

Litigation and Advocacy Surrounding Gender-Affirming and Reproductive Health Care: An Intersectional Update

**The 2022 Lavender Law Conference & Career Fair
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CLE MATERIALS

The last few years have brought about significant political and legal changes that have affected access to gender-affirming and reproductive health care across the United States. This panel will explore and discuss legal developments that have diminished access to care to these necessary forms of health care as well as the various victories, defeats, obstacles, and opportunities that transgender and gender nonconforming people, including pregnant people and people of color, face. We will address developments in privacy, liberty, and personal autonomy jurisprudence affecting these forms of care, including the Supreme Court's decisions in *Dobbs v. Jackson Women's Health Organization* and *Whole Woman's Health v. Jackson*. We will discuss the litigation and other efforts to eliminate barriers to coverage as well as regulatory changes that have taken place since the Biden administration came into office. Finally, we will discuss the intersections of the advocacy and litigation surrounding these forms of essential health care.

Doctrines Relating to Gender-Affirming and Reproductive Health Care

- Equal Protection of the Laws
- Decisional Privacy
- Liberty/Individual Autonomy
- Bodily Autonomy

Key Supreme Court Precedents:

- *Dobbs v. Jackson Women's Health Organization* (forthcoming)
- *Obergefell v. Hodges*, 576 U.S. 644 (2015)
- *Lawrence v. Texas*, 539 U.S. 558 (2003)
- *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)
- *Roe v. Wade*, 410 U.S. 113 (1973)

Enclosed Materials

Court Decisions:

- *Eknes-Tucker v. Marshall*, No. 2:22-cv-00184 (N.D. Ala. May 13, 2022)
- *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021)
- *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019)
- *Arroyo González v. Rosselló Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018)

Briefs:

- Brief of Lambda Legal Defense and Education Fund, Inc., National Women's Law Center, and 20 Additional LGBTQ and Women's Rights Organizations, *Brandt v. Rutledge*, Case No. 21-2875 (8th Cir. Jan 19, 2022)
- Brief of LGBTQ Organizations and Advocates, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (U.S. Sept. 20, 2021)
- Brief of Lambda Legal Defense and Education Fund, Inc., *Whole Woman's Health v. Hellerstedt*, No. 15-274 (U.S. Jan. 4, 2016)

Expert Reports:

- Expert Report of Chanel Haley, *Lange v. Houston County, Georgia*, No. 19-cv-00392 (M.D. Ga. July 16, 2021)
- Supplemental Declaration of Dr. Randi C. Ettner, *County of Santa Clara v. U.S. Department of Health & Human Services*, No. 19-cv-02916 (N.D. Cal. filed Oct. 10, 2019)

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

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|---------------------------------------------|---|---------------------------------|
| PAUL A. EKNES-TUCKER, <i>et al.</i>, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Case No. 2:22-cv-184-LCB |
| |) | |
| STEVE MARSHALL, <i>et al.</i>, |) | |
| |) | |
| Defendants. |) | |

OPINION & ORDER

Several individuals and the United States challenge the constitutionality of the Alabama Vulnerable Child Compassion and Protection Act.¹ In part, the Act restricts transgender minors from utilizing puberty blockers and hormone therapies. Because the Supreme Court and the Court of Appeals for the Eleventh Circuit have made clear that: (1) parents have a fundamental right to direct the medical care of their children subject to accepted medical standards; and (2) discrimination based on gender-nonconformity equates to sex discrimination, the Court finds that there is a substantial likelihood that Section 4(a)(1)–(3) of the Act is unconstitutional and, thus, enjoins Defendants from enforcing that portion of the Act pending trial. However, all other provisions of the Act remain in effect, specifically: (1) the

¹ As explained *infra* note 3 and accompanying text, this suit challenges only Section 4(a)(1)–(3) of the Act. For purposes of this opinion, all references to “the Act” refer to these subdivisions unless noted otherwise.

provision that bans sex-altering surgeries on minors; (2) the provision prohibiting school officials from keeping certain gender-identity information of children secret from their parents; and (3) the provision that prohibits school officials from encouraging or compelling children to keep certain gender-identity information secret from their parents.

I. BACKGROUND

Regarding a child's belief that they might be transgender, Merriam-Webster's Dictionary defines a "transgender" person as one whose gender identity is different from the sex the person had or was identified as having at birth. *Transgender*, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). The Dictionary defines "gender identity" as a person's internal sense of being a male or a female. *Gender Identity*, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). These terms and definitions are largely consistent with those used by the parties. Accordingly, the Court relies on these terms throughout this opinion, but recognizes that they might mean different things to different people and in different contexts.

According to the uncontradicted record evidence, some transgender minors suffer from a mental health condition known as gender dysphoria. *Tr.* at 30.² Gender dysphoria is a clinically diagnosed incongruence between one's gender identity and

² "*Tr.*" is a consecutively paginated transcript of the two-day preliminary injunction hearing the Court held on May 5–6, 2022. For clarity, the Court cites to the internal pagination of the transcript rather than the ECF pagination.

assigned gender. *DSM-5* (Doc. 69-17) at 4. If untreated, gender dysphoria may cause or lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. *Tr.* at 20. According to the World Professional Association for Transgender Health (WPATH), an organization whose mission is to promote education and research about transgender healthcare, gender dysphoria in adolescents (minors twelve and over) is more likely to persist into adulthood than gender dysphoria in children (minors under twelve). *WPATH Standards of Care* (Doc. 69-18) at 17.³

In some cases, physicians treat gender dysphoria in minors with a family of medications known as GnRH agonists, commonly referred to as puberty blockers. *Id.* at 24; *Tr.* at 103. After a minor has been on puberty blockers for one to three years, doctors may then use hormone therapies to masculinize or feminize his or her body. *Tr.* at 108–11, 131. The primary effect of these treatments is to delay physical maturation, allowing transgender minors to socially transition their gender while they await adulthood. *Id.* at 105–06, 110–11. For clarity and conciseness, the Court refers to puberty blockers and hormone therapies used for these purposes as “transitioning medications.”

Like all medications, transitioning medications come with risks. *Tr.* at 121–22. Known risks, for example, include loss of fertility and sexual function. *Id.* at

³ Plaintiffs, the State, and the United States individually introduced the WPATH standards into evidence during the May 5–6 preliminary injunction hearing.

132–33. Nevertheless, WPATH recognizes transitioning medications as established medical treatments and publishes a set of guidelines for treating gender dysphoria in minors with these medications. *WPATH Standards of Care* (Doc. 69-18) at 19. The American Medical Association, the American Pediatric Society, the American Psychiatric Association, the Association of American Medical Colleges, and at least eighteen additional major medical associations endorse these guidelines as evidence-based methods for treating gender dysphoria in minors. *Tr.* at 97–98; *Healthcare Amici Br.* (Doc. 91-1) at 15.⁴

The Alabama Vulnerable Child Compassion and Protection Act states in pertinent part:

Section 4. (a) . . . [N]o person shall engage in or cause any of the following practices to be performed upon a minor if the practice is performed for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex as defined in this act:

- (1) Prescribing or administering puberty blocking medication to stop or delay normal puberty.
- (2) Prescribing or administering supraphysiologic doses of testosterone or other androgens to females.
- (3) Prescribing or administering supraphysiologic doses of estrogen to males.

⁴ For a full list of the twenty-two major medical associations that endorse these guidelines, see *infra* note 13.

(4) Performing surgeries that sterilize, including castration, vasectomy, hysterectomy, oophorectomy, orchiectomy, and penectomy.

(5) Performing surgeries that artificially construct tissue with the appearance of genitalia that differs from the individual's sex, including metoidioplasty, phalloplasty, and vaginoplasty.

(6) Removing any healthy or non-diseased body part or tissue, except for a male circumcision.

(c) A violation of this section is a Class C felony.

Section 5. No nurse, counselor, teacher, principal, or other administrative official at a public or private school attended by a minor shall do either of the following:

(1) Encourage or coerce a minor to withhold from the minor's parent or legal guardian the fact that the minor's perception of his or her gender or sex is inconsistent with the minor's sex.

(2) Withhold from a minor's parent or legal guardian information related to a minor's perception that his or her gender or sex is inconsistent with his or her sex.

S.B. 184, ALA. 2022 REG. SESS. §§ 4–5 (Ala. 2022).⁵ The Act defines a “minor” as anyone under the age of nineteen. *Id.* § 3(1); ALA. CODE § 43-8-1(18). The Act defines “sex” as “[t]he biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profiles.” S.B. 184, ALA. 2022 REG. SESS. § 3(3) (Ala. 2022).

⁵ Based on their oral representations during a May 4, 2022 hearing, Plaintiffs seek to enjoin only Section 4(a)(1)–(3) of the Act.

In support of these prohibitions, the Legislature made several legislative findings. *Id.* § 2. The Legislature found in part that “[s]ome in the medical community are aggressively pushing” minors to take transitioning medications, which the Act describes as “unproven, poorly studied . . . interventions” that cause “numerous harmful effects for minors, as well as risks of effects simply unknown due to the new and experimental nature of these interventions.” *Id.* § 2(6), (11). The Legislature went on to find that “[m]inors, and often their parents, are unable to comprehend and fully appreciate the risk and life implications” of these treatments. *Id.* § 2(15). Thus, the Legislature concluded, “the decision to pursue” these treatments “should not be presented to or determined for minors[.]” *Id.* § 2(16).

Alabama legislators passed the Act on April 7, 2022.⁶ Governor Kay Ivey signed the Act into law the following day.⁷ In the week that followed, civil rights groups filed two lawsuits challenging the Act’s constitutionality.⁸ In *Ladinsky v. Ivey*, Case No. 2:22-cv-447 (N.D. Ala. 2022), several plaintiffs challenged the Act in the United States District Court of the Northern District of Alabama. The case

⁶ Jo Yurcaba, *Alabama Passes Bills to Target Trans Minors and LGBTQ Classroom Discussion*, NBCNEWS.COM (Apr. 7, 2022, 4:22 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/alabama-passes-bills-targeting-trans-minors-lgbtq-classroom-discussion-rcna23444>.

⁷ Madeleine Carlisle, *Alabama’s Wave of Anti-LGBTQ Legislation Could Have National Consequences*, TIME.COM (Apr. 15, 2022, 11:40 AM), <https://time.com/6167472/alabama-anti-lgbtq-legislation/>.

⁸ *Alabama Law Banning Transgender Medication Challenged in Two Lawsuits*, CBSNEWS.COM (Apr. 11, 2022, 10:05 PM), <https://www.cbsnews.com/news/alabama-transgender-law-lawsuits/>.

was randomly assigned to United States District Judge Anna M. Manasco. Judge Manasco recused, and the case was randomly reassigned to United States Magistrate Judge Staci G. Cornelius. After the parties declined to proceed before Judge Cornelius in accordance with 28 U.S.C. § 636(c), the case was randomly reassigned to the Honorable Annemarie C. Axon.

With *Ladinsky* pending, a separate set of plaintiffs challenged the Act in the United States District Court of the Middle District of Alabama. That case, styled *Walker v. Marshall*, Case No. 5:22-cv-480 (M.D. Ala. 2022), was randomly assigned to Chief United States District Judge Emily C. Marks. The *Walker* plaintiffs moved to enjoin enforcement of the Act and moved to reassign the case to United States District Judge Myron H. Thompson, alleging that he had previously presided over a similar case. The parties, however, later consented to transferring the case to the Northern District of Alabama for consolidation with *Ladinsky*. At that time, the *Walker* plaintiffs withdrew their motion to reassign.

On April 15, 2022, Chief Judge Marks transferred *Walker* to the Northern District of Alabama in accordance with the “first-filed” rule and 28 U.S.C. § 1404(a). The case was randomly assigned to this Court. Judge Axon then transferred *Ladinsky* to this Court for consolidation with *Walker*. That same day, at 6:24 p.m. CDT, the *Walker* plaintiffs filed a notice of voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i). The *Ladinsky* plaintiffs voluntarily

dismissed their case nine minutes later. Neither the *Walker* plaintiffs nor the *Ladinsky* plaintiffs explained their respective dismissals, but counsel for *Ladinsky* informed the press: “We do plan to refile imminently[.]”⁹

Sure enough, on April 19, four transgender minors (Minor Plaintiffs), their parents (Parent Plaintiffs), a child psychologist and a pediatrician (Healthcare Plaintiffs), and Reverend Paul A. Eknes-Tucker filed this suit in the United States District Court of the Middle District of Alabama and moved to enjoin the Act’s enforcement pending trial. The case was randomly assigned to United States District Judge R. Austin Huffaker, Jr. Due to this Court’s familiarity with *Ladinsky* and *Walker*, Judge Huffaker reassigned the case to this Court to expedite disposition of Plaintiffs’ motion for preliminary injunction. With the Act set to take effect on May 8, the Court entered an abbreviated briefing schedule and set a hearing on Plaintiffs’ motion for May 5–6.

Just days before the hearing, the United States moved to intervene on behalf of Plaintiffs under Federal Rule of Civil Procedure 24.¹⁰ In the process, the United States filed its own motion to enjoin enforcement of the Act and requested to

⁹ Paul Gattis, *Lawsuits Seeking to Overturn New Alabama Transgender Law Dropped, Could be Refiled*, AL.COM, <https://www.al.com/news/2022/04/lawsuits-seeking-to-overturn-new-alabama-transgender-law-dropped-could-be-refiled.html> (last updated Apr. 16, 2022, 9:22 PM).

¹⁰ The United States’s amended intervenor complaint does not add any additional claims, name any new defendants, or seek to expand the relief sought by Plaintiffs. *Compare Am. Intervenor Compl.* (Doc. 92) at 4–5, 13–14, *with Compl.* (Doc. 1) at 6–8, 28–35.

participate in the preliminary injunction hearing. Additionally, fifteen states moved for leave to proceed as *amici curiae*¹¹ and to file a brief in support of Defendants.¹² Twenty-two healthcare organizations also moved for leave to proceed as *amici curiae* and to file a brief in support of Plaintiffs.¹³ Ultimately, the Court granted these motions in full, took the *amici* briefs under advisement, and gave the United States leave to participate during the preliminary injunction hearing.

During that hearing, the parties submitted hundreds of pages of medical evidence and called several live witnesses. Plaintiffs tendered Dr. Linda Hawkins and Dr. Morissa Ladinsky as experts in the treatment of gender dysphoria in minors. *Tr.* at 16, 92. Dr. Hawkins and Dr. Ladinsky testified that at least twenty-two major

¹¹ *Amici curiae*, Latin for “friends of the court,” refers to a group of people or institutions who are not parties to a lawsuit, but petition the court (or are requested by the court) to file a brief in the action because they have “a strong interest in the subject matter.” *Amicus Curiae*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹² The State *Amici* are the States of Arkansas, Alaska, Arizona, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia.

¹³ The Healthcare *Amici* are the American Academy of Pediatrics; the Alabama Chapter of the American Academy of Pediatrics; the Academic Pediatric Association; the American Academy of Child and Adolescent Psychiatry; the American Academy of Family Physicians; the American Academy of Nursing; the American Association of Physicians for Human Rights, Inc. *d/b/a* Health Professionals Advancing LGBTQ Equality; the American College of Obstetricians and Gynecologists; the American College of Osteopathic Pediatricians; the American College of Physicians; the American Medical Association; the American Pediatric Society; the American Psychiatric Association; the Association of American Medical Colleges; the Association of Medical School Pediatric Department Chairs; the Endocrine Society; the National Association of Pediatric Nurse Practitioners; the Pediatric Endocrine Society; the Society for Adolescent Health and Medicine; the Society for Pediatric Research; the Society of Pediatric Nurses; the Societies for Pediatric Urology; and the World Professional Association for Transgender Health.

medical associations in the United States endorse transitioning medications as well-established, evidence-based methods for treating gender dysphoria in minors. *Tr.* at 25, 97–98, 126–27. They opined that there are risks associated with transitioning medications, but that the benefits of treating minors with these medications outweigh these risks in certain cases. *Id.* at 57–58, 121–22, 136, 170. They also explained that minors and their parents undergo a thorough screening process and give informed consent before any treatment regimen begins. *Id.* at 41, 59, 132; *see also Consent Form* (Doc. 78-41) at 1–14. Finally, they testified that, without these medications, minors with gender dysphoria suffer significant deterioration in their familial relationships and educational performance. *Tr.* at 35, 112–13.

Plaintiffs also called Healthcare Plaintiff Dr. Rachel Koe (a licensed pediatrician), Plaintiff Eknes-Tucker, and Parent Plaintiff Megan Poe to testify about their personal knowledge and experiences regarding the treatment of gender dysphoria in minors. *Tr.* at 150–51, 170–71, 195. Parent Plaintiff Megan Poe specifically described the positive effects transitioning treatments have had on her fifteen-year-old transgender daughter, Minor Plaintiff Allison Poe. *Id.* at 157–68.

According to Megan, Allison was born a male, but has shown evidence of identifying as a female since she was two-years-old. *Id.* at 153–54. During her early adolescent years, Allison suffered from severe depression and suicidality due to gender dysphoria. *Id.* at 156–57. She began taking transitioning medications at the

end of her sixth-grade year, and her health significantly improved as a result. *Id.* at 163. Megan explained that the medications have had no adverse effects on Allison and that Allison is now happy and “thriving.” *Id.* at 166–67. When asked what would occur if her daughter stopped taking the medications, Megan responded that she feared her daughter would commit suicide. *Id.* at 167.

Intervening on behalf of Plaintiffs, the United States tendered Dr. Armand H. Antommaria as an expert in bioethics and treatment protocols for adolescents suffering from gender dysphoria. *Id.* at 213–26. He reiterated that transitioning medications are well-established, evidence-based methods for treating gender dysphoria in minors. *Id.* at 120–21.

Defendants called two witnesses. *Id.* at 253, 337. First, Defendants tendered Dr. James Cantor—a private psychologist in Toronto, Canada—to testify as an expert on psychology, human sexuality, research methodology, and the state of the research literature on gender dysphoria and its treatment. *Id.* at 253–54. Dr. Cantor opined that, due to the risks of transitioning medications, doctors should use a “watchful waiting” approach to treat gender dysphoria in minors. *Id.* at 281. That approach, according to Dr. Cantor, “refers specifically to withholding any decision about medical interventions until [doctors] have a better idea or feel more confident” that the minor’s gender dysphoria will persist without medical intervention other than counseling. *Id.* Dr. Cantor further testified that several European countries have

restricted treating minors with transitioning medications due to growing concern about the medications' risks. *Id.* at 296–97.

On cross examination, however, Dr. Cantor admitted that: (1) his patients are, on average, thirty years old; (2) he had never provided care to a transgender minor under the age of sixteen; (3) he had never diagnosed a child or adolescent with gender dysphoria; (4) he had never treated a child or adolescent for gender dysphoria; (5) he had no personal experience monitoring patients receiving transitioning medications; and (6) he had no personal knowledge of the assessments or treatment methodologies used at any Alabama gender clinic. Accordingly, the Court gave his testimony regarding the treatment of gender dysphoria in minors very little weight. *Id.* at 306–09. Dr. Cantor also testified that no country in Europe (or elsewhere) has categorically banned treating gender dysphoria in minors with transitioning medications. *Id.* at 326–28. Unlike the Act, Dr. Cantor added, those countries allow such treatments under certain circumstances and for research purposes. *Id.* at 327–28.

Defendants' other witness was Sydney Wright, a twenty-three-year-old woman who took hormone therapies for gender dysphoria for roughly a year beginning when she was nineteen. *Id.* at 338, 351, 357. She testified that she now believes taking the medication was a mistake and that she no longer believes gender dysphoria is a legitimate medical diagnosis. *Id.* at 348–49, 355. She also testified

that she received her treatments in Georgia and never visited a gender clinic in Alabama. *Id.* at 359–61.

II. LEGAL STANDARDS

The purpose of a preliminary injunction “is to preserve the positions of the parties” pending trial. *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). When a federal court preliminarily enjoins a state law passed by duly elected officials, the court effectively overrules a decision “of the people and, thus, in a sense interferes with the processes of democratic government.” *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). This is an extraordinary and drastic remedy. *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998).

To receive a preliminary injunction, a movant must show that: (1) he or she has a substantial likelihood of success on the merits; (2) he or she will suffer irreparable injury absent injunctive relief; (3) the threatened injury to him or her “outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). The movant bears the burden of persuasion on each element. *State of Fla. v. Dep’t of Health & Hum. Servs.*, 19 F.4th 1271, 1279 (11th Cir. 2021).

III. DISCUSSION

Plaintiffs and the United States seek to enjoin Section 4(a)(1)–(3) of the Act pending trial under Federal Rule of Civil Procedure 65. *Pls.’ Mot.* (Doc. 7) at 2; *Intervenor Pl.’s Mot.* (Doc. 62) at 2. Under this rule, a court may issue a preliminary injunction only after giving notice to the adverse party. FED. R. CIV. P. 65(a)(1). Where injunctive relief is appropriate, the movant must give security “to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” *Id.* at 65(c). Here, Defendants have received proper notice. The Court addresses whether Plaintiffs are entitled to preliminary injunctive relief before turning to the issue of security.

A. Substantial Likelihood of Success on the Merits

The Court first considers whether Plaintiffs are substantially likely to succeed on their claims. When a plaintiff brings multiple claims, a reviewing court must consider the plaintiff’s likelihood of success on each claim. *See N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1226 (11th Cir. 2008). Here, Plaintiffs bring five causes of action: four constitutional claims and one preemption claim. The Court begins with Plaintiffs’ constitutional claims.

1. Plaintiffs’ Constitutional Claims

Plaintiffs’ constitutional claims arise under the Civil Rights Act of 1871, 42 U.S.C. § 1983. *Compl.* (Doc. 1) at 28–30, 33–35. That statute guarantees “a federal

forum for claims of unconstitutional treatment at the hands of state officials[.]” *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). To state a claim under § 1983, a plaintiff must allege: (1) the defendant deprived him of a right secured under federal law or the Constitution; and (2) such deprivation occurred under color of state law. *Richardson v. Johnson*, 598 F.3d 734, 737 (11th Cir. 2010) (per curiam).

Parent Plaintiffs claim that the Act violates their constitutional right to direct the medical care of their children under the Due Process Clause of the Fourteenth Amendment. *Compl.* (Doc. 1) at 28–29. Minor Plaintiffs assert that the Act discriminates against them based on their sex in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 29–30. Plaintiffs collectively claim that the Act unlawfully restricts their speech under the First Amendment. *Id.* at 33–34. Finally, Parent Plaintiffs, Minor Plaintiffs, and Healthcare Plaintiffs allege that the Act is void for vagueness under the Fifth and Fourteenth Amendments. *Id.* at 34–35. The Court addresses Plaintiffs’ claims in that order.

i. Substantive Due Process Claim

Parent Plaintiffs assert that the Act violates their constitutional right to direct the medical care of their children under the Fourteenth Amendment. *Compl.* (Doc. 1) at 28–29.¹⁴ The Due Process Clause provides that no State shall “deprive any

¹⁴ Based on the record evidence, the Court finds that Parent Plaintiffs have standing to bring their Substantive Due Process Claim. Defendants raise no opposition to this conclusion.

person of life, liberty, or property, without due process of law.” U.S. CONST. AMEND. XIV. The Clause protects against governmental violations of “certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). Fundamental rights are “those guaranteed by the Bill of Rights as well as certain ‘liberty’ and privacy interests implicit in the [D]ue [P]rocess [C]lause and the penumbra of constitutional rights.” *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005).

A parent’s right “to make decisions concerning the care, custody, and control of their children” is one of “the oldest of the fundamental liberty interests” recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000). Encompassed within this right is the more specific right to direct a child’s medical care. *See Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990) (recognizing “the right of parents to generally make decisions concerning the treatment to be given to their children”).¹⁵ Accordingly, parents “retain plenary authority to seek such care for their children, subject to a physician’s independent examination and medical judgment.” *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

Against this backdrop, Parent Plaintiffs are substantially likely to show that they have a fundamental right to treat their children with transitioning medications

¹⁵ See also *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (explaining that “the Due Process Clause provides some level of protection for parents’ decisions regarding their children’s medical care”).

subject to medically accepted standards and that the Act infringes on that right. The Act prevents Parent Plaintiffs from choosing that course of treatment for their children by criminalizing the use of transitioning medications to treat gender dysphoria in minors, even at the independent recommendation of a licensed pediatrician. Accordingly, Parent Plaintiffs are substantially likely to show that the Act infringes on their fundamental right to treat their children with transitioning medications subject to medically accepted standards.

The State counters that parents have no fundamental right to treat their children with experimental medications. *Defs.’ Br.* (Doc. 74) at 120. To be sure, the parental right to autonomy is not limitless; the State may limit the right and intercede on a child’s behalf when the child’s health or safety is in jeopardy. *Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990). But the fact that a pediatric treatment “involves risks does not automatically transfer the power” to choose that treatment “from the parents to some agency or officer of the state.” *Parham*, 442 U.S. 603.

Defendants produce no credible evidence to show that transitioning medications are “experimental.” While Defendants offer some evidence that transitioning medications pose certain risks, the uncontradicted record evidence is that at least twenty-two major medical associations in the United States endorse transitioning medications as well-established, evidence-based treatments for gender dysphoria in minors. *Tr.* at 25, 97–98, 126–27. Indeed, according to Defendants’

own expert, no country or state in the world categorically bans their use as Alabama has. Certainly, the science is quickly evolving and will likely continue to do so. But this is true of almost every medical treatment regimen. Risk alone does not make a medication experimental.

Moreover, the record shows that medical providers have used transitioning medications for decades to treat medical conditions other than gender dysphoria, such as central precocious puberty, a condition in which a child enters puberty at a young age. Doctors have also long used hormone therapies for patients whose natural hormone levels are below normal. Based on the current record, Defendants fail to show that transitioning medications are experimental. Thus, Parent Plaintiffs are substantially likely to show that the Act violates their fundamental right to treat their children with transitioning medications subject to medically accepted standards.

Statutes that infringe on fundamental rights are constitutional only when they satisfy the most demanding standard of judicial review, strict scrutiny. *Williams v. Pryor*, 240 F.3d 944, 947 (11th Cir. 2001). To satisfy strict scrutiny, a statute must be “narrowly tailored” to achieve “a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). The State’s interest in “safeguarding the physical and psychological well-being of a minor is a compelling one.” *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982) (cleaned up).

Defendants proffer that the purpose of the Act is “to protect children from experimental medical procedures,” the consequences of which neither they nor their parents often fully appreciate or understand. *Defs.’ Br.* (Doc. 74) at 129; *see also* S.B. 184, ALA. 2022 REG. SESS. § 2(13)–(15) (Ala. 2022). Defendants also allege that the Act halts medical associations from “aggressively pushing” transitioning medications on minors. *Defs.’ Br.* (Doc. 74) at 114; *see also* S.B. 184, ALA. 2022 REG. SESS. § 2(6) (Ala. 2022).

But as explained above, Defendants fail to produce evidence showing that transitioning medications jeopardize the health and safety of minors suffering from gender dysphoria. Nor do Defendants offer evidence to suggest that healthcare associations are aggressively pushing these medications on minors. Instead, the record shows that at least twenty-two major medical associations in the United States endorse transitioning medications as well-established, evidence-based treatments for gender dysphoria in minors. *Tr.* at 25, 97–98, 126–27. The record also indicates that parents undergo a thorough screening and consent process before they may choose these medications for their children.

Undoubtedly, transitioning medications carry risks. But again, the fact that pediatric medication “involves risks does not automatically transfer the power” to choose that medication “from the parents to some agency or officer of the state.” *Parham*, 442 U.S. at 603. Parents, pediatricians, and psychologists—not the State or

this Court—are best qualified to determine whether transitioning medications are in a child’s best interest on a case-by-case basis. Defendants’ proffered purposes—which amount to speculative, future concerns about the health and safety of unidentified children—are not genuinely compelling justifications based on the record evidence. For this reason alone, the Act cannot survive strict scrutiny at this stage of litigation.

But even if Defendants’ proffered purposes are genuinely compelling, the Act is not narrowly tailored to achieve those interests. A narrowly tailored statute employs the “least restrictive means” necessary to achieve its purpose. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). A statute is not narrowly tailored when “numerous and less-burdensome alternatives” are available to advance the statute’s purpose. *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1299 (11th Cir. 2017). Put differently, “if a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000).

Defendants applaud the efforts of several European countries to restrict minors from taking transitioning medications, but unlike Alabama’s Act, these countries allow minors to take transitioning medications in exceptional circumstances on a case-by-case basis. *Defs.’ Br.* (Doc. 74) at 76–82. According to Dr. Cantor, Defendants’ own expert witness, no state or country in the entire world

has enacted a blanket ban of these medications other than Alabama. *Tr.* at 328. The Act, unlike the cited European regulations, does not even permit minors to take transitioning medications for research purposes, even though Defendants adamantly maintain that more research on them is needed. *Tr.* at 326–27; *Defs.’ Br.* (Doc. 74) at 116. Because Defendants themselves offer several less restrictive ways to achieve their proffered purposes, the Act is not narrowly tailored at this stage of litigation.

In sum, Parent Plaintiffs have a fundamental right to direct the medical care of their children. This right includes the more specific right to treat their children with transitioning medications subject to medically accepted standards. The Act infringes on that right and, as such, is subject to strict scrutiny. At this stage of litigation, the Act falls short of that standard because it is not narrowly tailored to achieve a compelling government interest. Accordingly, Parent Plaintiffs are substantially likely to succeed on their Substantive Due Process claim.

ii. Equal Protection Claim

Minor Plaintiffs claim that the Act discriminates against them based on their sex in violation of the Fourteenth Amendment. *Compl.* (Doc. 1) at 29–30.¹⁶ The Equal Protection Clause provides that no State shall “deny to any person within its

¹⁶ Based on the record evidence, the Court finds that Minor Plaintiffs have standing to bring their Equal Protection claim. Defendants raise no opposition to this conclusion. However, Parent Plaintiffs, Healthcare Plaintiffs, and Plaintiff Eknes-Tucker do not explain—nor is it readily apparent—how they have standing to bring an Equal Protection Claim and, thus, are not substantially likely to succeed on the merits of their claim.

jurisdiction the equal protection of the laws.” U.S. CONST. AMEND. XIV, § 1. The Clause’s chief purpose “is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923)).

As the Supreme Court recently explained, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). Governmental classification based on an individual’s gender nonconformity equates to a sex-based classification for purposes of the Equal Protection Clause. *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011). Here, the Act prohibits transgender minors—and only transgender minors—from taking transitioning medications due to their gender nonconformity. *See* S.B. 184, ALA. 2022 REG. SESS. § 4(a)(1)–(3) (Ala. 2022). The Act therefore constitutes a sex-based classification for purposes of the Fourteenth Amendment.

The State views things differently. The State argues that the Act creates two categories of people: (1) minors who seek transitioning medications “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex”;

and (2) “all other minors.” *Defs.’ Br.* (Doc. 74) at 93. (quoting S.B. 184, ALA. 2022 REG. SESS. § 4(a) (Ala. 2022)). Because transgender minors fall into both categories, the State reasons, the Act is not a sex-based classification. *Id.* at 94.

The fundamental flaw in this argument is that the first category consists entirely of transgender minors. The Act categorically prohibits transgender minors from taking transitioning medications due to their gender nonconformity. In this way, the Act places a special burden on transgender minors because their gender identity does not match their birth sex. The Act therefore amounts to a sex-based classification for purposes of the Equal Protection Clause. *See Glenn*, 663 F.3d at 1317 (explaining that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”).

Sex-based classifications are constitutional only when they satisfy a heightened standard of review known as intermediate scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). To satisfy this standard, a classification must substantially relate to an important governmental interest. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). The State bears the burden to proffer an exceedingly persuasive justification for the classification. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017). An exceedingly persuasive justification is one that is “genuine, not hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The State again argues that the Act's purpose is to protect children from experimental medical procedures and to stop medical providers from "aggressively pushing" these medications on minors. *Defs.' Br.* (Doc. 74) at 109–120. As explained above, the State puts on no evidence to show that transitioning medications are "experimental." The record indicates that at least twenty-two major medical associations in the United States endorse these medications as well-established, evidence-based methods for treating gender dysphoria in minors. *Tr.* at 25, 97–98, 126–27. Finally, nothing in the record shows that medical providers are pushing transitioning medications on minors. Accordingly, the States' proffered justifications are hypothesized, not exceedingly persuasive. Thus, Minor Plaintiffs are substantially likely to succeed on their Equal Protection claim.

iii. Void-for-Vagueness Claim

Plaintiffs collectively claim that the Act is void for vagueness under the Fifth and Fourteenth Amendments because it does not sufficiently define "what actions constitute 'caus[ing]' any of the proscribed activities upon a minor." *Compl.* (Doc. 1) at 34–35. Under the void-for-vagueness doctrine, a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Marte*, 356 F.3d 1336, 1342 (11th Cir. 2004) (quoting *United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002)). A

federal court reviews a void-for-vagueness claim only when the litigant alleges a constitutional harm. *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1349–50 (11th Cir. 2011).

In this context, constitutional harms come in two forms: (1) where a criminal defendant violates a vague statute, comes under prosecution, and then moves to dismiss the charges on the grounds that he or she lacked notice that his or her conduct was unlawful; and (2) where a civil plaintiff is “chilled from engaging in constitutional activity” due to a vague statute. *Dana’s R.R. Supply v. Att’y Gen.*, 807 F.3d 1235, 1241 (11th Cir. 2015). Here, Plaintiffs’ void-for-vagueness claim falls into the second category.

Plaintiffs, however, are not substantially likely to succeed on their claim. Under ALA. CODE § 13A-2-5(a), a person is liable for causing a crime “if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was sufficient to produce the result and the conduct of the actor clearly insufficient.” The fact that the Act has a scienter requirement greatly weighs against Plaintiffs’ void-for-vagueness claim. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (“The Court has made clear that scienter requirements alleviate vagueness concerns.”); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (“This Court has long recognized that the constitutionality of a

vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.”).

Also weighing against Plaintiffs’ claim is the State’s interpretation of the Act. During the preliminary injunction hearing, Alabama Solicitor General Edmund LaCour explained that a person must administer or prescribe transitioning medications to violate the Act. *Tr.* at 409–11. General LaCour opined that a person cannot violate the Act simply by advising a minor to take transitioning medications or by driving a minor to a gender clinic where transitioning medications are administered. *Id.* at 410.

Additionally, the statutory scienter requirement and the State’s interpretation both align with the modern, plain-language definition of the word cause. According to Merriam-Webster’s Dictionary, “cause” means to “effect by command, authority, or force” or “bring into existence” an action. *Cause*, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). Based on the record evidence, Plaintiffs do not show that they have been chilled from engaging in constitutional activity due to the Act. Plaintiffs are therefore not substantially likely to succeed on their void-for-vagueness claim at this stage of litigation.

iv. Free speech claim

Plaintiffs collectively claim that the Act violates their First Amendment right to free speech by prohibiting “any ‘person,’ including physicians, healthcare

professionals, or even parents, from engaging in speech that would ‘cause’ a transgender minor to receive medical treatment for gender dysphoria.” *Compl.* (Doc. 1) at 33–34. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech[.]” U.S. CONST. AMEND. I. At its core, “the First Amendment means that government” generally “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The Amendment, however, offers no protection to words that incite or constitute criminal activity. For example, sexually derogatory remarks may violate Title VII’s general prohibition of sexual discrimination in the workplace. 42 U.S.C. § 2000-e2; *see also* 29 C.F.R. § 1604.11(a) (explaining that, under certain circumstances, “[u]nwelcome sexual advances, *requests* for sexual favors, and other *verbal* or physical conduct of a sexual nature” are actionable as sexual harassment for purposes of Title VII (emphasis added)). Likewise, “[s]peech attempting to arrange the sexual abuse of children is no more constitutionally protected than speech attempting to arrange any other type of crime.” *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004). More examples abound, but the point is this: Where the State does not target conduct because of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

As explained *supra* Section III.A.1.iii, the Act does not criminalize speech that could indirectly lead to a minor taking transitioning medications. Rather, the only speech criminalized by Act is that which compels the administration or prescription of transitioning medications to minors. Accordingly, the Act targets conduct (administration and prescription), not speech. Plaintiffs are therefore not substantially likely to succeed on their First Amendment claim.

2. Plaintiffs’ Preemption Claim

Parent Plaintiffs, Minor Plaintiffs, and Healthcare Plaintiffs bring their preemption claim under Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116. *Compl.* (Doc. 1) at 31. Section 1557, through its incorporation of the Title IX, prohibits discrimination based on sex and the denial of benefits based on sex in any health program or activity that receives federal funding. 42 U.S.C. § 18116(a); 20 U.S.C. § 1681 *et seq.* Here, Plaintiffs generally rely on the same arguments Minor Plaintiffs made in support of their Equal Protection claim. *Pls.’ Br.* (Doc. 8) at 49–52; *Tr.* at 379.

At this stage of litigation, Plaintiffs’ preemption claim fails. As explained *supra* Section III.A.1.ii, only Minor Plaintiffs are substantially likely to succeed on their Equal Protection claim. Additionally, Section 1557—by incorporating the enforcement mechanism of Title IX—“is enforceable against institutions and programs that receive federal funds, but does not authorize suits against individuals.”

Hill v. Cundiff, 797 F.3d 948, 977 (11th Cir. 2015). It is presently unclear how Plaintiffs may bring their preemption claim against Defendants who are state officials, not institutions. Due to these concerns, Plaintiffs are not substantially likely to succeed on their preemption claim.

B. Irreparable Harm

The Court next considers whether Parent Plaintiffs and Minor Plaintiffs will suffer irreparable harm absent injunctive relief.¹⁷ Harm “is ‘irreparable’ only if it cannot be undone through monetary remedies.” *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am.*, 896 F.2d at 1285. An irreparable harm is one that is “actual and imminent, not remote or speculative.” *Odebrecht Const., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1288 (11th Cir. 2013). The risk of suffering severe medical harm constitutes irreparable harm. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (explaining that a risk of suffering “a severe medical setback” is an irreparable injury); *Blaine v. N. Brevard Cnty. Hosp. Dist.*, 312 F. Supp. 3d 1295, 1306 (M.D. Fla. 2018) (finding irreparable harm where doctor plaintiffs could not provide necessary medical care to their patients).

The Act prevents Parent Plaintiffs from treating their children with transitioning medications subject to medically accepted standards. S.B. 184, ALA.

¹⁷ *See Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994) (explaining that a court need not consider whether a plaintiff shows irreparable harm if he or she does not show a substantial likelihood of success on his or her claims).

2022 REG. SESS. § 4(a)(1)–(3) (Ala. 2022). The record shows that, without transitioning medications, Minor Plaintiffs will suffer severe medical harm, including anxiety, depression, eating disorders, substance abuse, self-harm, and suicidality. *Tr.* at 20, 167. Additionally, the evidence shows that Minor Plaintiffs will suffer significant deterioration in their familial relationships and educational performance. *Id.* at 35, 112–13. The Court therefore concludes that Parent Plaintiffs and Minor Plaintiffs will suffer irreparable harm absent injunctive relief.

C. Balance of Harms & Public Interests

The Court now considers the final two elements together. To satisfy the third and fourth elements of a preliminary injunction, a plaintiff must show that the harm she will likely suffer without an injunction outweighs any harm that her opponent will suffer from the injunction and that the injunction would not disserve (or be adverse to) the public interest. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). These factors merge when the State is the opponent. *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (*per curiam*).

This case largely presents two competing interests. On one hand, “preliminary injunctions of legislative enactments—because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits—must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other

strict legal and equitable principles that restrain courts.” *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am.*, 896 F.2d at 1285. On the other hand, “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.” *Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944).

Based the record evidence, the Court finds that the imminent threat of harm to Parent Plaintiffs and Minor Plaintiffs—i.e., severe physical and/or psychological harm—outweighs the harm the State will suffer from the injunction. The Court further finds that an injunction is not adverse to the public interest. To the contrary, enjoining the Act upholds and reaffirms the “enduring American tradition” that parents—not the States or federal courts—play the primary role in nurturing and caring for their children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Accordingly, the final two factors favor injunctive relief.

IV. SECURITY

Defendants argue that, if injunctive relief is appropriate, the Court should require each Healthcare Plaintiff to post a \$1 million security. *Defs.’ Br.* (Doc. 74) at 159–60.¹⁸ Calculating the “amount of an injunction bond is within the sound discretion of the district court.” *Carillon Importers, Ltd. v. Frank Pesce Int’l Grp.*,

¹⁸ According to Defendants, this amount represents that “by which [Healthcare] Plaintiffs will be unjustly enriched should they be allowed to administer profitable (and illegal) medical procedures to kids.” *Defs.’ Br.* (Doc. 74) at 160.

112 F.3d 1125, 1127 (11th Cir. 1997) (per curiam). Here, the Court finds that a security bond is not necessary for three reasons. First, as explained *supra* Part III, Healthcare Plaintiffs themselves are not entitled to preliminary injunctive relief. Second, Federal Rule of Civil Procedure 65 does not require the United States to pay security. FED. R. CIV. P. 65(c). Finally, Defendants do not allege that they will suffer any cost or economic harm if they are wrongly enjoined from enforcing the Act. *Defs.’ Br.* (Doc. 74) at 159–60. The Court therefore relieves Plaintiffs from posting security under Rule 65.

V. CONCLUSION

For these reasons, the Court **GRANTS** in part Plaintiffs’ motion for preliminary injunction (Doc. 7) and **ENJOINS** Defendants from enforcing Section 4(a)(1)–(3) of the Act pending trial. The Court **GRANTS** in part the United States’s motion for preliminary injunction (Doc. 62) to the same degree and effect. All other provisions of the Act remain enforceable.

DONE and **ORDERED** May 13, 2022.

A handwritten signature in black ink, appearing to read "L.C. Burke", is written over a horizontal line.

LILES C. BURKE
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

DYLAN BRANDT, ET AL

PLAINTIFFS

V.

4:21CV00450 JM

LESLIE RUTLEDGE, ET AL

DEFENDANTS

SUPPLEMENTAL ORDER

After further consideration, the Court supplements the ruling made at the conclusion of the July 21, 2021 hearing to include the following findings:

On April 6, 2021, the Arkansas Legislature passed House Bill 1570, Act 626 of the 93rd General Assembly of Arkansas, to be codified at Ark. Code Ann. §§ 20-9-1501 to 20-9-1504 and 23-79-164 (“Act 626”). Act 626 prohibits a physician or other healthcare provider from providing or referring any individual under the age of 18 for “gender transition procedures.”

“Gender transition procedures” means the process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex, and may involve social, legal, or physical changes;

(6)(A) “Gender transition procedures” means any medical or surgical service, including without limitation physician's services, inpatient and outpatient hospital services, or prescribed drugs related to gender transition that seeks to:

- (i) Alter or remove physical or anatomical characteristics or features that are typical for the individual's biological sex; or
- (ii) Instill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without limitation medical services that provide puberty-blocking drugs, cross-sex hormones, or other mechanisms to promote the development of feminizing or masculinizing features in the opposite biological sex, or genital or nongenital gender reassignment surgery performed for the purpose of assisting an individual with a gender transition.

AR LEGIS 626 (2021), 2021 Arkansas Laws Act 626 (H.B. 1570). The Defendants asserts that Arkansas has a compelling government interest in protecting the health and safety of its citizens, particularly “vulnerable” children who are gender nonconforming or who experience distress at identifying with their biological sex. *Id.*

Plaintiffs are minors, Dylan Brandt, Sabrina Jennen, Brooke Dennis, Parker Saxton (the “Patient Plaintiffs”), their parents, Joanna Brandt, Lacey and Aaron Jennen, Amanda and Shayne Dennis, Donnie Saxton (the “Parent Plaintiffs”) and their healthcare providers, Dr. Michele Hutchison, and Dr. Kathryn Stambough (the “Physician Plaintiffs”). Plaintiffs have filed suit claiming the Act violates the Equal Protection Clause, Due Process Clause, and the First Amendment. They seek a preliminary injunction to enjoin Defendants and their successors in office from enforcing Act 626 during the pendency of this litigation. Plaintiffs contend that Act 626 categorically prohibits transgender adolescents with gender dysphoria from treatment, that the patient, their parents, and their medical providers agree, is medically necessary and in the adolescent’s best interest. They allege that the Act singles out individuals in need of medically necessary gender-affirming care solely because the individual’s gender identity does not conform to their assigned sex at birth.

I. Rule 12(b)(1) Motion to Dismiss

As stated on the record, the Court finds that the Patient and Parent Plaintiffs have standing under the Equal Protection Clause to challenge Act 626’s prohibition of “gender transition procedures” as that term is defined in Ark. Code Ann. §§ 20-9-1501(6). They also have standing to challenge the Act’s authorization of private rights of action. “Where an unconstitutional statute provides for enforcement both through official acts and private suits, Plaintiffs with standing to seek an injunction against the official acts may also challenge the

constitutionality of private suits.” See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887-88 (1992).

The Court finds that Physician Plaintiffs have standing in their own right to challenge the Act’s unequal treatment between healthcare providers who provide gender-affirming care to transgender patients, which would be prohibited by Act 626, and other healthcare providers, who provide all other medically accepted care, including gender-affirming care to non-transgender patients, which is not prohibited. See *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, 472 F. Supp. 3d 183, 206 (D. Md. 2020).

The Court finds that Physician Plaintiffs have third-party standing to challenge Act 626 on behalf of their patients based upon the Supreme Court’s opinion in *June Med. Serv’s. LLC v. Russo*, 140 S. Ct. 2103, 2118-2119 (2020) (“[W]e have generally permitted plaintiffs to assert third-party rights in cases where the ‘enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.”) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)). Further, Physician Plaintiffs have alleged a close relationship with their patients and a hindrance to their patients’ ability to protect their interests because of the risk of discrimination and their patients’ desire to protect their privacy. See *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (patient may be “chilled” from asserting their rights “by a desire to protect the very privacy of [their] decision from the publicity of a court suit.”).

II. Preliminary Injunction

“The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief.” *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984). The Court considers four factors in evaluating Plaintiffs’ request for a preliminary injunction: (1) the likelihood of success on the merits; (2) the likelihood

of irreparable harm in the absence of an injunction; (3) the balance of equities; and (4) the public interest. *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485-86 (8th Cir. 1983). “When the government is a party, these last two factors merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

A. Equal Protection

To analyze Plaintiffs’ facial challenge to Act 626, the Court must determine what level of scrutiny applies and whether Act 626 survives that scrutiny. The Court concludes that heightened scrutiny applies to Plaintiffs’ Equal Protection claims because Act 626 rests on sex-based classifications and because “transgender people constitute at least a quasi-suspect class.” *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (8th Cir. 2020); accord *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020) (discrimination for being transgender is discrimination “on the basis of sex”). Defendants argue that Act 626 does not specifically refer to transgender individuals. It does, however, refer to gender transition which is only sought by transgender individuals. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (“Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed.”).

Under heightened scrutiny, Act 626 must be substantially related to a sufficiently important governmental interest. A policy subject to intermediate scrutiny must be supported by an “exceedingly persuasive justification.” *United States v. Virginia*, 518 U.S. 515, 531 (1996). The policy must serve important governmental objectives, and the government must show “that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 533 (citation omitted).

Defendants contend that Act 626 is substantially related to the State’s important governmental objectives of protecting vulnerable children from experimental treatment and regulating the ethics of the medical profession. Defendants contend that there is a lack of credible scientific evidence that gender-transition procedures improve children’s health. They also contend that the consequences of performing these procedures on Arkansas children are too great to allow physicians and healthcare providers to continue performing them. Defendants state that the Arkansas General Assembly passed Act 626 in response to a recent judicial ruling of the U.K. High Court of Justice of England and Wales and an Arizona district court. *See Bell v. Tavistock and Portman Nat’l Health Serv. Found. Trust*, [2020] EWHC (Admin) 3274; *Hennessy-Waller v. Snyder*, 2021 WL 1192842, at *1 (D. Ariz. Mar. 30, 2021).

In *Tavistock*, the U.K. High Court considered the “narrow” issue of whether “a child or young person under the age of 16 [can] achieve *Gillick*¹ competence in respect of the decision to take PBs [puberty blockers] for GD [gender dysphoria]” *Id.* at ¶133. Although Defendants argue that this case is evidence that the U.K. Court is on the forefront of ethics by banning all gender transitioning procedures, *Tavistock* does not categorically prohibit individuals from all “gender transition procedures.” The U.K. Court merely concluded that it is “unlikely” that a 13-year-old or under would be competent to give *Gillick* consent to puberty blockers and doubtful that a 14- or 15-year-old could give consent. However, a 16-year-old or older is presumed to have the ability to consent to these procedures. Act 626 prohibits anyone under the age of 18 from receiving treatment without regard to informed consent.

¹ *Gillick* refers to a U.K. High Court case where the House of Lords held by a majority that a doctor could lawfully give contraceptive advice and treatment to a girl aged under 16 if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment and provided that certain conditions were satisfied. *See Gillick v. West Norfolk and Wisbech Health Authority* [1986] AC 112.

The Arizona district court case, *Hennessey-Waller v. Snyder*, which is on appeal to the Ninth Circuit Court of Appeals, denied plaintiffs’ motion to enjoin the director of the Arizona Health Care Cost Containment System “from further enforcement of” a regulation that excludes gender reassignment surgery from Arizona’s Medicaid coverage and to “order AHCCCS to cover male chest reconstruction surgery for D.H. and John.” *Hennessey-Waller v. Snyder*, 2021 WL 1192842, at *1 (D. Ariz. Mar. 30, 2021). The *Hennessey-Waller* plaintiffs are not prohibited from all gender-transition treatments and their healthcare providers are not prohibited from providing gender-transition treatments to them. The Court does not find either “authority” to be persuasive or precedential.

Plaintiffs argue that Act 626 does not protect children. Instead, it bans potentially life-saving treatment to transgender adolescents given in accordance with widely accepted medical protocols for treatment of adolescent gender dysphoria.² The consensus recommendation of medical organizations is that the only effective treatment for individuals at risk of or suffering from gender dysphoria is to provide gender-affirming care.³ According to the Medical Organizations, the goal of gender-affirming care is to provide patients who struggle with their gender identity the time and support they need to resolve that struggle and to mitigate the distress

² Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Soc’y Clinical Practice Guideline*, 1029110 J. Clinical Endocrinology & Metabolism, Vol. 103, Issue 11, pgs. 3869-3903 (Nov. 2017) [hereinafter “Endocrine Soc’y Clinical Guidelines”]; Eli Coleman et al., *The World Professional Association for Transgender Health. Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 13, 19 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?t=1613669341 [hereinafter “WPATH Standards of Care”].

³ See Brief for American Medical Association, American Pediatric Society, American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychiatric Association, American Association of Physicians for Human Rights Inc, American College of Osteopathic Pediatricians, Arkansas Chapter of the American Academy of Pediatrics, Arkansas Council on Child and Adolescent Psychiatry, Arkansas Psychiatric Society, Association of Medical School Pediatric Department Chairs, Endocrine Society, National Association of Pediatric Nurse Practitioners, Pediatric Endocrine Society, Society for Adolescent Health and Medicine, Society for Pediatric Research, Society of Pediatric Nurses, and World Professional Association for Transgender Health (the “Medical Organizations”) as Amici Curiae Supporting Plaintiffs at ECF No. 30, p.16.

that can be associated with that condition.⁴ Gender-affirming care seeks to minimize the incongruence between a transgender person's gender identity and their sex assigned at birth, thereby minimizing or eliminating gender dysphoria. *Id.* In addition, Plaintiffs argue that the State's contention that gender transition treatments cause irreversible and dangerous consequences is belied by the fact that the same medical treatments banned for transgender adolescents for "gender transition" by Act 626 are permitted for non-transgender adolescents for any other purpose, including to bring their bodies into alignment with their gender.

At this point in the proceedings, the Court finds that Act 626 is not substantially related to protecting children in Arkansas from experimental treatment or regulating the ethics of Arkansas doctors and Defendant's purported health concerns regarding the risks of gender transition procedures are pretextual. The State's reliance on the U.K. High Court's ruling is not credible. If the State's health concerns were genuine, the State would prohibit these procedures for all patients under 18 regardless of gender identity. The State's goal in passing Act 626 was not to ban a treatment. It was to ban an outcome that the State deems undesirable. In other words, Defendants' rationale that the Act protects children from experimental treatment and the long-term, irreversible effects of the treatment, is counterintuitive to the fact that it allows the same treatment for cisgender minors as long as the desired results conform with the stereotype of their biological sex.

The Court finds the Act's ban of services and referrals by healthcare providers is not substantially related to the regulation of the ethics of the medical profession in Arkansas. Gender-affirming treatment is supported by medical evidence that has been subject to rigorous study. Every major expert medical association⁵ recognizes that gender-affirming care for

⁴ See Brief for Medical Organizations as Amici Curiae, *supra* note 3, ECF No. 30 at 16-17.

⁵ See Brief for Medical Organizations as Amici Curiae, *supra* note 3, ECF No. 30 at 16.

transgender minors may be medically appropriate and necessary to improve the physical and mental health of transgender people. Act 626 prohibits most of these treatments. Further, the State's goal of ensuring the ethics of Arkansas healthcare providers is not attained by interfering with the patient-physician relationship, unnecessarily regulating the evidence-based practice of medicine and subjecting physicians who deliver safe, legal, and medically necessary care to civil liability and loss of licensing.⁶ If the Act is not enjoined, healthcare providers in this State will not be able to consider the recognized standard of care for adolescent gender dysphoria. Instead of ensuring that healthcare providers in the State of Arkansas abide by ethical standards, the State has ensured that its healthcare providers do not have the ability to abide by their ethical standards which may include medically necessary transition-related care for improving the physical and mental health of their transgender patients. The Court finds that Act 626 cannot withstand heightened scrutiny and based on the record would not even withstand rational basis scrutiny if it were the appropriate standard of review. Plaintiffs are, therefore, likely to succeed on the merits of their Equal Protection claim.

Next, the Court finds that Plaintiffs will suffer irreparable harm if Act 626 is not enjoined. The Act will cause irreparable physical and psychological harms to the Patient Plaintiffs by terminating their access to necessary medical treatment. Plaintiffs who have begun puberty blocking hormones will be forced to stop the treatments which will cause them to undergo endogenous puberty. Plaintiffs who will soon enter puberty will lose access to puberty blockers. In each case, Patient Plaintiffs will have to live with physical characteristics that do not

⁶ See Statement, American Academy of Family Physicians, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American College of Physicians, American Osteopathic Association, and American Psychiatric Association, *Frontline Physicians Call on Politicians to End Political Interference in the Delivery of evidence Based Medicine*, (May 15, 2019), <https://www.acog.org/news/news-releases/2019/05/frontline-physicians-call-on-politicians-to-end-political-interference-in-the-delivery-of-evidence-based-medicine>.

conform to their gender identity, putting them at high risk of gender dysphoria and lifelong physical and emotional pain. Parent Plaintiffs face the irreparable harm of having to watch their children experience physical and emotional pain or of uprooting their families to move to another state where their children can receive medically necessary treatment. Physician Plaintiffs face the irreparable harm of choosing between breaking the law and providing appropriate guidance and interventions for their transgender patients.

The Court finds that the State’s interest in enforcing Act 626 during the pendency of this litigation pales in comparison to the certain and severe harm faced by Plaintiffs. The “State has no interest in enforcing laws that are unconstitutional. . .” *Little Rock Fam. Plan. Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1322 (E.D. Ark. 2019), *aff’d in part, appeal dismissed in part and remanded*, 984 F.3d 682 (8th Cir. 2021). Because Plaintiffs have demonstrated at least at this preliminary stage that they are likely to prevail on the issue of Act 626’s unconstitutionality, an injunction preventing the State from enforcing the Act does not irreparably harm the State.

B. Due Process

The Due Process Clause of the Fourteenth Amendment forbids states to “deprive any person of life, liberty, or property, without due process of law....” U.S. Const. amend. XIV, § 1. The Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Kanuszewski v. Mich. Dep’t of Health and Human Serv’s*, 927 F.3d 396, 419 (6th Cir. 2019) (“[P]arents’ substantive due process right to make decisions concerning the care,

custody, and control of their children includes the right to direct their children's medical care.”). Parents are presumed to be acting in the best interest of their children. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

The Court finds that the Parent Plaintiffs have a fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a judgment that medical care is necessary. So long as a parent adequately cares for his or her children, “there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.” *Troxel*, 530 U.S. at 68-69.

Strict scrutiny is the appropriate standard of review for infringement of a fundamental parental right. *Glucksberg*, 521 U.S. at 719-20. In applying strict scrutiny, the Court finds that Defendants have not met their burden of showing that Arkansas has a compelling state interest in infringing upon parents' fundamental right to seek medical care for their children, or that Act 626 is narrowly tailored to serve that interest. As stated, the State has not shown that Act 626 serves the stated goal of protecting Arkansas's children. The goal in this context is pretextual because Act 626 allows the same treatments for cisgender minors that are banned for transgender minors as long as the desired results conform with the stereotype of the minor's biological sex. Based on these findings, the State could not withstand either heightened scrutiny or rational basis review.

The Court finds that Plaintiffs have shown irreparable harm. The State suffers little harm from maintaining the status quo through the litigation of this case. The risk of irreparable harm to the Plaintiffs tips the balance of equities in favor of a preliminary injunction of Act 626.

C. First Amendment

Plaintiffs claim that Act 626 prevents healthcare professionals from speaking, and their patients and parents from hearing, about medically accepted treatments for gender dysphoria in violation of their First Amendment rights. Defendants argue that Act 626 is not a regulation of speech but rather a regulation of professional conduct. Further, they argue that the Act does not restrict any right to receive information.

The Court finds that Act 626's ban on referrals by healthcare providers is a regulation of speech. The Supreme Court has held that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct")). "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 439 (1963); *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) ("[T]his Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'").

The Court further finds that Act 626 is a content and viewpoint-based regulation because it restricts healthcare professionals only from making referrals for "gender transition procedures," not for other purposes. As such, it is "presumptively unconstitutional" and is subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). To meet the strict scrutiny standard, Defendants assert that Arkansas has a compelling interest in protecting children from experimental gender-transition procedures and safeguarding medical ethics.

However, the Supreme Court has held that the government does not have a legitimate interest in protecting against the “fear that people [will] make bad decisions if given truthful information.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002); *see also Brown v. Entm’t. Merch. Ass’n*, 564 U.S. 786, 794 (2011) (while states can protect children from harm, that “does not include a free-floating power to restrict the ideas to which children may be exposed”). In this case, the State believes that a transgender adolescent who, along with their parents and health care providers, decides to receive gender transition treatment is making a bad decision. The State believes it can keep these individuals from getting this treatment if healthcare providers are not allowed to refer their patients to providers in other states who can prescribe the treatment. Because the Court finds that Act 626 cannot survive strict scrutiny or even rational scrutiny, Plaintiffs are likely to succeed on the merits of their First Amendment claim.

The Court also finds that Plaintiffs will suffer irreparable harm if Act 626 is not enjoined. “It is well-established that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015) (*Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The balance of equities so favors the Plaintiffs that justice requires the Court to preserve the status quo until the merits of the case are determined.

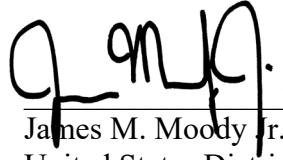
III. Rule 12(b)(6) Motion to Dismiss

As for the Defendants motion to dismiss for failure to state a claim, it is inherent in the Court’s decision to grant the preliminary injunction that the Plaintiffs have stated claims for violations of their Equal Protection, Due Process, and First Amendment rights.

IV. Conclusion

Defendants and successors in office are enjoined from enforcing any provision of House Bill 1570, Act 626 of the 93rd General Assembly of Arkansas, to be codified at Ark. Code Ann. §§ 20-9-1501 to 20-9-1504 and 23-79-164 during the pendency of the litigation of this case.

IT IS SO ORDERED this 2nd day of August, 2021.



James M. Moody Jr.
United States District Judge

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 114,153

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

SYLLABUS BY THE COURT

1.

To obtain a temporary injunction, a plaintiff must show the court: (1) The plaintiff has a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest.

2.

When a party alleges a trial court erred in issuing a temporary injunction, an appellate court examines whether the court abused its discretion. A trial court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.

3.

Kansas courts have the authority to interpret Kansas constitutional provisions independently of the manner in which federal courts interpret similar or corresponding provisions of the United States Constitution. This can result in the Kansas Constitution protecting the rights of Kansans more robustly than would the United States Constitution.

4.

Kansas courts look to the words of the Kansas Constitution to interpret its meaning. When the words do not make the drafters' and people's intent clear, courts look to the historical record, remembering the polestar is the intention of the makers and adopters of the relevant provisions.

5.

Appellate courts conduct de novo review of issues requiring the interpretation of constitutional provisions, which means appellate courts are not bound by the interpretation of a lower court.

6.

Section 1 of the Kansas Constitution Bill of Rights sets forth rights that are broader than and distinct from the rights in the Fourteenth Amendment to the United States Constitution.

7.

The rights acknowledged in section 1 of the Kansas Constitution Bill of Rights are judicially enforceable against governmental action that does not meet constitutional standards.

8.

Section 1 of the Kansas Constitution Bill of Rights affords protection of the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy.

9.

The State may only infringe upon the right to decide whether to continue a pregnancy if the State has a compelling interest and has narrowly tailored its actions to that interest.

10.

When common-law terms are used in the Kansas Constitution Bill of Rights, courts should look to common-law definitions for their meaning.

11.

The recognition of inalienable natural rights in section 1 of the Kansas Constitution Bill of Rights is intended for all Kansans, including pregnant women.

12.

The Kansas Constitution does not begin with an enumeration of the powers of government; it instead begins with a Bill of Rights for all Kansans, which in turn begins with a statement of inalienable natural rights, among which are life, liberty, and the pursuit of happiness. By this ordering, demonstrating the supremacy placed on the rights of individuals, preservation of these natural rights is given precedence over the establishment of government.

13.

This court, when considering claims brought under section 1 of the Kansas Constitution Bill of Rights has recognized and adopted three standards: (1) the rational basis standard, which requires only that the enactment bear some rational relationship to a legitimate state interest; (2) the heightened or intermediate scrutiny standard, which requires the enactment to substantially further an important state interest; and (3) the strict scrutiny standard, which requires the enactment serve some compelling state interest and be narrowly tailored to further that interest. The determination of which of the three standards applies depends on the nature of the right at stake.

14.

The most searching of these standards—strict scrutiny—applies when a fundamental right is implicated.

15.

The natural right of personal autonomy is fundamental and thus requires applying strict scrutiny.

16.

Under strict scrutiny, the burden falls on the government to defend challenged legislation.

17.

Before a court considers whether any governmental action survives strict scrutiny, it must be sure the action actually impairs the right.

18.

