**February 24, 2020**

**TO: Ron Ryckman, Speaker of the Kansas House of Representatives**

 **Blaine Finch, Speaker Pro Tem of the Kansas House of Representatives**

 **House Majority Leader Dan Hawkins**

**House Minority Leader Tom Sawyer**

 **Susan Wagle, President of the Kansas Senate**

 **Senate Vice President Jeff Longbine**

 **Senate Minority Leader Anthony Hensley**

 **Jim Denning, Senate Majority Leader**

**FR: Bill Rich\***

**RE: Interpretation of the Kansas State Constitution and Abortion Funding Decisions**

When considering amendments to the Kansas State Constitution, we should all insist upon accuracy and clarity of information considered relevant by those charged with making such decisions. This makes it particularly important to respond when it appears that some written communications intentionally fail to tell the full story,[[1]](#footnote-1) provoking unwarranted and alarmist reactions. Specifically, when predicting Kansas Supreme Court interpretations of Medicaid funding for abortions, no one should be led to believe that state Medicaid funds would be used to fund elective abortions.

Failure to distinguish between elective abortions and those deemed medically necessary (as narrowly defined) distorts the picture of existing case law. With limited exceptions in cases that would not apply to questions about Medicaid funding in Kansas,[[2]](#footnote-2) *no* state courts have recognized a right to government-funded *elective* abortions. For example, a 1981 Massachusetts opinion ruled only that state funding could not be restricted solely to cases in which a physician certified absence of an abortion could lead to death.[[3]](#footnote-3) More recently, the Indiana Supreme Court emphasized the narrowness of its conclusion that only applies to women “whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function.”[[4]](#footnote-4) All courts that recognized state constitutional protection for a woman’s control over her body limited their holdings to the equal right of poor women when faced with serious dangers to life or health or as victims of rape or incest.[[5]](#footnote-5)

Protection for women under such circumstances does not present novel issues that warrant a frightened response by legislators in this state. In 2015, the Kansas Legislature recognized the Indiana exception to abortion restrictions when necessary to prevent a “substantial and irreversible physical impairment of a major bodily function of the pregnant woman.”[[6]](#footnote-6) In other words, Kansas legislation (co-sponsored by Senator Wagle) already recognizes the narrow exception for medically necessary abortions that courts in other states have extended to public funding.[[7]](#footnote-7) Potential application of this exception within the context of Kansas Medicaid services should not constitute cause for alarm. Ignoring the limited nature of such a ruling, however, does great disservice to members of the Legislature who seek to make wise decisions on behalf of the people of Kansas.

It must also be understood that government funding decisions involve a separate question from the issue of individual autonomy addressed by the Kansas Supreme Court. In 1980, the United States Supreme Court rejected the link between autonomy and funding. [[8]](#footnote-8) In 2001, the Supreme Court of Florida reached the same conclusion, finding that although the state constitution protects a woman’s right to privacy, including the choice to make abortion decisions, that decision-making autonomy did not extend to a right to Medicaid funding even of “medically necessary” abortions.[[9]](#footnote-9) The Florida Court followed the reasoning of the United States Supreme Court, explaining that “There is a big difference between a government making a decision not to fund the exercise of a constitutional right and doing something affirmatively to prohibit, restrict, or interfere with it. . . . It is difficult to see . . . how such a decision could be violative of the privacy provision of the Florida Constitution, the heart of which is the right to be let alone and free from government intrusion into private affairs.”[[10]](#footnote-10)

While some purport to know that Kansas will follow the lead of states like Indiana or Minnesota rather than the United States Supreme Court or the Supreme Court of Florida, we cannot know with certainty how the Kansas Supreme Court would resolve this question. The cases decided by various state courts demonstrate the difficulty of the issue, and the narrowness of existing precedent. Those cases also highlight why now would not be the right time for an amendment to the Kansas Constitution that eliminates state constitutional protection, particularly an amendment that would preclude protection for poor women when confronted with pregnancies threatening their life, their health, or resulting from rape or incest. Those who either favor or oppose such an amendment should defer action until the Kansas Supreme Court has been given the opportunity to address these issues, which will both explain the scope of the constitutional right at issue, and also help to clarify the debate which follows.

Furthermore, when predicting the impact of the Kansas Supreme Court decision beyond the context of public funding, we should recognize the carefully constrained substance of the Court’s opinion. In the future, the state will have to articulate a compelling need for laws that restricts women’s decisions, and that law will need to be narrowly tailored to that interest. In other words, this test requires a legislative purpose genuinely tied to health and safety concerns, and not aimed at restricting choice. The Court explicitly recognized protecting fetal life and patient safety as examples of possible compelling interests. It would be premature to assert that any existing Kansas law fails the test.[[11]](#footnote-11) Again, the record supports a need to observe future results rather than seek an immediate, draconian response.

