REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

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IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2024-RL-059

RE: Rules Relating to Kansas eCourt

The court amends the attached Supreme Court Rules 21, 23, and 24, effective July 1, 2024.

Dated this 27th day of June 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 21

DEFINITIONS

(a) **"Attachment"** means a document efiled simultaneously with a pleading that is referenced within the pleading as support for the filing user's statement of facts or legal argument.

(b) **"Business hours"** means the hours of the day the court is open to the public to conduct court-related business.

(c) **"Case management system"** means the Kansas judicial branch system to receive, maintain, and store electronic case records in an internet, browser-based format.

(d) **"Case record"** means all electronic documents filed in a case. Each document in a case record must either be certified by the filer as compliant with Rule 24 or be filed under Rule 23(b).

(e) **"Certification"** means that an attorney or a party if not represented by an attorney certifies that, to the best of the person's knowledge, the document being submitted for filing complies with requirements of K.S.A. 60-211(b).

(f) **"Citation"** means:

(1) a Uniform Notice to Appear and Complaint issued by a law enforcement officer to a person alleged to have violated any of the statutes, rules, or regulations listed in, or authorized by, K.S.A. 8-2106 when signed by the officer and filed with a court having jurisdiction over the alleged offense;
(2) an electronic citation as that term is defined by K.S.A. 8-2119; and
(3) a citation, as defined by K.S.A. 32-1049a(b), by a conservation officer or employee of the Kansas Department of Wildlife, Parks, and Tourism having law enforcement authority as described in K.S.A. 32-808 to a person alleged to have violated any of the wildlife, parks, or tourism statutes, rules, or regulations listed in, or authorized by, K.S.A. 32-1049(a) when signed by the officer or employee and filed with a court having jurisdiction.

(g) **"Courthouse terminal"** means a computer terminal available to the public to access public case records at a courthouse. The courthouse terminal may be in a kiosk.

(h) **"Efiling"** means the submission of a document through the use of either an approved district court electronic filing system as defined in Rule 122 or the appellate courts' electronic filing system as mandated by Rule 1.14.

(i) **"Efiling interface"** means the contact point where a filing user submits an electronic document.

(j) **"Electronic access"** means access to case records available to the public through a courthouse terminal or remotely through the public access portal, unless otherwise specified in these rules.

(k) **"Events index"** means items listed in a chronological index of filings, actions, and events in a specific case, which may include identifying information of the parties and counsel; a brief description or summary of the filings, actions, and events; and other case information. The events index, also referred to as the register of actions, is a record created and maintained by the judicial branch only for administrative purposes that is not part of the case record. The events index must comply with Rule 24.

(l) **"Filing user"** means any individual who is authorized to submit a document through the Kansas Court eFiling System. This term does not include the following individuals when acting in their official capacity:

(1) an employee of the Kansas judicial branch;
(2) a judge of the district court as defined by K.S.A. 20-301a;
(3) a temporary judge assigned as described by K.S.A. 20-310b(a); or any retired justice of the Supreme Court, retired judge of the Court of Appeals, or retired judge of the district court assigned as described by K.S.A. 20- 2616;
(4) a retired justice of the Supreme Court, a retired judge of the Court of Appeals, or a retired judge of the district court who has entered into a written agreement with the Supreme Court under K.S.A. 20-2622;
(5) a judge of the Court of Appeals as described by K.S.A. 20-3002(d); and
(6) a justice of the Supreme Court as described by Kansas Constitution, article3, section 2.

(m) **"Judicial branch"** means the judicial branch of government, which includes all district and appellate courts, judicial officers, offices of the clerks of the district 4 and appellate courts, the Office of Judicial Administration, court services offices, and judicial branch employees.

(n) **"Kansas Court eFiling System"** means the Kansas Court Electronic Filing System that the Kansas Supreme Court has approved for use to submit documents in an electronic format to the case management system for Kansas district and appellate courts. The Kansas Court eFiling System (also referred to as the efiling system) provides a means to view case histories, check the status of submissions, send follow-up documents, and access service lists.

(o) **"Nondocketable event"** means a note, bench note, memorandum, draft, worksheet, or work product of a justice, judge, or court personnel that does not record court action taken in a case.

(p) **"Nonpublic case record"** means any case record that is sealed or made confidential by statute, caselaw, Supreme Court rule, or court order.

(q) **"Public"** means any person, business, nonprofit entity, organization, association, and member of the media.

(r) **"Public access portal"** means an internet, browser-based access point for the public to freely and conveniently access certain public case records. At the discretion of the Kansas judicial branch, the public access portal may require user registration, email or identity verification, or other protocol and may restrict bulk record access.

(s) **"Public case record"** means any case record that is not sealed or made confidential by statute, caselaw, Supreme Court rule, or court order.

(t) **"Sealed"** means a case type or document to which access is limited by statute, Supreme Court rule, or court order.

(u) **"Standard operating procedures"** means those procedures adopted by the judicial administrator, with input from stakeholders, that ensure documentssubmitted electronically are processed efficiently, increase effectiveness of court operations, and enhance access to justice for the people of Kansas.

(v) **"Transcript"** means any written verbatim record of a court proceeding or deposition taken in accordance with the rules of civil or criminal procedure**.**

(w) **"Trial exhibit"** means a document or object introduced or admitted into evidence in a court proceeding.5

Rule 23

FILING IN A DISTRICT OR AN APPELLATE COURT

(a) **Filing User's Obligations.** When filing a document with the a district or an appellate court, at the efiling interface, a filing user must correctly designate the case and document type and indicate if the document is submitted under subsection (b) or certify that the document complies with Rule 24. The requirement to certify compliance with Rule 24(b) does not apply to those individuals exempted from the definition of "filing user" in Rule 21(l).

(1) A court employee is not required to review a document that a filing user submits to ensure that the filing user appropriately designated a case, document, or information.
(2) If a document does not comply with these rules, the court may order that the document be segregated from public view until a ruling has been made on its noncompliance.

(b) **Filing Under Seal.**

(1) If a filing user submits a document under a pre-existing seal order, the filing user must affirm by certification on the efiling interface that such anorder exists.
(2) If at the time of filing a filing user believes that a document not covered by a pre-existing seal order should be sealed, the filing user must

submit a motion to seal that includes a general description of the document at issue. The filing user must affirm by certification on the efiling interface that the motion complies with Rule 24.

(3) A filing user may file a motion to seal a document already on file. The motion must specify the document that is proposed to be sealed. When a motion to seal is filed, the identified document will be segregated from public view until the court rules on the motion to seal. A court employee is not required to search for a document that is not identified with specificity in a motion to seal.

(4) A case or document may be sealed only by a court order that is case or document specific or as required by a statute or Supreme Court rule.

(c) **~~District Court~~ Clerk Processing of an eFiled Document.**

(1) **Document Review.** Upon receipt of a document submitted to a district court using the Kansas Court eFiling System, a clerk of the district court is authorized to return the document only for the following reasons:

(A) the document is illegible or in a format that prevents it from being opened;

(B) the document does not leave a margin sufficient to affix a file stamp, as required by Rule 111;

(C) the document does not have the correct county designation, case number, or case caption;

(D) the applicable fee has not been paid or no poverty affidavit is submitted with the document or already on file in the case; or

(E) the document only sets a hearing date, and the hearing date is a date the court is closed or a date that has already passed and the hearing did not occur on that date; or

(F) the filing user failed to include the necessary information or required documents for docketing an appeal or initiating an appellate case.

(2) **Timeline for a Clerk to Process a Document.** A clerk of the district court must process a document for filing as quickly as possible but not more than four business hours after the filing user submits the document for filing.

(3) **Return of Document.** If a clerk determines that a document must be returned for any of the reasons listed in subsection (c)(1), the clerk must designate the reason for its return.

(4) **Quality Review.** If a document is not returned rejected under subsection (c)(1), a clerk will approve the document for filing in the case management system. The clerk may flag the document for further review as authorized by the standard operating procedures adopted by the judicial administrator.

(5) **File Stamping a Document.** A document submitted through the Kansas Court eFiling System will be marked with the date and time of original submission.

(d) **Inclusion of a Paper Document.** If a clerk is authorized to accept a paper document for filing in a case record under a standard operating procedure adopted by the judicial administrator, the clerk must follow the requirements of that procedure for including the document in the case management system.

Comments

[1] The return reason listed in Rule 23(c)(1)(C) applies to a document filed in an existing case where the clerk must match the county designation, the names of the parties in the case caption, and the case number with those of the existing case.

[2] The return reason listed in Rule 23(c)(1)(E) is not limited to a document labeled "Notice of Hearing." But it does not apply to a document that does more than set a hearing date, such as a document that also asks a court to decide an issue.

[3] The Kansas eCourt Rules make clear that the responsibility for correctly filing a document in a court case rests with the person filing the document.

Rule 24

PROTECTION OF PERSONALLY IDENTIFIABLE INFORMATION

(a) **Obligation to Redact Personally Identifiable Information.** In all filings, an attorney, or a party if not represented by an attorney, is solely obligated to protect the confidentiality of personally identifiable information as identified in this rule by ensuring that the filing contains no personally identifiable information. A district court clerk of the court has no duty to review a document to ensure compliance with this rule.

(b) **Personally Identifiable Information.** The following is personally identifiable information:

(1) the name of a minor in a district court case who is not a named party in at he case and, if applicable, the name of a person whose identity could reveal the name of a the minor who is not a named party in a case;
(2) the name of a minor in an appellate court case and, if applicable, the name of a person whose identity could reveal the name of the minor;
(3~~2~~) the name of an alleged victim of a sex crime;
(4~~3~~) the name of a petitioner in a protection from abuse case;
(5~~4~~) the name of a petitioner in a protection from stalking, sexual assault, or human trafficking case;
(6~~5~~) the name of a juror or venire member;
(7~~6~~) a person's date of birth except for the year;
(8~~7~~) any portion of the following:

(A) an email address except when required by statute or rule;
(B) a computer username, password, or PIN; and
(C) a DNA profile or other biometric information;

(9~~8~~) the following numbers except for the last four digits:

(A) a Social Security number;
(B) a financial account number, including a bank, credit card, and debit card account;
(C) a taxpayer identification number (TIN);
(D) an employee identification number;
(E) a driver's license or nondriver's identification number;
(F) a passport number;
(G) a brokerage account number;
(H) an insurance policy account number;
(I) a loan account number;
(J) a customer account number;
(K) a patient or health care number;
(L) a student identification number; and
(M) a vehicle identification number (VIN);

(109) any information identified as personally identifiable information by court order; and

(110) the physical address of an individual's residence.

(c) **Exceptions.** The following is not personally identifiable information:

(1) an account number that identifies the property alleged to be the subject of a proceeding;
(2) the name of an emancipated minor;
(3) information used by the court for case maintenance purposes that is not accessible by the public;
(3) information a party's attorney, or a party if not represented by an attorney, reasonably believes is necessary or material to an issue before the court;
(5) the first name, initials, or pseudonym of any person in a district court case identified in subsections (b)(1) and (b)(3)-(b)(6) to (b)(5);
(6) the initials, pseudonym, familial relationship, generic descriptor, or jurornumber of any person in an appellate court case identified in subsections (b)(2)-(b)(6);
(76) any information required to be included by statute or court rule; and
(87) any information in a transcript.

(d) **Administrative Information Required.** When a filing user submits a new case through the Kansas Court eFiling System, the filing user must complete the administrative information requested at the efiling interface to the extent possible. If an initial pleading in a new district court case is in paper form, the filer must submit a paper cover sheet that substantially complies with the form located on the judicial council website. The following rules apply.

(1) Personally identifiable information gathered for administrative purposes when a new case is efiled:

(A) if stored electronically, must be accessible only by authorized court personnel and

(B) is not subject to reproduction and disposition of court records under Rule 108.

(2) Personally identifiable information gathered for administrative purposes using a paper cover sheet:

(A) must not be retained in the case file;
(B) is not subject to reproduction and disposition of court records under Rule 108; and
(C) may be shredded or otherwise destroyed within a reasonable time after the case is entered electronically into the case management system.

(3) In an action for divorce, child custody, child support, or maintenance, the administrative information provided must include, to the extent known:

(A) the parties' Social Security numbers;
(B) the parties' birth dates; and
(C) the parties' child's full name or pseudonym, Social Security number, and birth date.

(e) **Certification.** Each document submitted to a court must be accompanied by a certification by an attorney, or by a party if not represented by an attorney, that the document has been reviewed and is submitted under Rule 23(b) or complies with this rule.

