Family Policy ALLIANCE of Kansas

Testimony of Brittany Jones, Esq., Director of Advocacy for Family Policy Alliance of Kansas. Presented to the House Federal and State Affairs Committee on January 15, 2021.

Chair Barker 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 and stand for life. We ally with 40 other state-based family policy organizations across the country.

Just a few floors down from this room, there is a sign that says, "All political power is inherent in the people." These words from the Kansas Bill of Rights[1], along with the colloquial name of the Kansas State Capitol – the "people's house" – denote the importance of democracy and the people's voice in Kansas' governmental decisions.

While the separation of powers is an indispensable aspect of our American experiment, the proper balance of those powers is equally important. The 2019 decision in *Hodes & Nauser v. Schmidt* went a step too far, effectively removing the power of the legislature to regulate abortion and thus silencing the voice of Kansans. The Supreme Court of Kansas, at the behest of a New York abortion organization, turned Kansas into the Wild West of the abortion industry, stripping the people of their power to have any say in regulating the industry.

This is why it is so imperative that we adopt the Value Them Both Amendment to restore the authority of the people to regulate the abortion industry.

By voting "yes," you will be voting to put the Value Them Both Amendment on the ballot. This allows the people of Kansas to vote, and their voices on this issue to be heard. When this amendment passes on the ballot, it will restore the ability

[1] Kan. Const., Bill of Rights §2.

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of Kansans to debate how best to deal with the topic of discussion, rather than regulating that decision to the court alone.

Today, I will address the legal and political effect of the *Hodes* decision, and what laws are most likely at stake due to the Supreme Court's ruling.

BACKGROUND OF FEDERAL AND STATE COURT CASELAW REGARDING ABORTION.

As a preliminary matter, *Roe v. Wade* created a fundamental right to abortion and set out the trimester framework for determining when states could regulate abortion.[2] This rule was often applied like strict scrutiny and required the states to provide compelling interest before they could regulate abortion. Because strict scrutiny is such a high standard, courts that adopt it regularly strike down regulations that are deemed constitutional under less exacting federal caselaw.[3]

However, after almost two decades of many basic laws being struck down, the Court reevaluated its standard in *Planned Parenthood v. Casey* and set out the undue burden standard.[4] While criticized by many primarily because its viability standard is constantly changing, the undue burden standard allows the legislature to regulate the abortion industry in some basic respects after viability.

In the *Hodes* decision, the Kansas Supreme Court found a right to abortion in our state constitution. By declaring abortion to be among Kansans' fundamental

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[2] *Roe v. Wade*, 410 U.S. 113 (1973) (essentially the trimester framework was set up so that almost no regulation of abortion was allowed during the first trimester, some regulation was allowed in the second, and states could even ban abortion in the third trimester).

[3] *See, e.g., Valley Hosp. Ass'n v. Mat-Su Coalition*, 948 P.2d 963 (Alaska 1997)(adopting a strict scrutiny test and requiring government funding of abortion); *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018) (adopting strict scrutiny and striking down a law banning abortion once a heartbeat is detected); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (adopting strict scrutiny and requiring government funding of abortion); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (adopting strict scrutiny to strike down informed consent law), *superseded by amendment* Tenn. Const. art. I, § 36 (2014).

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

rights, the Kansas Supreme Court adopted the rigorous strict scrutiny test.[5] The court specifically rejected the prevailing federal undue burden test, applying the harsher standard.

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. As stated before, many of the laws supported by a majority of Kansans and passed through the democratic process are at stake and had been struck down in the pre-*Casey* era.

REGULATIONS AT RISK BECAUSE OF THIS RULING: WOMAN'S RIGHT TO KNOW & WAITING PERIODS, PARENTAL NOTIFICATION, CLINIC LICENSING, & FORCED GOVERNMENT FUNDING OF ABORTION.

To see the implications of the strict scrutiny standard used in *Hodes,* I'll look at four key regulations that have bipartisan support, but are in danger as a result of this ruling: (1) Woman's Right to Know & 24-Hour Waiting Periods, (2) Parental Notification, (3) Clinic Licensing Laws, and (4) Taxpayer funding of abortion.

These are all regulations that have withstood scrutiny under the federal *Casey* standard, but have been struck down under state strict scrutiny analysis or in the years before *Casey*. Value Them Both will ensure that the legislature, and by extension Kansans, have a say in these regulations.

1. Woman's Right to Know and 24-Hour Waiting Periods were routinely struck down before *Casey* and continue to be struck down in states that apply strict scrutiny.

Woman's Right to Know, one of the first modern pro-life laws in Kansas, was enacted in 1997 to ensure that women had access to basic information when receiving an abortion.[6] This act required that a woman be given information 24

[5] *Hodes* at 675.
[6] Kan. Stat. §65-6708–65-6715.

hours before her procedure to ensure she was at least aware of the name of the abortionist performing the procedure, a description of the procedure, and the potential risk of the procedure. These are all basic things that any patient would want to know before having any procedure.

The heart of these laws is to ensure that a woman has at least the chance to learn as much as she can about the procedure before she undergoes it. Because courts who use strict scrutiny do not recognize the state's interest in protecting the health of the mother, state and even some federal courts under a standard strict scrutiny standard have struck down informed consent laws.[7]

However, under the current undue burden standard used by the U.S. Supreme Court, laws very similar to Kansas' Women's Right to Know have been upheld.[8] These cases show us that any standard that is higher than the undue burden standard as established in *Casey* will likely allow these important laws in our state to be struck down.

