

**Date: February 13, 2020**

**To: Kansas House, Health and Human Services Committee  
Representative Brenda Landwehr, Chairperson**

**From: Paul Benjamin Linton<sup>1</sup> and Elizabeth R. Kirk<sup>2</sup>  
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*,<sup>3</sup> 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."<sup>4</sup> 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.<sup>5</sup> The court defined a compelling interest as "not only extremely weighty, possibly urgent, but also rare."<sup>6</sup>

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

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

<sup>4</sup> *Id.* at 493.

<sup>5</sup> *Id.* at 496.

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

<sup>7</sup> 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,<sup>8</sup> as well as by trial courts in Connecticut and Montana (in unappealed judgments).<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> **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 five<sup>12</sup> 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.**

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<sup>8</sup> 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).

<sup>9</sup> 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).

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

<sup>11</sup> 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).

<sup>12</sup> *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).