

Summary of the Kansas Supreme Court Opinion in *Hodes & Nausser, MDs, P.A. v. Schmidt*, issued April 26, 2019

Jason B. Long, Senior Assistant Revisor of Statutes

October 30, 2019

On April 26, 2019, the Kansas Supreme Court (Court) issued its decision in *Hodes & Nausser, MDs, P.A. v. Schmidt*.¹ The Court affirmed the District Court's decision to issue a temporary injunction prohibiting the enforcement of the provisions of 2015 Senate Bill No. 95 (SB 95).² In doing so, the Court held that Section 1 of the Bill of Rights of the Constitution of the State of Kansas (Section 1) protects natural, inalienable rights of the people of Kansas, and such natural rights include a woman's right to decide whether to continue her pregnancy or have an abortion.³ The Court further held this right of personal autonomy is a fundamental right and cannot be restricted by the State unless there is a compelling government interest and the restriction is narrowly tailored to further that interest.⁴ The Court's decision imposes a strict scrutiny standard of review whenever a statute regulating abortion is challenged.

After reviewing the District Court's factual findings and conclusions of law, the Court agreed with the District Court that the plaintiffs had shown that they are substantially likely to prevail on their claim that SB 95 unconstitutionally infringes on a woman's right to obtain an abortion. The Court also remanded the case to the District Court for a full resolution of the issues under the strict scrutiny constitutional standard laid out by the Court.⁵

Procedural History

In 2015, the Legislature enacted SB 95 to prohibit dismemberment abortions, which are medically referred to as dilation and evacuation method abortions.⁶ The plaintiffs are doctors who performed abortions using the method prohibited under SB 95. Along with their initial

¹*Hodes & Nausser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (Kan. 2019) (per curiam) (*Hodes*). Justice Biles concurred in the majority opinion as to the rights of a woman under Section 1 of the Kansas Bill of Rights, but would have applied the undue burden standard to laws such as SB 95 similar to federal jurisprudence on laws regulating abortion. Justice Stegall filed a dissenting opinion.

² *Id.* at 680.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 680-82

⁶ See K.S.A. 65-6741 through 65-6749.

challenge to the constitutionality of SB 95, the plaintiffs also sought a temporary injunction to block the enforcement of SB 95 pending the final outcome of the lawsuit.⁷

Following a hearing on the limited issue of whether the District Court should issue a temporary injunction, the District Court found that plaintiffs were substantially likely to prove their claim that SB 95 imposed an unconstitutional burden on a woman's access to abortion.⁸ The State appealed this ruling to the Kansas Court of Appeals.

Sitting *en banc*,⁹ the Kansas Court of Appeals split evenly. Seven judges ruled to affirm the District Court's conclusion that there was a right to obtain an abortion under the Constitution of the State of Kansas (Kansas Constitution), and that the plaintiffs were substantially likely to prevail on the merits of their claim. The other seven appellate judges dissented arguing that there was no such right contained in the Kansas Constitution, and therefore, there was no basis for issuance of the injunction.¹⁰ The split among the appellate court meant that the decision of the District Court remained in effect.¹¹ The State then appealed to the Kansas Supreme Court.

Rights Under Section 1 of the Bill of Rights

The Court began its analysis by examining whether Section 1 provides a right to obtain an abortion under the Kansas Constitution as the District Court had concluded. Section 1 states: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."¹² Focusing on the phrase "among which are," the Court first concluded that the language of Section 1 recognizes a "nonexhaustive list of inalienable natural rights,"¹³ that distinguishes Section 1 from the 14th Amendment to the Constitution of the United States (14th Amendment).

The 14th Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹⁴ While there is federal precedent establishing a right to obtain an abortion under the 14th Amendment, the Court found that because Section 1 is "nonexhaustive,"

⁷ *Hodes*, 309 Kan. at 615.

⁸ *Hodes & Nauser, MDs, P.A. v. Schmidt*, 2015 WL 13065200 at *5 (Kan. Dist. Ct. June 30, 2015).

⁹ In most cases appeals made to the Kansas Court of Appeals are heard by a panel of three appellate judges. However, at the suggestion of a party, or on its own, the Kansas Court of Appeals may order that a case be heard *en banc*. When this occurs all 14 appellate judges hear the oral arguments and participate in resolving the appeal.

¹⁰ *Hodes*, 610 Kan. at 618.

¹¹ *Id.* at 619.

¹² Kan. Const. Bill of Rights, § 1.

¹³ *Hodes*, 610 Kan. at 626.

¹⁴ U.S. Const. 14th Amendment.

it provides rights "that are broader than and distinct from the rights described in the Fourteenth Amendment."¹⁵

The other notable distinction between Section 1 and the 14th Amendment is Section 1's lack of a due process provision. While the 14th Amendment clearly prohibits the deprivation of life, liberty, or property without due process of law, Section 1 contains no such guarantee.¹⁶ The Court, however, reviewed the historical record of the drafting and adoption of Section 1, and cases involving judicial enforcement of natural right guarantees similar to Section 1.¹⁷ The Court concluded that natural rights such as those protected by Section 1 were widely accepted as being judicially enforceable rights, and were not merely aspirational as argued by the State.¹⁸

