



**Kansas Hospital
ASSOCIATION**

To: KHA Member CEOs

From: Audrey Dunkel, Vice President Government Relations

Date: June 24, 2022

Re: Implication of U.S. Supreme Court Action on *Roe v. Wade*

Today the court released its opinion in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). We wanted to provide an overview of current Kansas law and how overturning *Roe v. Wade* in its entirety—that is, finding the U.S. Constitution does not contain a fundamental right to abortion—impacts that law.

It is important to note that the Court overturning *Roe v. Wade* and *Planned Parenthood v. Casey*, it does not result in a federal abortion ban. Instead, generally, states will be able to enforce laws regarding abortion that *Roe* and *Casey* had prohibited from enforcement. Thus, each state can determine how it will handle abortions for those within their own state. In theory, this could include banning abortion entirely. Some states have "trigger laws" or pre-existing statutes banning abortions that will be enforceable upon *Roe*'s overturn. However, Kansas does not have a trigger law or pre-existing statute that will automatically outlaw abortion. Indeed, abortion rights are currently protected by Section 1 of the Kansas Bill of Rights, under *Hodes & Nausser v. Schmidt*, 309 Kan. 610 (2019).

Recent Kansas Abortion Law Activity

In 2019, the Kansas Supreme Court decided *Hodes & Nausser v. Schmidt*, which held that the Section 1 of the Kansas Bill of Rights "affords protection of the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life – decisions that can include whether to continue a pregnancy." However, as it is a fairly new case, many of Kansas' abortion statutes have not been tested under *Hodes*.

In response to *Hodes*, a two-thirds majority of both the Kansas House and Senate adopted a resolution that would add a constitutional amendment to the August 2022 primary election ballot as follows:

"§ 22. Regulation of abortion. Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not limited to, in circumstances of pregnancy resulting from rape or incest, or when necessary to save the life of the mother."

Passage of the constitutional amendment would also not ban abortion in Kansas. However, the passage of this amendment would have a similar effect in Kansas as the overturning of *Roe v. Wade* federally. Those seeking and providing abortions would not have the constitutional right to an abortion. And the Kansas executive and judicial branches would be able to enforce laws and regulations that could encumber or ban abortions.

Current Kansas Abortion Law

The bulk of Kansas abortion-related laws are found in K.S.A. 65-6701 et. seq. Kansas law prohibits abortion when an unborn child is viable—meaning that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measure—or has reached the gestational age of 22 weeks.

That said, there are two exceptions in which a physician may perform an abortion on a viable or 22-week unborn child: (1) an abortion is necessary to preserve the life of the mother or (2) the continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman. A third-party physician who is not performing the abortion must make the determination that one of these exceptions applies. K.S.A. 65-6701(m); K.S.A. 65-6703(a); K.S.A. 65-6723(f); K.S.A. 65-6724(a).

Moreover, "the Woman's Right to Know Act," K.S.A. 65-6708 through 65-6715, requires a series of informed consent recitations and productions of medical material before an abortion is performed. This includes a requirement—except during a medical emergency—that a physician who used an ultrasound must offer—at least 30 minutes before the procedure—the patient the opportunity to view the ultrasound image and obtain a signed acceptance or rejection of such offer from the patient. K.S.A. 65-6709(h) Outside of this Act, the physician performing an abortion must also provide to the pregnant woman no less than 30 minutes before the procedure—except in an emergency—a copy of the referral and the medical basis for the determination that the abortion that:

- If the unborn child was determined to be nonviable and the medical basis of such determination,
- it is necessary to preserve the life of the mother and an explanation of the specific medical condition, or
- that the pregnancy would result in a substantial or irreversible impairment of a major bodily function of the pregnant woman and the specific related medical condition.

K.S.A. 65-6703(b); K.S.A. 65-6724(b).

The medical bases for these determinations must also be filed with the Kansas Department of Health and Environment.

Kansas law also sets requirements for consent for minors (K.S.A. 65-6705), restrictions on partial-birth abortions (K.S.A. 65-6721) and dismemberment abortions (K.S.A. 64-6741 through 65-6749)—which was enjoined from enforcement in *Hodes*—and prohibition of abortion based on gender (K.S.A. 65-6726), as well as civil damages and criminal penalties for violations of these laws. In addition, Kansas law prohibits using public funds, except as required by federal law, to pay for abortion services (K.S.A. 65-6731 through 65-6738).

Due to the Kansas Supreme Court's decision in *Hodes*, it is not anticipated that the overturning of *Roe v. Wade* and *Planned Parenthood v. Casey* will immediately affect the current status of any of these laws.