Generally, a statute comes before the court cloaked in a presumption of constitutionality, and it is the duty of the one attacking the statute to sustain the burden of proving unconstitutionality.

19.

When a statute is presumed constitutional, all doubts must be resolved in favor of its validity. If there is any reasonable way to construe that statute as constitutionally valid, the court has the authority and duty to do so.

20.

In a case involving a suspect classification or fundamental interest, the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny. In that case, the burden of proof is shifted from plaintiff to defendant and the ordinary presumption of validity of the statute is reversed.

21.

No presumption of constitutionality applies to a statute subject to strict scrutiny under section 1 of the Kansas Constitution Bill of Rights.

Review of the judgment of the Court of Appeals in 52 Kan. App. 2d 274, 368 P.3d 667 (2016). Appeal from Shawnee District Court; LARRY D. HENDRICKS, judge. Opinion filed April 26, 2019. The judgment of the Court of Appeals affirming the district court is affirmed. The judgment of the district court is affirmed, and the case is remanded.

Stephen R. McAllister, solicitor general, argued the cause, and *Sarah E. Warner* and *Shon D. Qualseth*, of Thompson Ramsdell Qualseth & Warner, P.A., of Lawrence, *Jeffrey A. Chanay*, chief deputy attorney general, *Dennis D. Depew*, deputy attorney general, *Dwight R. Carswell*, assistant solicitor

general, *Bryan C. Clark*, assistant solicitor general, and *Derek Schmidt*, attorney general, were with him on the briefs for appellant.

Janet Crepps, of Center for Reproductive Rights, of New York, New York, argued the cause, and *Genevieve Scott* and *Zoe Levine*, of the same office, *Erin Thompson*, of Foland, Wickens, Eisfelder, Roper and Hofer, P.C., of Kansas City, Missouri, *Lee Thompson*, of Thompson Law Firm, LLC, of Wichita, *Robert V. Eye*, of Robert V. Eye Law Office, LLC, of Lawrence, and *Teresa A. Woody*, of The Woody Law Firm PC, of Kansas City, Missouri, were with her on the briefs for appellee.

Mary Ellen Rose, of Overland Park, *Kevin M. Smith*, of Law Offices of Kevin M. Smith, P.A., of Wichita, and *Paul Benjamin Linton*, of Thomas More Society, of Northbrook, Illinois, were on the briefs for amicus curiae Family Research Council.

Stephen Douglas Bonney, of ACLU Foundation of Kansas, of Overland Park, and *Brianne J. Gorod* and *David H. Gans*, of Constitutional Accountability Center, of Washington, D.C., were on the brief for amici curiae Constitutional Accountability Center and American Civil Liberties Union Foundation of Kansas.

Frederick J. Patton, II, of Patton and Patton Chartered, of Topeka, and *Teresa S. Collett*, of Saint Paul, Minnesota, were on the briefs for amicus curiae Kansans for Life.

Mark P. Johnson, of Dentons US LLP, of Kansas City, Missouri, was on the brief for amici curiae Kansas physicians.

Don Saxton, of Saxton Law Firm LLC, of Kansas City, Missouri, and *Kimberly A. Parker*, *Skye L. Perryman*, *Brittani Kirkpatrick Ivey*, and *Souvik Saha*, of Wilmer Cutler Pickering Hale and Dorr LLP, of Washington, D.C., were on the briefs for amicus curiae American College of Obstetricians and Gynecologists.

Richard J. Peckham, of Andover, and *Mathew D. Staver* and *Horatio G. Mihet*, of Liberty Counsel, of Orlando, Florida, were on the brief for amici curiae American Association of Pro-Life Obstetricians & Gynecologists, American College of Pediatricians, and Catholic Medical Association.

PER CURIAM: Section 1 of the Kansas Constitution Bill of Rights provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." We are now asked: Is this declaration of rights more than an idealized aspiration? And, if so, do the substantive rights include a woman's right to make decisions about her body, including the decision whether to continue her pregnancy? We answer these questions, "Yes."

We conclude that, through the language in section 1, the state's founders acknowledged that the people had rights that preexisted the formation of the Kansas government. There they listed several of these natural, inalienable rights—deliberately choosing language of the Declaration of Independence by a vote of 42 to 6.

Included in that limited category is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy. Although not absolute, this right is fundamental. Accordingly, the State is prohibited from restricting this right unless it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest. And we thus join many other states' supreme courts that recognize a similar right under their particular constitutions.

Finally, we conclude that the plaintiffs Herbert C. Hodes, M.D., Traci Lynn Nauser, M.D., and Hodes & Nauser, MDs, P.A. (Doctors) have shown they are substantially likely to ultimately prevail on their claim that Senate Bill 95 violates these principles by severely limiting access to the safest procedure for second-trimester abortions. As a result, we affirm the trial court's injunction temporarily enjoining the enforcement of S.B. 95 and remand to that court for full resolution on the merits.

THE LEGISLATION AND THIS CASE'S PROCEDURAL HISTORY

In 2015, the Kansas Legislature enacted S.B. 95, which is now codified at K.S.A. 65-6741 through 65-6749. S.B. 95 prohibits physicians from performing a specific abortion method referred to in medical terms as Dilation and Evacuation (D & E) except when "necessary to preserve the life of the pregnant woman" or to prevent a "substantial and irreversible physical impairment of a major bodily function of the pregnant woman." K.S.A. 65-6743(a).

In this case, the Doctors provide abortions, including D & E procedures, in Kansas. They filed this action challenging S.B. 95 on behalf of themselves and their patients on June 1, 2015. They argued S.B. 95 prevents them from using the safest method for most second-trimester abortions—the D & E method. These restrictions, according to the Doctors, violate sections 1 and 2 of the Kansas Constitution Bill of Rights because they infringe on inalienable natural rights, specifically, the right to liberty.

A graphic description of the D & E procedure referred to in S.B. 95 is not necessary to resolving the legal issues before us. Although the detailed nature of the procedure may factor into the lower court's later decision on the full merits, at this temporary injunction stage the United States Supreme Court's description suffices. That Court explained the procedure involves "(1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the 15th week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus." *Stenberg v. Carhart*, 530 U.S. 914, 925, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000). The Doctors argued, and the trial court found, that 95% of second-trimester abortions in the United States are performed using the D & E procedure.

When the Doctors filed this action, they also filed a motion for temporary injunction to prevent S.B. 95 from taking effect while the case moved forward. The Doctors submitted documentation to support this motion, including two affidavits from board-certified physicians licensed to provide abortion care and one affidavit from an expert on medical ethics.

The defendants, the Kansas Attorney General and the District Attorney for Johnson County (the State), submitted a response opposing the temporary injunction, asserting that the Doctors had failed to show they were entitled to the relief they sought because there is no right to abortion protected by the Kansas Constitution. The State acknowledged that the United States Supreme Court decided in *Roe v. Wade*, 410 U.S. 113, 157-58, 164, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), that a fetus is not a "person" entitled to protection under the Fourteenth Amendment to the United States Constitution and that, at least in the early stages of a pregnancy, the State could not interfere with a woman's right to decide whether to continue her pregnancy. But it argued those same rights do not exist under the Kansas Constitution.

Alternatively, the State argued that, if such state constitutional rights exist, S.B. 95 would not violate them. It first pointed to the test adopted by the United States Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874-78, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (plurality opinion)—often referred to as the undue burden test or standard—for balancing the burdens imposed on a woman's rights and the State's interests. The State then concluded S.B. 95 does not impose an undue burden on a pregnant woman's right to obtain a lawful abortion, in part because other abortion procedures are available. Before the trial court, the State primarily presented three alternatives: labor induction, induction of fetal demise using an injection, and induction of fetal demise using umbilical cord transection.

Following a hearing on the Doctors' motion, the trial court granted the temporary injunction. The court noted (1) this court has repeatedly stated that sections 1 and 2 of the Kansas Constitution Bill of Rights are given much the same effect as the Fourteenth Amendment to the United States Constitution; (2) the United States Supreme Court caselaw provides a framework for analyzing the constitutionality of the Kansas legislation; and (3) under that framework, the Doctors are substantially likely to prevail on the merits of their claim that the legislation is unconstitutional. Citing *Casey* and other United States Supreme Court decisions that applied its undue burden test advanced by the State, the trial court concluded S.B. 95 is likely to unduly burden access to abortions because it eliminates the most commonly used procedure for second-trimester abortions and the State's proposed alternatives are more dangerous. In rejecting the State's arguments about alternative procedures, the trial court made the following findings of fact regarding those procedures:

- "Labor induction is used in approximately 2% of second-trimester abortion procedures. It requires an inpatient labor process in a hospital that will last between 5-6 hours up to 2-3 days, includes increased risks of infection when compared to D & E, and is medically contraindicated for some women."
- "There is no established safety benefit to inducing demise prior to a D & E procedure."
- Regarding fetal demise by either transabdominal or transvaginal injection of digoxin, "[r]esearch studies have shown increased risks of nausea, vomiting, extramural delivery, and hospitalization."

- "Injections to induce demise using digoxin prior to D & E are not practiced prior to 18 weeks gestation, and the impact of subsequent doses of digoxin, required in cases where a first does is not effective, is virtually unstudied."
- "Umbilical cord transection prior to a D & E is not possible in every case" and, when used, "increases procedure time, makes the procedure more complex, and increases risks of pain, infection, uterine perforation, and bleeding."
- "The use of transection to induce fetal demise has only been discussed in a single retrospective study, the authors of which note that its main limitation is 'a potential lack of generalizability.'"

The State reminds us that it has not yet fully litigated the safety of the various procedures. Nevertheless, it does not suggest the trial court lacked a factual basis for making those findings based on the limited record made for purposes of the ruling on the temporary injunction.

Before us, the State discusses an alternative to the D & E procedure it had briefly mentioned to the trial court: the induction of fetal demise using potassium chloride, otherwise known as KCl. During the trial court proceedings, the Doctors, in apparent anticipation of this alternative being argued, presented affidavits that included facts about this procedure and its risks. Nevertheless, presumably because the State made only a passing reference to this procedure, the trial court did not make any factual finding about it. As a result, this alternative does not factor into our analysis. "[A]ppellate courts do not make factual findings but review those made by district courts." *State v. Berriozabal*, 291 Kan. 568, 591, 243 P.3d 352 (2010). And the State did nothing to insure adequate factual findings on the issue. See *State v. Rodriguez*, 302 Kan. 85, 91, 350 P.3d 1083 (2015) (party must object to inadequate findings of fact to preserve issue for appeal).

Consequently, the State has essentially waived this alternative—at least for the purposes of this appeal—and we have no basis to consider the State's fact-based argument regarding the comparative safety of the KCl procedure.

After making the findings about the safety risks associated with the three alternatives primarily argued by the State to the trial court, that court cited *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007); *Stenberg v. Carhart*, 530 U.S. 914; and *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976). *Gonzales* and *Stenberg* both dealt with legislation restricting access to D & E procedures. Based on that authority, the trial court concluded: "[T]he Supreme Court has already balanced the State interests asserted here against a ban on the most common method of second-trimester abortion and determined that it is unconstitutional." Finding this indicated a likelihood that the Doctors ultimately would succeed on the merits of their petition, the trial court granted a temporary injunction.

The State immediately appealed from this temporary injunction to the Court of Appeals. That court, sitting en banc, split 6-1-7. *Hodes & Nauser, MDs v. Schmidt*, 52 Kan. App. 2d 274, 368 P.3d 667 (2016). Seven of the judges concluded that the Kansas Constitution protects a woman's access to abortion services and held that the injunction should be affirmed, but they split 6-1 on the reasons to reach that result. In a plurality opinion, six of the judges adopted the reasoning of the trial court—i.e., that sections 1 and 2 of the Kansas Constitution Bill of Rights are given much the same effect as the Fourteenth Amendment to the United States Constitution. 52 Kan. App. 2d at 275. One judge wrote separately, concurring in the plurality's result only and reasoning that our state Constitution provides protection of interests separate and distinct from the United States Constitution. 52 Kan. App. 2d at 297. The seven remaining judges dissented, concluding that the injunction was not warranted because a woman has no right protected by the Kansas Constitution to obtain an abortion. 52 Kan. App. 2d at 330. Because the

panel split evenly on the result, the trial court's temporary injunction remained in place. 52 Kan. App. 2d at 295.

We granted the State's petition for review, providing our jurisdiction under K.S.A. 60-2101(b).

ANALYSIS

The ultimate question presented in this appeal is whether the trial court erred in granting a temporary injunction. A temporary injunction merely preserves the relative positions of the parties until a full decision on the merits can be made. *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007). Even so, in order to obtain such an injunction, a plaintiff must show the court: (1) The plaintiff has a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest. *Downtown Bar and Grill v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012).

When a party alleges a trial court erred in issuing a temporary injunction, an appellate court examines whether the court abused its discretion. 294 Kan. at 191. A trial court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

The State primarily contests the trial court's conclusions regarding only one of the five requirements for issuing a temporary injunction—specifically, the first element that

requires a plaintiff to establish a substantial likelihood of eventually prevailing on the merits. According to the State, the trial court abused its discretion when it held the Kansas Constitution Bill of Rights protects a woman's right to access abortion. Alternatively, the State argues S.B. 95 does not violate any such rights. In both instances, the State argues the court's decisions were based on an error of law.

These arguments address the two elements the Doctors must establish in order to prevail on the temporary injunction. First, having alleged a violation of the Kansas Constitution Bill of Rights, they must establish this right exists and that our Constitution protects it. Second, the Doctors must establish S.B. 95 unconstitutionally infringes on this right. See *State v. Limon*, 280 Kan. 275, 284, 122 P.3d 22 (2005).

1. The Doctors' First Burden: Establishing a Constitutional Right

As to the first of the Doctors' burdens, as previously discussed, the trial court applied United States Supreme Court decisions interpreting the Fourteenth Amendment to reach the conclusion that sections 1 and 2 of the Kansas Constitution Bill of Rights, like the Fourteenth Amendment, protect a fundamental right to abortion. In doing so, the trial court followed the guidance that has been provided by this court over the years.

As pointed out by the trial court and the members of the Court of Appeals plurality, this court has often said that sections 1 and 2 have "much the same effect" as the Due Process and Equal Protection Clauses found in the Fourteenth Amendment to the United States Constitution. Generally, this statement has been made in cases where a party asserts violations of both Constitutions without making unique arguments about sections 1 and 2. See, e.g., *Limon*, 280 Kan. at 283; *State ex rel. Stephan v. Parrish*, 257 Kan. 294, Syl. ¶ 5, 891 P.2d 445 (1995); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *Manzanares v. Bell*, 214 Kan.

589, 602, 522 P.2d 1291 (1974); *Henry v. Bauder*, 213 Kan. 751, 752-53, 518 P.2d 362 (1974); *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, Syl. ¶ 1, 408 P.2d 877 (1965); *The State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917). In yet another case, *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364 (2006), this court did not depart from that line of cases when asked to determine if the Kansas Constitution protects a woman's right to decide whether to continue a pregnancy.

In *Alpha Med. Clinic*, this court discussed the "federal constitutional rights to privacy [that] are potentially implicated" by an inquisition seeking abortion records. 280 Kan. 903, Syl. ¶ 10. These include "the fundamental right of a pregnant woman to obtain a lawful abortion without government imposition of an undue burden on that right." 280 Kan. at 920 (citing *Casey*, 505 U.S. at 874-78 [plurality opinion]). In referencing the potential that such a right arose under the Kansas Constitution, this court stated: "We have not previously recognized—and need not recognize in this case despite petitioners' invitation to do so—that such rights also exist under the Kansas Constitution." 280 Kan. at 920.

Thus, the question asserted by the Doctors—whether the Kansas Constitution Bill of Rights independently protects a woman's right to decide whether to continue a pregnancy—was not answered in *Alpha Med. Clinic*. And it has not been determined in any other case before this court. Moreover, since the ratification of the Fourteenth Amendment in 1868, this court has rarely been asked to focus solely on sections 1 or 2. Litigants typically present sections 1 and 2 in tandem with the Fourteenth Amendment, and Kansas courts have rarely contrasted the Kansas constitutional provisions with the Fourteenth Amendment.

In other contexts, however, this court has acknowledged that "allowing the federal courts to interpret the Kansas Constitution seems inconsistent with the notion of state

sovereignty." *State v. Lawson*, 296 Kan. 1084, 1091-92, 297 P.3d 1164 (2013). Indeed, this court has the authority to interpret Kansas constitutional provisions independently of the manner in which federal courts interpret corresponding provisions of the United States Constitution. This can result in the Kansas Constitution protecting the rights of Kansans more robustly than would the United States Constitution. 296 Kan. at 1090-91.

This court has put these principles into practice on occasion and, after doing so, has interpreted a provision of the Kansas Constitution in a manner different from the United States Supreme Court's interpretation of a parallel provision of the United States Constitution. E.g., *State v. McDaniel & Owens*, 228 Kan. 172, 184-85, 612 P.2d 1231 (1980) (independently interpreting section 9 of the Kansas Constitution Bill of Rights in manner different from the Eighth Amendment to the United States Constitution). Significantly, in *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987), this court recognized section 1 of the Kansas Constitution Bill of Rights describes rights that are broader than and distinct from those in the Fourteenth Amendment.

Farley addressed the constitutionality of a statute that abolished the collateral source rule in medical malpractice cases. The parties had raised issues relating to the Fourteenth Amendment and sections 1 and 18 of the Kansas Constitution Bill of Rights. This court chose to analyze the issues under the Kansas Constitution, holding it "affords separate, adequate, and greater rights than the federal Constitution. Therefore, [it held] we clearly and expressly decide this case upon sections 1 and 18 of the Kansas Bill of Rights." 241 Kan. at 671.

Consistent with *Farley*'s holding, the Doctors argue the Kansas Constitution Bill of Rights describes stronger rights than the United States Constitution. In contrast, the State argues the Kansas Bill of Rights does not recognize the same rights as have been found to exist under the United States Constitution. The parties have not cited, nor have

we found, a decision fully analyzing the divergent positions they pose. Although *Farley* supports the Doctors' position, the court did not explain its holding that section 1 affords greater rights than the United States Constitution. In addition, *Farley* did not deal with the personal rights at issue in the present case.

Accordingly, the parties' arguments and Doctors' exclusive reliance on the Kansas Constitution Bill of Rights require us to now delve deeper into the differences between it and the Fourteenth Amendment.

Doing so raises questions of constitutional interpretation. The standard applied by Kansas courts when interpreting the Kansas Constitution was enunciated by this court in 1876. There, it rejected a man's argument that a woman who received more votes than he nevertheless was barred by her gender from holding the office of superintendent of public instruction then described in article 6 of the Kansas Constitution because the same Constitution denied her the right to vote in that race. The court stated:

"[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing." *Wright v. Noell*, 16 Kan. 601, 607, 1876 WL 1081 (1876).

This court has repeatedly quoted *Wright* as stating the standard governing this court's constitutional interpretation. See, e.g., *State v. Spencer Gifts*, 304 Kan. 755, 761, 374 P.3d 680 (2016); *In re Estate of Strader*, 301 Kan. 50, 55, 339 P.3d 769 (2014); *Gannon v. State*, 298 Kan. 1107, 1143, 319 P.3d 1196 (2014). When the words themselves do not make the drafters' intent clear, courts look to the historical record, remembering "'the polestar . . . is the *intention* of the *makers* and *adopters*.'" [Citation

omitted.]" *Hunt v. Eddy*, 150 Kan. 1, 5, 90 P.2d 747 (1939); see *State ex rel. Stephan v. Finney*, 254 Kan. 632, 655, 867 P.2d 1034 (1994).

Appellate courts conduct de novo review of issues requiring the interpretation of constitutional provisions, which means appellate courts are not bound by the interpretation of a lower court. See *Limon*, 280 Kan. at 283.

We begin our analysis of the issue of whether the Kansas Constitution Bill of Rights protects a woman's right to decide whether to continue a pregnancy by comparing the text of section 1 and the Fourteenth Amendment. This comparison highlights that Kansans chose to protect their "inalienable natural rights," including their liberty.

Second, we examine whether there is any support for the State's argument that the framers of section 1 did not intend to grant individual rights that could be judicially protected. The historical record overwhelmingly shows an intent to broadly and robustly protect natural rights and to impose limitations on governmental intrusion into an individual's rights.

Third, we explore the meaning of a "natural right." We do so by examining the philosophical underpinnings of natural rights, legal recognition of natural rights, the history of state courts recognizing an enforceable natural right of bodily integrity, and the recognition of the concepts of liberty and the pursuit of happiness as including the right to make decisions about parenting and procreation.

Fourth, we consider whether these rights extend to women, as well as men. This leads, fifth, to our examination of whether protections extend to a pregnant woman's right to control her body and to her right to decide whether to continue a pregnancy. And,

sixth, we consider the relevance of Kansas territorial and state statutes that criminalized abortion.

Our analysis leads us to the conclusion that section 1 of the Kansas Constitution Bill of Rights acknowledges rights that are distinct from and broader than the United States Constitution and that our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards. Among the rights is the right of personal autonomy. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy. Although the Doctors, the lower courts here, and various decisions from this court have tended to lump sections 1 and 2 together, we base our decision on section 1 alone because we find it sufficiently protects the rights at stake.

1.1 *Section 1 Identifies Rights Distinct from and Broader than Those Listed in the Fourteenth Amendment; It Provides a Nonexhaustive List of Natural Rights.*

A comparison of the text of section 1 of the Kansas Bill of Rights, which was part of the Kansas Constitution ratified by the territorial voters in October 1859, and the Fourteenth Amendment to the United States Constitution, which was ratified in 1868, reveals several differences in wording. Again, section 1 states: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." And the Fourteenth Amendment states, in relevant part, that no State can "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

As this side-by-side comparison reveals, section 1 contains the following words not found in the Fourteenth Amendment: "All men are possessed of equal and

inalienable natural rights." In fact, no provision of the United States Constitution uses the term "natural rights"—i.e., "[a] right that is conceived as part of natural law and that is therefore thought to exist independently of rights created by government or society." Black's Law Dictionary 1519 (10th ed. 2014); see *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 319, 6 L. Ed. 606 (1827) (Trimble, J., opinion); 25 U.S. at 345 (Marshall, C.J., opinion). This silence created an ambiguity as to whether rights other than those listed are protected by the United States Constitution. In contrast, the Kansas provision lists certain rights—life, liberty, and the pursuit of happiness—but indicates these are just among the natural rights Kansans possess.

The framers of the Kansas Constitution in 1859 were not alone in adopting a natural rights provision. William Hutchinson, who chaired the "Preamble and Bill of Rights" Committee of the Wyandotte Constitutional Convention that initially developed section 1, explained the history of natural rights declarations to the other Convention delegates when he submitted his committee's report, stating:

"It is a historical fact, that ever since the days of King John, when the magna charta in favor of British freedom was obtained by the English yeomanry, some declaration of rights similar to the one presented by us, has been common with the people of all countries; but it was not until 1776, when that memorable Declaration of ours came into existence, that the people cut loose from a narrow conception of humanity, and entered upon that broad field of human liberty. All the States [State Constitutions] since that day down to [that of] the prospective State of Kansas, have contained a similar instrument, that becomes as it were the timbers of the building—the superstructure upon which the edifice of State must be erected." Proceedings and Debates of the Kansas Constitutional Convention (Drapier ed., 1859), *reprinted in* Kansas Constitutional Convention 184-85 (1920) (hereinafter Convention).

By the time the Fourteenth Amendment to the United States Constitution was ratified in "1868, twenty-four of the thirty-seven state constitutions existing at that time,

nearly a two-thirds majority, contained provisions guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type. Thus, in 1868, approximately 67% of all Americans then living resided in states that constitutionally protected unenumerated individual liberty rights." Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1303 (2015) (*Lockean Natural Rights Guarantees*).

These provisions in state constitutions, which are often referred to as "Lockean Natural Rights Guarantees," originated with the Virginia Declaration of Rights of 1776. The Virginia Declaration, principally drafted by George Mason, relies heavily on the philosophy of John Locke. In particular, Mason "endorsed the Lockean ideal that all men retain some of their natural rights after subscribing to the social compact, in contrast to the idea put forth by Thomas Hobbes and Jean-Jacques Rousseau that men surrender all their natural rights to the sovereign in exchange for security and public order." 93 Tex. L. Rev. at 1314, 1316-17.

Mason's draft served not only as the model for many state constitutions but also for portions of the Declaration of Independence. 93 Tex. L. Rev. at 1318. As we will discuss in more detail when looking at the history of the Kansas Constitution, Kansas' section 1 was patterned after the Declaration of Independence. Convention, at 283. Therefore, we may, by this path, trace our section 1 to the Lockean natural rights guarantees.

Returning to the language of section 1, after using the phrase "inalienable natural rights," it delineates three rights: life, liberty, and the pursuit of happiness. The framers made clear the list was not intended to be exhaustive—rather, the listed rights are "among" the inalienable natural rights recognized by the provision. See Webster's New World College Dictionary 47 (5th ed. 2014) (defining "among" to mean "in the company

of; surrounded by; included with a group of"). Two of the three nonexclusive listed rights—life and liberty—are mirrored in the Fourteenth Amendment, while section 1's explicit inclusion of "pursuit of happiness" is absent from the Fourteenth Amendment. Section 1, however, does not list "property," while the Fourteenth Amendment does. Whatever implications arise from that omission need not be plumbed today, because section 1's broad declaration that all men are entitled to a nonexhaustive list of inalienable natural rights clearly reveals that section 1 recognizes a distinct and broader category of rights than does the Fourteenth Amendment.

A final and notable language distinction between section 1 and the Fourteenth Amendment arises from another phrase found in the Amendment but not in section 1: "without due process of law." In other words, the text of section 1 demonstrates an emphasis on substantive rights—not procedural rights. In contrast, the Fourteenth Amendment's use of "the term 'due process' seem[s] to speak of procedural regularity." Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 272 (1985). Thus, section 1's focus on substantive rights removes from our calculus one of the criticisms of *Roe* and other decisions of the United States Supreme Court relying on substantive due process rights under the Fourteenth Amendment. See *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

1.2 The Historical Record of the Kansas Bill of Rights Indicates Section 1 Describes Judicially Enforceable Rights.

The State focuses on the omission of a due process clause from section 1 to argue the rights listed there are aspirational or hortatory and not enforceable or self-executing. Although the State recognizes that the 1859 Wyandotte Constitutional Convention delegates could not have considered the Fourteenth Amendment's inclusion of the due process provision because it was not ratified until nine years after voters ratified the Kansas Constitution, it argues they could have considered the Fifth Amendment to the

United States Constitution, which was ratified in 1791. The Fifth Amendment, which applies only to the federal government, provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." Because those attending the Wyandotte Convention could have adopted a similar due process clause but did not, the rights described in section 1 cannot be judicially enforced, according to the State.

The Kansas Constitution does include a due process provision, however: section 18 of the Bill of Rights. It states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law" But the Wyandotte Convention delegates simply chose to separate the provisions acknowledging rights—for example, section 1—from the due process provision in section 18.

Arguably, the failure to combine sections 1 and 18 creates an ambiguity that underlies the State's argument that section 1 does not provide for judicially enforceable rights. To resolve this potential ambiguity, we next examine the historical record regarding the debates at the Wyandotte Convention as well as the early caselaw interpreting section 1.

Section 1 was incorporated into and adopted as part of the Kansas Constitution that emerged from the Wyandotte Convention and was subsequently ratified by the voters in October 1859. The section has not been amended since that time.

The Wyandotte Convention followed three other conventions: the 1855 Topeka convention at which free-state proponents repudiated the positions on slavery by the 1855 proslavery territorial legislature, the 1857 Lecompton convention convened by the proslavery legislature in order to make slavery an "inviolable" right of property, and the 1858 Leavenworth convention that decried the Lecompton constitution. Congress rejected the constitution produced at the Topeka convention, and Kansas territorial voters

rejected the constitution produced at the Lecompton convention. The constitution from the Leavenworth convention was abandoned when the Lecompton constitution was defeated. Thacher, Address at the Quarter-Centennial Celebration: The Rejected Constitutions, *in* 3 Kansas Historical Collections 436-48 (1886).

In 1859, the Kansas Territorial Legislature called for another constitutional convention, this one to be held in Wyandotte for the purpose of producing a constitution that would be acceptable both to the citizens of the prospective state and to Congress. Elected delegates—all men—included eighteen lawyers, sixteen farmers, eight merchants, three manufacturers, three physicians, a mechanic, a land agent, a printer, and a surveyor. See generally Simpson, *The Wyandotte Constitutional Convention*, *in* 2 Kansas Historical Collections 236, 236-38 (1881).

A majority of the delegates who voted chose to use the Ohio Constitution as the foundation for the one they would craft. Perdue, Address Before the Kansas State Historical Society: The Sources of the Constitutions of Kansas, *in* 7 Kansas Historical Collections 130, 131-32 (1902). At the end of the convention, sections 2 through 20 of the Bill of Rights mirrored those same sections in the Ohio Constitution. Perdue, at 133-34.

Section 1, however, followed a different path, and it "was the only one that led to an extended debate." Perdue, at 134. The first proposed text of section 1 derived from the previous constitutions drafted at the Topeka and Leavenworth conventions and was presented by the Preamble and Bill of Rights Committee. It stated:

"All men are by nature equally free and independent, and have certain inalienable rights, among which are those of enjoying and defending their lives and liberties, acquiring, possessing, and protecting property, and of seeking and obtaining happiness and safety,

and the right of all men to the control of their persons, exists prior to law and is inalienable." Convention, at 187.

During the Wyandotte Convention debates regarding section 1, the chairman of that committee, William Hutchinson, commented on the reasons for having an expansive section 1 that protects natural rights:

"This is the first section of our bill of rights. What is a bill of rights? It is a mere declaration of the natural rights of man. And in summing up these rights, it is not to be supposed that we will come down to any narrow, contracted conception of them—that we will use the pocket compass of legislation—but it is to be supposed that we will look on the bright side—will take a fair and independent view of the rights of man, aside from the restrictions of law and civil government of any character. . . . It is but a declaration of those natural rights of man that have been acknowledged from the foundation of this government." Convention, at 281-82.

These concepts remained a focal point of all the proposals for section 1. In short, the drafters made no attempt to list all rights; they incorporated the broad concept of natural rights (by using that term or substitute descriptions), and they expressed a desire to protect those rights from government infringement.

Despite the apparent consensus on these concepts, reaching agreement on the specific wording proved problematic.

The Topeka constitution had used nearly the same language as proposed by the Hutchinson committee through the word "safety" where the provision ended. The proslavery Lecompton constitution was quite different, allowing rights for only "freemen." The Leavenworth convention returned to the Topeka constitution language but added the words, "and the right of all men to the control of their persons exists prior

to law and is inalienable." These "changes in the phraseology [were] made by the Leavenworth committee, with the definite purpose of antagonizing the proslavery sentiment." Perdue, at 134. The antagonism carried over to the Wyandotte Convention.

One proslavery delegate to the Wyandotte Convention expressed the opinion that section 1 "was brought forward here for the express purpose of setting the fugitive slave law of the United States at defiance." The delegate went on to explain that section 1 would operate as a "liberty bill" for any fugitive slave who entered the state. Convention, at 274; see Waters, Address Before the Kansas State Historical Society: Fifty Years of the Wyandotte Constitution, *in* 11 Kansas Historical Collections 47, 49 (1910). Other delegates concurred with this view, and several debated whether including the wording would cause Congress to reject the constitution because of a potential conflict with the federal fugitive slave law. Convention, at 274-81. Delegates also expressed concern that giving inalienable control of a man's person would mean the state "cannot make a man amenable to any criminal law." Convention, at 272.

While other delegates countered that these concerns were unfounded, the "extended" and "violent" debate continued. Several amendments or outright substitutions were proposed. Convention, at 272-82; Perdue, at 134. "To pour oil upon the troubled waters, the first section of the Ohio bill of rights was twice introduced. The first time it was voted down, and the second declared out of order." Perdue, at 134. It read: "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." Convention, at 272.

Eventually, the chair of the convention's Judiciary Committee, a lawyer from Hiawatha named Samuel A. Kingman, who two years later became a justice of this court and who eventually served as its Chief Justice from 1867 to 1876, proposed the current

wording of section 1: "All men are possessed of equal and inalienable natural rights, among which are those of life, liberty and the pursuit of happiness." Convention, at 282-83.

Kingman indicated he could support earlier proposals that granted all men inalienable rights but he preferred his variation based on the Declaration of Independence, which states: "[A]ll men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Convention, at 282-83. Kingman explained the reasons for using similar language when proposing section 1: "We all cling to old truths, . . . and our national Declaration of Independence is of this class of truth. . . . I think the amendment I have read, in these old terms, is broad enough. It will show no man's prejudices, and it is broad enough for all to stand upon." Convention, at 283. Kingman's proposal was adopted by a vote of 42 to 6. Convention, at 285.

The Constitution containing Kingman's section 1 language was subsequently approved by Kansas Territory citizens by a vote of 10,421 to 5,530. Following the election of Abraham Lincoln as our sixteenth President and the secession of several southern states in 1861, Congress voted to admit Kansas to the Union as a free state, and President James Buchanan signed the admission bill during his last weeks as our fifteenth president on January 29, 1861. Sutton, *Stark Mad Abolitionists* 123-25 (2017).

This broad wording of Kansas' section 1, with its unenumerated natural rights guarantee, was not unlike the natural rights guarantees in at least 14 other states' constitutions in place at the time of the Wyandotte Convention. Although the wording of each state's constitutional natural rights guarantee varied, the provisions shared three characteristics. They (1) "affirmed the freedom or equality of men (or both)"; (2) "guaranteed inalienable, inherent, or natural rights"; and (3) "guaranteed a right to

enjoy life, liberty," property, the pursuit of happiness, or some combination of these words. *Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. at 1305-06, 1444-48.

Applying these provisions in cases decided before Kansas convened the 1859 Wyandotte Convention, the courts in many of these 14 states had enforced unenumerated rights through judicial orders. 93 Tex. L. Rev. at 1311-12, 1444-48 (surveying natural rights guarantees in 24 state constitutions—16 of which predated Kansas'—ratified before the adoption of the Fourteenth Amendment and surveying court decisions in these states). These cases provided a context for how these natural rights guarantees would have been viewed at the time of the Wyandotte Convention, and several conclusions that can be drawn from these cases inform our interpretation of section 1.

First, these cases "make[] it crystal clear that the Lockean Natural Rights Guarantees did mean *something*. They did not function as simply vague, preambular language but were instead applied with varying degrees of judicial vigor to decide some of the most challenging and controversial issues of the day." 93 Tex. L. Rev. at 1440. Professor Steven G. Calabresi and Sofia M. Vickery addressed the question posed by the State in this case: Are these guarantees merely hortatory and not enforceable? They answered the guarantees were neither, "after exhaustively studying the case law applying the Lockean Natural Rights Guarantees from the founding of the Republic until 1868" and concluding that "the Guarantees protected rights grounded in natural law" 93 Tex. L. Rev. at 1304.

Second, the "state supreme courts applied the Lockean Natural Rights Guarantees to an enormous variety of topics, suggesting an understanding during this time that the Lockean Natural Rights Guarantees protected a vast range of unenumerated rights." 93 Tex. L. Rev. at 1442. For example, state supreme courts had invoked the rights guarantees in cases dealing with a number of civil and political rights, including: "(1)

freedom of religion; (2) the right of marriage; (3) the involuntary confinement and transportation of the poor; (4) retroactive legislation; (5) the constitutionality of statutes imposing or exempting tort liability"; and (6) a variety of other issues that "show the far-reaching nature of the state court's consideration of liberty and natural or unalienable rights for a very broad range of fact patterns." 93 Tex. L. Rev. at 1364-82.

So, contrary to the State's argument, at the time the Kansas Bill of Rights was written and ratified in 1859, provisions like section 1 were widely accepted as guaranteeing natural rights enforceable via court proceedings.

Kingman, Hutchinson, and the other delegates to the 1859 Wyandotte Convention had this background information when they chose the wording for section 1. We know from the statements of Hutchinson, chair of the Preamble and Bill of Rights Committee, and Kingman, chair of the Judiciary Committee, that section 1's language was intended to be "broad enough for all to stand upon" and that it not be "any narrow, contracted conception" of rights but "a fair and independent view of the rights of man, aside from the restrictions of law and civil government of any character." Convention, at 281-83. This intent has been repeatedly recognized in the caselaw of this court.

In 1876, David Brewer, who at that time was a justice of this court but who became a justice of the United States Supreme Court in 1889, explained that the Kansas Constitution had retained a wide range of individual rights. Writing for a unanimous court that included Chief Justice Kingman, Justice Brewer stated:

"All political power is inherent in the people,' and all powers not delegated by the constitution remain with them. These truths, which lie at the foundation of all republican governments, are distinctly asserted in our own bill of rights, §§ 2 and 20. By the constitution the people have granted certain powers, and to that extent have restricted and limited their own action. But beyond those restrictions, and except as to matters guarded

by absolute justice, and the inherent rights of the individual, the power of the people is unlimited." *Wright*, 16 Kan. at 603.

Justice Brewer also explained in several decisions he authored while on this court that the rights in section 1 were judicially enforceable. In one case, counsel argued that "the bill of rights is not to be considered as containing precise limitations upon power, but rather only comprehensive statements of general truths; that it is more in the nature of a guide to the legislature, than a test for the courts." *Atchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, 664, 3 P. 284 (1884). In rejecting this argument about the Bill of Rights, Justice Brewer wrote:

"The bill of rights is something more than a mere collection of glittering generalities: some of its sections are clear, precise and definite limitations on the powers of the legislature and all other officers and agencies of the state; and while others are largely in the nature of general affirmations of political truths, *yet all are binding on legislatures and courts*, and no act of the legislature can be upheld which conflicts with their provisions, or trenches upon the political truths which they affirm." (Emphasis added.) 31 Kan. 660, Syl. ¶ 1.

Consistent with these declarations, this court later recognized a natural right to contract in 1899. See *The State v. Wilson*, 61 Kan. 32, 36, 58 P. 981 (1899); see also *Ogden*, 25 U.S. at 345 (Marshall, C.J., opinion) (recognizing right to contract as a "natural right[]"). A few years after *Wilson*, citing section 1 along with its discussion of the Fourteenth Amendment, this court recognized the right of "[e]very citizen . . . to work where and for whom he will" and a natural right prohibiting one person from being compelled to provide personal services to another. *Brick Co. v. Perry*, 69 Kan. 297, 298-300, 76 P. 848 (1904).

Then, in a case relied on by the State and the Court of Appeals' dissenting opinion (*Hodes*, 52 Kan. App. 2d at 339), this court in *Schaake v. Dolley*, 85 Kan. 598, 118 P. 80 (1911), seemed to distance itself from these prior decisions. Referring to Justice Brewer's words in *Atchison Street Rly. Co.*, the *Schaake* court first noted that section 1 of the Kansas Constitution Bill of Rights "is a political maxim addressed to the wisdom of the legislature and not a limitation upon its power. It is not a mere 'glittering generality' and can not be entirely disregarded in any valid enactment." 85 Kan. at 601. But, according to *Schaake*, "it lacks the definiteness, certainty and precision of a rule . . . and consequently can not . . . furnish a basis for the judicial determination of specific controversies." 85 Kan. at 601.

Certainly, this statement from *Schaake* supports the State's position here. Nevertheless, it stands in sharp contrast to the court's previous decisions. In addition, it stands apart from later ones. Just three years after *Schaake*, this court again embraced the rationale that the Bill of Rights provided enforceable rights, this time in the context of section 2. *Winters v. Myers*, 92 Kan. 414, 140 P. 1033 (1914).

In *Winters*, the court noted the "glittering generalities" discussions in *Atchison Street Rly. Co.* and *Schaake* and assessed how those discussions applied to section 2, which states, 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." Discussing that language, the *Winters* court looked to decisions from Wisconsin and Ohio, including one that dealt with a provision much like section 1. In that Wisconsin decision, the court stated:

"This may be said to be somewhat vague and general,—somewhat in the nature of rhetorical flourish; but when it is said that all men equally free have the inherent rights of life, liberty, and the pursuit of happiness, it is certain that it is not meant that some

have or may have greater privileges before the law than others. The phrase must mean equality before the law, if it means anything." *Black v. State*, 113 Wis. 205, 219, 89 N.W. 522 (1902), *quoted in Winters*, 92 Kan. at 422.

The *Winters* court found this "vigorous language" persuasive, concluding that section 2 of the Kansas Constitution Bill of Rights, "while declaring a political truth, does not permit legislation which trenches upon the truth thus affirmed. To this extent at least it must, like other constitutional provisions, be interpreted with sufficient liberality to carry into effect the principles of government which it embodies." 92 Kan. at 422, 428.

Soon thereafter, this court made clear that section 1 also could be enforced in the courts as a protection against legislation that impeded the exercise of individual rights. In *Wilson*, 101 Kan. 789, this court recognized that an act suppressing the use of trading stamps would violate the right to contract guaranteed in section 1 if it was an improper use of the State's police power. In resolving the question, the *Wilson* court looked to caselaw in which the United States Supreme Court had upheld similar legislation, holding it did not violate the Fourteenth Amendment to the United States Constitution. The *Wilson* court noted: "These decisions are of course conclusive so far as concerns any of the guaranties of the constitution of the United States, and are highly persuasive with respect" to sections 1 and 2 of the Kansas Constitution Bill of Rights. 101 Kan. at 795.

In that discussion, the court, for the first time, used the phrase that has often been repeated in Kansas cases for more than 100 years when it stated that sections 1 and 2 "are given much the same effect as the clauses of the fourteenth amendment relating to due process of law and equal protection." 101 Kan. at 796. The liberty interest found in the Fourteenth Amendment included

"the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any

lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." 101 Kan. at 796 (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 17 S. Ct. 427, 41 L. Ed. 832 [1897]).

More recently, this court recognized the importance of protecting the people's inalienable rights to life, liberty, and the pursuit of happiness:

"So there could be no mistake about its object and purpose, the American Republic officially and with the first breath of its new life declared, 'that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.' (The Declaration of Independence.) This is the American proclamation of freedom and equality, and the individual worth of a single human being." *Harris v. Shanahan*, 192 Kan. 183, 204, 387 P.2d 771 (1963).

Quoting from that passage, this court has held that "[t]he [Kansas] Bill of Rights protects the basic liberties which inure to each person at birth"—i.e., natural rights. *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 341, 757 P.2d 251 (1988), *disapproved on other grounds by Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991). Furthermore, as we previously noted, in *Farley*, 241 Kan. at 671, this court held: "[T]he Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution."

As this discussion illustrates, this court has determined, as have other courts, that section 1 or similar provisions describe a wide range of judicially enforceable rights, even if the provisions do not contain a due process clause and are stated in generalities. See *Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. at 1305 (recognizing "the Lockean

Natural Rights Guarantees [found in state constitutions] might support the holdings" of the United States Supreme Court).

The dissent has opined that section 1 simply was to guarantee

"Kansans their first rights of republican self-rule. Namely, the right to participatory consent to government for the benefit of the common welfare, on the one hand, and the right to otherwise be free from arbitrary, irrational, or discriminatory regulation that bears no reasonable relationship to that same common welfare, on the other." Slip op. at 169.

Abraham Lincoln, whom the dissent cites freely (slip op. at 146-51), would not be quite so dismissive—particularly on the existence of equal "natural rights." In Lincoln's speech at Springfield, Illinois, on June 26, 1857—just two years before the Wyandotte Convention—he "briefly expressed [his] view of the *meaning* and *objects* of that part of the Declaration of Independence which declares that 'all men are created equal.'" Hirsch and Van Haften, *Abraham Lincoln and the Structure of Reason*, app. A, at 262 (2010).

In expressing his view of this phrase, Lincoln declared that United States Senator Stephen A. Douglas and United States Supreme Court Chief Justice Roger Taney, author of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857) (denying equality to black men), were doing "obvious violence to the plain unmistakable language of the Declaration. . . . [T]he authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*." Hirsch and Van Haften, app. A, at 262.

Lincoln made clear that in articulating equality the Declaration's authors "did not mean to say all were equal in color, size, intellect, moral developments, or social capacity"—but equal in certain inalienable rights: "They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in 'certain

inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this meant." Hirsch and Van Haften, app. A, at 262.

"They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit." Hirsch and Van Haften, app. A, at 262.

As for his view of the object, i.e., purpose, of their statement of equality, Lincoln reasoned:

"They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. *The assertion that 'all men are created equal' was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use.*" (Emphasis added.) Hirsch and Van Haften, app. A, at 262.

Lincoln most certainly was not suggesting the breadth of the State's police power that the dissent advocates. We do not disagree with the dissent's position that the people have given the State the power to act only when it does so reasonably and for the common welfare. But based on our Constitution, we fervently object to the dissent's assertion that the State can use this power to do anything it desires so long as it passes that test. The State's police power is limited by the language borrowed from the Declaration of Independence and purposely included in our Bill of Rights—the language explicitly acknowledging that "[a]ll men are possessed of equal and inalienable natural rights." It is clear that Lincoln and an overwhelming majority of the delegates at the

Wyandotte Convention saw these words as more than rhetorical flourishes. The language recognized rights that to be meaningful—as they were certainly meant to be—had to be enforced and protected by courts. So when the State attempts to use its police power to unconstitutionally encroach on these *inalienable* rights, we have an obligation to ensure it does not. As this court stated more than 50 years ago, "the judiciary . . . has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people." *Harris*, 192 Kan. at 206.

Based on this review of section 1, the Fourteenth Amendment, the differences between them, and the statements of intent by delegates at the Wyandotte Constitutional Convention, we conclude section 1 establishes the judicial enforceability of rights that are broader than and distinct from the rights described in the Fourteenth Amendment.

1.3 *Natural Rights Include a Right to Personal Autonomy that Allows Us to Make Decisions Regarding Our Bodies, Our Health Care, Family Formation, and Family Life.*

We turn now to the specific questions of what a natural right entails and whether it includes a woman's right to decide whether to continue a pregnancy.

When common-law terms are used in the Kansas Constitution Bill of Rights, courts should look to common-law definitions for their meaning. *Addington v. State*, 199 Kan. 554, 561, 431 P.2d 532 (1967); *The State v. Criqui*, 105 Kan. 716, 719-20, 185 P. 1063 (1919).

"It is also a very reasonable rule that a state constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the constitution, . . . but only that for its definitions we are to draw from that great fountain, and that in judging what it means we are to keep in mind that it is not the

beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." *Criqui*, 105 Kan. at 719-20 (quoting Cooley Const. Lim., 7th ed. p. 94).

Because section 1 recognizes "natural rights," we must investigate the historical—the common-law—basis for determining whether an asserted right can be labeled a "natural right." Consequently, we turn to that question.

Certainly, as our prior discussion of the early caselaw of this court reveals, we have been willing to identify "natural rights." Further, the historical record of the Wyandotte Convention reveals the framers of section 1 looked to and adopted the language of the Declaration of Independence. In writing that document, Thomas Jefferson looked to the Virginia Declaration of Rights of 1776, written by George Mason, who, in turn, looked to the writings of Locke. *Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. at 1316, 1318; Convention, at 283. In light of this foundation of section 1, Locke's views on natural rights are significant.

Locke identified the law of nature as the source of inalienable individual rights. He wrote that man is born "with a Title to perfect Freedom, and an uncontrouled enjoyment of all the Rights and Priviledges of the Law of Nature, equally with any other Man, or Number of Men in the World" and thus possesses "a Power . . . to preserve his Property, that is, his Life, Liberty and Estate, against the Injuries and Attempts of other Men." Locke, *Two Treatises of Government*, Bk. II, § 87 (Gryphon special ed. 1994) (1698).

In the present case, the Doctors assert that the following natural rights underlie the right of a woman to decide whether to continue a pregnancy: personal autonomy and decision-making about issues that affect one's physical health, family formation, and

family life. To test these assertions, we look to the historical and philosophical basis for considering those rights as "natural."

1.3.1 *The Philosophy of Locke and Others Recognized Personal Autonomy and Bodily Integrity as Natural Rights.*

Locke observed that "every Man has a *Property* in his own *Person*." Two Treatises, Bk. II, § 27. He also wrote about the components of autonomy, bodily integrity, and self-determination, noting that "so far as a man has power to think, or not to think: to move or not to move, according to the preference or direction of his own mind; so far is a man free." Locke, *An Essay Concerning Human Understanding*, Bk. II, ch. 21, § 8 (27th ed. 1836).

Other political philosophers and legal writers uniformly maintained that one's control over one's own person stands at the heart of the concept of liberty, one of the enumerated natural rights in section 1.

Already in 1642, in his *Second Institute, Commentary on Magna Carta*, Sir Edward Coke observed that an ordinance setting requirements on the clothes that certain merchants could wear was against the law of the land, "because it was against the liberty of the subject, for every subject hath freedom to put his clothes to be dressed by whom he will." See Pound, *The Development of Constitutional Guarantees of Liberty* 47-48, 150 (1975).

William Blackstone in his *Commentaries* identified the private rights to life, liberty, and property as the three "absolute" rights—so called because they "appertain[ed] and belong[ed] to particular men, merely as individuals," not "to them as members of society [or] standing in various relations to each other"—that is, not dependent upon the will of the government. 1 Blackstone, *Commentaries on the Laws of England* *123,

*129-38 (1765). American courts reaffirmed these observations in applying the common law in this country. See, e.g., *State v. Moore*, 42 N.J.L. 208, 13 Vroom 208 (1880) (quoting 1 Blackstone, at *134: "[T]he law . . . regards, asserts and preserves the personal liberty of individuals.").

In his Letter to the Sheriffs of Bristol in 1777, the conservative philosopher Edmund Burke, writing about the American Revolution, reflected the spirit of his times when he declared:

"[I]t ought to be the constant aim of every wise public counsel to find out by cautious experiments, and rational, cool endeavors, with how little, not how much, . . . restraint [on liberty] the community can subsist: for liberty is a good to be improved, and not an evil to be lessened. It is not only a private blessing of the first order, but the vital spring and energy of the state itself, which has just so much life and vigor as there is liberty in it." Burke, *Selected Works* 211 (Bate ed., 1960).

James Madison wrote that a person has an inviolable interest in the "safety and liberty" of one's person. Madison, *Essay on Property for the National Gazette* (Mar. 27, 1792), in 14 *The Papers of James Madison* 266 (Rutland & Mason et al. eds., 1983).

Chancellor James Kent, in his *Commentaries on American Law*, Volume 2, Lecture 24, at 1 (1827), spoke of the right of personal liberty as one of the "absolute rights of individuals." See *McMasters v. West Chester State Normal School*, 13 Pa. C.C. 481, 2 Pa. D. 753, 757 (1893); see also *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1220 (9th Cir. 1988) (quoting 2 Kent, at 1; right of personal liberty in the United States considered "natural, inherent, and unalienable"), *rev'd on other grounds* 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

1.3.2 *The United States Supreme Court Has Recognized the Natural Right of Personal Autonomy.*

The natural right to personal autonomy has been recognized by the United States Supreme Court for more than 120 years.

In 1891, the Supreme Court recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891).

At about that same time, future United States Supreme Court Justice Louis Brandeis wrote of the "general right of the individual to be let alone," which is a component of the "inviolable personality" of human beings. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 205 (1890). And he elaborated on this concept nearly 40 years later in *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting):

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.*" (Emphasis added.)

Even when the State regulates health care, demands some medical action such as an immunization, or eliminates treatment options in the interests of public health, safety, and welfare, the government still cannot intrude on a person's control of his or her own body when doing so will cause harm to the individual. See *Jacobson v. Massachusetts*,

197 U.S. 11, 39, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (upholding mandatory vaccination regulation and its authorizing state statute only because of presumption that legislature intended exceptions where individual could establish he or she "is not at the time a fit subject of vaccination or that vaccination, by reason of his [or her] then condition, would seriously impair his health or probably cause his [or her] death").

1.3.3 *State Courts, Including This Court, Have Recognized an Enforceable Natural Right to Bodily Integrity.*

Various state courts have reached the same conclusion as the United States Supreme Court. In Illinois, "under a free government at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person, in other words, his right to himself—is the subject of universal acquiescence." *Pratt v. Davis*, 118 Ill. App. 161, 166 (1905), *aff'd* 224 Ill. 300, 79 N.E. 562 (1906). New York's highest court has held: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body" *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-30, 105 N.E. 92 (1914), *abrogated on other grounds by Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957). And the Florida Supreme Court has stated that "everyone has a fundamental right to the sole control of his or her person." *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990).

In interpreting a provision in the Pennsylvania Constitution providing for the rights of enjoying and defending life and liberty, the acquisition and protection of property, and the pursuit of happiness, the Pennsylvania Supreme Court stated:

"The greatest joy that can be experienced by mortal man is to feel himself master of his fate,—this in small as well as in big things. Of all the precious privileges and prerogatives in the crown of happiness which every American citizen has the right to wear, none shines with greater luster and imparts more innate satisfaction and soulful

contentment to the wearer than the golden, diamond-studded right to be let alone. Everything else in comparison is dross and sawdust." *Commonwealth v. Murray*, 423 Pa. 37, 51, 223 A.2d 102 (1966) (plurality opinion).

The Alaska Supreme Court has concluded that exercising control over one's body "involves the kind of decision-making that is 'necessary for . . . civilized life and ordered liberty.'" *Valley Hosp. Ass'n v. Mat-Su Coalition*, 948 P.2d 963, 968 (Alaska 1997) (quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 [Alaska 1970]). And Mississippi's highest court has held: "Each of us has a right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination, if you will." *In re Brown*, 478 So. 2d 1033, 1039 (Miss. 1985).

This court has recognized the same principles, stating: "Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment." *Natanson v. Kline*, 186 Kan. 393, 406-07, 350 P.2d 1093, *decision clarified on denial of reh'g* 187 Kan. 186, 354 P.2d 670 (1960).

Each of these court-recognized principles acknowledging the natural-law right to control one's own body and to exercise self-determination stands firmly on the shoulders of the Lockean philosophies embraced in section 1's natural rights, which include liberty and the pursuit of happiness. And these concepts of control over one's body and of self-determination have roots in common law, as the United States Supreme Court noted in *Union Pacific Railway Co. v. Botsford*, 141 U.S. at 251, and as this court noted in *Natanson v. Kline*, 186 Kan. at 406-07.

The State argues, however, that the men at the Wyandotte Convention rejected control over one's body as a constitutionally protected right. This argument is based on failure of the convention delegates to adopt the version of section 1 that would have protected property, happiness, and "the right of all men to the control of their persons." Convention, at 271.

The State is wrong to attribute such significance to this rejection. The historical record shows this provision was a taunt to the proslavery delegates at the Leavenworth convention, and the animosity and distrust from that experience obviously tainted the debate in Wyandotte. Convention, at 271-85; see Waters, at 49. Ultimately, the language of section 1 is better understood as continuing a guarantee of natural rights, which include control over one's own body, by using the familiar and revered wording of the Declaration of Independence.

1.3.4 *Concepts of Liberty and the Pursuit of Happiness Include a Right to Make Decisions About Parenting and Procreation.*

Lockean principles also underlie a recognition that section 1 encompasses a natural right to make decisions about parenting and procreation.

Locke described the rights related to the relationship between a man and a woman as it impacts procreation as follows:

"Conjugal Society is made by a voluntary Compact between Man and Woman, and tho' it consist chiefly in such a Communion and Right in one anothers [*sic*] Bodies, as is necessary to its chief End, Procreation; yet it draws with it mutual Support and Assistance; and a Communion of Interest too, as necessary not only to unite their Care and Affection, but also necessary to their common Off-spring, who have a Right to be nourished and maintained by them, till they are able to provide for themselves." Two Treatises, Bk. II, § 78.

Expressing similar views, the United States Supreme Court has acknowledged that the rights "to marry, establish a home and bring up children" were "long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). In *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), the Court made additional statements similar to Locke's, noting that a "couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." The Court recognized the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" applied to each "individual, married or single." 405 U.S. at 453.

And significantly, in *Chapsky v. Wood*, 26 Kan. 650, 652, 1881 WL 1006 (1881), this court recognized that the parent-child relationship is rooted in the "law of nature."

1.3.5 *Summary*

At the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy. Few decisions impact our lives more than those about issues that affect one's physical health, family formation, and family life. We conclude that this right to personal autonomy is firmly embedded within section 1's natural rights guarantee and its included concepts of liberty and the pursuit of happiness.

1.4 *Section 1 Guarantees Women, as well as Men, the Right of Personal Autonomy.*

Given that women were not allowed as delegates to the Wyandotte Convention or as voters on the resultant Constitution's ratification, one might question whether the Convention delegates intended to acknowledge in section 1 that women possessed these natural rights. But the record reveals they did. The dissent more fully discusses the historical context, and Kingman clearly explained as much in his report to the convention. He directly stated that "[s]uch rights as are natural are now enjoyed as fully by women as men." Convention, at 169.

At first glance, the sincerity of Kingman's comment seems questionable. After all, he chaired the Judiciary Committee that had considered and denied a petition asking for female suffrage. But the Convention record explains that Kingman and the other delegates distinguished between natural and political rights. After noting that women should have natural rights, Kingman continued by saying on behalf of the committee that "[s]uch rights and duties as are merely political in their character, they should be relieved from, that they have more time to attend to those 'greater and more complicated responsibilities' which, petitioners claim and your committee admits, devolve upon women." Convention, at 169. The comments by Kingman and his committee reflect that society's attitude regarding women at the time was not in step with the natural rights guarantee in section 1. We discuss what impact this has on our analysis in section 1.6.

At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This ability enables decision-making about issues that affect one's physical health, family formation, and family life. Each of us has the right to make self-defining and self-governing decisions about these matters.

1.5 *Section 1's Protections Extend to a Pregnant Woman's Right to Control Her Own Body.*

Denying a pregnant woman the ability to determine whether to continue a pregnancy would severely limit her right of personal autonomy. And abortion laws do not merely restrict a particular action; they can impose an obligation on an unwilling woman to carry out a long-term course of conduct that will impact her health and alter her life. Pregnancy often brings discomfort and pain and, for some, can bring serious illness and even death. The New Mexico Supreme Court described some of these health concerns:

"[T]here is undisputed evidence in the record that carrying a pregnancy to term may aggravate pre-existing conditions such as heart disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. According to these sources, pregnancy also can hamper the diagnosis or treatment of a serious medical condition, as when a pregnant woman cannot receive chemotherapy to treat her cancer, or cannot take psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus." *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 855, 975 P.2d 841 (1998).

The list of ways the government's restriction on abortion can have an impact on a woman's ability to control her own body and the course of her life could continue at length. In summary, "[t]he decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989). Other courts with natural rights constitutional guarantees similar to Kansas' have reached the same conclusion. Some have done so based on privacy, but others have reached the conclusion because of constitutional protections of inalienable natural rights such as liberty—guarantees like that in the Kansas Constitution Bill of Rights.

Although the Wyandotte Convention delegates rejected article I, section 1 of the Ohio Constitution in favor of Kingman's proposal, its language is very similar. It stated that men "by nature" have "certain inalienable rights," including "enjoying and defending life and liberty" and "seeking and obtaining happiness and safety." Applying that provision, the Ohio Court of Appeals recognized it was broader than any provision in the United States Constitution because it recognized natural rights while the United States Constitution did not. "In that sense, the Ohio Constitution confers greater rights than are conferred by the United States Constitution, although that Constitution has been construed very broadly so as to maximize the nature of the individual rights guaranteed by it." *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684, 691, 627 N.E.2d 570 (1993).

Given the broad scope of the Ohio natural rights provision, the Ohio court determined "it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection," including the right to have an abortion. 89 Ohio App. 3d at 691-92.

The Supreme Judicial Court of Massachusetts had arrived at the same conclusion in 1981 after noting that its state constitutional guarantees had "sometimes impelled us to go further than the United States Supreme Court." *Moe v. Secretary of Administration & Finance*, 382 Mass. 629, 649, 417 N.E.2d 387 (1981). The Massachusetts Constitution, part 1, article I, recognizes individuals have "certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness." See also Mass. Const. pt. 1, art. XII (due process provision).

As to a "woman's right to make the abortion decision privately," the Massachusetts court observed it was "but one aspect of a far broader constitutional guarantee" related to "[t]he existence of a "private realm of family life which the state cannot enter,"" the "'sanctity of individual free choice and self-determination,'" the "'strong interest in being free from nonconsensual invasion of . . . bodily integrity, and a constitutional right of privacy that may be asserted to prevent unwanted infringements of bodily integrity.'" [Citations omitted.]" *Moe*, 382 Mass. at 648-49. Likewise, the court concluded, "decisions whether to accomplish or to prevent conception are among the most private and sensitive." 382 Mass. at 649 (quoting *Carey v. Population Services International*, 431 U.S. 678, 685, 97 S. Ct. 2010, 52 L. Ed. 2d 675 [1977]).

A little over a decade later, the highest court in West Virginia, its Supreme Court of Appeals, relied in part on its state constitution to invalidate an abortion funding regulation in *Women's Health Center v. Panepinto*, 191 W. Va. 436, 446 S.E.2d 658 (1993). The relevant West Virginia constitutional provision declares that the "[g]overnment is instituted for the common benefit" of the people. 191 W. Va. at 441. Because the West Virginia Constitution provides guarantees that are not present in the United States Constitution, the court deemed it appropriate to "interpret those guarantees independent from federal precedent," and held that denying funding for certain abortions violated the constitutionally protected right to an abortion. 191 W. Va. at 442, 445.

A woman's right to decide whether to continue a pregnancy has also been recognized under the Mississippi Constitution, which provides: "The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people." Miss. Const. art. 3, § 32. In *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998), the Mississippi Supreme Court rejected an argument that this provision could not provide for a woman's right to decide whether to continue a pregnancy because abortion was not mentioned in the state constitution. "While we do not interpret our Constitution as recognizing an explicit right to an

abortion, we believe that autonomous bodily integrity is protected under the right to privacy as stated in [our previous decision]. Protected within the right of autonomous bodily integrity is an implicit right to have an abortion." 716 So. 2d at 653. The Mississippi court observed that "'no aspects of life [are] more personal and private than those having to do with one's . . . reproductive system.'" 716 So. 2d at 653 (quoting *Young v. Jackson*, 572 So. 2d 378, 382 [Miss. 1990]).

Recently the Iowa Supreme Court also has held that the Iowa Constitution's guarantee that "'no person shall be deprived of life, liberty, or property, without due process of law,'" protects a woman's right to decide whether to continue a pregnancy. *Planned Parenthood v. Reynolds ex rel.*, 915 N.W.2d 206, 232, 237 (Iowa 2018). The court wrote that "[a]utonomy and dominion over one's body go to the very heart of what it means to be free." 915 N.W.2d at 237. It characterized the right to decide whether to continue a pregnancy as "the right to shape, for oneself, without unwarranted governmental intrusion, one's own identity, destiny, and place in the world" and noted that "[n]othing could be more fundamental to the notion of liberty." 915 N.W.2d at 237. It concluded that "under the Iowa Constitution, . . . implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy." 915 N.W.2d at 237.