(f) **Remedies and Sanctions.** Failure to comply with this rule is grounds for sanctions against an attorney or a party. Upon motion by a party or interested person, or sua sponte by the court, the court may order remedies for a violation of any requirements of the Kansas eCourt Rules. Following notice and an opportunity to respond, the court may impose sanctions if such filing was not made in good faith.

(g) **Motions Not Restricted.** This rule does not restrict a party's right to request a protective order, to move to file a document under seal, or to request the court to seal a document.

(h) **Application.** This rule does not affect the application of constitutional provisions, statutes, or court rules regarding confidential information or access to public information.

Comments

[1] Rule 24 applies to information contained in a filing, not to information contained in an oral communication, whether made in a court proceeding or otherwise.

[2] If use of a person's initials is unwieldy, parties in a district court case may consider using other options such as a first name with the first initial of the last name, a generic descriptor such as "child 1," or a pseudonym in lieu of a name.

[3] Rule 24(b)(110) includes "the physical address of an individual's residence" in the definition of personally identifiable information. However, if an exception in Rule 24(c) applies, this information is no longer considered to be personally identifiable information. If a party is required by law to include the physical address of an individual's residence, then it may be provided under Rule 24(c)(76). For example, if a document will be served by leaving a copy at a person's dwelling, see K.S.A. 60-205(b)(2)(B)(ii) or K.S.A. 61-3003(d), or by mailing the document to a person's last known address, see K.S.A. 60-205(b)(2)(C) or K.S.A. 61-3003(c), then providing the physical address is required by law to perfect service. In that situation, the physical address is needed and will not be considered personally identifiable information because it meets the exception of Rule 24(c)(76).

[4] Under Rule 24(c)(4), "necessary" means information essential for the document to make sense or for the proper processing of the document or information requested on a Judicial Council form. Examples include information necessary to establish the court's personal or subject matter jurisdiction, to process a protective order, to serve a filed document on another party, or to issue and execute a subpoena

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PETITIONS FOR REVIEW OF DECISIONS OF THE COURT OF APPEALS
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TITLE	DOCKET NUMBER	DISPOSITION	DATE	REPORTED BELOW
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In re Adoption of E.A.	125,994	Granted.	06/26/2024	Unpublished
In re Estate of Barnes	125,990	Denied	07/01/2024	Unpublished
State v. Gleason	125,156	Granted	06/26/2024	Unpublished

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APPEAL AND ERROR:

Appellate Review of District Court's Denial of Pretrial Motion to Suppress—Consideration of Evidence from Suppression Hearing and Trial. When reviewing a district court's ruling denying a pretrial motion to suppress, an appellate court may consider both the evidence presented at the suppression hearing and the evidence adduced at trial.
State v. Martin 538

Claim of Cumulative Error—Appellate Review. Appellate courts analyzing a claim of cumulative error consider the errors in context, the way the trial judge addressed the errors, the nature and number of errors and whether they are connected, and the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test from *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), applies. Under that test, the party benefiting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome.
State v. Coleman 296

Continuance Denials Reviewed for Abuse of Discretion—Appellate Review. Appellate courts review continuance denials for abuse of discretion. A court abuses its discretion when its action is unreasonable or based on an error of law or fact. The party asserting an abuse of discretion must demonstrate it.
State v. Flack 79

Crime of Possession of Weapon by Felon—Inadequate Stipulation to Establish Prior Felony—Appellate Review. When a stipulation in a criminal-possession-of-a-weapon case is inadequate to establish that the defendant had committed a prior felony that prohibited the defendant from possessing a weapon on the date in question, appellate courts review under the constitutional harmless-error standard. In doing so, the appellate court may consider a journal entry admitted into the record but withheld from the jury under the procedures governing prior-felony stipulations in criminal-possession cases. *State v. Guebara* 458

Determination Whether Confession was Voluntary—Mixed Standard of Review—Appellate Review. On appeal from a trial judge's determination of whether the State met the burden of proving an individual voluntarily confessed, appellate courts apply a mixed standard of review. The appellate court reviews the trial judge's findings of fact about the totality of circumstances to see whether each is supported by substantial competent evidence. Appellate courts assess de novo the trial judge's legal conclusion based on those facts. This means the appellate court gives no deference to the trial judge's legal conclusion about voluntariness.
State v. G.O. 386

Equally Divided Appellate Court—Lower Court's Ruling Stands. When an appellate court is equally divided, the lower court's ruling stands.
Williams-Davidson v. Lui 491

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Law-of-the-Case Doctrine—Exceptions. Exceptions to the law-of-the-case doctrine are when (1) a subsequent trial produces substantially different evidence; (2) a controlling authority has made a contrary decision regarding the law applicable to the issues; or (3) the prior decision was clearly erroneous and would work a manifest injustice. *Hodes & Nauser v. Kobach* 940*

— Restricts Relitigation of Issue Already Decided in Same Case. The law-of-the-case doctrine restricts a party from relitigating an issue already decided on appeal in successive stages of the same proceeding.
Hodes & Nauser v. Kobach 940*

Statute Provides Jurisdiction to Supreme Court to Vacate Act, Order, or Judgment. K.S.A. 60-2101(b) provides the Kansas Supreme Court with jurisdiction to vacate any act, order, or judgment of a district court or the Court of Appeals to ensure that such act, order, or judgment is "just, legal and free of abuse." *State v. Scheetz* 48

Trial Court's Ruling on Juror Challenge for Cause—Appellate Review. Appellate courts traditionally accord deference to a trial court's ruling on a juror challenge for cause. *State v. Flack* 79

APPELLATE PROCEDURE:

Statutory Right to Appeal Criminal Case When Defendant Not Present—Thirty Days from Date Received Notice of Judgment. Under K.S.A. 2022 Supp. 60-2103(a), if entry of judgment in a criminal case occurs when a defendant is not present, defendant has 30 days from the date he receives notice of the judgment to take an appeal without a showing of excusable neglect. *State v. Perry* 374

ATTORNEY AND CLIENT:

Application for Order of Termination of Probation—Discharge from Probation. Following a one-year period of probation, attorney filed for termination of probation. Supreme Court grants Leavitt's application after compliance with successful probation term and Leavitt is discharged from probation. *In re Leavitt* 150

Breakdown in Communication between Defendant and Counsel—Disagreement About Trial Strategy. Disagreements about trial strategy do not show a complete breakdown in communication between a defendant and counsel. *State v. Turner* 162

Defendant Must Show Requisite Justifiable Dissatisfaction for Substitute Appointed Counsel.. If a defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction for substitute appointed counsel. *State v. Turner* 162

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Disciplinary Proceeding—Indefinite Suspension. Attorney found to have violated numerous KRPCs in six separate complaints filed by the ODA. The Supreme Court orders indefinite suspension and Rule 231 compliance, as well as compliance with reinstatement rule and reinstatement hearing, if she applies for reinstatement. *In re Johnson* 322

—— Attorney was suspended indefinitely from the practice of law in Kansas for violating KRPC 1.2(a) (scope of representation); KRPC 1.3 (diligence); KRPC 1.4(a) (communication); KRPC 1.16(a)((2), (3) (declining or terminating representation); and KRPC 8.4(d) (misconduct). If respondent applies for reinstatement, he shall comply with Rule 232 and be required to undergo a reinstatement hearing. *In re Cure* 742

— **Ninety-day Suspension**. Attorney entered into summary submission agreement admitting to violations of KRPCs. The Supreme Court ordered that Respondent's license to practice law in Kansas be suspended for 90 days but that suspension is stayed contingent upon the respondent's successful completion of a 12-month period of probation that begins on the filing of this opinion. Supreme Court Rule 225(a)(2). No reinstatement hearing is required upon the respondent's successful completion of probation.
In re Wiske 584

— **One-year Suspension**. Attorney was disciplined by one-year suspension for violations of KRPC 1.7, KRPC 1.8, KRPC 1.15, and KRPC 8.4(d). Respondent failed to file an affidavit verifying compliance with a probation plan with the Disciplinary Administrator and failed to appear at the hearing before the Supreme Court. A reinstatement hearing is required if respondent seeks to be reinstated.
In re Maughan 890*

— **Published Censure.** A majority of the Supreme Court, after considering the evidence presented, the exceptions filed by Davis and the ODA, and the ABA Standards for Imposing Lawyer Sanctions, holds that published censure is the appropriate discipline in this case. In deciding on published censure as the appropriate discipline, the court relied on ABA Standard 5.13.
In re Davis 199

— **Twelve-month Suspension, Stayed Pending Successful Completion of Twelve-month Period of Probation**. Attorney found to have violated KPRC 1.1, 1.15, 1.3, 1.5, and 8.4(g) by Supreme Court. Suspension is stayed pending completion of 12-month probation period.
In re Roy 184

— **Two-year Suspension**. Attorney failed to report a felony charge to the Disciplinary Administrator's office. Respondent stipulated to violations of KRPCs. The Supreme Court ordered that the temporary suspension previously imposed based on the respondent's felony conviction be lifted and Davis be disciplined by a two-year suspension in accordance with Supreme Court Rule 225(a)(3). The two-year suspension is stayed after six months,

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conditioned on successful participation and completion of a two-year probation period. No reinstatement hearing is required upon successful completion of probation. *In re Davis* 450

— **Two-year Suspension Stayed**. Attorney stipulated in a summary submission agreement that he violated KRPC 8.4(b), (e), and (g). The Supreme Court ordered suspension for two years, stayed conditioned upon respondent's successful participation and completion of two-year probation period. Probation is subject to terms of probation plan and KALAP monitoring agreement. *In re Samsel* 910*

Evaluating Ineffective Assistance of Counsel Claim Using ABA Guidelines in Death Penalty Cases. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases are a relevant guidepost for evaluating an ineffective assistance of counsel claim in a capital case, but they are not coextensive with constitutional requirements. *State v. Flack* 79

Motion for Discharge from Probation—Order of Discharge from Probation. Attorney filed motion for discharge from probation following nine months of suspension from the practice of law. ODA confirmed that Kupka complied with her probation and confirmed she is eligible for discharge from probation. The Supreme Court granted Kupka's motion for discharge from probation. *In re Kupka* 599

— — Attorney on three-years' probation files motion to discharge him from probation. The Disciplinary Administrator's office had no objections following his compliance with probation and eligibility to be discharged. The Supreme Court ordered Shepherd's discharge from probation. *In re Shepherd* 597

— — Attorney previously suspended and on probation, filed motion for discharge from probation. Office of the Disciplinary Administrator confirmed Delaney successfully complied with probation and was eligible for discharge from probation. The Supreme Court granted Delaney's motion for discharge from probation. *In re Delaney* 598

Petition for Reinstatement—Reinstatement. Attorney petitions the court for reinstatement of his license following his suspension from the practice of law. Supreme Court reinstates his license conditioned upon payment of reinstatement and registration fees and completion of CLE requirements. *In re Pistotnik* 148

Sixth Amendment Right to Effective Assistance of Counsel—Trial Judge has Duty to Inquire if Dissatisfaction. A defendant has a right under the Sixth Amendment to the United States Constitution to effective assistance of counsel. Effective assistance includes a right to representation unimpaired by conflicts of interest or divided loyalties but, in situations with appointed counsel, it does not include the right to counsel of the defendant's choosing. When a defendant articulates dissatisfaction with counsel, the trial judge has a duty to inquire. Dissatisfaction can be demonstrated by showing a

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conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant. *State v. Coleman* 296

Voluntary Surrender of License—Disbarment. Attorney voluntarily surrendered her license to practice law before facing a formal disciplinary hearing for violations of the Kansas Rules of Professional Conduct. The Supreme Court accepted the voluntary surrender and ordered disbarment. *In re* Morehead 709

— — Attorney voluntarily surrendered his license to practice law due to his noncompliance with registration and continuing legal education requirements. McCollum was also recently disbarred in the state of Missouri. The Kansas Supreme Court accepted the voluntary surrender and ordered disbarment. *In re McCollum* 710

— — Attorney voluntarily surrendered his license to practice law following a formal disciplinary hearing at which a hearing panel concluded there was clear and convincing evidence that Baylor violated KRPC 8.4(g) and Rules 210 and 219. The Supreme Court accepted the voluntary surrender and ordered disbarment. *In re Baylor* 595

— — Attorney voluntarily surrendered his license to practice law in Kansas following a complaint filed by the Disciplinary Administrator's office that alleged Smith violated multiple KRPCs. His license had been administratively suspended in 2022 for noncompliance with registration and CLE requirements. The Supreme Court accepted the voluntary surrender and ordered disbarment. *In re Smith* 151

CIVIL PROCEDURE:

