solicitor General of Kansas
Sarah E. Warner
333 West 9th Street
P.O. Box 1264
Lawrence, KS 66044-2803
shon.qualseth@trqlaw.com
steve.mcallister@trqlaw.com
sarah.warner@trqlaw.com

Don P. Saxton
Saxton Law Firm, LLC
1000 Broadway, Suite 400
Kansas City, MO 64105
don@saxtonlawfirm.com

Paul Benjamin Linton
921 Keystone Avenue
Northbrook, IL 60062
pblconlaw@aol.com

/s/Mark P. Johnson
Mark P. Johnson
Counsel for *Amici Curiae*