Written Testimony of Elizabeth R. Kirk, J.D.
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Chairman John Barker, Chairman Rick Wilborn and members of the House and Senate committees, my name is Elizabeth Kirk and I am a legal scholar and former law professor. Thank you for the opportunity to address you today.

This testimony is focused on a narrow matter, namely, the nature of the standard of judicial review adopted by the Kansas Supreme Court in *Hodes & Nauser v. Schmidt*.[1] The most important (and decisive) point to emphasize for the members of the two committees is that the standard of judicial review adopted by the court in *Hodes* is so rigorous that it is likely to unsettle existing abortion law in Kansas and result in a legal landscape for abortion in this state that is more permissive of abortion than either the current federal standard or the original federal standard established by *Roe v. Wade*.

In order to appreciate the expansiveness of the court's holding, one needs to understand *Roe v. Wade* and the 1992 case which altered its impact, *Planned Parenthood v. Casey*. My task today is to provide a brief sketch of the key aspects of those two cases, background which demonstrates the astonishing breadth of the *Hodes* decision.

The central holding of *Roe v. Wade* was that laws involving a woman's decision to terminate her pregnancy implicate a right to privacy.[2] Describing the right to terminate a pregnancy as akin to a "fundamental" right, the Court determined that challenged abortion laws must be analyzed under the highest level of judicial review. This standard, "strict scrutiny," is known colloquially among lawyers as "strict in theory, fatal in fact."[3] Under strict scrutiny, in order for an abortion regulation to pass constitutional muster, the state must demonstrate that it has a "compelling state interest" and that the law in question is "narrowly drawn to express only the legitimate state interests at stake."[4]

The *Roe* Court acknowledged that states have legitimate interests that "grow as the woman approaches term,"[5] eventually becoming compelling. Therefore, it set forth the trimester framework for weighing those growing interests of the state.[6] Under that framework,

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[1] *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) (*per curiam*).
[2] *Roe v. Wade*, 410 U.S. 113, 153 (1973).
[3] This phrase originated in Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (referring to standard as "'strict' in theory and fatal in fact").
[4] *Roe* at 155.
[5] *Id.* at 162-63.
[6] *Id.* at 162-166.

during the first trimester of pregnancy, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician"[7] without interference of the state. Thus, states have no compelling interest during the first trimester that would justify regulating abortion at all. After the first trimester, states may regulate abortion "in ways that are reasonably related to maternal health."[8] After viability, states may regulate and even proscribe abortion because of its interest in the "potentiality of human life" but must include exceptions for the preservation of the life or health of the mother.[9]

In the years after *Roe*, very little legislation survived this heightened judicial scrutiny including many laws that today have broad support among most Americans, whether they identify as pro-life or pro-choice.[10] For example, under the *Roe* regime, the Supreme Court struck down a twenty-four-hour waiting period,[11] a parental consent requirement,[12] various informed consent requirements,[13] and a requirement of humane disposal of fetal remains.[14] Recall, maternal health wasn't a "compelling" state interest until the second trimester. So, federal appellate and district courts invalidated more than twenty first-trimester clinic health and safety regulations, including admitting privilege and clinic licensure requirements.[15] Two