Action for Wrongful Conviction and Imprisonment—Meaning of Statutory Language "the Charges were Dismissed." The phrase "the charges were dismissed" in K.S.A. 2022 Supp. 60-5004(c)(1)(B) clearly and unambiguously means both terminating the criminal accusation presented in court and relieving the defendant of that accusation's criminal liability. *In re Wrongful Conviction of Sims* 153

— **Two Elements**. K.S.A. 2022 Supp. 60-5004(c)(1)(B) requires a claimant to show two elements: (a) a court's reversal or vacating of a felony conviction; and (b) either the dismissal of charges or a finding of not guilty following a new trial. *In re Wrongful Conviction of Sims* 153

Applicable Statute of Limitations Period—Court's Considerations. Substance prevails over form when determining the applicable statute of limitations. A party's labeling of a claim in a civil petition as an action in negligence does not alter the character of that claim when deciding the applicable limitations period. A court must look to the particular facts and circumstances to properly characterize the cause of action. *Unruh v. City of Wichita* 12

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Civil Action for Compensation for Wrongful Conviction—Conviction for Lesser Included Offense in Second Trial Precludes Recovery under Statute. A defendant convicted of a lesser included offense after a second trial based on the same criminal conduct underlying the alleged wrongful conviction has engaged in illegal conduct that precludes the claimant's recovery under K.S.A. 2023 Supp. 60-5004.
In re Wrongful Conviction of Spangler 697

Civil Action for Persons Wrongfully Convicted and Imprisoned—Compensation Prohibited When Conduct Causes Conviction. K.S.A. 2023 Supp. 60-5004(c)(1)(D), part of a statutory provision allowing persons wrongfully convicted and imprisoned to bring a civil action, prohibits compensation when the claimant's own conduct causes or brings about the conviction. *In re Wrongful Conviction of Spangler* 697

Doctrine of Stare Decisis—Application. Under the doctrine of stare decisis, once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Even so, this court will overturn precedent, no matter how longstanding, if it is clearly convinced the rule of law was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent. *State v. Moeller* 860*

Legal Error to Expand Scope of Hearing Beyond Adequate Notice to All Parties Before Hearing. It is legal error, and thus an abuse of discretion, for a district court to expand the scope of a hearing beyond the extent specified by adequate, clear, and unambiguous notice given to all parties before the hearing begins.
Jennings v. Shauck 711

Motion to Dismiss for Failure to State a Claim—Appellate Review. When reviewing a motion to dismiss for failure to state a claim, courts do not evaluate the strength of the plaintiff's position, but rather whether the petition has alleged facts that may support a claim on either the petition's stated theory or any other possible theory.
Towne v. Unified School District No. 259 1

Reversible Error if Prejudice Results from Improper Expansion of Scope of Hearing. When the improper expansion of the scope of a hearing results in prejudice to an affected party, the error is reversible. *Jennings v. Shauck* 711

CONSTITUTIONAL LAW:

Application of Due Process Clause of Fourteenth Amendment When Reviewing Interrogation of Individual—Courts Required to Assess Totality of All Surrounding Circumstances. The Due Process Clause of the Fourteenth Amendment applies when the interrogation techniques were improper because, in the circumstances of the case, the confession is not the product of an individual's free and rational will. Applying this aspect of the due process protection requires courts to assess the totality of all an interro-

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gation's surrounding circumstances—both the characteristics of the individual and the details of the interrogation—to determine if a confession is a free and unconstrained choice by its maker. *State v. G.O.* 386

Compelling Interest Rarer than Legitimate and Important Interests. A compelling interest is extremely weighty, possibly urgent, and rare—much rarer than merely legitimate interests and rarer too than important interests. *Hodes & Nauser v. Stanek* 995*

Constitutionality of Statute or Ordinance—Question of Law—Burden on Challenging Party. The constitutionality of a statute or ordinance is a question of law subject to unlimited review. The party challenging the statute or ordinance as unconstitutionally overbroad has the burden to establish its overbreadth. *City of Wichita v. Griffie* 510

Double Jeopardy Clause—Prohibits Court from Imposing Multiple Punishments under Different Statutes for Same Conduct. The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights prohibit a court from imposing multiple punishments under different statutes for the same conduct in the same proceeding when the Legislature did not intend multiple punishments. *State v. Martin* 538

Fifth Amendment Right to Remain Silent—Requirement of Voluntary Waiver—Voluntariness Standard Used to Review Waiver. The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment to the United States Constitution, protects the right of a person to remain silent, unless the individual chooses to speak in the unfettered exercise of the person's own will, and to suffer no penalty for such silence. Under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), law enforcement officers must inform individuals subject to custodial interrogation of this and other Fifth Amendment rights. Once the *Miranda* advisories are communicated, an individual may waive the right to remain silent, provided the waiver is made voluntarily, knowingly, and intelligently. Courts use this same voluntariness standard to evaluate a juvenile's waiver of *Miranda* rights. *State v. G.O.* 386

First Amendment Facial Overbreadth Analysis—Three-Step Review. A First Amendment facial overbreadth analysis consists of three steps. First, the court interprets the language of the challenged law to determine its scope. If the scope of the law extends to prohibit protected activity, the court next decides whether the law prohibits a substantial amount of protected activity judged in relation to the law's plainly legitimate sweep. Finally, if the court finds substantial overbreadth, the court looks to see whether there is a satisfactory method of severing the law's constitutional provisions from its unconstitutional provisions. *City of Wichita v. Griffie* 510

First Amendment Facial Overbreadth Doctrine—Departure from Traditional Rule of Standing. The First Amendment facial overbreadth doc-

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trine departs from the traditional rule of standing that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court.
City of Wichita v. Griffie 510

Fourth Amendment Right to Protection from Unreasonable Searches and Seizure by Government. The Fourth Amendment to the United States Constitution protects the right of an individual to be secure in his or her person and not subject to unreasonable searches and seizures by the government. Section 15 of the Kansas Constitution Bill of Rights offers the same protections. *State v. McDonald* 486

Impairment of Right to Terminate Pregnancy—Government's Burden to Show Impairment Withstands Strict Scrutiny. Once the plaintiff shows government action impairs the right to terminate a pregnancy, the burden shifts to the government to show that this impairment withstands strict scrutiny. Under the strict scrutiny standard, the government must show three things: (1) it has a compelling interest; (2) the challenged action actually furthers that interest; and (3) it does so in a way that is narrowly tailored. *Hodes & Nauser v. Kobach* 940*

Impairment of Right to Terminate Pregnancy—Strict Scrutiny. Impairment of the right to terminate a pregnancy must withstand strict scrutiny. The plaintiff carries the burden to show government action impairs this right.
Hodes & Nauser v. Kobach 940*

Protections of Fifth and Fourteenth Amendments Applicable – State's Burden of Proof that Individual Waived Rights to Make Statement – Requirements. When the protections of the Fifth and Fourteenth Amendments apply, the State bears the burden of proving by a preponderance of the evidence that an individual voluntarily, intelligently, and knowingly waived rights guaranteed by the Fifth Amendment to the United States Constitution and voluntarily—that is, based on the person's unfettered will—made a statement. To do so, the State must establish that police or other state actors did not intimidate, coerce, deceive, or engage in other misconduct that, when considered in the totality of the circumstances, was the motivation for the individual to make a statement. *State v. G.O.* 386

Right of Criminal Defendant to Present Their Theory of Defense—Exclusion of Evidence Violates Right to Fair Trial. Under both the United States and Kansas Constitutions, a criminal defendant has the right to present their defense theory, and excluding evidence integral to that theory violates their fundamental right to a fair trial. To constitute error, the excluded evidence supporting the defense theory must be relevant, admissible, and noncumulative. *State v. Waldschmidt* 633

Right to Testify in One's Criminal Trial Is Fundamental Right. The right to testify on one's own behalf at a criminal trial is a fundamental right grounded in multiple provisions of the United States Constitution. *State v. Cantu* 759

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Unconstitutional Provisions May Be Severed From a Law Leaving Remainder in Force—Requirements. A court may sever unconstitutional provisions from a law and leave the remainder in force and effect if, after examining the law, it can conclude (1) the Legislature would have passed the law without the objectionable portion and (2) the law would operate effectively to carry out the intention of the Legislature with the objectionable portion stricken. *City of Wichita v. Griffie* 510

COURTS:

Considerations in Deciding If Law Is Narrowly Tailored. Courts consider one or more of the following three components in deciding whether a law is narrowly tailored: whether the government's action is necessary, whether the government's action is underinclusive, and whether the government's action is overinclusive. *Hodes & Nauser v. Kobach* 940*

Disciplinary Proceeding—Public Reprimand. Court reporter alleged to have violated Supreme Court Rule 367, Board Rule 9.F.2, 9.F.3, 9.F.6, and 9.F.11. Following a hearing to the Board, the Board recommended a six-month suspension. The Supreme Court ordered discipline by public reprimand. *In re Rogers* 365

— Twelve Months' Probation. Court reporter stipulates to violations of Supreme Court Rule 367, Board Rule 9.F.2 and 9.F.3. Supreme Court orders discipline of twelve-months' probation in accordance with Rule 367, Board Rule 9.E.4. of the rules adopted by the State Board of Examiners of Court Reporters. *In re Burkdoll* 248

CRIMINAL LAW:

Aggravated Assault and Aggravated Battery Can Both Be Predicate Felonies for Felony Murder. Under K.S.A. 2022 Supp. 21-5402(c)(2)(D) and (F), aggravated assault, as defined in K.S.A. 2022 Supp. 21-5412(b), and amendments thereto, and aggravated battery, as defined in K.S.A. 2022 Supp. 21-5413(b)(1), and amendments thereto, can both serve as predicate felonies for felony murder if they are so distinct from the killing as to not be an ingredient of the killing. *State v. Waldschmidt* 633

Convictions for Premeditated First-Degree Murder under Aiding and Abetting Theory and Conspiracy to Commit First-Degree Murder Not Duplicitous. A conviction for premeditated first-degree murder under an aiding and abetting theory is not duplicitous of a conviction for conspiracy to commit first-degree murder even when the two convictions are based on the same act. Even if the two convictions involve a single act of violence, they are different offenses because the convictions arise from violations of different statutes with different elements. The convictions thus do not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution or § 10 of the Kansas Constitution Bill of Rights and are not prohibited under K.S.A. 21-5109(d) or (e). *State v. Alston* 979*

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Crime of Capital Murder—Killing of More than One Person. The State may allege the crime of capital murder was committed in a "heinous, atrocious, or cruel" manner with respect to any single victim of a capital murder conviction when the conviction is predicated on the killing of more than one person. There is nothing in the statute suggesting that each individual killing must be shown to have been committed in a heinous manner. *State v. Flack* 79

Crime of Possession of Firearm by Convicted Felon—Defendant May Request Court Approve Stipulation of Prior Felony. When requested by a defendant charged with unlawful possession of a weapon, a district court must approve a stipulation that the defendant had committed a prior felony that prohibited the defendant from owning or possessing a weapon on the date in question. *State v. Guebara* 458

Death of Defendant Does Not Automatically Abate Appeal. Kansas precedent establishes that the death of a criminal defendant during the appeal of his or her conviction does not automatically abate the appeal but may render some issues moot. *State v. Moeller* 860*

Defendant's Motion for New Trial—Appellate Review. K.S.A. 22-3501 empowers a district court to grant a defendant's motion for new trial if required in the interest of justice. Appellate courts review a district court's denial of a motion for new trial for abuse of discretion, which occurs if an action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. The party seeking the new trial has the burden of demonstrating an abuse of discretion. *State v. Alston* 979*

DNA Testing Not Required if Not Requested by Defendant. K.S.A. 21-2512 does not require a district court to order DNA testing a defendant does not ask for. *State v. Harris* 926*

Double Jeopardy Challenge Based on Multiple Punishments—Two-Part Test. When a defendant brings a double jeopardy challenge based on multiple punishments imposed in one case, courts conduct a two-part test to determine whether the convictions giving rise to those punishments are for the same offense. First, courts consider whether the convictions arose from unitary conduct. Second, courts consider whether by statutory definition there are two crimes or only one. In cases involving convictions under different statutes, this second part of the analysis requires courts to apply what has been called the "same-elements test." Under that test, courts consider if each statute requires proof of an element not necessary to prove the other offense. *State v. Martin* 538

Failing to Affix Drug-Tax Stamp Not a Lesser Included Crime of Possession of Methamphetamine. The crime of failing to affix a drug-tax stamp is not a lesser included crime of possession of methamphetamine under K.S.A. 2019 Supp. 21-5109(b)(2) because not all elements of the former are identical to some elements of the latter. *State v. Martin* 538

