

# COURT of APPEALS

IN THE SUPREME COURT OF THE STATE OF KANSAS

KS

FILED

AUG 05 2015

HEATHER L. SMITH  
CLERK OF APPELLATE COURTS

HODES & NAUSER, MDs, P.A.;  
HERBERT C. HODES, M.D.; and  
TRACI LYNN NAUSER, M.D.,

Plaintiffs-Appellees,

Appellate Court Case No : 15-114153-A

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,

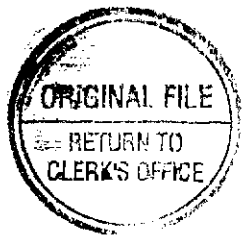
Defendants-Appellants.

## DOCKETING STATEMENT—ANSWER

Pursuant to Rule 2.041(c), and Rules 7.01(c), and 7.02(c), Plaintiff-Appellees submit the following Answer to Defendant-Appellants docketing statement.

### Material Facts

Senate Bill 95, 2015 Kan. Sess. Laws 285 ("the Act" or "S.B. 95"), prohibits the performance of D & E, the most common method of second-trimester abortion, used in 95% of the abortions done in the second trimester. The Plaintiffs-Appellees, Dr. Herbert C. Hodes and Dr. Traci Lynn Nauser, are board-certified obstetrician-gynecologists who provide pre-viability second-trimester abortions using D & E.



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Defendant-Appellants mischaracterize Judge Hendricks' Order. Judge Hendricks did not hold that *Gonzales* established a bright line rule against *any* restriction on D & E abortion; rather, the Order held that a complete ban on D & E is unconstitutional. More specifically, Judge Hendricks granted a temporary injunction following his finding that Sections 1 and 2 of the Kansas Constitution Bill of Rights protects the fundamental right to abortion, and that Plaintiff-Appellees were likely to succeed on their claim that the Act imposes an impermissible burden by banning the most common method of second-trimester abortion—D & E—under the Supreme Court's precedent in *Gonzales v. Carhart*, 550 U.S. 124, 147, 150–54, 156–65 (2007), and *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000), and that alternatives proposed by Defendant-Appellants “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.” Order Granting Temporary Injunction at 7–8.


#### Issues Raised

a. The Kansas Supreme Court has recognized that Section 1 of the Kansas Constitution Bill of Rights is given “much the same effect” as the Due Process and Equal Protection Clauses of the Fourteen Amendment, but in some cases, it “affords separate, adequate, and greater rights than the federal Constitution.” *Farely v. Engelken*, 241 Kan. 663, 667, 671 (1987). Did the district court err in holding that the Sections 1 and 2 of the Bill of Rights of the Kansas Constitution protects the fundamental right to abortion?

b. The United States Supreme Court has repeatedly held that a ban on the most commonly-used method of second-trimester abortion is unconstitutional. See *Gonzales*, 550 U.S. at 147, 164–65; *Stenberg*, 530 U.S. at 945–46 (2000); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976). The Act bans the most common method of second-trimester abortion, a

D & E, which does not involve a separate procedure to induce fetal demise. Did the district court err in holding that Plaintiffs-Appellees had established a likelihood of success on their claim that the Act's ban on the most commonly-used method of second-trimester abortion, a D & E, is unconstitutional?

Respectfully submitted, this 5<sup>th</sup> day of August, 2015.

  
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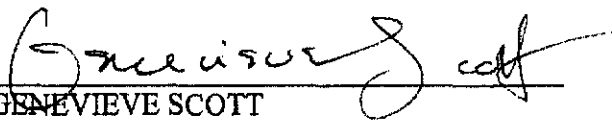
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent via electronic mail on the 5<sup>th</sup> day of August, 2015, addressed to the following:

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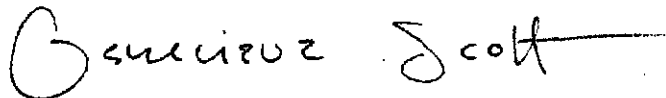
# FAX

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<b>Fax:</b> (785) 296-1028	<b>Pages:</b> 6 (including cover page)
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<b>Re:</b> Case # 15-114153-A	<b>CC:</b> Please see below

**Comments:**

Attached please find for filing a **Docketing Statement—Answer** in *Hodes & Nauser v. Schmidt*, Appellate Case # 15-114153-A. If you should have any questions, please do not hesitate to contact me at [gscott@reprorights.org](mailto:gscott@reprorights.org) or (917) 637-3605.

Best,



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