

No. 114153

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,

Defendants-Appellants.

APPLICATION TO FILE *AMICI CURIAE* BRIEF OF THE
CONSTITUTIONAL ACCOUNTABILITY CENTER AND THE ACLU of KANSAS
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Pursuant to Rule 6.06 of this Court, the Constitutional
Accountability Center (“CAC”) and the American Civil Liberties Union
Foundation of Kansas (“ACLU-KS”), by and through their undersigned
attorneys, respectfully move for leave to file an *amici curiae* brief in
support of Plaintiffs-Appellees urging this Court to affirm the judgment
of the district court.

In support of this motion, *amici* state:

1. *Amicus curiae* Constitutional Accountability Center (CAC) is
a think tank, public interest law firm, and action center dedicated to
fulfilling the progressive promise of our Constitution’s text and history.

CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees.

2. Founded more than fifty years ago, the ACLU-KS has approximately 3,000 members in Kansas and is an affiliate of the national ACLU. Over the past fifty years, the ACLU-KS has participated, either as direct counsel or as *amicus curiae*, in numerous cases in Kansas's state and federal courts to advocate for a broad interpretation of constitutional rights and liberties. In particular, the ACLU-KS has frequently participated in cases involving reproductive freedom.

3. CAC and the ACLU-KS have a strong interest in this case and the questions it raises about the scope of the Kansas Constitution's protection of substantive fundamental rights and whether the Kansas Constitution grants lesser protections for substantive fundamental rights than the U.S. Constitution.

4. CAC's and the ACLU-KS's brief will provide the Court with a unique perspective by making arguments that are grounded in the

text and history of the Kansas and U.S. Constitutions. More specifically, *amici* will argue that Section 1 of the Kansas Constitution's Bill of Rights and Section 1 of the Fourteenth Amendment share a common history: both were written to incorporate the principles of the Declaration of Independence and guarantee broad protection of substantive fundamental rights. Despite the different wording of the liberty guarantees of the Kansas Bill of Rights and the Fourteenth Amendment to the U.S. Constitution, both guarantees ensure the full promise of liberty and equal dignity for all in line with the principles spelled out in the Declaration of Independence. Thus, contrary to arguments made by Defendants-Appellants and their *amici*, the difference in wording of Section 1 of the Kansas Constitution and Section 1 of the Fourteenth Amendment does not support reading the Kansas Constitution to be less protective of substantive fundamental rights. Section 1 of the Kansas Constitution, no less than Section 1 of the Fourteenth Amendment, protects the full scope of liberty and equal dignity for all, including a woman's right to choose abortion.

5. CAC has filed *amicus* briefs addressing the text and history of the Fourteenth Amendment in other courts—including the Supreme

Court of the United States. *See, e.g.* Brief of Constitutional Accountability Center as *Amicus Curiae* in Support of Petitioners, *Whole Women’s Health v. Hellerstedt* (No. 15-274); Brief of Constitutional Law Professors as *Amici Curiae* in Support of Petitioners, *McDonald v. City of Chicago* (No. 08-1521).

6. Counsel for Appellees consents to the filing of a brief by *amici curiae* CAC and ACLU-KS, and counsel for Appellants does not object to the filing of a brief by *amici curiae* CAC and ACLU-KS.

For these reasons, pursuant to Rule 6.06, *amici* respectfully request that the Court enter an order granting its application to file an *amici curiae* brief.

Respectfully submitted,

/s/ Stephen Douglas Bonney
Stephen Douglas Bonney
KS Bar No. 12322
ACLU OF KANSAS
6701 W 64th St., Suite 210
Overland Park, KS 66202
(913) 490-4100
dbonney@aclukansas.org

*Counsel of Record for Amicus ACLU of
Kansas*

/s/ Brianne J. Gorod
Brianne J. Gorod
David H. Gans
CONSTITUTIONAL ACCOUNTABILITY
CENTER
1200 18th Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org
david@theusconstitution.org

*Counsel of Record for Amicus
Constitutional Accountability Center*

Dated: June 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion of the Constitutional Accountability Center and ACLU of Kansas for leave to file its brief *amici curiae* in support of plaintiffs-appellees were served, via email through the Court's electronic filing system, on June 23, 2016, on the following counsel:

Jeffrey A. Chanay
Chief Deputy Attorney General
Dennis D. Depew
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
Memorial Building 3rd Floor
120 S.W. Tenth Avenue
Topeka, Kansas 66612-1597
jeff.chanay@ag.ks.gov
dennis.depew@ag.ks.gov

Shon D. Qualseth
Stephen R. McAllister
Solicitor General of Kansas
Sarah E. Warner
333 West 9th Street
P.O. Box 1264
Lawrence, Kansas 66044-2801
shon.qualseth@trqlaw.com
steve.mcallister@trqlaw.com
sarah.warner@trqlaw.com

Teresa A. Woody
The Woody Law Firm, P.C.
1621 Baltimore Avenue
Kansas City, Missouri 64108
teresa@woodylawfirm.com

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

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

Erin Thompson
Thompson Law Firm, LLC
106 E. 2nd Street
Wichita, Kansas 67202
ethompson@tslawfirm.com

Robert V. Eye
Brett A. Jarmer
Robert V. Eye Law Office, LLC
4840 Billings Pkwy., Suite 200
Lawrence, Kansas 66049
bob@kaufmanneye.com
brett@kaufmanneye.com

Don P. Saxton
Saxton Law Firm, LLC
1000 Broadway
Suite 400
Kansas City, Missouri 64015
don@saxtonlawfirm.com

Mark P. Johnson
Dentons US, LLP
4520 Main Street
Suite 1100
Kansas City, Missouri 64111
mark.johnson@dentons.com

Paul Benjamin Linton
Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, Illinois 60062
pblconlaw@aol.com

Frederick J. Patton II
534 S. Kansas Avenue
Suite 1120
Topeka, Kansas 66603
joe@joepatton.com

Lee Thompson
Thompson Law Firm
106 East 2nd Street
Wichita, Kansas 67202
lthompson@tslawfirm.com

Mary Ellen Rose
10308 Metcalf Avenue, #182
Overland Park, Kansas 66212
mercat@aol.com

/s/ Stephen Douglas Bonney
Stephen Douglas Bonney
Counsel for *Amici*