

Testimony of Teresa A. Woody
The Woody Law Firm PC
Committee on State and Federal Affairs
IN OPPOSITION TO HCR 5003
January 15, 2021

I am one of the co-counsel for Plaintiffs/Appellants in the case of *Hodes & Nauser MDs, P.A., et al. v. Derek Schmidt, in his official capacity as Attorney General of the State of Kansas, et al.*, Case No. 114,153. The case arose from a challenge to Senate Bill 95 (“S.B. 95”) enacted to ban and criminalize the most common method of second-trimester abortion, dilation and evacuation (“D & E”). The Trial Court issued a temporary injunction blocking the statute from going into effect until a decision on the merits is reached, on the grounds that Plaintiffs were substantially likely to prevail on their claims that the statute was unconstitutional under the Kansas Constitution. The Kansas Court of Appeals *en banc* affirmed the Trial Court’s decision.

The Kansas Supreme Court, 6-1, in a reasoned decision relying on Kansas law and precedent, held that Section 1 the Kansas Constitution Bill of Rights includes protection of the natural and fundamental right of personal autonomy, which in turn includes the right to determine whether to continue a pregnancy. The Kansas Supreme Court recognized this right as a fundamental right, but held that right may be regulated by the State so long as the State establishes a compelling State interest, and the regulations are narrowly tailored to promote that interest. The Kansas Supreme Court’s decision in *Hodes & Nauser* properly interprets the Kansas Constitution and provides both for the protection of a fundamental right – the right to determine whether to continue a pregnancy - while at the same time recognizing that the State of Kansas may impose regulations on that right in the instances of a compelling State interest, with appropriately tailored statutes or regulations. Thus, there is no need for a constitutional amendment of the Kansas Constitution with respect to abortion.

As of the Time of this Committee Hearing, There Has Been No Decision on the Merits as to the Constitutionality of S.B. 95.

Drs. Hodes and Nauser initially challenged the constitutionality of S.B. 95 in the Trial Court in Shawnee County. The trial court made factual findings, *inter alia*, establishing that D & E is the most common and established procedure for second trimester abortions, and that criminalizing that procedure would force women and their doctors to choose procedures that carry increased risks, may be untested in some circumstances, and may be impossible in some cases, without increasing the health and safety of the women. The trial court found that the doctors had shown a substantial likelihood of prevailing, and issued a temporary injunction that stayed the enforcement of S.B 95 until such time as a decision on the merits is reached.

The State, which had presented no evidence at the hearing on the temporary injunction, appealed strictly on the argument that the Kansas Constitution did not protect the right of a woman to determine whether to continue her pregnancy. The Kansas Court of Appeals, recognizing the importance of the issues raised in the appeal, ordered that the case be heard *en banc*, or before all of the fourteen judges that sit on the Court of Appeals. The Court of Appeals, in an equally divided opinion, affirmed the district court's order granting a temporary injunction. The Kansas Supreme Court held that Section 1 of the Kansas Constitution protects the right of a woman to determine whether to continue a pregnancy, but also protects the State's right to regulate that right where the State demonstrates a compelling State interest and regulations that are narrowly tailored to promote that interest. The Kansas Supreme Court then remanded the case back to the trial court in Shawnee County for further proceedings on the merits, stating: "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." Upon remand, Plaintiffs moved for summary judgment. The summary judgment has been briefed and argued before the District Court, but to date there has been no decision on the motion. Should the motion for summary judgment be denied, the trial court will hear evidence from both the Plaintiffs and the State. At this time, there has been no determination on the merits as to whether S.B. 95 is constitutional or unconstitutional, and no decision by the trial court as to whether it will issue a permanent injunction.

There Is No Necessity for a Constitutional Amendment Preserving the Right of the Legislature to Regulate Abortion. The Decision in *Hodes* Is Well-Reasoned and Is Based on Kansas Law and Precedent, and Recognizes that the Right to Personal Autonomy Encompasses Pregnant Women as well as All Citizens of Kansas. That Decision Also Recognizes the Rights of the Legislative Bodies to Regulate Abortion so long as the State Can Demonstrate a Compelling Interest, and the Regulation Is Narrowly Tailored to That Interest.

The Kansas Supreme Court's majority 6 -1 decision 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 is based on an extensive analysis of the development of the Kansas Constitution and its Bill of Rights, Section 1 of which was enacted even before the Fourteenth Amendment of the United States Constitution, along with a thorough review of the caselaw of Kansas. Based on this comprehensive analytical review, the Court holds that: "[S]ection 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." The Court then logically concludes that this right of personal autonomy must include pregnant women, as well as men.

The Kansas Supreme Court, having determined that personal autonomy is a fundamental right under the Kansas Constitution, then correctly required that in order to infringe on that right, the State must show a compelling interest, and tailor its regulation narrowly to promote that interest, following Kansas Supreme Court precedent regarding fundamental, constitutional rights. It is

well established law in Kansas that fundamental rights are analyzed under the strict scrutiny standard.

The Decision in *Hodes* Is No Outlier, but Is Consistent with the Decisions of Other States in Finding a Fundamental Right to Determine Whether to Continue a Pregnancy within their State Constitutions.

The Kansas Supreme Court is by no means alone in finding that its state constitution protects the rights of women to determine whether to continue a pregnancy. The States of Alaska, California, Florida, Iowa, Massachusetts, Minnesota, Montana, New Jersey, and New Mexico, among others, have held that their state constitutions protect a women's right to determine whether to continue a pregnancy. Every state supreme court facing this question, with one exception, has found that the state constitution encompasses the right to determine whether to continue a pregnancy. In almost all of these cases, the finding of this protection is based on the fundamental right of personal or bodily integrity and autonomy. Likewise, almost every state supreme court considering this issue has found that strict scrutiny is the appropriate standard through which to analyze regulations on abortion. The *Hodes* decision is consistent with the analysis of other state courts' holdings with respect to their state constitutions' fundamental protections

In summary, the Kansas Supreme Court properly analyzed the Kansas Constitution and Kansas caselaw in holding that Section 1 of the Kansas Constitution's Bill of Rights protects the fundamental right to determine whether to continue a pregnancy, and further properly stated the correct standard of strict scrutiny when analyzing regulation of that right. The State has the right and opportunity to present its claims that S. B. 95 serves a compelling State interest and is tailored to promote that interest. The Kansas Supreme Court's decision is in the mainstream of the decisions of state courts that have been presented with this issue. There is no need for a potential amendment to the Kansas Constitution relating to the right to regulate abortion.