Next, the Court explored the broader natural rights protected by Section 1. After reviewing federal and state case law regarding the right to personal autonomy, the Court held that Section 1 protects the right to make decisions about "issues that affect one's physical health, family formation, and family life."¹⁹ This natural right of personal autonomy also extends to "the ability to control one's own body, to assert bodily integrity, and to exercise self-determination,"²⁰ which includes, "the right to decide whether to continue a pregnancy."²¹

The State argued that the framers of the Kansas Constitution could not have "envisioned a right of a woman to decide whether to continue her pregnancy,"²² because the criminal laws of both the Territory of Kansas prior to statehood, and the State of Kansas made the performance of any abortion a misdemeanor, and an abortion performed on a quickened child manslaughter in the second degree.²³

The Court found the State's argument unpersuasive for three reasons. First, the legislative history of the statutory enactments did not persuade the Court that such criminal laws reflected how the "majority of Kansans felt about abortion in 1855."²⁴ Instead, the Court referenced historian Dr. James Mohr's work in concluding that there was not a strong antiabortion sentiment at the time Kansas became a state.²⁵ Second, the constitutionality of the early criminal laws was

¹⁵ *Hodes*, 610 Kan. at 638.

¹⁶ *Id.* at 627.

¹⁷ *Id.* at 627-32.

¹⁸ *Id.* at 638.

¹⁹ *Id.* at 645.

²⁰ *Id.* at 646.

²¹ *Id.* at 650.

²² *Id.* at 650-51.

²³ *Id.* at 651.

²⁴ *Id.*

²⁵ *See id.* at 651-55 (discussing the adoption of abortion legislation in other states prior to Kansas' statehood).

never challenged in any court of law. "[T]he fact that an unconstitutional statute has been enacted and has remained in the statute books for a long period of time in no sense imparts legality."²⁶ Finally, the Court recognized a prevailing gender bias during territorial times that precluded the State from applying the natural rights protected by Section 1 equally to all people. "[W]e cannot ignore the prevailing views justifying widespread legal differentiation between the sexes during territorial times and the reality that these views were reflected in policies impacting women's ability to exercise their rights of personal autonomy, including their right to decide whether to continue a pregnancy."²⁷

Constitutional Standard of Review

Having determined that Section 1 provides constitutional rights, including the right to obtain an abortion, the Court then turned to the issue of whether the plaintiffs had shown a substantial likelihood that SB 95 unconstitutionally infringed on those rights. The Court noted that the current prevailing federal standard for reviewing abortion statutes is the undue burden standard that was first applied in *Planned Parenthood of Southeastern Pa. v. Casey*.²⁸ However, the Court found that the undue burden standard "has proven difficult to understand and apply."²⁹ Finding that Section 1 protects natural rights, including the right to obtain an abortion, the Court adopted a different standard for determining whether a law unconstitutionally infringed on a such natural and fundamental rights. The Court held that the strict scrutiny standard should be applied in such cases to "protect (1) the intent of the Wyandotte Convention delegation and voters who ratified the Constitution and (2) the inalienable natural rights of all Kansans today."³⁰

Under the strict scrutiny standard, a statute cannot restrict a woman's right to obtain an abortion unless the State can show that doing so will further a compelling government interest, and that the restriction is narrowly tailored to further that interest.³¹ This standard also places a higher burden on the State in defending the constitutionality of such laws. Once the plaintiff has proven that the statute infringes on a woman's right to obtain an abortion, the State must then prove it has a compelling interest that is protected by the statute, and that such statute is narrowly tailored to protect such interest.³² The Court acknowledged that on remand to the District Court the State may assert it has a compelling interest in "promoting potential life, protecting the

²⁶ *Id.* at 657 (quoting *State v. Hill*, 189 Kan. 403, 410, 369 P.2d 365 (1962)).

²⁷ *Id.* at 659.

²⁸ 505 U.S. 833, 112 S.Ct. 2791 (1992).

²⁹ *Hodes*, 610 Kan. at 665.

³⁰ *Id.* at 669.

³¹ *Id.* at 671.

³² *Id.* at 669.

dignity of life, protecting medical ethics, and protecting patient safety,"³³ but the State must also demonstrate that SB 95 is narrowly tailored to any such interests.³⁴

Conclusion and Remand

The Court concluded by reviewing the District Court's findings and conclusions of law in light of the Court's holdings regarding the existence of a right to obtain an abortion and the standard for reviewing the constitutionality of laws that potentially infringe on such right. The Court held that the District Court was correct in ruling the plaintiffs were substantially likely to prevail on their claims.³⁵ However, the District Court applied the wrong standard in reaching its decision. The Court concluded that the District Court should have applied the more stringent strict scrutiny standard when analyzing the plaintiffs' likelihood of success on the merits even though "doing so would not change the conclusions reached by the trial court."³⁶

The Court affirmed the District Court's issuance of the temporary injunction, which will continue to prohibit the enforcement of SB 95 pending the final disposition of the case.³⁷ The Court remanded the matter to the District Court with instructions to conduct further proceedings using the strict scrutiny standard of review.³⁸ On remand, the State will have the opportunity to present evidence of a compelling government interest and that SB 95 is narrowly tailored to further that interest.

³³ *Id.* at 678.

³⁴ *Id.*

³⁵ *Id.* at 674.

³⁶ *Id.* at 677.

³⁷ *Id.* at 682.

³⁸ *Id.*