The natural right of personal autonomy recognized in these states' constitutions allows individuals to control their own bodies, to make health care decisions, and to make decisions about whether to bear or beget a child. Some of these courts chose the terminology of *Roe*, 410 U.S. at 153, and spoke in terms of a state constitutional right to "privacy." See Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 Wm. & Mary J. Women & L. 469, 521-26 (2009) (discussing state abortion decisions post-*Roe*). And this court has recognized privacy as a natural right. See *Kunz v. Allen*, 102 Kan. 883, 884, 172 P. 532 (1918) ("The

right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. . . . A right of privacy in matters purely private is therefore derived from natural law."); see also *Munsell v. Ideal Food Stores*, 208 Kan. 909, 922-23, 494 P.2d 1063 (1972); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953). But we agree with the Ohio court that concluded "it is not necessary to find a constitutional right of privacy in order to reach the conclusion that the choice of a woman whether to bear a child is *one of the liberties guaranteed by Section 1* [of the] Ohio Constitution." (Emphasis added.) *Voinovich*, 89 Ohio App. 3d at 692.

Consistent with these and other states, today we hold our Kansas Constitution's drafters' and ratifiers' proclamation of natural rights applies to pregnant women. This proclamation protects the right to decide whether to continue a pregnancy.

We are struck by the ease with which the dissent ignores the importance of this natural right and the consequences women would face if we did not recognize the founders' intent to protect it from an overreaching government. The dissent mentions pregnant women only when discussing the graphic details of the D & E and other medical procedures. By avoiding any other aspect of the lives of pregnant women, the dissent appears to maintain that upon becoming pregnant, women relinquish virtually all rights of personal sovereignty in favor of the Legislature's determination of what is in the common good. Essentially, the dissent exploits the vivid medical details of abortion procedures by turning them into a constitutional prerogative to invade the autonomy of pregnant women and exclude them from our state Constitution's Bill of Rights.

1.6 *Territorial and Early State Statutes that Criminalized Abortion Cannot Be the Basis for Ignoring Constitutional Rights.*

The State argues we cannot conclude the framers of our Constitution envisioned a right of a woman to decide whether to continue her pregnancy. For support, it cites the Statutes of the Territory of Kansas, 1855, ch. 48, secs. 10 and 39, which made performing any abortion a misdemeanor and performing an abortion on a quickened child manslaughter in the second degree. It points out these laws were carried forward into the first state statutes. See G.L. 1862, ch. 33, secs. 10 and 37.

The State's reliance on the existence of 19th century criminal abortion statutes is wholly unpersuasive. There are three reasons we reject this argument: (1) the history of enactment provides no evidence that the legislation reflected the will of the people; (2) these statutes were never tested for constitutionality; and (3) the historical record reflects that those at the Wyandotte Convention, while willing to recognize some rights for women, refused to recognize women as having all the rights that men had.

As to the first reason, we have only sketchy legislative history regarding the statutes adopted by the 1855 territorial legislature. But we do know that in slightly more than 30 days this proslavery legislature enacted a complete code of laws consisting of 147 chapters and 1,058 printed pages, the overwhelming majority of which were statutes from the slave state of Missouri. This body became known as the "'bogus legislature'" because 5,000 Missouri voters took over the polls in the Kansas Territory to elect the members of the legislature. Wilson, *How the Law Came to Kansas*, 63 J.K.B.A. 26, 29 (January 1994); Wilder, *The Annals of Kansas* 72 (1886). The bogus legislature's criminal statutes on abortion were virtually verbatim statements of Missouri statutes. Compare Mo. Rev. Stat., Crimes and Punishments, art. II, §§ 9, 10, 36 (1835), with Kan. Terr. Stat. 1855, ch. 48, §§ 9, 10, 39.

What we know about the Missouri laws and the manner in which those laws were passed in Kansas convinces us these early statutes provide little evidence of what a majority of Kansans felt about abortion in 1855. Dr. James Mohr, a historian who focuses his academic work on the history of social policy in America, wrote about the shift in abortion policy in America in his work, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978). His research has been widely cited, including by the United States Supreme Court, see *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in part and dissenting in part), and it provides some background on Missouri's abortion statutes, which can be traced back to the first abortion law passed in the United States in 1821.

To first provide some perspective, Dr. Mohr documents that, until the first statute was adopted, abortion in the United States was governed by the traditional British common law. Mohr, at 3. He explains "the practice of aborting unwanted pregnancies was, if not common, almost certainly not rare in the United States during the first decades of the nineteenth century." Mohr, at 16. In fact, women could obtain abortifacient information "from home medical guides, from health books for women, from midwives and irregular practitioners [that is, individuals who were not properly trained], and from trained physicians." Mohr, at 16. "[M]any American women sought abortions, tried the standard techniques of the day, and no doubt succeeded some proportion of the time in terminating unwanted pregnancies. Moreover, this practice was neither morally nor legally wrong in the eyes of the vast majority of Americans, provided it was accomplished before quickening." Mohr, at 16.

In 1821, Connecticut passed the first statute limiting abortion in the United States. It prohibited the use of "any deadly poison, or other noxious and destructive substance, with an intention . . . to murder, or thereby to cause or procure the miscarriage of any

woman, then being quick with child." Mohr, at 21 (quoting Conn. Stat. tit. 22, § 14 [1821]). Mohr explains this law "might best be characterized as a poison control measure." Mohr, at 21. It "did not proscribe abortion per se; it declared illegal one particular method of attempting to induce an abortion because that method was considered prohibitively unsafe owing to the threat of death by poisoning." Mohr, at 22.

After Connecticut's legislation, "three other states—Missouri in 1825, Illinois in 1827, and New York in 1828—also passed laws that dealt specifically with abortion. Both the Missouri law and the Illinois law followed Connecticut's 1821 statute closely and, like the Connecticut law, they were as much poison control measures as anti-abortion measures." Mohr, at 25-26. Unlike the Connecticut statute, the Missouri law deleted any reference to quickening, but "in practice, indictments could not be brought under these laws before quickening because intent had to be proved and the only way that intent could be proved was to demonstrate that the person who administered the poison could have known beyond any doubt the woman was pregnant." Mohr, at 26.

The New York statute instead "addressed abortion in three separate clauses." Mohr, at 26. It influenced subsequently adopted provisions in other states, and it seems this influence extended to the Missouri Legislature. In 1835, Missouri amended its poison-control abortion laws and the new law, although not identical to New York's law, was very similar. Compare 2 N.Y. Rev. Stat. pt. IV, ch. I, tit. 2, §§ 8, 9, and tit. 6, § 21 (1828), with Mo. Rev. Stat., Crimes and Punishments, art. II, §§ 9, 10, 36 (1835). The similarity makes the history of the 1828 New York legislation relevant.

Mohr explains that the passage of the 1828 New York legislation, while including physiological and moral arguments about abortion, "was inextricably bound up with the history of medicine and medical practice in America," specifically in the movement to regulate the medical profession. Mohr, at 31, 36. Historically, there had been little

regulation of the credentials required to hold oneself out as a medical practitioner. "As early as 1800, for example, two-thirds of the people who made their livings as physicians in the city of Philadelphia were neither members of the local College of Physicians nor graduates of any medical school of any kind." Mohr, at 32. Outside the cities, "regular" physicians—"those physicians dedicated to the principles of what later became scientific medicine"—were very rare. Mohr, at 32-33. Instead, in rural areas like Missouri or the Kansas Territory, "irregulars" or "self-taught lay healers and part-time folk doctors dispensed medicines of all kinds and performed simple surgery." Mohr, at 33.

The proliferation of the "irregulars" created "an intense competition for paying patients that hurt the regulars badly." Mohr, at 34. The regulars turned to state legislatures, and in New York, "by controlling through the speaker of the assembly all appointments to the standing committee on medical practice, [they] had pushed through the legislature in 1827 the toughest medical regulation law the state had ever had." Mohr, at 37-38.

The following year, the New York Legislature's revisers reported they listened to the "'old and experienced surgeons'" in drafting additional, medically related sections of the state code, including the abortion provisions. Mohr, at 38. These new requirements included a mandate that no therapeutic abortion could occur unless two physicians, who by operation of the 1827 provisions meant two "regulars," had been consulted. Mohr, at 38. In the Missouri version of the statute, only one physician had to be consulted. Mo. Rev. Stat., Crimes and Punishments, art. II, § 36 (1835). In New York, the wide-ranging regulation of the medical field led to "[i]rregulars organiz[ing] protests and launch[ing] a counteroffensive of major proportions in favor of what might be termed laissez-faire medicine." Mohr, at 38. As a result, New York's abortion law "lay buried in the code, unenforced." Mohr, at 39.

Mohr concludes the "first wave of abortion legislation in American history," which included Missouri's provisions, "emerged from the struggles of both legislators and physicians to control medical practice rather than from public pressures to deal with abortions per se" and "were aimed . . . at regulating the activities of apothecaries and physicians, not at dissuading women from seeking abortions." Mohr, at 43. Moreover, "not a single one of these early abortion provisions was passed by itself. They were all contained in large revisions of the criminal codes in their jurisdictions or in omnibus 'crimes and punishments' bills." Mohr, at 42.

Mohr found this significant, noting: "[T]here was no substantial popular outcry for anti-abortion activity; or, conversely, no evidence of public disapproval of the nation's traditional common law attitudes." Mohr, at 42. According to Mohr, "[n]o legislator took a political stand" or cast a recorded vote on stand-alone abortion legislation. "The popular press neither called for nor remarked upon the passage of the acts; the religious press was equally detached." Mohr, at 42. Instead, Mohr attributes the statutory language to "the regular physicians to whom . . . legal scholars would look for guidance in drafting their codes." Mohr, at 42. "But as far as the vast majority of the population was concerned, the country's first laws on abortion remained deeply buried in the ponderous prose of criminal codes and were evidently little noticed and rarely enforced by anybody." Mohr, at 43; see Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 282 (1992) (In the early 1800s, "America's politicians, clergy, and press were silent on the question of abortion."). Most organized religions in America, including Catholic, Protestant, and Jewish denominations, did not condemn early-term abortions until after criminal abortion laws were already on the books. See *Roe*, 410 U.S. at 160-61; Reagan, *When Abortion Was a Crime* 6-14 (1997).

This history does not reflect the type of antiabortion sentiment the State wishes to ascribe to the genesis of Kansas' early abortion statutes. And the legislative record suggests Kansas territorial legislators gave no consideration to the appropriateness of the abortion statutes. Given that the 1855 bogus legislature's criminal statutes on abortion were virtually verbatim recitations of Missouri statutes, and buried in the approximately 300 sections of Missouri's criminal statutes that Kansas adopted, little, if any, weight can be accorded these statutes as expressing the will of the people of the Kansas Territory at the time of the Wyandotte Convention four years later.

Without much ado, the 1859 Territorial Legislature simply reenacted most, if not all, of the criminal code from the bogus legislature. See House J. 1859, p. 42. Since proslavery legislators were now outnumbered, the deleted statutes involved crimes related to slaves, e.g., assisting in their escape or specifically criminalizing conduct related to "negroes or mulattoes." Compare Kan. Terr. Stat. 1855, ch. 151, with Kan. Terr. G.L. 1859.

Once Kansas became a state, the procedure was much the same. The bill admitting Kansas to the Union was signed by President James Buchanan on January 29, 1861. Charles Robinson took the oath as governor on February 9, and he asked the Legislature to meet on March 26. That first Legislature, as one member would later recall, spent its time "passing just such laws as were necessary to put the state government in motion." Ballard, Address Before the Kansas State Historical Society: The First State Legislature, *in* 10 Kansas Historical Collections 232, 232-33, 237 (1908). Indeed, the "General Laws of the State of Kansas, passed at the First Session of the Legislature" (i.e., 1861 session laws) show the only criminal law change during these early months of the Civil War was to add treason and disloyalty crimes on May 21, 1861. G.L. 1861, ch. 27.

During the second legislative session in 1862, a committee was appointed to "ascertain what laws are in force at this time, and what laws have become obsolete or repealed by implication." Baker, Address Before the Kansas State Historical Society: The Kansas Legislature in 1862, *in* 3 Kansas Historical Collections 101, 107-08 (1885) (quoting resolution on January 27, 1862). The committee was not tasked with looking at the merits of any legislation.

Even given the committee's limited task of determining what statutes were in effect, its members obviously felt rushed. The committee reported:

"Owing to want of time, the committee have not been able to give the work that care and attention which it should have had It would indeed be difficult, in the time allowed us to perform this work, to select from the mass of legislation now upon our statute books, all the laws and parts of laws in force, and omit all which have been repealed, suspended, and become obsolete, without fault or mistake We have inserted all laws about which we have any doubt, preferring that the error, if there was any, should be on the safe side." Baker, at 108.

The Legislature acted as a committee of the whole to hear the report on the night before adjournment. In a speech before the Kansas Historical Society, the President of the Society described the Legislature's handling of the report:

"The chairman stood for three hours reading the report, making motions to amend, strike out, &c., &c., and receiving the paper balls which were hurled at him. Every motion he made was carried with a whoop, and he might have inserted an appropriation to himself for any amount, without its being discovered." Baker, at 108.

Given the way in which these bills were passed, we cannot know what a majority of the legislators—much less the people in the Kansas Territory or the new state—thought about abortion. For this reason, we give them little weight. Indeed, the "General

Laws of the State of Kansas in force at the close of the session of the Legislature [e]nding March 6th, 1862," reveal the crimes and punishments statutory sources are the "Acts of 1859" of the Territorial Legislature plus the treason-based acts of the 1861 Legislature. G.L. 1862, chs. 33 and 34.

The second reason the statutes do not warrant deference in our constitutional analysis is that, obviously, the Kansas Constitution and section 1 of its Bill of Rights did not apply to the territorial laws that predated the Wyandotte Convention and those territorial laws were never tested for constitutionality. Constitutions are supreme over statutes—whether territorial or state. *Atkinson v. Woodmansee*, 68 Kan. 71, 90-91, 74 P. 640 (1903) (citing *Fairbank v. United States*, 181 U.S. 283, 285-86, 21 S. Ct. 648, 45 L. Ed. 862 [1901] [Brewer, J.]). Additionally, no Kansas reported court decision discusses whether the state abortion statutes were constitutional. And nothing in the history of the Wyandotte Convention or the text of the Kansas Constitution indicates the framers intended to create any exceptions to the natural right of personal autonomy. Finally, "the fact that an unconstitutional statute has been enacted and has remained in the statute books for a long period of time in no sense imparts legality. . . . Age does not invest a statute with constitutional validity, neither does it rob it of such validity." *State v. Hill*, 189 Kan. 403, 410, 369 P.2d 365 (1962).

The third reason we reject the State's reliance on the territorial and early state statutes arises from the gender-differentiated rights recognized at that time. The biases reflected in these differences, which we now recognize as discriminatory, manifested in a majority of legislators serving in Missouri and Kansas during the 1800s who failed to actually recognize all the natural and political rights of women, regardless of whether the Constitution recognized them. To appreciate the bias, one need only note the conduct barring women from the Wyandotte Convention and from voting on the resultant Constitution's ratification.

The Kansas Constitution initially denied women the right to vote in most elections, to serve on juries, and to exercise other rights that we now consider fundamental to all citizens of our state. See Kan. Const. art. 5, § 1 and art. 15, § 6 (1861). These types of limitations had a long history in England and the United States, as the following examples demonstrate.

The venerable Magna Carta, in its charter of rights, stated: "No one shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband." Pound, at 125 (quoting McKechnie's translation of Magna Carta, ¶ 54). In 1765, Blackstone explained, in his Commentaries on the Laws of England, Volume 1, at *442-45, that a married woman had no separate legal existence from her husband and she could "bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued, without making the husband a defendant." Blackstone noted the law permitted a husband "to restrain a wife of her liberty." 1 Blackstone, at *445.

The English common-law deprivation of rights for women was transported to the new world. In 1845, Edward Mansfield wrote:

"[T]he husband's control over the person of his wife is so complete that he may claim her society altogether; that he may reclaim her if she goes away or is detained by others; that he may use gentle constraint upon her liberty to prevent her going away, or to prevent improper conduct; that he may maintain suits for injuries to her person; that he may defend her with force; that she cannot sue alone; and that she cannot execute a deed or valid conveyance, without the concurrence of her husband. In most respects she loses the power of personal independence, and altogether that of separate action in legal matters." Mansfield, *The Legal Rights, Liabilities and Duties of Women* 272-73.

Under the common law, a "feme-covert" could not contract, even with the assent of her husband, for the sale of her real estate. See, e.g., *Butler v. Buckingham*, 5 Day 492 (Conn. 1813). The common law recognized a right of a husband to punish his wife by beating her with "a rod no larger than the diameter of his thumb." See, e.g., *Feltmeier v. Feltmeier*, 333 Ill. App. 3d 1167, 1169 n.1, 777 N.E.2d 1032 (2002); *State v. Oliver*, 70 N.C. 60, 61 (1874). The common-law spousal exception to rape continued in this country for nearly 200 years. See *Shunn v. State*, 742 P.2d 775, 777 (Wyo. 1987).

In *Bradwell v. The State*, 83 U.S. 130, 21 L. Ed. 442 (1872), the Supreme Court upheld a state's rejection of a woman's application for admittance to practice law. A concurring opinion of three of the court's justices pointed out that, under the common law, only men were admitted to the bar. 83 U.S. at 140. The concurrence explained the legal status of women at the time:

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States." 83 U.S. at 141.

By 1879, in *Strauder v. West Virginia*, 100 U.S. 303, 310, 25 L. Ed. 664, the Supreme Court held that the Constitution protected the right of males of color to sit on juries but not the right of women to do so.

And, as late as in 1910, in *Thompson v. Thompson*, 218 U.S. 611, 31 S. Ct. 111, 54 L. Ed. 1180, the Supreme Court upheld the common-law rule that a wife could not recover damages from her husband for assault and battery committed by him against her person. Abrogating this common-law relationship might unleash "evils" upon society and would "open the doors of the courts to accusations of all sorts of one spouse against the other." Rejecting the common law in this regard would constitute "radical and far-reaching changes in the policy of the common law." 218 U.S. at 617-19.

We recognize that many do not view abortion through a lens of gender bias. But we cannot ignore the prevailing views justifying widespread legal differentiation between the sexes during territorial times and the reality that these views were reflected in policies impacting women's ability to exercise their rights of personal autonomy, including their right to decide whether to continue a pregnancy. See Siegel, 44 Stan. L. Rev. 261. In essence, the history of women's rights contemporaneous to the Wyandotte Convention reflects a paternalistic attitude and—despite what the Constitution said—a practical lack of recognition that women, as individuals distinct from men, possessed natural rights. We no longer live in a world of separate spheres for men and women. True equality of opportunity in the full range of human endeavor is a Kansas constitutional value, and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago. Therefore, rather than rely on historical prejudices in our analysis, we look to natural rights and apply them equally to protect all individuals. Territorial and early state statutes do not compel another result or rationale.

1.7 *Conclusion: Section 1 Protects a Right to Determine Whether to Continue a Pregnancy.*

As discussed, we reach our conclusion that section 1 of the Kansas Constitution Bill of Rights protects a woman's right to make decisions about whether she will continue a pregnancy based on several factors. These include an analysis of natural rights, Lockean principles, the caselaw of Kansas, the rationale and holdings of court decisions from other jurisdictions reviewing broad constitutional natural rights provisions or other provisions similar to ours, and the history of early statutes limiting abortion in Kansas. These factors lead us to conclude that section 1's declaration of natural rights, which specifically includes the rights to liberty and the pursuit of happiness, protects the core right of personal autonomy—which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows Kansans to make their own decisions regarding their bodies, their health, their family formation, and their family life. Pregnant women, like men, possess these rights.

2. *The Doctors' Second Burden: Establishing an Unconstitutional Infringement*

Now that the Doctors have established a protected right, they must show an unconstitutional infringement of that right. One may question whether the Legislature may adopt any restrictions that implicate a natural right, declared in section 1 to be inalienable.

In answering this question, we start by observing that the Kansas Constitution does not begin with an enumeration of the powers of government. It instead begins with a Bill of Rights for Kansans, which in turn begins with a statement of acknowledged inalienable natural rights, among which are life, liberty, and the pursuit of happiness. By this ordering, demonstrating the supremacy placed on the rights of individuals, preservation of these natural rights is given precedence over the establishment of

government. Cf. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 532, 90 N.W. 1098 (1902).

Further, a state constitution's bill of rights "is inserted in the constitution for the express purpose of operating as a restriction upon legislative power." Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 176 (1868). Even though those in the Kansas Territory recognized the advisability of establishing a government that would protect the common welfare, by starting the Kansas Constitution with the Bill of Rights, the founders, like those in other territories, set the limit beyond which "no human legislation should be suffered to conflict with the rights declared to be *inherent and inalienable*." Bateman, *Political and Constitutional Law of the United States of America* 17 n.1 (1876). Bills of rights in state constitutions acted as "*admonitions to the legislature which aimed at preventing the abuse of private rights*." Elliott, *The Constitution as the American Social Myth*, in *The Constitution Reconsidered* 217 (Read ed., 1938).

Does all of this mean no governmental action may infringe to any degree on such rights? We turn to that question.

2.1 *The Historical Record Demonstrates a Recognition and Acceptance that Governmental Regulations Could Encroach on Rights.*

The debates about the wording of section 1 at the Wyandotte Convention suggest the framers did not intend to prohibit all government encroachment of natural rights. Kingman told his fellow delegates that "the word 'inalienable' has a fixed meaning in law." Convention, at 282. He gave an example: "[W]hen in the common use of the word we say, that a man cannot alienate his property, none would suppose we mean to say, he cannot forfeit his property." Convention, at 282-83. Referring to the constitution's homestead provision, "which shall be inalienable," he indicated his committee did "not

propose to ordain that it shall not be forfeited for debts due to the State, and so on." Convention, at 283.

Nor did Locke himself view inalienable rights as being totally outside the purview of regulation in an organized society. He viewed some regulation of natural rights as essential to civil society because there is no privilege to violate the rights of others. Two Treatises, Bk. II, §§ 87, 95. But that regulation cannot be so extensive or invasive that these natural rights are surrendered completely. Two Treatises, Bk. II, § 131 (a person forgoes natural rights "only with an intention . . . to preserve himself his Liberty and Property"); see Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429, 450-56, 479-86 (2004) (discussing Locke's theories and their understanding during the time period of the Wyandotte Convention).

This means that, as long as an individual remains within her (or his) private domain, she may do as she pleases, provided her "conduct does not encroach upon the rightful domain of others. As long as [her] actions remain within this rightful domain, other persons—including persons calling themselves government officials—should not interfere without *a compelling justification*." (Emphasis added.) 79 Notre Dame L. Rev. at 446.

2.2 *Courts Review Whether a Compelling Justification Exists Under a Strict Scrutiny Standard.*

What then constitutes a compelling justification? The United States Supreme Court and this court have adopted a standard for courts to apply when determining if the government has met its burden of establishing a compelling justification for enactments. The standard is referred to as "strict scrutiny." See *Farley*, 241 Kan. at 669-70; Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007) (providing a comprehensive history of strict scrutiny review and tracing its development); see also Siegel, *The Origin*

of the Compelling State Interest Test and Strict Scrutiny, 48 Am. J. Legal Hist. 355 (2006) (same). The strict scrutiny standard, also called the strict scrutiny test, is part of a three-tiered set of standards generally applied to claims under the Fourteenth Amendment to the United States Constitution. Initially, these standards were applied in equal protection cases, but the United States Supreme Court has expanded the application of strict scrutiny review to include government violations of fundamental rights under the Due Process Clause. Fallon, 54 UCLA L. Rev. at 1281-84. A robust body of United States Supreme Court caselaw sets out the parameters of the strict scrutiny standard and how courts should apply it.

This court, when considering claims brought concurrently under section 1 of the Kansas Constitution Bill of Rights and the Fourteenth Amendment to the United States Constitution, has recognized and adopted these three standards. *Farley*, 241 Kan. at 669. They are: (1) the rational basis standard, which requires only that the legislative enactment bear some rational relationship to a legitimate state interest; (2) the heightened or intermediate scrutiny standard, which requires the enactment to substantially further an important state interest; and (3) the strict scrutiny standard, which requires the enactment serve some compelling state interest and be narrowly tailored to further that interest. *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (strict scrutiny); *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (rational basis); *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (intermediate scrutiny). The determination of which of the three standards applies depends on the nature of the right at stake. *Farley*, 241 Kan. at 669.

The most searching of these standards—strict scrutiny—applies when a fundamental right is implicated. *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1017, 850 P.2d 773 (1993); see *State v. Ryce*, 303 Kan. 899, 957, 368 P.3d 342 (2016). As we have already noted, the natural right of personal autonomy is fundamental and thus requires

applying strict scrutiny. As such, to justify S.B. 95, the State must establish a compelling interest—one that is "not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." Fallon, 54 UCLA L. Rev. at 1273.

The strict scrutiny standard has been applied in cases where the government has imposed restrictions on abortions. Initially, the United States Supreme Court applied the strict scrutiny standard in *Roe*, 410 U.S. at 154-55, and its companion case, *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), to state statutes restricting access to medical procedures used to end a pregnancy.

The Court adopted a different standard in *Casey*—a case that addressed restrictions on women's access to abortion. In doing so, the Court observed that the *Roe* Court had adopted a trimester-based framework when deciding the point during a pregnancy at which the State's interest in regulating abortion was significant enough to impose restrictions on the procedure. *Casey*, 505 U.S. at 872 (plurality opinion). During the first trimester, the State had no compelling interest and could not restrict abortion; during the second trimester, it could restrict abortion to ensure the woman's safety; and during the third trimester—when science then considered a fetus viable—its interest was compelling enough to completely prohibit the procedure unless it put the woman's life or health in danger. *Casey*, 505 U.S. at 872 (plurality opinion).

The *Casey* Court noted that medical advances had made it safe for women to have abortions later in pregnancy and had advanced viability to an earlier time in the pregnancy. But it concluded "these facts go only to the scheme of time limits on the realization of competing interests" and have "no bearing on the validity of *Roe*'s central holding" regarding a woman's right to terminate her pregnancy. 505 U.S. at 860. After reaffirming *Roe*'s conclusions on a woman's right to choose an abortion, the three

authoring justices in *Casey* realigned the "other side of the equation[, which] is the interest of the State in the protection of potential life." *Casey*, 505 U.S. at 871 (plurality opinion). Rather than the traditional strict scrutiny standard, the three justices adopted an "undue burden" standard for the State to meet. 505 U.S. at 876 (plurality opinion). As we will discuss, this standard is less rigorous than strict scrutiny.

Under the undue burden standard, the three justices divided pregnancy into two stages, with different rules applying to each stage. Before viability of the fetus, states could adopt measures designed "to persuade the woman to choose childbirth over abortion" as long as those measures were "reasonably related to that goal" and did not impose an "undue burden" on the woman's ability to obtain an abortion. 505 U.S. at 878 (plurality opinion). The decision defined "undue burden" as a law whose "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878 (plurality opinion). After viability, states could "'regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" 505 U.S. at 879 (plurality opinion) (quoting *Roe*, 410 U.S. at 164-65).

This court has never adopted the undue burden standard. But it has, as acknowledged above, tended to employ a Fourteenth Amendment based approach to challenges invoking both that amendment and section 1 of the Kansas Constitution Bill of Rights. Thus, the trial court and the six members comprising the Court of Appeals plurality predicted this court would adopt the undue burden standard. Several worthy reasons lead us to do otherwise and apply the strict scrutiny standard.

First, the undue burden standard has proven difficult to understand and apply. See Chemerinsky & Goodwin, *Abortion: A Woman's Private Choice*, 95 Tex. L. Rev. 1189, 1219-20 (2017) (discussing the ambiguities in the Court's articulation of the standard and

the internal "tension" of the undue burden test, which "says both that the state cannot act with the purpose of creating obstacles to abortion and that it can act with the purpose of discouraging abortion and encouraging childbirth"). One troubling ambiguity has arisen regarding the level of judicial scrutiny the standard requires. At least one author has referred to the *Casey* standard as "[a] form of intermediate scrutiny." Fallon, 54 UCLA L. Rev. at 1299. Under this standard, the State must show only an "important" interest in order to successfully defend the challenged legislation. 54 UCLA L. Rev. at 1298. Meanwhile, the Fifth Circuit has interpreted the undue burden test as a form of the rational basis test—i.e., a standard of review even less demanding than intermediate scrutiny. See Greenhouse & Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 Yale L.J. 1428, 1466-67 (2016) (discussing Fifth Circuit cases).

The United States Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, 579 U.S.____, 136 S. Ct. 2292, 2309, 195 L. Ed. 2d 665 (2016), did not equate the undue burden test to the rational basis test, and some have argued that *Hellerstedt* requires courts to apply "close scrutiny." Greenhouse & Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 Yale L.J. Forum 149, 163 (2016). But "close scrutiny" is not a defined term. It presumably means something very stringent, and Justice Thomas, in his *Hellerstedt* dissent, apparently believed that the majority had "transform[ed] the undue-burden test to something much more akin to strict scrutiny." 136 S. Ct. at 2324.

These shifting and conflicting pronouncements leave the exact contours of the undue burden test murky. In part, the lack of clarity comes from the fact that neither *Casey*, in stating the undue burden test, nor any of the cases applying it, including *Hellerstedt*, have set out the test in, or in relation to, the traditional language used for the three tiers of scrutiny.

Further, the undue burden standard has been criticized by some of our sister courts for leaving judges to subjectively gauge what is an undue burden—something that varies based on a judge's own views and experiences as well as on the circumstances of each pregnant woman. See, e.g., *Planned Parenthood*, 915 N.W.2d at 239 ("[A] regulation held to be an undue burden by one judge could just as easily be found to be reasonable by another judge because the gauge for what is an undue burden necessarily varies from person to person."); 915 N.W.2d at 232 ("Abortion regulations impact different women in many different ways. . . . There are few hurdles that are of level height for women of different races, classes, and abilities."). There, the Iowa Supreme Court also observed—in our view, correctly:

"When a state regulates abortion in furtherance of its interest in potential life, the undue burden standard solely measures the impact the regulation has on women's ability to receive the procedure. . . . More, however, can be at stake. A standard that only reviews the burdens of the regulation fails to guarantee that the objective of the regulation is, in fact, being served and is inconsistent with the protections afforded to fundamental rights." 915 N.W.2d at 240.

Another reason not to default to the federal undue burden standard is that this court's precedent indicates application of strict scrutiny is appropriate. Traditionally this court has reviewed ordinances and statutes for violations of section 1 of the Kansas Constitution Bill of Rights using the three tests applied to equal protection challenges under the Fourteenth Amendment by the United States Supreme Court: rational basis, intermediate scrutiny, and strict scrutiny. See, e.g., *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 618, 576 P.2d 221 (1978) (practice of medicine not a fundamental interest under Constitution; therefore, traditional rational relationship test applied); *Henry v. Bauder*, 213 Kan. 751, 762, 518 P.2d 362 (1974) (Kansas automobile guest statute

imposing legal liability on driver only if guilty of some act constituting recklessness or willful or wanton misconduct fails rational basis test).

Significantly, in *Farley*, 241 Kan. at 670-71, a case in which this court expressly decided the issue of a statute's constitutionality based on section 1's guarantee of equal protection rather than the Fourteenth Amendment's, we considered the possibility of applying strict scrutiny. Under the facts of the case, which did not involve a natural right, the court decided to apply the intermediate scrutiny standard to declare unconstitutional a statute that abolished the collateral source rule in medical malpractice litigation. 241 Kan. at 672, 678.

In short, although there are no Kansas cases applying strict scrutiny to natural rights, *Farley* and other cases suggest the standard is available. See *Limon*, 280 Kan. at 283-84, 287 (although applying rational basis analysis, recognizing tiers of scrutiny in an equal protection analysis under section 1).

The State urges us to distinguish these cases as dealing with equal protection rather than substantive rights and to refuse to expand the tiered scrutiny approach to include the latter. But the State does not explain why section 1 should be applied in two different ways—one way for an equal protection analysis and another for violation of a substantive right. We can perceive no doctrinal basis for doing so. And certainly nothing in the language of section 1 suggests a textual reason for doing so. In our view the same judicial standard of review should apply to this case arising under section 1. And strict scrutiny has been applied outside of equal protection—and due process. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 395, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (under First Amendment to the United States Constitution, content-based laws—those that target speech based on its communicative content—are subject to strict scrutiny). It serves as an appropriate test when fundamental rights are at issue.

As further support for our adopting the strict scrutiny standard, we note it has been applied by a majority of other courts that have determined their state constitutions provide a right to decide whether to continue a pregnancy. See, e.g., *Valley Hosp. Ass'n v. Mat-Su Coalition*, 948 P.2d 963, 969 (Alaska 1997) (constitution allows constraint of abortion rights only when it serves a "compelling state interest" and "no less restrictive means could advance that interest"); *Committee to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252, 262, 276, 172 Cal. Rptr. 866, 625 P.2d 779 (1981) ("only the most compelling of state interests" could possibly justify impairment of "fundamental constitutional right to choose whether or not to bear a child"); *In re T.W.*, 551 So. 2d 1186, 1192-93 (Fla. 1989) (statute interfering with a woman's decision to continue a pregnancy violates her constitutional rights unless the regulation "'serves a compelling state interest and accomplishes its goal through the use of the least intrusive means'"); *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 765-67 (Ill. 2013) (abortion regulations must withstand strict scrutiny); *Planned Parenthood*, 915 N.W.2d 206, 237-41 (because decision whether to end a pregnancy is a fundamental liberty, strict scrutiny applies); *Women v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995) (state statutes affecting a woman's fundamental right to choose whether to continue a pregnancy are subject to strict scrutiny); *Armstrong v. State*, 296 Mont. 361, 374-76, 989 P.2d 364 (1999) (infringement on women's right to obtain pre-viability abortion unconstitutional unless provision is narrowly tailored to effectuate compelling interest); *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000) (because abortion regulations interfere with fundamental right, such regulations must withstand strict scrutiny), *superseded by amendment* Tenn. Const. art. I, § 36 (2014). But see *Moe*, 382 Mass. at 655-58 (impairment of fundamental right of choice assessed by balancing state interest against pregnant woman's interest); *Fordice*, 716 So. 2d at 655 (assessing statutes impairing access to abortion under undue burden standard instead of usual compelling interest standard applied to violations of right to privacy; privacy right to abortion "much more

complex"); *Voinovich*, 89 Ohio App. 3d at 702-03 (adopting *Casey* undue burden analysis for restrictions that interfere with liberty right to choose abortion; holding equal protection analysis requires abortion restrictions to be "'tailored to further an important government interest"; state must demonstrate "'exceedingly persuasive justification").

Finally, and perhaps most importantly, we adopt the strict scrutiny standard because it is our obligation to protect (1) the intent of the Wyandotte Convention delegation and voters who ratified the Constitution and (2) the inalienable natural rights of all Kansans today. And the strict scrutiny test best protects those natural rights that we today hold to be fundamental.

We agree with the concurring opinion that both the undue burden and strict scrutiny tests start with determining how governmental action burdens or infringes on a right. But significant differences between the two standards makes the undue burden standard less rigorous for the State to meet. We mention some of the most consequential ones.

First, under the strict scrutiny standard, the State faces a higher burden. As we will discuss in more detail in section 2.4 below, once a plaintiff proves an infringement—regardless of degree—the government's action is presumed unconstitutional. Then, the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it. See, e.g., *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015) (in free speech context, holding "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests"); *Fisher v. University of Texas at Austin*, 570 U.S. 297, 310, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013) ("[s]trict

scrutiny is a searching examination, and it is the government that bears the burden"); *Liggett*, 223 Kan. at 617 (when strict scrutiny applies state has burden of proof).

On the other hand, *Hellerstedt*—with the undue burden test—"essentially engages in ad hoc balancing of the individual and state interests involved, seemingly *distributing the burden of proof roughly evenly* between the plaintiff and state in a given case." (Emphasis added.) McDonald, *A Hellerstedt Tale: There and Back Again?*, 85 U. Cin. L. Rev. 979, 1012 (2018). This balancing test relieves the State of some of the burden of proof and from having to narrowly tailor an infringement to the interest it seeks to protect. As long as that infringement—the burden on abortion access—is less than the benefit, it is constitutional. See *Hellerstedt*, 136 S. Ct. at 2309.

Second, the undue burden test requires only that the governmental interest be "legitimate" or "valid." 136 S. Ct. at 2309. Thus, a weak but legitimate or valid interest—one that is less than compelling—may justify an infringement on a right if the burden is not substantial. In contrast, when the State has to show a compelling interest under strict scrutiny, it must show something that is "not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." Fallon, 54 UCLA L. Rev. at 1273. In essence, the undue burden test emphasizes the governmental interest by simply balancing it against the individual rights of Kansans. This is instead of starting with an emphasis on the individual's rights and requiring the government to establish its compelling interest and to prove its action is narrowly tailored to serve that interest—even if the infringement is slight. And by placing their acknowledgment of these individual rights in the first section of Kansans' Bill of Rights, the drafters and adopters of our Constitution made clear the rights are foremost.

Simply put, the undue burden standard—both as set out in *Hellerstedt*, 136 S. Ct. at 2309, and in the concurring opinion, lacks the rigor demanded by the Kansas Constitution for protecting the right of personal autonomy at issue in this case. Further, great uncertainty exists about when—and how—to apply the standard to different abortion restrictions in the future. See McDonald, 85 U. Cin. L. Rev. at 1005-06 (arguing *Hellerstedt* applies only to maternal health regulations and not to persuasion regulations, which arguably continue to be subject to *Casey*'s more deferential approach). The standard also lacks the predictability the concurring opinion seeks to attach to it by criticizing the varied outcomes of strict scrutiny caselaw. As one legal commentator has noted: "As framed by *Whole Woman's Health* [*v. Hellerstedt*], the outcome of undue-burden analysis depends heavily on the facts of an individual case. Fact-intensive litigation rarely yields generalizable rules or consistent results." Ziegler, *Rethinking an Undue Burden: Whole Woman's Health's New Approach to Fundamental Rights*, 85 Tenn. L. Rev. 461, 512 (2018).

For similar reasons we also reject the dissent's position that a governmental regulation, such as S.B. 95, is constitutional as long as it is not arbitrary, irrational, or discriminatory and is reasonably related to the common welfare. Slip op. at 186, 188. Like the United States Supreme Court, this court has held that an exercise of the police power does not ensure constitutionality. Rather, "[w]hile the legislature is vested with a wide discretion . . . , it cannot, under the guise of the police power, enact unequal, unreasonable or oppressive legislation or *that which violates the Constitution*." (Emphasis added.) *Londerholm*, 195 Kan. at 760. Simply adopting the dissent's test sets too low a bar when protecting a natural right from unconstitutional governmental encroachment.

At issue here is the inalienable natural right of personal autonomy, which is the heart of human dignity. It encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination. It allows each of us to make decisions

about medical treatment and family formation, including whether to bear or beget a child. For women, these decisions can include whether to continue a pregnancy. Imposing a lower standard than strict scrutiny, especially mere reasonableness, or the dissent's "rational basis with bite"—when the factual circumstances implicate these rights because a woman decides to end her pregnancy—risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making. It cheapens the rights at stake. The strict scrutiny test better protects these rights. See, e.g., *Farley*, 241 Kan. at 669-70.

All of these reasons persuade us that any government infringement of the inalienable natural right of personal autonomy requires the State to establish a compelling state interest and to show that S.B. 95 is narrowly tailored to promote it.

2.3 *The Doctors Established They are Substantially Likely to Show that S.B. 95 Impairs Natural Rights.*

Of course, before a court considers whether a governmental action survives this test, it must be sure the action actually impairs the right. In some cases, it will be obvious that an action has such effect. Imprisonment, for example, obviously impairs the right to liberty. In other cases, the court may need to assess preliminarily whether the action only appears to contravene a protected right without creating any actual impairment. See *Casey*, 505 U.S. at 873 (plurality opinion) (noting that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right"). See generally *Limon*, 280 Kan. at 284 (noting multi-step process, first of which is deciding whether legislation actually creates discriminatory classification before deciding whether the classification impermissibly infringes constitutional rights).

The trial court, although applying a different standard, made factual findings establishing the broad brush of S.B. 95. It found that criminalizing the performance of the

D & E procedure limits second-trimester abortion options to procedures that carry increased risks, are untested in some circumstances, require extra steps and time, and may be impossible in some cases—all with no established health and safety benefit for the woman. The increased risks and lack of medical research associated with the remaining options will force a woman to gamble with other aspects of her health if she chooses to end her pregnancy. Finally, S.B. 95's requirement that doctors perform procedures for which there are no known health advantages and subject their patients to the aforementioned risks, uncertainty, and hardship—especially when safe, effective, and less intrusive means exist—will undoubtedly test the boundaries of medical ethics and threaten the already small number of providers willing to perform second-trimester abortions. These implications make the procedures more dangerous and, for some, will delay or completely prevent the exercise of an inalienable natural right.

2.4 *The Trial Court Did Not Err by Failing to Apply a Presumption of Constitutionality.*

The State also argues the trial court was required to presume that S.B. 95 was constitutional when deciding whether the Doctors had shown a substantial likelihood of prevailing on the merits. Instead, the State contends, the trial court ignored this presumption, effectively shifting the burden of proof to the State and forcing it to prove that S.B. 95 is constitutional. It argues this improper shift colored the court's findings of facts and impermissibly tipped the scale in the Doctors' favor.

The Doctors respond that the right to abortion is a fundamental right and, consequently, a presumption of constitutionality would be contrary to Kansas caselaw. Alternatively, the Doctors contend that even if the trial court should have applied a presumption of constitutionality, they overcame this presumption.

This is a legal issue and therefore our review is de novo. *Apodaca v. Willmore*, 306 Kan. 103, 106, 392 P.3d 529 (2017).

The State is correct in its assertion that, generally, "[a] statute comes before the court cloaked in a presumption of constitutionality and it is the duty of the one attacking the statute to sustain the burden of proof." *Liggett*, 223 Kan. at 616. When a statute is presumed constitutional, "all doubts must be resolved in favor of its validity. If there is any reasonable way to construe that statute as constitutionally valid, this court has the authority and duty to do so." *Miller v. Johnson*, 295 Kan. 636, 646-47, 289 P.3d 1098 (2012).

"A more stringent test has emerged, however, in cases involving 'suspect classifications' or 'fundamental interests.' Here the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny." *Liggett*, 223 Kan. at 617. In such a case, "the burden of proof is shifted from plaintiff to defendant and the ordinary presumption of validity of the statute is reversed." *Farley*, 241 Kan. at 670. This burden shift stems from the recognition that government infringement of a fundamental right is inherently suspect. When considering government-instituted racial classifications, the United States Supreme Court has explained that such suspicion demands a "searching judicial inquiry" as a way to "'smoke out' illegitimate" governmental action by "assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Johnson v. California*, 543 U.S. 499, 506, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 102 L. Ed. 2d 854 [1989] [plurality opinion]).

Section 1 protects an inalienable natural right of personal autonomy, which today we hold to be fundamental. Presuming that any state action alleged to infringe that right is

constitutional dilutes the protections established by our Constitution. Thus, to the extent that the trial court actually refused to apply a presumption, it did so correctly.

Furthermore, we question the State's legal theory that the failure to apply a presumption colors a court's findings of fact. The State produces no support for this assertion. And, even if there is some legitimacy to its argument, it is of no consequence here because none of the State's factual assertions directly contradict the trial court's findings. Thus, even if the failure to apply a presumption would have altered the way the court assessed the facts, any error in not applying that presumption was harmless and gives us no reason to disturb the trial court's findings. See K.S.A. 2018 Supp. 60-261 ("Unless justice requires otherwise, no error in admitting or excluding evidence, or any other error by the court or a party, is ground for granting a new trial, for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012) (An error is harmless when there is no reasonable probability that the error affected the trial's outcome in light of the entire record).

2.5 The Trial Court Abused Its Discretion by Applying the Wrong Legal Standard, but the Result Would Be the Same.

Accepting the trial court's factual findings, we now ask the ultimate question before us in this appeal: Did the trial court abuse its discretion when it concluded that the Doctors were substantially likely to prevail on the merits of their claim? See *Downtown Bar and Grill*, 294 Kan. at 191 (on first prong of temporary injunction test, plaintiffs need show only that they are substantially likely to win, not that they absolutely will). The trial court did not apply a strict scrutiny standard when answering this question. Nor did 13 of the 14 Court of Appeals judges. Although the concurring judge did not label his standard "strict scrutiny," it had some similarities. See *Hodes*, 52 Kan. App. 2d at 328 (Atcheson,

J., concurring) ("[E]ven a fundamental right may be regulated to advance an essential governmental interest, so long as the regulation is carefully circumscribed and does no more than required to advance that interest."). Applying the wrong legal standard constitutes an abuse of discretion. See *Ward*, 292 Kan. at 550 (A trial court abuses its discretion if its decision is [1] arbitrary, fanciful, or unreasonable; [2] based on an error of law; or [3] based on an error of fact.).

Nevertheless, when a trial court applies the wrong standard, remand for it to apply the correct standard is not always necessary. Cf. *Stueckemann v. City of Basehor*, 301 Kan. 718, 750-51, 756, 348 P.3d 526 (2015) (affirming district court's inquiry that met expansive concept of reasonableness in test later articulated by Supreme Court); *State v. Prado*, 299 Kan. 1251, 1260, 329 P.3d 473 (2014) (declining to remand for additional findings where record was sufficiently developed for appellate court to conclude attorney conflict of interest existed). As in those cases, we conclude a remand is not necessary here because the result would be the same.

Although the State only argued in the trial court that, if the Kansas Constitution protects a right to end a pregnancy, S.B. 95 is constitutional under the undue burden standard, we conclude that remand to consider whether the Doctors have shown they are substantially likely to prevail on the merits in light of the strict scrutiny standard we set out today is not necessary. See *Downtown Bar and Grill*, 294 Kan. at 191. The trial court and the Court of Appeals plurality held there was a substantial likelihood S.B. 95 could not survive *Casey's* undue burden test, which in our view is a lesser standard. *Stenberg*, 530 U.S. 914, and *Gonzales*, 550 U.S. 124—the two cases that guided the trial court and the Court of Appeals plurality—illustrate this point.

In *Stenberg*, the United States Supreme Court considered a Nebraska law that banned two types of abortions it labeled as "partial birth" procedures, including the

D & E procedure at issue in the instant case and an "intact" D & E procedure. Intact D & E procedures occur in one of two ways, depending on whether the fetus presents head first or feet first. The feet-first method is known as "dilation and extraction" or "D & X." 530 U.S. at 927.

The *Stenberg* Court found two reasons the statute violated women's constitutional right to access abortion. First, the statute did not include a health exception allowing use of the targeted procedures when the mother's health was endangered. 530 U.S. at 929-30. Second, the Court concluded the Nebraska law placed an undue burden on a woman's right because it subjected physicians who performed the most common type of second-trimester abortion (the D & E procedure) to criminal prosecution. 530 U.S. at 945-46. In so holding, the Supreme Court stated that the Constitution protects against abortion regulations imposing "significant health risks," whether those risks "happen[] to arise from regulating a particular method of abortion, or from barring abortion entirely." 530 U.S. at 931.

In combination, these holdings indicate a woman has a federal constitutional right to access an abortion, including whenever it is necessary to protect her health. A regulation that prevents her from accessing the safest method of abortion for her places an undue burden on that right. These holdings have particular significance in this case, where the trial court found that S.B. 95 has removed access to the method for performing a second-trimester abortion that is the safest in most cases.

Seven years later, in *Gonzales*, 550 U.S. at 141, 168, again applying the undue burden test, the Court rejected a constitutional challenge to the federal Partial-Birth Abortion Ban Act (PBABA) of 2003, which restricted D & X abortions "'in or affecting interstate or foreign commerce.'" The Court's conclusion rested, in part, on the fact that abortion by D & E would still be available. 550 U.S. at 164.

In light of these decisions, the Kansas Court of Appeals plurality, applying the undue burden standard, discussed the impact of these cases on the present case and explained why they persuasively showed that the Doctors are substantially likely to succeed here:

"Kansas has banned the intact D & E abortion procedure since 1998. See K.S.A. 2014 Supp. 65-6721; L. 1998, ch. 142, sec. 18; L. 2011, ch. 91, sec. 30. By combining that ban with a new one on the D & E abortion procedure, Kansas has simply attempted to do in two statutes what the United States Supreme Court [in *Stenberg*] held Nebraska could not do in one—ban both D & E and intact D & E abortions.

"The State contends, based on *Gonzales*, that the new Kansas statute is permissible because reasonable alternative procedures remain available. But the circumstances here are quite unlike *Gonzales*. There, the Court considered a ban on an uncommon procedure and noted that the most common and generally safest abortion method remained available. Here, the State has done the opposite, banning the most common, safest procedure and leaving only uncommon and often unstudied options available." *Hodes*, 52 Kan. App. 2d at 291-92 (plurality opinion).

We agree with this reading of *Stenberg* and *Gonzales* and the Court of Appeals plurality's analysis of their impact on this case. We would add that, after the Court of Appeals' decision in this case, the United States Supreme Court reiterated, quoting *Roe*, that the "'State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.'" *Hellerstedt*, 136 S. Ct. at 2309 (quoting *Roe*, 410 U.S. at 150). Here, according to the findings of the trial court, through S.B. 95 the State actually thwarts its legitimate interest by taking away a method that is safer for the woman than the alternatives it proposes. See also *Danforth*, 428 U.S. at 79 (holding unconstitutional a ban on a method of abortion after finding the ban "force[d] a woman . . . to terminate her pregnancy by

methods more dangerous to her health"); *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting) ("[A] State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion.").

As previously noted, the undue burden standard applied in *Stenberg* and *Gonzales* and by the Court of Appeals plurality is often viewed as a more lenient standard than strict scrutiny or, at most, something akin to strict scrutiny. Accordingly, even though we would apply what we view as the more demanding strict scrutiny standard for the State to meet, doing so would not change the conclusions reached by the trial court.

2.6 *Conclusion: We Affirm the Trial Court's Decision to Impose the Temporary Injunction.*

Thus, neither the State's arguments about the application of a presumption nor our determination that strict scrutiny is the most appropriate test of constitutionality makes it necessary to remand this case to the trial court for new findings or additional legal analysis related to the temporary injunction phase. However, we do remand to the trial court for full consideration of the merits of the remainder of the case.

At oral argument, the State posited that if full resolution of the merits is ultimately required in the lower court, then there it might assert state interests in promoting potential life, protecting the dignity of life, protecting medical ethics, and protecting patient safety. We acknowledge some of these interests were argued in the line of cases relied on by the trial court. See *Gonzales*, 550 U.S. at 157 (recognizing "'State's interest in potential life'" and stating, "[t]here can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession'"); *Danforth*, 428 U.S. at 79, 81 (discussing state's interest in patient health and holding unconstitutional a ban on a method of abortion after finding the ban "force[d] a woman . . . to terminate her pregnancy by

methods more dangerous to her health"). And some of these interests, particularly those of promoting or protecting fetal life and patient safety, have been court-recognized as interests that may be compelling. E.g., *Planned Parenthood*, 915 N.W.2d at 239. On remand for full consideration of the merits, the State may certainly raise to the trial court any interests it claims are compelling, including those it mentioned at oral argument before this court, and show why S.B. 95 is narrowly tailored to those interests. See *Grutter*, 539 U.S. at 326.

3. *The Dissent Weakens Section 1 in a Manner the Framers and Ratifiers of the Constitution Did Not Intend.*

Although we have responded to some points made by the dissent, we pause here to point out key distinctions between it and the majority opinion. The overriding difference between the opinions is the degree of importance and substance that each attaches to individual liberty. The majority holds that individuals enjoy constitutional protection against unwarranted government intrusion in their personal business, whereas the dissent leaves the individual nearly naked and defenseless, especially in the realm of individual sovereignty.

The dissent is at its strongest when it is in agreement with the majority, that is, when it drives home the historical and legal emphasis on rights accruing to the individual at birth. In particular, the dissent insightfully cites to numerous sources supporting the majority position that government may interfere with essential personal rights only when "necessary," which can be characterized as saying that the government may interfere with essential personal rights only when its actions pass a test of strict scrutiny. The dissent cogently argues that it is up to the courts to protect the individual from "unchecked" police power exercised by the State.

But the dissent is at its weakest when it takes the majority's reliance on individual rights and distorts that argument into one that favors a government-first reasoning. The dissent finds itself in a painful dilemma: It feels obligated to hold that government may intrude with impunity on the most fundamental of natural human rights, the right of personal autonomy—in particular, the right to make medical decisions about oneself; but it also wants to hold itself out as favoring constitutionally limited government power.

In order to resolve this conflict, the dissent engages in a fantastic acrobatic midair twist. It contends that government should come from rights first, but then maintains that government should be largely unrestrained in exercising its power over the personal sovereignty of pregnant women. The dissent achieves this astonishing reversal by fervently arguing that the Kansas Constitution Bill of Rights was intended to protect the pre-political rights of Kansans. But that argument eventually leads, of course, to the same conclusion that the majority reaches.

As a consequence, the dissent is forced to mischaracterize the majority opinion. It attempts to portray the majority as paternalistic and authoritarian, endorsing government power at the expense of citizens' rights, e.g., personal autonomy. But it is the dissent who argues for a government largely unfettered by constitutional constraints, with the State deciding for the individual what is best for that individual.

The dissent concedes that some state action may violate the protections of section 1 but only if such exercise of police power is completely arbitrary, irrational, or discriminatory. The dissent ultimately favors limited state powers that in reality have no practical limits. Presumably, if the Legislature were to mandate that all males receive vasectomies at the age of 18 in order to limit population density and therefore enhance respect for human dignity, the dissent would find no constitutional conflicts. The dissent's vision of government and rights is one of regal government powers, powers that sweep

away individual liberty in favor of a majoritarian dictate. In the dissent's view, the Kansas Constitution Bill of Rights is akin to a gentle reminder not to disturb liberty very much but with no legal consequences if government ignores that reminder.

CONCLUSION

We hold today that section 1 of the Kansas Constitution Bill of Rights protects all Kansans' natural right of personal autonomy, which includes the right to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy.

Under our strict scrutiny standard, the State is prohibited from restricting that right unless it can show it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest. The Doctors have shown they are substantially likely to prevail on their claim that S.B. 95 does not meet this standard. So the trial court's temporary injunction enjoining the enforcement of S.B. 95 is appropriate.

On remand to the trial court for a full resolution of the issues on the merits, the State is certainly free to assert any interests it believes compelling and show how S.B. 95 is narrowly tailored to those interests. We are aware that the evidentiary record is sparsely developed because of the narrow issue previously before that court: simply whether a temporary injunction should be granted. We, thus, decline the concurring opinion's invitation to guess at what the arguments and evidence might be in order to provide guidance on remand.

To this point, despite the criticism of the concurring opinion, we will not accept the challenge to become a trial court ourselves. The conclusions the concurring opinion

asks us to draw should rest on the evidence actually or eventually presented, not on hypotheticals and theories. It may be that the trial court will make holdings that are similar or even identical to those made by the Iowa Supreme Court in *Planned Parenthood*, 915 N.W.2d 206—a decision the concurring opinion lauds. But it is premature for us to do so. The Iowa Supreme Court's decision came after trial—after evidence was available for review and after a trial court had made findings of fact. See also *Gannon v. State*, 298 Kan. 1107, 1171, 319 P.3d 1196 (2014) (setting out new legal test and remanding case for trial court to apply test to evidence already or eventually to be produced). Ironically, the concurring opinion even recognizes this, noting that the Iowa decision was "based on credible trial evidence" and was based "on evidence showing waiting periods do not change women's decisions whether to have an abortion." Slip op. at 103.

The trial court undoubtedly has a heavy task ahead of it. Not only must it grapple with one of the most divisive issues of our time, it must also take into account advances in science that have blurred the sharp trimester-based lines used in *Roe*'s strict scrutiny analysis. And it must do this with a deep awareness that the outcome of this case could generate a profound and personal consequence for many women. But we have great confidence in the trial court's ability to meet this challenge while applying strict scrutiny and the understandings developed over many years in various United States jurisdictions of what constitutes compelling interests and a narrow tailoring to those interests. The term "strict scrutiny" was first articulated by the United States Supreme Court in 1942, and courts have utilized the test in various contexts for over half a century. See *Shapiro v. Thompson*, 394 U.S. 618, 658-60, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) (Harlan, J., dissenting) (explicitly describing two prongs of test and citing older cases for analogous support), *overruled in part for other reasons by Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); see also Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal Hist. 355, 355-56 (2006). We note that

the strict scrutiny standard provides considerable guidance to a trial court—more so than the undue burden standard urged by the concurrence, a standard that has never been applied by this court in any context.

In its merits resolution, the trial court will "adopt an attitude of active and critical analysis," as it performs its "'searching judicial inquiry.'" *Liggett*, 223 Kan. at 617; *Johnson*, 543 U.S. at 506 (quoting *Richmond*, 488 U.S. at 493). As it does so, it should remain mindful of the words of former Kansas Attorney General and Supreme Court Justice Harold Fatzer. "[C]ourts have no power to overturn a law enacted by the legislature within constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such a case lies with the people." *Harris*, 192 Kan. at 206-07. On the other hand, "[t]he judiciary . . . has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people." *Harris*, 192 Kan. at 206. So "when legislative action exceeds the boundaries of authority limited by our Constitution, *and transgresses a sacred right guaranteed or reserved to a citizen*, final decision as to invalidity of such action must rest exclusively with the courts." (Emphasis added.) 192 Kan. at 207.

The decision of the Court of Appeals is affirmed; the trial court's ruling on the Doctors' motion for temporary injunction is affirmed; and this case is remanded to the trial court for further proceedings consistent with this decision.

* * *

BILES, J., concurring: I concur in the result. I do so because the majority decision provides little guidance for applying strict scrutiny—very rarely used in Kansas—as a meaningful constitutional measure for this legislation. And what guidance it does provide confuses rather than clarifies. For all practical purposes, the majority leaves the trial court

to fend for itself. In my view, an issue as troubling as this one requires us to be more instructive. Toward that end, I suggest what our state test should look like using an evidence-based analytical model taken from *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).

But to be clear from the outset, I join the other members of this court who unanimously agree section 1 of the Kansas Constitution Bill of Rights provides all Kansans, including pregnant women, with state-based, judicially enforceable protections against unwarranted government intrusion. Some cast this as a right to abortion, others as a limitation on state police powers, but the bottom line is the same: those challenging government conduct as an unlawful restriction on their protected section 1 interests may do so in a Kansas courtroom. The difference in our approaches is the standard used to measure where our state Constitution draws the line. See majority slip op. at 64-75 ("traditional" strict scrutiny); slip op. at 94, 107-09 (Biles, J., concurring) (evidence-based analytical model taken from *Hellerstedt*); slip op. at 185-86 (Stegall, J., dissenting) (rational basis "with bite"). This unanimity puts an end to suggestions that section 1 furnishes no basis for judicial relief when government treads on individual rights. See, e.g., *Hodes & Nauser, MDs v. Schmidt*, 52 Kan. App. 2d 274, 342, 368 P.3d 667 (2016) (Malone, C.J., dissenting); *State ex rel. Kline v. Sebelius*, No. 05-C-1050, 2006 WL 237113, at *11-12 (Kan. 3d Jud. Dist. Ct. Jan. 24, 2006); Appellants' Supp. Brief, at 12; Appellants' Brief, at 23; Amicus Curiae Brief, The Family Research Council, at 2-9.

It is also worth mentioning our court has not gone rogue today. By my count, appellate courts in 17 states have addressed whether their state constitutions independently protect a pregnant woman's decisions regarding her pregnancy from unjustifiable government interference. Of those, 13 have plainly held they do. *Valley Hosp. Ass'n v. Mat-Su Coalition*, 948 P.2d 963, 969 (Alaska 1997); *Committee to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252, 262, 274, 172 Cal. Rptr. 866, 625 P.2d 779

(1981); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989); *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 765-67 (Ill. 2013); *Planned Parenthood v. Reynolds ex rel.*, 915 N.W.2d 206, 237 (Iowa 2018); *Moe v. Secretary of Administration & Finance*, 382 Mass. 629, 649, 417 N.E.2d 387 (1981); *Women v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995); *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 653 (Miss. 1998); *Armstrong v. State*, 296 Mont. 361, 376, 989 P.2d 364 (1999); *Planned Parenthood v. Farmer*, 165 N.J. 609, 613, 762 A.2d 620 (2000); *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684, 691, 627 N.E.2d 570 (1993); *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 11, 15 (Tenn. 2000), *superseded by amendment* Tenn. Const. art. I, § 36 (2014); *State v. Koome*, 84 Wash. 2d 901, 904, 530 P.2d 260 (1975).

Three others have implicitly held their state constitutions contain this protection. *Reproductive Health Services v. Nixon*, 185 S.W.3d 685, 692 (Mo. 2006) (implying a state constitution right to abortion by explicitly holding state constitutional language is not broader than the corresponding federal language); *Hope v. Perales*, 83 N.Y.2d 563, 575-77, 634 N.E.2d 183 (1994) (stating whether the state constitution protects a woman's "fundamental right of reproductive choice" is "undisputed," and holding the challenged statute constitutional because it did not implicate "her fundamental right of choice"); *Wood v. University of Utah Medical Center*, 67 P.3d 436, 447-48 (Utah 2002) (implying state constitutional protection when noting the state constitution does not "give any further protection to plaintiffs than does the federal constitution"); cf. *Planned Parenthood v. Bd. of Medicine*, 865 N.W.2d 252, 262 (Iowa 2015) (listing *Nixon* and *Hope* as holding independent state right existed). Only one—an intermediate Michigan appellate court—has held its state constitution does not contain this guarantee. *Mahaffey v. Attorney General*, 222 Mich. App. 325, 338-39, 564 N.W.2d 104 (1997).

That said, I need to more fully explain my concurrence. I agree with the majority that section 1 substantially restrains the government's ability to encroach into intimate,

personal matters deeply affecting a person's "inalienable natural rights," such as a woman's decision whether to bear a child. If it means anything, section 1 must mean that. See *Planned Parenthood*, 915 N.W.2d at 237 ("Autonomy and dominion over one's body go to the very heart of what it means to be free. At stake in this case is the right to shape, for oneself, without unwarranted governmental intrusion, one's own identity, destiny, and place in the world. Nothing could be more fundamental to the notion of liberty."); *Women*, 542 N.W.2d. at 27 ("We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion.").