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[7] *Id*. at 164.
[8] *Id.* at 164.
[9] *Id.* at 164-65. *See also Doe v. Bolton,* 410 U.S. 179, 192 (1973) (companion case to *Roe* which defined health as "all factors–physical, emotional, psychological, familial, and the woman's age–relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.").
[10] *See, e.g.,* Domenico Montanaro, *Poll: Majority Want to Keep Abortion Legal, but They Also Want Restrictions*, N.P.R. (June 7, 2019) *https://www.npr.org/2019/06/07/730183531/poll-majority-want-to-keep-abortion-legal-but-they-also-want-restrictions*
[11] *See City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 449-51 (1983) (striking Ohio 24-hour waiting period because the state failed to demonstrate a legitimate state interest that would be furthered by an "arbitrary and inflexible waiting period").
[12] *See Planned Parenthood v. Danforth,* 428 U.S. 52, 72-75 (1976) (invalidating a parental consent requirement determined to be an "absolute parental veto" over the decision of a minor to terminate her pregnancy); *Bellotti v. Baird*, 443 U.S. 622 (1979) (invalidating a parental consent requirement, without an alternative procedure where authorization can be obtained); *Akron*, 462 U.S. at 439-42 (striking Ohio parental consent requirement because it did not contain a judicial bypass); *Cf. H. L. v. Matheson*, 450 U.S. 398 (1981) (upholding Utah parental notification statute because it does not give parents a veto power over minor's abortion decision).
[13] *See, e.g., Akron*, 462 U.S. at 442-48 (striking Ohio informed consent requirement because it was designed to persuade or influence a woman's informed choice between abortion and childbirth, and finding no "vital" state need for the doctor performing the abortion to personally counsel the pregnant woman); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759-765 (1986) (striking law requiring informed consent, including provisions which require she be advised that medical assistance benefits may be available, because it is designed to persuade her and because it intrudes on the discretion of the pregnant woman's doctor).
[14] *See, e.g., Akron*, 462 U.S. at 451-52 (striking humane disposal requirement as impermissibly vague under the due process clause).
[15] *See, e.g., Baird v. Dep't of Pub. Health*, 599 F.2d 1098 (1st Cir. 1979) (invalidating first-trimester clinic licensure requirement); *Mobile Women's Med. Clinic v. Bd. of Comm'rs*, 426 F.Supp. 331 (S.D. Ala. 1977) (invalidating requirement that abortion physician have admitting privileges or an agreement with a physician with such privileges). *See also* Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 Vill. L. Rev. 45, 62 n. 84, 85 (2012) (listing courts which invalidated first-trimester clinic regulations in the wake of *Roe*).

scholars described the federal courts' jurisprudence in this area as having created a public health vacuum endangering the lives and health of women.[16] A notable exception to this was the consistent ruling that states may restrict the use of public funds or facilities for abortion, and that the right to abortion did not carry with it an affirmative funding obligation.[17]

By the early 1990s, many thought the Supreme Court might be poised to revisit, or even overturn, *Roe* based on its changed composition.[18] When the Court had the opportunity in *Planned Parenthood v. Casey*, it reaffirmed the essential holding of *Roe*, the right of a woman to have an abortion.[19] Nevertheless, *Casey* made significant changes to the legal standard of judicial review applicable in abortion cases, significantly expanding the latitude afforded to states in regulating abortion. *Casey* remains the governing federal standard today.

In *Casey*, abortion providers had challenged a Pennsylvania omnibus statute which contained a number of restrictions on abortion, including informed consent, a 24-hour waiting period, parental consent (with judicial bypass), spousal notification (with judicial bypass), and reporting requirements for abortion facilities.[20] All of these restrictions had been declared unconstitutional by the lower district court applying the strict scrutiny test of *Roe*[21] and it was ultimately appealed to the Supreme Court.

While affirming the central holding of *Roe*, the Court described the right at stake as a "protected liberty interest" (rather than akin to a fundamental right), and instead of strict scrutiny, *Casey* articulated a new standard of judicial review (made just for the abortion context) known as the undue burden test, under which a law is invalid if it has the "purpose or effect placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable

[16] Forsythe & Kehr, 57 Vill. L. Rev. at 65 (analyzing effect of Supreme Court's abortion jurisprudence on health and safety regulations for abortion clinic).
[17] *See Maher v. Roe,* 432 U.S. 464 (1977) (upheld Connecticut law which prohibited the use of Medicaid funds for non-therapeutic abortions and states are not required to show a compelling interest for its policy preference of childbirth to abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which prohibits the use of federal Medicaid funds to reimburse states the cost of abortions under the program, and the federal right to abortion carries with it no affirmative funding obligation); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (upheld a Missouri law which prohibited the use of public employees or facilities to perform abortions and prohibited the use of public funds, employees or facilities for the purpose of encouraging a woman to have an abortion); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upheld federal regulations prohibiting family planning clinics receiving Title X funding from abortion counseling or referrals).
[18] There were only three remaining justices from *Roe*, and two of them, Justices Rehnquist and White, had dissented. The Court now included six replacements, Justices Kennedy, O'Connor, Scalia, Souter, Stevens, and Thomas, all Republican appointees.
[19] *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 846 (1992).
[20] *Id.* at 844.
[21] *Planned Parenthood of SE Pa. v. Casey*, 744 F.Supp. 1323 (E.D. Pa. 1990).

