

**IN THE SUPREME COURT
OF THE STATE OF KANSAS**

HODES & NAUSER, MDS, P.A.;
HERBERT C. HODES, M.D.; and
TRACI LYNN NAUSER, M.D.,

Plaintiffs/Appellees,

v.

DEREK SCHMIDT, in his official capacity as
Attorney General of the State of Kansas;
and STEPHEN M. HOWE, in his official
capacity as District Attorney for Johnson
County,

Appellate Case No. 114,153

Defendants/Appellants.

NOTICE OF TWO CLARIFICATIONS
FOLLOWING ORAL ARGUMENT

The Kansas Supreme Court held oral arguments in this case on March 16, 2017.
Appellants submit this notice to clarify two matters discussed during that hearing.

First, there was some discussion during oral argument regarding *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993), where a panel of the Ohio Court of Appeals concluded that Section 1 of the Ohio Constitution provides protection for, among other things, the decision whether to have an abortion. (The *Preterm* court then imported and applied the federal undue-burden analysis from *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992).) Seven years after *Preterm*, the Ohio Supreme Court held that although Section 1 of the Ohio Constitution “in many ways[] mirrors the precatory words of the Declaration of Independence,” Section 1 “is not an independent source of self-executing protections. Rather, it is a statement of fundamental ideals upon which a limited

government is created.” *State v. Williams*, 728 N.E.2d 342, 354 (Ohio 2000). The Ohio Supreme Court also observed that “‘Natural law’ rights [as outlined in Section 1], in and of themselves, are of no legal force. Rather, it is the laws enacted by legislatures that define the rights of the individual.” 728 N.E.2d at 354. The *Williams* decision was cited in appellants’ briefs in this case but was not discussed at argument. See Appellants’ Reply Brief, at 10.

Second, the Court and counsel engaged in a dialogue during oral argument regarding Missouri’s policy declaration that life begins at conception. The people of Kansas, through their elected representatives, made a similar declaration in K.S.A. 2016 Supp. 65-6732:

(a) The legislature hereby finds and declares the following:

- (1) The life of each human being begins at fertilization;
- (2) unborn children have interests in life, health and well-being that should be protected; and
- (3) the parents of unborn children have protectable interests in the life, health and well-being of the unborn children of such parents.

(b) On and after July 1, 2013, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the constitution of the United States, and decisional interpretations thereof by the United States supreme court and specific provisions to the contrary in the Kansas constitution and the Kansas Statutes Annotated.

(c) As used in this section:

- (1) “Fertilization” means the fusion of a human spermatozoon with a human ovum.
- (2) “Unborn children” or “unborn child” shall include all unborn children or the offspring of human beings from the moment of fertilization until birth at every stage of biological development.

(d) Nothing in this section shall be construed as creating a cause of action against a woman for indirectly harming her unborn child by failing to

properly care for herself or by failing to follow any particular program of prenatal care.

This statute, along with other provisions of Kansas law adopted in 2013, were challenged in a separate action by the same plaintiffs in this case, but the Shawnee County District Court denied plaintiffs' request for a preliminary injunction in that action. See *Hodes & Nauser, MDs, P.A. v. Schmidt*, Shawnee County Case No. 2013-CV-705. Thus, K.S.A. 2016 Supp. 65-6732 has been in effect since July 1, 2013, and was in force when the Kansas Legislature passed the statutes challenged here.

Respectfully submitted,

THOMPSON RAMSDELL & WARNER, P.A.

/s/ Sarah E. Warner

Stephen R. McAllister #15845

Sarah E. Warner #22788

333 West 9th Street – Suite B

Lawrence, KS 66044-2803

Phone: (785) 841-4554

Fax: (785) 841-4499

steve.mcallister@trqlaw.com

sarah.warner@trqlaw.com

Office of Attorney General Derek Schmidt

Jeffrey A. Chanay #12056

Chief Deputy Attorney General

Dennis D. Depew #11605

Deputy Attorney General, Civil Litigation Division

Shon D. Qualseth #18369

Memorial Building 3rd Floor

120 SW Tenth Avenue

Topeka, KS 66612-1597

Phone: (785) 368-8435

Fax: (785) 291-3767

jeff.chanay@ag.ks.gov

dennis.depew@ag.ks.gov

shon.qualseth@ag.ks.gov

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, a copy of the foregoing was filed via Kansas's electronic filing system and was sent by electronic mail, addressed to:

Janet Crepps
Genevieve Scott
Zoe Levine
Center for Reproductive
Rights
199 Water Street, 22nd
Floor
New York, NY 10038
jcrepps@reprorights.org
gscott@reprorights.org
zlevine@reprorights.org

Lee Thompson
Thompson Law Firm, LLC
106 E. 2nd Street
Wichita, KS 67202
lthompson@tslawfirm.com

Robert V. Eye
Brett A. Jarmer
Robert V. Eye Law Office,
LLC
123 SE 6th Avenue, Suite
200
Topeka, KS 66603
bob@kauffmaneye.com
brett@kauffmaneye.com

Teresa A. Woody
The Woody Law Firm PC
1621 Baltimore Avenue
Kansas City, MO 64108
teresa@woodylawfirm.com

Erin Thompson
Foland, Wickens, Eisfelder,
Roper & Hofer, P.C.
One Kansas City Place
1200 Main St., Suite 2200
Kansas City, MO 64105
ethompson@fwpcclaw.com

Brianne J. Gorod
David H. Gans
Constitutional Accountability Center
1200 18th Street, N.W.
Suite 501
Washington, D.C. 20003
brianne@theusconstitution.org
david@theusconstitution.org

Kimberly A. Parker
Skye L. Perryman
Brittani Kirkpatrick Ivey
Souvik Saha
Wilmer Cutler Pickering Hale &
Dorr, LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
kimberly.parker@wilmerhale.com
skye.perryman@wilmerhale.com
brittani.ivey@wilmerhale.com
souvik.saha@wilmerhale.com

Steven Douglas Bonney
ACLU Foundation of Kansas
6701 W. 64th Street
Suite 210
Overland Park, KS 66202
dbonney@aclukansas.org

Mark P. Johnson
Dentons US, LLP
4530 Main Street, Suite 1100
Kansas City, MO 64111
mark.johnson@dentons.com

Don P. Saxton
Saxton Law Firm, LLC
1000 Broadway, Suite 400
Kansas City, MO 64105
don@saxtonlawfirm.com

Mathew D. Staver
Horatio G. Mihet
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854-0774
court@lc.org

Paul Benjamin Linton
Special Counsel
Thomas More Society
921 Keystone Ave.
Northbrook, IL 60062
pblconlaw@aol.com
Frederick J. Patton II
Patton and Patton, Chtd.
534 S. Kansas Ave., Suite 1120
Topeka, Kansas 66603
joe@joepatton.com

Richard Peckham
105 Rhondda Ave.
Andover, KS 67002
peckhamrj@aol.com

Teresa S. Collett
1824 Stanford Ave.
St. Paul, MN 55105
teresa.s.collett@gmail.com

/s/ Sarah E. Warner

Sarah E. Warner