



# Kansas Courts News Release

## *Office of Judicial Administration*

**FOR IMMEDIATE RELEASE**

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### **DECISION: Appeal No: 114,153: Hodes & Nauser, MDs, PA, et al v. Derek Schmidt, et al**

[Appeal No. 114,153: Hodes & Nauser, MDs, PA, et al v. Derek Schmidt, et al](#)

[Archived oral argument video](#)

In a decision released today, the Kansas Supreme Court affirmed a Shawnee County District Court's order temporarily enjoining enforcement of legislation banning an abortion procedure known as dilation and evacuation. The Supreme Court held the Kansas Constitution Bill of Rights protects a woman's access to abortion and the plaintiffs showed they were substantially likely to succeed on their claim challenging the law.

The Kansas Legislature enacted Senate Bill 95 in 2015. The plaintiffs, two physicians who perform dilation and evacuation procedures, filed suit arguing the Kansas Constitution protects a woman's right to an abortion and the bill violates that right because it prevents physicians from using the safest procedure for most

second-trimester abortions. The two physicians requested a temporary injunction to stop the bill from taking effect while the case moved through the courts.

The Kansas Attorney General responded that no right to abortion exists under the Kansas Constitution. In the alternative, the Attorney General argued, even if the Kansas Constitution protects such a right, the bill did not violate it because physicians had other ways to perform second-trimester abortions.

The trial court concluded the Kansas Constitution protects a right to abortion and applied the federal undue burden test to decide whether the bill violated that right. It found dilation and evacuation was the most commonly-used procedure for second trimester abortions and the medical alternatives the Attorney General proposed were more dangerous. Based on these findings and United States Supreme Court caselaw, the trial court held it was substantially likely Senate Bill 95 violated Section 1 of the Kansas Constitution Bill of Rights. It therefore granted the temporary injunction.

The Attorney General appealed. The Kansas Court of Appeals affirmed the trial court. Seven judges concluded the Kansas Constitution protects a woman's right to abortion and that it was substantially likely Senate Bill 95 violated that right. Seven other judges concluded there is no right to access an abortion under the Kansas Constitution. The temporary injunction remained in place because the Court of Appeals was evenly split.

The Kansas Supreme Court agreed to review these decisions. Today, the court concluded Section 1 of the Kansas Constitution Bill of Rights, which states that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," protects a woman's right to decide whether to continue a pregnancy. The court looked at the historical record surrounding the people's ratification of Section 1 and concluded the drafters and ratifiers meant for Section 1 to protect every person's right to personal autonomy—and this right enables a woman to make decisions regarding her body, health, family formation, and family life, including the decision whether to continue a pregnancy. The court further concluded this right to personal autonomy is fundamental and governmental regulation of abortion is constitutional only if it passes a test of strict scrutiny. Passing this test requires a compelling government interest and government action that is narrowly tailored to that interest.

Although the trial court used the federal undue burden test to decide Senate Bill 95 likely violated the Constitution, the Supreme Court left the temporary injunction in

place. Specifically, the court held that, because strict scrutiny is a more difficult test to pass, the trial court's conclusion was correct. The court affirmed the trial court's decision and remanded the case to the trial court for further proceedings.

Justice Dan Biles concurred in the result. He wrote separately because he would have adopted an evidence-based test for Kansas courts to decide whether the challenged legislation unduly restricts abortion access when the burdens are viewed in light of the legislation's actual benefits and the state's valid interests.

Justice Caleb Stegall dissented. He would interpret Section 1 as a limit on the police power. The police power test prevents the state from passing any law that is not reasonably related to the furtherance of the common welfare or is arbitrary, irrational, or discriminatory. Justice Stegall would remand the case to the trial court to apply this legal standard.

All previously filed documents are available on the [Hodes & Nauser v. State case page](#).

[Kansas Court of Appeals decisions released today](#)

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