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Felony Murder—Definition. Felony murder holds a defendant strictly liable for homicides occurring in the commission of, attempt to commit, or flight from any inherently dangerous felony. Consequently, self-defense can never be a legal justification for the killing itself; it may be asserted only in felony-murder cases to the extent it may negate an element of the underlying inherently dangerous felony. *State v. Waldschmidt* 633

Forensic DNA Testing Statute—Application of Law of Case Doctrine. The law of the case doctrine applies to motions for DNA testing under K.S.A. 21-2512 and prevents a party from relitigating an issue already decided in the same proceeding. *State v. Edwards* 567

— Court May Act on Filings after Docketed Appeal. The plain language of K.S.A. 21-2512 grants the district court jurisdiction to consider and act on filings made under the statute even after an appeal has been docketed. *State v. Edwards* 567

Grant of Motion for Continuance—Speedy Trial Exceptions—Appellate Review. Appellate courts review a district court's decision to grant a continuance under the speedy trial exceptions in K.S.A. 2019 Supp. 22-3402(e) for an abuse of discretion. A district court abuses its discretion if its decision (1) is based on an error of law—if the discretion is guided by an erroneous legal conclusion; (2) is based on an error of fact—if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based; or (3) is arbitrary, fanciful, or unreasonable—if no reasonable person would have taken the view adopted by the trial court. The party claiming error bears the burden to show the district court abused its discretion.
State v. Sinnard 261

Late Appeal May Be Allowed under *Ortiz*—Requirements. *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982), may allow a late appeal if a criminal defendant (1) was not informed of his or her right to appeal, (2) was not furnished an attorney to perfect an appeal, or (3) was furnished an attorney who failed to perfect an appeal. *State v. Bennett* 933*

Legal Duty of Care by Common Law or Legislative Enactment—Liability for Failure to Act. A person may be held criminally liable for a failure to act if that person owes a legal duty of care. Legal duties of care can arise out of either common law or legislative enactment.
State v. Burris 493

Lesser Included Crime under Statute—Lesser Crime Than Crime Charged. To be a lesser included crime under K.S.A. 2019 Supp. 21-5109(b)(2), a crime must be a "lesser" crime than the crime charged—meaning it carries a lesser penalty. And that "lesser" crime must also be "included" in the crime charged—meaning all elements of the lesser crime must be identical to some elements of the crime charged. *State v. Martin* 538

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Lesser Included Offense—Consider Whether Charges Based on Separate Acts. Just because one offense can technically be a lesser included offense of another does not always require such a finding if the charges are based on separate acts. *State v. Crudo* 32

Merger Doctrine—Factors to Assess Whether the Inherently Dangerous Felony Is Part of the Killing. The merger doctrine examines whether an inherently dangerous felony is part of the killing, or if it stands as an independent predicate felony supporting a felony murder charge. This assessment hinges on factors such as the temporal and spatial proximity between the predicate felony and the killing, as well as the causal relationship between them. *State v. Waldschmidt* 633

Possession of Meth Not a Lesser Included Crime of No Drug-Tax Stamp. Possession of methamphetamine is not a lesser included crime of no drug-tax stamp under K.S.A. 2019 Supp. 21-5109(b)(2) because the former carries a greater penalty than the latter. *State v. Martin* 538

Revised Sentencing Guidelines Act—Illegal Sentence if Drawn from Incorrect Sentencing Grid Block. Under the Revised Kansas Sentencing Guidelines Act, K.S.A. 21-6801 et seq., when a sentence is drawn from an incorrect sentencing grid block, it is presumptively illegal. *State v. Lamia-Beck* 884*

Self-defense Cannot Be Claimed in Aggravated Robbery. Self-defense cannot negate aggravated robbery, as the crime of aggravated robbery has no element that could justify the use of force in defense of oneself or another. *State v. Klesath* 72

Self-defense May Not Be Claimed if in Commission of Forcible Felony. A defendant may not assert self-defense if the defendant is attempting to commit, committing, or escaping from the commission of a forcible felony. *State v. Klesath* 72

Sentencing—BIDS Expenditures Taxed to Defendant—Considerations. If convicted, K.S.A. 22-4513 provides that the district court shall tax defendant with all expenditures made by the State Board of Indigents' Defense Services to provide counsel and other defense services. In determining the amount and method of payment, district courts must explicitly consider two circumstances on the record: (1) the financial resources of defendant; and (2) the nature of the burden that payment of the award will impose. *State v. Anderson* 425

— Sentence Effective When Pronounced from Bench. A sentence is effective when pronounced from the bench, which means a district court generally may not change its mind about a sentence after orally pronouncing it. But the court is not precluded from correcting or clarifying a sentence at the same hearing after misspeaking or miscalculating. *State v. D.W.* 575

— Statute Prohibits Multiple Punishments for Crime Charged and Lesser Included Crime Arising from Same Conduct. In K.S.A. 2019 Supp. 21-

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5109(b), the Kansas Legislature has identified a specific circumstance in which it did not intend multiple punishments. Under the statute, a defendant cannot be convicted of (and thus punished for) both the crime charged and a lesser included crime arising from the same conduct in the same prosecution. *State v. Martin* 538

Specific Intent to Permanently Deprive Person of Property—Not Element of Aggravated Robbery. Specific intent to permanently deprive a person of their property is not an element of aggravated robbery. *State v. Klesath* 72

State Not Required to Retain Possession of DNA Evidence under Statute. K.S.A. 21-2512 does not impose a duty on the State to retain physical possession of nonbiological evidence it previously gathered in a case. *State v. Harris* 926*

Statements Made During Custodial Interview—Determination Whether Invocation of Right to Remain Silent. Whether a defendant's repeated statements during a custodial interview to "[t]ake me to jail" constitute an unambiguous invocation of the right to remain silent depends on their context. *State v. Flack* 79

Statute Imposes Legal Duty of Care on Primary Caregiver of Dependent Adult. K.S.A. 2022 Supp. 21-5417 imposes a legal duty of care on the primary caregivers of dependent adults. *State v. Burris* 493

Statute Prohibits Appeals by Defendants who Plead Guilty or Nolo Contendere with Exceptions—No Direct Appeal of Ruling on Self-Defense Immunity Claim. K.S.A. 2022 Supp. 22-3602(a) prohibits most appeals by criminal defendants who plead guilty or nolo contendere except motions attacking a sentence under K.S.A. 60-1507 and its amendments by prisoners in custody. It does not permit direct appeal of a district court's ruling on a self-defense immunity claim under K.S.A. 2022 Supp. 21-5231 when a defendant subsequently pleads guilty or nolo contendere in the same proceeding. *State v. Jones* 600

Statutory Crime of Possession of Firearm by Convicted Felon—Stipulation to a Prior Felony Does Not Satisfy Prosecution's Burden. Because Kansas' statutory possession-of-a-weapon ban applies to people who have committed only certain felonies, a stipulation to only a prior felony does not satisfy the prosecution's burden because it fails to establish that the defendant had committed a felony that prohibited the defendant from possessing a weapon on the date in question. *State v. Guebara* 458

Statutory Phrase "Taking or Confining" Does Not Present Alternative Means of Committing Kidnapping and Aggravated Kidnapping. The phrase "taking or confining" in K.S.A. 21-5408(a) does not present alternative means of committing kidnapping and aggravated kidnapping; rather, it presents options within a means merely describing the factual circumstances that may prove the material element—the actus reus—of holding the victim to accomplish one of the four alternative means of committing

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kidnapping set forth in the statute. To the extent language in *State v. Haberlein*, 296 Kan. 195, 290 P.3d 640 (2012), may suggest "taking" and "confining" are distinct actus rei intended by the Legislature to create alternative means, we disapprove it. *State v. Garcia-Martinez* 681

Sufficiency of Evidence Challenge—Appellate Review. When the sufficiency of the evidence is challenged in a criminal case, appellate courts review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or weigh in on witness credibility. *State v. Hambright* 603

Unconstitutional-Conditions Doctrine—Application. The unconstitutional-conditions doctrine states that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. The doctrine has been applied in situations in which the State either forced a criminal defendant to forfeit one constitutional right to exercise another or impaired the exercise of a constitutional right by needlessly penalizing the defendant for asserting that right. *State v. J.L.J.* 720

— Considerations of Inquiry. In determining whether a government-imposed choice violates the unconstitutional-conditions doctrine, the threshold inquiry is whether the State's action impairs to an appreciable extent any of the policies behind the rights involved. In conducting this inquiry, it is appropriate to consider both the nature of the impairment and the legitimacy of the State's practice. *State v. J.L.J.* 720

Voluntariness of Confession—Coercive Police Activity a Predicate to Finding of Involuntary Confession. Coercive police activity is a necessary predicate to a finding that a confession is not voluntary. And there must be a link between coercive activity of the State and a resulting confession by a defendant. *State v. G.O.* 386

— Consideration of Individual's Mental Condition. An individual's mental condition, by itself and apart from its relation to official coercion, can never dispose of the inquiry into constitutional voluntariness of a confession. *State v. G.O.* 386

— Potential Characteristics of Accused—Relevant Factors. Potential characteristics or circumstances of the accused that may be relevant to a determination of whether a confession was voluntary include, but are not limited to, the accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement. *State v. G.O.* 386

— Potential Circumstances of Interrogation—Relevant Factors for Determining Voluntariness of Confession. Potential circumstances of the interrogation that may be relevant to whether a confession was voluntary include, but are not limited to, the length of the interview; the accused's ability to communicate with the outside world; any delay in arraignment; the length

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of custody; the general conditions under which the statements took place; any physical or psychological pressure brought to bear on the accused; the officer's fairness in conducting the interview, including any promises, inducements, threats, methods, or strategies used to compel a response; whether the accused was informed of the right to counsel and the right against self-incrimination through the *Miranda* advisory; and whether the officer negated or otherwise failed to honor the accused's Fifth Amendment rights. *State v. G.O.* 386

Voluntariness of Confession Determined from Totality of Circumstances. Even where there is a link between police misconduct and a confession, it does not automatically follow that there has been a violation of the Due Process Clause of the Fourteenth Amendment. Voluntariness must be determined from the totality of the circumstances. *State v. G.O.* 386

ELECTIONS:

Restrictions on Advance Ballots Delivered by One Person—Does Not Inhibit Speech. Restrictions on the number of advance ballots one person may deliver does not, in isolation, inhibit speech because delivering ballots is not speech or expressive conduct.
League of Women Voters of Kansas v. Schwab 777*

Scope of K.S.A. 25-2438(a)—Extends to Protected Speech. The scope of K.S.A. 25-2438(a) extends to protected speech because its prohibitions extend to speech that is not fraudulent or deceptive.
League of Women Voters of Kansas v. Schwab 777*

Statute's Limitation on Advanced Ballots Delivered by One Person—Not Added Qualification. K.S.A. 2023 Supp. 25-2437's limitation on the number of advanced ballots that may be delivered by one person can in no way be characterized as an added qualification on the right to be an elector.
League of Women Voters of Kansas v. Schwab 777*

EVIDENCE:

Admission or Exclusion of Hearsay Statements—Appellate Review. Like many evidentiary determinations considered on appeal, an appellate court reviews a trial court's admission or exclusion of hearsay statements for an abuse of discretion. Hearsay is defined as evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated. Out-of-court statements that are not offered to prove the truth of the matter stated are not hearsay under K.S.A. 2022 Supp. 60-460. The theory behind the hearsay rule is that when a statement is offered as evidence of the truth of the matter stated, the credibility of the declarant is the basis for its reliability, and the declarant must therefore be subject to cross-examination. *State v. Sinnard* 261

All Relevant Evidence Is Admissible by Statute—Exceptions. Under K.S.A. 60-407(f), all relevant evidence is admissible unless barred by statute, constitutional provisions, or caselaw. When a defendant's intent is in

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question, a trial court must allow the defendant to testify about the defendant's motive and actual intent, or state of mind, provided that such testimony aligns with our legal principle. *State v. Waldschmidt* 633

Circumstantial Evidence May Be Used to Prove Identity of Controlled Substance. The identity of a controlled substance may be proven by circumstantial evidence if that evidence supports a reasonable inference that the defendant distributed or possessed the substance in question. *State v. Anderson* 425

Contemporaneous Objection at Trial Required to Reverse or Set Aside Judgment. K.S.A. 60-404 directs that a verdict "shall not" be set aside, or the judgment reversed, based on the erroneous admission of evidence without a contemporaneous objection at trial. *State v. Scheetz* 48