fetus."[22] The Court also rejected the trimester framework in favor of a viability one.[23] Under the *Casey* rubric, before viability, the State may not create any undue burden on a woman's right.[24] However, the Court admitted that the states' interests during this early stage of pregnancy had "been given too little acknowledgement and implementation by the Court in its subsequent cases."[25] Therefore, before viability, the Court declared that regulation *is* permissible as long as it does not constitute an undue burden. For example, the Court said that states could take "steps to ensure that [the woman's] choice is thoughtful and informed,"[26] could create structural mechanisms by which the state, or the parent or guardian of a minor, expresses profound respect for life of unborn,[27] could pass measures designed to persuade a woman to choose childbirth over abortion,[28] could pass laws which have "the incidental effect of making [abortion] more difficult or expensive to procure,"[29] or regulations "to further the health or safety of a woman seeking an abortion."[30] Subsequent to viability, the holding of *Roe* was left in place, i.e., that states could regulate or even prohibit abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[31]

In articulating this new, relaxed standard of judicial review, and upholding all challenged provisions (except spousal notification), the Court conceded serious problems with the rigid strict scrutiny and trimester framework. In particular the court identified that strict scrutiny had "led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision"[32] and that it undervalued the "State's interests in the potential life within the woman."[33] Justices Blackman, in contrast, wrote separately urging the Court to continue to require all "*non-de-minimis* abortion regulations [be subject to] strict scrutiny" as

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[22] *Casey,* 505 U.S. at 877. This test has been further nuanced by the "large fraction" test articulated in *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (a law constitutes an undue burden if "in a large fraction of cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion") and by the "benefits-and-burdens balancing test" articulated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) ("The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.").

[23] *Id.* at 870.

[24] *Id.* at 879.

[25] *Id.* at 871.

[26] *Id.* at 872.

[27] *Id*. at 877.

[28] *Id.* at 878.

[29] *Id.* at 874.

[30] *Id.* at 878.

[31] *Id.* at 879.

[32] *Id.* at 875. *Casey* in fact overturned, in part, such prior decisions. *Id.* at 883 ("As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.)

[33] *Id.* at 875.

implemented by a trimester framework, and, as one would expect under this more rigid standard, he would have stricken all of the statutory provisions.[34]

Since the *Casey* standard was adopted, states have had more latitude to enact constitutionally permissible restrictions on abortion that reflect the policy preferences of the electorate and which have broad support from the American people, as Kansas has done, such as bans on partial-birth[35] and post-viability abortions,[36] required waiting periods where a woman is offered the option to view a sonogram,[37] or information about potential health risks,[38] prenatal development[39] and available pregnancy assistance,[40] a requirement that both parents give permission before a minor can have an abortion,[41] and health and safety standards in clinics.[42] Again, most of these restrictions had been held unconstitutional under *Roe.*

With that background, let us now turn back to the *Hodes* decision, in which the Kansas Supreme Court found a right to abortion in our state constitution. In a 6-1 *per curiam* decision, the Kansas Supreme Court interpreted Section 1 of the Bill of Rights to include the right to abortion. That section provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." The Kansas Supreme Court found that the word "liberty" protects a woman's right "to make decisions about whether she will continue a pregnancy."[43] This right, located in our state constitution, is independent of the existing federal right.

Declaring abortion to be among Kansans' fundamental rights, the Kansas Supreme Court adopted the rigorous strict scrutiny test.[44] The court specifically rejected the prevailing federal undue burden test, finding it difficult to understand and apply, less demanding than was appropriate for infringement of a fundamental right, too subjective, and without adequate precedent under Kansas law.[45] The court described two ways in which the strict scrutiny standard was more rigorous than the undue burden one. First, the court noted that once a plaintiff proves an infringement, "regardless of degree,"[46] "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.[47] In contrast, the court said that the undue burden test is a balancing test which distributes "the burden of proof roughly evenly between