Kansas Legislature leaders have a unique responsibility to provide accurate information regarding the substance and potential impact of legislation. Introduction of proposed constitutional amendments heightens this responsibility. Our leaders should reject false claims that Kansas Supreme Court recognition of a woman’s right to make decisions regarding pregnancy and childbirth would dramatically impact public funding of abortions in this state.

**Conclusion**

 An accurate and complete analysis of court rulings from other states supports a prediction that the recent Kansas Supreme Court ruling will either have no impact at all or will extend public funds to poor women in the event of rape, incest, or medical necessity including either likely death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman. While Medicaid funding in the case of narrowly defined medical necessity could impact current law, it merely recognizes an important protection for maternal health previously embraced in legislation co-sponsored by Senator Wagle and many others. That should not present cause for alarm.

1. \*Professor Bill Rich has more than forty years of experience teaching and writing about constitutional law. He wrote the three-volume treatise, Modern Constitutional Law, 3rd Edition, published by Thomson Reuters.

 Analogies by those who know better between Kansas and states like Connecticut, where the legislature chose to fund *elective* abortions, appear to embody intentional deception. [↑](#footnote-ref-1)
2. *Committee to Defend Reproductive Rights v. Myer*s, 625 P.2d 779 (Cal. 1981) (relying upon long history of California cases rejecting discrimination or restrictions in government benefits); *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (stating that quasi-public hospital could not preclude elective abortions, but not addressing questions of government funding). [↑](#footnote-ref-2)
3. *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981) (extending public coverage to “medically necessary” abortions). [↑](#footnote-ref-3)
4. *Humphreys v. Clinic for Women*, *Inc*., 796 N.E.2d 247, 260 (Ind. 2003). [↑](#footnote-ref-4)
5. *See* *State of Alaska*, *Dep’t of Health & Human Services v. Planned Parenthood of Alaska*, *Inc*., 28 P.3d 904 (Alaska 2001) (explicitly noting that the opinion did not apply to elective abortions); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (explicitly emphasizing that “our decision is limited to the class of plaintiffs certified by the district court and the narrow statutory provisions at issue in this case” involving “medically necessary abortions”; *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (finding no constitutional violation after construing state statute to fund abortions deemed medically necessary to preserve life or health of a woman, also including instances of rape or incest, noting that “the state may not use its treasury to persuade a poor woman to sacrifice her health by remaining pregnant,” and that “determination of ‘medical necessity’ is the proper province of physicians”); *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986) (protecting finding for medically necessary abortions); *Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002) (funding abortions where deemed “medically necessary to save their health and thus prolong their life”); *Women’s Health Center of West Virginia*, *Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993) (protecting medically necessary abortion care); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998) (ruling that the New Mexico Equal Rights Amendment gave the District Court authority to order payment for medically necessary abortions for Medicaid-eligible women). [↑](#footnote-ref-5)
6. K.S.A. 65-6743(a). That very law was before the Kansas Supreme Court in the case of *Hodes & Nauser, MD’s, P.A. v. Schmidt,* 440 P.3d 461 (Kan. 2019) (*per curiam*). In that case, the Court recognized the potentially compelling nature of state interest in promoting or protecting fetal life and patient safety. (*Id.*  at501.) The opinion, however, did not address separate questions about government funding. [↑](#footnote-ref-6)
7. Although precise wording of such an exception may differ, language used by both Indiana and Kansas provides the most useful current guide. It would be premature to speculate that the Kansas Supreme Court would require a broader exception, and this is one more reason for waiting before adopting a state constitutional amendment. [↑](#footnote-ref-7)
8. *Harris v. McRae,* 448 U.S. 297 (1980) (finding no constitutional right to government funding of abortions under either 5th Amendment due process arguments or 1st Amendment arguments based upon the Establishment Clause*).* [↑](#footnote-ref-8)
9. *Renee B. v. Florida Agency for Health Care Administration,* 790 So.2d 1036 (Fla. 2001). [↑](#footnote-ref-9)
10. *Id.* at 1040. Both the United States Supreme Court and the Florida Supreme Court made these decisions at a time when they applied the same “strict scrutiny” standard recently adopted by the Kansas Supreme Court. [↑](#footnote-ref-10)
11. Even in the recent *Hodes & Nauser* case, the Justices remanded the case to the trial court for a factual determination of whether the law restricting “D & E” abortion procedures met that test rather than striking down the legislation. [↑](#footnote-ref-11)