Contemporaneous Objection Rule—Requires Timely and Specific Objection at Trial to Preserve Challenge for Appellate Review. The contemporaneous objection rule under K.S.A. 60-404 requires a party to make a timely and specific objection at trial to preserve an evidentiary challenge for appellate review. The statute has the practical effect of confining a party's appellate arguments to the grounds presented to the district court. *State v. D.W.* 575

— Timely and Specific Objection Required at Trial to Preserve Challenge. The contemporaneous objection rule under K.S.A. 60-404 requires a party to make a timely and specific objection at trial to preserve an evidentiary challenge for appellate review. The statute has the practical effect of confining a party's appellate arguments to the grounds presented to the district court. *State v. Scheetz* 48

Definition of Relevant Evidence—All Relevant Evidence Is Admissible—Exceptions. Relevant evidence under K.S.A. 60-401(b) means evidence having any tendency in reason to prove any material fact. Relevancy has both a probative element and a materiality element. Evidence is probative if it has any tendency in reason to prove a fact. Evidence is material if it addresses whether a fact has a legitimate and effective bearing on the decision of the case and is disputed. Our well-established law is that all relevant evidence is admissible unless prohibited by statute, constitutional provision, or court decision. *State v. Scheetz* 48

Determination if Violation of Due Process Clause by Officers—Purpose to Prevent Fundamental Unfairness in Use of Evidence. Neither K.S.A. 2022 Supp. 60-460(f)(2)(B), a hearsay exception, nor the reliability standard it incorporates apply when a court decides whether an accused's statements to law enforcement officers violate the Due Process Clause of the Fourteenth Amendment. The purpose of the Due Process Clause is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. Holdings to the contrary in *State v. McCarther*, 197 Kan. 279, 285, 416 P.2d 290 (1966), and its progeny are overruled. *State v. G.O.* 386

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District Court's Evidentiary Determination—Appellate Review. An appellate court reviews a district court's evidentiary determination on materiality de novo, while it reviews the decision on probative value for abuse of discretion. A district court abuses its discretion when no reasonable person could agree with its decision or when its exercise of discretion is founded on a factual or legal error. *State v. Scheetz* 48

Guidelines for Admissibility of Lay and Expert Opinion Testimony under Statute. K.S.A. 2022 Supp. 60-456 provides guidelines for the admissibility of lay and expert opinion testimony. The distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field. *State v. Sinnard* 261

Hearsay Testimonial Evidence—Admissible under Confrontation Clause of Sixth Amendment—Conditions. Hearsay testimonial evidence in criminal prosecutions is admissible under the Confrontation Clause of the Sixth Amendment only when (1) the witness is unavailable, and (2) the accused had a prior opportunity to cross-examine the witness. *State v. Showalter* 338

Motion to Suppress Evidence—No Factual Dispute—Appellate Review. When the facts material to a decision on a motion to suppress evidence are not in dispute, the inquiry on appeal becomes a question of law. *State v. Flack* 79

Preserving Evidentiary Claims for Appellate Review. Under K.S.A. 60-404, evidentiary claims, including those concerning questions and responses during witness examination, must be preserved for appellate review by a contemporaneous and specific objection at trial. *State v. Waldschmidt* 633

Review of Admission of Video Evidence—Determination Whether Challenged Evidence Is Relevant—Appellate Review. An appellate court reviews the admission of video evidence by first determining whether the challenged evidence is relevant. If the video evidence is relevant, and a challenging party's objection is based on a claim that the video evidence is overly repetitious, gruesome, or inflammatory, i.e., unduly prejudicial, the standard of review is abuse of discretion. The burden of showing an abuse of discretion rests with the party asserting the error. *State v. D.W.* 575

Sanction for Discovery Violation—Abuse of Discretion Review—No Due Process Right to Have Evidence Excluded If Violation of Discovery Order. A district court's decision about whether to impose a sanction for a discovery violation, and which sanction to impose, is reviewed for an abuse of discretion so long as due process rights are not implicated. And generally, defendants do not have a due process right to have evidence excluded when a party violates a discovery order. An abuse of discretion occurs if the decision is arbitrary, fanciful, or unreasonable, or if it is based on an error of

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law or fact. The party asserting error has the burden to establish an abuse of discretion. *State v. Anderson* 425

Statutory Hearsay Exception for Depositions—Showing of Unavailability Not Required—Requirements. The K.S.A. 2022 Supp. 60-460(c)(1) hearsay exception for depositions does not require a showing of unavailability, so the party seeking to introduce the deposition under this exception need not show it acted in good faith or made a diligent effort to secure the witness' attendance at trial. Subject to other rules of evidence, when a deposition testimony taken in a criminal trial qualifies as a hearsay exception because it was taken for use in the trial of the action in which it is offered, the party seeking to introduce it must only show (1) the witness is out of the state and the witness' appearance cannot be obtained, unless the offering party procured the witness' absence; or (2) the party offering the deposition has been unable to procure the attendance of the witness by subpoena or other process. *State v. Showalter* 338

Statutory Requirement That Defense Be Permitted to Inspect and Copy Certain Evidence upon Request— Discovery Violation if Not Permitted. K.S.A. 2022 Supp. 22-3212(a) requires that the prosecuting attorney permit the defense to inspect and copy certain evidence upon request by the defense. Thus, to establish a discovery violation under that statute, the record must show the defendant requested inspection or copies of the evidence at issue. *State v. Anderson* 425

Timely and Specific Objection Required to Preserve Challenge on Appeal under Statute. K.S.A. 60-404 directs that a verdict shall not be set aside, or a judgment reversed, based on the erroneous admission of evidence without a timely and specific objection. In other words, the statute is a legislative mandate limiting the authority of Kansas appellate courts to address evidentiary challenges. Thus, much like jurisdictional issues, appellate courts may consider a party's compliance with K.S.A. 60-404 on their own initiative. *State v. Sinnard* 261

HABEAS CORPUS:

Exceptional Circumstance—Unusual Events or Intervening Changes. Exceptional circumstances are unusual events or intervening changes in the law.
State v. Brown 446

Motion May Not Raise Issue Not Raised on Direct Appeal—Exceptional Circumstances. A K.S.A. 60-1507 motion cannot serve as a vehicle to raise an issue that should have been raised on direct appeal, unless the movant demonstrates exceptional circumstances excusing earlier failure to bring the issue before the court.
State v. Brown 446

No Second or Successive Motion for Relief under K.S.A. 60-1507—Exceptions. A district court may not entertain a second or successive motion for relief under K.S.A. 60-1507 unless the alleged errors affect constitutional rights and exceptional circumstances justify raising the successive motion. *State v. Brown* 446

Statutory Vehicle for Collateral Attack on Conviction and Sentence. K.S.A. 60-1507 provides a statutory vehicle for a collateral attack on a criminal conviction and sentence. Appeal from Sedgwick District Court; JEFFREY GOERING, judge.

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Submitted without oral argument December 15, 2023. Opinion filed March 1, 2024. Affirmed. *State v. Brown* 446

INSURANCE:

Anti-Subrogation Regulation Applies to Self-Funded Plan under Facts of this Case. Under the facts of this case, K.A.R. 40-1-20 applies to U.S.D. No. 259's self-funded Plan. *Towne v. Unified School District No. 259* 1

Medical Benefit Plan Offered by Self-Insured School District Is a Health Benefit Plan under Statute. Under the facts of this case, the medical benefit plan offered by U.S.D. No. 259 is a "health benefit plan" under K.S.A. 40-4602(c) because it is a "hospital or medical expense policy." An entity that chooses to self-insure under K.S.A. 72-1891 can still be said to offer a "health benefit plan," as that statute plainly contemplates a self-insurer will "provide health care services." *Towne v. Unified School District No. 259* 1

Self-Insured School District Is a Health Insurer under Facts of this Case. Under the facts of this case, U.S.D. No. 259 is a "health insurer" under K.S.A. 40-4602(d) because it is an "entity which offers a health benefit plan subject to the Kansas Statutes Annotated."
Towne v. Unified School District No. 259 1

Self-Insured School Districts Not Exempt from Regulation under Insurance Code. K.S.A. 40-202(b) exempts the "*employees* of a particular person, firm, or corporation" from regulation under the Insurance Code of the state of Kansas, K.S.A. 40-101 et seq. This provision does not exempt self-insured school districts from regulation under the Code. The holding of *U.S.D. No. 259 v. Sloan*, 19 Kan. App. 2d 445, 871 P.2d 861 (1994), to the contrary is overruled.
Towne v. Unified School District No. 259 1

JUDGES:

Disagreement with Judge's Rulings Not a Basis for Judge's Recusal. Disagreement with a judge's rulings cannot serve as the basis for a judge's recusal under K.S.A. 20-311d(d). *State v. Turner* 162

JURISDICTION:

Two-Part Standing Test—Cognizable Injury and Causal Connection. Kansas courts use a two-part standing test. First, the party who claims standing must show a cognizable injury. Second, the party must establish a causal connection between the cognizable injury and the challenged conduct. A cognizable injury, or an injury in fact, occurs when the party personally suffers an actual or threatened injury because of the challenged conduct. *Hodes & Nauser v. Stanek* 995*

KANSAS CONSTITUTION:

Article 5 Right to Suffrage—Requirement of Proper Proofs. Article 5 of the Kansas Constitution requires the Legislature to pass such laws as may be necessary for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage. The "proper proofs" contemplated by article

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5, section 4 may include any reasonable provision for ascertaining who is entitled to vote—that is, who is a qualified elector under article 5.
League of Women Voters of Kansas v. Schwab 777*

Claim of Violation of Article 5 Right to Suffrage—Violation of Law Is Unconstitutional. To prevail on a claim that the article 5 right to suffrage under the Kansas Constitution has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector. If a law violates the article 5 right to suffrage, it is unconstitutional.
League of Women Voters of Kansas v. Schwab 777*

Constitution Achieves Section 2's Ongoing Delegation of Power Through Elections and Appointments. The Kansas Constitution contemplates achieving section 2's ongoing and perpetual delegation of power through varied mechanisms, including popular elections, limited elections, appointments, and succession.
League of Women Voters of Kansas v. Schwab 777*

Originating Act of Delegation of Power from People to the Free Government—Provides for Ongoing Secondary Acts of Delegation. The Constitution itself is the originating act of delegation of power from the people to their free government. And the Constitution makes provision for ongoing, perpetual secondary acts of delegation. The Constitution creates the *offices* of free governments—that is the seats of delegated power, largely contained in the three great departments of the executive, legislative, and judicial branches. And it provides mechanisms by which the people continue to delegate their power to *officers* who will, for a time, occupy the constitutional offices.
League of Women Voters of Kansas v. Schwab 777*

Right to Suffrage—Protected by Article 5 of Constitution. The right to suffrage is an enumerated political right protected by article 5 of the Kansas Constitution. As an expressly enumerated right, article 5 provides the strongest possible constitutional protections.
League of Women Voters of Kansas v. Schwab 777*

Right to Vote—Not Right Protected by Section 1 of Bill of Rights. The "right to vote" is not an unenumerated natural right protected by section 1 of the Kansas Constitution Bill of Rights.
League of Women Voters of Kansas v. Schwab 777*

Section 1 of Bill of Rights—Fundamental Right to Personal Autonomy. Section 1 of the Kansas Constitution Bill of Rights protects a fundamental right to personal autonomy, which includes the right to decide whether to terminate a pregnancy. *Hodes & Nauser v. Kobach* 940*

— Plaintiff's Burden to Prove Challenged Law Infringes on Protected Right. Under strict scrutiny, the initial burden is on the plaintiff to prove a challenged law actually infringes on a constitutionally protected right under section 1 of the Kansas Constitution Bill of Rights. Any degree of actual infringement on such a right—however slight—triggers strict scrutiny. .*Hodes & Nauser v. Stanek* 995*

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— Proof by Plaintiff of Infringement of Protected Right—State Must Defend Law under Strict Scrutiny. Once a plaintiff proves actual infringement of a protected right under section 1, the court presumes the law is unconstitutional and the burden shifts to the State to defend the challenged law under strict scrutiny. Strict scrutiny requires the State to prove (a) the existence of a compelling government interest, (b) its actions further that compelling interest, and (c) its actions do so in a way that is narrowly tailored. *Hodes & Nauser v. Stanek* 995*

— Protects Natural Right of Personal Autonomy—Includes Right to Abortion. Section 1 of the Kansas Constitution Bill of Rights protects an inalienable natural right of personal autonomy, which includes the right to abortion. The unique and profound attributes of the decision to have an abortion are integral to a woman's inalienable natural right of personal autonomy under section 1; thus, laws that infringe on the right to abortion are subject to strict scrutiny. *Hodes & Nauser v. Stanek* 995*