The Iowa Supreme Court recently articulated the intensely personal and demanding crossroads a pregnant woman can face at this constitutionally protected moment in her life:

"Many reasons have been identified to explain why women choose to have an abortion. Sixty percent of abortion patients already have at least one child and many feel they cannot adequately care for another child. Other women feel they are currently unable to be the type of parent they feel a child deserves. Patients frequently identify financial, physical, psychological, or situational reasons for deciding to terminate an unplanned pregnancy. Some patients are victims of rape or incest, and others are victims of domestic violence. Women also present with health conditions that prevent a safe pregnancy or childbirth. Sometimes, women discover fetal anomalies later in their pregnancies and make the choice to terminate." *Planned Parenthood*, 915 N.W.2d at 214-15.

This Kansas litigation concerns S.B. 95, which injects the State into a pregnant woman's second trimester decision-making. Again, the Iowa court's description about the personal situations that can arise during this timeframe is equally well-stated:

"There are many reasons women have second trimester or otherwise late-in-window procedures. Most women are not aware of a pregnancy until at least five weeks since their last menstrual period. Some forms of contraception can mask the symptoms of

pregnancy, which delays women from discovering a pregnancy by days or weeks. Some patients' life circumstances change drastically between discovery and the decision to terminate. A patient may have lost her job, ended the relationship with her partner, or lost a support system. Significantly, almost no fetal anomalies can be diagnosed until the second trimester when prenatal screening is conducted. Usually, an anatomical ultrasound is not performed until the eighteenth or twentieth week of pregnancy. Thus, some women may not be alerted to a problem until the second trimester, and by the time they have spoken with physicians and made the difficult choice to terminate, they may be very close to, or beyond, the twenty-week cutoff [for an abortion in Iowa]." 915 N.W.2d at 218.

See also The American College of Obstetricians and Gynecologists, Practice Bulletin No. 135: Second Trimester Abortion, 121 *Obstetrics & Gynecology* 1394, 1394 (2013).

Pregnant women, like the rest of us, have protected liberty interests fully rooted in our Kansas Constitution. No one can reasonably deny that. Yet the record so far indisputably shows S.B. 95 does more than significantly constrain a woman's access to abortion. It is a governmental edict denying pregnant women the safest and most routine medical procedure available for its purpose in the second trimester—a procedure elected by approximately 600 women in Kansas annually. And the justification for this prohibition is that the government professes to prefer less routine, more physically invasive medical options without offering actual evidence at the temporary injunction hearing to support this preference. Those who think there is no role for our state Constitution when government flexes this kind of muscle should be very afraid about what comes next.

We seem to relearn these lessons far too often. For instance, in *Buck v. Bell*, 274 U.S. 200, 205-06, 47 S. Ct. 584, 71 L. Ed. 1000 (1927), the Court upheld a Virginia law authorizing involuntary sterilization of the intellectually disabled. In doing so, the Court

remained silent about whether substantive due process protected those subject to forced government sterilization and justified it as a means to an appropriate end. 274 U.S. at 207 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."). Kansas courts shamefully fell in line. See *State, ex rel., v. Schaffer*, 126 Kan. 607, 270 P. 604 (1928) (upholding constitutionality of R.S. 1923, 76-149 through 76-155, authorizing sterilization of the "insane," epileptic, or "feeble-minded" as justified by "the interest of the higher general welfare"); cf. L. 1965, ch. 477, § 1 (repealing R.S. 1923, 76-149). Fortunately, an appropriate constitutional perspective eventually materialized. See *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (holding Oklahoma Habitual Criminal Sterilization Act violated equal protection guarantee by applying strict scrutiny since the challenged law implicated a fundamental right; stating, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race").

This is why we have a state constitution with a bill of rights instead of unrestrained rule by whatever legislatively represented majority exists in the moment. See Madison, Federalist No. 51, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, in Hamilton, Jay, and Madison, *The Federalist Papers* 382 (The Floating Press ed. 2011) (1787) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."); *Planned Parenthood*, 915 N.W.2d at 244 ("[T]he state's capacity to legislate pursuant to its own moral scruples is necessarily curbed by the constitution. The state may pick a side, but in doing so, it may not trespass upon the fundamental rights of the people."). And once we accept that there must be constraints on the government's power over its citizens, as we do in this country, courts have a singular

role in defining contours to the constitutional protections that ensure statutory or regulatory restrictions on our rights are commensurate with what is at stake. "[T]his court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas." *Harris v. Shanahan*, 192 Kan. 183, 207, 387 P.2d 771 (1963).

Our court is called upon today to set those contours in a specific context, i.e., limiting the government's ability to control a woman's decisions concerning her pregnancy. This is where I take exception with the majority's unrefined strict scrutiny standard. It amounts to little more than name dropping. Let me explain my concern.

The false dichotomy between the "strict scrutiny" vs. "undue burden" labels

Federalism principles, which underlay our form of government, recognize that states are free to establish their own standards against which they will measure governmental restrictions on judicially enforceable, substantive rights arising from their state constitutions. See *Kansas v. Carr*, 577 U.S. ___, 136 S. Ct. 633, 648, 193 L. Ed. 2d 535 (2016) ("The Federal Constitution guarantees only a minimum slate of protections; States can and do provide individual rights above that constitutional floor."); *Oregon v. Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975) ("[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.").

My colleagues all agree, as do I, that a Kansas standard based on section 1 in the present context cannot be blindly bound to United States Supreme Court jurisprudence on abortion. Majority slip op. at 15-16, 67-70; slip op. at 185-86 (Stegall, J., dissenting). This is not an instance in which we simply go lockstep with federal caselaw. See, e.g., *State v. Daniel*, 291 Kan. 490, 498, 242 P.3d 1186 (2010) ("We interpret § 15 of the Kansas Constitution Bill of Rights to provide the same protection from unlawful

government searches and seizures as the Fourth Amendment to the federal Constitution."). As both the majority and dissent point out, section 1 of the Kansas Constitution Bill of Rights differs from any federal counterpart, so the measure for deciding when its protections can be invoked does not necessarily mirror federal caselaw.

But federal jurisprudence can inform how our court should fashion a state constitutional test. And there is more than 45 years of federal caselaw to draw from on this subject, so I would look to the evidence-based analytical framework from *Hellerstedt* to style our Kansas test. My *Hellerstedt*-based test sets a considerably high bar that sufficiently protects the substantive personal interests at risk from legislation such as this. At the same time, this *Hellerstedt* analysis acknowledges important state interests with abortion that must also be conceded, but are not recognized under federal strict scrutiny abortion jurisprudence.

The *Hellerstedt* model I suggest effectively secures the constitutional protections considered today in a manner commensurate with what is at stake. And for me, the articulation that follows is necessary because it avoids simply tossing around strict scrutiny nomenclature like "compelling state interest" or "narrowly tailored to further that compelling state interest" without giving those concepts contextual substance and then hoping for the best. Majority slip op. at 7, 65, 82-83, 85-87. Litigation such as this is factually intensive and often medically based so an abstract, textbook approach is counterproductive. This is where the majority decision leaves the district court in a lurch.

The majority rationalizes that federal "undue burden" jurisprudence "has proven difficult to understand and apply." Slip op. at 67. But so what? We are tasked with developing a state standard against which a Kansas court is to scrutinize S.B. 95, so why not learn from the federal standard and do what needs to be done now to help this litigation conclude? Instead, the majority masks the lack of strict scrutiny caselaw in

Kansas by citing a string of cases that only mention strict scrutiny in passing while applying a lesser standard to the facts in controversy. See, e.g., slip op. at 73 (citing *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 618, 576 P.2d 221 [1978], as support for strict scrutiny when it actually applied rational basis standard). This necessarily raises the question how the district court can predict what might be viewed as "strict scrutiny" without proper direction from this court.

Said more pointedly, there is very little Kansas "tradition" to the constitutional analytical standard the majority characterizes as "traditional." Slip op. at 69. I can find only two strict scrutiny cases by this court applying that standard for state constitutional claims, and neither is particularly helpful in the context presented by this legislation. See *State v. Ryce*, 303 Kan. 899, 957, 368 P.3d 342 (2016) (because a fundamental right to be free from an unreasonable search was involved, the court employed strict scrutiny in evaluating the constitutionality of a statute criminalizing driver's revoking implied consent for DUI testing); *Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, Syl. ¶ 5, 853 P.2d 669 (1993) (since a suspect classification—alienage—was implicated, the court used strict scrutiny in assessing the constitutionality of a statute limiting workers compensation death benefits of dependents who were nonresident aliens to the sum of \$750). Indeed, the majority concedes "there are no Kansas cases applying strict scrutiny to natural rights." Slip op. at 70. I expect the trial court will have the same problem I am trying to figure out what "strict scrutiny" means for this case since this is only the third time in our court's caselaw that standard is to be applied.

Adding to this confusion, the majority announces: "Of course, before a court considers whether a governmental action survives this [strict scrutiny] test, *it must be sure the action actually impairs the right.*" (Emphasis added.) Slip op. at 75. But how does this differ from undue burden? See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (plurality opinion)

("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."); see also *Hellerstedt*, 136 S. Ct. at 2309 ("[A] statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."). Is a government act that "actually impairs the right" something different? Is there not a process of weighing inherent in making that determination? The trial court is going to have to make sense of this nuance, and I wish it luck because I can't tell the difference.

Another trouble spot is reconciling "strict scrutiny" abortion caselaw with the majority's rationale and its instructions on remand. The majority correctly observes the United States Supreme Court applied strict scrutiny to abortion legislation in *Roe v. Wade*, 410 U.S. 113, 154-55, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (invalidating law forbidding abortion except to save mother's life), and its companion case, *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) (invalidating procedural conditions and limitations on abortion access to Georgia residents). Slip op. at 66. But the *Roe* Court identified the State's "'compelling' point" as beginning at a pregnancy's second trimester—and only as to "the State's important and legitimate interest *in the health of the mother*." (Emphasis added.) *Roe*, 410 U.S. at 163. Is the majority signaling a return to *Roe*? It's hard to tell.

Under *Roe*, it was not until fetal viability that the State had any "'compelling'" interest in potential life. *Roe*, 410 U.S. at 163 ("State regulation protective of fetal life after viability thus has both logical and biological justifications."). *Roe* also made clear the State has no "'compelling' point" in the first trimester, so "the attending physician, in consultation with [the] patient, is free to determine, without regulation by the State, that, in [the doctor's] medical judgment, the patient's pregnancy should be terminated." 410

U.S. at 163. The majority does not explain whether *Roe*'s trimester framework has any application in Kansas, even though it refers to it and says it is adopting a strict scrutiny standard. Slip op. at 66. More confusingly, the majority implies criticism of *Roe*'s trimester-based distinctions by directing the district court on remand to "take into account advances in science that have blurred the sharp trimester-based lines used in *Roe*'s strict scrutiny analysis." Slip op. at 86. But those distinctions are at the heart of federal strict scrutiny abortion jurisprudence, so what is the district court to do? The answer, it seems, will be for the trial court to make something up.

It also should be understood federal strict scrutiny cases in the abortion context tolerated no government interference into a woman's pregnancy before viability—except for maternal health reasons during the second trimester and unique circumstances relating to pregnant minors. *Casey*, 505 U.S. at 876 (plurality opinion) ("Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted."); *Bellotti v. Baird*, 443 U.S. 622, 639-40, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (plurality opinion) (considering whether the "special interest of the State in encouraging an unmarried pregnant minor to seek advice of her parents in making the important decision whether or not to bear a child" does not "unduly burden the right to seek an abortion"); cf. *Colautti v. Franklin*, 439 U.S. 379, 388, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) ("Viability is reached when, in the judgment of the attending physician on the particular facts of the case before [the physician], there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support.").

My larger point is this: if Kansas is adopting a pre-*Casey* stance, then this legal dispute is all but over. S.B. 95 is not claimed by the State to have been enacted to promote maternal health—it is all about fetal protection and tellingly entitled, "the Kansas unborn child protection from dismemberment abortion act." K.S.A. 65-6741. And

its legislative history shows patient safety was never brought up as a supporting justification. So what is left for the district court to ferret out through trial if the State's only "compelling interest" in the second trimester can be promoting maternal health? The majority says it will not "guess at what the arguments and evidence might be in order to provide guidance on remand." Slip op. at 85. But no guesswork is required—it is squarely in this legislation's title and legislative record, so why not talk about it now?

Pre-*Casey* federal strict scrutiny jurisprudence will also have potentially unsettling ripple effects in other areas of Kansas law touching on abortion access. See, e.g., K.S.A. 65-6709 (requiring informed consent). Compare *Casey*, 505 U.S. at 882 (plurality opinion) (holding informed consent provisions requiring "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus" did not impose undue burden), with *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 764, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (holding informed consent provisions were facially unconstitutional for requiring patient to be informed of "'detrimental physical and psychological effects'" and "'particular medical risks'" of abortion, because it tended to "increase the patient's anxiety, and intrude upon the physician's . . . professional judgment"). The majority signals this consequence when citing to McDonald, *A Hellerstedt Tale: There and Back Again?*, 85 U. Cin. L. Rev. 979, 1005-06 (2018), regarding scrutiny of governmental persuasion regulations. Slip op. at 74. I simply do not understand why the majority would stop short in explaining what its ruling today means.

I am even more puzzled by the majority's suggestion that on remand "the State may certainly raise to the trial court *any interests it claims are compelling*, including those it mentioned at oral argument before this court, and show why S.B. 95 is narrowly tailored to those interests." (Emphasis added.) Slip op. at 83. How does this comport with strict scrutiny analysis? The interests mentioned by the State do not fit the pre-*Casey*

federal strict scrutiny standard except for patient safety. Interests such as promoting potential life before viability, protecting the dignity of life, and protecting medical ethics, are permissibly advanced under a federal undue burden analysis but not strict scrutiny. Compare *Casey*, 505 U.S. at 872 (plurality opinion) (noting rigid trimester framework "sometimes contradicted the State's permissible exercise of its powers" to further its interest in promoting fetal life), with *Roe*, 410 U.S. at 163 (state's interest in mother's health becomes compelling approximately at end of first trimester, and interest in potential life becomes compelling at viability). And this litany of interests does not square with the majority's declaration that "to justify S.B. 95, the State must establish a compelling interest—one that is 'not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.'" Slip op. at 66 (quoting Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273 [2007]).

But if the majority is really open to such claims being considered "compelling" state interests, I fail to see how this remains a "strict scrutiny" standard and not equally as vulnerable to "leaving judges to subjectively gauge" what is a state interest as the majority complains now occurs with federal undue burden under *Casey*. Slip op. at 69. The majority decision is fraught with these mixed signals, which the trial court will need to decode before it can proceed.

I also doubt the trial court will find helpful the out-of-state cases listed by the majority as *applying* strict scrutiny in the abortion context. Slip op. at 71-72. From my reading, they are inapplicable to the majority's stated standard or inconsistent in their resolution under similar facts. This presents several concerns.

For instance, *Hope Clinic*, 991 N.E.2d 745, confuses things because it did not explicitly analyze the abortion issue under strict scrutiny. It noted Illinois employs a

limited lockstep approach when the state and federal constitutional language is nearly identical and departs from the federal construction only if there is a reason to do so. 991 N.E.2d at 757. *Hope Clinic* was decided in 2013, so it would have employed undue burden under Illinois caselaw. But without explanation, the *Hope Clinic* court discussed pre-*Casey* federal decisions to determine whether the challenged statute was constitutional. See 991 N.E.2d at 766-69. This may explain why the Iowa Supreme Court included *Hope Clinic* among the court decisions employing undue burden. See *Planned Parenthood*, 915 N.W.2d at 253. The inescapable conclusion is that *Hope Clinic* will not assist the trial court on remand.

Among other decisions identified by the majority, Alaska, California, and Tennessee courts recognized compelling interests beyond those accepted under *Roe*'s strict scrutiny jurisprudence. *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 579 (Alaska 2007) ("We decide today that the State has an undeniably compelling interest in protecting the health of minors and in fostering family involvement in a minor's decisions regarding her pregnancy."); *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 348, 66 Cal. Rptr. 2d 210, 940 P.2d 797 (1997) (plurality opinion) ("We agree that the state's interests in protecting the health of minors and in preserving and fostering the parent-child relationship are extremely important interests that rise to the level of 'compelling interests' for purposes of constitutional analysis."). Compare *Sundquist*, 38 S.W.3d at 17 ("In our view, the State has an interest in promoting the health and safety of all its citizens, and the State clearly has a compelling interest in maternal health from the beginning of pregnancy."), with *Roe*, 410 U.S. at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester."). But, once again, this just means the trial court will have to guess whether it can ignore the pre-*Casey* federal jurisprudence and expand the state "interests" that might be "compelling."

Another problem comes when considering particular statutory provisions because the state courts the majority lists have rendered conflicting rulings. For example, when a parental consent statute was challenged, the Florida court concluded there was no compelling state interest. *In re T.W.*, 551 So. 2d at 1195. But Alaska and California courts decided similar statutes sufficiently implicated a compelling state interest but were unconstitutional because they were not the least restrictive means of achieving it. *Planned Parenthood of Alaska*, 171 P.3d at 579; *American Academy of Pediatrics*, 16 Cal. 4th at 348, 356-57 (plurality opinion). And when laws prohibiting public funding for certain abortions were challenged, the Minnesota court held the prohibition unconstitutional, but the Florida court did not even view a funding limitation as implicating a woman's right to abortion. Compare *Women*, 542 N.W.2d at 27, 31-32 (noting statute funding childbirth-related medical services but prohibiting similar funding for medical services related to therapeutic abortion impacted a woman's right to decide to terminate her pregnancy), with *Renee B. v. Fl. Agency for Health Care*, 790 So. 2d 1036, 1041 (Fla. 2001) (acknowledging poverty makes it difficult for some women to exercise a constitutional right but the challenged regulation did not implicate a right to abortion because it did not impose any restriction to existing abortion access).

It is also worth noting that unlike other state courts that held implication of an abortion right triggers strict scrutiny, courts in California may not review every abortion case based on a privacy right under strict scrutiny. In *American Academy of Pediatrics*, 16 Cal. 4th at 329-32 (plurality opinion), the court held a balancing test is appropriate when intrusion is "so insignificant or de minimis"; only "significant" intrusion calls for strict scrutiny. 16 Cal. 4th at 331-32.

Arguably, *Armstrong*, 296 Mont. 361 (statute restricting performance of abortions to licensed physicians fails strict scrutiny), might come factually closer to our Kansas

question on Dilation and Evacuation procedures if the issue on remand becomes patient health. But I question its analytical value for this S.B. 95 challenge. Montana's Constitution has an explicit strict scrutiny test written into it, as well as a special privacy provision that "adheres to one of the most stringent protections of its citizens' right to privacy in the United States—exceeding even that provided by the federal constitution." 296 Mont. at 373-74. Under those circumstances, *Armstrong* held:

"Simply put, except in the face of a medically-acknowledged, *bona fide* health risk, clearly and convincingly demonstrated, the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so. To this end, it also logically and necessarily follows that legal standards for medical practice and procedure cannot be based on political ideology, but, rather, must be grounded in the methods and procedures of science and in the collective professional judgment, knowledge and experience of the medical community acting through the state's medical examining and licensing authorities." 296 Mont. at 385.

Our Kansas Constitution contains no similar explicit strict scrutiny standard provision, so *Armstrong*'s analytical relevance is suspect. And even so, if the suggestion is that our Kansas controversy can be judged by Montana's standards, I again have to wonder what is left for trial because the Kansas legislation has not been claimed by the State to be based on "medically-acknowledged, *bona fide* health risks." 296 Mont. at 385. So unless the majority wants to move beyond *Roe*, 410 U.S. at 163 (recognizing the state's compelling interests in maternal health only after the first trimester and in potential fetal life only after viability), and closer to *Casey*, 505 U.S. at 846; 505 U.S. at 882-83 (plurality opinion) (not only recognizing but considering the state's legitimate interests in maternal health and potential fetal life from the outset of pregnancy in assessing a challenged governmental action), there is no compelling state interest to begin the analysis. See *Women*, 542 N.W.2d at 32 (holding state interest in potential life does not

become compelling before viability, citing *Roe*; concluding the challenged statute was unconstitutional as it applied at all stages of pregnancy). But if protecting potential life is a "compelling" state interest in the majority's view, it should just say so.

Unlike *Roe* and the Montana decision, the recent Iowa Supreme Court case also cited by the majority conflicts because the Iowa court held there is a compelling state interest in promoting potential life and helping people make informed choices about abortion. *Planned Parenthood*, 915 N.W.2d at 241 (challenge to a mandatory, 72-hour waiting period requirement for all abortions). That court held the statute failed "strict scrutiny" because it was not narrowly tailored and did not further the state's claimed interest in promoting potential life. 915 N.W.2d at 243-44.

In my reading, the Iowa "strict scrutiny" inquiry is much like *Hellerstedt* in that it is based on credible trial evidence and employs an analytical process tailored to the interests at stake, which in Iowa include promoting potential life and making informed choices about abortion. The Iowa court based its determination on evidence showing waiting periods do not change women's decisions whether to have an abortion. See 915 N.W.2d at 239-40 ("A regulation must further the identified state interest that motivated the regulation not merely in theory, but in fact.").

Put another way, the amici American Association of Pro-Life Obstetricians & Gynecologists, American College of Pediatricians, and Catholic Medical Association lay out arguments they claim are evidence based concerning fetal pain. The State chose not to present such evidence at the temporary injunction hearing; but if it had, and a trier of fact agreed, would the majority hold this would have been a waste of time under its strict scrutiny standard? Said yet another way, if the State really can prove to the court's satisfaction fetal pain from this second-trimester procedure, would not the majority

concede that legislation narrowly tailored to address that fact could pass constitutional muster?

With such uncertainty front and center, this court has a duty to provide more detailed direction in a case as complex and divisive as this one. And we have done so before. See, e.g., *Gannon v. State*, 298 Kan. 1107, 1171, 319 P.3d 1196 (2014) (remanding to apply a newly clarified constitutional standard under Kansas Constitution's Article 6, Section 6[b]). More thorough guidance concerning a Kansas test that similarly spells out the constitutional standard at issue would help the trial court fulfill its responsibilities and expedite this controversy's final resolution.

Notably, the majority flirts with *Hellerstedt* when deciding it is unnecessary to return the temporary injunction question to the district court to apply strict scrutiny. Slip op. at 81-82 ("[E]ven though we would apply what we view as the more demanding strict scrutiny standard for the State to meet, doing so would not change the conclusions reached by the trial court."). But the majority does not delve deeply enough into *Hellerstedt*'s analytical process to give the district court any clue about what it should do next. Quite possibly, the majority wants to imply potential life may constitute a compelling state interest simply by returning the case for a trial. But it does not really make any commitment about that when it merely invites the State to advance "any interests it believes compelling." Slip op. at 85. Nor does it supply a test for the district court to distinguish "compelling" interests from lesser ones in the abortion context. Instead, the majority cites a content-based First Amendment case, a race-based affirmative action case, and a law review article to try and define a distinction, which simply underscores the lack of abortion-related strict scrutiny jurisprudence for the district court to consider. Slip op. at 72-73. The majority, quite simply, is mistaken when it says "the strict scrutiny standard provides considerable guidance to a trial court" for the controversy presented today. Slip op. at 87.

To better address these uncertainties, I detail below what I see as *Hellerstedt*-like parameters appropriate for a Kansas test. At the very least, the district court and parties will have this to ponder for trial purposes.

But before doing that, I need to mention concerns with the dissent's standard, which it characterizes as rational basis "with bite." Slip op. at 185 (Stegall, J., dissenting). It describes this process as looking for a reasonable relationship to the common welfare or otherwise being arbitrary, irrational, or discriminatory. And it approvingly quotes *Patel v. Dept. of Licensing and Regulation*, 469 S.W.3d 69, 98 (Tex. 2015) (Willett, J., concurring), in explaining that this methodology demands "'actual *rationality*, scrutinizing the law's actual *basis*, and applying an actual *test*.'" Slip op. at 185-86 (Stegall, J., dissenting). There are things about this I don't understand. Let me explain.

At oral argument, I asked the State's counsel a hypothetical: A woman is told she must have an abortion to save her life; does the Kansas Constitution allow her Legislature to forbid this and say she must die? Committed as he was to the State's initial position that section 1 confers no judicially enforceable protections, the State's lawyer noticeably fumbled his response. But what is the answer under the dissent's scrutiny? Is legislating away a woman's chance to avoid death from childbirth irrational? Or arbitrary? I certainly think so.

But under the dissent's rationale, if this life-or-death decision becomes a judicial call—instead of a legislative one—how is that not the creation of a "judicially privileged act of abortion" the dissent excoriates? Slip op. at 116 (Stegall, J., dissenting). Is this judicial search for rationality or arbitrariness not an exercise in determining court-favored outcomes? See slip op. at 185-86 (Stegall, J., dissenting). And if a pregnant woman's death is a bridge too far on this continuum, how about great bodily harm, rape, incest,

fetal anomalies, or other prospects for an unsafe birth? How about the many other profoundly personal reasons a pregnant woman takes into consideration with her doctor when facing a pregnancy's possible termination? See, e.g., *Planned Parenthood*, 915 N.W.2d at 214-15, 218. If courts are drawing lines in this high stakes exercise in democratic majority rule, must not the judicial scrutiny needed to draw them be commensurate with what is at stake? Or do we really want to equate childbirth with selling ice cream on public streets? See slip op. at 169 (Stegall, J., dissenting) (suggesting same test applies to all challenged legislative acts, and citing *Delight Wholesale Co. v. City of Overland Park*, 203 Kan. 99, Syl. ¶ 5, 453 P.2d 82 [1969]). For me, that question answers itself.

More disturbingly, consider how the dissent's standard perfectly aligns with this notorious passage from our American caselaw:

"In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizen for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. [Citation omitted.] Three generations of imbeciles are enough." *Buck*, 274 U.S. at 207.

The interests at stake for our citizens must dictate the degree of judicial scrutiny given when government seeks to intrude into those interests. See *Skinner*, 316 U.S. at 546 (Jackson, J., concurring) ("There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity

and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes."). The dissent, of course, has the benefit at this stage of simply proposing its new standard in the abstract. But it is a mystery how rational basis "with bite" would actually operate to judicially limit government power when the circumstances are as serious as the complications attendant to a woman's pregnancy.

A Hellerstedt-based test

As explained, my premise is that *Hellerstedt's* approach can inform our analysis of S.B. 95 under section 1 of the Kansas Constitution Bill of Rights. I would articulate the Kansas test as follows: When a litigant claims a law unconstitutionally infringes on a pregnant woman's access to abortion, a court must determine whether that law imposes an undue burden on that access. I intentionally use the term "undue burden" because it signals the weighing *Hellerstedt* contemplates and the scrutiny these circumstances demand, which the majority begrudgingly concedes. Slip op. at 72 ("We agree with the concurring opinion that both the undue burden and strict scrutiny tests start with determining how governmental action burdens or infringes on a right."). And I emphasize this is a Kansas test that going forward should be developed by Kansas courts distinct and independent from any federal abortion standard. This is why the majority's criticisms about *Hellerstedt* providing a lower level of rigor and being difficult to apply miss the mark. See slip op. at 67-69, 72-74.

I would see the district court's analytical path as first needing to determine whether, and to what extent, a challenged legislative or administrative action burdens abortion access. Next, the court would need to determine to what extent that action directly promotes valid state interests. These findings must be based on evidence, including medical evidence, presented in judicial proceedings. Mere deference to legislative or administrative findings or stated goals would be insufficient.

From these independent judicial findings, the court would then be in a position to decide whether the challenged action unduly restricts abortion access when the burdens are viewed in light of the action's actual benefits to the state's valid interests. The burdens, however slight, must be sufficiently justified by the actual benefits. See Robertson, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, 7 UC Irvine L. Rev. 623, 631 (2017) ("If there was no actual benefit, then more than de minimis burdens, even if not a substantial obstacle, would be 'undue.' To hold otherwise would remove most judicial scrutiny of legislation in the abortion area and impair the dignity, not only of women, but of law itself.") (citing Greenhouse & Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 Yale L.J. 1428 [2016]).

The *Hellerstedt* Court described the analytical process this way when agreeing the district court in that case correctly applied the legal standard:

"[The district court] did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens." 136 S. Ct. at 2310.

The above is an evidence-based analysis that compares actual benefits and burdens to support or oppose the government action in controversy. And while I appreciate it does not employ the "strict scrutiny" terminology the majority seems to prefer, I am confident this inquiry captures the majority's proposition that the challenged state action must actually impair abortion access, and its concern that any impairment be appropriately tailored to promote that state interest. See slip op. at 75; see also *Hellerstedt*, 136 S. Ct. at 2309-10; 136 S. Ct. at 2326 (Thomas, J., dissenting) ("The majority's undue-burden test

looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion."). It also remains mindful of the State's valid interests by recognizing greater regulatory latitude as the conflict with individual rights diminishes. See *Planned Parenthood*, 915 N.W.2d at 241 (recognizing the state's interests in protecting potential life beyond *Roe*'s trimester framework). Most importantly, this inquiry's real world application in a courtroom, based as it must be on evidence, will protect a pregnant woman's constitutional rights from legislative or administrative pretext.

Given this as my test, I explain next its use to determine whether the district court correctly granted the temporary injunction. That is, after all, the question in this appeal.

The test's application

It is legitimate to wonder whether remand is appropriate. See *Gannon*, 298 Kan. at 1171 (remanding to apply a newly clarified constitutional standard under Kansas Constitution's Article 6, Section 6[b]). The majority holds remand is unnecessary because S.B. 95 effectively eliminates D & E procedures when coupled with our state's existing partial-birth restriction in K.S.A. 65-6721, so the practical result is squarely prohibited by *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000). Slip op. at 81-82. The dissent would remand to apply rational basis with bite. Slip op. at 188.

I would hold remand is unnecessary based on the lopsided evidentiary record favoring plaintiffs so far in these proceedings. As a practical matter, the State made no evidence-based defense for this legislation, even though at times its arguments on appeal claim it did by pointing to incomplete quotes from a few medical journals.

As a defense strategy, the State's decision to rely on lawyer interpretation of medical journals—rather than using actual medical professionals—is at best curious given the pivotal role expert testimony typically plays in medically related litigation. See, e.g., *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 435, 228 P.3d 1048 (2010) (expert testimony generally required in medical malpractice cases to establish applicable standard of care and prove causation). In contrast, plaintiffs submitted sworn affidavits from medical doctors, who detailed: (1) their training, qualifications, and experience upon which they based their testimony and opinions; (2) explanations regarding the relevant medical procedures and opinions about their relative safety and risks; (3) the doctors' professional judgments about the medical considerations concerning those procedures and the likely adverse impacts from S.B. 95; and (4) supportive medical research for their opinions.

Based on its hearing record, the district court expressly held the State did not dispute the facts plaintiffs outlined in supporting their temporary injunction request. Its order granting the temporary injunction found:

- The D & E procedure prohibited by the legislation is used for 95% of second trimester abortions.
- The State proposed three alternative procedures to D & E permitted by the legislation: labor induction, induction of fetal demise using an injection, and induction of fetal demise using umbilical cord transection.
- Labor induction is used in approximately 2% of second-trimester abortion procedures. It requires an inpatient labor process in a hospital lasting between five-to-six hours and up to two or three days. Labor induction includes

increased risks of infection when compared to D & E and is medically inadvisable for some women.

- An injection of digoxin may be administered either by transabdominal or transvaginal injection. "Injections to induce demise using digoxin prior to D & E are not practiced prior to 18 weeks gestation, and the impact of subsequent doses of digoxin, required in cases [when] a first dose is not effective, is virtually unstudied. Research studies have shown increased risks of nausea, vomiting, extramural delivery, and hospitalization."
- "Umbilical cord transection prior to a D & E is not possible in every case. Requiring transection prior to a D & E increases procedure time, makes the procedure more complex, and increases risks of pain, infection, uterine perforation, and bleeding." Using transection to induce fetal demise has only been discussed in a single retrospective study, the authors of which note its main limitation is a "potential lack of generalizability."
- "There is no established safety benefit to inducing demise prior to a D & E procedure."

Standard of review

Generally, appellate courts review a district court's grant or denial of injunctive relief for abuse of discretion. To issue a temporary injunction, five factors are necessary: (1) a substantial likelihood of success on the merits; (2) a reasonable probability of suffering irreparable future injury to the movant; (3) a lack of obtaining an adequate remedy at law; (4) the threat of suffering injury outweighs whatever damage the requested injunction may cause the opposing party; and (5) the injunction, if issued, will

not be adverse to the public interest. *Downtown Bar and Grill v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). A court abuses its discretion when its action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

Discussion

The State does not claim the district court made any error of fact. See majority slip op. at 13-14; *Hodes*, 52 Kan. App. 2d at 275. And those facts sufficiently establish that S.B. 95 unduly restricts abortion access. This leaves the State with nowhere to go on appeal except to argue as a matter of law that the Legislature is free to do whatever it wants. That strategy plainly fails across the board with this court as discussed. From my vantage point, under the applicable abuse of discretion standard, there is nothing to remand as far as the temporary injunction motion is concerned.

The State repeatedly avows in its briefing that it produced "evidence" about the legislation's alternative medical procedures. But it did no such thing. The State is referencing medical journals cited in its arguments opposing the temporary injunction. But these articles were never offered into evidence or for that matter even given to the trial court. And they are not part of our record on appeal. I had to search them out across multiple library resources, including locating some behind website paywalls, just to get a look. In my experience, it is a strange defense strategy for a litigant to play hide and seek with "evidence" characterized as supporting its position.

Nevertheless, the State's briefing about these articles supplied only partial quotes that were recited as prelude to its lawyers' arguments about what those medical passages meant. There is a long-standing admonition we tell our juries that comes to mind: the arguments of counsel are not evidence. PIK Civ. 4th 102.04 (2010 Supp.). Plaintiffs, on

the other hand, offered sworn testimony expressing expert medical opinions. Their references to medical journals only bolstered the doctors' stated professional opinions. Plaintiffs did not attempt to use those articles by themselves to establish medically based facts—the doctors' sworn testimony did that. The State's approach was starkly different; and, as explained, that difference is significant. See *Puckett*, 290 Kan. at 435 (discussing the evidence's sufficiency).

Worse yet, the State's advocates deleted findings from those medical journals that flatly contradicted their arguments supporting S.B. 95. Consider this example, offered at least twice by the State in its fractured quotation from the article, Diedrich and Drey, Society of Family Planning, Induction of Fetal Demise Before Abortion, SFP Guideline 20101, 81 Contraception 462, 464 (2010). Note particularly the ellipses in the State's quoted material:

"It is difficult to determine whether or not a fetus has the ability to perceive pain. . . . By inducing fetal demise the issue of whether the fetus could experience pain during the abortion can be circumvented . . . , which is another reason feticide may be offered by some providers.'" Appellants' Brief, at 7; Defendants' Response Opposing Plaintiffs' Motion for Temporary Restraining Order and/or Temporary Injunction, at 24.

Now consider that same passage in its original published form, with the State-excised portion italicized:

"It is difficult to determine whether or not a fetus has the ability to perceive pain, *which by its definition requires cortical interpretation of noxious stimuli. A multidisciplinary review of the medical evidence concluded that a fetus cannot experience pain until 29 weeks of gestation at the earliest, when thalamocortical connections are first present. In the past, withdrawal reflexes and the release of hormonal stress hormones have been indicated as evidence of fetal pain perception. This review shows evidence that both withdrawal reflexes and hormonal stress hormones can*

be elicited by nonpainful stimuli and can occur without conscious cortical processing. Therefore, the best indicator as to when a fetus has potentially the capacity to experience pain is the development of the thalamocortical axons, which do not occur until at least 29 weeks of gestational duration; however, their functionality within the intrauterine environment has not been determined. With the difficulty of establishing any clear way to measure fetal pain and the lack of specific markers for fetal pain, any potential pain of the means of inducing fetal demise cannot be assessed either. By inducing fetal demise the issue of whether the fetus could experience pain during the abortion can be circumvented, which is another reason feticide may be offered by some providers." (Emphasis added.)

Setting aside the stunning lack of candor with the court the State's machinations exemplify, if we view these journals as "evidence," as the State argues we should, the italicized passage only bolsters plaintiffs' expert testimony that S.B. 95 is unjustified from a fetal pain perspective—at least until 29 weeks into the gestational process. No wonder the State tried to hide it.

It is also unclear from a benefits/burdens perspective how S.B. 95 furthers any state interest from a fetal pain standpoint. Existing law already restricts abortion on "a pain-capable unborn child." See K.S.A. 65-6724(a). So under my suggested test, S.B. 95's burdens are unjustified as shown by the evidence presented at the temporary injunction hearing.

Given the current record on appeal, and applying what I see as the appropriate Kansas test, I would hold the district court did not abuse its discretion in issuing the temporary injunction against S.B. 95's enforcement pending trial on the merits.

Conclusion

All agree this court should interpret the Kansas Constitution in accordance with the framers' intent and the values expressed by its words. Both the majority and the dissent devote nearly 108 pages discussing historical lineage for those words. And it is a demanding read. I hope those reviewing my colleagues' history lessons will accept the exercise for what it obviously is—hard working judges trying to honestly answer the questions presented in good faith. But for me, an originalism search gets us only so far when divining meaning for words with such obvious open-ended qualities as "liberty" or "inalienable natural rights." The historical back-and-forth really just boils down to how much weight is given one selected fact over another.

I believe our framers had to understand this interpretative dynamic and picked those particular words because they require contemporary context. This means we must apply what "liberty" and "inalienable natural rights" mean in the real world today for a pregnant woman. In doing so, that necessarily demonstrates meaningful limitations on the government's ability to elbow its way into the decisions she must make concerning her pregnancy.

The district court did not abuse its discretion by temporarily enjoining S.B. 95's enforcement pending trial.

* * *

STEGALL, J., dissenting: This case is not only about abortion *policy*—the most divisive social issue of our day—it is more elementally about the *structure* of our republican form of government. Which is to say, this case is about the proper conditions for just rule. At bottom, this case is about finding and drawing the sometimes elusive line

between law and arbitrary exercises of power. Here we venture onto a battlefield as old as politics itself. And as we argue about the structure of government—and ultimately delineate the proper conditions for just rule—we must never forget that we are also actively engaged in ruling.

The structural idea that gave birth to Kansas as a political community, which has achieved consensus support across most of our history, is that the proper conditions for just rule are met via *participatory consent to secure and promote the common welfare*. Today, a majority of this court dramatically departs from this consensus. Today, we hoist our sail and navigate the ship-of-state out of its firm anchorage in the harbor-of-common-good and onto the uncertain waters of the sea-of-fundamental-values. Today we issue the most significant and far-reaching decision this court has ever made.

The majority's decision is so consequential because it fundamentally alters the structure of our government to magnify the power of the state—all while using that power to arbitrarily grant a regulatory reprieve to the judicially privileged act of abortion. In the process, the majority abandons the original public meaning of section 1 of the Kansas Constitution Bill of Rights and paints the interest in unborn life championed by millions of Kansans as rooted in an ugly prejudice. For these reasons, I dissent.

CLEARING THE UNDERBRUSH

Reading today's majority opinion is a follow-the-white-rabbit experience. One is left feeling like Alice, invited by the Queen to believe "as many as six impossible things before breakfast." Carroll, *Through the Looking-Glass* 100 (1899). Indeed, the story told by the majority is a strange one. In it, all the luminaries of the western legal tradition—from Sir Edward Coke and William Blackstone to Edmund Burke and Thomas

Jefferson—would celebrate and enshrine a right to nearly unfettered abortion access. In this imagined world, the Liberty Bell rings every time a baby *in utero* loses her arm.

The experience of women in Kansas, however, is rendered as a dystopian *Handmaid's Tale* of oppression. According to the majority, the State of Kansas has commandeered the bodies and lives of "unwilling wom[e]n to carry out a long-term course of conduct" that will last for their entire "course of . . . life." Slip op. at 46. The enactment of laws such as S.B. 95 is described as the moral equivalent of legalized wife beating and spousal rape. Slip op. at 60. Abortion restrictions are framed as lingering vestiges of a discredited and bankrupt patriarchy, fit only for history's slag heap. The trope is as common as it is unjustified. See, e.g., *Jackson Women's Health Organization v. Currier*, 349 F. Supp. 3d 536, 540 n.22 (S.D. Miss. 2018) (claiming a Mississippi abortion regulation reflected "the Mississippi bent on controlling women and minorities . . . [t]he Mississippi that . . . barred women from serving on juries . . . [t]he Mississippi that . . . sterilized six out of ten black women in Sunflower County . . . [a]nd the Mississippi that . . . was the last State to ratify the 19th Amendment."), *appeal filed* December 17, 2018.

The majority claims "the prevailing views justifying" these long-since-discredited misogynistic practices were "manifested in a majority" of the drafters and ratifiers of the Kansas Constitution and of the Kansas legislators who criminalized abortion in 1862. Slip op. at 58, 61. The majority concludes that these "discriminatory" "biases" and "paternalistic attitude[s]" "were reflected in" the abortion policies enacted at the time. Slip op. at 58, 61. As if the point wasn't clear, the majority reminds the reader that these benighted individuals were "all men." Slip op. at 24.

Oddly, at other points, the majority makes the contrary claim that "history does not reflect" an "antiabortion sentiment" in Kansas' early days. Slip op. at 56. In fact, our

prejudiced early lawmakers "gave no consideration to the appropriateness of the abortion statutes." Slip op. at 56. Thus, "we cannot know what a majority of the legislators—much less the people in the Kansas Territory or the new state—thought about abortion." Slip op. at 57.

No matter. Whatever our founders thought or didn't think about abortion, we are certain they were bad. As a result, the majority concludes our founders' views on the Constitution they drafted and ratified and lived under for the first decades of the new State of Kansas must be "give[n] . . . little weight" and are "wholly unpersuasive" when it comes to the majority's enlightened 21st century constitutional interpretation. Slip op. at 51, 57. In the majority's telling, today's legislators are not much better. The policy embodied in S.B. 95—that living babies not be "torn limb from limb" (*Stenberg v. Carhart*, 530 U.S. 914, 958-59, 120 S. Ct. 2597, 147 L. Ed. 2d 743 [2000] [Kennedy, J., dissenting])—is likewise hopelessly "tethered to prejudices from two centuries ago." Slip op. at 61. That policy does not reflect true "Kansas constitutional value[s]." Slip op. at 61. Values this court is prepared to pronounce.

It is important to pause here and ask, what is really going on? For it is certainly true that sex-based discrimination and oppressive practices aimed at women are part of our history, as both a nation and a State. Such misogynistic practices, where they existed (or still exist), are truly heinous and deserving of scorn and moral condemnation, from this court as much as from society as a whole. The story of resistance to sanctioned abuses and second-class status is indeed a heroic one. A story in which Kansas and Kansas women played their own significant role. See 2 *History of Woman Suffrage* 229-68 (Stanton et al. eds., 1882) (documenting the trailblazing Kansas women's suffrage campaign of 1867); Caldwell, *The Woman Suffrage Campaign of 1912*, 12 *The Kansas Historical Quarterly* 300-18 (Aug. 1943) (recounting the victorious women's suffrage

campaign of 1912, where Kansas women won the right to vote 8 years before the national women's suffrage amendment).

But that story is not this one, as much as the majority wishes it were. The majority's framing of the issue before us solely as a battleground in a war on women is a ruse. Abortion restrictions are not relics of a patriarchal society—they are a longstanding feature of Kansas law. A ban on dismembering a living human being *in utero* is not inherently sexist and discriminatory. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (rejecting claim that "opposition to abortion reflects an animus against women in general").

There are women on both sides of this debate—one that involves complex considerations about the nature of life itself; the contours of a just and fair society; and competing interests, each of which may have a legitimate claim on society's attention. "From reading the majority opinion, one would scarcely be aware that many women . . . are pro-life and strongly support the same law the court concludes unconstitutionally discriminates against them." *Planned Parenthood v. Reynolds ex rel.*, 915 N.W.2d 206, 246 (Iowa 2018) (Mansfield, J., dissenting).

As the United States Supreme Court has said, equating "opposition to voluntary abortion" with "opposition to (or paternalism towards) women" is "irrational." *Bray*, 506 U.S. at 270. "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue" 506 U.S. at 270. By claiming to speak for all women on such a divisive issue, it is actually a majority of this court who now reenact the old story of paternalism—a government stripping away the political agency of thousands of women simply because it claims to know better.

Today's opinion does not disclose the inconvenient fact that a majority of the 41 women serving in the Kansas Legislature at the time of passage voted *in favor of* S.B. 95. Sen. J. 2015, p. 141; House J. 2015, p. 547-48. The majority does not grapple with the problem of sex-selection abortions and the vicious misogyny inherent in that despicable practice. See Eberstadt, *The Global War Against Baby Girls*, 33 *The New Atlantis* 3, 3 (Fall 2011) ("Over the past three decades the world has come to witness an ominous and entirely new form of gender discrimination: sex-selective feticide, implemented through the practice of surgical abortion with the assistance of . . . prenatal gender determination technology. All around the world, the victims of this new practice are overwhelmingly female—in fact, almost universally female."); *Gender-Biased Sex Selection*, United Nations Population Fund, <https://www.unfpa.org/gender-biased-sex-selection> (last visited April 26, 2019) ("Today, around 126 million women are believed to be 'missing' around the world—the result of son preference and gender-biased sex selection, a form of discrimination. . . . The rise in sex selection is alarming as it reflects the persistent low status of women and girls."); see also United Nations Population Fund, *Programme of Action of the International Conference on Population and Development* 34 (20th anniversary ed. 2014) (containing resolution adopted by 179 countries that urges governments worldwide "[t]o eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection"). The majority does not mention the fact that the more "progressive" nations in our global community tend to restrict abortion access after the first trimester. See generally Acosta et al., *Abortion Legislation in Europe*, The Law Library of Congress, Global Legal Research Center (January 2015).

The majority cannot even bring itself to agree with the United States Supreme Court's statement in *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992):

"Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted." 505 U.S. at 852.

The very language chosen by the majority to describe the act prohibited by S.B. 95—"instrumental disarticulation," "collapse of fetal parts," "fetal demise," etc. (slip op. at 8-9)—is designed to "name things without calling up mental pictures of them." Orwell, *Politics and the English Language*, in 4 The Collected Essays, Journalism, and Letters of George Orwell 127, 136 (Orwell & Angus eds., 1968). In the majority's narrative, even the word abortion is set aside in favor of the anodyne decision to "continue a pregnancy"—a phrase occurring more times in the majority opinion than I can cite. Perhaps the majority finds the unsanitized facts "too brutal for most people to face." Orwell, at 136.

The majority doesn't recite the portion of S.B. 95 defining "dismemberment abortion" as:

"[W]ith the purpose of causing the death of an unborn child, knowingly dismembering a living unborn child and extracting such unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors or similar instruments that, through the convergence of two rigid levers, slice, crush or grasp a portion of the unborn child's body in order to cut or rip it off." K.S.A. 65-6742(b)(1); L. 2015, ch. 22, § 2.

As Justice Kennedy wrote in *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting), the "majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending

human life." Justice Kennedy went on to describe what actually happens during a D & E procedure—the very procedure at issue here. He did so "for the citizens who seek to know why laws on this subject have been enacted across the Nation." 530 U.S. at 957 (Kennedy, J., dissenting).

The procedure "requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina." 530 U.S. at 958 (Kennedy, J., dissenting). Using the resistance "created by the opening between the uterus and vagina" the "grasped portion" is torn "away from the remainder of the body." 530 U.S. at 958 (Kennedy, J., dissenting). "For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman." *Gonzales v. Carhart*, 550 U.S. 124, 135, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007). The baby then "bleeds to death as it is torn limb from limb." *Stenberg*, 530 U.S. at 958-59 (Kennedy, J., dissenting). The child "can survive for a time while its limbs are being torn off." 530 U.S. at 959 (Kennedy, J., dissenting). The heartbeat can continue even "with 'extensive parts of the fetus removed.'" 530 U.S. at 959 (Kennedy, J., dissenting). "At the conclusion of a D&E abortion . . . the abortionist is left with 'a tray full of pieces.'" 530 U.S. at 959 (Kennedy, J., dissenting).

Our Legislature heard similar testimony about the procedure—one even Justice Ruth Bader Ginsburg has called "'brutal'" and "'gruesome.'" *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting) (quoting *Stenberg*, 530 U.S. at 946 [Stevens, J., concurring]). Dr. Anthony Levatino, a board-certified obstetrician gynecologist, provided an eyewitness account of one such dismemberment abortion performed on a 21-week-old fetus:

"Once you have grasped something inside, squeeze on the clamp to set the jaws and pull hard—really hard. You feel something let go and out pops a fully formed leg about 5

inches long. Reach in again and grasp whatever you can. Set the jaw and pull really hard once again and out pops an arm about the same length. Reach in again and again with that clamp and tear out the spine, intestines, heart and lungs." Hearing on S.B. 95 Before the Kansas Senate Public Health and Human Services Committee (Feb. 2, 2015) (testimony of Dr. Anthony Levatino).

None of these complexifying factors make it into the simplistic morality tale told by the majority. Why? Because by appropriating the rhetorical and moral force of the legitimate historical struggle against sex-based tyranny, the reader's attention is drawn away from the majority's jurisprudential sleight-of-hand. By the time the majority soars to new heights above the "paternalistic attitude" of the Wyandotte Convention on wings of "constitutional value[s]" leaving behind the accumulated "prejudices" of two centuries, the reader has completely forgotten the majority's earlier, boilerplate paean to the ""intention of the makers and adopters"" as the ""polestar"" of constitutional interpretation. Slip op. at 61, 17. Instead, the majority is in the judicial Wonderland of a "vibrating, flexing, and marching constitution" that is "often simply referred to as a 'living' constitution." *State v. Riffe*, 308 Kan. 103, 118, 418 P.3d 1278 (2018) (Stegall, J., concurring).

Invoking the spirit of this living constitutionalism (while avoiding its name), today's majority proceeds as follows. First, it contrives to find a "wide range of judicially enforceable [though unenumerated] rights" in section 1 of the Kansas Constitution Bill of Rights. Slip op. at 33. Then it divines a "natural right[]" to abortion. Slip op. at 62. And finally, it decides to review restrictions on that newly minted right according to one among varying levels of judicial "scrutiny" depending on its favored or disfavored classification. Slip op. at 64-75.

In the end, our court holds the right to an abortion is "fundamental" under the Kansas Constitution and restrictions on that right are subject to the highest, strictest level

of judicial review in a system of tiered scrutiny. Slip op. at Syl. ¶ 15. Despite claiming to interpret section 1 of the Kansas Constitution Bill of Rights independent of the United States Constitution, the majority imposes a legal rubric that is indistinguishable from the "substantive due process" guarantees the 20th century United States Supreme Court found in the Fourteenth Amendment. See generally Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. Rev. 63 (2006) (summarizing 20th century substantive due process jurisprudence); Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. Pa. J. Const. L. 945 (2004) (tracing the development and "unwieldy" application of tiered scrutiny).

Perhaps it is apropos—though macabre—that while reviewing a prohibition against human dismemberment we have fashioned a 20th century jurisprudence of fundamental rights and tiered scrutiny into a procrustean bed upon which we now force the Kansas Constitution Bill of Rights to lie. Given this, the reader likely wonders, what *does* section 1 of the Kansas Constitution Bill of Rights properly mean? It is to this question that I now turn.

ORIGINAL PUBLIC MEANING

I have previously posed the question: "Is the meaning of our Constitution fixed or flexible? A great deal turns on how judges answer this question." *Riffe*, 308 Kan. at 118 (Stegall, J., concurring). Today we see just how much can turn on the answer to this question. My commitment is to the fixed meaning of our constitutional text as it was originally understood by the people writing, reading, and ratifying that text.

"Law's meaning must be fixed if it is to be the people's bulwark against arbitrary power manifest in the vicissitudes of time. This simple idea—the rule of law—has historically been the way our free society has vigorously insisted that we will not be

governed by the whims of the mere men and women who happen, at any given moment, to have their hands on governmental levers. '[W]here . . . is the king of America? . . . [I]n America *the law is king*. For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.' Paine, *Common Sense* 46 (1776)." 308 Kan. at 113 (Stegall, J., concurring).

Original public meaning jurisprudence seeks to find the "contemporaneously expressed understanding of ratified text." Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1924 (2017) (describing the two basic claims of originalism: "First, the meaning of constitutional text is fixed at the time of its ratification. Second, the original meaning of the text controls because 'it and it alone is law.'"). Most states follow these same principles of constitutional interpretation—"by first positing the law's fixed meaning and then by looking to the public's common and ordinary understanding of the text at the time of its adoption to ascertain that meaning." *Riffe*, 308 Kan. at 115 (Stegall, J., concurring); see Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 Geo. J.L. & Pub. Pol'y 341, 344 (2017). Kansas, too, has mostly adhered to these ideas. See *Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536 (2015) ("In ascertaining the meaning of a constitutional provision courts consider the circumstances attending its adoption and what appears to have been the understanding of the people when they adopted it."); *State, ex rel., v. Highwood Service, Inc.*, 205 Kan. 821, 825-26, 473 P.2d 97 (1970) ("ascertaining the meaning of constitutional provisions" requires courts to consider the "understanding of the people at their adoption"); *State, ex rel., v. Fadely*, 180 Kan. 652, 659, 308 P.2d 537 (1957) ("the test is . . . the common understanding . . . of the people at the time they adopted the constitutional provision and the presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who adopted them").

I have previously noted, as well, the need for judicial humility—"attendant as it is to the indeterminacy of language and the difficulties of the interpretive process," *Riffe*, 308 Kan. at 117 (Stegall, J., concurring)—as a third leg of the originalist stool:

"Even with these principles of constitutional interpretation firmly in hand, the conscientious judge will understand that all texts, even those 'penned with the greatest technical skill' are 'more or less obscure . . . until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.' James Madison, *The Federalist* No. 37, p. 229 (Modern Library ed. 1969). Madison went on to articulate what every judge involved in constitutional interpretation learns from experience—that the 'complexity of objects' served by the constitutional text and the 'imperfection of the human faculties' leads often to 'fresh embarrassment[s]' in any interpretive endeavor. *The Federalist* No. 37, p. 229. Even the commands of the 'Almighty himself,' Madison wryly notes, are 'rendered dim and doubtful by the cloudy medium through which [they are] communicated.' *The Federalist* No. 37, p. 230." 308 Kan. at 116-17 (Stegall, J., concurring).

One of the most powerful criticisms of originalist methods takes the form of the so-called "dead hand" problem. See, e.g., Polsby, *Introduction to Panel I: Originalism and the Dead Hand*, 19 Harv. J.L. & Pub. Pol'y 243, 243 (1996) ("Why should the thoughts and philosophies of those who have gone before us be considered authoritative in present day life?"). Often, it is claimed, originalist outcomes will—either wittingly or unwittingly—import the repugnant racist or sexist views some of our forebearers held into modern constitutional law. Modern judges, these critics suggest, should not be required to repeat the sins of the past. For example, one prominent critic of originalism (and "strong supporter of abortion rights," Segall, *Beware a Gay Rights Backlash*, Los Angeles Times [May 15, 2012], at A13) has candidly stated:

"The hypothetical 'objective meaning' of much of the constitutional text at the time of ratification if looked at fairly runs directly though the racist and sexist values,

perspectives, and actions of the people living at the time. For example, there can be little debate that a woman's choice to terminate her pregnancy was not part of the original public meaning of the word liberty in the Fourteenth Amendment. But many, perhaps most, of the men who wrote, voted for, and understood what liberty meant in 1868, believed women didn't have the right to vote or have substantial legal identities separate from their husbands. Why should judges today be beholden to people living in such a sexist society?" Segall, *Originalism as Faith* 88-89 (2018).

These unacceptable results, it is argued, render originalism suspect at best and cruel at worst. As one erudite critic of originalism has put it, an austere originalism is unacceptable "because it is inconsistent with too much that is both settled and worthy in many areas, including free speech, religious liberty, racial discrimination, and sex discrimination." Sunstein, *Five Theses on Originalism*, 19 Harv. J.L. & Pub. Pol'y 311, 312 (1996). As such, strict originalist methods will result "in an unacceptably narrow set of liberties for the United States in the [modern era]." 19 Harv. J.L. & Pub. Pol'y at 312. Or more bluntly, as another scholar recently put it, "Originalism has a difficult relationship with race and gender." Mulligan, *Diverse Originalism*, 21 U. Pa. J. Const. L. 379, 379 (2018).

Thus, a straightforward critique of originalist methods claims that originalist jurists are bound to perpetuate the political disenfranchisement of minorities that prevailed during the founding era. Therefore, they claim originalism fails "to advance the interests or reach the preferred outcomes of women and people of color." 21 U. Pa. J. Const. L. at 383. Such difficulties lead naturally to the question of "whether originalism can address its relationship with race and gender while maintaining its commitment to the fixation principle—the principle that a constitutional provision's meaning was fixed at the time of its adoption." 21 U. Pa. J. Const. L. at 381. This question presents a serious challenge that ought to be taken seriously by committed originalists.

For example, the use of the word "men" in section 1 presents a kind of "dead hand" challenge to my preferred originalist approach to the Kansas Constitution. Did our founders mean to exclude women from the promises made in section 1? And if they did, how can we justify enforcing the original meaning of section 1? At oral argument, the State had some difficulty contending with this question, falling back on the notion that perhaps the use of the word "men" in section 1 was merely a "historical accident."

But substantial effort has been made to demonstrate that the unacceptable results critique—especially as it relates to issues concerning race and gender—is premised on the false assumption that originalism necessarily produces unjust outcomes. See generally McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) (defending *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954], on originalist grounds); Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L.Q. 213 (2015) (defending *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 [1967], on originalist grounds); Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 Pac. L.J. 977 (1997) (presenting an originalist argument that slavery was unconstitutional even before the adoption of the Thirteenth Amendment). In my view, these scholars, and others doing similar work, have the better argument.

In the same way, the historical case that those who drafted and ratified the Kansas Constitution understood section 1 to apply only to men is dubious. Even going all the way back to the Declaration itself, the use of the term "men" in the phrase "all men are created equal" was understood as a generic term for all humankind. See Van Patten, *The Enigma of the ERA*, 30 S.D. L. Rev. 8, 9 (1984) ("Did Jefferson mean 'men' in the specific sense or did he mean the word to be understood in the broader sense of 'people'? It was, of course, the style of the time to use the word 'men' in both senses. . . . It appears

. . . that the statement of equality in the Declaration is a statement about the natural equality of all people."). Contemporary dictionaries corroborate this understanding. An American Dictionary of the English Language published in 1841 defines "men" as, "Persons; people; mankind; in an indefinite sense." An American Dictionary of the English Language 525 (1841).

Accordingly, Justice Clarence Thomas has said:

"What Jefferson meant, like John Locke before him, is that all men and women, all human beings, are equally created by God, endowed with the capacity to reason and with free will, thus sufficiently sharing in human nature as to render it unjust for any man to rule another without consent. This principle of equality is applicable to all men and women at all times, and applies as much to the greatest king as to the lowest laborer." Thomas, Associate Justice, U.S. Supreme Court, Remarks at the Dwight D. Opperman Lecture (Sept. 24, 1999): *Why Federalism Matters*, in 48 Drake L. Rev. 231, 232 (2000).

Even Susan B. Anthony described Jefferson's famous language as containing no "exclusion of any class" and pronouncing "the rights of all men, and 'consequently,' . . . 'of all women.'" 2 History of Woman Suffrage, at 631. If there was any lingering question about the generic use of the term "men" in section 1 referring to all people, it would be put to rest by Samuel A. Kingman's statement on the floor of the Wyandotte Constitutional Convention, addressing this *very question*: "Such rights as are natural are now enjoyed as fully by women as men." Proceedings and Debates of the Kansas Constitutional Convention (Drapier ed., 1859), *reprinted in* Kansas Constitutional Convention 169 (1920) (hereinafter Convention). Whatever else Kingman may have thought about a woman's role in society, he believed section 1 applied to women. So did the vast majority of those who adopted and ratified the Kansas Constitution. On this point, the majority and I agree.

The majority frames the rest of its section 1 analysis as an effort to finally deliver on the Constitution's promises to women—promises that now include a right to an abortion. Slip op. at 45 (claiming that "society's attitude regarding women at the time was not in step with the natural rights guarantee in section 1"). It is here, in my view, that the majority must by necessity embrace a living, evolving constitution instead of treating the "law as an ever-fixed mark." *Riffe*, 308 Kan. at 117 (Stegall, J., concurring). "As times change, the thinking goes, so too must our interpretation of the law." 308 Kan. at 117 (Stegall, J., concurring). As the meaning of the text evolves "to reflect vacillating social sensibilities, the Constitution becomes a kind of mood ring for the zeitgeist of the age" giving "judges the power to announce the new colors of the constitutional text whenever the kaleidoscope of history turns." 308 Kan. at 117-18 (Stegall, J., concurring).

I reject the view of our organic law adopted by the majority. Though admittedly, the majority can find support for its approach in our caselaw. See *State, ex rel., v. Hines*, 163 Kan. 300, 301, 182 P.2d 865 (1947) ("the constitution must be given flexibility so that it may vibrate in tune with the vicissitudes of time"); *Markham v. Cornell*, 136 Kan. 884, 891, 18 P.2d 158 (1933) (The constitution should "march abreast of the times," and the constitutional text "must yield to the pressure of changed social conditions, more enlightened ideals, advanced business organizations and the general march of progress."); *Postlethwaite v. Edson*, 102 Kan. 619, 643, 171 P. 769 (1918) (Porter, J., dissenting) ("constitutions march, aided by judicial interpretation").

"The brief of reason, liberty, and experience argues forcefully in favor of a fixed meaning. The opposing brief of hubris, progress, and good intentions holds forth the enticing fruit of 'flexibility.'" 308 Kan. at 118 (Stegall, J., concurring). But "we should resist the temptation" because the "problem with judges striving to pick up on vibrations emanating from a constitutional text as it yields to the march of progress is that the

process tends to produce results we 'just can't explain.' Brian Wilson, *Good Vibrations*, on SMiLE (Nonesuch Records 2004)." 308 Kan. at 118 (Stegall, J., concurring).

LIMITING THE POLICE POWER

Today's decision is a textbook case of unexplainable results. To be sure, the majority *attempts* a rational explanation. To no avail. The majority misunderstands and misuses history; bolsters its rejection of Kansas law with factually unsupported allegations of prejudice; ignores even its own claim to be pursuing the "drafters' intent" as the ""polestar"" of constitutional interpretation (slip op. at 17); and in the end, can do no better than to fall back on federal substantive due process jurisprudence—complete with judicially favored rights and a byzantine system of tiered scrutiny. We thus vindicate Justice Sandra Day O'Connor's warning "that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 814, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (O'Connor, J., dissenting).

