

Testimony of Brittany Jones, Esq., Director of Advocacy for Family Policy Alliance of Kansas. Presented to the Senate Committee on Public Health and Welfare on February 11, 2020.

Chair Suellentrop, Vice Chair Berger, and members of the Committees, my name is Brittany Jones. I am an attorney and Director of Advocacy for Family Policy Alliance of Kansas. Family Policy Alliance of Kansas advocates for policies that strengthen families, stand for life, and protect religious freedom. We ally with 40 other state-based family policy organizations across the country.

I am here to express our grave concern that without a constitutional amendment, Medicaid will be used as new funding stream for abortion. I will be focusing specifically on how our Kansas Supreme Court's decision in *Hodes & Nauser v. Schmidt* paved the way to force our taxpayers to pay for abortions through Medicaid.

HOW *HODES AND NAUSER* LEADS TO THE EXTENSION OF MEDICAID FUNDING FOR ABORTION

The Kansas Supreme Court created a right to abortion in the Kansas Constitution in *Hodes and Nauser v. Schmidt*.¹ This case now requires that strict scrutiny, the highest level of scrutiny, be used in all cases dealing with abortion. This is an even higher standard of scrutiny than what the U.S. Supreme Court required in *Planned Parenthood v. Casey*, the case that set the current test for federal abortion cases.²

Strict scrutiny requires that the state have a compelling interest before it can limit a fundamental right. Further, the limitation must be narrowly tailored to meet the state's compelling interest. This standard assumes that the government regulation is invalid.

¹ *Hodes & Nauser, MDS, P.A. v. Schmidt*, 309 Kan. 610 (2019).

² *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that the undue burden does not allow the state to place an undue burden on the right to abortion before viability).

One of our state provisions most at risk because of this ruling is our prohibition on state funds going to pay for abortion. Kansas passed a law in 2013 with bipartisan support to ban the use of state appropriations from the general fund or a special fund for abortion.³ Historically this is one area that many Americans and especially Kansans agree. While they may have differing opinions on the morality of abortion – they can agree the government should not be paying for it.

However, based on the cases used in the decision and cases around the country, government funding restrictions is one of the things most at risk by this decision. We already know that at least five states have already required government funding of abortion under a strict scrutiny standard.⁴ More importantly, in the *Hodes & Nauser* decision in the section on strict scrutiny, the Court cited to these five rulings having to do with state funding and required abortions: *Valley Hospital Association v. Mat-Su Coalition for Choice* which required a nonprofit hospital to perform abortions because the hospital took government money and abortion was a fundamental right;⁵ *Committee to Defend Reproductive Rights v. Myers* which did not allow the state to deny funding abortions through Medicaid because there was a fundamental right to reproductive health;⁶ *Women's Health Center v. Panepinto*, which did not allow the state to deny Medicaid funding because there was a constitutional right to abortion in the state;⁷ and *Women v. Gomez*, which did not allow the state to restrict state funding streams to abortion because it abridged a fundamental right;⁸ and *Moe v. Secretary of Admin. & Finance* holding restrictions on funding under state Medicaid program was unconstitutional.⁹

By relying on these cases in its decision, the Court has set the groundwork for a case that will deny the state the ability to restrict any sort of funding for abortion and could even lead to mandating that hospitals that receive state funding to provide abortions. We will

³ Kan. Stat. § 65-6733 (2013).

⁴ *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (holding that the state cannot restrict access to abortion funding because it is a fundamental right protected by strict scrutiny); *Moe v. Secretary of Admin. & Finance*, 417 N.E.2d 387 (Mass. 1981) (holding restrictions on funding under state Medicaid program was unconstitutional); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (holding that funding restrictions on abortion violated a fundamental right to privacy); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (holding restrictions on public funding of abortion unconstitutional); *Women's Health Center v. Panepinto*, 191 W. Va. 436, (1993) (superseded by W.V. Const. Amend. 1) (holding that restricting Medicaid funds for abortion was a discriminatory scheme).

⁵ *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997).

⁶ *Committee to Defend Reprod Rights v. Myers*, 29 Cal. 3d 252 (1981).

⁷ *Women's Health Center v. Panepinto*, 191 W. Va. 436 (1993).

⁸ *Women v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995).

⁹ *Moe v. Secretary of Admin. & Finance*, 417 N.E.2d 387 (Mass. 1981).

no longer be able to rely on statutory protections in these areas because the Court will overturn them.

By relying on these cases in its decision, the Court has set the groundwork for a case that will eventually deny the state the ability to restrict any sort of funding for abortion and could even lead to mandating that hospitals that receive state funding to provide abortions. We will no longer be able to rely on statutory protections in these areas because the Court will overturn them.

Thank you.