Section 2 of Bill of Rights—Does Not Address Mechanism of Delegation—Articles 4 and 5 Provide Controlling Law of Elections. Section 2 of the Kansas Constitution Bill of Rights does not address itself to these mechanisms of delegation. To find the controlling law of popular elections, we must look instead to the specific provisions in articles 4 and 5 of the Kansas Constitution.
League of Women Voters of Kansas v. Schwab 777*

— Principle of Delegated Power from People to the Government. Section 2 of the Kansas Constitution Bill of Rights declares the foundational political principle of delegated power from the people to their free government. This principle informs the entire edifice of law-making in a free society. *League of Women Voters of Kansas v. Schwab* 777*

LEGISLATURE:

Article 5 Right to Suffrage—Violated if Extra-Constitutional Qualifications Imposed on Voting. The Legislature violates the Kansas Constitution's article 5 right to suffrage—meaning a right to be a qualified elector in any election called by the state or its political subdivisions—if it imposes any extra-constitutional qualifications to the precisely defined right to suffrage. *League of Women Voters of Kansas v. Schwab* 777*

Compelling Government Interests—Level of Specificity. Government interests are more likely to be compelling when they are concrete and exhibit some level of specificity, rather than broad and open to wide interpretation and inclusion of a great array of concerns. *Hodes & Nauser v. Kobach* 940*

Government Interest—Actual Evidence to Withstand Strict Scrutiny. The government must rely on actual evidence to show its action withstands strict scrutiny. *Hodes & Nauser v. Kobach* 940*

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Proper Proofs Must Comply with Constitutional Guarantees. Simply because a law does not violate article 5 of the Kansas Constitution does not mean that any regime of proper proofs is permissible. In designing a process of providing proper proofs, the Legislature still must comply with other constitutional guarantees such as those of equal protection and due process. *League of Women Voters of Kansas v. Schwab* 777*

Proper Proofs Must Comply with Due Process. To comply with due process, any proper proofs devised by the Legislature must include reasonable notice to the voter and an opportunity to contest the disqualification of otherwise valid absentee ballots and to cure deficiencies.
League of Women Voters of Kansas v. Schwab 777*

Proper Proofs Must Comply with Equal Protection. To comply with equal protection, any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards. *League of Women Voters of Kansas v. Schwab* 777*

Regulations Must Advance State's Compelling Interest—Requires Evidence Presented in Judicial Proceedings. Once the State establishes an interest as compelling, the State must show any regulations it claims further that interest do *so in fact*, not merely in theory, and the regulations are a substantially effective means for advancing the State's identified compelling interest. A court's determination about whether the State met this burden must be based on evidence presented in judicial proceedings. Mere deference to legislative or administrative findings or stated goals is insufficient. *Hodes & Nauser v. Stanek* 995*

LIMITATIONS OF ACTIONS:

Duty of Reasonable Investigation to Determine When Injury Becomes Reasonably Ascertainable. The phrase "reasonably ascertainable" implicates a duty of reasonable investigation under the circumstances. In determining whether an investigation was reasonable, the court considers reliable sources contemporaneously and reasonably available to the injured party that would have provided him information about the injury and its causation. *Murray v. Miracorp. Inc.* 615

Two-year Statute of Limitations for Several Civil Actions under K.S.A. 60-513. K.S.A. 60-513(a) provides a two-year statute of limitations for several civil actions. K.S.A. 60-513(b) provides that, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party. For such situations, there are thus two questions involved in determining when a statute of limitations begins to run: (1) When did the plaintiffs suffer an actionable injury—i.e., when were all the elements of the cause of action in place? and (2) When did the existence of that injury become reasonably ascertainable to them?
Murray v. Miracorp. Inc. 615

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MARRIAGE:

Legal Duty of Care Imposed by Marriage—Voluntary Assumption to Care for Another. A legal duty of care is imposed at common law when a person is in a special relationship with another. One such relationship is marriage. A legal duty of care also arises when a person has voluntarily assumed the care of another and has prevented others from rendering aid.
State v. Burris 493

MOTOR VEHICLES:

Statutory Definition of Operation of Vehicle Distinguished from Attempted Operation. K.S.A. 8-1002(a) distinguishes operation of a vehicle from attempted operation of a vehicle. The word "operate," as used in K.S.A. 8-1002(a), is synonymous with the word "drive," which requires that the vehicle must move. A would-be driver's physical control over the vehicle does not establish "operation" of the vehicle.
Jarmer v. Kansas Dept. of Revenue 671

Suspension of Person's Driving Privileges for Operating Vehicle—Not for Attempting to Operate Vehicle. When an individual fails a breath alcohol test, K.S.A. 8-1002(a)(2) authorizes the Kansas Department of Revenue to suspend that person's driving privileges if they were operating a vehicle, but not if they were attempting to operate a vehicle.
Jarmer v. Kansas Dept. of Revenue 671

SEARCH AND SEIZURE:

Probable Cause to Search Vehicle—Extends to Entire Travelling Unit. Probable cause to search a stopped vehicle does not have to be "localized" and thus limited to one particular area or part of the travelling unit. That is, under the automobile exception, once probable cause to search is established, it extends to the entire travelling unit.
State v. Crudo 32

Public Safety Stop Is Exception to Warrant Requirement. A public safety stop is a seizure and an exception to the Fourth Amendment warrant requirement. *State v. McDonald* 486

Recognized Exception to Warrant Requirement— Incident to Lawful Arrest. Incident to a lawful arrest, an arresting officer may search the arrestee's person and the area within the arrestee's immediate control, including personal property immediately associated with the person of the arrestee. *State v. Martin* 538

— Warrantless Search Preceding Arrest Is Valid—Requirements. A warrantless search preceding an arrest is a valid search incident to arrest if (1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed shortly after the search.
State v. Martin 538

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Warrantless Search Unreasonable under Fourth Amendment and Section 15 Unless Recognized Exception—Exceptions. A warrantless search is presumptively unreasonable under the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights unless the search falls within a recognized exception to the warrant requirement. Those recognized exceptions are: consent; search incident to a lawful arrest; stop and frisk; probable cause plus exigent circumstances; the emergency doctrine; inventory searches; plain view or feel; and administrative searches of closely regulated businesses. *State v. Martin* 538

Warrantless Traffic Stop Justified for Public Safety Reasons—Must Be Based on Specific and Articulable Facts. A warrantless traffic stop can be justified for public safety reasons if the safety reasons are based upon specific and articulable facts. Suspicion of criminal activity is not a legitimate basis for a public welfare stop. In this case, the facts are insufficient to allow a warrantless seizure and do not support a valid public safety stop. *State v. McDonald* 486

SECURITIES:

Investment Contract Definition in Statute—Common Enterprise Shown by Horizontal Commonality or Vertical Commonality. For purposes of an investment contract as defined in K.S.A. 17-12a102(28)(D) under the Kansas Uniform Securities Act, K.S.A. 17-12a101 et seq., a common enterprise may be shown either by horizontal commonality—an enterprise common to a group of investors—or by vertical commonality—an enterprise common to the investor and the seller, promoter, or some third party. *State v. Moeller* 860*

Kansas Uniform Securities Act—Investment Contract Is Type of Security—Four Elements. Under the Kansas Uniform Securities Act, K.S.A. 17-12a101 et seq., an investment contract is a type of security. An investment contract consists of four elements: (1) an investment of money; (2) in a common enterprise; (3) with the expectation of profits; and (4) from the efforts of others. *State v. Moeller* 860*

Statutory Meaning of "Fraud" and "Deceit." As used in the securities fraud statute, K.S.A. 17-12a501(3), the words "fraud" and "deceit" carry their ordinary meanings. *State v. Moeller* 860*

STATUTES:

Challenge to Statute's Constitutionality—Appellate Review. A challenge to a statute's constitutionality presents a question of law subject to unlimited review. *Hodes & Nauser v. Stanek* 995*

Double Jeopardy Analysis—Same-Elements Test Is Rule of Statutory Construction—Consideration of Legislative Intent—Factors. Under a Fifth Amendment double jeopardy analysis, the same-elements test is a rule of statutory construction, and the rule should not be controlling where there is a clear indication of contrary legislative intent. In determining whether

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there is contrary legislative intent, courts consider factors such as the language, structure, and legislative history of the statutes as well as the social evil each statute seeks to address. *State v. Martin* 538

Legislative Intent—Court's Interpret from Statute's Text. A severability clause is merely an aid, and courts must still divine the intent of the Legislature from the statute's text. Legislative intent is the touchstone of statutory interpretation. *Hodes & Nauser v. Stanek* 995*

Review of Legislative Enactment—Severability Test. For parts of a legislative enactment to survive a severability analysis, the State must prove (a) the Legislature would have passed the enactment at issue without the objectionable portion and (b) the enactment can still operate effectively to carry out the Legislature's intent without the stricken portion. The severability test is inapplicable when the entire statutory scheme is objectionable. *Hodes & Nauser v. Stanek* 995*

Statutory Offenses of Possession of Meth and Failure to Affix Drug-Tax Stamp—Consideration of Legislative Intent—Multiple Punishments under Different Statutes. Based on the targeted conduct and objectives of the statutory offenses of possession of methamphetamine and failure to affix a drug-tax stamp, as well as the language and structure of the relevant statutes, the Legislature intended to impose multiple punishments under the different statutes. *State v. Martin* 538

Supreme Court—Final Authority Whether Statute Is Constitutional. The Kansas Supreme Court is the final authority on whether a Kansas statute violates the Kansas Constitution. *Hodes & Nauser v. Stanek* 995*

TORTS:

Civil Battery and Negligence Actions—Different Elements of Proof. Civil battery and negligence are discrete concepts in tort with different elements of proof. *Unruh v. City of Wichita* 12

Civil Battery Definition—Elements. Civil battery is the unprivileged touching or striking of one person by another, done with the intent of bringing about either a contact or an apprehension of contact that is harmful or offensive. Intent to inflict such contact or apprehension of such contact is a necessary element for the intentional tort of battery. *Unruh v. City of Wichita* 12

Language in *Dauffenbach v. City of Wichita* is Disapproved. Language in *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 1033, 667 P.2d 380 (1983), suggesting a police officer owes a special duty anytime "there is an affirmative act by the officer causing injury" is disapproved.
Unruh v. City of Wichita 12

Negligence Claim—Elements. A negligence claim requires a plaintiff to prove: (a) the defendant owed plaintiff a legally recognized duty; (b) the defendant breached that duty; (c) the defendant's breach caused plaintiff's

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injuries; and (d) plaintiff suffered damages. None of these concerns the defendant's mental state. *Unruh v. City of Wichita* 12

Negligence Claim Alleging Excessive Use of Force by Police Officer—Requirement of Legally Recognized Duty of Care Independent of Excessive Force. A negligence claim alleging excessive use of force by a police officer requires the plaintiff to show the officer owed that plaintiff a legally recognized duty of care that arose independent of the force the plaintiff alleges to be excessive. A court must be able to analyze the distinct elements of negligence separately from the distinct elements of battery and its associated defense of privilege. *Unruh v. City of Wichita* 12

TRIAL:

Constitutional Errors Reviewed for Harmlessness—Reversal Not Required if Determined to Be Harmless. Most constitutional errors can be reviewed for harmlessness. A constitutional error is harmless only if the party benefiting from the error establishes beyond a reasonable doubt the error will not or did not affect the trial's outcome in light of the entire record. Constitutional errors determined to be harmless do not require reversal. *State v. Cantu* 759

Cumulative Error Analysis—Unpreserved Instructional Issues Not Clearly Erroneous Not Aggregated in Analysis. Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 2022 Supp. 22-3414(3) limits a party's ability to claim them as error. Our caselaw suggesting otherwise is disapproved. *State v. Waldschmidt* 633

Denial of Defendant's Right to Testify by Striking Testimony—Structural Error. The complete and wrongful denial of a defendant's constitutional right to testify by improperly removing a defendant from the stand and striking the defendant's entire testimony is structural error because it renders the criminal trial fundamentally unfair, regardless of whether the outcome of the trial would have been different had the defendant been permitted to testify and his or her testimony been left intact.
State v. Cantu 759

Deprivation of Defendant's Right to Testify—Forfeiture and Striking Defendant's Testimony. While a finding of forfeiture is the most overt way in which a defendant may be deprived of the right to testify, a court may also infringe on the right to testify by striking the defendant's testimony. *State v. Cantu* 759