This "major distortion in [our] constitutional jurisprudence" can at least be shown for what it is. 476 U.S. at 814 (O'Connor, J., dissenting). In this section, I will provide some historical corrections, investigate and describe the original public meaning of section 1 of the Kansas Constitution Bill of Rights as a limit on the police power of the state, and review the applicable judicial test for evaluating alleged violations of that limit.

1. *From Locke to Jefferson*

The majority recognizes the influence of John Locke on the Declaration of Independence and thus, on section 1 of our Bill of Rights. Tracing the language of section 1 all the way back to Locke's Second Treatise, the majority discovers a line that says

"every Man has a *Property* in his own *Person*." Slip op. at 38; Locke, *Two Treatises of Government*, Bk. II, § 27 (Gryphon special ed. 1994) (1698). This lonely line then becomes the springboard to a fundamental—nay absolute—right to abortion. Connecting these dots is difficult, to say the least. But it begins with the premise that Locke's *Treatise* announced a 21st-century-style list of fundamental rights. The premise is not just wrong, it is utterly foreign to Locke.

That said, it is true that Locke is amenable to an interpretive gloss that emphasizes a voluntarist understanding of the "heart of liberty" and its "right to define" its own "concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851. Call this the "voluntarist lens." This is the lens through which the majority reads Locke, and hence section 1:

"At the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy. Few decisions impact our lives more than those about issues that affect one's physical health, family formation, and family life. We conclude that this right to personal autonomy is firmly embedded within section 1's natural rights guarantee and its included concepts of liberty and the pursuit of happiness." Slip op. at 44.

As one scholar has summarized, seeing the world through the voluntarist lens dictates that the purpose of the social compact is to "increase our personal liberty by eliminating customs and even laws that can be thought to limit individual freedom." Deneen, *Why Liberalism Failed* 49 (2018). This "ideal of liberty can be realized only through a powerful state" whose main role "becomes the active liberation of individuals from any limiting conditions." Deneen, at 49. In this sense, many of Locke's modern, voluntarist interpreters suggest the ultimate goal of the Lockean state is to disembed and disassociate the individual from the political community itself—freeing persons from any and every unchosen condition of life. The purpose of the state is not to secure and

promote a common good but is instead to relentlessly tear down all barriers to the choose-your-own-adventurism of a voluntarist paradise.

But as I will demonstrate, the dominant and accepted *jurisprudential* view of the Lockean natural rights tradition during the first century-and-a-half of our existence as a nation—and for our entire existence as a state—has focused on the idea of a limited central power chartered by consent to secure and promote a "commonwealth." Call this the "commonwealth lens." In this view, Locke's primary, overriding theoretical concern is sovereignty: What is it, where does it come from, and what are the conditions for its just exercise?

By focusing on the proper conditions for just rule (the exercise of sovereignty) rather than on a voluntarist theory of "rights," this approach has striven, imperfectly to be sure, to protect *both* a sphere of individually retained, pre-political freedom (the negative liberty *from* tyranny) *and* a sphere of collectively held, political freedom to self-rule (the positive liberty *toward* citizenship). The latter is the kind of freedom that adheres to and arises out of the duties, obligations, privileges, and affections that flow from participation in a just and well-ordered political community.

Given these radically different lenses through which one may view the history and thinkers at issue, a short review of the Lockean "natural rights" tradition—a tradition far broader than Locke himself—animating the Declaration of Independence is in order. As mentioned, Locke was less interested in delineating "rights" than he was in describing the contours of republican self-government. He begins his Second Treatise by describing people in their pre-political state—that is, before they agree to associate in a political community. In that pre-political state—Locke's "State of Nature"—all people are in a "State of perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave,

or depending upon the Will of any other Man." Two Treatises, Bk. II, § 4. This includes the "Freedom from Absolute, Arbitrary Power." Two Treatises, Bk. II, § 23. People in the State of Nature are governed by the Law of Nature: "That being all equal and independent, no one ought to harm another in his Life, Health, Liberty or Possessions" Two Treatises, Bk. II, § 6.

But Locke sees a problem. Individuals in the State of Nature are left to their own devices to enforce the Law of Nature themselves. Two Treatises, Bk. II, §§ 6, 13. Thus, the State of Nature is prone to "Confusion and Disorder" as the powerful naturally prey upon the weak and even the enforcement of legitimate interests will be tainted with partiality and revenge. Two Treatises, Bk. II, § 13. People remain in the State of Nature "till by their own Consents they make themselves Members of some Politick Society," one that promotes the common good and "the mutual Preservation of their Lives, Liberties and Estates." Two Treatises, Bk. II, §§ 15, 123.

The power of the "Politick Society" extends only so far as the people's consent. This is because governmental power originates from the "mutual Consent of those who make up the Community," which Locke calls the "Compact." Two Treatises, Bk. II, §§ 97, 171. In this compact, the people agree to give up some of their pre-political sovereignty to a central power—surrendering some natural rights—but only to the extent necessary to secure a common good. Two Treatises, Bk. II, §§ 131, 171. People in a social compact can be presumed to have consented to rational laws that promote or secure the common good:

"[Y]et it being only with an intention in every one the better to preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse) the power of the Society, or Legislative, constituted by them, can never be suppos'd to extend farther than the common good" Two Treatises, Bk. II, § 131.

For Locke, legislative acts beyond the scope of this consent are illegitimate. Put simply, the Lockean understanding of republican self-rule cannot tolerate arbitrary power. *Two Treatises*, Bk. II, § 23.

"[W]hensoever the Legislators endeavor to take away, and destroy the Property of the People, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience Whensoever therefore the Legislative shall transgress this fundamental Rule of Society; and either by Ambition, Fear, Folly, or Corruption, endeavor to grasp themselves, or put into the hands of any other an Absolute Power over the Lives, Liberties, and Estates of the People: By this breach of Trust they forfeit the Power, the People had put into their hands for quite contrary ends" *Two Treatises*, Bk. II, § 222.

Locke also recognized the freedom that comes with a flourishing community, what he called a "Communion of Interest," which unites the parties to a social compact in "Care and Affection." *Two Treatises*, Bk. II, § 77-78 (describing the more basic "first [s]ociety" between spouses and their children). Bizarrely, the majority interprets this cozy picture of the most basic "commonwealth" in human society—a family—through a voluntarist lens as a justification for finding a fundamental right to abortion. See slip op. at 43-44.

The influential ideas in Locke's *Second Treatise* permeated the revolutionary moment of 1776. But of course Locke was just one in a long line of enlightenment "natural rights" political theorists that included, among others, the Spanish Jesuit Francisco Suárez and the Dutch jurist Hugo Grotius—all of whom influenced Thomas Jefferson and the other intellectuals behind the American break with Great Britain. It was "[a] central feature of Suárez' thought on rights and political theory," for example, "that ruling power was brought into being, not by patriarchy or divine right or the supposed

superiority of some person or class, but by the will and consent of free right-bearing individuals who entered into a compact with one another to form a political society." Tierney, *The Idea of Natural Rights* 311 (1997).

Tierney helpfully traces the history of this "developing tradition of thought" that sought to harmonize "state sovereignty" with "individual natural rights." Tierney, at 289. Thinkers like Grotius reasoned deeply about "the relationship between individuals and community within a civil society." Tierney, at 334. "In this way of thinking, the natural sociability of humans led to the formation of political societies with sovereign governments; but the sociability itself was related to the needs of individual persons." Tierney, at 289. Some theorists believed that "political society was created in the first place by the voluntary acts of free individuals and that some of the rights that existed in pre-political society were not and could not be yielded to a sovereign community or a sovereign ruler." Tierney, 289. Thus, they were "able to hold together, in coherent structures of thought, ideas that later thinkers would sometimes treat as polar opposites." Tierney, at 334. In the end, "modern constitutional thought evolved in the way it did partly because the practice of monarchial absolutism could not easily be reconciled with a theory of the state expressed in the language of natural rights." Tierney, at 289.

The concepts developed within this tradition functioned for the American revolutionaries not only as a justification for their declaration of independence, but also as the foundation of a new republican structure of government. As John Hancock explained in a letter to the colonies on July 6, 1776, the Declaration of Independence was "the ground and foundation of a future Government." Hancock, *Letter to the New York Convention July 6, 1776*, in 1 *American Archives, Fifth Series: A Documentary History of the United States of America* 33 (Force ed., 1848). "It was an act of original, inherent sovereignty by the people themselves, resulting from their right to change the form of

government, and to institute a new government, whenever necessary for their safety and happiness." 1 Story, *Commentaries on the Constitution of the United States* 198 (1833).

The Declaration of Independence was in good company. The Virginia Declaration of Rights of 1776—which some believe was Jefferson's model for the Declaration of Independence—was the first of many state constitutions to incorporate this structure:

"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." Va. Const. Bill of Rights, art. I, § 1.

See Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1313-19 (2015). About a year before he drafted the Virginia Declaration of Rights, George Mason explained this republican theory of government in greater depth:

"We came equals into this world, and equals shall we go out of it. All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required. Every society, all government, and every kind of civil compact therefore, is or ought to be, calculated for the general good and safety of the community. Every power, every authority vested in particular men is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these purposes, it may be called government, but it is in fact oppression." 1 The Papers of George Mason 1725-1792, at 229-30 (Rutland ed., 1970).

Given all this, it is difficult to credit the majority's co-opting of Locke for the idea that there is a fundamental, natural right to terminate a pregnancy in whatever manner one chooses.

But an aside:

After these forays into long-ago history, complete with jousting views of a political theory of natural rights that is separated from us by an ocean of both time and water, any reader who has persevered to this point is entitled to wonder— isn't the history of ideas more complicated than this? And how can European theorists who died long before America's founding tell us anything about whether the Kansas Constitution contains a right to abortion?

I do not wish to denigrate the proper role history can and should play in constitutional adjudication—after all, here I have offered an important historical corrective to the majority's misunderstanding of Locke. But I am sensitive to the words of Justice John Paul Stevens, who often warned that "[i]t is not the role of . . . judges to be amateur historians." *McDonald v. Chicago*, 561 U.S. 742, 910, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Stevens, J., dissenting). Indeed, I agree with Chief Judge Posner's suggestion that "judges do not have either the leisure or the training to conduct *responsible* historical research or *competently* umpire historical controversies." *Velasquez v. Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998), *vacated in part* 165 F.3d 593 (7th Cir. 1999). Though something else Justice Stevens said is likewise true: "Some appellate judges are better historians than others." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 550, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (Stevens, J., dissenting).

In the end, I recognize that while the majority opinion illustrates the maxim that "bad history can make bad law," the cautious judge will understand that even "good history can sometimes do the same." Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 Yale L.J. 281, 289 (1987). Thus, I will return to safer judicial ground—the legal principles being debated at the time of our State's founding and the widely understood public meaning of the language our founders chose to enshrine in section 1 of our state Constitution.

2. *The Structure of the American State: Rights First, Then Government*

When George Washington wrote the cover letter from the Constitutional Convention to Congress, transmitting the proposed Constitution, he summarized the whole endeavor in starkly Lockean terms:

"Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be preserved" 1 Annals of Congress vii (Gales ed., 1834).

Washington's sentiment echoed through the ratification process as delegates explained the structure of the new government. For example, during the ratification convention in South Carolina, Robert Barnwell argued that "in the compacts which unite men into society, it always is necessary to give up a part of our natural rights to secure the remainder" *Debates, etc., in the Legislature, and in the Convention, of South Carolina, in 3 The Debates, Resolutions, and other Proceedings, in Convention, on the Adoption of the Federal Constitution* 327, 363-65 (Elliot ed., 1830). Or again, during the Massachusetts ratification debates, Samuel Nasson asserted: "When I give up any of my

natural rights, it is for the security of the rest." Debates and Proceedings in the Convention of the Commonwealth of Massachusetts in 1788, at 236 (1856).

According to James Madison, the European model of government called for "charters of liberty . . . granted by power," but America provided a new example of "charters of power granted by liberty." Madison, *Charters*, in 6 The Writings of James Madison 83 (Hunt ed., 1906).

It would be hard to improve on Madison's words, but for modern ears, Professor Randy Barnett at Georgetown has distilled the classical liberal tradition from Locke to Madison down to its root idea that "'first come rights, then comes government.'" Barnett, *We the People: Each and Every One*, 123 Yale L.J. 2576, 2596 (2014); see also Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 Harv. J.L. & Pub. Pol'y 101, 103 (1987) ("[T]he authors of our Constitution were very much influenced by the Lockean philosophy of 'rights first—government second.'"). Indeed, there is ample evidence in the earliest United States Supreme Court caselaw that "rights first, then government" was the proper way to understand the structure of the American experiment in self-government.

For example, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793), by a vote of 4-1, the United States Supreme Court first held that a state was required to answer a civil suit in federal courts. Georgia argued that as a sovereign state, it was not subject to a foreign jurisdiction without consent. See 2 U.S. at 424. The Court's *Chisholm* decision—and Justice James Wilson's written opinion in particular—was the first systematic exploration of state sovereignty under the newly ratified Constitution.

Justice Wilson began with the comment that "the term *sovereign* is totally unknown" to "the [C]onstitution of the United States." 2 U.S. at 454. Citing William

Blackstone, Justice Wilson then summarized the commonly understood theory of sovereignty England operated under. "[I]n the case of the King, the sovereignty had a double operation. While it vested him . . . with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and consequently . . . no right of jurisdiction." 2 U.S. at 458 (Wilson, J., opinion).

But Justice Wilson perceived "that another principle, very different in its nature and operations" was at work in the American understanding of republican government. 2 U.S. at 458. This principle held that "laws derived from the pure source of equality and justice must be founded on the *consent* of those whose obedience they require. The sovereign, when traced to his source, must be found in the man." 2 U.S. at 458 (Wilson, J., opinion). In the American republic, the "only reason . . . a free man is bound by human laws, is, that he binds himself." 2 U.S. at 456 (Wilson, J., opinion). And the same principle "upon which he becomes bound by the laws" makes him "amenable to the courts of justice." 2 U.S. at 456 (Wilson, J., opinion). Because Georgia's sovereignty as a state was derived from the sovereignty of the people, the "aggregate of free men, a collection of original sovereigns," could bind the State of Georgia in the same way. 2 U.S. at 456, 458 (Wilson, J., opinion). Interestingly, the "collection of original sovereigns" got together after *Chisholm* and expressly unbound the states from federal court jurisdiction by passing the Eleventh Amendment.

3. *The Rise of "States' Rights": Government First, Then Rights*

But as the 19th century progressed and the question of slavery moved inexorably to the center of American political and legal debates, a new, competing account of the proper scope of the state's general policing power rose to prominence. Often, the argument began with a soft concession that while the federal government may be a government of limited powers, the same is not true of state governments. Highly

summarized, these theorists "argued that rights were created by society, not by nature, and that the state or the legislature that spoke for it held the ultimate sovereign power to determine what rights would or would not be politically recognized." Sandefur, *The Right to Earn a Living* 84-85 (2010). Sometimes shorthanded as a defense of "states' rights," these judges, politicians, and legal theorists were perverting our original self-understanding of the American structure by espousing a "government first, then rights" view of things.

By the time the United States Supreme Court decided *City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139, 9 L. Ed. 648 (1837), this view—that the police power of the various states was absolute unless expressly constrained by some constitutional provision—was so widespread that the Court declared it to be "impregnable." "[A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation." 36 U.S. at 139. Thus, "it is not only the right, but the . . . duty of a state, to advance the safety, happiness and prosperity of its people . . . by any and every act of legislation" in any manner except where the "exercise [of power] is not surrendered or restrained" by a constitutional provision. 36 U.S. at 139.

Perhaps the most infamous legal expositor of the primacy of state sovereignty was Chief Justice Roger Taney, who would later apply the principle in his abominable *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857), *superseded by* U.S. Const. amend. XIV (1868), decision. Several years before that, however, he articulated an expansive commitment to government first, then rights. "But what are the police powers of a State?" he asked. *License Cases*, 46 U.S. (5 How.) 504, 583, 12 L. Ed. 256 (1847) (Taney, C.J., opinion), *overruled in part by* *Leisy v. Hardin*, 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890).

"They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates" *License Cases*, 46 U.S. at 583 (Taney, C.J., opinion).

Thus, according to Taney, the "authority" of a state to make laws is "absolute . . . except in so far as it has been restricted" by a constitutional pronouncement. 46 U.S. at 583 (Taney, C.J., opinion). Moreover,

"when the validity of a State law . . . is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade." 46 U.S. at 583 (Taney, C.J., opinion).

That is to say, states have near absolute power to legislate as they please subject only to judicial review for encroachment on a constitutionally protected right of the people. If no right or encroachment is found, courts must not question the real motives or intent of the Legislature.

This was a complete and total rejection of John Quincy Adams' widely read 1831 Fourth of July Oration. There, Adams had maintained that "the body politic is formed by a voluntary association of individuals; that it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws, for the common good." Adams, *An Oration Addressed to the Citizens of the Town of Quincy* (July 4, 1831), in *Adams Addresses* 17 (1831). We know this, according to Adams, because the "Declaration of Independence was a social

compact, by which the whole people covenanted with each citizen of the United Colonies, and each citizen with the whole people" Adams, at 17.

Adams went on to explain that the "sovereignty" of the "States of this confederation . . . is not, and never was, a sovereignty as defined by Blackstone and the English lawyers, identical with unlimited power; that sovereignty, thus defined, is in direct contradiction to the Declaration of Independence, and incompatible with the nature of our institutions" Adams, at 35. Instead, the States are "but creatures of the people, and possess none but delegated powers" Adams, at 35-36. Finally, in dramatic fashion, Adams intoned that it was the "hallucination of State sovereignty" that became "identified with unlimited power" that had "blasted the Confederation from its birth." Adams, at 23. Figures like Adams and Taney stood irreconcilably at odds. For them, the absolute "police powers in the states" on the one hand, and the "Lockean theory of natural rights" on the other, were, as one scholar put it, "mutually contradictory." Forte, *Ideology and History*, 13 Ga. L. Rev. 1501, 1508 (1979).

In 1857, the California Supreme Court succinctly summarized the contending legal theories of state sovereignty:

"Whether there is any restriction upon legislative power, irrespective of the Constitution, is a question upon which ethical and political writers have differed. Many of the ancient writers have based this claim of omnipotence upon the doctrine of the absolute and sacred character of sovereignty, assuming that princes bear rule by divine right, and not by virtue of the expressed or tacit consent of the governed. Some contend that the very existence of government depends upon the supreme power being lodged in some branch of the government, from which there is no appeal, and, if laws are passed which are immoral, or violate the principles of natural justice, the subject is bound to obey them. Others contend that there are boundaries set to the exercise of the supreme sovereign power of the State, that it is limited in its exercise by the great and fundamental principles of the social compact, which is founded in consent, express or implied; that it shall be

called into existence for the great ends which that compact was designed to secure, and, hence, it cannot be converted into such an unlimited power, as to defeat the end which mankind had in view, when they entered into the social compact." *Billings v. Hall*, 7 Cal. 1, 10 (1857).

Following Chief Justice Taney's *Dred Scott* opinion, the great debate quickly moved from courtrooms and legal briefs to the political battleground. On that field, Chief Justice Taney's political counterpart was Senator Stephen Douglas, who championed the Kansas-Nebraska Act of 1854. In short, the Act repealed the Missouri Compromise; enacted a policy of "popular sovereignty" for the territories of Kansas and Nebraska; and thus permitted the expansion of slavery into the north. Farber, *Lincoln's Constitution* 8-10, 71 (2003).

But Douglas—more politically savvy than Chief Justice Taney—knew that slavery expansion had to be "freely" chosen if the Act would have any chance at success. Thus, in a deft display of tactical sophistication, Douglas framed the question in terms of self-government and popular sovereignty. See Adkins, *Lincoln's Constitution Revisited*, 36 N. Ky. L. Rev. 211, 225-26 (2009). If the people of Nebraska and Kansas wanted slavery, they could have it. Who could oppose self-government? After all, self-government was the rallying cry of the American Revolution itself.

But in truth, Douglas' understanding of "self-government" was no different from Taney's. Douglas believed "the doctrine of popular sovereignty" extended only to the constituting process itself, and not beyond. Jaffa, *Crisis of the House Divided* 347 (50th anniversary ed. 2009). That is, behind the Kansas-Nebraska Act was the doctrine that the pre-political sovereignty of the individual is *fully and completely* vested in the state in and during the constituting act. Therefore, state sovereignty is absolute so long as it is not expressly limited by constitutional command. From there, the sovereign state exercising

its "state's rights" may freely choose to dole some rights or privileges back to individuals or minority interests—or choose not to. Government first, then rights.

Then came Abraham Lincoln.

4. *Lincoln's Fight to Renew the Declaration of Independence*

In 1854, in Peoria, Illinois, Lincoln delivered perhaps the most consequential speech in American history. It was at Peoria that Lincoln formed "the foundation of his politics and principles" and "developed the mature model that would guide his principal writings for the last decade of his life." Lehrman, *Lincoln at Peoria* xvi, xviii (2008). His mission was to make clear to the public the competing notions of "popular sovereignty" spawned by the pressing national need to resolve the tension between slavery and the language of the Declaration; the rise of states' rights absolutism; and the passage of the Kansas-Nebraska Act. Peoria was Lincoln's refutation of Douglas' account of state sovereignty.

To do so, Lincoln expressly took up the question of political chronology—do rights come from government, or does government follow rights? Lincoln framed this as a war between the "ancient faith" of the Declaration and a "new" understanding of so-called "self-government" that would enshrine slavery. Lincoln, *Speech at Peoria, Illinois* (October 16, 1854), in Lehrman, *Lincoln at Peoria* 289, 309 (2008). He lamented that with the passage of the Kansas-Nebraska Act "we have been giving up the OLD for the NEW faith." Lehrman, at 319.

It is no exaggeration to say that Lincoln became such a towering figure in American history because he was among the first to publicly recognize and forcefully repudiate the dangerous perversion of self-government pedaled by Chief Justice Taney,

Senator Douglas, and the slave power. Lincoln called it the "one great argument in the support of the repeal of the Missouri Compromise"—the argument of, quoting Douglas, "'the sacred right of government.'" Lehrman, at 308. Douglas had sarcastically chided, "'[Lincoln thinks] [t]he white people of Nebraska are good enough to govern themselves, *but they are not good enough to govern a few miserable negroes!!*'" Lehrman, at 309. As repulsive and evil as Douglas' language and assumptions were, Lincoln understood it was insufficient to respond with purely moral objections to slavery, valid as those objections certainly were. Lincoln had to repudiate Douglas' perversion of the idea of popular sovereignty and articulate a more compelling account of the structure of American government. Thus, he insisted he "hate[d]" the Kansas-Nebraska Act not just "because of the monstrous injustice of slavery itself" but also "because it deprives our republican example of its just influence in the world." Lehrman, at 297.

The simple genius of Lincoln's argument lay in his recognition that underlying Douglas' jibe was a fundamental commitment to Chief Justice Taney's idea that, once constituted, the all-powerful, sovereign state can determine what rights to grant (or not grant) to any within its jurisdiction excepting only those rights expressly reserved in the constitution itself. For Douglas, government came first, and only then could government provide rights through its organic or positive laws. Lincoln found his answer to this pernicious "new faith" in the Declaration of Independence. In Peoria, he quoted:

"We hold these truths to be self evident: that all men 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 to secure these rights, governments are instituted among men, DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED." Lehrman, at 309.

"I have quoted so much," Lincoln said, "merely to show that according to our ancient faith, the just powers of governments are derived from the consent of the

governed." Lehrman, at 309. Moreover, "[w]hen the white man governs himself," that is self-government; but when he "also governs *another* man, that is *more* than self-government—that is despotism." Lehrman, at 309.

Given how deeply Lincoln is imprinted on our minds, it would be easy to miss what is happening here. Lincoln found an antidote to Douglas' poisonous theory of self-government in the Declaration's language. He rejected the notion that government comes first. Instead, the Declaration asserts that individual sovereignty—the natural rights of pre-political people—predates the formation of any just government. For Lincoln, the problem was not only that Douglas excluded some people from the social compact—which both he and Chief Justice Taney clearly did. See *Dred Scott*, 60 U.S. at 410 (stating the words of the Declaration of Independence "would seem to embrace the whole human family" but "the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration").

Lincoln understood the problem was deeper. He recognized that Chief Justice Taney and Senator Douglas were distorting the fundamental structure of republican government. For Lincoln, it was a distinction that made all the difference. Lincoln championed a government of limited power constituted when the people relinquished only a defined and limited measure of their pre-political sovereignty while retaining the rest. Douglas championed a government of nearly unlimited power constituted when the people relinquished all of their pre-political sovereignty excepting only a defined and limited measure expressly reserved. The former idea Lincoln celebrated as "the sheet anchor of American republicanism." Lehrman, at 309. The latter was to Lincoln the seedbed of tyranny and despotism. For Lincoln, the Declaration's principles and Douglas' distortion of "self-government" "can not stand together . . . and whoever holds to the one, must despise the other." Lehrman, at 319. Essentially, Lincoln accused Douglas of perpetrating a nasty bait-and-switch scheme—under the promise of "popular sovereignty"

Douglas had cleverly substituted tyrannical and arbitrary majority rule (despotism) for the structural guarantee of the proper conditions for just rule (republican self-rule).

Indeed, Lincoln drove the point home by demonstrating how Douglas and his supporters rejected the language of the Declaration. During the Senate debate on the Kansas-Nebraska Act, Senator John Pettit of Indiana, arguing in favor of the Act, had insisted that Jefferson's words in the Declaration were a "self-evident lie." 31 Appendix to the Congressional Globe for the First Session, Thirty-third Congress: Containing Speeches, Important State Papers, Etc. 214 (Rives ed., 1854). Referring to those who supported Douglas and the Kansas-Nebraska Act as "Nebraska men," "Nebraska Senators," and "Nebraska newspaper[s]," Lincoln inveighed:

"When Pe[t]tit, in connection with his support of the Nebraska bill, called the Declaration of Independence 'a self-evident lie' he only did what consistency and candor require all other Nebraska men to do. Of the forty odd Nebraska Senators who sat present and heard him, no one rebuked him. Nor am I apprized that any Nebraska newspaper, or any Nebraska orator, in the whole nation, has ever yet rebuked him. . . . If it had been said in old Independence Hall, seventy-eight years ago, the very door-keeper would have throttled the man, and thrust him into the street.

"Let no one be deceived. The spirit of seventy-six and the spirit of Nebraska, are utter antagonisms; and the former is being rapidly displaced by the latter." Lehrman, at 319-20.

See Lincoln, Seventh Joint Debate at Alton, Illinois (October 15, 1858), *in* The Lincoln-Douglas Debates 128, 135 (Sparks ed., 1918). Lincoln's visage was etched on Rushmore that day.

Douglas' crusade for "states' rights" owed much of its theoretical oomph to the South Carolina politician, political theorist, and vehement defender of slavery, John C.

Calhoun. In one famous speech, Calhoun traced the language of the Declaration back to Locke, only to repudiate Locke's ideas. He referred to Locke's idea that pre-political human beings possessed autonomy in their state of nature as a "hypothetical truism"—that is, because there is no actual state of nature, considering this hypothetical state is "of little or no practical value." Calhoun, Speech on the Oregon Bill, delivered in the Senate (June 27, 1848), in 4 *The Works of John C. Calhoun* 479, 509 (Crallé ed., 1883). From this, Calhoun accused Jefferson of larding up the Declaration with aspirational nonsense. As far as the celebrated first lines were concerned, Calhoun claimed "there is not a word of truth in" the whole proposition and they were "inserted in our Declaration of Independence without any necessity." Calhoun, at 507-08.

Other, more moderate opponents of the Republican Party did not go as far as Calhoun or Pettit in directly attacking the language of the Declaration. For example, during the 1856 presidential contest, Rufus Choate, a Whig congressman from Massachusetts, refused to join the Republican Party (as most Whigs had) and instead supported the Democrat James Buchanan. He explained his decision was based on his commitment to unionism—that is, he accused the Republican Party of using the "'glittering and sounding generalities of natural right which make up the Declaration of Independence'" to foment sectionalism and disunion. Choate, *Letter to the Maine Whig State Central Committee* (Aug. 9, 1856), in 1 *The Works of Rufus Choate with a Memoir of His Life* 212, 215 (Brown ed., 1862); see, e.g., *Cox Improving on Choate*, *White Cloud Kansas Chief* (Nov. 5, 1857), at 1 (describing Rufus Choate as "[t]hat once distinguished man" who "made his memory infamous, by stigmatizing the Declaration of Independence as a 'glittering generality'").

Despite these criticisms, Lincoln's use of the Declaration quickly caught on and was adopted in the newly formed Republican Party platform. *Republican National Convention, J.C. Fremont Nominated*, *Fremont Journal* (June 20, 1856), at 3;

Osawatomie Platform, The Commercial Gazette (June 4, 1859), at 2. Describing the platform, Republican Senator Henry Wilson (later Vice-President under President Grant) noted:

"We do not believe, with Mr. Calhoun, the Declaration of Independence to be a 'rhetorical flourish.' We do not believe it to be what Mr. Pettit pronounced it—a self-evident lie.' We do not believe it to be . . . mere 'glittering and sounding generalities of natural right.' We believe it to be a living truth" Appendix to the Congressional Globe: Containing Speeches, Important State Papers, Laws, Etc., of Third Session, Thirty-fourth Congress 64 (Rives ed., 1857).

5. *Bleeding Kansas: Two Ideas in Conflict*

In 1859, President James Buchanan appointed Senator Pettit as the chief justice of the Supreme Court of the Territory of Kansas, where he served until statehood. 1 Courts and Lawyers of Indiana 257 (Monks, Esarey, and Shockley eds., 1916). In at least one case, Chief Justice Pettit discussed his understanding of state sovereignty and its relationship to organic law. *The Territory of Kansas agt. William S. Reyburn*, McCahon 134, 1 Kan. (Dassler) 551 (1860). In that case, Chief Justice Pettit considered whether Congress had the power to permit the territorial legislature of Kansas to "abrogate or impair the obligation of a contract." McCahon at 142. He announced his view that while the power to impair contracts was "immoral in itself, and abhorrent to every man's sense of natural justice," nevertheless, the "separate states" likely had that power initially because they were the "original sovereignties." McCahon at 142-43.

Here, Chief Justice Pettit adds theoretical flesh to the bone of his claim that the Declaration was a "self-evident lie." According to Chief Justice Pettit, the original sovereigns are not the people in their pre-political state but rather the states themselves. While Chief Justice Pettit did not articulate how he would have applied his notions of

sovereignty to the constituting of the states, it seems clear that he was willing to concede a virtually unlimited power in state sovereignty. Even the power to take action that was "immoral . . . and abhorrent" to every "sense of natural justice" was nearly limitless. McCahon at 143. Evidently, Chief Justice Pettit subscribed to what the California Supreme Court had described in 1857 as the "claim of [state] omnipotence" premised "upon the doctrine of the absolute and sacred character of sovereignty." *Billings*, 7 Cal. at 10. Though such sovereignty was tempered with Chief Justice Taney's understanding that the power of a state to make laws is "absolute . . . except in so far as it has been restricted" by a constitutional pronouncement. *License Cases*, 46 U.S. at 583.

Thus, the anti-Declaration rhetoric of absolute state sovereignty had moved to Kansas—the hottest spot in the nascent war between the old faith in *government by consent* and new faith in *consent by government*. But Pettit's claims were not limited to the territorial supreme court. They were regularly debated publicly in the territory before statehood. See, e.g., *The Democratic Creed*, The Kansas News (Nov. 7, 1857), at 2 (stating, to mock the democratic platform, "I believe the Declaration of Independence to be 'a self-evident lie' and a 'issue of glittering generalities'"). As one pro-slavery newspaper put it:

"Nor is it literally true, that 'life, liberty, and the pursuit of happiness are inalienable.' On the contrary life is taken, the pursuit of happiness is regulated, liberty is restrained from the hour of birth, to the day of death. If the abolitionists were right in their interpretation of this principle, our army should be disbanded, our navy dismantled, our prisons thrown up, our very laws blotted out; they are all practical refutations of their construction." *Negro-Slavery, No Evil*, Squatter Sovereign (Feb. 20, 1855), at 1.

The slave power had so internalized the "new faith" of Douglas' government-first perspective that the language of the Declaration began to make no sense at all. What about criminal laws? What about regulations? Doesn't virtually every law limit someone's

liberty or pursuit of happiness? If one completely rejects the Lockean social compact as a pre-constitutional event—which Douglas had done—then the Declaration did seem to "blot out" almost all positive laws enacted by the State.

Following the election of the proslavery "bogus legislature" in 1855, the free-staters elected their own legislature and began drafting what would become known as the Topeka Constitution. Etcheson, *The Goose Question: The Proslavery Party in Territorial Kansas and the "Crisis in Law and Order," in Bleeding Kansas, Bleeding Missouri: The Long Civil War on the Border* 47, 54 (Earle & Mutti-Burke eds., 2013). Its preamble stated: "[I]n order to secure to ourselves and our posterity the enjoyment of all the rights of life, liberty and property, and the free pursuit of happiness, do mutually agree with each other, to form ourselves into a free and independent State" Topeka Const. of 1855, Preamble. Section 1 of its Bill of Rights stated: "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." Topeka Const. Bill of Rights, art. I, § 1.

Ultimately, the United States Senate rejected Kansas' admission to the Union under the Topeka Constitution, suggesting it was not actually the product of popular sovereignty. Kansas's War: The Civil War in Documents 23 (Ponce ed., 2011) ("On July 3, 1856, the Republican-controlled House of Representatives voted to accept the Topeka Constitution and admit Kansas to the Union. The Senate, however, rejected Kansas's admission because the constitution was written by a minority of residents acting without proper authority."). The language of the Declaration was front and center of the fiery Senate debate. Senator Charles Sumner gave his sensationally vehement speech, "The Crime Against Kansas," accusing Congress of tyrannically depriving Kansans of their rights and forcing slavery upon them. He lambasted his colleagues, saying, "Are you for the protection of American citizens?—I show you how their dearest rights have been

cloven down, while a tyrannical usurpation has sought to install itself on their very necks!" Sumner, *The Crime Against Kansas*, Speech of Hon. Charles Sumner in the Senate of the United States May 19 and 20, 1856, at 5 (1856). He continued:

"I plant [the case to admit Kansas] firmly on the fundamental principle of American Institutions, as embodied in the Declaration of Independence, by which Government is recognized as deriving its just powers only *from the consent of the governed*, who may alter or abolish it when it becomes destructive of their rights. In the debate on the Nebraska Bill, at the overthrow of the Prohibition of Slavery, the Declaration of Independence was denounced as a 'self-evident lie.' It is only by a similar audacity that the fundamental principle which sustains the proceedings in Kansas can be assailed. Nay, more: you must disown the Declaration of Independence" Sumner, at 79.

Here again, it is evident that while the future of slavery in America was at stake, so too was a particular understanding of self-government—an understanding grounded in the presumption that the power of government *flows from* a limited consent of the people to relinquish only a measure of their natural, pre-political rights. The abolitionists, following Lincoln's lead, insisted that the proslavery forces, motivated by their "depraved longing for a new slave State," were adding to their crimes by tossing overboard the old republican commitment to limited government—"all for the sake of political power." Sumner, at 5. And this new, government-first notion of "self-government" was threatening to establish a strong foothold in the Kansas territory.

6. *Constituting Kansas*

These happenings weren't history to either the people of the Kansas territory or to the men who convened in Wyandotte in 1859 to draft a new constitution establishing the hoped-for State of Kansas. These were current events. The Lincoln-Douglas debates were widely discussed in the Kansas frontier newspapers. See, e.g., *The Last of it—Joint*

Debate, The Kansas News (Nov. 13, 1858), at 2. The concepts were actively debated in community forums, dueling editorials, and by blistering political invective. See *Only the Beginning of the Battle*, The Kansas News (Nov. 27, 1858), at 3 (describing Douglas' Illinois campaign and calling on Republicans to fight for "life, liberty and the pursuit of happiness"); *Men Who Do and a Man Who Don't Care Whether Slavery is Voted Up or Down*, White Cloud Kansas Chief (September 20, 1860), at 1 (contrasting Douglas' view with the guarantees of the Declaration of Independence); *The Administration of Abraham Lincoln*, The Commercial Gazette (Oct. 13, 1860), at 2 (predicting Lincoln would win the presidential election and restore "the principles promulgated in the Declaration of Independence," including that "governments are instituted among men deriving their just powers from the consent of the governed").

By the late 1850s, the public conversation in Kansas was so thoroughly steeped in these competing ideas that certain phrases and slogans became flags that could be hoisted to immediately declare which side one was on. The organizational meetings in the town of Hyatt, Kansas, are illustrative. In 1857, free-state advocates—self-declared "citizens of the United States, inhabitants of Kansas and settlers of the town of Hyatt"—invoked the Lockean language of the Declaration of Independence to establish their own social compact. Town Organization of Hyatt, Kansas, Kansas Historical Society; see *People's Movement at Hyatt*, The Kansas News (June 20, 1857), at 2. They asserted: "As the only 'divine right' of governing, emanates from the people, it follows that the sovereignty of the individual is first, the sovereignty of communities next, the sovereignty of associated communities or States, third, and the sovereignty of a union of States is last and least." Town Organization of Hyatt. Moreover, they were organizing the town of Hyatt because the "citizens of the town of Hyatt, being without any government of an operative character, and without officers or organization, are necessarily thrown back upon that individual sovereignty" Town Organization of Hyatt. Put another way, these original

sovereigns sought to purchase a miniature commonwealth of their own at the cost of relinquishing a limited measure of their pre-political sovereignty.

By 1859, free-staters had gained the upper hand. At the new constitutional convention in Wyandotte that summer, it was clear the language of the Declaration was to play a starring role in the new Kansas Constitution. As first introduced, section 1 of the Bill of Rights read:

"All men are by nature equally free and independent, and have certain inalienable rights, among which are those of enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and of seeking and obtaining happiness and safety, and the right of all men to the control of their persons, exists prior to law and is inalienable." Convention, at 271.

Explaining its rationale, the committee on the Preamble and Bill of Rights claimed that the Declaration—and this language in particular—was where "people [first] cut loose from a narrow conception of humanity, and entered upon that broad field of human liberty." Convention, at 184. The language was described in explicitly *structural* terms—as "the timbers of the building" and "the superstructure upon which the edifice of State must be erected." Convention, at 185. The importance of understanding section 1 as a *structural* clause cannot be missed. The delegates to Wyandotte understood the language of section 1 to be creating a government of *structurally limited* powers. To emphasize this, the committee explained: "This bill of rights starts out on the old maxim that the world is governed too much—that there is too much proscriptive law." Convention, at 185. Section 1 guaranteed that "[t]he people are here allowed to do the nearest what they like." Convention, at 185. The only way this could be true is if the language of section 1 was publicly understood to *limit power* rather than to *grant rights*.

The older European idea of liberty flowing from the power of the state was then lifted up as an example Kansas had soundly rejected:

"It is said in French history, at a certain time, that no people could assemble at the theatre, or on the street, or anywhere, without having soldiers attending them; passports were required of their citizens of mornings under police regulations—pretending thus to secure liberty to the people. Even the government sent its messengers to the markets to see that the meat was in proper condition; and sent them to the stores to see that weights and measures were properly regulated. . . . [The people] could not cut a canal or build a railroad without looking up to their ruler for both the mode and means. With our democracy, the rulers should look to the people." Convention, at 185.

Finally, to emphasize that section 1 was understood to be a restriction on the police power of the state, the Bill of Rights was introduced with the claim that "[t]he tyranny of the Legislature is really the danger most to be feared." Convention, at 186.

When the floor was opened to debate the proposed Bill of Rights, the use of the Declaration's language in section 1 caused immediate confusion and skepticism. Was the language of the Declaration true? If it wasn't true, why put it in the new constitution? In the words of one delegate, "I know, sir, that there is, at the present time . . . a great disposition to look upon the Declaration of Independence as a string of 'glittering generalities.'" Convention, at 280. Would section 1—whether by its "control of their persons" clause or by its "lives and liberties" clause—mean that the state could not enforce criminal statutes?

For example, one delegate objected that "the language of this section is an enunciation of the higher law principle" and that, specifically, the "'control of a man's person'" provision was wrong. Convention, at 272. "[F]or if this doctrine is correct, you cannot make a man amenable to any criminal law." Convention, at 272. Another delegate

worried that "if there is any necessity for making qualifications . . . it might be best to place them also in connection with the right to life and liberty." Convention, at 280. Yet another delegate roundly rejected the proposed language of section 1, saying: "[T]he effect of this provision is to declare, that no person can forfeit his right to liberty under any circumstances." Convention, at 274. He went on: "Adopt this declaration here, and at once you abolish the criminal law, and open all your jails. I am opposed to the declaration . . . because I believe the declaration is not true in itself." Convention, at 274.

The hotly contested issue of the Declaration's truth was evident throughout the Wyandotte debates. Some were confused about the true meaning of the "unalienable rights" language of the Declaration, while others still committed to a government-first view of states' rights expressed outright hostility to the idea. It was not until George Lillie—a lawyer who had served on the Preamble and Bill of Rights Committee—rose to instruct his fellow delegates in the majestic meaning of section 1 that the confusion and opposition subsided. His brief speech is a brilliant summation of the Lockean commitment—charters of power granted by liberty rather than charters of liberty granted by power—animating both the Declaration of Independence and section 1:

"Mr. President, . . . I think this debate has taken rather an extraordinary range. It occurs to me, sir, that this is a question of natural rights, and not at all connected with artificial rights and civil disability. It is a declaration that all men are created free and equal and possessed of certain inalienable rights, such as we all concede, as set forth in the Declaration of our national independence—from which I suppose no gentleman at this hour will deliberately dissent. These are natural rights; but by this section we say that they existed prior to the formation of any government; that they are coextensive with the existence of man, and so were before the formation of civil government. When, by the multiplication of men, it became necessary to have civil government, individuals gave up part of their natural rights to secure for themselves the blessings of civil liberty, and among them were restraints upon the liberty and life of the person. Hence it became necessary that laws should be enacted to protect the weak. These natural rights were

given up for the protection of the weak. Thus, every man in the State has acknowledged that he has given away part of his natural rights. . . . I consider this question as contemplating only natural rights, and not acquired rights" Convention, at 280.

Lillie understood—first come rights, then government. Lillie would go on to serve as a Kansas legislator, a district attorney, and a judge. *Bar Resolutions*, The Eureka Herald (Nov. 29, 1883), at 4. His extraordinary convention floor speech, though mostly lost to history, deserves to be remembered as one of the greatest in the history of our state.

Soon after Lillie's address, Samuel A. Kingman offered the language forever enshrined as section 1 of our Bill of Rights: "'All men are possessed of equal and inalienable natural rights, among which are those of life, liberty and the pursuit of happiness.'" Convention, at 283. Kingman asserted that these words "are fixed in the minds of the American people" and "part of our political creed, from which no man can extricate himself" being the "political Bible of every citizen of the United States." Convention, at 283.

7. *The Original Public Meaning of Section 1*

The delegates at Wyandotte who voted to approve Kingman's language understood what they were doing. The citizens of Kansas who ratified the language understood its meaning. They knew they were establishing a *structural constraint on the power of the government*. They were not, in section 1, conferring "civil" rights on the people—that came in later provisions of the Bill of Rights. Rather, they were *giving up* only so much of their pre-political sovereignty as was necessary to establish a civil government—to quite literally, constitute a new state. They, in their pre-political state, represented absolute *liberty* granting a limited charter of *power* to the state.

As Kansas was bleeding its way into the Union, the warring parties were thus relitigating one of the most fundamental and perennial debates of western political systems—which come first, rights or governments? Do our individual freedoms flow from the constitution and the power of the State, or does the constitution and the power of the State flow from our freedom as individuals? This debate echoes anew through the diametrically opposed views of our Constitution my colleagues and I have announced today.

Tellingly, today's majority shares its government-first assumptions with many courts that have considered challenges to state abortion restrictions under state constitutions. After all, most modern jurisprudence on abortion regulation shares the majority's underlying assumption that the scope of the state's police power is unlimited unless expressly constrained by a constitutional provision. This explains the fierce contest to locate a specific "right to abortion" somewhere in the organic law—whether it be federal or state.

Consider the California Second District Court of Appeal's decision in *People v. Gallardo*, 243 P.2d 532 (Cal. Dist. Ct. App. 1952), *vacated* 41 Cal. 2d 57, 257 P.2d 29 (1953). In *Gallardo*, the California court considered whether the state's criminalization of abortion violated the "'natural law'" right to "the care of one's corporeal tenement." 243 P.2d at 535. But, the court said, "The realm of statecraft acknowledges no such thing as 'natural law.'" 243 P.2d at 535. "[M]any men," the court mocked, have become "persuade[d] . . . to believe" that "the principles embodied in the Bill of Rights are so allied to the happiness and freedom of people" that they must be "the direct gift of the Deity." 243 P.2d at 535. To which the California court emphatically responded, "Not so." 243 P.2d at 535. Rather, rights come from "[t]he state." 243 P.2d at 535.

The *Gallardo* court then rhapsodized about the state as "the paramount creation of man." 243 P.2d at 535. "Either through a monarch, a dictator or a legislature" the state has "the absolute control of society except to the extent abridged by its organic law." 243 P.2d at 536. Because the California court had not yet achieved the judicial creativity and flexibility of today's majority, it could find nothing in its organic law establishing a woman's right to an abortion, so the state was free to regulate in any manner it saw fit. See 243 P.2d at 537.

Even though the *Gallardo* court and today's majority desire different outcomes, both share a government-first understanding of the constitution arising from the belief that in the act of constituting a state, the people only retained a small chunk of expressly defined sovereignty for themselves, which was carved out of an otherwise universal grant of power to the state. This starting point naturally leads present-day political actors—including judges—to view the constitution primarily as a rights-granting document. This rights-oriented understanding of the constitution only magnifies the State and its near-limitless power. For the *Gallardo* court, the legislature was the "monarch" with near "absolute control" to dole rights out to the people as it saw fit. 243 P.2d at 536. For today's majority, the State's power is equally broad—and the Kansas Supreme Court has a similar absolute control to creatively find and grant specific, fundamental rights, mentioned nowhere in the Constitution, as a kind of benevolent judicial preferment.

So even though results have varied dramatically, this basic assumption—government first, then rights—has become the standard framing in cases adjudicating constitutional rights. If a right cannot be "found" in some constitutional clause (or even a penumbra), then the state is free to act as it sees fit—however arbitrary its action may be. The pressure this puts on judges to be more creative and ambitious in their "search" for "fundamental rights" is largely to blame for the erosion of rigorous—and constrained—constitutional interpretation.

At least in Kansas, it does not have to be this way. Our rights-first founding was accomplished when, in the act of constituting Kansas, our founders retained for themselves all pre-political individual sovereignty *except* that which was relinquished as necessary to secure the political community being formed. When political actors and judges start from this understanding, the constitution becomes primarily a power-limiting document. This power-oriented understanding of the constitution magnifies the people's natural, pre-political rights. This is how our founders understood the political charter they wrote and ratified. In particular, section 1 of the Kansas Constitution Bill of Rights was intended to settle this question for the newly formed State of Kansas. In Kansas, rights come first—then government.

The winning side of the long and labored debates over Kansas' political birth believed that rights bearing, pre-political persons compacted together to give a measure of their sovereignty—no more than necessary—to their agents in the newly formed State. Those agents, in turn, were to exercise that limited measure of sovereignty to promote and secure the common good. In this way, our founders reaffirmed the republican genius of the American founding that a government of limited powers, delegated by the consent of naturally sovereign individuals to secure a common welfare (literally a commonwealth), is a better guarantee—the only real guarantee—of the full range of natural pre-political rights than is a government of unlimited power which doles certain favored rights back out to citizens. See, e.g., Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in our Constitutional Jurisprudence: An Exercise in Legal History*, 20 Wm. & Mary Bill Rts. J. 457, 481-83 (2011) ("[T]he Declaration's preamble . . . embodies the belief and ideal that a Republic, based solely on the equitable consent of the people, will best preserve 'life, liberty, and the pursuit of happiness.'").

Today's proponents of a government-first view of the Kansas Constitution cannot, of course, call the language of the Declaration or section 1 a lie. But even so, the clear, original meaning of section 1 cannot be squared with their commitments. In a government-first world, a plain reading of the words simply makes no sense—if not quite a lie, they become "glittering generalities" at best. Some of our predecessors have taken that latter route. See *Schaake v. Dolley*, 85 Kan. 598, 601-02, 118 P. 80 (1911) (purporting to eschew the term "'glittering generality'" as a description of section 1, but nevertheless holding that it cannot "furnish a basis for the judicial determination of specific controversies" and is more of a "'guide[] to the legislative judgment'" than a "'limitation of power'").

The majority chooses to avoid each of these distasteful concessions by instead—in a display of staggering judicial creativity and ambition—choosing to distort the original public meaning of section 1 in order to make it "fit" both a government-first perspective *and* a "fundamental right" to abortion. Beginning with the assumption that government has all the power—and given the desired result—the majority reads section 1 as a grant of unlimited power to judges to declare which "fundamental rights" the State cannot encroach upon. In so doing, the majority has repudiated not only the original meaning and spirit of Wyandotte, but also the consistent interpretation of that language by our predecessors.

8. *Early Police Power Jurisprudence*

As I have made clear, *sequence* is of central importance in this long-running debate about the just exercise of government power. Construing Professor Barnett's "first come rights, then comes government" formulation as a *prioritization* of rights over government (even if that might, sometimes be the result) would be a misunderstanding. Properly understood, the claim is about political *chronology*. It answers the fundamental

"which came first?" chicken-and-egg problem of modern, western political theory. Does the State come first and, only then, provide protections to individual rights, or are people possessed of absolute pre-political sovereignty which they delegate—in part—to a state to secure the general welfare of the political community?

The answer given by the Declaration of Independence and section 1 of the Kansas Constitution Bill of Rights is that the people are sovereign, and the government rests on their limited delegation of power. The question then becomes: How do we know how much pre-political sovereignty the people delegated to the State and how much they retained? This question is paramount because the scope of pre-political sovereignty retained is the only proper "measure of whether government is acting" within the just and lawful scope of its general police powers. Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429, 451 (2004).

Put the same question a little differently and you get something like this: If the only foundation on which the State may enact just laws is the voluntary consent of the governed—the "giving up" of sovereignty exercised to a central power—how do we know whether the people have "consented" in any particular instance? It turns out, this is the precise question courts have busied themselves answering over the course of a long tradition of police power jurisprudence.

In Washington's words, the "difficult" task of drawing "the line between those rights which must be surrendered, and those which may be preserved" must always "depend . . . on situation and circumstance, as [well as] on the object to be obtained." 1 Annals of Congress vii (Gales ed., 1834). Justice Samuel Chase undertook one of the earliest efforts to draw this line in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798).

In *Calder*, Justice Chase first rejected the idea that the power of the state is absolute unless expressly limited by constitutional command: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution" 3 U.S. at 387-88. Next, Justice Chase tackled the Washingtonian question at hand—where exactly is the line limiting the just and proper exercise of a state legislature's police power? Heeding Washington's admonition to pay attention to the "object to be obtained," Justice Chase began with the proposition that the "purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it." 3 U.S. at 388. Thus, the "nature, and ends of legislative power will limit the exercise of it." 3 U.S. at 388. Generally, those ends are "to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect . . . persons and property from violence." 3 U.S. at 388.

Justice Chase then turned to Washington's other admonition—to scrutinize the particular "situation and circumstance" before deciding the precise boundary of the police power. Generally speaking, Justice Chase claimed that "[a]n *act* of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." (Emphasis added.) 3 U.S. at 388. But legislative bodies make laws to address specific concerns and courts judge particular cases. How is a court to apply "great first principles" to a specific law or in a specific case?

To answer this, Justice Chase listed specific laws that would exceed the legitimate police power, including: punishing "a citizen for an innocent action"; permitting a man to be "judge in his own cause"; and taking "property from A. and giv[ing] it to B." 3 U.S. at 388. What did all these examples have in common? Justice Chase answered this with

an early version of what would become, over time, the developed and accepted judicial standard applied to questions involving the proper scope of state police power: "[I]t is against all reason and justice, for a people to intrust a legislature with *such* powers; and therefore, it cannot be presumed that they have done it." (Emphasis added.) 3 U.S. at 388. For Justice Chase, claiming a state legislature possessed any powers beyond those reasonably presumed to have been delegated by the people was "a political heresy, altogether inadmissible in our free republican governments." 3 U.S. at 388-89.

The proper bounds of state police power was a common subject of discussion in constitutional treatises published after the Civil War. One of the most influential was Thomas Cooley's *A Treatise on the Constitutional Limitations* first published in 1868. There, Cooley made the commonplace observation that "[p]olice regulations cannot be purely arbitrary nor purely for the promotion of private interests. It must appear that the general welfare is to be in some degree promoted." 2 Cooley, *A Treatise on the Constitutional Limitations* 1227 n.2 (8th ed. 1927). "[A] large discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." Cooley, at 1231. Thus, "courts will not interfere" with legislative choices—or question the legislature's "wisdom or expediency"—unless "the regulations adopted are arbitrary, oppressive, or unreasonable." Cooley, at 1228; see Sutherland, *Notes on the Constitution of the United States* 732-33 (1904) (stating any exercise of police power "must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good"; the police power cannot be used for the benefit or "oppression of a particular class" or to pass "unduly oppressive" or "arbitrary" laws.).

The view that there were "substantive limit[s] upon the police power of the states" was "consistent" across the constitutional commentators of the era. Larsen, *Nationalism and States' Rights in Commentaries on the Constitution after the Civil War*, 3 Am. J. of

Legal Hist. 360, 368 (1959). "All of them expressed a fear of a tyranny of the majority" and were concerned with "protecting the vested rights [that is, pre-political rights] of all persons . . . from legislative attacks upon their liberty *under the guise* of the police power." 3 Am. J. of Legal Hist., at 368.

9. *Early Kansas Supreme Court Interpretations of Section 1*

The earliest justices on this court felt the same way. For decades after statehood, this court interpreted sections 1 and 2 of the Kansas Constitution Bill of Rights as imposing a structural limit on the police power of the state. In fact, we consistently held, in no uncertain terms, that section 1 is a police power provision. In *The State v. Wilson*, 101 Kan. 789, 168 P. 679 (1917), this court considered whether a trading stamp tax was an unconstitutional exercise of the police power. The court stated unequivocally: "The provisions of our own constitution which are violated by the act in question, if the suppression of trading stamps is beyond the police power of the state, are the declarations of the first two sections of our bill of rights" 101 Kan. at 795. Decades later, we affirmed the same truth, citing *Wilson* (among other cases) in support. See *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 759, 408 P.2d 877 (1965) ("The provisions of our Constitution which are violated by the Act, if it is beyond the police power of the state as the plaintiffs contend, are Sections 1 and 2 of our Bill of Rights.").

As *Wilson* explained, the "judicial question" posed by section 1 is does the act under scrutiny have "a real relation to the public good? Does it tend to remove or diminish a practice that is injurious, obnoxious or inconvenient to the public?" 101 Kan. at 799; *Carolene Products Co. v. Mohler*, 152 Kan. 2, 6-7, 102 P.2d 1044 (1940); see *Tri-State Hotel*, 195 Kan. at 763 (asking whether the classification bore "a real, logical and substantial relation to the public welfare?"). Applying this test, the *Wilson* court held the

trading stamp tax was a legitimate exercise of the police power because it reasonably prevented "evil consequences" to the public. 101 Kan. at 800.

In a long and settled line of cases, the Kansas Supreme Court applied these same tests to a variety of challenged legislative acts. See *Brick Co. v. Perry*, 69 Kan. 297, 299, 76 P. 848 (1904) (holding law that prohibited firing an employee for belonging to a labor organization was not a valid "police regulation" because it did "not affect the public welfare, health, safety or morals of the community, or prevent the commission of any offense or other manifest evil"); *In re Williams*, 79 Kan. 212, 221, 98 P. 777 (1908) (upholding regulation of the sale of explosive powder because "'the police power can not be put forward as an excuse for oppressive and unjust legislation'" but "'it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances'"); *Wilson*, 101 Kan. at 799-800 (upholding trading stamp tax as a valid exercise of the police power because it had a "real relation to the public good" and reasonably prevented "evil consequences to the public"); *State v. Haining*, 131 Kan. 853, 854-55, 293 P. 952 (1930) (upholding Sunday closing law as a valid exercise of the police power); *Capital Gas & Electric Co. v. Boynton*, 137 Kan. 717, 728, 730, 22 P.2d 958 (1933) (holding law that prohibited public utility companies from selling appliances violated the police power because it "create[d] a monopoly," did not promote the public welfare, and was "unreasonable, arbitrary, unjust and oppressive"); *State v. Payne*, 183 Kan. 396, 405, 327 P.2d 1071 (1958) (affirming conviction for evading alcoholic liquor tax because alcoholic liquor was "'fraught with such contagious peril to society'" and thus subject to police power regulation); *Gilbert v. Mathews*, 186 Kan. 672, 686, 352 P.2d 58 (1960) (holding law requiring itinerant merchants to obtain licenses to conduct public auctions violated the police power because it "places arbitrary and unreasonable limitations, regulations and impositions on the conduct of a lawful business, and is designed to be so oppressive and unreasonable that it prohibits the conduct of such lawful business"); *Tri-State Hotel*, 195 Kan. at 761, 764

(upholding separate liquor licensing laws for nonprofit and for-profit clubs because alcohol consumption was "attendant with danger to the state" and the distinction between the clubs bore "a real, logical and substantial relation to the public welfare in regulating the consumption of alcoholic liquor in the state"); *Laird & Company v. Cheney*, 196 Kan. 675, 686, 414 P.2d 18 (1966) (following *Tri-State* to hold that liquor price-fixing law did not violate the police power because "the method used is reasonable and not arbitrary and . . . there is a real and substantial relation to a proper legislative purpose"); *Delight Wholesale Co. v. City of Overland Park*, 203 Kan. 99, Syl. ¶ 5, 453 P.2d 82 (1969) (holding ordinance that prohibited selling ice cream from vehicles on city streets violated the police power because "such enterprises may be controlled by reasonable regulations" but "the absolute prohibition of such legitimate enterprises is arbitrary and unreasonable"); *City of Junction City v. Mevis*, 226 Kan. 526, Syl. ¶ 1, 601 P.2d 1145 (1979) (affirming the dismissal of conviction for firearm possession under overbroad ordinance that criminalized innocent conduct because "[a] city cannot enact unreasonable and oppressive legislation under the guise of the police power").

The majority tries to force cases like *Wilson* and *Tri-State Hotel* into its "fundamental rights" framework. See slip op. at 14-15, 32-33. But this is a critical misunderstanding of not only political philosophy, but also of the history of police power jurisprudence in this country and in Kansas. Section 1, as originally understood and historically interpreted by this court, was not a fount of judicially found "fundamental" or "natural" rights. Instead, it guaranteed Kansans their first rights of republican self-rule. Namely, the right to participatory consent to government for the benefit of the common welfare, on the one hand, and the right to otherwise be free from arbitrary, irrational, or discriminatory regulation that bears no reasonable relationship to that same common welfare, on the other. Two decisions in particular—*Williams* and *Gilbert*—show how the judicial test should be applied.

In *Williams*, the petitioner was convicted for selling black powder in an unlawful manner. On appeal, Williams argued the act regulating the sale of black powder violated the police power under section 1 and the Fourteenth Amendment because it singled out the coal industry for special oversight. 79 Kan. at 213-14. Our police power analysis focused on two questions: (1) whether the purpose of the act was valid, and (2) whether the means used reasonably furthered that purpose.

First, we determined the purpose of the act was "to provide for safety in the operation of coal-mines." 79 Kan. at 216. Then we explained that the distinction between coal mines and other mines would be valid if the means used reasonably furthered that purpose:

"That a law operates only upon a class does not make it invalid, if the classification is reasonable. If the classification is arbitrary or fictitious, it is objectionable, but where it is based upon such differences in situation as to be reasonable in view of the purpose to be accomplished, and tends fairly to accomplish that purpose, it must be upheld. (*Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915.) It is sufficient if the classification is based upon some reasonable ground—some differences which bear a just and proper relation to the attempted classification, and is not a mere arbitrary selection. (*Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037.)

"The coal mining industry of the state is of great and growing importance, about 12,000 men being employed in this occupation in this state. The hazards incident to this work are matters of common knowledge, and proper regulations to secure the safety of employees, so far as possible, is a matter appealing strongly to the wisdom and conscience of the legislature. Regulations to promote this beneficent end are not void because they do not relate to other industries, where, if the peril is as great, the conditions at least are different and may properly call for different regulations." 79 Kan. at 217.

Distilling the test further, the court summarized: "Speaking generally, laws may be enacted to promote the health and safety of the people, and will be upheld when they have a necessary or reasonable relation to the accomplishment of such ends." 79 Kan. at 217. In the end, the court upheld the act as a legitimate exercise of the police power under both constitutional provisions because its purpose—to promote the safety of a dangerous industry—was valid and the means used to achieve that purpose were reasonable. 79 Kan. at 216-20; see *The State v. Reaser*, 93 Kan. 628, 629-30, 145 P. 838 (1915) (following *Williams* to hold that a mining regulation was a valid exercise of the police power).

Later in *Gilbert*, we considered whether a law requiring itinerant merchants (but not local ones) to obtain licenses to conduct public auctions violated section 1's limitation on the state's police power. This public auction law was full of red tape and fees, and hindered itinerant merchants from participating in the trade. The key question was whether the law was a reasonable regulation or a protectionist roadblock.

The *Gilbert* court explained that the police power is first limited by the *purpose* of the law in question; it extends only to "the protection of the public health, safety and morals" and "the preservation and promotion of the public welfare." 186 Kan. at 676-77. This is because the police power

"springs from the obligation of the State to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self protection, and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury." 186 Kan. at 677 (quoting *Panhandle Co. v. Highway Comm'n.*, 294 U.S. 613, 622, 55 S. Ct. 563, 79 L. Ed. 1090 [1935]).

But the *Gilbert* court refused to be a rubber stamp. Instead, it questioned the real purpose behind the public auction law and cautioned courts to watch out for the proverbial wolf of arbitrary special interest legislation masquerading as a harmless sheep of public welfare regulation. 186 Kan. at 677-79; see *State, ex rel., v. Sage Stores Co.*, 157 Kan. 404, 427, 141 P.2d 655 (1943) (Wedell, J., dissenting) (explaining when the "principle purpose" behind an exercise of the police power is to advantage "a particular class[,] . . . courts will look behind even the declared intent of legislatures, and relieve citizens against oppressive acts where the primary purpose is not to the protection of the public health, safety, or morals"). The court held the public auction law was not a valid exercise of the police power because it was "purposely designed to completely eliminate the sale of new merchandise at public auctions by itinerant vendors." *Gilbert*, 186 Kan. at 679. As the court explained:

"While the police power is wide in its scope and gives the legislature broad power to enact laws to promote the health, morals, security and welfare of the people, and further, that a large discretion is vested in it to determine for itself what is deleterious to health, morals or is inimical to public welfare, it cannot under the guise of the police power enact unequal, unreasonable and oppressive legislation or that which is in violation of the fundamental law." 186 Kan. at 677.