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[34] *Id*. at 926 (Blackmun, J. concurring in part, dissenting in part).
[35] Kan. Stat. Ann. § 65-6721 (2020).
[36] Kan. Stat. Ann. § 65-6703 (2020).
[37] Kan. Stat. Ann. § 65-6709(h) (2020).
[38] Kan. Stat. Ann. § 65-6709(a)(3) (2020).
[39] Kan. Stat. Ann. § 65-6710(a)(2) (2020).
[40] Kan. Stat. Ann. § 65-6710(a)(1) (2020).
[41] Kan. Stat. Ann. § 65-6705 (2020).
[42] Kan. Stat. Ann. § 65-4a01 *et seq.* (2020).
[43] 440 P.3d at 491.
[44] *Id.* at 498.
[45] *Id.* at 494-95.
[46] *Id.* at 493.
[47] *Id.* at 496.

the plaintiff and state in a given case."[48] Second, the court noted that the undue burden test requires only that the governmental interest at stake be "legitimate" or "valid" rather than one that is compelling, which the court defined as "not only extremely weighty, possibly urgent, but also rare."[49] Concluding that the undue burden test "lacks the rigor demanded by the Kansas Constitution for protecting the right of personal autonomy at issue in this case,"[50] the court held that strict scrutiny best protected that right.

Opponents of a constitutional amendment have suggested that the state legislature remains free to regulate abortion.[51] Against the backdrop of *Roe* and *Casey,* this is plainly misleading. The standard adopted by the Kansas Supreme Court has an immediate concrete effect, one articulated emphatically by the court itself. Our court did not adopt a lock-step approach in which laws are interpreted consistently with federally applicable standards. Instead, it adopted the strictest standard, specifically rejecting the current undue burden standard of *Casey.* This is not a distinction without a difference. Indeed, post-*Hodes* submissions by plaintiffs in pending litigation (in the *Hodes* case itself and a challenge to the state's ban on telemedicine abortions) rely on this difference, describing the scrutiny standard of review as "the most exacting test courts apply"[52] and the "most searching" standard.[53]

The court's adoption of the most rigorous standard means that it will be far more difficult for the Kansas Legislature to adopt common-sense regulations on abortion. Just as common-sense regulations were struck down pre-*Casey*, our basic informed consent provisions (subject to a judicial bypass option), 24-hour waiting periods, and parental consent requirements, are now vulnerable under *Hodes*. This conclusion is not scaremongering. It is predictable and likely, for three reasons.

First, the experience of other states, like Kansas, that have found independent constitutional rights to abortion[54] and adopted a strict scrutiny standard of judicial review

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[48] *Id.* at 497.
[49] *Id. at 497 (quoting* Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273 (2007)).
[50] *Id.* at 497.
[51] *See, e.g.,* Hearing before Special Committee on Federal & State Affairs, October 30, 2019 (Statement of Rachel Sweet, Planned Parenthood).
[52] Plaintiffs' Mot. for a Case Mgmt. Conf., *Hodes & Nauser, MDs, P.A. v. Norman*, No. 2011-cv-1298 (D.Ct. Shawnee Kan. May 17, 2019).
[53] Brief of Appellant, *Trust Women Found. Inc. v. Bennett*, No. 19-121693-A (Kan. Ct. App. Oct. 30, 2019).
[54] In addition to Kansas, twelve states have found an independent right to abortion in their state constitutions. *See Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (adopting a strict scrutiny test); *People v. Belous*, 71 Cal. 2d 954 (1969); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (adopting strict scrutiny); *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745 (Ill. 2013) (adopting a "limited lockstep" standard of judicial review and applying the *Casey* test); *Planned Parenthood of the Heartland v. Reynolds ex re. State*, 915 N.W.2d 206 (Iowa 2018) (adopting strict scrutiny); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981) (adopting a "balancing of interests" test); *Women of the State v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (adopting strict scrutiny); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998) (adopting undue burden standard for abortion cases); *Armstrong v. State*, 989 P.2d 364 (Mont. 1999) (adopting strict scrutiny); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Hope v. Perales,* 634 N.E.2d 183 (N.Y. 1994); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (adopting strict scrutiny), *superseded by constitutional amendment* Tenn. Const. art. I, § 36 (2014).