2. Parental consent laws were routinely struck down before *Casey* and are often struck down by states using strict scrutiny to this day.

Likewise, Kansas passed a robust parental consent law in 2011 to ensure that pregnant minors are not left alone in the care of strangers while walking through this difficult process.[9] Before *Casey*, the Supreme Court struck down regulations that required minors to receive parental consent before receiving an abortion.[10]

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[7] *See, e.g., Planned Parenthood of Middle Tennessee v. Sunquist*, 305 S.W.3d 1 (Tenn. 2001) (hold informed consent requirements unconstitutional under strict scrutiny); *Akron v. Akron Ctr. For Reproductive Health,* 462 U.S. 416 (1983) (striking Ohio informed consent requirement); *Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists*, 476 U.S. 747, 759-765 (1986) (striking law requiring informed consent).

[8] *Casey,* 505 U.S. at 872 ("Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.").

[9] Kan. Stat. § 65-6705 (2011).

[10] *Bellotti v. Baird*, 443 U.S. 622 (1979) (holding that a state may not require a pregnant minor to obtain parental consent to undergo an abortion where that consent may operate as an absolute veto); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (striking down a parental consent requirement even with a judicial bypass).

Yet, in *Casey* the court clarified that as long as the parental consent law included a judicial bypass it would be constitutional.[11]

However, under strict scrutiny, at least four state courts have struck down parental consent or notification as violating their state constitution's right to abortion even after *Casey*.[12] When courts use strict scrutiny, even when alerting a parent to the fact that their minor daughter is considering an abortion, it is seen as an infringement on the constitutional right. After the *Hodes* decision, there's no reason the same law won't be struck down here in Kansas.

3. Kansas clinic licensing law that require that clinics maintain basic safety are the types of laws were regularly struck down in cases before *Casey*.

In 2011, following a series of abuses by abortionists, this body passed comprehensive clinic licensing laws.[13] These laws required clinics to meet basic health and safety requirements, apply and display a license, require a doctor to be present and perform an abortion, and that inspections occur in the facilities.

At least three states have struck down similar laws using strict scrutiny.[14] If we want to ensure at the very least that clinics are safe places for women and babies to be, we need the ability to pass clinic licensing laws.

4. Based on cases used by our own Supreme Court in the *Hodes & Nauser* decision, our funding restrictions will likely be struck down.

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[11] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[12] *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (holding parental consent law unconstitutional); *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000) (striking down a state parental notice statute); *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So.2d 612 (Fla. 2003) (holding state parental notification statute unconstitutional), *superseded by amendment,* Fla. Const. art. X, § 22; *State of Alaska v. Planned Parenthood of Alaska*, 177 P.3d 577 (Alaska 2007) (holding parental consent statute unconstitutional).
[13] Kan. Stat. § 65-4a01, et seq. (2011).
[14] *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (holding down regulations requiring an abortion be performed in a hospital or in a licensed medical facility); *Sendak v. Arnold*, 429 U.S. 968 (1976)(striking down admitting privileges); *Florida Women's Medical Clinic v. Smith*, 536 F. Supp. 1048 (S.D. Fla. 1982)(striking down licensing laws because the state had to show a compelling justification before it could regulate abortion).

The prohibition on state funds going to pay for abortion is at risk due to the *Hodes* decision. In 2013, Kansas passed a law with bipartisan support to ban the use of state appropriations from the general fund or a special fund for abortion.[15] This is historically an area that Kansans agree – while they may have differing opinions about abortion, they agree that 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.[16]

The most important indication of the fate the Court intends for this valuable and popular law is that the Court cited to five cases that compelled taxpayers to pay for abortions.[17] In the section on strict scrutiny in *Hodes & Nauser*, the Court cited to five rulings having to do with courts requiring abortions be paid for with tax dollars funding and required abortions. [18]

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

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[15] Kan. Stat. § 65-6733 (2013).
[16] *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).
[17] *Hodes* at 668 (citing *Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *State of Alaska, Department of Health & Human Services v. Planned Parenthood of Alaska, Inc.* 28 P.3d 904 (Alaska 2001). *Committee to Defend Reproductive 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 (Minn. 1995).
[18] *Women v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995).

In conclusion, if we want to ensure that women are given the most basic information about their doctor, that minor children are not left to make important decisions on their own, that women can know that they will enter a clean, safe facility, and that Kansas will not be forced to pay for abortions, we must ensure that the people have the right to regulate the abortion industry through the legislature. That is why we need the Value Them Both Amendment. Six other states have already passed similar amendments, [19] and multiple other states are considering them this session.[20] Let's be a leader in valuing both women and babies by letting the people of Kansas vote.

Thank you.

[19] Ark. Const. Amendment 68; R.I. Const. Art. I, Section 2; W. Va. Const. Art. VI, § 57; Ala. Const. Art. I, § 36.06; Tenn. Const. art. I, § 36 (2014); La. Senate Bill 184 (passed 2019).
[20] Ia. SJR 21 (2019); Ky. H.B. 67 (2020).

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