Delight Wholesale, 203 Kan. 99, Syl. ¶ 4; *Junction City*, 226 Kan. at 535.

The *Gilbert* court also declared that "[t]he reasonableness of restrictions imposed by the legislature by the exercise of the police power is a judicial matter." 186 Kan. at 678; see *Delight Wholesale*, 203 Kan. at 104-05 ("the reasonableness of the enactment is a question for courts to determine in the exercise of sound judicial discretion"); *Sage Stores*, 157 Kan. at 421-22 (Wedell, J., dissenting) (stating the determination of the reasonableness of police power legislation "is the ultimate province, responsibility and duty of courts"). The court described the judicial inquiry this way:

"The controlling principle is that if legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for the government to effect, the legislature transcends the limits of its power in interfering with the rights of persons affected by the legislation, but if there is reasonable relation to an object within governmental authority, the exercise of the legislative discretion is not subject to judicial review." *Gilbert*, 186 Kan. at 678.

See *Tri-State*, 195 Kan. at 760 (citing *Gilbert* for the rule: "If the classification provided is arbitrary, as the plaintiffs contend, and has no reasonable relation to objects sought to be attained, the legislature transcended the limits of its power in interfering with the rights of persons affected by the Act.").

Applying this test, the *Gilbert* court held the licensing regulations were "poorly and awkwardly drawn," "oppressive and unreasonable," and "discriminatory and confiscatory." 186 Kan. at 683, 686. Furthermore, the law "place[d] arbitrary and unreasonable limitations, regulations and impositions on the conduct of a lawful business" and was "designed to be so oppressive and unreasonable that it prohibit[ed] the conduct of such lawful business." 186 Kan. at 686.

The consistency of these judicial concepts across time is remarkable and unassailable. Perhaps the most influential Kansan to espouse the structural principles of the Declaration and section 1 was Kansas Supreme Court Justice—and later United States Supreme Court Justice—David Brewer.

10. *Justice David Brewer: Defending Republican Self-Government*

Justice Brewer came from a solidly abolitionist New England family of "old stock." Brodhead, David J. Brewer: The Life of a Supreme Court Justice, 1837-1910, at

1 (1994). His father, Josiah, edited antislavery periodicals. Brodhead, at 3. While studying law, Justice Brewer began to consider the Kansas struggle as emblematic of the national crisis over slavery. He inveighed against the Kansas-Nebraska Act and the administration of President Franklin Pierce. He wrote that "'the crackling flames which rose from burning Lawrence and the pillar of fire and cloud of smoke that have rested on the plains of that lovely Territory [must] be the everlasting witness' to the 'failure and curse' of Pierce's administration." Brodhead, at 5.

After graduating, in September 1859, mere months after the Wyandotte Convention, the young lawyer relocated to Kansas to join the free-state movement. He arrived in Leavenworth with 65 cents in his pocket and a head full of ideas about the future of republican self-government. Brodhead, at 7. Ideas inspired by the Declaration of Independence, the Lincoln-Douglas debates, and the constituting of his adopted home state of Kansas. Ideas which he would spend a lifetime espousing as a political philosopher; evangelizing for as a public speaker; and enforcing as a jurist on the supreme courts of Kansas, which he joined in 1871, and of the United States, which he joined in 1889.

Curiously, the majority credits Justice Brewer with the idea that section 1 provided the people with enforceable "individual rights." Slip op at. 29-30. But Justice Brewer never espoused the majority's view that section 1 provides fundamental rights to limit an otherwise absolute legislative power. On the contrary, he enunciated a theory of delegated powers and retained pre-political sovereignty, echoing the likes of Justice Chase. During his tenure on the Kansas Supreme Court, Justice Brewer was the most consistent and insistent defender of the Declaration's principles of republican self-government, as set forth in sections 1 and 2 of the Kansas Constitution Bill of Rights. For example, in an early forceful dissent challenging legislation that fueled the growing railroad power, Justice Brewer asked: "[U]pon what, let me inquire, must such

legislative action rest for support?" *The State, ex rel., v. Nemaha County*, 7 Kan. 542, 554 (1871) (Brewer, J., dissenting). His answer:

"All power resides with the people. The ultimate sovereignty is with them. The constitution is the instrument by which some portion of that power is granted to different departments of the government. Power is not inherent in the government, from which some portion is withdrawn by the constitution. The object of the constitution of a free government is to grant, not to withdraw, power. This is the primal distinction between the constitutions of the old monarchical governments of Europe, and those of this country. The former indicate the amount of power which the people have been enabled to withdraw from the government; ours the amount of power the people have granted to the government. . . . The constitution creates legislature, courts, and executive. It defines their limits, grants their powers. It should always be construed as a grant. The habit of regarding the legislature *as inherently omnipotent*, and looking to see what express restrictions the constitution has placed upon its action, is dangerous, and tends to error." 7 Kan. at 554-55 (Brewer, J., dissenting).

For Justice Brewer, sections 1 and 2 of the Kansas Constitution Bill of Rights planted Kansas firmly in this fertile social compact soil. He declared these provisions were not a bunch of "'glittering generalities"; instead, they imposed the "conditions upon which legislative power is granted" and through which the exercise of such power must be vetted. 7 Kan. at 555-56 (Brewer, J., dissenting); see *Atchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, Syl. ¶ 1, 3 P. 284 (1884) ("The bill of rights is something more than a mere collection of glittering generalities: . . . all are binding on legislatures and courts, and no act of the legislature can be upheld which conflicts with their provisions, or trenches upon the political truths which they affirm.").

"[A]s expressed in the Bill of Rights, 'all political power is inherent in the people.' In extended communities, for obvious reasons, the direct exercise of this power becomes impracticable, and this has led to an institution of a subordinate agency called the

government, entrusted for the time being with the exercise of such sovereign power, and such only, as is clearly expressed in the instrument of delegation—the constitution. . . . Hence this court has held that it is always legitimate to insist that a legislative enactment, drawn in question, is invalid, either *because it does not fall within the general grant of power* to that body, or because it is prohibited by some provision of the constitution: and if the former is made to appear, it is as clearly void as though expressly prohibited." *Nemaha*, 7 Kan. at 556-57 (Brewer, J., dissenting) (quoting *Cass v. Dillon*, 2 Ohio St. 607, 628 [1853] [Ranney, J., dissenting]).

For Justice Brewer, sections 1 and 2, drawn as they were in the language of the Declaration, imposed a structural limitation on the "general grant of power" that had been "entrusted for the time being" to the state. Special interest legislation "whose apparent object and manifest result is to add wealth to the few by taking it from the many, or to give by law to one man that which another has gained by labor" fell outside that grant of power. 7 Kan. at 556 (Brewer, J., dissenting).

In other words, Justice Brewer understood sections 1 and 2 as announcing a Madisonian charter of limited power granted by liberty. All pre-political power belongs to the people; they grant some of this power to the government for the security and furtherance of the common good; and the government cannot act outside this granted power. Thus, courts must inspect legislation to prevent arbitrary, irrational, and discriminatory acts that are not reasonably related to the common welfare. Otherwise, the state becomes "inherently omnipotent" to create or deny rights as it sees fit. 7 Kan. at 555 (Brewer, J., dissenting); see *Fong Yue Ting v. United States*, 149 U.S. 698, 737, 13 S. Ct. 1016, 37 L. Ed. 905 (1893) (Brewer, J., dissenting) ("This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? . . . The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution.").

Because ours is a charter of limited power granted by liberty, Brewer's question (echoing Washington and Justice Chase before him) was "'[w]hat have [the people] authorized to be done?'" *Nemaha*, 7 Kan. at 557 (Brewer, J., dissenting). Justice Brewer began exploring this question on the Kansas Supreme Court and would continue to do so the rest of his career. The basic answer to Justice Brewer's question was this: the people have authorized the State to take any reasonable measure which promotes the common good. Arbitrary, irrational, or discriminatory regulations, however, have not been authorized.

So, by way of example, in *Intoxicating-Liquor Cases*, 25 Kan. 751 (1881), Justice Brewer, writing for the court, construed a ban on intoxicating liquor narrowly, holding it prohibited the use of such liquor as a beverage but not for medicinal, culinary, or sanitary purposes. But he also commented that a broad construction of the statute—one that would prohibit the use of all intoxicating liquors without reasonable exceptions—would violate the guarantees of section 1:

"[T]he writer of this opinion does not hesitate to say that such a construction, if imperatively demanded by the language used, would carry the statute beyond the power of the legislature. I do not think the legislature can prohibit the sale or use of any article whose sale or use involves no danger to the general public. The habits, the occupation, the food, the drink, the life of the individual, are matters of his own choice and determination, and can be abridged or changed by the majority speaking through the legislature only when the public safety, the public health, or the public protection requires it. I do not think the legislature has the power to prohibit the raising or sale of corn, though out of it whisky may be obtained. No more do I believe that the legislature has the power to prohibit the sale of cologne, though alcohol be in it. The constitutional guaranty of 'life, liberty, and the pursuit of happiness,' is not limited by the temporary caprice of a present majority, and can be limited only by the absolute necessities of the public."

25 Kan. at 765-66.

I could be wrong, but I doubt even my colleagues in the majority could find in section 1 a "fundamental right" to sell cologne. So why does Brewer mention it as an activity section 1 may protect? Because Brewer understood that section 1 has never been about "fundamental rights."

Justice Brewer may have been influenced by his uncle, United States Supreme Court Justice Stephen Field, who authored the influential dissent in the Court's *Slaughterhouse* cases. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83-111, 21 L. Ed. 394 (1872) (Field, J., dissenting). There, the Supreme Court upheld Louisiana's grant of a monopoly to one slaughterhouse corporation. 83 U.S. at 83. The question raised by the *Slaughter-House Cases* was whether the Fourteenth Amendment—and the Privileges and Immunities Clause in particular—imposed any limits on a state's exercise of its police powers. In dissent, Justice Field wrote:

"It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the State. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. . . . But under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment." 83 U.S. at 87 (Field, J., dissenting).

But what, precisely, were those "just rights" described as the "privileges and immunities" of the American citizen? To find an answer, Justice Field looked to a famous passage in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230), authored by George Washington's nephew, Justice Bushrod Washington. In *Corfield*, Justice Washington considered the privileges and immunities to which "[t]he Citizens of

each State shall be entitled" under U.S. Const. art. IV, § 2, cl. 1, concluding that they could all be

"comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." 6 F. Cas. at 551-52.

"This appears to me," said Justice Field, "to be a sound construction of the clause in question." *Slaughter-House Cases*, 83 U.S. at 97 (Field, J., dissenting). I doubt the similarity of this language to the language of section 1—as a structural limitation on the police power of the state—was lost on Justice Brewer.

Familial speculation aside, Justice Brewer arrived at the United States Supreme Court on the heels of the Court's decision in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), a watershed police power case that overturned an ordinance that discriminated against Chinese nationals by excluding them from the laundromat business in San Francisco. *Yick Wo* made clear this arbitrary law—which gave a local board unfettered power to decide the fate of Chinese-owned laundromats—not only violated the Fourteenth Amendment but also undermined the foundation of government itself. As the Court explained, the people did not authorize the government to use "purely personal and arbitrary power":

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains

with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power." 118 U.S. at 369-70.

The Court also analogized the laundromat law to slavery because it deprived Chinese nationals of "the means of living . . . at the mere will of another," citing the Declaration's guarantees of "life, liberty, and the pursuit of happiness" in support. 118 U.S. at 370. Thus, a government of delegated powers has no authority to sabotage the lawful business of a disfavored group. See Brewer, *The Liberty of Each Individual*, Address at H.C. Bowen's residence, Roseland Park, (July 4, 1893), in *N.Y. Times*, *Mr. Bowen's Celebration: Judge Brewer's Plea for Individual-Liberty as Against Combinations* (July 5, 1893) (warning about the "'growing disposition to sacrifice the individual to the mass, to make the liberty of the one something which may be ruthlessly trampled into the dust because of some supposed benefit to the many'").

During his time on the Court, Justice Brewer relied on *Yick Wo* to advance a rights-first theory of government, using language from the Declaration of Independence to describe the boundary of the police power. For example, in *Gulf, Colorado & Santa Fe R'y v. Ellis*, 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897), the Court considered whether a law imposing a special penalty on railroad companies for failing to pay certain debts violated the police power. The problem was that "[t]he act single[d] out a certain class of debtors and punishe[d] them when, for like delinquencies, it punishe[d] no others," not even other types of corporations. 165 U.S. at 153, 157. The Court simply asked, why was *this* industry singled out for a special penalty? The answer: for no good reason.

Justice Brewer, writing for the majority, debunked the myth that the penalty would protect the public from the "peculiarly dangerous nature" of railroad corporations. 165 U.S. at 158. He conceded that a law requiring railroad tracks to be fenced, for example,

would be a reasonable exercise of the police power to promote the public safety. But, he explained, "[t]he hazardous business of railroading carries with it no special necessity for the prompt payment of debts." 165 U.S. at 158. Indeed, the Court recognized that the public safety rationale was a red herring and held the statute was enacted to arbitrarily punish railroad corporations. 165 U.S. at 159. Justice Brewer used *Yick Wo* and the Declaration to drive the point home that arbitrary laws are beyond the scope of the police power:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U.S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, . . . yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." 165 U.S. at 159-60.

Of course, the language of the Declaration does not carry "the force of organic law" in the federal Constitution as it does in Kansas. But in determining the original public meaning of section 1, it is compelling that Justice Brewer—who championed section 1 of the Kansas Constitution Bill of Rights as an enforceable restriction on the

police power—also invoked the same language of the Declaration to check the police power at the federal level. See *Budd v. New York*, 143 U.S. 517, 550, 12 S. Ct. 468, 36 L. Ed. 247 (1892) (Brewer, J., dissenting) (invoking the "unalienable rights" of "life, liberty and the pursuit of happiness" to argue that a grain storage price-fixing law violated the police power). And it is also compelling that the Supreme Court adopted a delegated powers theory of government to guide its police power inquiry. See *Cotting v. Kansas City Stock Yards Co., etc.*, 183 U.S. 79, 84, 22 S. Ct. 30, 46 L. Ed. 92 (1901) (following *Yick Wo*'s theory of government to reign in the police power: "It has been wisely and aptly said that this is a government of laws and not of men; that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."). Indeed, the Court's delegated powers approach in *Yick Wo* and its progeny bears a striking resemblance to Justice Brewer's dissent in *Nemaha*.

In *Gulf*, Justice Brewer also set forth a police power test that finds kinship in Kansas caselaw: "[I]n all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." 165 U.S. at 165-66. Indeed, Justice Brewer exhorted courts to guard against even one step outside the bounds of the police power, insisting, "[i]t is the duty of courts to be watchful for the constitutional rights of the citizens[,] and against any stealthy encroachments thereon. Their motto should be *obsta principiis* [withstand beginnings]." 165 U.S. at 154 (quoting *Boyd v. United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746 [1886]); *Fong Yue Ting*, 149 U.S. at 744 (Brewer, J., dissenting).

Justice Brewer later carried this warning from the bench to the podium. In a series of speeches, he cautioned that left unchecked, the police power would grow "until it

threatens to become an omniverous governmental mouth, swallowing individual rights and immunities." Brewer, U.S. Sup. Ct. Justice, Address to the Virginia State Bar Association: Two Periods in the History of the Supreme Court 23 (August 1906); see Brewer, U.S. Sup. Ct. Justice, Address to the Kansas Bar Association: Some Thoughts about Kansas (January 16, 1895), *in* Twelfth Annual Meeting of the Bar Association of the State of Kansas 61, 68-69 (1895) (hereinafter *Thoughts*) ("It seems often as though the function of the policeman was not that of protection against crime, but that of regulation and watch over the daily life of each individual."). He described the police power as "that power by which the State provides for the public health, and the public morals, and promotes the general welfare" but has tragically become "the refuge of timid judges to escape the obligations of denouncing a wrong, in a case in which some supposed general and public good is the object of legislation." Brewer, U.S. Sup. Ct. Justice, Address to the Graduating Class at Yale Law School: Protection of Private Property from Public Attack (June 23, 1891) 10 (Hoggson and Robinson eds., 1891).

Justice Brewer even indulged a willingness to apply the principle of participatory consent outside strictly jurisprudential pursuits. Speaking to the Kansas Bar Association in 1895, Brewer warned that even private interests—the accumulation of capital into "combinations"—can exercise arbitrary power over people's lives. *Thoughts*, at 69. Brewer's warning came at a period of great unrest in Kansas, during the populist resistance to economic control by far-away, mostly out-of-state forces over the lives of ordinary Kansans (farmers in particular). "Has Kansas fulfilled her mission? Has her intense enthusiasm for liberty spent its force?" he rhetorically asked. *Thoughts*, at 67. He worried that even in the private sphere, liberty was threatened:

"The corporation is not content to carry on its work without interfering with that of the individual, but it aims by virtue of its accumulated power to destroy all competition and

monopolize the entire business. The voice of the combination and trust to the individual is, 'Be swallowed up and live, or fight and die.'" *Thoughts*, at 69.

Thus, Justice Brewer sympathized with the "[h]elpless" laborer who, "in a contest with such accumulated power," organizes seeking "to maintain his rights against the combination of capital." *Thoughts*, at 69. But in this struggle, Justice Brewer lamented, the organization itself "becomes equally despotic over the individual laborer" determining "when he shall work and when not, the wages he must receive, and the various other conditions of employment." *Thoughts*, at 69. Given this, "[n]ever has there been a time when the inspiring thought written into the Declaration of Independence, of inalienable rights, rights which each individual has to life, liberty, and the pursuit of happiness, was in greater peril than at the present moment." *Thoughts*, at 67.

These ideas also echo through disciplines besides law. For example, explaining his objection to what Brewer called the "combination" of capital, the economic theorist Karl Polanyi clarified: "It is not degrading to work under orders: any collective work requires its coordination through orders." Polanyi et al., *Economy and Society: Selected Writings* 17 (2018). Instead, "[w]hat is degrading is the fact that under the given conditions the power to command, to which the workers are subjected, is an alien power, although it should be the workers' own since, from the social point of view, it rests on . . . their own labour" Polanyi, at 17.

The question, to appropriate Polanyi's felicitous phrasing, is whether, "under the given conditions," the "power to command . . . is an alien power" or is the people's own power, delegated by consent. That is the crucial distinction, and it makes all the difference. It doesn't matter how many "rights" an alien power confers upon those under its dominion; the degradation is the same. Treating human beings as mere profit and choice maximizing machines disembeds them from the political community itself,

rendering the "power to command" an "alien" rule. This "un-freedom"—as Polanyi termed it—stands in the "voluntarist" tradition described above. And there is a stark contrast between the voluntarist unfreedom and the true liberty that flourishes under the conditions of just rule, based on participatory consent for the promotion and security of the commonwealth.

Either section 1 is a fount of judicially discovered and preferred "fundamental" rights or it is a blanket guarantee to all Kansans of the *first* rights of republican self-government: the right to participatory consent to government for the benefit of the common welfare, on the one hand, and the right to otherwise be free from arbitrary, irrational, or discriminatory regulation that bears no reasonable relationship to the common welfare, on the other. Section 1 cannot be both. The former road alienates the people from the exercise of power and disembeds them from the political community. But this is the way the majority has decided to go.

11. Rational Basis with Bite

If section 1 does not protect "fundamental" rights with the shield of "strict scrutiny" judicial review, is it necessarily a mere paper law—a glittering generality? No. Contrary to modern notions of "rational basis" review, the judicial inquiry demanded by section 1 would look to the actual legislative record rather than to hypothetical reasons or any possible imagined rationale. The test has occasionally been described as "rational basis with bite." Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779, 779-80 (1987) (coining the phrase).

As one judge recently put it, "this test is rational basis with bite, demanding actual *rationality*, scrutinizing the law's actual *basis*, and applying an actual *test*." *Patel v. Dept. of Licensing and Regulation*, 469 S.W.3d 69, 98 (Tex. 2015) (Willett, J., concurring). On

the one hand, it does not load "the dice—relentlessly—in government's favor," resulting in a "pass/fail" test that the "government never fails." 469 S.W.3d at 99 (Willett, J., concurring). On the other hand, it remains a deferential test—one that recognizes our Constitution vests the legislative branch of government with the institutional competence to consider competing interests and policy options, resulting in democratic judgment about the common welfare of all Kansans.

In sum, section 1 demands this "rational basis with bite" judicial inquiry. In order to be a constitutional exercise of power, *every* act of our Legislature must be rationally related to the furtherance or protection of the commonwealth. The lodestar of this test is, "*what have [the people] authorized to be done?*" *Nemaha*, 7 Kan. at 557 (Brewer, J., dissenting). The people have not authorized the State to act in arbitrary, irrational, or discriminatory ways. Applying the necessary deference, a court must examine the *actual* legislative record to determine the *real* purpose behind any law in question before it can conclude the law is within the limited constitutional grant of power possessed by the State.

Again, Justice Brewer provides guidance. "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed," courts reviewing an exercise of police power should never "carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation" because to do so would "make the protecting clauses . . . a mere rope of sand, in no manner restraining state action." *Gulf*, 165 U.S. at 154.

Here I pause to observe that the majority's characterization of the judicial test I have set forth—the test section 1 demands *every* exercise of the State's police powers must satisfy—bears no resemblance to anything I have written here. The majority claims

I am "dismissive" of the rights of citizens. Slip op. at 34. The majority reads the limitations on the State's police power I describe as setting "too low a bar" and "allowing the State to . . . intrude into all decisions about childbearing" and "our families." Slip op. at 74-75. The original public meaning of section 1 is described as leaving citizens "naked and defenseless" against abusive state power. Slip op. at 83. The majority suggests my approach grants "unrestrained" power to the State, "unfettered by constitutional constraints," which has "no practical limits" and allows the government to "intrude with impunity" against the individual. Slip op. at 84. And finally, with an Atwoodian flourish, I stand accused of maintaining "that upon becoming pregnant, women relinquish virtually all rights of personal sovereignty in favor of the Legislature's determination of what is in the common good." Slip op. at 50. All of which leads to the preposterous "presumption" that I would find "no constitutional conflicts" with state-mandated mass sterilization. See slip op. at 84 (describing a hypothetical law where all males are forcibly sterilized at the age of 18 in order to limit population density). Meanwhile, continuing the theme, the concurring opinion suggests I am "perfectly align[ed]" with the infamous Holmesian judgment that "[t]hree generations of imbeciles are enough." Slip op. at 106 (Biles, J., concurring).

I am agog. I must know—*what* have my colleagues been reading? It cannot be anything I have written. In any case, I assure the reader this description of my view is a fabrication so flimsy it makes run-of-the-mill straw men appear as fairy tale knights by comparison.

IS S.B. 95 A LEGITIMATE EXERCISE OF POLICE POWER?

So, is S.B. 95 a legitimate exercise of state police power? If the original meaning of section 1—and this court's prior mode of consistently applying section 1 as a police power provision—had carried the day here, I would be content to wait to answer that

question. In the meantime, I would remand this case to the district court to apply the correct legal standard. See, e.g., *State v. Garcia*, 295 Kan. 53, 54, 283 P.3d 165 (2012) (reversing and remanding to ensure the district court applied the correct legal standard). On remand, the question for the parties to litigate, and the district court to resolve, would be whether S.B. 95 bears a reasonable relationship to the common welfare or is otherwise arbitrary, irrational, or discriminatory.

Unfortunately, history, reason, and original meaning have not carried the day. Hence, because the proper "rational basis with bite" test will otherwise go unapplied in today's context, I offer some thoughts on the general considerations a court *might* entertain if such a test was applied, with the caveat that sufficient facts have not been developed in the record to arrive at any definitive conclusions.

The overriding question is whether the legislative act is reasonably related to the furtherance or protection of the common welfare. The Legislature has wide latitude to define for itself the substantive content of the common good, circumscribed by the traditional police power limit that a law cannot be arbitrary, irrational, or involve a class-based form of discrimination. Of course, protecting unborn life and requiring humane abortion procedures when that life is taken can promote the common good. Even the Supreme Court has recognized the state's so-called "life interest." See *Gonzales*, 550 U.S. at 157-58 (affirming the government's valid objectives in "protecting the life of the fetus," showing "profound respect for the life within the woman," and "'protecting the integrity and ethics of the medical profession'").

The stated goal of S.B. 95 is to protect Kansas unborn children from dismemberment abortion, or being "cut" "one piece at a time from the uterus." K.S.A. 65-6742(b)(1); K.S.A. 65-6741. It is certainly reasonable to say the State could have a valid purpose in banning this brutal method of killing an unborn child. See *Stenberg*, 530 U.S.

at 961 (Kennedy, J., dissenting) ("States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."); 530 U.S. at 953 (Scalia, J., dissenting) ("The method of killing a human child . . . proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion."). Shockingly, the majority hardly even *considers* the State's legitimate interest in protecting unborn life as a means of promoting and furthering the common welfare of our state.

This failure is glaring when contrasted with the State of Kansas' longstanding policy of protecting the unborn—even outside the abortion context. For instance, Kansas criminalizes homicides of the unborn; refuses to execute pregnant convicts; permits wrongful death actions for the unborn; gives no effect to a living will when the patient is pregnant; and provides for the representation of the unborn in trust and probate proceedings. See K.S.A. 2018 Supp. 21-5419(c) (homicides of unborn children); K.S.A. 22-4009 (prohibition against execution of a pregnant convict); K.S.A. 2018 Supp. 60-1901(b) (action for wrongful death of unborn child); K.S.A. 65-28,103 (living will has no effect during pregnancy); K.S.A. 59-2205 (representation of unborn in a probate proceeding); K.S.A. 59-2254 (representation of unborn in a trust accounting); K.S.A. 58a-305 (appointment of representative for unborn individual under Kansas Uniform Trust Code).

If, however, the legislative record reveals evidence of a discriminatory intent or some other arbitrary or irrational purpose behind the law, a court must actively consider the possibility that the act was not *actually* intended to further the common welfare and legitimate state interest in unborn life and humane medical practices. But such considerations are neither possible nor appropriate at this stage of litigation, where a preliminary injunction has been granted, and in the context of a dissenting opinion. This

brief recitation is sufficient to limn the outlines of the kind of judicial review that the original public meaning of section 1 requires and our predecessors actually performed many times.

LOSING OUR COMMONWEALTH

Many Kansans—a significant majority of them if one extrapolates from the votes of their political representatives—will feel aggrieved by the decision this court renders today. They will not be pacified by claims that the result was achieved by a fair, impartial, and "democratic vote by [seven] lawyers." *Stenberg*, 530 U.S. at 955 (Scalia, J., dissenting). It's important to ask, why? Is it because, as the majority suggests, a significant majority of Kansans continue to be informed by centuries-old prejudices? Given the flourishing and broadly equal society Kansans have fashioned, this explanation seems unlikely at best. Or is it because Kansans will feel, even if only intuitively, that an important right of self-government has been stolen away from them under a cloud of impenetrable legal jargon?

As explained at length above, section 1—properly understood—expresses a truth widely known and accepted at the time of Kansas' constitutional moment: pre-political individual sovereigns possess a natural and inalienable right to do "what they like." Convention, at 185. But that was only half the story. Just as important, Kansans understood the Declaration's language anticipated that such pre-political people desired to be more—they desired to be citizens. Such people came together and formed political communities by relinquishing however much of that individual sovereignty was necessary to obtain a "state"—that is, a common welfare secured for all.

Thus, the newly constituted State of Kansas exercised limited police power *in the name of* the pre-constitutional person who, by his or her implied consent, had agreed to

be bound to police regulations so long as they were not irrational, arbitrary, or discriminatory, and were reasonably related to the furtherance of the common welfare. At our founding, Kansans understood the "old truth" embodied in section 1 to mean that every person would give up "enough control over his original rights to permit government to maintain an organized, stable, peaceful pattern of human relations." Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 442 (1953).

Kansans were just as interested in achieving an organized, stable, peaceful commonwealth as they were in retaining individual sovereignty. The liberty proclaimed in both the Declaration and in section 1 was not just the negative liberty of the pre-political individual, but also the "'positive liberty'" of newly created "citizens of a self-governing society to participate and act for the public good and to use their government to seek, in Aristotle's words, 'not merely life alone, but the good life.'" Ketcham, *Framed For Posterity: The Enduring Philosophy of the Constitution* 40 (McWilliams & Banning eds., 1993).

It is the right to self-government properly understood—and the constituent political community it establishes—which today's majority has taken from Kansans. Put another way, the "practice of constitutional revision by an unelected committee of [seven], always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves." *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2627, 192 L. Ed. 2d 609 (2015) (Scalia, J., dissenting). Likewise, if "'the people . . . should ever think of making judges supreme arbiters in political controversies . . . they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic . . .'" *In re Gunn, Petitioner*, 50 Kan. 155, 229, 32 P. 948 (1893)

(Allen, J., dissenting) (quoting *Luther v. Borden et al.*, 48 U.S. (7 How.) 1, 52-53, 12 L. Ed. 581 [1849] [Woodbury, J., dissenting]); see *Janus v. State, County, and Municipal Employees*, 585 U.S. ___, 138 S. Ct. 2448, 2502, 201 L. Ed. 2d 924 (2018) (Kagan, J., dissenting) (warning about "black-robed rulers overriding citizens' choices").

As one dissenting Tennessee Supreme Court Justice explained, calling abortion a fundamental right denies the people the opportunity to rule themselves and weigh difficult competing interests:

"Undoubtedly, the issue of abortion is one of the most controversial and fiercely debated political issues of our time, and any resolution of this issue can only be achieved through deliberative, thoughtful, and public dialogue. Nevertheless, with its decision today, the Court has elevated one extreme of this debate to a constitutional level and has made any meaningful compromise on this issue all but impossible. The Court has done so simply by proclaiming that the right to obtain an abortion is 'fundamental' under the Tennessee Constitution, and that as such, our Constitution effectively removes from the General Assembly any power to reach a reasonable compromise that considers all of the important interests involved." *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 25 (Tenn. 2000) (Barker, J., dissenting in part and concurring in part).

Long ago, in Federalist 71, Alexander Hamilton described the importance of this kind of thoughtful, public resolution of difficult and fiercely debated issues. He wrote that the "republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs" Hamilton, The Federalist No. 71, *The Same View Continued in Regard to the Duration of the Office*, in Madison, Hamilton, and Jay, The Federalist Papers 409 (Kramnick ed., 1987). "In the particular type of deliberative democracy fashioned by the American framers, the citizenry would reason, or deliberate, *through* their representatives" Bessette, *The Mild Voice of Reason: Deliberative Democracy & American National*

Government 1 (1994). The framers conceived the republican "political process as an effort to select and implement public values. The process is primarily one of collective self-determination [in which] . . . [t]he role of the representative . . . is not to choose among preselected values but instead to select values through public deliberation and debate." Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1694-95 (1984).

The first Kansans understood the language of section 1 not only as an inherent limitation on the police power of the state, but also as legitimizing the political community itself, along with its "deliberative sense" of how to further the common welfare of all Kansans. "Kansas" was the community being "constituted" after all. See, e.g., Topeka Const. of 1855, Preamble ("[I]n order to secure to ourselves and our posterity the enjoyment of all the rights of life, liberty and property, and the free pursuit of happiness, do mutually agree with each other, to form ourselves into a free and independent State . . .").

This deliberative sense is the only thing legitimizing law itself. "Law is more than just another opinion Law is the principal institution through which a society can assert its values." Bickel, *The Morality of Consent* 5 (1975). The people's deliberative sense, when confined to the pursuit of the common welfare, creates a pragmatic and flexible counterweight to the absolute sovereignty of the Lockean pre-constitutional person. As one scholar put it, "eighteenth century values of natural rights never totally supplanted the seventeenth century American belief in a community held together by substantive values reflected in moral legislation." Forte, 13 Ga. L. Rev. at 1507.

Such balance is the hallmark of our historic understanding of what makes a republican form of government. When pursued unilaterally, each version of "liberty" had proven inherently unstable. But when placed in creative equipoise, the two traditions

achieved their most lasting expression in the Declaration and the explosion of republican governments it spawned. Thus, the natural rights theorists that so influenced the American founding "emphasized both individual rights and the common good as complementary rather than conflicting aspects of the human condition." Tierney, at 334.

A more down-to-earth way to say the same thing—the Constitution announces and defines boundaries, not values. Or, if one must use the language and discourse of values, one might say those boundaries *are the values* the Constitution announces. And it is the courts' job to patrol boundaries, not to decide whether any particular enactment is consistent with "fundamental" or "substantive" values. See slip op. at 7, 77. One of the most cogent and penetrating critics of the judicial pursuit of fundamental constitutional values was the longtime Harvard legal philosopher and constitutional theorist John Hart Ely.

Ely was no originalist, and he supported legal abortion access as a matter of policy. He took the view that "certain of our Constitution's critical phrases cannot intelligibly be given shape without a substantial injection of content from some source beyond the documentary language." Ely, *Foreword: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5, 5 (1978). But this cannot mean "that all bets are off" and judges are "free to make the Constitution mean whatever [they] please." 92 Harv. L. Rev. at 5. As Ely explained, the "jurisprudence that defines the Court's role as one of protecting those values the Court regards as truly fundamental" began in earnest with *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). 92 Harv. L. Rev. at 15. Such a jurisprudence conceives of the role of appellate judges as "identifying and enforcing upon the political branches those values that are, according to one formula or another, truly important or fundamental" because "the political process [cannot] be trusted with such judgments." 92 Harv. L. Rev. at 10, 12. Specifically, "the democratic process is incapable of dealing responsibly with the excruciating clash of values abortion

entails." 92 Harv. L. Rev. at 11. Thus, "a woman's right to choose an abortion is simply so important, so fundamental, that we cannot permit it to be legislatively inhibited." 92 Harv. L. Rev. at 11.

Today's majority certainly follows this well-trod rationale. And in truth, many people have grown accustomed to thinking about the American judiciary in precisely this fashion. The idea is buttressed by "the prevailing academic line . . . that the Court should give content to the Constitution's open-ended provisions by identifying and enforcing upon the political branches America's fundamental values." 92 Harv. L. Rev. at 15. The glaring problem, as Ely devastatingly describes, is that when judges are engaged in this process of values discovery, what the judge is "likely really to be 'discovering,' whether or not he is fully aware of it, are his own values." 92 Harv. L. Rev. at 16. And in that process of self-discovery, there "*will* be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper middle, professional class from which most lawyers and judges . . . are drawn." 92 Harv. L. Rev. at 37. This undeniable truth seems "so flagrantly elitist and undemocratic it should be dismissed forthwith." 92 Harv. L. Rev. at 38. Ely concludes with Robert Dahl's wry observation that "'almost the only people who seem to be convinced of the advantages of being ruled by philosopher-kings are . . . a few philosophers.'" 92 Harv. L. Rev. at 39 (quoting Dahl, *Democracy in the United States* 24 [3d ed. 1967]). And by way of addendum one might add—a majority of Kansas Supreme Court justices.

So how *should* we understand the proper role of judges in our republican system of government? Ely again supplies a useful metaphor: "The approach to constitutional adjudication recommended here is akin to what might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs—rather than dictate substantive results it intervenes only when the 'market,' in our case the political market, is systematically malfunctioning." Ely, *Democracy and Distrust: A Theory of Judicial Review* 102-03

(1980). Just so. While I have set forth a more originalist understanding of the proper constitutional boundaries imposed on the exercise of state power by the Kansas Constitution, and Ely preferred an approach grounded more in notions of procedural participation and fairness, the end results are not too far apart.

Both Ely and I fall on the side of judges as "keeper[s] of the covenant" instead of "Platonic guardians." Pacelle Jr. et al., *Keepers of the Covenant or Platonic Guardians? Decision Making on the U.S. Supreme Court*, 35 American Politics Research 718 (2007); see also *Plyler v. Doe*, 457 U.S. 202, 242, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (Burger, C.J., dissenting) ("The Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'"). It is the judicial maintenance of this constitutional synthesis—between boundaries that may not be crossed by the state for any reason, on the one hand, and a wide field to permissibly pursue the common good through the deliberative sense of the political community, on the other—that properly balances (and thus preserves) *both* the people's political liberty of self-government and their pre-political liberty "to do the nearest what they like—the nearest what they think and act." Convention, at 185.

Thus, among the casualties of today's decision is the deliberative sense of our particular political community—constituted in 1861 as "Kansas"—concerning what best serves the common welfare of its people. Without that deliberative sense, the ground under the political community erodes. Which is to say, the "constituting" of Kansas is itself effaced and diminished. Our unity as a particular "people" is undermined. As one leading political philosopher of the 20th century put it, "[h]uman society is . . . illuminated with meaning from within" through "an elaborate symbolism" by "the human beings who continuously create and bear it as the mode and condition of their self-

realization." Voegelin, *Representation and Existence*, in *5 The Collected Works of Eric Voegelin* 109 (2000).

Those symbols—in our case, the paramount symbol of the Declaration of Independence and section 1—are so important because they reveal "the internal structure" of the political community—"the relations between its members and groups of members." Voegelin, at 109. In simpler terms, constitutions both create and express the self-understanding of a particular political community. "[T]he members of a society experience" the "symbolization" inherent in constituting acts as "more than an accident or a convenience; they experience it as of their human essence." Voegelin, at 109.

The loss of this self-reflective, deliberative sense of ourselves is felt keenly by citizens who perceive, even if dimly, that something of their political "essence" is being eliminated. Practically speaking, "by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight," this court "merely prolongs and intensifies the anguish" felt by all sides of this existential argument. *Casey*, 505 U.S. at 1002 (Scalia, J., dissenting).

Nothing in this suggests that the deliberative sense of the political community cannot or does not, from time to time, exceed its legitimate bounds. Of course it can, and often does. When it does, it is the role of the judicial branch to police the policeman, to curtail those abuses, to put the political community back inside its "constituted" bounds. When judges carry out this policing function by considering the deliberative sense of the political community on its own terms—that is, by considering its reasonable relationship to the common good—we affirm the legitimacy of the political community exercising its lawmaking function. This remains true even when determining the police power was exceeded in a particular instance. But today's majority eschews the more modest,

restrained role of constitutional covenant keeper in favor of the unrestrained Platonic guardian of constitutional "values."

CONCLUSION

If any state has a historical claim to a seat of honor on any dais celebrating the triumph of the principles of the Declaration of Independence in the decades surrounding the Civil War, it is our beloved home of Kansas. More than any other state, ours was birthed in the crucible of pitched battle between two opposed and irreconcilable ideas—*government by consent* or *consent by government*.

Given the opportunity to seize this birthright anew, our court has decided—"all for the sake of political power," in Senator Sumner's words—to reach instead for the thin gruel of an all-powerful state restrained only by the caprice of judicially discovered "fundamental" rights. Sumner, 5. Section 1 was always intended to introduce a charter of limited power, not a charter of limited rights. As it turns out, there is an important difference between the two. Again, in Madison's striking words, it is the difference between "charters of power granted by liberty" and "charters of liberty . . . granted by power." Madison, at 83.

We have turned our constitutional structure on its head. Instead of a general limit on the police power of the state which constrains *every* exercise of that power, section 1 is now a "guarantee" of limited, preferred rights granted by the arbitrary power of a majority of judges on this court. Of course, this leaves in place the equally dangerous arbitrary power of the Legislature to act with impunity in any area not already occupied by this court.

At the outset, I noted that this case isn't just about the policy of abortion, it is more basically about the structure of our government. While true, this description fails to account for a strange but persistent symbiosis between the two. Abortion has become the judicially preferred policy tail wagging the structure of government dog. For the majority, the settled and carefully calibrated republican structure of our government must give way, at every turn, to the favored policy. But in my considered judgment, *constitutional structure* is the very thing securing and guaranteeing the *full range* of human liberty. History and reason suggest that those who, in the name of liberty, tear down that edifice will wind up out in the political elements, unsheltered and exposed to the cold wind of every arbitrary power.

I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DANIELA ARROYO GONZALEZ;
VICTORIA RODRIGUEZ ROLDAN;
J.G.; PUERTO RICO PARA TOD@S

Plaintiffs

CIVIL 17-1457CCC

vs

RICARDO ROSSELLO NEVARES,
in his official capacity as Governor of
the Commonwealth of Puerto Rico;
RAFAEL RODRIGUEZ-MERCADO,
in his official capacity as Secretary of
the Department of Health of the
Commonwealth of Puerto Rico;
WANDA LLOVET DIAZ, in her
official capacity as Director of the
Division of Demographic Registry
and Vital Statistics of the
Commonwealth of Puerto Rico

Defendants

OPINION AND ORDER

This is an action for declaratory relief brought by three transgenders and an organization that advocates for the civil rights of LGBT people in the Commonwealth of Puerto Rico. They seek one common determination: that defendants be ordered to permit transgender persons born in Puerto Rico to correct their birth certificates to accurately reflect their true sex, consistent with their gender identity, in accordance with the practice delineated in 24 L.P.R.A. section 1136¹ and without adhering to the practice delineated in 24 L.P.R.A.

¹24 L.P.R.A. section 1136 provides: "If the birth of an adoptee had previously been registered in the Vital Statistics Registry, **the registration certificate of such birth shall be substituted for another showing the new juridic status of the registered child**, as if he were a legitimate child of the adopters; Provided, that the original registration certificate of the birth of

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section 1231 of using a strike-out line to change one's name, or otherwise including any information that would disclose a person's transgender status on the face of the birth certificate. See Amended Complaint (d.e. 15), Prayer's Clause (C), p. 40. A Motion to Dismiss filed on June 12, 2017 by defendants Ricardo Rossello Nevares, in his official capacity as Governor of the Commonwealth of Puerto Rico; Rafael Rodriguez Mercado, in his official capacity as Secretary of the Department of Health of the Commonwealth of Puerto Rico; and Wanda LLOvet Diaz, in her official capacity as Director of the Division of Demographic Registry and Vital Statistics of the Commonwealth of Puerto Rico (d.e. 22), was denied on August 29, 2017 (d.e. 35). Defendants have not filed an answer to the amended complaint. Plaintiffs filed a Motion for Summary Judgment on June 26, 2017 (d.e. 26), accompanied by a Statement of Material Facts (d.e. 26-1).

Having considered the Motion for Summary Judgment, the declarations under penalty of perjury executed by the plaintiffs and other supporting materials, as well as defendants' opposition, the Court sets forth the following material facts that remain undisputed:

the adoptee, the decision of the court, and other documents shall be kept in the Registry in a sealed envelope and shall be confidential documents. In no registration certificate issued by the Registry shall the fact of the original registration be set forth, unless the petitioner of said certificate has expressly required the showing of such facts and a competent court has so ordered for justified causes; Provided, That such authorization shall not be required when the applicant be the adopter or the adoptee." (Emphasis ours).

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Findings of Fact

1. Plaintiffs are three transgender individuals and an organization with transgender members that seek to have their Puerto Rico birth certificates amended to accurately reflect their gender identity.
2. Ms. Daniela Arroyo's and Ms. Victoria Rodriguez's gender identity and expression is female.
3. Mr. J.G.'s gender identity and expression is male. His transgender status is not publicly known, nor known by his current employer or co-workers.
4. Ms. Arroyo and Ms. Rodriguez have aligned their body characteristics, appearance, and lived experience with their female gender identity.
5. Mr. J.G. has aligned his body characteristics, appearance, and lived experience with his male gender identity.
6. All three plaintiffs wish to correct the gender marker on their birth certificates.
7. Ms. Arroyo and Ms. Rodriguez wish to correct the gender markers on their birth certificates to accurately reflect the identity of each as a woman, as determined by their gender identity.
8. Mr. J.G. wishes to correct the gender marker on his birth certificate to accurately reflect his identity as a man, as determined by his gender identity.

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9. Ms. Arroyo's and Ms. Rodriguez' birth certificates do not reflect their true identity, are incongruent with their female identity and expression, and conflict with their other identification documents.
10. Mr. J.G.'s birth certificate does not reflect his true identity, is incongruent with his male identity and expression, and conflicts with his other identification documents.
11. Ms. Rodríguez changed her name and corrected the gender marker on her driver's license, U.S. Passport, and Social Security records.
12. Mr. J.G. changed his name on his birth certificate and has also changed his name and corrected the gender marker on his driver's license and Social Security records.
13. An individual's birth certificate is a primary identification document. In Puerto Rico, it is needed to obtain a driver's license, a marriage license, a U.S. passport, a Social Security card, a voting card, and generally as proof of identification to conduct banking transactions and other business.
14. Pursuant to its Birth Certificate Policy, Puerto Rico categorically requires that birth certificates reflect the sex assigned at birth and prohibits transgender persons from correcting the gender marker in their birth certificates so that these accurately reflect the persons' sex, as determined by their gender identity.

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15. Birth certificates in Puerto Rico indicate a person's birth-assigned sex based on the appearance of genitalia rather than their actual sex, as determined by their gender identity and lived experience.
16. Transgenderism is an immutable characteristic determined by the hormonal balance a person is born with. It is an innate trait caused by an individual's biological features and genetic makeup. Some scientists confirm that brain development is influenced by the prenatal environment, that is, to what hormones the fetus was exposed to in the uterus. For example, exposure to inadequate levels of estrogen during development of the fetus because of insufficient estrogen production in the fetus' immediate environment or poor receptive sensitivity in the fetus, are possible scenarios underlying insufficient feminization.
17. Ms. Rodriguez is 28 years old, born in Puerto Rico, and currently a resident of the District of Columbia metropolitan area. She is a graduate of the University of Puerto Rico and of the University of Maine School of Law. She is a transgender who was designated "male" in her birth certificate. She learned the term transgender at the age of 14. Ms. Rodriguez kept her gender secret until she was 18 and had started college for fear of rejection by her family. In 2007, by her sophomore year, she asked her professors and others to call her by her chosen name, Victoria. Calling her 'Victoria' during the roll call prevented disclosure of her transgender status to other students. She was diagnosed that

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same year by her medical provider with gender dysphoria and underwent hormone therapy to relieve the condition. In 2011, while at law school, she legally changed her name and gender marker on all her identification documents, except for her birth certificate.

18. Ms. Arroyo is 18 years old, a high school graduate, transgender, designated “male” in her birth certificate, who states she never questioned that she was a girl, so informed her family when she was a young girl, and told her mother that she was a transgender at the age 14. This led her to begin at that age to socially and medically transition to align her life experience and body characteristics with her gender identity. She began hormone therapy in 2016 after having been diagnosed with gender dysphoria in 2013. Ms. Arroyo is cofounder of the Puerto Rico Trans Youth Coalition since 2015, an organization that provides a network for transgender youth in Puerto Rico with over 200 participants. In February 2017, she legally changed her name to her current female name. In March 2017, she began the process to correct her name and gender marker in her identification documents to accurately reflect her gender identity as female but has been prohibited from correcting the gender marker in her birth certificate because of Puerto Rico’s Birth Certificate Policy, thereby rendering her birth certificate incongruent with her other identification papers.

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19. Mr. J.G. is 25 years old, born and raised in San Juan, Puerto Rico, and designated as female on his birth certificate. He described his childhood as a solitary life. Since age four (4) he knew he was different from the children whose assigned sex at birth was female. This caused him profound discomfort and it was not until his young adulthood that Mr. J.G. was able to understand the cause of his distress: the clash between his perception of self and the sex characteristics of his body. In 2015, he commenced to medically transition to align his body characteristics and live his true self, as a man. That same year, having been diagnosed with gender dysphoria, he commenced hormone treatment.
20. The incongruence between a transgender person's gender identity and sex assigned at birth is associated with gender dysphoria. Gender dysphoria is a serious medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (2013)("DSM-V").
21. Gender dysphoria refers to clinically significant distress that can result when a person's gender identity differs from the person's birth-assigned sex. If left untreated, gender dysphoria may result in psychological distress, anxiety, depression, suicidal ideation or even self-inflicted harm.
22. Identity documents that are consistent with one's lived experience affirm and consolidate one's gender identity, mitigating distress and functional consequences. Changes in gender presentation and

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role to feminize or masculinize appearance as well as social acceptance and legal legitimacy are crucial components of treatment for gender dysphoria. Social transition involves dressing, grooming, and otherwise outwardly presenting oneself through social signifiers of a person's true sex as determined by their affirmed gender identity.

23. Not every person suffering from gender dysphoria undergoes the same treatment. From a medical and scientific perspective, there is no basis for refusing to acknowledge a transgender person's true sex based on whether that person has undergone surgery or any other medical treatment.
24. Ms. Arroyo was diagnosed with gender dysphoria by her medical provider in the year 2013. In 2016, in consultation with her medical and mental health professionals, she began to undergo medically-necessary treatment, specifically hormone therapy, to relieve her gender dysphoria and to bring her body into alignment with her gender identity. During this transition, she brought her external appearance into alignment with her female identity.
25. Ms. Rodriguez was diagnosed with gender dysphoria by her medical provider in the year 2007. In consultation with her medical and mental health professionals, she began hormone therapy, to relieve her gender dysphoria and bring her body into alignment with her female identity.

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26. Mr. J.G. was diagnosed in 2015 with gender dysphoria. In consultation with his medical and mental health professionals, he began to undergo hormone therapy to relieve his gender dysphoria and bring his body in alignment with his gender identity. These steps brought his physical appearance into alignment with his male identity.
27. Ms. Arroyo and Mr. J.G. corrected their names on their respective birth certificates but pursuant to Puerto Rico's birth certificate policy, were prohibited from correcting the gender marker on their birth certificates.
28. Ms. Rodriguez has not changed her name on her birth certificate since she deems it to be futile given the prohibition related to the correction of the gender marker in her certificate.
29. Ms. Arroyo asserts she feels stigmatized and harmed by Puerto Rico's birth certificate policy and claims her right to possess identity documents that accurately reflect who she is – a woman.
30. Ms. Rodriguez states she considers it futile to correct the name on her birth certificate since it is impossible to obtain a correction of the gender marker on her birth certificate. As a consequence, her birth certificate, which identifies her with a male name and sex, and her other identification documents, drivers' license and U.S. passport, are incongruent with each other. She asserts the need for her identity documents to be consistent with the woman that she is.

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31. Mr. J.G. legally changed his name in 2016 to one traditionally associated with men. He updated his name and corrected the gender marker in his Puerto Rico driver's license in accordance with a policy followed by the Department of Transportation and Public Works of the Commonwealth. He also corrected his Social Security records and updated his name in his birth certificate. However, due to Puerto Rico's Birth Certificate Policy, he was precluded from correcting the gender marker on his birth certificate. He attempted in April 2016 to correct the gender marker on his Puerto Rico voter identification card after the local Board of Registration staff requested his birth certificate. This was denied. As a result of this, Mr. J.G. did not vote in the 2016 election because the presentation of his voter identification card disclosed his transgender status.
32. The forced disclosure of the transgender status of plaintiffs and other transgender persons by way of inaccurate birth certificates exposes them to prejudice, discrimination, distress, harassment, and violence.
33. On November 14, 2008, the Commonwealth of Puerto Rico (the "Commonwealth") issued Executive Order OE-2008-57 that established as a matter of public policy the prohibition of discrimination in the provision of public services. It applies to all public agencies and instrumentalities, including the Demographic

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Registry of Puerto Rico. Such sweeping outlawed discrimination in all forms, including gender identity.

34. Pursuant to this public policy, on August 10, 2015, the Commonwealth issued Executive Order OE-2015-029, permitting transgender individuals to change their gender marker in their driver's license. On June 19, 2014, the Department of Transportation and Public Works issued regulations implementing the Executive Order.
35. Pursuant to the aforementioned Executive Orders, on May 31, 2016, the Electoral Commission of the Commonwealth of Puerto Rico issued Resolution CEE-RS-16-9, permitting transgender individuals to change the gender marker on their voter identification cards.
36. The Department of Transportation and Public Works and the Electoral Commission of the Commonwealth of Puerto Rico both issue identification cards that reflect the applicant's correct gender marker in accordance with the public policy outlined in OE-2008-57, without disclosing the sex that was assigned at birth.

Based on these Findings of Fact, the Court states the following:

Conclusions of Law

The Supreme Court recognizes that "a constitutional right to privacy is now well established." *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988) (referring to *Roe v. Wade*, 410 U.S. 113, 92 S.Ct. 705, 35 L.Ed. 2d 147 (1973);

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Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965). The majority opinion in *Ex parte Delgado Hernández*, 165 D.P.R. 170 (2005), which defendants relied on in their opposition, is limited to the statutory interpretation of the Demographic Registry Law of Puerto Rico, 24 L.P.R.A. § 1071 et seq., and does not supersede this fundamental constitutional right. See *Fournier v. Reardon*, 160 F.3d 754, 758 (1st Cir. 1998) (stating that the constitutional right to privacy is deemed fundamental).

“The courts have identified two clusters of personal privacy rights recognized by the Fourteenth Amendment. One bundle of rights relates to ensuring autonomy in making certain kinds of significant personal decisions; the other relates to ensuring confidentiality of personal matters.” *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174, 182-83 (D.P.R. 1997) (referring to *Whalen v. Roe*, 429 U.S. 589, 598-600, 97 S.Ct. 869, 51 L.Ed. 2d 64 (1977); *Borucki v. Ryan*, 827 F.2d 836, 840 (1st Cir. 1987)).

“The autonomy branch of the Fourteenth Amendment right to privacy is limited to decisions arising in the personal sphere—matters relating to marriage, procreation, contraception, family relationships, child rearing, and the like.” *Vega-Rodriguez*, 110 F.3d at 183. The confidentiality branch, also referred to as ‘informational privacy’, see *National Aeronautics and Space Administration v. Nelson*, 562 U.S. 134, 146, 131 S.Ct. 746, 756, 178 L.Ed. 2d 667 (2011), “includes ‘the individual interest in avoiding the disclosure of personal matters . . .’” *Daury*, 842 F.2d at 13 (citing *Whalen*, 429 U.S. at 599).

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The Commonwealth's ban on changing the gender marker in plaintiffs' birth certificates implicates both.

The Commonwealth's forced disclosure of plaintiffs' transgender status violates their constitutional right to decisional privacy. Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, "there are few areas which more closely intimate facts of a personal nature" than one's transgender status. *Doe v. Town of Plymouth*, 825 F.Supp. 1102, 117 (D. Mass. 1993) (finding the constitutional right to privacy encompasses nondisclosure of HIV status). "The decision of who to tell and when to relate such information is an emotionally sensitive area 'fraught with serious implications for that individual.'" *Id.* (citing *Doe v. Coughlin*, 697 F.Supp. 1234, 1237 (N.D.N.Y. 1988)). Disclosing that one is transgender involves a deep personal choice which the government cannot compel, unless disclosure furthers a valid public interest. "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. **At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.** Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 2807, 120 L.Ed. 2d 674 (1992) (Emphasis ours).

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By permitting plaintiffs to change the name on their birth certificate, while prohibiting the change to their gender markers, the Commonwealth forces them to disclose their transgender status in violation of their constitutional right to informational privacy. Such forced disclosure of a transgender person's most private information is not justified by any legitimate government interest. It does not further public safety, such that it would amount to a valid exercise of police power. See *Whalen*, 429 U.S. at 598. To the contrary, it exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger. Forcing disclosure of transgender identity chills speech and restrains engagement in the democratic process in order for transgenders to protect themselves from the real possibility of harm and humiliation. The Commonwealth's inconsistent policies not only harm the plaintiffs before the Court; it also hurts society as a whole by depriving all from the voices of the transgender community.

Having determined that the Commonwealth's Birth Certificate Policy violates transgender persons' decisional privacy and informational privacy, and further considering that: (1) the Commonwealth has adopted a public policy that prohibits discrimination by public agencies and instrumentalities in providing their services, including discrimination based on gender identity, and (2) the Department of Transportation and Motor Vehicles and the Election Commission of the Commonwealth have enabled transgender individuals to apply for new official identifications that display their true gender, without disclosing their transgender status, IT IS HEREBY ORDERED AND ADJUDGED that the Demographic Registry of the Commonwealth of Puerto

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Rico permit forthwith that transgender individuals change the gender marker in their birth certificates, as delineated in 24 L.P.R.A. section 1136, specifically, **by issuing a new birth certificate** with the applicant's true gender, without using a strike-out line or otherwise including any information that would disclose a person's transgender status on the face of the birth certificate, in compliance with this Opinion and Order.

The Demographic Registry of the Commonwealth of Puerto Rico **SHALL ADOPT** the criteria of the Department of Transportation and Public Work's "Request to Change Transgender Persons' Gender Marker," DTOP-DIS-324 Form, as **the** application form to be submitted by transgenders and which shall be accepted as the first step towards the issuance of their new birth certificates, in compliance with the Court's mandate. See Attachment A to the Judgment. The transgender individual shall present the application accompanied by one of the following documents: (1) a passport that reflects a person's true gender, whether female or male, (2) a driver's license that reflects the person's true gender, whether female or male, or (3) a certification issued by a healthcare professional or mental health professional with whom the person has a doctor-patient relationship stating, based on his or her professional opinion, the true gender identity of the applicant, whether female or male, and that it is expected that this will continue to be the gender with which the applicant will identify him or herself in the future. If the applicant has not had any of the documents requested previously issued, a health care professional or mental health professional with whom the applicant has a doctor-patient relationship must certify based on his or her professional opinion

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that the true gender identity of the applicant is () female or () male and that it is expected that this will continue to be the gender with which the applicant will identify him or herself in the future. See Part B of DTOP-DIS-32 Form, which is included as Attachment A to the Judgment.

Conclusion

The right to identify our own existence lies at the heart of one's humanity. And so, we must heed their voices: "the woman that I am," "the man that I am." Plaintiffs know they are not fodder for memoranda legalese. They have stepped up for those whose voices, debilitated by raw discrimination, have been hushed into silence. They cannot wait for another generation, hoping for a lawmaker to act. They, like Linda Brown, took the steps to the courthouse to demand what is due:

their right to exist, to live more and die less.

SO ORDERED.

At San Juan, Puerto Rico, on April 20, 2018.

S/CARMEN CONSUELO CEREZO
United States District Judge

**In The United States Court of Appeals
for the Eighth Circuit**

DYLAN BRANDT, et al.,

Plaintiffs-Appellees,

v.

LESLIE RUTLEDGE, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of Arkansas, No. 4:21-cv-00450-JM

**Brief of Lambda Legal Defense and Education Fund, Inc.,
National Women's Law Center, and 20 Additional LGBTQ and
Women's Rights Organizations as *Amici Curiae* in Support of
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel of record for *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., National Women's Law Center, and 20 Additional LGBTQ and Women's Rights Organizations certifies that none of the *Amici Curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock. This representation is made in order so that the judges of this Court may evaluate possible disqualification or recusal.

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INTERESTS OF *AMICI CURIAE*¹

Amici consist of Lambda Legal Defense and Education Fund, Inc., the National Women’s Law Center, and the 20 additional organizations listed below. *Amici* are committed to ensuring that all people, including women and LGBTQ people, can live their lives free from discrimination, including with respect to access to health care they need.

Founded in 1973, **Lambda Legal Defense and Education Fund, Inc.** is the nation’s oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel or *amicus* in seminal cases regarding the rights of LGBT people and people living with HIV. *See, e.g., Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731 (2020); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v.*

¹ No party’s counsel authored this brief in whole or in part, and no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Texas, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Since its founding, Lambda Legal has sought to eliminate discriminatory barriers to health care for LGBTQ people, particularly transgender people. This includes, among others: *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F.Supp.3d 1 (D.D.C. 2020); *Fletcher v. Alaska*, 443 F.Supp.3d 1024 (D. Alaska 2020); *Kadel v. Folwell*, 446 F.Supp.3d 1 (M.D.N.C. 2020), *aff’d sub nom. Kadel v. N. Carolina State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422 (4th Cir. 2021), *as amended* (Dec. 2, 2021); and *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011). Lambda Legal therefore has a particular interest in ensuring that laws, like Arkansas’s ban on gender-affirming care for transgender minors, be properly scrutinized by the courts and enjoined.

The **National Women’s Law Center** (“NWLC”) is a nonprofit legal organization dedicated to the advancement and protection of women’s legal rights and the rights of all people to be free from sex discrimination. Since 1972, NWLC has focused on issues of key importance to women and girls, including economic security, reproductive rights and health, workplace justice, and education, with special attention to the needs of low-income women and those who face

multiple and intersecting forms of discrimination, including LGBTQ people. NWLC has participated in numerous cases, including before Courts of Appeals and the U.S. Supreme Court, to ensure that rights and opportunities are not restricted based on sex. Additionally, NWLC has a particular interest in ensuring that discrimination against LGBTQ individuals is not perpetuated in the name of women's rights.

Additional *Amici* include:

- Equality South Dakota
- Family Equality
- Freedom for All Americans
- Gender Justice
- GLBTQ Legal Advocates & Defenders
- Human Rights Campaign
- Intransitive (Mabelvale, Arkansas)
- Legal Voice
- Lucie's Place (Little Rock, Arkansas)
- National Center for Lesbian Rights
- National Center for Transgender Equality
- National LGBTQ Task Force

- One Iowa
- OutNebraska
- PFLAG
- SisterReach
- South Dakota Transformation Project
- Southwest Women's Law Center
- Transformation Project Advocacy Network
- Women's Law Project

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). All parties consent to the filing of this brief.

INTRODUCTION

In April 2021, the Arkansas Legislature passed House Bill 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021), over the governor's veto, and thereby blocked all access for transgender adolescents who suffer from gender dysphoria to the medically necessary and often lifesaving gender-affirming medical care they need. This Health Care Ban prohibits a physician or any other health care professional from providing or referring any individual under the age of 18 for "gender transition procedures." In doing so, Arkansas has placed many transgender adolescents at grave risk of harm and violated their constitutional rights, as well as those of their parents.

Amici fully support the arguments made by Plaintiffs in their brief. The district court did not abuse its discretion when it decided to preliminary enjoin the Health Care Ban and prevent it from taking effect. *Amici* submit this brief to provide the court with additional guidance regarding the multiple reasons why the Health Care Ban is subject to heightened scrutiny under the Fourteenth Amendment. *Amici* also provide additional information as to why the Ban cannot be justified by a purported motivation to protect minors.

Arkansas is the only state that prohibits transgender youth suffering from gender dysphoria from accessing the gender-affirming care that they may need—health care treatments that are well-documented and widely-accepted by the medical and scientific community. This Court should affirm the district court’s decision and allow the current injunction to remain in place.