reveals that they regularly strike down regulations which would pass muster under current federal law. Under strict scrutiny, Alaska has invalidated down funding restrictions, parental consent, and parental notification,[55] California has invalidated funding restrictions and parental consent,[56] Florida has struck down parental notice and parental consent,[57] Iowa has struck down a 72-hour waiting period,[58] Massachusetts has invalidated funding restrictions and a parental consent statute,[59] Minnesota has struck down funding restrictions,[60] Montana has invalidated a requirement that only physicians may perform abortions,[61] New Jersey has struck down funding restrictions and parental notice,[62] and Tennessee struck down informed consent and a waiting period.[63] All of those statutes and regulations would have been upheld under *Casey*, but were struck down under independent state constitutional analyses. In contrast, in states (like Ohio and Mississippi) that have adopted the undue burden standard, courts have upheld the statutes being challenged, like parental consent, informed consent, and waiting periods.[64] Given this persuasive precedent from other states, there is little reason to take the opponents' word for it that a broad range of Kansas statutes regulating abortion would survive strict scrutiny review. Indeed, the *Hodes* court relied on four of these cases (involving

[55] *Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001) (holding state ban on use of Medicaid funds for abortion unconstitutional); *State of Alaska v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007) (holding parental consent statute unconstitutional); *Planned Parenthood of the Great NW v. State*, 375 P.3d 1122 (Alaska 2016) (holding state's notification law unconstitutional).

[56] *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (holding that the state has no power to indirectly affect the choice of poor women by funding childbirth and not abortion); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (holding parental consent law unconstitutional).

[57] *In re T.W.*, 551 So.2d 1186 (Fla. 1989) (holding state parental consent statute unconstitutional); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003) (holding state parental notification statute unconstitutional), *superseded by constitutional amendment,* Fla. Const. art. X, § 22.

[58] *Planned Parenthood of the Heartland v. Reynolds ex re. State*, 915 N.W.2d 206 (Iowa 2018) (under strict scrutiny, a 72-hour waiting period held unconstitutional).

[59] *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981) (holding restrictions on public funding of abortions under state Medicaid program unconstitutional); *Planned Parenthood League of Mass. Inc. v. Attorney General*, 677 N.E.2d 101 (Mass. 1997) (finding requirement that more than one parent give consent to a minor's abortion unconstitutional).

[60] *Women of the State v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (using strict scrutiny, held "statutes that permit the use of public funds for childbirth-related medical services but prohibit similar use of funds for medical services related to therapeutic abortions impermissibly infringe on a woman's fundamental right of privacy").

[61] *Armstrong v. State*, 989 P.2d 364 (Mont. 1999) (using strict scrutiny standard, statute prohibiting physician assistants from performing abortions held to infringe upon the right to privacy of women).

[62] *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (striking restrictions on public funding of abortion); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000) (striking down state parental notice statute).

[63] *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2001) (using strict scrutiny standard, Court held unconstitutional a 2-day waiting period, a hospitalization requirement for abortions performed during the second trimester, and numerous informed consent requirements).

[64] *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993) (upholding informed consent and 24-hour waiting period under undue burden standard); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998) (upholding informed consent, 24-hour waiting period, and two parent consent (with judicial bypass) under undue burden standard).

restrictions on state funding of abortions),[65] which strongly suggests that the court finds those other states persuasive and believes publicly funded abortion will be required by its decision.

Second, in the *Hodes* decision, Justice Biles, while concurring in the result, wrote separately to criticize adoption of the strict scrutiny standard. Anyone who thinks that the strict scrutiny standard adopted by *Hodes* is not meaningfully different from the undue burden standard should read this concurrence carefully. He advocated the adoption of an "evidence-based analytical framework" based on the United States Supreme Court decision in *Whole Woman's Health v. Hellerstedt* which, he said, "acknowledges important state interests with abortion that … are not recognized under federal strict scrutiny jurisprudence."[66] In addition, Justice Biles identified what I have already explained, namely that "pre-*Casey* federal strict scrutiny jurisprudence will also have potentially unsettling ripple effects in other areas of Kansas law touching on abortion access."[67] By way of example, Justice Biles specifically referenced the Kansas informed consent statute, implying its vulnerability.[68]

