

Date: February 11, 2020

**To: Kansas Senate, Public Health and Welfare Committee
Senator Gene Suellentrop, Chairman**

**From: Paul Benjamin Linton¹ and Elizabeth R. Kirk²
Regarding the Impact of *Hodes & Nausser, MDs, P.A. v. Schmidt*
on Medicaid Funding of Abortion (written, with phone testimony from Linton)**

In *Hodes & Nausser, MDs, P.A. v. Schmidt*,³ the Kansas Supreme Court found an independent right to abortion in the state constitution. Declaring abortion to be among Kansans' fundamental rights, the Kansas Supreme Court adopted the strict scrutiny test as the standard of judicial review for all laws touching on abortion, "regardless of degree."⁴ Once a plaintiff proves such an infringement, "the government's action is presumed unconstitutional" and the burden shifts to the State to establish its compelling interest and narrow tailoring of the law to serve it.⁵ The court defined a compelling interest as "not only extremely weighty, possibly urgent, but also rare."⁶

With the exception of the Florida Supreme Court,⁷ every state court that has recognized an independent state constitutional right to abortion and that has also adopted the strict scrutiny

¹ Paul Benjamin Linton is an attorney in private practice who specializes in state and federal constitutional law, legislative consulting and scholarly writing. He has published twenty law review articles and several articles in journals of opinion, as well as the leading treatise on abortion under state constitutions, *Abortion under State Constitutions: A State-by-State Analysis* (3d ed. 2020) (Carolina Academic Press).

² Elizabeth R. Kirk is a former law professor who specializes on matters pertaining to the family in law and policy. She is a writer and speaker and provides strategic consulting on related matters to policy leaders and legislators. She also serves as Director of the Institute for Faith and Culture at the St. Lawrence Catholic Campus Center at the University of Kansas.

³ *Hodes & Nausser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) (*per curiam*).

⁴ *Id.* at 493.

⁵ *Id.* at 496.

⁶ *Id.* at 497 (quoting Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273 (2007)).

⁷ See *Renee B. v. Florida Agency for Health Care Administration*, 790 So.2d 1036 (Fla. 2001).

standard of judicial review (as the Kansas Supreme Court did) has struck down restrictions on public funding of abortion when those restrictions have been challenged. Such restrictions have been declared unconstitutional on state constitutional grounds by the supreme courts of Alaska, California, Massachusetts, Minnesota and New Jersey,⁸ as well as by trial courts in Connecticut and Montana (in unappealed judgments).⁹ And, applying the equivalent of a “strict scrutiny” analysis under the state’s equal right provision, the New Mexico Supreme Court has also invalidated restrictions on public funding of abortion.¹⁰ Restrictions on public funding of abortion have been struck down on state constitutional grounds even under a standard of review that is less exacting than strict scrutiny.¹¹ **Given the overwhelming weight of state constitutional authority, it is a virtual certainty the Kansas restrictions on public funding of abortion would be struck down, if challenged on the basis of the opinion in *Hodes*.**

Moreover, the *Hodes* court cited five¹² of these cases favorably, relying upon them in support of its conclusion that there was an independent state constitutional right to abortion and that strict scrutiny was the appropriate judicial standard of review. **Therefore, it is reasonable to conclude that confronted with similar facts, the Kansas Supreme Court, as presently constituted and following its own precedent, would conclude that publicly funded abortion is required by its decision.**

⁸ See *State of Alaska, Dep’t of Health & Human Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001); *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982). See also *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (under state constitutional right to abortion, nonprofit hospital which accepted public funds was “quasi-public” institution and therefore could not refuse to permit its facilities to be used for elective abortions).

⁹ See *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986) (applying strict scrutiny); *Jeannette R. v. Ellery*, No. BDV-94-811 (Lewis & Clark County), Order of Motions for Summary Judgment (May 22, 1995).

¹⁰ See *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).

¹¹ See *Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003) (limited partial invalidity); *Women’s Health Center of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993) (overturned by a state constitutional amendment in 2018).

¹² *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); *Women of the State v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Women’s Health Center v. Panepinto*, 191 W. Va. 436 (W. Va. 1993).