ARGUMENT

I. Arkansas’s Health Care Ban is subject to heightened scrutiny because it discriminates based on sex.

It is incontrovertible that “all gender-based classifications ... warrant heightened scrutiny.” *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quotation omitted). Here, the Ban is subject to heightened scrutiny because: (1) on its face, it is a classification based on sex; (2) “[t]here is [] a congruence between discriminating against transgender ... individuals and discrimination on the basis of gender-based [] norms,” *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); (3) “discrimination on the basis of ... transitioning status is necessarily discrimination based on sex,” *Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), *aff’d sub nom. Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731 (2020);

and (4) any policy that treats transgender people differently “is inherently based upon a sex-classification,” *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

a. The Ban facially discriminates based on sex.

The Health Care Ban prohibits a physician or any other health care professional from providing or referring any individual under the age of 18 for “*gender* transition procedures,” which it defines as “the process in which a person goes from identifying with and living as a *gender* that corresponds to his or her biological *sex* to identifying with and living as a *gender* different from his or her biological *sex*.” Ark. Code Ann. § 20-9-1501(5) (2021). The Ban’s explicitly sex-based terms make plain that the discrimination at issue here is based on sex. It simply “cannot be stated without referencing sex,” *Whitaker*, 858 F.3d at 1051, and “[o]n that ground alone, heightened scrutiny should apply.” *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S.Ct. 2878 (2021).

What is more, on its face, the Ban discriminates against transgender minors because their identities differ from the sex they were

designated at birth. The Supreme Court confirmed in *Bostock v. Clayton County, Georgia*, that by discriminating against a transgender person because they identify with a sex that differs from their birth-assigned sex while treating more favorably an otherwise similarly situated person who identifies with the same birth-assigned sex, one “intentionally penalizes” the transgender person “for traits or actions that it tolerates” in the cisgender person. 140 S.Ct. at 1741–42.

The case of *Fletcher v. Alaska*, 443 F.Supp.3d 1024 (D. Alaska 2020), is particularly instructive here. The district court considered an exclusion of coverage for gender-affirming care contained in the Alaska state employee health plan. In granting summary judgment to the plaintiff and declaring the policy unlawful, the court explained that where the plan covers some forms of care “if it reaffirms an individual’s natal sex, but denies coverage for the same [care] if it diverges from an individual’s natal sex,” that constitutes “discrimination because of sex.” *Id.* at 1030. That is what the Ban does here. In the words of the court in *Boyden v. Conlin*, 341 F.Supp.3d 979, 995 (W.D. Wisc. 2018), the Ban is a “straightforward” case of sex discrimination.

b. The Ban discriminates based on sex stereotypes.

The Ban also unlawfully discriminates based on sex stereotypes. “There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity.” *Harris Funeral Homes*, 884 F.3d at 576–77. Indeed, “[m]any courts ... have held that various forms of discrimination against transgender people constitute sex-based discrimination ... because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes.” *Grimm*, 972 F.3d at 608. This includes, among others, the First, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits, which have recognized this impermissible sex stereotyping in both constitutional and statutory contexts. *See id.*; *Harris Funeral Homes*, 884 F.3d at 576–77; *Whitaker*, 858 F.3d at 1051; *Glenn*, 663 F.3d at 1316 (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000). “In so holding, these courts have recognized a central tenet of equal protection in sex discrimination cases: that states ‘must not rely on overbroad

generalizations’ regarding the sexes.” *Grimm*, 972 F.3d at 609 (quoting *Virginia*, 518 U.S. at 533).²

Here, the Health Care Ban is based on stereotypes of how a person’s body should look vis-à-vis their sex designated at birth. *See* Ark. Code Ann. § 20-9-1501(6)(A) (2021) (prohibiting “any medical or surgical service ... related to gender transition that seeks to: (i) Alter or remove physical or anatomical characteristics or features that are *typical for the individual’s biological sex*; or (ii) Instill or create physiological or anatomical characteristics that resemble a sex different from the individual’s biological sex” (emphasis added)); *cf. Kadel v. Folwell*, 446 F.Supp.3d 1, 14 (M.D.N.C. 2020) (finding a health plan’s exclusion of gender-affirming care “tethers Plaintiffs to sex stereotypes which, as a

² *Amici* refute the assertion made by one of Defendants’ *amici* that holding that the Ban unlawfully discriminates based on sex would somehow undermine protections for cisgender women and girls. (WoLF Br. at 25.) Not only is this argument unsupported and without merit but holding that the Ban unlawfully discriminates based on sex would actually strengthen our legal protections against sex discrimination for all women and girls. Affirming that the Ban constitutes unlawful sex discrimination will fortify protections from sex discrimination for all by discouraging the very type of discrimination and generalizations based on archaic notions about sex that has been historically deployed to undermine the equal participation of women and girls in society.

matter of medical necessity, they seek to reject”). But relying on “notions of how sexual organs and gender identity ought to align” is impermissible sex stereotyping. *Harris Funeral Homes*, 884 F.3d at 576; *see also Toomey v. Arizona*, No. CV-19-00035, 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019) (“Discrimination based on the incongruence between natal sex and gender identity—which transgender individuals, by definition, experience and display—implicates the gender stereotyping[.]”). Discrimination based on sex “is not only discrimination because of maleness and discrimination because of femaleness,” but also “discrimination because of the properties or characteristics by which individuals may be classified as male or female.” *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509, 526 (D. Conn. 2016).

c. The Ban discriminates based on sex because it discriminates based on gender transition.

Moreover, as multiple courts have recognized, discrimination based on gender transition is necessarily discrimination based on sex. *See Harris Funeral Homes*, 884 F.3d at 575 (“discrimination ‘because of sex’ inherently includes discrimination against employees because of a change in their sex”); *Fabian*, 172 F.Supp.3d at 527; *Schroer v. Billington*, 577 F.Supp.2d 293, 306–07 (D.D.C. 2008).

Just as discrimination based on religious conversion is necessarily based on religion, discrimination based on gender transition is discrimination based on sex. For example, the district court for D.C. noted in *Schroer* that firing an employee for transitioning was impermissible discrimination because of sex just as firing an employee because she converts from Christianity to Judaism “would be a clear case of discrimination ‘because of religion.’” 577 F.Supp.2d at 306. Even if the employer “harbors no bias toward either Christians or Jews but only ‘converts[,]’ ... [n]o court would take seriously the notion that ‘converts’ are not covered” by the statutory ban on religious discrimination. *Id.*; accord *Fabian*, 172 F.Supp.3d at 527. “Because Christianity and Judaism are understood as examples of religions rather than the definition of religion itself, discrimination against converts, or against those who practice either religion the ‘wrong’ way, is obviously discrimination ‘because of religion.’” *Id.*

The same analysis applies here: a law that discriminates against those who undertake “gender transition procedures” constitutes discrimination because of sex. As such, the Ban discriminates based on sex.

d. The Ban discriminates based on sex because it discriminates based on transgender status.

Finally, there can be no doubt that classifications based on transgender status are necessarily sex-based classifications. As the Supreme Court recognized in *Bostock*, “it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.” 140 S.Ct. at 1741. “That is because the discriminator is necessarily referring to the individual’s sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator’s actions.” *Grimm*, 972 F.3d at 616.

It is of no consequence that the Ban does not explicitly mention the word “transgender.” By definition, the Ban prohibits treatment that *only* transgender people would seek, i.e., gender-affirming care or “gender transition procedures.” As the court in *Toomey* explained, “transgender individuals are the only people who would ever seek [‘gender transition procedures’].” 2019 WL 7172144, at *6. As such, the Ban “singles out transgender individuals for different treatment.” *Id.*; see also *Bear Creek Bible Church v. Equal Emp. Opportunity Comm’n*, No. 4:18-cv-00824, 2021 WL 5052661, at *35 (N.D. Tex. Oct. 31, 2021) (employer’s exclusion “would apply only to individuals with gender dysphoria, so on their face,

the policies explicitly target transgender individuals”). Defendants split hairs in arguing otherwise.

Indeed, it is in this very type of circumstance that the Supreme Court has “declined to distinguish between status and conduct.” *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 689 (2010). Targeting conduct that is exclusive to a particular identity in fact targets people who share that identity. *See id.* (rejecting the idea that discrimination based on same-sex intimacy was not discrimination based on sexual orientation). The same is true of the Ban.

II. Arkansas’s Ban is also independently subject to heightened scrutiny because it discriminates based on transgender status.

The district court correctly determined that heightened scrutiny also independently applies to Arkansas’s Ban because it discriminates based on transgender status, reasoning that such discrimination is based on at least a quasi-suspect classification. *Brandt v. Rutledge*, No. 4:21-CV-00450, 2021 WL 3292057, at *2 (E.D. Ark. Aug. 2, 2021). While this Court has not addressed whether laws that discriminate based on transgender status are subject to heightened scrutiny on that basis alone,

the Fourth and Ninth Circuits have held that “heightened scrutiny applies because transgender people constitute at least a quasi-suspect class.” *Grimm*, 972 F.3d at 610 (finding “[e]ach factor readily satisfied” with regard to transgender people); *accord Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (affirming the district court’s reasoning as to why transgender people are a quasi-suspect class). The same is true for a multitude of district courts. *See, e.g., Ray v. McCloud*, 507 F.Supp.3d 925, 937 (S.D. Ohio 2020); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F.Supp.3d 704, 719–22 (D. Md. 2018); *Flack v. Wis. Dep’t of Health Servs.*, 328 F.Supp.3d 931, 952–53 (W.D. Wis. 2018); *F.V. v. Barron*, 286 F.Supp.3d 1131, 1144 (D. Idaho 2018); *Evancho v. Pine–Richland Sch. Dist.*, 237 F.Supp.3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F.Supp.3d 850, 874 (S.D. Ohio 2016); *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1119 (N.D. Cal. 2015); *Adkins v. City of New York*, 143 F.Supp.3d 134, 139–40 (S.D.N.Y. 2015).

In identifying whether a classification is suspect or quasi-suspect, courts consider whether: (a) the class has historically been “subjected to discrimination,” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (b) the

class's defining characteristic "bears [any] relation to ability to perform or contribute to society," *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); (c) the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Gilliard*, 483 U.S. at 602; and (d) the class is "a minority or politically powerless," *id.*; *see also Grimm*, 972 F.3d at 611; *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013). While not all factors need to be present, *see id.* at 181; *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), here, all four factors justify treating classifications based on transgender status as suspect or at least a quasi-suspect for equal protection purposes.

First, it is beyond debate that transgender people in our country have experienced a long history of discrimination, including violence and pervasive discrimination in employment, housing, and access to places of public accommodation or government services. *See Grimm*, 972 F.3d at 611; *Whitaker*, 858 F.3d at 1051; *Ray*, 507 F.Supp.3d at 937 ("[T]here is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access

to healthcare.” (citation omitted)); *see also Foster v. Andersen*, No. 18-2552, 2019 WL 329548, at *2 (D. Kan. Jan. 25, 2019).

But “this history of persecution and discrimination is not yet history.” *Adkins*, 143 F.Supp.3d at 139. According to a national public opinion study published in 2020 exploring the experiences of LGBTQ Americans, 62 percent of transgender respondents reported experiencing discrimination in the past year. *See Lindsay Mahowald, Sharita Gruberg, and John Halpin, Ctr. for Am. Progress, The State of the LGBTQ Community in 2020 A National Public Opinion Study* 4 (Oct. 2020), <https://tinyurl.com/yc6vctku>. This is consistent with prior studies. For example, according to a 2015 U.S. Transgender Survey, a study involving 27,715 participants, nearly half of transgender respondents reported being “denied equal treatment, verbally harassed, and/or physically attacked in the past year because of being transgender.” *See Sandy E. James et al., Nat’l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey* 198 (Dec. 2016), <https://tinyurl.com/bmhahmtz>.

These numbers become starker when one accounts for particular contexts or backgrounds. For example, over three-quarters (77%) of those who were out or perceived as transgender at some point between K–12 in

school experienced some form of mistreatment, such as being verbally harassed, prohibited from dressing consistent with their gender identity, disciplined more harshly, or physically or sexually assaulted because people thought they were transgender. *Id.* at 132. Over a quarter (27%) of respondents who had held or applied for a job during the past year reported being fired, denied a promotion, or not being hired for a job they applied for because of their gender identity or expression. *Id.* at 12. And these alarming rates of discrimination, harassment, and violence are even higher for transgender people of color, particularly Black and Latino/a transgender people. *See, e.g.,* Sandy E. James and Bamby Salcedo, Nat’l Ctr. for Transgender Equal. and TransLatin@ Coalition, *2015 U.S. Transgender Survey: Report on the Experiences of Latino/a Respondents* (Oct. 2017), <https://tinyurl.com/4mp8xusw>; Sandy E. James, et al., Nat’l Ctr. for Transgender Equal., Black Trans Adv. and Nat’l Black Justice Coal., *2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents* (Sept. 2017), <https://tinyurl.com/ycyv9vnh>.

Courts that have recognized these alarming rates of discrimination have also cited “current measures and policies [that] continue to target

transgender persons to differential treatment.” *Grimm*, 972 F.3d at 612 (noting, among others, the re-implementation in 2017 of “policies precluding transgender persons from military service” and the rescission by federal agencies of protections from discrimination based on gender identity). Indeed, more than 110 bills targeting transgender people for discrimination were introduced across dozens of state legislatures in 2021, with some of them becoming law. *See, e.g., 2021 set a record for anti-transgender bills. Here’s how you can support the community*, PBS NewsHour (Dec. 30, 2021 6:44PM EST), <https://tinyurl.com/2p8c4h94>; Sam Levin, *Mapping the anti-trans laws sweeping America: ‘A war on 100 fronts’*, The Guardian (June 14, 2021), <https://tinyurl.com/mwy2m3bm>; Priya Krishnakumar, *This record-breaking year for anti-transgender legislation would affect minors the most*, CNN.com (Apr. 15, 2021), <https://tinyurl.com/3xun7z7x>. The effects of these policies targeting transgender persons for differential treatment are profound. Indeed, “2021 was the deadliest year for transgender and gender non-conforming people in the U.S. on record.” Madeleine Carlisle, *Anti-Trans Violence and Rhetoric Reached Record Highs Across America in 2021*, TIME (Dec. 30, 2021), <https://tinyurl.com/3dcpas6r>.

Second, being transgender bears no relationship with a person's ability to perform or contribute to society. *See Grimm*, 972 F.3d at 612; *see also Evancho*, 237 F.Supp.3d at 288; *Highland Local Sch. Dist.*, 208 F.Supp.3d at 874; *Adkins*, 143 F.Supp.3d at 139. “[A]s should by now be uncontroversial,” “being transgender is natural.” *Kadel*, 12 F.4th at 427. Over a decade ago, the American Psychiatric Association concluded that being transgender “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.” Am. Psychiatric Ass’n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (July 2012); *see also Kadel*, 12 F.4th at 427.

Third, transgender people have an obvious, immutable, or distinguishing characteristic that defines them as a discrete group.

Transgender people constitute a discrete group with immutable characteristics: Recall that gender identity is formulated for most people at a very early age, and ... being transgender is not a choice. Rather, it is as natural and immutable as being cisgender. But unlike being cisgender, being transgender marks the group for different treatment.

Grimm, 972 F.3d at 612–13 (citation omitted); *see also Ray*, 507 F.Supp.3d at 937 (“[T]ransgender people have common, immutable characteristics that define them as a discrete group, primarily in that

their gender identity does not align with the gender they were assigned at birth.”).

While “[t]his consideration is often couched in terms of ‘immutability,’ ... the test is broader.” *Windsor*, 699 F.3d at 183. “No ‘obvious badge’ is necessary.” *Id.* (citing *Mathews v. Lucas*, 427 U.S. 495, 506 (1976)). Nor is a “biological basis” for the characteristic necessary. *See Windsor*, 699 F.3d at 183 (noting “[c]lassifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny”); *Whitewood v. Wolf*, 992 F.Supp.2d 410, 429 (M.D. Pa. 2014) (“[A]lthough this factor is often phrased in terms of ‘immutability,’ the test is broader, encompassing groups whose members can hide the distinguishing trait and where the characteristic is subject to change.”).³ What matters is that the characteristic be “so fundamental to one’s identity that a person should not be required to abandon it,” *Golinski v. U.S. Off. of Pers. Mgmt.*,

³ To be sure, while not necessary for purposes of this analysis, there is a biological basis to gender identity and transgender status. *See* Pls.’ Br. at 4, n.2; *D.T. v. Christ*, No. CV-20-00484, 2021 WL 3419055, at *3 (D. Ariz. Aug. 5, 2021) (“This gender identity in transgender people has a biological component and cannot be changed.”); *Hecox v. Little*, 479F.Supp.3d 930, 945 (D. Idaho 2020) (noting “there is a medical consensus that there is a significant biologic component underlying gender identity”).

824 F.Supp.2d 968, 987 (N.D. Cal. 2012), or that the characteristic “calls down discrimination when it is manifest,” *Windsor*, 699 F.3d at 183. *See also Love v. Beshear*, 989 F.Supp.2d 536, 546 (W.D. Ky. 2014) (“As to immutability, the relevant inquiry is not whether a person could, in fact, change a characteristic, but rather whether the characteristic is so integral to a person’s identity that it would be inappropriate to require her to change it to avoid discrimination.”).

Here, transgender status is such a characteristic. The transgender status of transgender persons is “inherent in who they are as people.” *Evancho*, 237 F.Supp.3d at 288. It is neither a “choice” nor “changeable.” *Id.* at 277, n.12. And, as illustrated herein, transgender status is a characteristic that “calls down discrimination when it is manifest.” *Windsor*, 699 F.3d at 183; *see Arroyo González v. Rosselló Nevares*, 305 F.Supp.3d 327, 333 (D.P.R. 2018) (noting that disclosure of transgender status “exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger”); *Adkins*, 143 F.Supp.3d at 139–40.

Fourth, “[t]ransgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political

process.” *Grimm*, 972 F.3d at 613. In fact, “transgender people are unarguably a politically vulnerable minority.” *F.V.*, 286 F.Supp.3d at 1144; *see also Evancho*, 237 F.Supp.3d at 288. “Even considering the low percentage of the population that is transgender, transgender persons are underrepresented in every branch of government.” *Grimm*, 972 F.3d at 613. And as illustrated above, “[t]ransgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process.” *Id.*

In sum, “transgender people as a class have historically been subject to discrimination or differentiation; ... they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; ... as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and ... as a class, they are a minority with relatively little political power.” *Evancho*, 237 F.Supp.3d at 288.

This Court should therefore join the Fourth and Ninth Circuits and myriad district courts across the country in holding that laws, such as the Health Care Ban, that discriminate based on a person’s transgender

status are suspect or quasi-suspect and therefore subject to heightened scrutiny. *See Ray*, 507 F.Supp.3d at 937 (collecting cases).

III. Arkansas’s Ban is subject to strict scrutiny because it interferes with constitutionally protected fundamental rights of parents to seek medical care for their children.

“[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Though this right is not absolute, *see infra*, “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also King v. Olmsted Cnty.*, 117 F.3d 1065, 1067 (8th Cir. 1997) (“We have recognized a right to familial relations, which includes the liberty interest of parents in the custody, care, and management of their children.”).

This parental liberty interest generally encompasses the “fundamental right to direct the medical care of their children.” *Kanuszewski v. Michigan Dep’t of Health & Human Servs.*, 927 F.3d 396, 419 (6th Cir. 2019); *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979)

(parent’s right to raise their child includes the ability “to recognize symptoms of illness and to seek and follow medical advice”); *Treistman ex rel. AT v. Greene*, 754 F.App’x 44, 47 (2d Cir. 2018) (“[P]arents have a right to determine the medical care their children receive and the government’s interference in that right can violate due process.” (citing *van Emrik v. Chemung Cnty. Dep’t of Soc. Servs.*, 911 F.2d 863, 867 (2d Cir. 1990))); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (“[A] parent’s general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child’s medical care.”). And contrary to the State’s argument, the parent’s fundamental right exists independently of the child’s right. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (recognizing distinct rights of parent and child); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (distinguishing between the parent’s right to “bring up children” and “control [their] education” and the child’s “opportunities ... to acquire knowledge”).

These parental rights are not absolute, particularly when they conflict with a child’s independent liberty interests. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74–75 (1976)

(parent’s interest in termination of minor child’s pregnancy “is no more weighty than the right of privacy of the competent minor”), *overruled on other grounds by Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Manzano v. South Dakota Dep’t of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995) (parents’ liberty interest vis-à-vis their children “has never been deemed absolute or unqualified” (quotation omitted)). But when the parent’s and child’s liberty interests in pursuing a course of medical care align, the strength of those interests is at its apex against state interference. *Cf. Santosky*, 455 U.S. at 760 (heightened evidentiary standards required where the “vital interest” of the parent and child in preserving their relationship “coincide.”).

The district court appropriately credited the strength of the Parent Plaintiffs’ “fundamental right to seek medical care for their children,” examining it “in conjunction with their adolescent child’s consent and their doctor’s recommendation, mak[ing] a judgment that medical care is necessary.” *Brandt*, 2021 WL 3292057, at *5. Because the Ban bars these parents from pursuing the medically necessary care their transgender adolescents with gender dysphoria need, the district court correctly held that the Ban violated the parents’ substantive due process rights. The

Ban interferes directly and substantially with the rights of parents of transgender youth to direct their children's medical care and is therefore subject to strict scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Zablocki v. Redhail*, 434 U.S. 374, 387–88 (1978).

IV. The Ban triggers strict scrutiny for the additional reason that it infringes the protected liberty interests of transgender minors in their own bodily autonomy.

Though not a claim raised by Plaintiffs-Appellees, the Ban triggers strict scrutiny for the additional reason that it infringes upon the liberty interests of transgender minors in their own bodily autonomy.

“It is settled now ... that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about ... bodily integrity.” *Casey*, 505 U.S. at 849 (citing *Washington v. Harper*, 494 U.S. 210, 221–22 (1990); *Winston v. Lee*, 470 U.S. 753 (1985); and *Rochin v. California*, 342 U.S. 165 (1952)). Inherent in the fundamental right to privacy is the right to “be free from unwarranted governmental intrusion into matters so fundamentally affecting a person,” *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and the right to make “personal choices central to individual dignity and autonomy,” *Obergefell*, 576 U.S. at 663; *see also Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); *McNally v. Pulitzer*

Pub. Co., 532 F.2d 69, 76 (8th Cir. 1976) (“[T]he most intimate phases of personal life have been held to be constitutionally protected.”). These constitutionally protected liberty interests implicate “choices central to individual dignity and autonomy”—i.e., decisions that “shape an individual’s destiny.” *Obergefell*, 576 U.S. at 663, 666; *see also Lawrence v. Texas*, 539 U.S. 558, 578 (2003). They protect the right of every person to possess and control their own person and to define their own personal identity. *See Obergefell*, 576 U.S. at 633.

These liberty and privacy rights encompass the right of bodily autonomy—a person’s control over their body and what happens to it. *See Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 795 (8th Cir. 1998) (“substantive due process right to bodily integrity” includes protection “against nonconsensual intrusion into one’s body” and the right of a competent person to refuse medical care). As this Court held in *Bishop v. Colaw*, the right to control even one’s personal appearance is part of “the right of every individual to the possession and control of his own person, free from all restraint or interference of others.” 450 F.2d 1069, 1075 (8th Cir. 1971) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

Minors, like the transgender adolescents at issue here, possess these liberty and privacy rights just as adults do. “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.” *Danforth*, 428 U.S. at 74. Though “the State has somewhat broader authority to regulate the activities of children than of adults,” *id.* at 74–75, “[a] child, merely on account of his minority, is not beyond the protection of the Constitution.” *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion). “[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.” *Application of Gault*, 387 U.S. 1, 13 (1967). When the government deprives minors of their liberty or property interests, “the child’s right is virtually coextensive with that of an adult.” *Bellotti*, 443 U.S. at 634.

Among a minor’s liberty interests is the fundamental right to privacy and autonomy with respect to their own medical care, especially care that implicates intimate matters. *See Carey v. Population Servs. Int’l*, 431 U.S. 678, 692 (1977) (statute barring distribution of contraceptives to people under age 16 violated minors’ privacy rights);

Bellotti, 443 U.S. at 647 (recognizing mature minors’ fundamental right to reproductive autonomy); *Danforth*, 428 U.S. at 74–75. Because of these protected interests, the state may not “constitutionally infringe on a minor’s ability to protect her health.” *Planned Parenthood of Rocky Mountains Servs., Corp. v. Owens*, 287 F.3d 910, 918 (10th Cir. 2002).

The Health Care Ban infringes on transgender adolescents’ rights to make decisions about their bodies and their health needs and bars them from accessing the often lifesaving care necessary to treat their gender dysphoria. *See Reno v. Flores*, 507 U.S. 292, 302 (1993) (substantive due process forbids government from infringing fundamental liberty interests, “no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”).⁴

⁴ Some Courts have applied intermediate scrutiny to infringements of minors’ fundamental rights in order to both rigorously protect those rights and accommodate legislative efforts to account for minor’s vulnerabilities. *See Ramos v. Vernon*, 353 F.3d 171, 180–81 (2d Cir. 2003). Others apply strict scrutiny, while recognizing those vulnerabilities in assessing whether the governmental interest is sufficiently compelling. *See Nunez ex rel. Nunez v. San Diego*, 114 F.3d 935, 946 (9th Cir. 1997).

V. The Health Care Ban cannot be justified based on Arkansas’s purported interest in protecting minors.

Arkansas’s Health Care Ban does not protect anyone; rather, it harms transgender minors with gender dysphoria by denying them the gender-affirming health care they need. Defendants argue that the Ban is justified in order to protect minors “from harmful experimentation” and the prohibited treatments that allegedly offer “no discernible mental-health benefits.” (Defs. Br. at 43–44.) As Plaintiffs aptly argue and for the reasons articulated in the briefs by other *amici* in support of affirmance, Defendants are wrong on both accounts. *Amici* do not seek to replicate the arguments presented by Plaintiffs and these other *amici*; rather, *Amici* simply provide some additional information explaining why the justification provided by Defendants fails.

As the Fourth Circuit has recognized, gender-affirming “treatments are not cosmetic, elective, or experimental.” *Kadel*, 12 F.4th at 427. “Rather, they are safe, effective, and often medically necessary.” *Id.* at 427–28. That is also the official, consensus, evidence-based position of the National Academies of Science, Engineering, and Medicine. In a 2020 Consensus Study Report, the National Academies noted that “[c]linicians who provide gender-affirming psychosocial and medical services in the

United States are informed by expert evidence-based guidelines” and that the *Standards of Care for the Health of Transgender, Transsexual, and Gender-Nonconforming People*, published by the World Professional Association for Transgender Health (WPATH), and Endocrine Society’s guidelines are “informed by the best available data” and have established an “expert consensus that gender-affirming care is medically necessary and, further, that withholding this care is not a neutral option.” Nat’l Acad. of Sciences, Eng’g, and Med., *Understanding the Well-Being of LGBTQI+ Populations* (2020), at 12-10, <https://doi.org/10.17226/25877>. Indeed, “withholding care,” as the Health Care Ban seeks to do, “increases distress and decreases well-being.” *Id.*

This is amply demonstrated by the record below, as noted by Plaintiffs, and by the available scientific research. For example, one of the most recent studies on this topic highlights how transgender people who accessed gender-affirming hormone treatment during adolescence have lower odds of suicidal ideation and severe psychological distress in adulthood, as compared to those who desired but were not able to access gender-affirming hormone treatments. See Jack L. Turban, et al. (2022), *Access to gender-affirming hormones during adolescence and mental*

health outcomes among transgender adults, PLoS ONE 17(1):e0261039, (Jan. 12, 2022), <https://doi.org/10.1371/journal.pone.0261039>. Indeed, this study and others discussed in the record below directly undermine Arkansas’s stated justification of protecting minors. As detailed herein, the Ban serves only to *harm transgender youth*.

CONCLUSION

For the foregoing reasons, and those articulated in Plaintiffs’ brief, *Amici* respectfully request that this Court affirm the district court’s decision to preliminarily enjoin Arkansas’s ban on the provision and referral of gender-affirming medical care for transgender minors.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned hereby certifies that:

1. This brief complies with the type-volume limitation, as set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), because it contains 6,207 words, excluding the parts of the brief exempted by Rule 32(f).

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3. As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2022, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the Appellate CM/ECF system, and that it has been served on all counsel of record through the court's electronic filing system.

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In The
Supreme Court of the United States

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IN HIS OFFICIAL CAPACITY AS STATE
HEALTH OFFICER OF THE MISSISSIPPI
DEPARTMENT OF HEALTH, ET AL., PETITIONERS

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR LGBTQ ORGANIZATIONS
AND ADVOCATES AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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INTERESTS OF AMICI CURIAE¹

Amici are organizations and advocates dedicated to protecting the rights and liberties of minorities, including lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. They have substantial expertise in the lived realities of LGBTQ people, including their need for reproductive health care, and their ongoing quest for full equal citizenship. Many have litigated the foundational cases recognizing the constitutional rights of this community. The amici joining this brief are:

Council for Global Equality

The Council for Global Equality brings together international human rights activists, foreign policy experts, LGBT and intersex leaders, philanthropists and corporate officials to encourage a clearer and stronger American voice on human rights concerns impacting LGBT communities around the world. The Council for

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of amicus briefs.

Global Equality is a dedicated coalition effort. Its institutional members include many of the most prominent organizations working to promote human rights and LGBT equality in the United States and overseas. This unique collaboration joins the respective expertise and positioning of LGBT and non-LGBT organizations; domestically-focused and internationally-focused organizations; as well as advocacy groups, think tanks, multinational corporations, and research organizations.

Equality California

Equality California is a 501(c)(4) nonprofit organization that works to achieve full, lived LGBTQ+ equality by electing pro-equality leaders, passing pro-equality legislation and fighting for LGBTQ+ civil rights and social justice in the courtroom. With over 900,000 members, Equality California is the nation's largest statewide LGBTQ+ civil rights organization. Equality California brings the voices of LGBTQ+ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ+ people. It advances civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those it serves.

Equality Federation

Equality Federation is an advocacy accelerator rooted in social justice, building power in its network of state-based lesbian, gay, bisexual, transgender, and queer (LGBTQ) advocacy organizations. In 1997, these organizations came together to harness their collective knowledge and power. Since then, Equality Federation (Institute) has become the leading movement builder, national network, and strategic partner to its 40+ member organizations. Collectively, its member network mobilizes more than 2 million supporters across the country to advance equality and justice. Equality Federation works collaboratively on critical issues—from advancing workplace fairness and family recognition to defeating anti-transgender bathroom bans and HIV criminalization laws—that affect how LGBTQ people experience the world from cradle to grave. Together with its partners, Equality Federation works on cross-cutting issues such as racial equity, reproductive justice, and immigration.

Equality North Carolina

Equality North Carolina (ENC) is the oldest statewide organization in the country dedicated to securing rights and protections for the LGBTQ community. ENC's long-term goal is to enact statewide nondiscrimination on the basis of sexual orientation, gender identity & expression in housing, employment, public accommodations, credit, insurance, and education without exemptions that treat LGBTQ people

differently from other protected groups. ENC provides training and education to individuals, institutions, businesses and the government on how to provide diverse, inclusive, and equitable environments. Additionally, it works to mobilize communities and partners to advocate and take action against discriminatory practices.

Family Equality

Family Equality's mission is to advance legal and lived equality for LGBTQ families, and for those who wish to form them, through building community, changing hearts and minds, and driving policy change. It connects LGBTQ+ families, prospective parents, and youth with community across the country. It provides important education about LGBTQ+ paths to parenthood for community members and professionals. It helps LGBTQ+ families and its allies advocate for legal and lived equality through state and national campaigns. It organizes LGBTQ+ families, providing opportunities to speak out and take action. Family Equality envisions a future where all LGBTQ families, regardless of creation or composition, live in communities that recognize, respect, protect, and value them.

GLBTQ Legal Advocates and Defenders

Through strategic litigation, public policy advocacy, and education GLBTQ Legal Advocates & Defenders (GLAD) has worked for almost four decades in

New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. Using impact litigation, legislative lawyering, and public education, GLAD will achieve legal progress on the broad range of challenges facing the entire LGBTQ community, including: ending discrimination at work, at home, and in public spaces; blocking the counter-movement, including improper religiously-based discrimination; expanding protections for all families, no matter how they are formed; fighting HIV discrimination and stigma; increasing legal rights and protections for transgender people; promoting the safety and well-being of all LGBTQ youth; and ensuring that LGBT older adults are treated with fairness and dignity.

Human Rights Campaign

Representing more than three million members and supporters, the Human Rights Campaign (HRC) strives to end discrimination against LGBTQ+ people and realize a world that achieves fundamental fairness and equality for all. HRC envisions a world where lesbian, gay, bisexual, transgender and queer people plus community members who use different language to describe identity are ensured equality and embraced as full members of society at home, at work, and in every community.

LPAC Action Network

LPAC Action Network is the only national organization whose mission is to build the political power of lesbian, gay, bisexual, transgender, and queer women. LPAC endorses and invests in LGBTQ women candidates, conducts research into issues that impact LGBTQ women, and leads social welfare advocacy campaigns to benefit the community and promote the values of women's rights, LGBTQ rights, and social justice. Founded as a Federal PAC in 2012, LPAC has expanded to support LGBTQ women candidates at the local, state, and federal levels, and launched non-profit and social advocacy arms to diversity representation at all levels of government. With the ongoing assault on women's rights in the states, LPAC believes it is more important than ever to support elected officials and candidates who put women's protections front and center.

Mazzoni Center

Founded in 1979, Mazzoni Center is a non-profit multi-service, community-based health care and social service provider in Philadelphia, Pennsylvania. Mazzoni Center's mission is to provide quality comprehensive health and wellness services in an LGBTQ-focused environment, while preserving the dignity and improving the quality of life of the individuals it serves. With the onset of HIV/AIDS in 1981, the agency responded by incorporating HIV care and prevention

services and continues to design and implement numerous programs and services to combat HIV/AIDS. In 2003, the organization opened its primary care medical practice, which has since become a cornerstone of its services. Through continued growth, Mazzoni Center currently offers a full continuum of services to Philadelphia's LGBTQ communities, serving more than 33,000 individuals annually through primary medical care (including family planning and abortion services), mental health counseling, substance abuse treatment services, legal services, HIV prevention and care, youth support in schools, professional development, and LGBTQ competency training.

Minority Veterans of America

Minority Veterans of America (MVA) is a non-partisan, 501(c)(3) non-profit organization that was designed to create belonging and advance equity and justice for underrepresented veterans, including women, veterans of color, LGBTQ-identifying veterans, and (non)religious minorities. MVA's advocative efforts are driven by the certainty that effectively supporting the nation's minority veterans begins with the recognition that at the heart of the problem lies social and structural inequities. MVA advocates for community and systemic change to equitably serve all veterans. Often, minority veterans have lower socioeconomic status and opportunity when compared to their non-minority counterparts. Healthcare access disparities exist for veterans based on their sex, gender, and race. MVA aims to rectify such disparities by working to

guarantee access to IVF and surrogacy programs, abortion and contraception, and gender confirmation surgery through VA for veterans.

Movement Advancement Project

Founded in 2006, the Movement Advancement Project (MAP) is an independent, nonprofit think tank that provides rigorous research, insight and communications that help speed equality and opportunity for all. MAP's mission is to provide independent and rigorous research, insight and communications that help speed equality and opportunity for all. MAP works to ensure that all people have a fair chance to pursue health and happiness, earn a living, take care of the ones they love, be safe in their communities, and participate in civic life.

National Center for Lesbian Rights

The National Center for Lesbian Rights (NCLR) is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education. NCLR represented six plaintiffs in the 2015 cases before this Court that resulted in the recognition of marriage equality for same-sex couples. NCLR is dedicated to working toward full gender equality and ensuring the rights of all people to reproductive and bodily autonomy, as well as access to essential reproductive health care services.

National Center for Transgender Equality

The National Center for Transgender Equality (NCTE) was founded in 2003 to advance justice, opportunity, and well-being for transgender people through education and advocacy. NCTE works with policymakers and communities around the country to develop fair and effective public policy on issues that affect transgender people's daily lives, including health care. Today, NCTE partners with local and issue-expert organizations to act beyond matters that *only* affect LGBTQ+ people (like conversion therapy), to include issues that *also* affect them (like reproductive rights)—often disproportionately. LGBTQ+ people and their allies have always known injustice, but not simply because of the sexual orientation or gender. They are also women, people of color, workers, immigrants, people living with HIV/AIDS, religious minorities, and more. LGBTQ+ people and their allies stand at a unique intersection of multiple identities giving them a unique perspective, and with it, a unique responsibility to act for Justice.

National Equality Action Team

The National Equality Action Team (NEAT) builds collaborative actions and partnerships so anyone, anywhere, can fight for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) justice everywhere. We believe in education and advocacy that is grassroots, intersectional, locally driven, and accessible. NEAT is built on the 20 years of experience of Marriage Equality New

York and Marriage Equality USA in grassroots, collective action and education that empowered LGBTQ+ people and their allies to win marriage equality in the United States.

The National LGBTQ+ Bar Association

Founded over thirty years ago by a small group of family law practitioners at the height of the HIV/AIDS crisis, the National LGBTQ+ Bar Association (“the LGBTQ+ Bar”) is a national association of lawyers, judges and other legal professionals, law students, activists, and affiliated lesbian, gay, bisexual, and transgender legal organizations that promotes justice in and through the legal profession for the LGBTQ+ community in all its diversity. As an official affiliate of the American Bar Association, the LGBTQ+ Bar has worked to prohibit discrimination against jurors on the bases of sexual orientation or gender identity or expression, and curtail the availability and effectiveness of the “LGBTQ+ panic” defense. The LGBTQ+ Bar has also submitted comments and signed on to many amicus briefs in cases concerning LGBTQ+ issues or issues of discrimination.

Sexuality Information and Education Council of the United States

The Sexual Information and Education Council of the United States (SIECUS) is a national, nonprofit organization dedicated to affirming that sexuality is a natural and healthy part of life. SIECUS develops,

collects, and disseminates information, promotes comprehensive education about sexuality, and advocates for the right of individuals to make responsible sexual choices. SIECUS asserts that sexuality is a fundamental part of being human, one worthy of dignity and respect. SIECUS advocates for the rights of all people to accurate information, comprehensive sexuality education, and the full spectrum of sexual and reproductive health services. SIECUS works to create a world that ensures social justice inclusive of sexual and reproductive rights. SIECUS envisions an equitable nation where all people receive comprehensive sexuality education and quality sexual and reproductive health services affirming their identities, thereby ensuring their lifelong health and well-being.

Transgender Law Center

Transgender Law Center (TLC) is the largest national trans-led organization advocating for a world in which all people are free to define themselves and their futures. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming people alive, thriving, and fighting for liberation. Founded in 2002, TLC has grown into the largest trans-specific, trans-led organization in the United States. Its advocacy and precedent-setting litigation victories—in areas including employment, prison conditions, education, immigration, and health-care—protect and advance the rights of transgender and gender nonconforming people across the country.

Through TLC's organizing and movement-building programs, TLC assists, informs, and empowers thousands of individual community members a year and builds towards a long-term, national, trans-led movement for liberation.

Transgender Legal Defense and Education Fund, Inc.

Transgender Legal Defense and Education Fund (TLDEF) is a non-profit organization that advocates on behalf of transgender and non-binary people across the United States. TLDEF is committed to ensuring that law and policy permit full, lived equality for the transgender and non-binary community. TLDEF seeks to coordinate with other civil rights organizations to address key issues affecting transgender people in the areas of employment, healthcare, education and public accommodations and provides public education on transgender rights.

U.S. People Living With HIV Caucus

The U.S. PLHIV Caucus (also known as "the HIV Caucus" or "Caucus") is comprised of organizations, coalitions, networks or client groups of people living with HIV, ("institutions") and independent advocates living with HIV. The HIV Caucus collectively speaks with a unified voice for people living with HIV in the United States. At present the HIV Caucus is an unincorporated association of interested parties and does not have a corporate non-profit status.

The Whitman-Walker Institute

The Whitman-Walker Institute provides research, education and public policy advocacy in partnership with Whitman-Walker Health, a Federally Qualified Health Center in Washington, D.C. Whitman-Walker Health offers primary care, LGBTQ specialty care, and HIV specialty care, to individuals and families in the District of Columbia, Northern Virginia, Suburban Maryland, and other parts of the Mid-Atlantic Region. The Whitman-Walker Institute has been on the frontlines of groundbreaking research and policy work. Whitman-Walker's policy team works with health care providers, researchers, and with local and national advocacy groups on a range of issues important to LGBTQ health, the continuing fight against HIV, and healthcare reform. Whitman-Walker aims to undo structural barriers to good health and wellbeing through new policy ideas, public and policymaker education, strategic partnerships, and litigation. Whitman-Walker Health and Institute have also been at the forefront of the legal fight against LGBTQ discrimination by health care providers and insurance plans—from bringing numerous individual discrimination cases; to providing important input into the Obama Administration's nondiscrimination rule under the Affordable Care Act; to fighting recent attempts to cut back on the Obama Administration's rule; to participating in litigation that has vacated an HHS rule authorizing conscience-based discrimination by health care providers, staff and insurance plans.

Evan Wolfson
Founder, Freedom to Marry

Evan Wolfson founded and led Freedom to Marry, the campaign that won marriage equality in the United States, and is widely considered the architect of the movement that led to nationwide victory in 2015. In 1983, Wolfson wrote his Harvard Law School thesis on gay people and the freedom to marry. During the 1990s he served as co-counsel in the historic Hawaii marriage case that launched the ongoing global movement for the freedom to marry, and has participated in numerous gay rights and HIV/AIDS cases. Wolfson earned a B.A. in history from Yale College in 1978; served as a Peace Corps volunteer in a village in Togo, West Africa; and wrote the book, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*, published by Simon & Schuster in July 2004. Citing his national leadership on marriage and his appearance before this Court in *Boy Scouts of America v. James Dale*, the National Law Journal in 2000 named Wolfson one of “the 100 most influential lawyers in America.” Newsweek/The Daily Beast dubbed Wolfson “the godfather of gay marriage” and Time Magazine named him one of “the 100 most influential people in the world.” In 2012, Wolfson received the Barnard Medal of Distinction alongside President Barack Obama.

The Woodhull Freedom Foundation

Established in 2003, Woodhull Freedom Foundation (Woodhull) is a 501(c)(3) non-profit organization devoted to education and public advocacy centered on protecting the fundamental human right to sexual freedom. Woodhull works in partnership with activists and advocacy organizations, forming collaborative partnerships across the United States to fight the political, social, and economic forces working to repress sexual freedom. Woodhull believes that broad recognition of the human right to sexual freedom will lead to a healthier, more humane society and support the creation of a more just, compassionate, and sustainable world. Woodhull assiduously cultivates allies and builds coalitions linking a broad range of communities to more effectively promote public policies that protect and affirm the fundamental human right to sexual freedom.

INTRODUCTION AND SUMMARY OF ARGUMENT

People rely on this Court’s decisions. They rely on the stability of the law, as this Court rarely retrenches on past precedent regarding fundamental rights and equality. Respondents ably demonstrate that bedrock principles of stare decisis strongly counsel against overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992). Amici support that position and wish to emphasize the vital importance of those decisions to sexual minority women—women who have same-sex partners or identify as lesbian, gay, bisexual, queer, or otherwise non-heterosexual.² According to the CDC, one in twelve women in the United States between the ages of 18 and 44 is a sexual minority. Centers for Disease Control and Prevention, *Key Statistics from the National Survey of Family Growth: Sexual identity, attraction, and activity* (2018).

Stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to

² This brief uses the term “sexual minority women” to refer to women who identify as something other than heterosexual. Many women who become pregnant are heterosexual, but that is not true for all. Some are bisexual. Some are lesbians who become pregnant either through sexual violence or by engaging in reproductive sex. In addition, some individuals who become pregnant do not identify as women, but as transgender or nonbinary (i.e., people identified as female at birth but who now identify as male or who do not identify as either male or female).

the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This Court does not overrule its constitutional precedents lightly. And when asked to do so, it carefully considers the real-world consequences its decision would have on those who have come to rely on the challenged ruling, especially those who are most likely to experience significant harms from a change in the law.

Overruling *Roe* and *Casey* would have catastrophic effects on sexual minority women. Lesbian, bisexual, and other non-heterosexual women are at least as likely as other women to experience unintended pregnancies and to require abortion care. Sexual minority women are more likely to experience unintended pregnancies as a result of sexual violence. They are more likely to lack insurance. And they face widespread discrimination in the health care system, including in the provision of contraceptive care.

All of these factors combine to make sexual minority women among the most vulnerable who rely on abortion rights. Being denied an abortion has serious, lasting consequences for all women, and has profound and often distinct adverse effects on sexual minority women. It exposes an already at-risk population to greater rates of poverty, domestic violence, and negative health outcomes.

Immediate, practical consequences are not the only effects relevant to stare decisis. This Court also considers broader jurisprudential consequences of overruling precedent, including such a decision’s

consistency with other areas of the law. Those considerations, too, counsel against jettisoning *Roe* and *Casey*. This Court rarely—if ever—overrules precedent to take away a previously recognized constitutional right. Doing so now cannot be reconciled with this Court’s decisions affirming the fundamental equality of women and of LGBTQ people or with its decisions banning discrimination based on sex. In addition to unduly burdening a fundamental right, Mississippi’s law violates the fundamental guarantee of equal protection, creating a sex-based classification that inflicts serious harms on women, including those represented by amici in this case.

Mississippi asks this Court to return the country to a time when the law subordinated women by denying them equal liberty because of their sex. The Court should reject this devastating wrong turn and decline to roll back the clock.

ARGUMENT

I. OVERRULING *ROE* AND *CASEY* WOULD CAUSE SERIOUS HARM TO SEXUAL MINORITY WOMEN

Among the Court’s most important tasks in deciding whether to overturn settled precedent is examining its impact on actual people. The Court must carefully “scrutinize the precedent’s real-world effects on the citizenry.” *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (Kavanaugh, J., concurring in part) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954); *W. Va. State*

Bd. of Educ. v. Barnette, 319 U.S. 624, 630-42 (1943); *Payne*, 501 U.S. at 825-27).

The ability to decide whether and when to have children is a fundamental aspect of being treated as an equal, respected, and participating member of our democracy. Women must be free to exercise this fundamental freedom on equal terms, as this Court's precedents have long recognized. Overturning *Roe* and *Casey* would have a deeply disruptive effect on the lives and expectations of millions of women, including those who are members of the LGBTQ community. Sexual minority women have the same interest as other women in reproductive autonomy. They are at least as likely to experience unintended pregnancies, in part due to sexual violence and to economic and other barriers to reproductive care. Sexual minority women often face both sexism and homophobia, and many confront racism and poverty as well, which makes their quest for equal citizenship an uphill battle. By stripping sexual minority women of an essential aspect of equal freedom, overturning *Roe* and *Casey* would inflict significant harm on this community.

A. Sexual Minority Women Are At Least As Likely As Other Women To Experience Unintended Pregnancies, In Part Due To Elevated Rates Of Sexual Violence

Pregnancy is a common experience among women of all sexual identities—not just those who are heterosexual. More than 80% of bisexual women have

experienced at least one pregnancy, and more than a third of lesbians have done so. Barbara G. Valanis et al., *Sexual Orientation and Health: Comparisons in the Women's Health Initiative Sample*, ARCHIVES OF FAMILY MED., Sept.–Oct. 2000, at 843, 843 (abstract). In addition, “a substantial proportion of [transgender and gender-expansive] individuals who were assigned female sex at birth may need pregnancy and/or abortion care during their lives.” See Heidi Moseson et al., *Abortion Experiences of Transgender, Nonbinary, and Gender-Expansive People in the United States*, 224 AM. J. OBSTETRICS & GYNECOLOGY 376, 376 (2021).

Similarly, due in part to higher rates of sexual victimization, sexual minority women are at least as likely as heterosexual women to experience unintended pregnancies. Caroline Sten Hartnett et al., *Congruence Across Sexual Orientation Dimensions and Risk for Unintended Pregnancy Among Adult U.S. Women*, 27 WOMEN'S HEALTH ISSUES 145, 145 (2017) (finding that unintended pregnancies are at least as common for sexual minority women as for heterosexual women); Bethany G. Everett et al., *Sexual Orientation Disparities in Mistimed and Unwanted Pregnancy Among Adult Women*, PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, Sept. 2017, at 157, 161-62 (finding that adult and adolescent sexual minority women are at greater risk of unintended pregnancy than are their heterosexual counterparts).

Multiple studies have found that adolescents who are lesbian or bisexual are at an especially high risk of unintended pregnancy due to social pressures to

hide their sexual orientation and convince others they are heterosexual. See Susan M. Blake et al., *Teen Pregnancy Preventing Sexual Risk Behaviors Among Gay, Lesbian, and Bisexual Adolescents: The Benefits of Gay-Sensitive HIV Instruction in Schools*, AM. J. PUBLIC HEALTH, June 2001, at 940, 944.³ As one summary noted: “A growing body of research has documented increased risk of teen pregnancy among sexual minority adolescent girls compared with their heterosexual peers.” Cynthia Stoffel et al., *Family Planning for Sexual Minority Women*, SEMIN. REPROD. MED., Sept. 2017, at 460, 461-62 (noting recent data showing that “young [sexual minority women] who were classified as either women who have sex with women or women who have sex with both women and men * * * were significantly more likely to have been pregnant in the past 12 months than their peers who were women who have sex with men only”). These higher rates of unintended pregnancies persist into adulthood. Bethany G. Everett et al., *Unintended Pregnancy, Depression, and Hazardous Drinking in a Community-Based Sample of Sexual Minority Women*, 25 J. WOMEN’S HEALTH, no. 9, 2016, at 904, 904.

Sexual minority women are more likely than other women to experience unwanted pregnancies caused by sexual violence. Among abortion patients, sexual minority women are significantly more likely than their heterosexual counterparts to experience physical or sexual violence, “sometimes by a factor of

³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446472/pdf/11392938.pdf>.

15 or more.” Rachel K. Jones et al., *Sexual Orientation and Exposure to Violence Among U.S. Patients Undergoing Abortion*, OBSTET. & GYNECOL., Sept. 2018 at 605, 609. In one study of abortion patients, lesbians were nine times more likely than those identifying as heterosexual to disclose that they had been subjected to violence by the man involved in the pregnancy, and bisexual women were more than twice as likely to so report. *Id.* at 608. Both groups also were more likely to report sexual abuse by the man who impregnated them. *Ibid.* And all sexual minority groups in the study were more likely to report that the pregnancy resulting in the abortion was the product of forced sex. *Ibid.*

Transgender and nonbinary individuals also experience very high rates of sexual violence and assault, with the attendant risk of unwanted pregnancies. According to the U.S. Department of Justice, some research indicates that more than 65% of transgender people experience sexual assault. Dep’t of Justice, Office for Victims of Crime, *Responding to Transgender Victims of Sexual Assault: The Numbers* (2014).⁴ A 2017 study by the Centers for Disease Control found that 23.8% of transgender high school students had been forced to have sexual intercourse (compared with 4.2% of cisgender boys and 10.5% of cisgender girls), and 22.9% of transgender students had experienced sexual dating violence (compared with 3.5% of cisgender boys and 12% of cisgender girls). Michelle M.

⁴ <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/printerFriendlyPDF/sexual-assault.pdf>.

Johns et al., Centers for Disease Control and Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, Morbidity and Mortality Weekly Report, Jan. 25, 2019, at 67, 68-69.⁵ Another study published in *Pediatrics* concluded that “[t]ransgender and nonbinary middle and high school youth * * * experienced sexual assault at troubling rates well above those for nontransgender adolescents.” Gabriel R. Murchison et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, PEDIATRICS, June 2019, at 1, 7.

B. Economic And Social Barriers Often Prevent Sexual Minority Women From Obtaining Contraceptive Care, Which Also Increase Their Risk Of Unintended Pregnancies

Sexual minority women face economic and social barriers to contraception, which also increase their risk of unintended pregnancies.

Sexual minority women are more likely to lack insurance and financial means than their heterosexual counterparts and thus less likely to seek care. Thomas Buchmueller & Christopher S. Carpenter, *Disparities in Health Insurance Coverage, Access, and Outcomes for Individuals in Same-Sex Versus Different-Sex*

⁵ <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf>.

Relationships, 2000-2007, AM. J. PUBLIC HEALTH, Mar. 2010, at 489, 492-93. For example, one study of Black sexual minority women in the southern United States found that 59.4% of study participants had no primary care provider. Madina Agénor et al., *Sexual Orientation and Sexual and Reproductive Health among African American Sexual Minority Women in the U.S. South*, 26 WOMEN'S HEALTH ISSUES, no. 6, 2016, at 612, 615. As a result, sexual minority women are less likely to use birth control and make regular gynecological visits. Bethany G. Everett & Stefanie Mollborn, *Examining Sexual Orientation Disparities in Unmet Medical Needs Among Men and Women*, POPUL. RES. POLICY REV., Aug. 2014, at 553, 556-57.

When they do seek health care, sexual minority women are vulnerable to mistreatment. In one survey of respondents from all 50 states, nearly ten percent of LGBQ people who had visited a doctor in the last year said that a doctor or other health care provider refused to see them because of their actual or perceived sexual orientation. Shabab Ahmed Mirza & Caitlin Rooney, Ctr. for Am. Progress, *Discrimination Prevents LGBTQ People from Accessing Health Care* (Jan. 18, 2018).⁶ In particular, sexual minority women are significantly less likely to receive contraceptive counseling or care, which puts them at an elevated risk of unintended pregnancy. Jenny A. Higgins et al., *Sexual Minority Women and Contraceptive Use: Complex Pathways*

⁶ <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care>.

between Sexual Orientation and Health Outcomes, AM. J. PUB. HEALTH, Dec. 2019, at 1680, 1680 (2019); Stoffel, *supra*, at 460 (summarizing studies).

These barriers to contraceptive care are even more formidable for transgender and nonbinary individuals, with one-third reporting being refused treatment, verbally harassed, or physically or sexually assaulted by a medical provider, or having to teach the provider about transgender people in order to get appropriate care. S. E. James et al., *Executive Summary of the Report of the 2015 U.S. Transgender Survey* 8 (2017).⁷ As a practical matter, transgender and nonbinary people who need contraception face “barriers to care, social stigma and limited data regarding transgender health.” A. Francis et al., *Contraceptive Challenges and the Transgender Individual*, 4 WOMEN’S MIDLIFE HEALTH, no. 12, 2018, at 1, 4.⁸

C. Mississippi’s Law Harms Sexual Minority Women

Being denied an abortion can cause lasting harms. Even years later, women who are denied an abortion are more likely to face economic hardship. Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, AM. J. PUBLIC HEALTH, Mar. 2018, at 407, 407. In one study, women

⁷ <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

⁸ <https://womensmidlifehealthjournal.biomedcentral.com/track/pdf/10.1186/s40695-018-0042-1.pdf>.

denied an abortion were nearly four times more likely to have household income below the federal poverty level and three times more likely to be unemployed than those who obtained abortions. Bixby Ctr. for Global Reproductive Health, *The Turnaway Study* (2020).⁹ These hardships are particularly salient for sexual minority women, who are already more likely to live in poverty or lack financial resources. *See supra* Part I.B.

Being denied access to abortion also exacerbates the harms caused by domestic violence and sexual abuse. Women who are unable to terminate unwanted pregnancies are more likely to stay with violent partners, exposing them and their children to greater risk of domestic abuse. Sarah CM Roberts et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, 12 BMC MED., no. 144, Sept. 29, 2014, at 1, 3-5.¹⁰ The “unique vulnerability of sexual minorities” puts them at high risk of experiencing these harms. Jones et al., *Sexual Orientation and Exposure to Violence*, *supra*, at 610.

Overall, health outcomes are also worse among women denied abortion services compared to those who received them. Lauren J. Ralph et al., *Self-reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion*

⁹ https://www.ansirh.org/sites/default/files/publications/files/turnaway_study_brief_web.pdf.

¹⁰ <https://bmcmmedicine.biomedcentral.com/track/pdf/10.1186/s12916-014-0144-z.pdf>.

Services: A Cohort Study, 20 ANNALS OF INTERNAL MED., no. 171, Aug. 20, 2019, at 238, 244-45.¹¹ Because many sexual minority women already experience health disparities (*supra* Part I.B), the added negative impact on overall health is especially significant.

In addition to these material and often life-altering harms, being denied the right to determine whether and when to have children deprives sexual minority women of their hard-won and not yet fully secured status as equal persons under the law. Like other women, sexual minority women have fought long and hard for the right to vote, to work in any occupation, to serve in our nation's military, and to exercise the same basic freedoms exercised by men. Similarly, it is only recently that LGBTQ people have secured recognition of their right to freedom of intimate association, to marry, and to work free from discrimination. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). No less than for other women, reproductive autonomy is an essential aspect of equality for sexual minority women.

¹¹ <https://www.acpjournals.org/doi/10.7326/m18-1666>.

II. *ROE* AND *CASEY* ARE CONSISTENT WITH IMPORTANT AND LONG-RECOGNIZED CONSTITUTIONAL PRINCIPLES

A. Overturning *Roe* And *Casey* Would Undermine The Consistency And Coherence Of Other Individual Rights And Equality Decisions

In addition to examining the practical effects of overruling precedent, *stare decisis* requires an examination of the “effects on the law and the legal system,” including the challenged decision’s “consistency and coherence with other decisions.” *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

Overruling *Roe* and *Casey* would represent a stark departure from the goal of maintaining coherence and consistency in this Court’s decisions. For starters, even when the Court has reconsidered its constitutional rulings, it rarely—if ever—overrules precedent to take away previously recognized individual rights. To the contrary, the Court’s most notable decisions overturning precedent have recognized the entitlement of previously excluded groups to constitutional liberties that belong equally to all persons. *See, e.g., Obergefell*, 576 U.S. 644; *Lawrence*, 539 U.S. 558; *Batson v. Kentucky*, 476 U.S. 79 (1986); *Craig v. Boren*, 429 U.S. 190 (1976); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Brown*, 347 U.S. 483; *Barnette*, 319 U.S. 624. Overturning *Roe* and *Casey* would create inconsistency and incoherence with respect to that

precedent. It would mark a sea change in this Court’s constitutional jurisprudence.

Overruling the landmark precedents of *Roe* and *Casey* would particularly conflict with this Court’s long-running recognition of basic equality principles. Abortion rights—like LGBTQ rights—are grounded in strong constitutional principles of equality. As Mississippi acknowledges (Pet. Br. 13), *Obergefell* did not purport to create a new right to “gay marriage” or “same-sex marriage.” Rather, the Court recognized that states cannot deny same-sex couples the same freedom to marry that different-sex couples enjoy. As this Court held, that disparate treatment “abridge[d] central precepts of equality.” *Obergefell*, 576 U.S. at 675.

Similarly, *Lawrence* advanced “[e]quality of treatment” by recognizing that the guarantees of due process and equal protection “are linked in important respects,” and that a decision based on “the due process right to demand respect for conduct protected by the substantive guarantee of liberty” necessarily incorporates a requirement that such guarantees must be protected equally for all. 539 U.S. at 575. As Justice O’Connor noted, the Texas law struck down in that case “treat[ed] the same conduct differently based solely on the participants.” *Id.* at 581 (O’Connor, J., concurring in judgment). The law “ma[de] homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.” *Ibid.*

Like denying marriage to same-sex couples or criminalizing same-sex relationships, pre-viability abortion restrictions deny women equal treatment under the law. The Court has held that *all* individuals—regardless of marital status—have a right to decide whether and when to have children. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). And the Court has never held that *any* individual may be categorically compelled to undermine or sacrifice their own health or life to serve a state interest. But to deny women the ability to determine whether to continue or end a pregnancy does just that. *Casey*, 505 U.S. at 857 (noting that this Court’s “cases since *Roe* accord with *Roe*’s view that a State’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims”). It elevates a purported state interest in compelling procreation above a woman’s interest in determining the course of her own life—a freedom that is essential to women’s equal membership in our society.

B. Forcing Sexual Minority Women To Undergo Pregnancy And Childbirth Against Their Will Is A Form Of Subordination That Undermines Their Equal Citizenship

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Casey*, 505 U.S. at 856. And “legal challenges to undue restrictions on abortion procedures * * * center on a woman’s autonomy to determine her life’s course,

and thus to enjoy equal citizenship stature.” *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). Mississippi seeks to take from women that very control over their reproductive lives.

Parenthood is a significant responsibility, perhaps the most significant societal role many Americans take on in their lifetimes. Like marriage, it is one of “society’s most basic compact[s].” *Obergefell*, 576 U.S. at 679. These “[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person.” *United States v. Windsor*, 570 U.S. 744, 772 (2013). But such responsibilities must be assumed freely. Using the power of the state to “conscript[] women’s bodies into its service” treats women as subordinates, not as equal persons who must be free to make life-altering decisions without unjustified governmental interference. *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part).

The stakes are high. As explained above, women denied an abortion are far more likely to earn less, become unemployed, and fall into poverty compared to those who received abortion care. *See supra* p. 11; Foster et al., *supra*, at 407-13; Bixby Center, *The Turnaway Study*. Those outcomes exacerbate existing disparities based on sex. Just last year, women’s annual earnings in the United States were 82.3% of men’s. Janelle Jones, U.S. Dep’t of Labor Blog, *5 Facts About the State of the Gender Pay Gap* (Mar. 19,

2021).¹² Layoffs and childcare shortages caused by the pandemic “have forced many women out of the workforce entirely,” regressing women’s labor force participation rate back to what it was in April 1987. *Ibid.* Mississippi’s characterization of the United States as a place where childbearing and parenting no longer pose any barriers to women’s full equality (Pet. Br. 5) bears little resemblance to reality. That is especially true for sexual minority women, who are more likely to lack financial means than their heterosexual counterparts. *See supra* Part I.B.

More broadly, permitting states to abridge women’s freedom to decide whether to have a child would deal a staggering blow to their status as equal citizens. “Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia*, 518 U.S. 515, 532 (1996) (referring to *Reed v. Reed*, 404 U.S. 71 (1971)). Like the policies struck down in those decisions, Mississippi’s law forces women into a predetermined role, simply because they are women.

¹² <https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-gap>.

C. Pre-Viability Bans On Abortion Are Impermissible Sex Discrimination

Laws that classify based on sex violate Equal Protection unless supported by “an exceedingly persuasive justification.” *Virginia*, 518 U.S. at 531. As explained in greater detail by other amici, pre-viability bans on abortion fail that test. *See* Amici Br. of Equal Protection Constitutional Law Scholars.

Like anti-LGBTQ discrimination, abortion bans discriminate based on sex. In *Bostock*, this Court held that discrimination because of a person’s sexual orientation or transgender status necessarily discriminates based on sex. 140 S. Ct. at 1737. Because being gay or transgender is a sex-based trait, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741.