Finally, perhaps the most compelling point is another one highlighted by Justice Biles and that is that the court does not "explain whether *Roe*'s trimester framework has any application in Kansas."[69] In other words, *Hodes* not only goes farther than the current federal standard under *Casey*; it goes even farther than *Roe*. Unlike the *Roe* standard, the Kansas Supreme Court did not make any meaningful allowance for the State's growing interest in the life of the unborn child as it develops in the womb.[70] Under both *Roe* and *Casey,* after viability the state may restrict or even proscribe abortion except where necessary to preserve the life or health of the mother. The *Hodes* court said no such thing. Therefore, it is reasonable to conclude that the court intended that *any* law touching on abortion, using the court's language, "regardless of degree"[71] – from conception to the delivery room, from informed consent to clinic safety standards – must pass strict scrutiny. This means that even abortion regulations

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[65] *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 could not refuse to permit its facilities to be used for elective abortions); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (holding that the state has no power to indirectly affect the choice of poor women by funding childbirth through Medicaid and not abortion); *Women's Health Ctr. Of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658 (W.Va. 1993) (ban on the use of state Medicaid funds for abortion constitutes a discriminatory funding scheme which violates an indigent woman's constitutional rights); *Women of the State v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (holding that "statutes that permit the use of public funds for childbirth-related medical services but prohibit similar use of funds for medical services related to therapeutic abortions impermissibly infringe on a woman's fundamental right of privacy").

[66] *Hodes*, 440 P.3d at 507 (Biles, J., concurring).

[67] *Id.* at 509.

[68] *Id. See supra* note 12.

[69] *Id.* at 508.

[70] The Kansas Supreme Court, in its conclusion, made a glancing reference to the trial court's task of taking "into account advances in science that have blurred the sharp trimester-based lines used in *Roe*'s strict scrutiny analysis." *Hodes,* 440 P.3d at 503. But, nowhere in its extensive analysis of the strict scrutiny standard does it describe the applicability of the trimester framework or acknowledge the State's growing interest in the potential life of the child.

[71] *Hodes*, 440 P.3d at 496.

which survived the heightened standard of *Roe*, such as post-viability bans or born-alive bills,[72] likely will not be upheld under *Hodes*.

The history over the last 40 years of state legislative attempts to regulate abortion and judicial review has been compared to the "classic recurring football drama of Charlie Brown and Lucy in the *Peanuts* comic strip."[73] However imperfect, the *Casey* compromise was intended to strike a balance on this contentious issue in our pluralistic republic and give greater latitude to the people, through their legislators, to regulate abortion. But the fact remains that, of all the standards of review, Kansas has adopted the most rigid and restrictive one – and one which promises to land this legislature, despite it most sincere efforts, again and again, flat on its back.

In closing, against the legal backdrop of the holdings of *Roe* and *Casey* and the cases decided under them, it is abundantly clear how very sweeping the Kansas Supreme Court's decision is and how it is not exaggeration to say that Kansas is now among the most permissive abortion regimes in the nation and how vulnerable many of our existing laws are under this decision.

Thank you.

[72] *See*, e.g., *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 289, 299–300 (3d Cir. 1984) (upholding a ban on abortions after viability), aff'd on other grounds 476 U.S. 747 (1986); *Wynn v. Scott*, 449 F. Supp. 1302, 1320–22 (N.D. Ill. 1978) (upholding a law requiring persons inducing post-viability abortions to exercise professional skill to preserve the life and health of the fetus and forbidding experimentation on any viable aborted fetus), appeal dismissed, 439 U.S. 8 (1978), aff'd on other grounds, 599 F.2d 193 (7th Cir. 1979); *Doe v. Deschamps*, 461 F. Supp. 682, 684, 687–88 (D. Mont. 1976) (three-judge panel) (*per curiam*) (upholding a law making it a crime to "caus[e] the death of a viable fetus delivered during an abortion" and requiring the concurrence of two additional physicians that the pregnant woman's life is in danger for any post-viability abortion).

[73] *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 218 (6th Cir. 1997) (Boggs, J., dissenting).