Determination Whether Counsel's Failure to Advocate for Instruction—Appellate Review. When determining whether counsel's failure to advocate for an instruction supporting the defendant's only line of defense was prejudicial, a jury verdict that clearly reveals the jury would have rejected that defense and strong evidence cutting directly against that defense can inform the analysis. *State v. Turner* 162

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Determining Whether Testimony Properly Admitted as Lay Opinion—Based on Nature of Testimony. The determination of whether testimony is properly admitted as lay opinion is based upon the nature of the testimony, not whether the witness could be qualified as an expert. A careful case-by-case review must be made of evidentiary questions which come before a district court. *State v. Crudo* 32

Discovery Violation—Wide Discretion by Trial Court in Imposing Sanctions—Considerations. The trial court has wide discretion in deciding which, if any, sanctions to impose for a discovery violation. In reaching this decision, the trial court should consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. The court may also consider whether there are recurring problems or repeated instances of intentional failure to disclose or to abide by the court's discovery rulings. Ordinarily, the court should impose the least drastic sanctions which are designed to accomplish the objects of discovery but not to punish. *State v. Anderson* 425

Discretion of Court to Impose Sanctions for Violations of Discovery Statutes—Sanctions. K.S.A. 2022 Supp. 22-3212(i) grants the district court discretion to impose sanctions for violations of the criminal discovery statutes. Such sanctions may include allowing the opposing party to inspect any materials not previously disclosed, ordering a continuance, excluding any materials not disclosed, or other orders the district court deems just under the circumstances. *State v. Anderson* 425

Establishing Witness Unavailability under Statutory Hearsay Exception—Two Requirements. To establish witness unavailability under the K.S.A. 2022 Supp. 60-460(c)(2) hearsay exception for depositions and prior testimony, the party seeking to introduce the deposition or prior testimony must show it acted in good faith and made a diligent effort to secure the witness' attendance at trial. *State v. Showalter* 338

Jury Instruction—Element of Crime Omitted—Legally Erroneous. A jury instruction that omits an essential element of the crime charged is legally erroneous.. *State v. Sinnard* 261

Jury Instructions—Claim of Error in Giving or Failing to Give Instruction. K.S.A. 2022 Supp. 22-3414(3) provides that no party may claim as error the giving or failing to give an instruction unless that party timely objects by stating a specific ground for objection or unless the instruction or failure to give an instruction is clearly erroneous.
State v. Waldschmidt 633

— No Error if Properly and Fairly State the Law. When jury instructions properly and fairly state the law and are not reasonably likely to mislead the jury, no error exists. It is immaterial whether another instruction, upon retrospect, was also legally and factually appropriate, even if such instruction might have been more clear or more thorough than the one given. *State v. Coleman* 296

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Motion for Continuance—Speedy Trial Exceptions—Appellate Review. When a defendant argues the district court abused its discretion by making an error of fact because the record does not support the district court's crowded-docket finding, we review that finding for substantial competent evidence. Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. An appellate court does not reweigh conflicting evidence, evaluate witness credibility, or determine questions of fact, and the court presumes the district court found all facts necessary to support its judgment. *State v. Sinnard* 261

— Speedy Trial Exceptions— Conditions on Granting Continuance. K.S.A. 2019 Supp. 22-3402(e)(4) imposes several conditions on the use of the crowded-docket exception to Kansas' speedy trial statute. First, the district court may order only one continuance based on a crowded docket. Second, the district court must order the continuance within the original speedy trial deadline. Third, the new trial date must be not more than 30 days after the limit otherwise applicable. And fourth, the record must show that other pending cases, rather than secondary matters such as witness availability, prevented the court from setting the trial within the speedy trial deadline. *State v. Sinnard* 261

No Objection Needed at Trial to Preserve Prosecutorial Error Claim. Generally, a defendant need not object at trial to preserve a claim of prosecutorial error for appellate review. But a defendant may not bypass the contemporaneous-objection rule in K.S.A. 60-404 by reframing an evidentiary challenge as prosecutorial error. *State v. J.L.J.* 720

Premeditation Includes Time and Consideration—Prosecutorial Error if Closing Argument Contradicts Definition. Premeditation includes both a temporal element (time) and a cognitive element (consideration). A prosecutor thus commits error during closing arguments by making statements that contradict or obfuscate the cognitive aspect of premeditation by saying premeditation only requires time. *State v. Coleman* 296

Prosecutor Did Not Err under Facts of This Case—Conflicting Evidence. Under the facts presented, a prosecutor did not err by downplaying a theory of defense because the prosecutor acknowledged there is conflicting evidence and merely presented a path for resolving the conflict that favors the State's theory of the case. *State v. Coleman* 296

Prosecutorial Error—Arguing Facts Not in Evidence Is Error. Prosecutors err by arguing facts not in evidence. *State v. Coleman* 296

Prosecutorial Error Claims—Appellate Review—Two-Step Analysis. An appellate court reviews prosecutorial error claims by employing a two-step analysis: error and prejudice. To decide error, the court must determine whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case in its attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. Upon finding error, the

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court must consider whether that error prejudiced the defendant's due process rights to a fair trial. *State v. Scheetz* 48

Prosecutorial Error to State Opinions to Jury. Prosecutors commit error by stating their opinions to the jury. *State v. Waldschmidt* 633

Prosecutors Have Wide Latitude Crafting Arguments—Shifting Burden of Proof Is Improper. Prosecutors generally have wide latitude in crafting arguments and commenting on the weaknesses of the defense. But an argument attempting to shift the burden of proof is improper. A prosecutor does not shift the burden of proof by pointing out a lack of evidence to support a defense or to corroborate a defendant's argument regarding holes in the State's case. Likewise, when the defense creates an inference that the State's evidence is not credible because the State failed to admit a certain piece of evidence, the State may rebut the inference by informing the jury that the defense has the power to introduce evidence. But when discussing the defense's subpoena power, the State crosses the line when it suggests the defendant must disprove the State's case or offer evidence to support a finding of reasonable doubt. *State v. Anderson* 425

Structural Errors Affect Fundamental Fairness—Require Automatic Reversal. Structural errors are defects affecting the fundamental fairness of the trial's mechanism, preventing the trial court from serving its basic function of determining guilt or innocence and depriving defendants of basic due process protections required in criminal proceedings. Structural errors are not amenable to a harmless error outcome-based analysis and thus require automatic reversal. *State v. Cantu* 759

To Avoid Prosecutorial Error—State Must Show There Is No Reasonable Possibility Error Contributed to Verdict. To avoid reversible prosecutorial error, the State must demonstrate beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial considering the entire record, i.e., that there is no reasonable possibility that the error contributed to the verdict. *State v. Coleman* 296

Unavailability of Witness at Trial—Prosecutor Must Make Good-Faith Effort to Obtain Witness' Presence at Trial. A witness is unavailable for Confrontation Clause purposes only if prosecutorial authorities have made a good-faith effort to obtain the witness' presence at trial. Constitutional provisions do not require the doing of a futile act, and the lengths to which the prosecution must go to produce a witness is a question of reasonableness. *State v. Showalter* 338

Under Facts of This Case Prosecutor's Statement Was Not Error. Under the facts, a prosecutor's use of "we don't know" when discussing inconclusive evidence was not error and was not an expression of the prosecutor's opinion. *State v. Coleman* 296

Wide Latitude of Prosecutors in Closing Arguments. Prosecutors generally have wide latitude in crafting their closing arguments, so long as those arguments accurately reflect the evidence presented at trial and accurately

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state the controlling law. But a prosecutor errs by arguing that it is the jury's job to convict a criminal defendant when the State proves its case beyond a reasonable doubt. *State v. J.L.J.* 720

Witness in Foreign Country Is Unavailable for Confrontation Clause Purposes. A witness residing in a foreign country is necessarily unavailable for purposes of the Confrontation Clause. *State v. Showalter* 338

Nos. 124,378
125,084

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, *Appellants*, v. SCOTT SCHWAB, in His Official Capacity as Kansas Secretary of State, and KRIS W. KOBACH, in His Official Capacity as Kansas Attorney General, *Appellees*.

(549 P.3d 363)

SYLLABUS BY THE COURT

1. ELECTIONS—*Scope of K.S.A. 25-2438(a)—Extends to Protected Speech.* The scope of K.S.A. 25-2438(a) extends to protected speech because its prohibitions extend to speech that is not fraudulent or deceptive.

2. KANSAS CONSTITUTION—*Right to Vote—Not Right Protected by Section 1 of Bill of Rights*. The "right to vote" is not an unenumerated natural right protected by section 1 of the Kansas Constitution Bill of Rights.

3. SAME—*Section 2 of Bill of Rights—Principle of Delegated Power from People to the Government*. Section 2 of the Kansas Constitution Bill of Rights declares the foundational political principle of delegated power from the people to their free government. This principle informs the entire edifice of law-making in a free society.

4. SAME—*Originating Act of Delegation of Power from People to the Free Government—Provides for Ongoing Secondary Acts of Delegation*. The Constitution itself is the originating act of delegation of power from the people to their free government. And the Constitution makes provision for ongoing, perpetual secondary acts of delegation. The Constitution creates the *offices* of free governments—that is the seats of delegated power, largely contained in the three great departments of the executive, legislative, and judicial branches. And it provides mechanisms by which the people continue to delegate their power to *officers* who will, for a time, occupy the constitutional offices.

5. SAME—*Constitution Achieves Section 2's Ongoing Delegation of Power Through Elections and Appointments.* The Kansas Constitution contemplates achieving section 2's ongoing and perpetual delegation of power through varied mechanisms, including popular elections, limited elections, appointments, and succession.

6. SAME—*Section 2 of Bill of Rights—Does Not Address Mechanism of Delegation—Articles 4 and 5 Provide Controlling Law of Elections.* Section 2 of the Kansas Constitution Bill of Rights does not address itself to these

mechanisms of delegation. To find the controlling law of popular elections, we must look instead to the specific provisions in articles 4 and 5 of the Kansas Constitution.

7. SAME—*Right to Suffrage—Protected by Article 5 of Constitution.* The right to suffrage is an enumerated political right protected by article 5 of the Kansas Constitution. As an expressly enumerated right, article 5 provides the strongest possible constitutional protections.

8. LEGISLATURE—*Article 5 Right to Suffrage—Violated if Extra-Constitutional Qualifications Imposed on Voting.* The Legislature violates the Kansas Constitution's article 5 right to suffrage—meaning a right to be a qualified elector in any election called by the state or its political subdivisions—if it imposes any extra-constitutional qualifications to the precisely defined right to suffrage.

9. KANSAS CONSTITUTION—*Article 5 Right to Suffrage—Requirement of Proper Proofs.* Article 5 of the Kansas Constitution requires the Legislature to pass such laws as may be necessary for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage. The "proper proofs" contemplated by article 5, section 4 may include any reasonable provision for ascertaining who is entitled to vote—that is, who is a qualified elector under article 5.

10. SAME—*Claim of Violation of Article 5 Right to Suffrage—Violation of Law Is Unconstitutional.* To prevail on a claim that the article 5 right to suffrage under the Kansas Constitution has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector. If a law violates the article 5 right to suffrage, it is unconstitutional.

11. LEGISLATURE—*Proper Proofs Must Comply with Constitutional Guarantees.* Simply because a law does not violate article 5 of the Kansas Constitution does not mean that any regime of proper proofs is permissible. In designing a process of providing proper proofs, the Legislature still must comply with other constitutional guarantees such as those of equal protection and due process.

12. SAME—*Proper Proofs Must Comply with Due Process.* To comply with due process, any proper proofs devised by the Legislature must include reasonable notice to the voter and an opportunity to contest the disqualification of otherwise valid absentee ballots and to cure deficiencies.

13. SAME—*Proper Proofs Must Comply with Equal Protection.* To comply with equal protection, any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards.

14. ELECTIONS—*Statute's Limitation on Advanced Ballots Delivered by One Person—Not Added Qualification.* K.S.A. 2023 Supp. 25-2437's limitation

on the number of advanced ballots that may be delivered by one person can in no way be characterized as an added qualification on the right to be an elector.

15. SAME—*Restrictions on Advance Ballots Delivered by One Person—Does Not Inhibit Speech.* Restrictions on the number of advance ballots one person may deliver does not, in isolation, inhibit speech because delivering ballots is not speech or expressive conduct.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 187, 525 P.3d 803 (2023). Appeal from Shawnee District Court; TERESA L. WATSON, judge. Oral argument held February 20, 2024. Opinion filed May 31, 2024. Judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.