State-Funded Abortions for Selected States for FY 2015*

State	Total Number of Abortions Performed (Occurrence) **	Total Number of State-Funded Abortions***	Number of State-Funded Abortions As A Percentage of All Abortions
Alaska	1,334	588	44.07%
California	148,400	88,466	59.61%
Connecticut	9,938	1,948	19.60%
Massachusetts	18,570	3,750	20.19%
Minnesota	9,861	4,023	40.79%
Montana	1,611	460	28.55%
New Jersey	22,991	10,277	44.70%
New Mexico	4,669	1,329	28.46%
Totals	217,374	110,841	50.99%

* Data from Vermont has been excluded because the state medical system is not representative of the systems that exist in the other States (in 2015, Vermont paid for more than 90% of all abortions performed in the State).

** All of the data in this column, except for California, is based on the CDC's Abortion Surveillance—United States, 2015, Morbidity and Mortality Weekly Report (Nov. 23, 2018). California does not collect and report abortion data. The Guttmacher Institute periodically publishes a report on the numbers of abortions performed in each State. The data in those reports for California is derived from abortion providers, not the State of California. The number of abortions given for 2015 in the chart is an interpolation of data published by the Guttmacher Institute for 2014 (157,350 abortions) and for 2017 (132,680 abortions). It should be noted that the Guttmacher Institute usually reports a somewhat higher number of abortions than does the CDC, whose reports are based entirely on state reporting (where the State reports such data).

*** All of the data in this column is based on a report by Kinsey Hasstedt, Adam Sonfield and Rachel Benson Gold, *Public Funding for Family Planning and Abortion Services, FY 1980-2015* (April 2017), published by the Guttmacher Institute.

Biographical Sketch

Paul Benjamin Linton is an attorney in private practice. He has been professionally engaged in the pro-life movement for more than thirty years, first at Americans United for Life (AUL), a national public interest law firm, where he was General Counsel, then in his own practice (where he also acted as Special Counsel for the Thomas More Society). Prior to working for AUL, Mr. Linton served as a law clerk and staff attorney for the Illinois Appellate Court and as an Assistant State's Attorney for the Cook County State's Attorney's Office (Chicago, Illinois).

Mr. Linton has represented *amici curiae* ("friends-of-the-court") in landmark beginning-of-life and end-of-life cases in the United States Supreme Court, including *Webster v. Reproductive Health Services* (1989), *Cruzan v. Director of the Missouri Department of Health* (1990), *Planned Parenthood v. Casey* (1992), *Washington v. Glucksberg* (1997), *Vacco v. Quill* (1997), *Stenberg v. Carhart* (2000), *Ayotte v. Planned Parenthood of Northern New England* (2006), *Gonzales v. Oregon* (2006), *Gonzales v. Carhart* (2007) and *Gonzales v. Planned Parenthood Federation of America* (2007), as well as defending traditional marriage in *Hollingsworth v. Perry* (2013), *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015). He was appointed as a Special Assistant Attorney General to represent the Territory of Guam in the defense of the Guam abortion prohibition (*Guam Society of Obstetricians & Gynecologists v. Ada*). In addition to his Supreme Court practice, Mr. Linton has represented parties, intervenors and friends-of-the-court in most of the federal circuit courts of appeals and more than one-half of all the state reviewing courts in the United States, including the Kansas Court of Appeals and the Kansas Supreme Court (in the *Hodes & Nauser v. Schmidt* case). He has worked closely on pro-life litigation with more than one-third of all the state Attorneys General in the United States. He has drafted or reviewed pro-life legislation in dozens of States and has testified on pro-life bills before legislative committees in several States. He has also drafted state constitutional amendments, including Tennessee's Amendment 1 (approved November 4, 2014).

Mr. Linton has published almost two dozen review articles on a variety of topics, including the history of abortion regulation, state and federal constitutional law, criminal law, religious freedom, sex discrimination and assisted suicide. In August 2008, he published the first comprehensive analysis of abortion rights claims under state constitutions, entitled *ABORTION UNDER STATE CONSTITUTIONS A State-by-State Analysis* (Carolina Academic Press 2008), which has received many favorable reviews. The third edition of this book has just been published by Carolina Academic Press. He has also published numerous articles in the journals *First Things* and the *Human Life Review*. In addition, he has been a guest lecturer in the Program in Human Rights & Medicine, University of Minnesota. Mr. Linton received his undergraduate (B.A. Honors) and law (J.D.) degrees from Loyola University of Chicago.