By the same logic, laws that restrict abortion also facially discriminate based on sex. Like being LGBTQ, pregnancy is a sex-based characteristic; it is “inextricably bound up with” an individual’s sex. *Id.* at 1742; *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 733 n.6 (2003) (stating that a “pregnancy disability leave” that is not based on gender-neutral medical criteria is

a “gender-discriminatory policy”).¹³ Accordingly, laws that force a pregnant woman to bear a child necessarily discriminate based on sex, as would a law that barred a reproductive medical procedure available only to men. For example, if Mississippi barred men from obtaining vasectomies, such a law would discriminate based on sex and would be upheld only if the state could show “an exceedingly persuasive justification.” *Virginia*, 518 U.S. at 531.

This Court has already held that the state has no interest strong enough to justify restricting a woman’s ability to obtain a pre-viability abortion. *Casey*, 505 U.S. at 860 (affirming “*Roe*’s central holding, that viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions). This Court should affirm that precedent here and ensure that all women, including those who are sexual minorities, continue to enjoy equal protection of the laws.

¹³ But compare *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (stating that not “every legislative classification concerning pregnancy is a sex-based classification like those” rising to the level of “invidious discrimination” in prior cases), with Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 170-71 (2020) (noting that later “equal protection cases holding that laws regulating pregnancy are part of the equal protection heightened-scrutiny framework” call *Geduldig* into question).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 15-274

IN THE
Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,

v.

KIRK COLE, COMMISSIONER,
TEXAS DEPARTMENT OF STATE
HEALTH SERVICES, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL
DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF PETITIONERS
AND SUPPORTING REVERSAL**

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the nation’s oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender (“LGBT”) people and people living with HIV through impact litigation, education, and policy advocacy. *Amicus* submits this brief in support of Petitioners.¹

Amicus submits this brief to explain why laws restricting access to abortion implicate not only the Due Process Clause’s liberty guarantee but also the equal protection guarantee of the Fourteenth Amendment because such laws deprive women of equal dignity, moral agency, and participation in the life of this nation. For several interrelated reasons, *Amicus* has an interest in opposing restrictions to abortion that unduly burden women.

First, the landmark cases in which this Court vindicated lesbian and gay individuals’ constitutional guarantees of liberty and equality share a common doctrinal foundation with this Court’s jurisprudence protecting procreative decision-making, access to contraception, and abortion. Lambda Legal participated as party counsel in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996),

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

and as counsel for *amici curiae* in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which together provide some of the most explicit recent articulation of the interconnected and mutually reinforcing nature of liberty and equality claims brought under the Due Process and Equal Protection Clauses. These landmarks addressing the constitutional rights of lesbian and gay people to be free from discrimination and to exercise their fundamental rights to marry, to family integrity and association, and to sexual intimacy demonstrate how the values and protections embodied in the Due Process and Equal Protection Clauses reinforce and inform one another. These cases also reaffirm the Constitution's protection for the principles of equal dignity and equal participation in society.

Second, women (whether lesbian, bisexual, or heterosexual) and LGBT people share a common history of discrimination and subordination in this country, including through application and enforcement of sex stereotypes—such as those that undergird laws restricting abortion. This history of discrimination and related stigma continues to pose an obstacle to equal respect and participation in society by members of both groups, and to their ability to protect themselves in the political arena against discriminatory legislative measures. *Amicus* has an interest in challenging laws that require conformity with sex stereotypes or otherwise reinforce related double standards with respect to sexuality, marriage, and parenting, especially as such laws often work to the detriment of LGBT people.

Third, *Amicus* has an interest in this case because many members of the LGBT community need and use

abortion services, and share an interest in preservation of the constitutionally protected right of each woman not to continue a pregnancy.

SUMMARY OF THE ARGUMENT

When government intrudes on a fundamental right as central to individual autonomy and dignity as marriage, sexual intimacy, contraception, or abortion, government infringes on the burdened individual's ability to participate equally in society. Equality and liberty principles are inextricably linked and reinforcing when the right at stake is the ability to control one's destiny by defining for oneself whether, with whom, and when to create a family. A woman's constitutional right to elect an abortion is essential to her dignity and integral to her autonomy to determine her life's course, including the structure of her family, her educational and career trajectory, and her economic future, especially given persistent inequality in societal gender role expectations with respect to parenting. Laws unduly restricting access to abortion therefore not only deprive women of liberty but also deny them the ability to participate equally in society relative to men, and accordingly should be reviewed with care to satisfy the dictates of both the liberty and equality guarantees.

The legislative justifications for state laws regulating abortion also warrant close scrutiny for the additional reason that women who exercise their constitutional right to have an abortion experience stigma and discrimination, which, in turn, creates a structural obstacle to their ability to advocate in the political arena against measures that unduly burden their decision to end a pregnancy. In cases involving lesbians and gay men, courts have acknowledged a

similar social dynamic—that stigma and discrimination can impede the ability of a disfavored group to participate effectively in the political process to rectify unjust laws, including those designed to coerce personal decision-making and independence. As cases involving lesbians and gay men demonstrate, when a law disadvantages a stigmatized group that historically has been the target of discrimination and moral condemnation, equality principles require courts to take particular care in scrutinizing legislative justifications to determine whether they serve their stated purposes, and whether those purposes have a basis in fact. This Court should exercise similar care here—not only because the Due Process Clause requires it, but also because the Equal Protection Clause does as well.

This Court’s jurisprudence concerning abortion, pregnancy, and other aspects of a woman’s reproductive autonomy has recognized that laws regulating such autonomy implicate not just a woman’s liberty but also her ability to be respected fully and to participate equally in society relative to men. *Amicus* urges this Court to hold expressly that the constitutional right to choose abortion finds protection under the Equal Protection Clause as well as the Due Process Clause.

ARGUMENT

I. Government Intrusion on Fundamental Rights Central to Individual Autonomy, Dignity, and Moral Agency Burdens the Individual's Ability to Participate Equally in Society.

This Court has recognized on numerous occasions, including recently in *Obergefell*, *Windsor*, and *Lawrence*, that liberty and equality principles are linked and mutually reinforcing when the right at stake concerns choices an individual makes about marriage, sexual intimacy, and reproductive autonomy, including the decision to terminate a pregnancy. These decisions can be intimate, self-defining, and capable of changing one's life course. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.") (citation omitted) (emphasis in original). The Constitution shields such decisions from undue government interference both out of respect for individual liberty and autonomy, and also because the ability to make these decisions for oneself is central to a person's equal dignity and ability to participate in society relative to other people.

1. "The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles." *Obergefell*, 135 S. Ct. at 2602-03. Although the two Clauses are not always co-extensive, in cases

concerning intimate decision-making about family life, “the two Clauses may converge in the identification and definition of the right.” *Id.* at 2603. “Each concept—liberty and equal protection—leads to a stronger understanding of the other,” and the “interrelation of the two principles furthers our understanding of what freedom is and has become.” *Id.*

Thus, the exclusion of same-sex couples from the fundamental right to marry implicated equality concerns because it stigmatized and demeaned lesbian and gay people, disparaged their life choices, and diminished their personhood. *Id.* at 2602; *see also* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. F. 16, 19-20, 22 (2015); Kenji Yoshino, *The Supreme Court 2014 Term—Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 Harv. L. Rev. 147, 172-75 (2015). Denying same-sex couples the right to marry, “[e]specially against a long history of disapproval of their relationships,” imposed a disability on lesbian and gay people that “serve[d] to disrespect and subordinate them,” violating not just due process but equal protection as well. *Obergefell*, 135 S. Ct. at 2604; *see also* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 802 (2011) (Supreme Court’s “liberty-based dignity jurisprudence synthesizes both equality and liberty claims”). Key to this Court’s ruling in *Obergefell* was the recognition that laws denying same-sex couples the fundamental right to marry “serve[d] to disrespect and subordinate them,” which the Equal Protection Clause, like the Due Process Clause, forbids. *Obergefell*, 135 S. Ct. at 2604.

Liberty and equality principles were also mutually reinforcing in *Windsor*. That case struck down Section 3 of the “Defense of Marriage Act” (“DOMA”), which denied federal respect to the marriages of same-sex couples validly entered under state law, because DOMA violated these couples’ “equal dignity.” 133 S. Ct. at 2695. This Court explained that both liberty and equality values drove the result because, while the due process guarantee “withdraws from government the power to degrade or demean . . . , the equal protection guarantee . . . makes that Fifth Amendment right all the more specific and all the better understood and preserved.” *Id.* By permitting same-sex couples to marry, states “conferred upon them a dignity and status of immense import.” *Id.* at 2692. Denying respect to these marriages deprived couples of equality by denying them “a relationship deemed by the State worthy of dignity in the community *equal with all other marriages*,” a marriage reflective of “the community’s . . . evolving understanding of the meaning of equality.” *Id.* at 2692-93 (emphasis added); see also Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not “Argle Bangle”: The Inevitability of Marriage Equality After Windsor*, 23 Tul. J. L. & Sexuality 17, 25 (2014); Tribe, *Equal Dignity*, *supra*, at 17. Thus, *Windsor* established that state laws respecting a couple’s autonomy in determining for themselves whether to marry were central to the couple’s dignity, and that a federal law denying respect for their autonomy in such matters deprived the couple not only of liberty but of equality in relation to others.

Lawrence similarly recognized the connection between liberty and equality principles, explaining that vindicating gay peoples’ fundamental right to

enter intimate relationships with the individuals of their choice resolved the inequality problem created by sodomy laws. 539 U.S. at 575, 578. “[E]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.” *Id.* at 575. As this Court explained, laws criminalizing intimacy between people of the same sex “demean the lives” and “control the . . . destiny” of lesbian and gay people. *Id.* at 578; *see also* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 U.C.L.A. L. Rev. 99 (2007); Nan D. Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103 (2004). *Lawrence* “both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty.” Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004). Thus, the anti-subordination principle that undergirds *Obergefell*, *Windsor*, and *Lawrence* demands consideration of more than just how a challenged law restricting exercise of a fundamental right infringes liberty and autonomy, but also how the law may stigmatize burdened individuals and deprive them of full and equal membership in society.

2. *Obergefell*, *Windsor*, and *Lawrence* also acknowledge that societal understandings of liberty may evolve over time, and that the burden imposed on a person’s dignity in relation to others may not be evident at first.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the

Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell, 135 S. Ct. at 2598; *see Windsor*, 133 S. Ct. at 2689-90, 2695; *Lawrence*, 539 U.S. at 578-79; *see also Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) ("liberty's full extent and meaning may remain yet to be discovered and affirmed").

The scope of the liberty guarantee's protections may expand in new generations as the nation comes over time to understand and respect emerging claims to equal personhood by members of minority groups formerly dismissed or unheard. Prejudice can stem from "simple want of careful, rational reflection" or from "indifference or insecurity as well as from malicious ill will," *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring), and it can take time and familiarity for society to recognize the way a law has subordinated a group of people. "[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell*, 135 S. Ct. at 2603. Thus, liberty and

equality principles not only reinforce each other but inform each other over time.

Indeed, over the years society has held differing and evolving views of the morality and social acceptability of individual decisions about relationships, marriage, and reproductive autonomy alike. States for generations condemned and criminalized interracial marriage. *Casey*, 505 U.S. at 847-48. Lesbian and gay people also faced condemnation and criminalization of their relationships. *Lawrence*, 539 U.S. at 570. So, too, did society disapprove of and criminalize a woman's decision not to continue with a pregnancy. *Roe v. Wade*, 410 U.S. 113, 138-40 (1973).

However, as the nation grew to understand both the significance of decisions concerning family life, intimacy, and reproduction for all individuals, and the ways in which laws interfering with individual autonomy in these arenas stigmatize people and deprive them of dignity in relation to their peers, courts stepped in to protect against such government interference, recognizing that all individuals have a fundamental liberty interest in making such decisions for themselves. Thus, this Court struck down bans on interracial marriage as “[t]he reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.” *Obergefell*, 135 S. Ct. at 2603. Likewise, “[a]s women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity,” laws subordinating married women also fell. *Id.* at 2595; *see also id.* at 2604 (citing cases invalidating laws imposing sex-based marriage

inequality); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 135 (1994) (rejecting barriers to women serving as jurors that had been grounded in “outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas.’”) (citations omitted).

Similarly, with respect to lesbians and gay men, although *Lawrence* invalidated laws that made same-sex intimacy a criminal act, this Court recognized in *Obergefell* that striking down laws criminalizing lesbian and gay couples’ relationships did not sufficiently accord respect to these couples’ equal dignity. “While *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.” *Obergefell*, 135 S. Ct. at 2600. To extend the full promise of constitutional guarantees of liberty and equality to lesbian and gay people, this Court afforded affirmative recognition to their fundamental right to marry. Thus, it became evident that members of interracial couples, lesbians and gay men, and women cannot participate equally in society without governmental respect for their autonomy to make decisions about the structure of their families for themselves. To recognize the equal dignity and personhood of members of these groups, it was necessary to respect their moral agency.

Such decisions recognizing the common humanity of subordinated groups were not always universally well-received at the time or over time. With respect to each of these claims for equal dignity, “reasonable and sincere people” in good faith held opposing views.

Obergefell, 135 S. Ct. at 2594. The Court’s abortion rights jurisprudence, for example, has recognized from the start the diversity of religious traditions and moral views about pregnancy and women’s related life interests. *See, e.g., Roe*, 410 U.S. at 160-62 (noting the contrasts among Jewish, Protestant, and Catholic beliefs, *inter alia*, about when legally cognizable life begins, morality of abortion, and proper locus of decision). Given the longstanding disagreements among those moral visions—including some that oppose abortion in all circumstances, and others that charge individuals not to bring children into the world absent capacity to parent them—the Court appropriately and consistently has recognized that government may not substitute the preferences of legislative majorities for the individual’s freedom to make decisions about matters “so fundamentally affecting a person.” *Casey*, 505 U.S. at 851. Majoritarian moral disapproval is never, standing alone, an adequate justification for interfering in individual autonomy in these areas. *Romer*, 517 U.S. at 633-34; *see also Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring). For government to choose sides among competing moral views and constrain an individual’s autonomy on that basis would be to deprive that person of equal dignity.

3. The analysis this Court described for identifying and defining the fundamental right at issue in *Obergefell* constitutes an additional, independent reason to recognize the equality values implicated by a woman’s constitutional right to choose to have an abortion. *Obergefell* held that fundamental rights cannot be defined by the identity of the persons seeking to exercise those rights for the first time, because if that were permitted, “received practices

could serve as their own continued justification and new groups could not invoke rights once denied.” *Obergefell*, 135 S. Ct. at 2602 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Lawrence*, 539 U.S. at 566-67). *Obergefell*’s guidance for identifying fundamental rights, together with this Court’s repeated recognition that the liberty guarantee protects an evolving understanding of personhood and dignity—the full parameters of which may never be seen or appreciated by any one generation—means that laws implicating fundamental liberty interests may belatedly be recognized as having subordinated certain groups, thereby infringing on the equal liberty of members of those groups.

Obergefell’s fundamental rights analysis also makes clear that it is not necessarily material whether a government practice that infringes a group’s fundamental right was *intended* at the time of its passage to target that particular group. The oppressive and unjustified aspects of the law may become evident over time in light of current experience and understanding. “The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.” *Obergefell*, 135 S. Ct. at 2602. When courts redress infringements of fundamental rights to a historically subordinated group, courts not only remedy the deprivation of the fundamental right, but also the equality problem. Tribe, *Equal Dignity*, *supra*, at 19. In such cases—when a restriction impinges on both liberty and equality interests, stigmatizing a historically subordinated group by denying members of that group equal dignity—the Court need not determine whether purposeful intent to discriminate

against that group was present in order to conclude that the restriction violates the Equal Protection Clause. Thus, this Court could find that marriage bans infringe the Equal Protection Clause without having to perform an inquiry into whether such laws were motivated by a desire to discriminate against same-sex couples. Similarly, laws unduly restricting abortion can—and do—offend equal protection principles because they subordinate women and deprive women of dignity, even if these laws were not expressly intended to discriminate based on sex at the time they were passed.

As these and other precedents of this Court show, when burdens on a fundamental right rest heavily upon a disempowered group, “the Equal Protection Clause can help to identify and correct inequalities,” thereby “vindicating precepts of liberty and equality under the Constitution.” *Obergefell*, 135 S. Ct. at 2604.

II. Laws Unduly Burdening Access to Abortion Implicate the Equal Protection Guarantee Because They Deny Women Equal Participation in Society and Equal Dignity.

Laws restricting women’s access to abortion implicate equality values as a result of the unequal “organization of work and family roles in American society,” which continue to reflect deep and enduring differences in gender roles, and “double standards in sex and parenting.” Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 Yale L. J. F. 349, 350 (2015). Control over whether and when to give birth is not only of crucial dignitary importance,

it also affects women's health and sexual freedom, ability to enter and end relationships, education and job training, and ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions and expectations—particularly for those who already are marginalized as a result of class, income, race, or marital status. Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights*, 56 Emory L. J. 815 (2007). Laws infringing upon a woman's reproductive autonomy prevent her from participating in full partnership with men in the nation's social and economic life. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 Women's Rights L. Rep. 143, 143-44 (1978).

Although this Court in *Roe*, 410 U.S. at 129, located the abortion right in the due process guarantee, this Court also has recognized that laws restricting abortion or contraception, or containing pregnancy-related regulations, implicate equality values as well as due process concerns. For example, in *Casey*, equality considerations guided this Court in identifying the kinds of restrictions on abortion that violate the undue burden test. *See* 505 U.S. at 852, 856, 898. “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives,” *id.* at 856, and a pregnant woman's “suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.” *Id.* at 852. “The destiny of the woman must be shaped . . . [by] her own conception of her spiritual imperatives and her place in society.” *Id.*

Similarly, in *Thornburgh*, this Court explained, “A woman’s right to make [the] choice freely [to end her pregnancy] is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees *equally* to all.” *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (emphasis added); *see also Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; *rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.*”) (emphasis added).

The principles woven through these cases demonstrate that enforcing a woman’s liberty and autonomy to make choices about terminating a pregnancy is central to women’s equality in society and under the law. Regulations unduly interfering with a woman’s ability to make such decisions for herself fetter a woman’s access to equality in family, economic, and civic life, imposing unconstitutional burdens on her that a man need not suffer.

III. Equality Principles, as Well as Due Process Principles, Require Close Scrutiny of Legislative Justifications of Abortion Restrictions Because of the Difficulty of Rectifying by Legislative Means Laws Unduly Burdening Access to Abortion.

Cases vindicating equality claims brought by lesbian and gay litigants counsel close judicial review of the legislative justifications for abortion restrictions

for an additional and independent reason—because abortion has become a stigmatized medical procedure. This Court and many others have acknowledged and described, in the context of equality claims brought by lesbians and gay men, how stigma and discrimination can impede the ability of a stigmatized group to participate effectively in the political arena to prevent legislative passage of discriminatory measures. The obstacles posed by stigma, moral condemnation, and the history of discrimination experienced by members of a disfavored group warrant skeptical evaluation by courts of related legislation to ensure that a challenged law does not violate equality principles. An equality framework permits courts to acknowledge this dynamic and scrutinize the asserted governmental interests for an abortion restriction more closely—to ensure that these interests are sufficiently important and that the law is adequately tailored in service of those interests.

A substantial majority of women who have exercised their constitutional right to choose to end a pregnancy experience stigma, discrimination, and moral condemnation as a result. Tracy A. Weitz & Katrina Kimport, *The Discursive Production of Abortion Stigma in the Texas Ultrasound Viewing Law*, 30 Berkeley J. Gender L. & Just. 6, 8 n.8 (2015) (collecting studies).² This stigma results not just from the multiple and conflicting moral views about

²This is not to suggest that women later regret this choice or that their right to this autonomy should be diminished in any way. Research does not show evidence of a post-abortion “syndrome” of regret. *See, e.g.*, Brenda Major, Mark Appelbaum, Linda Beckman, Mary Ann Dutton, Nancy Felipe Russo, Carolyn West, *Abortion and Mental Health, Evaluating the Evidence*, 64 American Psychologist 9 (2009).

abortion in our society, but also because abortion challenges deep-seated gender norms about ideals of womanhood, including traditional stereotypes of women as mothers and self-sacrificing nurturers. *Id.* at 9-10; Paula Abrams, *Abortion Stigma: The Legacy of Casey*, 35 Women's Rights L. Rep. 299, 307 (2014); Anuradha Kumar, Leila Hessini, & Ellen M. H. Mitchell, *Conceptualising Abortion Stigma*, 11 Culture, Health & Sexuality 625, 628 (2009). Abortion has been further stigmatized as a medical procedure through laws that separate reproductive health services from mainstream medicine. Abrams, *supra*, at 302.

Abortion and same-sex relationships share a common history of criminalization and stigmatization. In the mid-nineteenth century, states began enacting legislative restrictions on abortion. *Roe*, 410 U.S. at 129; see also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 281-82 (1992). Prior to that, abortion was governed by common law, and was not a criminal offense if performed before “quickening,” the point at which a pregnant woman could perceive fetal movement—typically late in the fourth month of pregnancy. *Id.* at 282. Although statutes varied in form and severity, the cumulative effect of the new legislation was to prohibit abortion from fertilization. *Id.* The new statutes also “subjected women seeking abortions to criminal sanctions, and increased criminal penalties [for health care providers who violated state law] generally.” *Id.*

Although many states removed these criminal restrictions in the years prior to *Roe*, this history of

criminalization contributed to abortion-related stigma. When government criminalizes constitutionally protected conduct, such a “declaration in and of itself is an invitation” to subject the people who engage in that conduct “to discrimination both in the public and in the private spheres.” *Lawrence*, 539 U.S. at 575.

Criminal laws and other discriminatory measures that branded lesbian and gay people as immoral similarly stigmatized them and deprived them of dignity for much of our nation’s history. “Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity.” *Obergefell*, 135 S. Ct. at 2596. Indeed, homosexuality was treated as an illness for much of the 20th century, and classified as a mental disorder. *Obergefell*, 135 S. Ct. at 2596; William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. Rev. 1327, 1328-29 (2000). As is true of abortion-related stigma, many of the negative attitudes toward lesbian and gay people related directly to their failure to conform to traditional sex stereotypes. *Latta v. Otter*, 771 F.3d 456, 495 (9th Cir. 2014) (Berzon, J., concurring) (“[T]he social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.”). In the context of lesbians and gay men, the stereotypes often involved assumptions that women should enter relationships only with men, and

men only with women. *Id.* at 486; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1998 Wisc. L. Rev. 187, 221 (1998).

Fear of social and familial ostracism as well as the legal repercussions of “coming out” historically kept many lesbians and gay men “in the closet.” See Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev. 1753, 1795 n.184 (1996); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 819 (1997); see also Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 Va. L. Rev. 817, 882 (2014) (“Even when states began to repeal their anti-sodomy statutes and police harassment eased, the social stigma associated with homosexuality caused many individuals to continue to camouflage their sexual orientation for fear of losing their jobs, their friends, and their membership in various communities.”). More than a quarter century ago, Eve Sedgwick described “the closet [a]s the defining structure for gay oppression in this century.” Eve Kosofsky Sedgwick, *EPISTEMOLOGY OF THE CLOSET* 71 (1990). It is “a figurative space” that allows persons “to conceal their sexual orientation or gender identity to avoid the varied legal, social, and political consequences” that might result from one’s sexual orientation or identity being discovered. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. Rev. 1, 11 (2013). And while the closet can provide some limited protection from discrimination until disclosure happens, it is itself “threatening” and stigmatizing because it is “always a confinement—really a badge of inferiority.” William N. Eskridge, Jr., *Privacy*

Jurisprudence and the Apartheid of the Closet, 1946-1961, 24 Fla. St. U. L. Rev. 703, 705-07 (1997).

The closet poses a particular obstacle to achievement of legislative goals, as it is challenging for lesbians and gay men to advocate on their own behalf in the political arena if they cannot disclose that they are lesbian or gay. In an early case acknowledging the political costs of the closet, *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979), the California Supreme Court explained that coming “out of the closet” is essential before lesbian and gay people can associate with others to advocate in the political realm for equal rights. *Id.* at 610. Accordingly, that court held that a company’s decision to refuse to hire “manifest homosexuals” is necessarily a limitation on “political freedom.” *Id.* at 609, 611 (quotation marks omitted). Likewise, the Connecticut Supreme Court observed in striking down Connecticut’s ban on marriage for same-sex couples, “Gay persons . . . continue to face an uphill battle in pursuing political success” because discrimination and fears of violence “undermine efforts to develop an effective gay political identity.” *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 452 (Conn. 2008) (citing Kenneth D. Wald, *The Context of Gay Politics*, in *THE POLITICS OF GAY RIGHTS* 1, 14 (Craig A. Rimmerman, Kenneth D. Wald & Clyde Wilcox eds., 2000) (quotation marks omitted)). Consequently, lesbian and gay people “are disinclined to risk retaliation by open identification with the movement, and potential allies from outside the gay [and lesbian] community may think twice about allying their fortunes with such a despised population.” *Id.* (alteration in original). The Court explained that this reality is one of the reasons why

lesbian and gay people “have not enjoyed the same level of political success” as other minority groups. *Id.*

Obergefell also recognized the connection between public disclosure of stigmatized characteristics and successful public policy advocacy, describing a period of such intense discrimination against lesbian and gay people in this country that “[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken.” 135 S. Ct. at 2596. Only when lesbian and gay people began to live “more open and public lives” was there “a shift in public attitudes toward greater tolerance.” *Id.* Thus, one of the consequences of stigma and concealment is that it impedes people’s ability to associate with each other to achieve social change. See Yoshino, *Suspect Symbols*, *supra*, at 1756 (“[T]he closet captures the invisibility and isolation that hinder gays [and lesbians] in their political mobilization.”); see also Erving Goffman, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* at 3, ch. 1 (1963) (stigma reduces the bearer “from a whole and usual person to a tainted, discounted one,” can fundamentally define a person’s social identity, and can restrict the opportunities of stigmatized groups).

The stigma associated with abortion has created for many women a “closet” of their own, causing them to be reluctant to “come out” as having had an abortion. Abrams, *supra*, at 301, 306 (it is common that women who obtain abortions perceive or experience stigma and a need for secrecy; and many women conceal they have had abortions out of fear of social opprobrium), see also, e.g., Kristen M. Shellenberg & Amy O. Tsui, *Correlates of Perceived and Internalized Stigma Among Abortion Patients in*

the USA: An Exploration by Race and Hispanic Ethnicity, 118 Int'l J. Gynecology & Obstetrics (Supp. 2) S152, S152, S155 (2012); Alison Norris, Danielle Bessett, Julia R. Steinberg, Megan L. Kavanaugh, Silvia De Zordo & Davida Becker, *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 Women's Health Issues (Supp. 3) S49, S50 (2011); Brenda Major & Richard H. Gramzow, *Abortion as Stigma: Cognitive Implications of Concealment*, 77 J. of Personality & Soc. Psychol. 735, 735, 739-40 (1999). Indeed, this Court has recognized the importance to women of preserving the confidentiality of their decisions to terminate a pregnancy given the potential for hostile, coercive reactions. *See Thornburgh*, 476 U.S. at 766-67.

As with the stigma experienced by lesbians and gay men, the fact of having had an abortion can be “concealable,” meaning that the stigmatizing characteristic is unknown to others unless disclosed. Norris et al., *supra*, S49, S50. The stigma experienced by women who have abortions “advances a culture of secrecy around abortion” and “perpetuates the misconception that abortion is uncommon, further marginalizing the procedure.” Abrams, *supra*, at 302; *see also* Norris et al., *supra*, at S52 (“Silence is an important mechanism for individuals coping with abortion stigma; people hope that if no one knows about their relationship to abortion, they cannot be stigmatized. Nevertheless, even a concealed stigma may lead to an internal experience of stigma and health consequences.”). And just as is true for lesbians and gay men, the reluctance of many women to identify themselves as having used abortion services interferes with their ability to advocate on their own behalf and participate in the political process to rectify

burdensome abortion measures by legislative means. Norris et al., *supra*, at S50 (“concealing abortion is part of a vicious cycle that reinforces the perpetuation of stigma”).

These factors militate close scrutiny of the legislative justifications for abortion restrictions under an equality framework. Especially in contexts where society holds differing and conflicting moral views and legislation subordinates a stigmatized group, the Equal Protection Clause requires courts to exercise particular care in scrutinizing the expressed purpose for a law to ensure that it is grounded in fact rather than moral disapproval. *Romer*, 517 U.S. at 634-45; *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring) (“Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause. . . .”). *See also generally* *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (elevated scrutiny is appropriate in some circumstances at least in part because laws targeting groups for discriminatory treatment using these classifications are unlikely to be rectified by legislative means). Moreover, legislative justifications for laws that subordinate women “must be genuine, not hypothesized or invented *post hoc* in response to litigation,” and “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). The equality guarantee thus informs how the undue burden standard is applied, demanding rigorous review of whether an abortion restriction in fact serves its stated purpose. In the context of abortion restrictions that purport to serve women’s health needs, the Equal Protection Clause and the Due Process Clause converge to require a searching inquiry into whether the restriction actually promotes

women's health in determining whether the law unduly burdens abortion access.

CONCLUSION

The interlocking rights to due process and equal protection require careful review of the legislative justifications for the law challenged here, which operates to severely restrict women's access to abortion services and so perpetuates barriers denying women the autonomy to make such life-defining decisions for themselves. Women's equal dignity and ability to participate as full and equal members in family, educational, economic, and civic arenas hang in the balance.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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January 4, 2016

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

ANNA LANGE,

PLAINTIFF,

V.

**HOUSTON COUNTY, GEORGIA; and
Houston County Sheriff CULLEN
TALTON, in his official capacity,**

DEFENDANTS.

Civil Action: 5:19-CV-00392

**PLAINTIFF'S EXPERT WITNESS
REPORT FOR CHANEL HALEY**

I. ASSIGNMENT AND SUMMARY OF OPINIONS

1. My name is Chanel Haley and I am the Gender Policy Manager for Georgia Equality, and a certified Diversity & Inclusion Specialist. I was engaged by Willkie Farr & Gallagher LLP and the Transgender Legal Defense Fund ("Counsel") on behalf of their client, Plaintiff Sgt. Anna Lange, to provide an expert opinion in connection with the above-captioned litigation.

2. This report offers the following opinions based on my extensive experience working with members of the transgender community: Transgender individuals living and/or working in Georgia face significant discrimination in many facets of life, including accessing healthcare. Despite advocacy efforts by the transgender community, there are still substantial hurdles and resistance to the recognition of full, equal rights for transgender individuals.

II. BACKGROUND AND QUALIFICATIONS

A. Qualifications

3. I have worked for twelve years with and in state and local government and politics in Georgia, with a specific focus on the transgender community and transgender issues.

4. For the past six years, I have been the Gender Policy Manager for Georgia Equality – the state’s leading LGBTQ advocacy and political education organization. As the Gender Policy Manager for Georgia Equality, I lead efforts to ensure the inclusion of transgender and gender variant individuals and communities in nondiscrimination legislation and policies across a diverse portfolio, including employment, housing, public accommodations, law enforcement, safe schools, access to health care, education and voter registration access. I am also engaged in efforts to educate and build relationships with businesses, corporations, and government entities (including law enforcement departments) throughout the state of Georgia that may have little or no background or experience with LGBT issues or the LGBT community. My position also requires me to collaborate with local and statewide elected officials and other policymakers, which has given me unique insight and perspective on what it takes to build support and momentum for advancing transgender inclusion. I also spearhead Georgia Equality’s Trans Leadership Equality program, which is designed to strengthen advocacy skills among the rising generation of transgender individuals and prepare them for community leadership. Through my work at Georgia Equality, I have become acutely aware of the discrimination

that the transgender community faces in nearly all facets of life and the work that is still needed to achieve widespread acceptance of transgender individuals in our society.

5. From 2014 to 2018, I was the Chair of the City of Atlanta Human Rights Commission. The City of Atlanta established the Human Relations Commission to be a “vehicle for addressing illegal discrimination in public accommodations, private employment, and housing within the city.” The prohibited forms of discrimination under Atlanta ordinances include race, color, creed, religion, sex, domestic relationship status, sexual orientation, national origin, gender identity, age, and physical disability.

6. From 2009 to 2015, I worked in the Georgia Legislature and for Georgia State Representative Simone Bell as an aide. While working with constituents, committee aides, and legal counsel, I witnessed the many challenges advocates often face, even when trying to obtain something that should be simple, like a public hearing. The General Assembly is a white, cisgender-male-dominated body that rarely looks to take up legislation that its members cannot relate to.

7. I am also a regular presenter regarding the Georgia transgender community at universities and in the media throughout the state. As a member of the Georgia Advisory Committee to the U.S. Commission on Civil Rights, I co-authored the report “Disability Rights and Civil Rights in Georgia.” On behalf of the City of Atlanta, I also co-authored, “LGBTQI 101 for Housing Shelters,” an educational manual on LGBTQ nondiscrimination and inclusion for housing shelters.

8. Additionally, I am a board member for Trans Housing Atlanta Program, a

nonprofit committed to providing safe housing and appropriate services to transgender and gender nonconforming individuals who are homeless with the goal of facilitating independent living, employment, and reduction of risky behaviors.

9. I hold certificates in diversity and inclusion from Cornell University and paralegal studies from Penn Foster College.

10. A copy of my CV is attached as Exhibit A to this report.

B. Compensation

11. I am being compensated at the rate of \$300 per hour. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I may provide.

C. Previous Testimony

12. I have not given expert testimony at trial or by deposition during the past four years.

III. BASIS FOR OPINIONS

13. My opinions contained in this report are based on my education, training, and years of professional experience with government, politics, and transgender advocacy in Georgia. In addition, a list of publications I have relied on in preparing this report is attached hereto as Exhibit B.

IV. DISCUSSION

A. Transgender individuals living and/or working in Georgia face significant discrimination in many facets of life.

14. Based on my significant experience working with the transgender

community in Georgia as well as independent research I have conducted on the subject, it is my opinion that transgender individuals living and working in Georgia are subject to widespread discrimination, in both rural and urban areas throughout the state.¹

15. In 2015, the National Center for Transgender Equality conducted a survey examining the experiences of 2,771 transgender persons living in the United States, including 614 residents of Georgia (the “Transgender Survey”).² Respondents living in Georgia reported experiencing discrimination or mistreatment in connection with multiple facets of daily life, including employment, education, housing, public accommodations, restrooms, healthcare, police interactions, and identity documents.

16. Overall, 34% of Georgia respondents to the Transgender Survey who had held a job in the prior year reported being fired, denied a promotion, or experiencing other mistreatment in the workplace related to their gender identity or expression.³ With respect to education, 80% of Georgia respondents who were out or perceived as transgender at some point between kindergarten and grade 12 reported experiencing some form of mistreatment.⁴ Reported mistreatment included being verbally harassed, prohibited from dressing according to their gender identity, disciplined more harshly, or physically or

¹ See e.g., Victor Sledge, *Trans People See No Equality in Rural Georgia*, The Signal (Mar. 6, 2018), <https://georgiastatesignal.com/being-trans-in-georgia/>.

² 2015 U.S. Transgender Survey: Georgia State Report. (2017). Washington, DC: National Center for Transgender Equality *available* at <https://transequality.org/sites/default/files/docs/usts/GA-State-Report-FINAL.pdf> (“Georgia Report”).

³ Georgia Report at 1.

⁴ Georgia Report at 1.

sexually assaulted because people thought they were transgender.⁵ Georgia respondents also reported facing discrimination in housing and public accommodations.⁶

17. These reports are consistent with my understanding that transgender people across the state lack sufficient legal protections to prevent discrimination.⁷ The reports are also consistent with the anecdotal experiences I have witnessed through my work. As an employee of Georgia Equality and as a member of the Atlanta Human Relations Commission, I have fielded numerous complaints from transgender individuals who have reported being targeted, profiled, and harassed at work, school, and in public. For example, a transgender woman who volunteered for the United Service Organizations (“USO”) at an airport reported being subjected to the following humiliating incident:

- “I was handed the phone and [my supervisor] informed me that he had received Many complaints that I was in a ‘ridiculous outfit’. . . . Then he [said] that I better not be there when [his supervisor gets there]. I feel as a transgender lady that I was targeted by either the Airport or the USO or both and told to leave the Airport or else!! . I have since resigned as a volunteer for the USO. . . . I was targeted for discrimination simply because someone or others didn’t like the dress I was wearing. I am a Vietnam veteran and retired USAF Msgt yet now I feel unwelcome at the Airport USO facility and if I went to the Airport I would be targeted again and told [t]o leave or

⁵ Georgia Report at 1.

⁶ Georgia Report at 2.

⁷ Victor Sledge, *Trans People See No Equality in Rural Georgia*, The Signal (Mar. 6, 2018), <https://georgiastatesignal.com/being-trans-in-georgia/>.

else.”

A nursing assistant shared how difficult it is to be a transgender person working in healthcare:

- “I’m a [transgender] medical assistant, phlebotomist, and a certified nursing assistant. I’ve been in Georgia since December last year when I transferred my job Recently I haven’t picked up due to new training and when I did I got removed without notification from superior and notified by another worker I was discussed with. It’s a lot that occurred as far as discrimination when I first applied at the job and it’s not in their policy or vision per corporate company for me to feel or think this way. I need some help I’m trying to find a lawyer and get this situation handle and get advice nobody in our community should have to go through life FEELING like this.”

Parents of transgender students have reported struggling with finding safe spaces for their children to play sports.

- “I have a transgender son and I’m extremely proud of that fact. He is 12, almost 13, and a student at [a middle school in Georgia]. We have been told for the last two years that he will not be able to play on the boys’ teams for soccer, cross country, or even do baseball because of GHSA guidelines and regulations. I took it upon myself to review these rules myself and discovered . . . [i]f I’m reading the rules correctly, then my child should be able to play on the boys’ teams if the school would honor his gender

determination. . . . All I want to know is what I need to do. The school system is not prepared to listen to one person and that's all I am.”.

These are just three examples of the kinds of discrimination that transgender Georgians have brought to my attention during my years working to end it.

18. Other forms of discrimination often compound anti-trans discrimination, such as by race, sex, and class. So trans women, BIPOC trans folks, and poor trans folks are usually the worst hit. For example, in *The Grapevine: A Southern Trans Report* by the Transgender Law Center @ SONG, which details the findings of a survey of 135 transgender and gender nonconforming individuals from thirteen Southern states, found that 52% of participants of color reported experiencing high levels of violence by law enforcement versus 41% of total participants.⁸

19. Facing such discrimination, transgender people are likely to experience increased poverty and even homelessness, stress, and reduced feelings of self-worth. I know of one transgender woman, an employee of Middle Georgia College, who committed suicide after being fired from her job and being denied housing because she was transgender. Many transgender Georgians find it difficult to have self-esteem, maintain healthy relationships, and keep a positive outlook about the future when faced with widespread discrimination, especially when it is condoned by the state itself. People have told me that they feel like they are not a citizen, that they are being made to feel “small,” or

⁸ Transgender Law Center @ SONG, *The Grapevine: A Southern Trans Report*, <https://transgenderlawcenter.org/grapevine>.

that they are being targeted by a campaign of erasure or exclusion. Discrimination makes transgender Georgians feel like they are being told to not exist.

B. Transgender individuals living and/or working in Georgia often face significant discrimination in accessing health care.

20. Based on my significant experience working with the transgender community in Georgia as well as independent research I have conducted on the subject, it is my opinion that transgender individuals living and/or working in Georgia often face significant discrimination accessing quality healthcare.

21. Georgia respondents to the Transgender Survey reported facing discrimination and other mistreatment in connection with accessing health care because of their gender identity. For example:

- “33% of [Georgia respondents] who saw a health care provider in the past year reported having at least one negative experience related to being transgender. This included being refused treatment, verbally harassed, or physically or sexually assaulted, or having to teach the provider about transgender people in order to get appropriate care.”⁹
- “In the past year, 26% of [Georgia] respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person.”¹⁰

22. A 2017 paper, “Voices For Equity: How the experiences of transgender Georgians can inform the implementation of nondiscrimination provisions in the

⁹ Georgia Report at 3.

¹⁰ Georgia Report at 3.

Affordable Care Act,” provided results from a series of focus groups with transgender Georgians about their experiences seeking and receiving healthcare.¹¹ The paper found that 60% of transgender respondents reported discrimination in health care settings due to gender identity, including 33% of respondents who reported being denied care on the basis of their gender identity; 17% reported being denied care by a provider; and 12% reported being denied care by an insurance company due to their gender identity.¹² Conversely, only 38% had reported successfully using their health insurance to cover services related to gender transition.¹³ In focus groups, participants reported “difficulty accessing culturally and medically competent health care and finding prescribers willing to prescribe hormone replacement therapy” and that they were “less likely to seek care, delay obtaining needed care, or not returning for follow-up care due to experiences of culturally or medically incompetent care.”¹⁴

23. The findings in the Georgia Report and Voices for Equity are consistent with the experiences of transgender persons I have observed in connection with my work with Georgia Equality. Overwhelmingly, the experiences within the transgender community are that of adversities: lack of access to healthcare, lack of adequate healthcare, bad bedside manner. Some healthcare providers link a transgender person’s transition to an illness or injury that is unrelated. Some healthcare providers refuse to provide care to transgender

¹¹ Sarah Dobra, Laura Colbert, Voices For Equity: How the experiences of transgender Georgians can inform the implementation of nondiscrimination provisions in the Affordable Care Act,” (2017), available at https://healthyfuturega.org/ghf_resource/voices-for-equity/ (“Voices for Equity”).

¹² Voices for Equality at 6.

¹³ Voices for Equality at 9.

¹⁴ Voices for Equality at 6.

people at all. Most insurance companies classify at least some transition-related procedures as “elective” surgeries. Even where coverage is provided, insurance companies erect significant barriers to requiring coverage, for example, by requiring multiple recommendations from mental health professionals for approval of surgery.

24. It is unsurprising that transgender individuals in Georgia face these barriers to obtaining healthcare, because there are very limited legal protections for transgender persons in terms of accessing care. For example, absent a medical emergency requiring life-saving care, under Georgia law a provider is under no legal obligation to provide health care to a transgender person because there is no state law prohibiting a health care provider from abandoning transgender patients provided they are in stable condition.¹⁵ In the early 2000s, Robert Eads, a transgender man diagnosed with ovarian cancer, was turned down for treatment by a dozen doctors out of fear that treating such a patient would hurt their reputations. By the time Eads received treatment, the cancer was too advanced to save his life. Since then, four transgender-friendly clinics have been established in three Georgia cities: Atlanta, Savannah, and Augusta. Although these clinics have helped to ensure that transgender patients do not die from providers refusing to treat them because they are transgender, having only four facilities in three cities means that transgender people have severely limited choices, often cannot get care in their own communities, and often face long waits or drives in order to get healthcare. Nevertheless, I advise

¹⁵ Victor Sledge, *Trans People See No Equality in Rural Georgia*, The Signal (Mar. 6, 2018), <https://georgiastatesignal.com/being-trans-in-georgia/>.

transgender Georgians in communities throughout the state to make the drive to a transgender-affirming clinic—even if it is 150 miles or more each way—as the better alternative to being discriminated against by doctors in their community. As reported in *Voices for Equity*, transgender Georgians who do not seek care from these few, trained, affirming providers continue to have doctors tell them that their identity is wrong, unwantingly push their religious beliefs on them, question their need to transition, refuse to use their proper name or pronoun with them, or refuse to provide them appropriate healthcare – even during medical emergencies.¹⁶ These problems are especially severe for transgender Georgians of color or those with limited English proficiency.¹⁷

25. As reported in the Transgender Survey, an additional barrier to health care access faced by transgender persons is transgender health care exclusions. “20% of [Georgia] respondents reported experiencing a problem in the past year with their insurance related to being transgender, such as being denied coverage for care related to gender transition or being denied coverage for routine care because they were transgender.”¹⁸ In my professional experience, many transgender Georgians are unable to obtain gender-affirming healthcare because their health plans exclude it. Some health plans contain outright exclusions or classify certain procedures as cosmetic. Even if a health plan provides coverage for gender-confirming healthcare, the insurance company still requires transgender persons to jump through a lot of hoops before they can obtain coverage for their

¹⁶ *Voices for Equity* at 7-8, 10-11.

¹⁷ *Id.* at 11-12.

¹⁸ Georgia Report at 3.

care. For example, insurance companies often require letters and evaluations from multiple mental health professionals and medical doctors that are specialists.

26. Transgender individuals who move to Georgia from other states are often shocked to face these barriers. For example, Anthem Blue Cross Blue Shield covers gender-affirming care in other states, but not in Georgia, and many other plans offered by other health insurance providers in Georgia also do not cover it. As a result, transgender people who move to Georgia actually lose healthcare coverage that was available to them in another state.

27. Through dozens of complaints and stories told to me by attendees at town hall meetings we have run at Georgia Equality, I have witnessed the devastating impact that the inability to access gender-affirming healthcare can have on individuals. People lack self-worth when they cannot present as they see themselves or as they think or others think they should be seen. Lack of access to gender-affirming healthcare can leave transgender people feeling depressed, hopeless, angry, or withdrawn. Without access to treatment for their gender dysphoria, transgender people often turn to self-medication. Some transgender persons will opt to buy hormones off the street, which can lead to additional risks, such as exposure to dirty needles. Some will engage in substance abuse to mask the pain and shame of the look, feelings, and body they do not like. Many transgender individuals who have been denied transition-related care also fail to obtain treatment for other serious medical conditions they are living with, such as HIV or diabetes. Transgender people, who are already at risk of depression, often feel even more hopeless because of their inability to

access care, exacerbating the already high risk of suicide faced by transgender people.

C. Despite advocacy efforts, the transgender community faces ongoing resistance to the recognition of transgender rights.

28. The transgender community has organized to end discrimination. Grassroots groups focused on promoting transgender rights exist throughout Georgia. However, these groups are often very small and, especially outside major metropolitan areas, often operate underground. Many are focused on ensuring that transgender persons have access to basic services necessary for survival. For example, Trans Housing Atlanta Program (THAP) is a 100% volunteer-based organization, which provides housing resources to transgender people, responding to the reality that transgender people are routinely denied access to housing. LaGender & TransForming are two black trans-led organizations that advocate for the health and well-being of transgender people in Atlanta. A number of churches with large transgender populations, such as R.I.M. United Church of Christ Atlanta, lead initiatives for food and social justice projects to assist transgender individuals in need. Grassroots groups like Southerners On New Ground (“SONG”) also focus on social justice initiatives. TranscendentsSAV provides healthcare navigators and support groups for transgender people in Savannah.

29. Despite these efforts, the need for more assistance for transgender people in Georgia is great, especially to ensure that protections against employment discrimination are enforced, that transgender Georgians have access to healthcare, and that social services are available when needed. Because Georgia lacks comprehensive laws prohibiting discrimination against transgender people, the burden falls to individual transgender people

and the community to challenge companies and government entities to end their discriminatory practices. This process is time-consuming, slow, and difficult. Sometimes, we even lose ground. For example, Transgender Health Education Alliance (“THEA”) used to help healthcare providers obtain certification with the World Professional Association of Transgender Health (“WPATH”), which provides guidance on the need for fair healthcare for the transgender community. But it has now folded.

30. Despite their efforts, the transgender community has not been completely successful in getting Georgia state and local elected officials to stand up for trans rights. For example, I have worked for many years on the “Safe Schools Initiative” – an effort to combat anti-LGBT bullying and cyberbullying in Georgia schools. Thus far, only fourteen school districts have enacted policies to prohibit bullying against kids on the basis of gender identity.

31. Similarly, although we have successfully lobbied for the adoption of nondiscrimination ordinances in municipalities, we have been unsuccessful in our efforts to advocate for the adoption of a comprehensive statewide antidiscrimination law. Although Georgia law protects against discrimination on the basis of race, color, religion, national origin, sex, disability, and age, our legislators have been unwilling to extend these same protections explicitly to LGBT people. And even the local ordinances have problems and shortcomings. Although we have succeeded in getting them adopted in several localities, only Atlanta’s has an enforcement mechanism. And even there, although the Commission was established in 2000, it had no budget and did little or no work until I

became Chair in 2015 and ensured we met regularly and had a \$20,000 budget to investigate and respond to complaints.

32. Government entities across Georgia also continue to discriminate against transgender persons. For example, the State Health Benefit Plan does not cover transgender healthcare equally with other forms of healthcare and has refused to engage in discussions with Georgia Equality about ending this invidious discrimination.

33. Transgender people in Georgia often have difficulty accessing government services and aid for indigent persons. Due to discrimination, transgender Georgians are likely to be denied housing or food assistance, especially if they are unable to access assistance targeted at people with children or who are living with HIV. And yet, because transgender people are more likely to be lacking appropriate healthcare, they need the assistance even more.

34. Even the Georgia Commission on Equal Opportunity—the government entity charged with safeguarding Georgians from discrimination in housing and employment through enforcement of the Georgia Fair Employment Practices Act of 1978 and Georgia Fair Housing Law—is not inclusive of the LGBT community. In fact, the Commission has not brought any actions on behalf of complainants alleging discrimination on the basis of gender identity or sexual orientation.

35. The transgender community’s ongoing efforts to seek equal rights and protection have been met with resistance and even backlash. For example, in the past year there has been a spate of anti-transgender legislation introduced in the state legislature.

Certain of the bills sought to prohibit transgender youth from competing in K–12 and collegiate athletics, while other bills targeted the provision of gender-affirming care to trans youth and would have had the effect of preventing trans youth from receiving transition-related medical care or surgeries even with the approval of parents, mental health professionals, and medical doctors.

36. This state-sponsored discrimination has serious consequences. When your own government discriminates against you, it compounds the stigma and suffering, and sometimes internalized transphobia, that people already experience from being trans.

Signed: July 16, 2021
Atlanta, Georgia



Chanel Haley

EXHIBIT A

Chanel R. Haley

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Georgia Equality

2015 to Present

Gender Policy Manager

- Facilitated Gender humility trainings to over 25 organizations, businesses, schools, law enforcement, and government agencies.
- Developed civic engagement curriculum inclusive of voting rights and proper voter registration.
- Developed & launched new diversity inclusion trainings for policy and programming nationwide for executives and management.
- Doubled a number of Gender Humility coalitions across the Georgia region in schools and various organizations.
- Worked closely with elected policy makers around nondiscrimination legislation and policies.
- Coordinated with organizations on voter registration drives and turnout.
- Oversee the development and curriculum for a Leadership Academy. Training and graduating 21 new leaders in Georgia. Managing a 200k program grant budget
- Became a nationally recognized Public Speaker, with invitations coming from prestigious schools like Yale University.

ALL-1-Family Inc.

2020 to Present

Director of Administrative Operations

- Managing staff, work flows, and scheduling
- Monitoring daily operations
- Liaison between staff, vendors, and founder.
- Developing and promoting policies for staff.

City of Atlanta Human Relations Commission

2014-2018

Chairperson

- Updated the bylaws that were almost 20years old to comply with current laws.
- Removed social security requirement on complaint forms, securing people's privacy.
- Created a form for communications with the Mayor's office.
- Acquired \$20,000 for the commission, first time the commission had a budget.
- Closed seven discrimination cases.
- Oversaw one discrimination Hearing.
- Coauthored of S.L.E.E.P. Training Manual for Atlanta Housing Shelters.

Georgia State Representative Simone Bell

2010 to 2015

Senior Legislative Aide

- Taking constituent's phone calls, registering their opinions/concerns/ideas, provide constituents with information.
- Scheduling for the legislator.
- Conducting policy research.
- Attend legislative caucus, delegation, & committee meetings.
- Create and manage database.
- Meet with constituents, school groups, & lobbyists.

Friends of Simone Bell

2009 to 2012

Office Manager

- Manage the campaign office.
- Recruit, train, & manage canvassing volunteers.
- Write phone banking scripts.
- Coordinate and assign phone banking list and schedules.

Georgia House of Representatives

2012 (session)

Legislative Administrative Assistant

- General clerical duties including answering, screening, & transferring calls for eight legislators.
- Schedule & coordinate meetings & appointments for eight legislators.
- Prepare & modify documents including reports, drafts, memos, & emails for eight legislators.

Presentations & Engagements:

Keynote Speech: UGA LGBTQ Resource Center Connect Conference

- <https://www.youtube.com/watch?v=qvNJVr3MJcw>

Equality Federation FED Talk: “Being Homeless & Transgender in Atlanta”

- <https://www.youtube.com/watch?v=rFGmFXIgOPI>

Panel Discussions:

- Georgia State University
- University of North Georgia
- Georgia Tech University
- Mercer University Law School
- Yale University

Lectures:

- Emory University
- Wesleyan College
- University of West Georgia
- Spelman University
- Armstrong University
- Middle Georgia University
- Kenyon College
- University System of Georgia Title IV Compliance Conference
- Federal Bureau Of Prisons Administrative Staff
- Savannah River Site
- Borders & Customs Atlanta

Media Appearances:

- GA Voice
- WFXG – Augusta
- Creative Loafing
- CBS46 – Atlanta
- Atlanta Tribune “Who’s Who in Black Atlanta”
- ProjectQ

Honors:

City of Atlanta Police Department

Citizens Police Academy Graduate (2018)

HR 2090 Resolution commendation (2012)

Authored by the Georgia Speaker of the House

United States Commission on Civil Rights

Georgia Advisory Committee Board Member, Secretary

Coauthored “Disability Rights & Civil Rights in Georgia”

Education:

| | | | |
|-----------------------------------|-------------------------------|------------------|-----------|
| Diversity & Inclusion Certificate | Cornell University | Ithaca, NY | 2020 |
| Management for Virtual Workplace | Georgia Center for Nonprofits | Atlanta, GA | 2020 |
| Volunteer Management | Georgia Center for Nonprofits | Atlanta, GA | 2020 |
| Change Management Certificate | Georgia Center for Nonprofits | Atlanta, GA | 2018 |
| Paralegal Studies Diploma | Penn Foster College | Scranton, PA | 2015 |
| Organizational Analysis | Coursera.org | Mountainview, CA | 2012-2013 |
| Introduction to Psychology | Coursera.org | Mountainview, CA | 2012-2013 |
| Music Theatre | North Atlanta High | Atlanta, GA | 1993-1997 |

EXHIBIT B

List of Documents Considered

1. 2015 U.S. Transgender Survey: Georgia State Report (2017); Washington, DC: National Center for Transgender Equality, *available at* <https://transequality.org/sites/default/files/docs/usts/GA-State-Report-FINAL.pdf>.
2. Chanel Haley, *Human Relations Commission End of Year Summary* (Nov. 16, 2017).
3. Letter from Atlanta Human Relations Commission to Mayer Reed (Aug. 17, 2017).
4. Sarah Dobra, Laura Colbert, *Voices For Equity: How the experiences of transgender Georgians can inform the implementation of nondiscrimination provisions in the Affordable Care Act* (2017), *available at* https://healthyfuturega.org/ghf_resource/voices-for-equity/.
5. Transgender Law Center @ SONG, *The Grapevine: A Southern Trans Report*, <https://transgenderlawcenter.org/grapevine>.
6. Trans Murder Monitoring, *TMM Absolute Numbers 2008-Sept 2020*, <https://transrespect.org/en/map/trans-murder-monitoring/>.
7. Victor Sledge, *Trans People See No Equality in Rural Georgia*, *The Signal* (Mar. 6, 2018), <https://georgiastatesignal.com/being-trans-in-georgia/>.
8. Email to chanel@georgiaequality.org re: *Trans Advocacy and Rights in South GA [Middle School, GA School District]* (Aug. 14, 2018).
9. Email to chanel@georgiaequality.org re: “Fwd: I’m a transsexual woman who is being discriminated against” (Oct. 25, 2016).
10. Email to Chanel@goergiaequality.org re: “Fwd: Discrimination complaint” (July 29, 2015).
11. City of Atlanta Human Relations Commission Complaint (Jun. 9, 2017).
12. City of Atlanta Human Relations Commission Complaint (Nov. 7, 2016).

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**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CITY AND COUNTY OF SAN FRANCISCO,
 Plaintiff,
 vs.
 ALEX M. AZAR II, et al.,
 Defendants.

No. C 19-02405 WHA
Related to
 No. C 19-02769 WHA
 No. C 19-02916 WHA

STATE OF CALIFORNIA, by and through
 ATTORNEY GENERAL XAVIER BECERRA,
 Plaintiff,
 vs.
 ALEX M. AZAR, et al.,
 Defendants.

**SUPPLEMENTAL DECLARATION OF
 DR. RANDI C. ETTNER, PH.D. IN
 SUPPORT OF PLAINTIFFS' MOTION
 FOR SUMMARY JUDGMENT AND
 OPPOSITION TO DEFENDANTS'
 MOTION TO DISMISS OR, IN THE
 ALTERNATIVE, FOR SUMMARY
 JUDGMENT**

COUNTY OF SANTA CLARA, et al.
 Plaintiffs,
 vs.
 U.S. DEPARTMENT OF HEALTH AND
 HUMAN SERVICES, et al.,
 Defendants.

1 I, Dr. Randi C. Ettner, declare as follows:

2 1. As detailed in my September 8, 2019 declaration submitted in support of the
3 plaintiffs' motion for summary judgment, I am a licensed clinical and forensic psychologist with a
4 specialization in the diagnosis, treatment, and management of gender dysphoric individuals. I also
5 am the secretary and a member of the Board of Directors of the World Professional Association of
6 Transgender Health (WPATH), and an author of the WPATH *Standards of Care for the Health of*
7 *Transsexual, Transgender and Gender Nonconforming People* (7th version).
8

9 2. I have been retained by counsel for Plaintiffs Trust Women Seattle, Los Angeles
10 LGBT Center, Whitman-Walker Clinic, Inc. d/b/a Whitman-Walker Health, Bradbury-Sullivan
11 LGBT Community Center, Center On Halsted, Hartford Gyn Center, Mazzoni Center, Medical
12 Students For Choice, AGLP: The Association Of LGBTQ+ Psychiatrists, American Association of
13 Physicians for Human Rights d/b/a Glma: Health Professionals Advancing LGBTQ Equality,
14 Colleen McNicholas, Robert Bolan, Ward Carpenter, Sarah Henn, and Randy Pumphrey as an
15 expert in connection with the above-captioned matter.
16

17 3. I submit this supplemental declaration in response to the Court's September 24,
18 2019 Notice Regarding Briefing requesting that the parties address "whether the word 'sterilization'
19 as used in the Church Amendments was intended to cover transgender medical operations and/or
20 gender reassignment surgery."
21

22 4. Attached as Exhibit A is a bibliography of additional relevant medical and scientific
23 materials I have relied upon in forming the opinions herein, in addition to my years of experience
24 and those already listed in my September 8, 2019 declaration.

25 5. If called to testify in this matter, I would testify truthfully and based on my expert
26 opinion.
27
28

1 **I. EXPERT OPINIONS**

2 6. A sterilization procedure is a medical procedure performed as a form of permanent
3 birth control. Thus, a sterilization procedure is one that is *intended* to function as a form of
4 permanent contraception.

5 7. The American College of Obstetricians and Gynecologists defines sterilization as
6 “a permanent method of birth control.” The U.S. Department of Health and Human Services
7 similarly defines sterilization as “a form of contraception (birth control) that is meant to be
8 permanent.”

9 8. By contrast, gender-affirming health care, such as hormone replacement therapy or
10 gender confirmation surgery (also known as gender reassignment surgery), are not sterilization
11 procedures because they are not performed for the purpose of contraception. Gender-affirming
12 health care is medically necessary for the treatment of gender dysphoria and can be life-saving for
13 transgender individuals diagnosed with gender dysphoria.

14 9. To be sure, studies document how transgender individuals desire to have children
15 and form families just like any other person (De Roo, et al., 2016; Wierckx, et al., 2012; De Sutter,
16 et al., 2002). Indeed, a majority of transgender men desire to have children (Wierckx, et al., 2012).

17 10. Some transgender people can, and sometimes do, seek to preserve their ability to
18 have children before undergoing any gender affirming medical procedure that will have an
19 *incidental* effect on their fertility. Others, who have commenced cross-sex hormone therapy and
20 choose to conceive, can stop hormonal treatment and stimulate reproductive organs.

21 11. There is documented evidence of transgender men becoming pregnant *after*
22 transitioning and having undergone cross-sex hormone therapy (Light, et al., 2014; Wierckx, et al.,
23 2012). Thus, transgender men are achieving pregnancy after having transitioned socially,
24 medically, or both.

1 12. Among the options available for fertility preservation to transgender men are: (1)
2 embryo banking; (2) oocyte banking; and (3) ovarian tissue cryopreservation (De Roo, et al., 2016;
3 Finlayson, et al., 2016). Transgender women can also preserve their fertility through
4 cryopreservation of sperm (De Roo, et al., 2016).

5 13. The options for fertility preservation available to transgender patients are no
6 different from those available to cancer patients undergoing treatments, including chemotherapy
7 and radiation, which can lead to infertility, a field known as oncofertility (Finlayson, et al., 2016).

8 14. It makes sense that the options for fertility preservation available to transgender
9 patients are the same as those available to cancer patients. In both instances, the patient is obtaining
10 medical treatment that may have an *incidental* effect on fertility, but which is obtained for the
11 primary purpose of treating a medical condition and not for contraception. For example, a
12 hysterectomy may be medically necessary for the treatment and alleviation of a transgender man's
13 gender dysphoria, just as hysterectomy may be medically necessary for the treatment of uterine
14 cancer or endometriosis.

15 15. Lastly, longitudinal studies show that gender confirmation surgery has been linked
16 with a reduction in the need for mental health treatment for transgender patients (Branstrom, et al.,
17 2019).

18 16. In other words, gender affirming health care is not a sterilization procedure. It is
19 not performed for the purposes of contraception. Rather, gender affirming health care, including
20 hormone replacement therapy and gender confirmation surgery, is medically necessary for the
21 treatment and alleviation of a transgender patient's gender dysphoria, which is a serious medical
22 condition that can result in significant clinical distress, debilitating depression, and suicidality.

23 //

24 //

//

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 7 day of October, 2019.

Respectfully submitted,

Dr. Randi C. Ettner
Dr. Randi C. Ettner

EXHIBIT A

BIBLIOGRAPHY

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Office of Population Affairs, U.S. Dept. of Health and Human Servs., *Sterilization*, available at: <https://www.hhs.gov/opa/pregnancy-prevention/sterilization/index.html> (last accessed Oct. 5, 2019).

Wallace S. A., Blough K. L., Kondapalli L. A. *Fertility preservation in the transgender patient: Expanding oncofertility care beyond cancer*. Gynecological Endocrinology. (2014) 30(12):868–871.

Wierckx K., Van Caenegem E., Pennings G., et al. *Reproductive wish in transsexual men*. Human Reproduction. (2012) 27(2):483–487.