

*Testimony of Brittany Jones, Esq., Director of Advocacy for Family Policy Alliance of Kansas. Presented to the Senate Judiciary Committee and the House Federal and State Affairs Committee on January 21, 2020.*

Chair Barker, Chair Wilborn, and members of the Committees, 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 call on the legislature to allow the people of Kansas to vote on the Value Them Both Amendment. The Supreme Court of Kansas, at the behest of a New York abortion organization, turned Kansas into the Wild West of the abortion industry, effectively stripping the people of their power to have any say in regulating the industry. Today, I will be addressing what laws are most likely at stake because of the Supreme Court's ruling. Most of these are basic regulation that we would expect for any industry to ensure the health and welfare of patients.

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

While the Court in *Hodes & Nauser*<sup>1</sup> did not specifically apply its newly created right to abortion to any specific law, we do have a good indication of how it will be applied going forward based on the cases the court relied on, the cases from the other twelve states who have created a right to abortion, and the cases that occurred between *Roe v. Wade* and *Planned Parenthood v. Casey*. These cases show us how detrimental this ruling could be to the most basic regulations that the people have placed around the abortion industry. Today, we will look at past cases and how they affect four key regulations that have received bipartisan support throughout the legislature: (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

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<sup>1</sup> *Hodes & Nauser, MDS, P.A. v. Schmidt*, 309 Kan. 610 (2019).

*Casey*. Value Them Both will ensure that the legislature has the ability to have a say in these regulations.

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.<sup>2</sup> This rule was often applied like strict scrutiny and required the states to provide compelling interest before they could regulate abortion, the highest legal interest. 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.<sup>3</sup> However, after almost two decades of many laws being struck down, even those that were viewed by many American's as reasonable regulations to protect women and babies, the Court reevaluated its standard in *Planned Parenthood v. Casey* and set out the undue burden standard.<sup>4</sup> This standard while criticized by many primarily because its viability standard is constantly changing, the undue burden standard does allow the legislature to regulate the abortion industry in some basic respects after viability.

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.<sup>5</sup> This act required that a woman be given information 24 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.

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<sup>2</sup> *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).

<sup>3</sup> 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).

<sup>4</sup> *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).

<sup>5</sup> Kan. Stat. §65-6708–65-6715.

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 courts under a standard strict scrutiny standard have struck down informed consent laws.<sup>6</sup>

Similarly, federal courts in the 1980s often struck down these types of laws using *Roe's* trimester framework, which is a higher standard than is currently used.<sup>7</sup> The case that set the current standard for abortion law, *Planned Parenthood v. Casey*, actually specifically upheld a law very similar to Kansas Woman's Right to Know law and our 24-hour waiting period.<sup>8</sup> Our law was designed to ensure that it passed scrutiny under *Casey*. However, it is likely that under the trimester framework of *Roe*, even our law would be struck down.

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.<sup>9</sup> Before *Casey*, the Supreme Court struck down regulations that required minors to receive parental consent before receiving an abortion.<sup>10</sup> Yet, in *Casey* the court clarified that as long as the parental consent law included a judicial bypass it would be constitutional.<sup>11</sup>

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<sup>6</sup> 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).

<sup>7</sup> *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).

<sup>8</sup> *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.").

<sup>9</sup> Kan. Stat. § 65-6705 (2011).

<sup>10</sup> *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).

<sup>11</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

However, under strict scrutiny, a higher standard than the undue burden standard in *Casey*, at least four state courts have struck down parental consent or notification as violating their state constitution's right to abortion even after *Casey*.<sup>12</sup> 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.

Given the application of strict scrutiny cases and even the laws struck down before *Casey*, there is a clear indication that these laws are under threat by the decision's strict scrutiny standard.

3. Kansas clinic licensing law was already tied to the decision in *Hodes & Nauser* and these 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.<sup>13</sup> However, these laws have been tied up in the same lawsuit that has precipitated the need for the Value Them Both Constitutional Amendment.<sup>14</sup> Because the court tied the clinic licensing lawsuit to the decision in *Hodes & Nauser v. Schmidt*, this may be the second law that a court is required to apply strict scrutiny to a law.<sup>15</sup>

While I will not attempt to do the court's work for it, given past jurisprudence our clinic licensing law will likely be struck down based on the number of state laws that the Supreme Court and other circuit courts struck down before the Court decided *Casey*.<sup>16</sup> These are likely some of the cases that the courts will use to determine whether the law we already have on the books can go into effect, and given the odds, it will likely be

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<sup>12</sup> *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).

<sup>13</sup> Kan. Stat. § 65-4a01, et seq. (2011).

<sup>14</sup> See Order Regarding TRO & Status Conference: *Hodes & Nauser, MDs, P.A. et al. v. Robert Moser, M.D et al.* (Dec. 2, 2011).

<sup>15</sup> The first law that the court will have to apply the strict scrutiny standard to is S.B. 95 that was the law at issue in *Hodes & Nauser v. Schmidt*.

<sup>16</sup> 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) (struck down admitting privileges); *Florida Women's Medical Clinic v. Smith*, 536 F. Supp. 1048 (S.D. Fla. 1982) (struck down licensing laws because the state had to show a compelling justification before it could regulate abortion).

struck down. If we want to ensure 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.

One of our state provisions most at risk because of this ruling is our prohibition on state funds going to pay for abortion. Kansas passed a law in 2013 with bipartisan support to ban the use of state appropriations from the general fund or a special fund for abortion.<sup>17</sup> Historically this is one area that many Americans and especially Kansans agree. While they may have differing opinions on the morality of abortion – they can agree 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.<sup>18</sup> More importantly, in the *Hodes & Nauser* decision in the section on strict scrutiny, the Court cited to these five rulings having to do with state funding and required abortions: *Valley Hospital Association v. Mat-Su Coalition for Choice* which required a nonprofit hospital to perform abortions because the hospital took government money and abortion was a fundamental right;<sup>19</sup> *State of Alaska, Department of Health & Human Services v. Planned Parenthood of Alaska, Inc.*, which held that a state ban on use of Medicaid funds for abortion was unconstitutional;<sup>20</sup> *Committee to Defend Reproductive Rights v. Myers* which did not allow the state to deny funding abortions through Medicaid because there was a fundamental right to reproductive health;<sup>21</sup> *Women's Health Center v. Panepinto*, which did not allow the state to deny Medicaid funding because there was a constitutional right

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<sup>17</sup> Kan. Stat. § 65-6733 (2013).

<sup>18</sup> *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).

<sup>19</sup> *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997).

<sup>20</sup> *State of Alaska, Dep't of Health & Human Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001)

<sup>21</sup> *Committee to Defend Reprod Rights v. Myers*, 29 Cal. 3d 252 (1981).

to abortion in the state;<sup>22</sup> and *Women v. Gomez*, which did not allow the state to restrict state funding streams to abortion because it abridged a fundamental right.<sup>23</sup>

By relying on these cases in its decision, the Court has set the groundwork for a case that will deny the state the ability to restrict any sort of funding for abortion and could even lead to mandating that hospitals that receive state funding to provide abortions. We will no longer be able to rely on statutory protections in these areas because the Court will overturn them.

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,<sup>24</sup> and multiple other states are considering them this session.<sup>25</sup> Let's be a leader in valuing both women and babies and let the people of Kansas vote.

Thank you.

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<sup>22</sup> *Women's Health Center v. Panepinto*, 191 W. Va. 436 (1993).

<sup>23</sup> *Women v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995).

<sup>24</sup> 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).

<sup>25</sup> Ia. SJR 21 (2019); Ky. H.B. 67 (2020).