Family Policy ALLIANCE of Kansas

Testimony of Brittany Jones, Esq., Director of Advocacy for Family Policy Alliance of Kansas. Presented to the Special Committee on Federal and State Affairs on October 30, 2019.

Chair Barker, Vice-Chair Estes, and members of the Committee, 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.

We have grave concerns with the Kansas Supreme Court's ruling in *Hodes & Nauser v. Schmidt*, and the broad ramifications the opinion has for even the most reasonable regulations and common-sense decisions by the legislature in regards to abortion. This opinion created an unfettered right to abortion, and through the application of strict scrutiny to this right, called into question even the most reasonable regulations on abortion.

One of the most basic principles of maintaining the rule of law is that the laws of society should be knowable and stable.[1] The *Hodes & Nauser v. Schmidt* is anything but knowable.[2] In this decision, the majority's opinion took huge legal leaps and failed to lay out any application of its broad ruling, making it impossible to know the outcome of cases, as even the concurrence pointed out.[2]

The Court did not specifically apply strict scrutiny to any specific law, because it was only determining whether a temporary injunction was appropriate for the challenged law. The Court gave us little guidance on what strict scrutiny will actually look like when it is applied. However, since court opinions build upon each other and the sources previous opinions have used, the Court in *Hodes* gave us fairly clear indications of what this ruling means for Kansas laws.

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[1] *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, VOL 1. 125–28 (1753).
[2] *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461, 490 (Kan. 2019).
[2] Id. at 683–84.

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One of the most alarming and strongest indication the Court gave us is that restricting government funding of abortion would violate this new right. Disturbingly, the decision could easily require the state could fund abortions, especially through Medicaid.

Our legislature has prioritized protecting taxpayers from funding abortions.[3] The Court indicated through the cases it cited, that if *Hodes* is allowed to stay in place, restricting abortion funding in Kansas will be nearly impossible. Because abortion is now a fundamental right protected by strict scrutiny, if the Court follows the precedent it cited, it will require that state to fund abortions.

In the section discussing strict scrutiny, the Court cited to four rulings having to do with state funding of and required performance of abortions. [4] The case the Court relied on from Alaska required a nonprofit hospital to perform abortions because the hospital took government money and abortion was a fundamental right.[5] This case also has serious implications for the conscience rights of medical providers and institution.[6] The Court also relied on three similar cases from West Virginia, Minnesota, and California that did not allow the state to deny Medicaid funding because there was a constitutional right to abortion in the state constitution.[7]

These cases raise serious concerns for what a fundamental right to abortion protected by strict scrutiny will mean for many important laws in Kansas but also for our ability to legislate as needed in the future. By relying on these cases in its

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[3] K.S.A. § 65-6733; K.S.A. § 65-103b.

[4] *Hodes & Nauser, supra* note 2 at 668 (*citing Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *Committee to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252 (1981); *Women's Health Center v. Panepinto*, 191 W. Va. 436 (1993); *Women v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995)).

[5] *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997) (the court held that even though the hospital had a "sincere moral belief" that elective abortions were wrong, that was not enough to contradict a fundamental right to abortion).

[6] *Id.* at 971.

[7] *Committee to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252 (1981); *Women's Health Center v. Panepinto*, 191 W. Va. 436 (1993).

decision, the Court has set the groundwork for a case that could eventually deny the state any ability to restrict any sort of funding for abortion and could even lead to mandating that even private hospitals that receive state funding provide abortions.

The Court created an unfettered right to abortion that calls every law into question on the issue. By taking this decision completely out of the hands of Kansans through their elected representatives, the Court has tried to force it's philosophy by judicial fiat on the people of Kansas.

Our concerns with the Court's decision in *Hodes & Nauser* are not limited to those enumerated in this testimony. However, we are gravely concerned that the Court chose to rely on these cases could restrict the ability of the legislature to direct funding, as well protect the conscience rights of many Kansans.

It is imperative that the legislature do its part to protect the right of Kansans to implement reasonable regulations on the abortion industry by reversing this specific ruling through a Constitutional Amendment.

Thank you.