Elisabeth C. Frost, pro hac vice, of Elias Law Group LLP, of Washington, D.C., argued the cause, and *Henry J. Brewster*, pro hac vice, *Tyler L. Bishop*, pro hac vice, *Justin Baxenberg*, pro hac vice, *Mollie A. DiBrell*, pro hac vice, *Richard A. Medina*, pro hac vice, *Marisa A. O'Gara*, pro hac vice, and *Spencer M. McCandless*, pro hac vice, of the same firm, *David Anstaett*, pro hac vice, of Perkins Coie LLP, of Madison, Wisconsin, and *Pedro L. Irigonegaray*, *Jason Zavadil*, *Nicole Revenaugh*, and *J. Bo Turney*, of Irigonegaray, Turney & Revenaugh LLP, of Topeka, were with her on the briefs for appellants.

Bradley J. Schlozman, of Hinkle Law Firm LLC, of Wichita, argued the cause, and *Scott R. Schillings*, of the same firm, *Brant M. Laue*, former solicitor general, *Anthony J. Powell*, solicitor general, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellees.

Jeffrey M. Kuhlman, of Watkins Calcara, Chtd., of Great Bend, and *Eric W. Lee*, pro hac vice, of Judicial Watch, Inc., of Washington, D.C., were on the brief for amici curiae Judicial Watch, Inc., and Allied Educational Foundation.

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Sharon Brett and *Karen Leve*, of ACLU Foundation of Kansas, of Overland Park, were on the brief for amicus curiae American Civil Liberties Union of Kansas.

Ryan A. Kriegshauser, of Kriegshauser Ney Law Group, of Olathe, and *Kaylan Phillips*, pro hac vice, of Public Interest Legal Foundation, Inc., of Alexandria, Virginia, were on the brief for amicus curiae Public Interest Legal Foundation, Inc.

T. Chet Compton, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, and *Bradley A. Benbrook*, pro hac vice, and *Stephen M. Duvernay*, pro hac vice, of Benbrook Law Group, PC, of Sacramento, California, were on the brief for amicus curiae Lawyers Democracy Fund.

George Lewis, of Graves Garrett LLC, of Kansas City, Missouri, and *Emmett E. Robinson*, pro hac vice, of Robinson Law Firm LLC, of Cleveland, Ohio, were on the brief for amicus curiae Restoring Integrity and Trust in Elections.

Barry R. Grissom, of Grissom Miller Law Firm, LLC, of Kansas City, Missouri, and *Derek S. Clinger*, pro hac vice, of State Democracy Initiative at the University of Wisconsin Law School, of Madison, Wisconsin, were on the brief for amicus curiae Richard E. Levy and Stephen R. McAllister.

The opinion of the court was delivered by

STEGALL, J.: In 2021, several voting advocacy organizations and individuals filed suit against three new Kansas election laws alleging those laws violate various provisions of the Kansas Constitution. The laws at issue prohibit the false representation of an election official; prohibit election officials from counting advance ballots that do not have a signature or have a signature that an election official determines does not match the signature on file; and prohibit any person from collecting and returning more than 10 advance ballots for other voters. The ensuing litigation resulted in multiple appeals, which have now been consolidated. Though consolidated, this appeal now includes two distinct procedural postures. The false representation provision is postured at the temporary injunction stage, while the other two laws are postured at the motion to dismiss stage. We recite the precise procedural history at greater length below.

Today, we hold the plaintiffs have met their burden to demonstrate a likelihood of prevailing on the merits of their claim that the false representation statute is constitutionally infirm. Therefore, the district court erred in denying their request for a temporary injunction. We reverse and remand this claim to the district court to consider the remaining temporary injunction factors.

We also hold that the signature verification requirement is a valid effort by the Legislature to provide "proper proofs" of the right to be a qualified elector, which is permissible under this court's precedent. But we remand to the district court to consider

whether the statute and its implementing regulations comply with the constitutional guarantees of equal protection and due process.

Finally, we affirm the district court's grant of defendants' motion to dismiss on the claim that the ballot collection restriction is constitutionally infirm, because the restriction is not a new qualification on the right to be an elector, and because the proscribed activity—the delivery of ballots—is not political speech or expressive conduct.

FACTS AND PROCEDURAL BACKGROUND

In 2021, the Kansas Legislature passed Senate Substitute for House Bill 2183 over the governor's veto. The bill created three election laws, commonly referred to in this case as the "false representation provision," the "signature verification requirement," and the "ballot collection restriction."

The plaintiffs challenged two subsections of the false representation provision, which criminalizes

> "knowingly engaging in any of the following conduct by phone, mail, email, website or other online activity or by any other means of communication while not holding a position as an election official:
>
> . . . .
>
> (2) engaging in conduct that gives the appearance of being an election official; or
>
> (3) engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official." K.S.A. 25-2438(a).

The plaintiffs do not challenge subsection (1), which criminalizes "[r]epresenting oneself as an election official." K.S.A. 25-2438(a)(1).

The signature verification requirement prohibits election officers from counting advance ballots that do not have a signature or that have a signature that does not match the signature on file unless the voter corrects the deficiency. It requires the election officer to attempt to contact the voter to allow the voter an opportunity to cure the defect, and it makes an exception for voters with a disability. It provides:

> "(b) The county election officer shall attempt to contact each person who submits an advance voting ballot where there is no signature or where the signa-

ture does not match with the signature on file and allow such voter the opportunity to correct the deficiency before the commencement of the final county canvass.

. . . .

"(h) Subject to the provisions of subsection (b), no county election officer shall accept an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records, except that verification of the voter's signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter's registration form. Signature verification may occur by electronic device or by human inspection. In the event that the signature of a person on the advance voting ballot envelope does not match the signature on file in the county voter registration records, the ballot shall not be counted." K.S.A. 25-1124.

The ballot collection provision criminalizes the delivery of more than 10 advance ballots on behalf of other voters. It provides:

"(a) No person shall knowingly transmit or deliver an advance voting ballot to the county election officer or polling place on behalf of a voter who is not such person, unless the person submits a written statement accompanying the ballot at the time of ballot delivery to the county election officer or polling place as provided in this section. Any written statement shall be transmitted or signed by both the voter and the person transmitting or delivering such ballot and shall be delivered only by such person. The statement shall be on a form prescribed by the secretary of state and shall contain:

(1) A sworn statement from the person transmitting or delivering such ballot affirming that such person has not:

(A) Exercised undue influence on the voting decision of the voter; or

(B) transmitted or delivered more than 10 advance voting ballots on behalf of other persons during the election in which the ballot is being cast; and

(2) a sworn statement by the voter affirming that:

(A) The voter has authorized such person to transmit or deliver the voter's ballot to a county election officer or polling place; and

(B) such person has not exercised undue influence on the voting decision of the voter.

"(b) No candidate for office shall knowingly transmit or deliver an advance voting ballot to the county election officer or polling place on behalf of a voter who is not such person, except on behalf of an immediate family member of such candidate.

"(c) No person shall transmit or deliver more than 10 advance voting ballots on behalf of other voters during an election.

"(d)(1) A violation of subsection (a) or (b) is a severity level 9, nonperson felony.

(2) A violation of subsection (c) is a class B misdemeanor." K.S.A. 2021 Supp. 25-2437.

In June 2021, the plaintiffs in this case filed a lawsuit in Shawnee County District Court challenging these laws under multiple sections of the Kansas Constitution. The plaintiffs are The League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., Topeka Independent Living Resource Center, Charley Crabtree, Faye Huelsmann, and Patricia Lewter. The defendants include Scott Schwab as Secretary of State and Derek Schmidt as the Kansas Attorney General, now Kris Kobach as the Attorney General. Collectively and for ease of use, we will refer to the plaintiffs from here on out as "the League" and to the defendants as "the State."

The League made the following three claims:

(1) The false representation provision violates the right to free speech and association under the Kansas Constitution Bill of Rights sections 3 and 11; is overbroad; and is vague.

(2) The signature verification requirement violates the right to vote under the Kansas Constitution Bill of Rights sections 1 and 2 and the Kansas Constitution article 5, section 1; the right to equal protection under the Kansas Constitution Bill of Rights sections 1 and 2; and the right to procedural due process under the Kansas Constitution Bill of Rights section 18.

(3) The ballot collection restriction violates the right to vote under sections 1 and 2 of the Kansas Constitution Bill of Rights and article 5, section 1 of the Kansas Constitution; and the right to free speech and association under the Kansas Constitution Bill of Rights sections 3 and 11.

The League sought declaratory relief holding the statutes unconstitutional and requested costs and attorney fees. This appeal is complicated by its tangled procedural journey through both the district court and our intermediate appellate court. The parties filed competing motions below and different rulings made by the district court were appealed at different times. It is important to

have a concise and clear recitation of each step along this path, which we now provide.

- With its petition, the League moved for a partial temporary injunction prohibiting the State from enforcing the false representation provision.
- The State then filed a motion to dismiss the League's petition in its entirety for failure to state a claim.
- In September 2021, the district court denied the League's request for a temporary injunction against the false representation provision after concluding the League had not demonstrated a substantial likelihood of prevailing on the merits of their claims.
- The League immediately appealed this ruling. We will refer to this appellate proceeding as *League I*.
- On April 7, 2022, the League filed a motion for a partial temporary injunction prohibiting the State from enforcing the signature verification requirement.
- On April 11, 2022, the district court granted the State's motion to dismiss the signature verification claims and the ballot collection claims in their entirety. It ruled it lacked jurisdiction to consider the motion to dismiss the false representation provision because, at that time, the denial of the temporary injunction against that legislation was still pending before the Court of Appeals.
- The district court also held that its ruling mooted the League's motion for a partial temporary injunction against the signature verification requirement.
- As before, the League immediately appealed the dismissal of these claims. We will refer to this appellate proceeding as *League II*.
- The State moved to dismiss *League II* for lack of jurisdiction, arguing there was no final judgment to appeal because the district court had yet to consider the merits of the motion to dismiss the false representation provision. The Court of Appeals denied the motion and retained the appeal.

- Around this time a separate Court of Appeals panel was considering the appeal in *League I*. In June 2022, a majority of that panel concluded the League lacked standing to challenge the false representation provision and dismissed the appeal. *League of Women Voters of Kansas v. Schwab*, 62 Kan. App. 2d 310, 331, 513 P.3d 1222 (2022) (*League I*). We granted the League's petition for review of that decision.
- Then in March of 2023, another Court of Appeals panel considering *League II* reversed the district court's order dismissing the League's petition with respect to the claims against the signature verification requirement and the ballot collection restriction. *League of Women Voters of Kansas v. Schwab*, 63 Kan. App. 2d 187, 224, 525 P.3d 803 (2023) (*League II*). The panel held the League had stated a claim for relief that the signature verification requirement violates the rights to vote, to procedural due process, and to equal protection under the Kansas Constitution; and that the ballot collection restriction violates the rights to vote and the right to free speech under the Kansas Constitution. It further ruled that the motion for temporary injunction against the signature verification requirement was not moot and the district court erred in dismissing it. The panel remanded the case for further proceedings.
- The State immediately petitioned for this court's review, which we granted. On June 27, 2023, the League moved for an order enjoining enforcement of the signature verification requirement and ballot collection restriction pending appeal. We denied the motion on July 28, 2023.
- On December 15, 2023, we overruled the panel's holding in *League I*, 62 Kan. App. 2d at 331, that the League lacked standing to challenge the false representation provision and we remanded the case to the Court of Appeals for further proceedings. *League of Women Voters of Kansas v. Schwab*, 317 Kan. 805, 821, 539 P.3d 1022 (2023). We then transferred the case back to this court and or-

dered the parties to show cause why we should not consolidate *League I* with *League II*. Receiving no objections, we consolidated the two cases.

ANALYSIS

In *League II*, the State had argued there was no appellate jurisdiction because the partial grant of the State's motion to dismiss was not a final order—given that the false representation claims were still pending. The panel disagreed, holding that jurisdiction was appropriate under K.S.A. 2021 Supp. 60-2102(a)(3) which grants appellate jurisdiction over "an order involving . . . the constitution of this state." *League II*, 63 Kan. App. 2d at 196. The State did not petition for review of that holding. And we agree with the panel's conclusion that appellate jurisdiction is proper under K.S.A. 2023 Supp. 60-2102(a)(3). See also Kan. Const. art. 3, § 3 (Kansas Supreme Court "shall have . . . such appellate jurisdiction as may be provided by law.").

False Representation Provision

The League attacks K.S.A. 25-2438(a)(2) and (a)(3) as a violation of the right to free speech protected by section 11 of the Kansas Constitution Bill of Rights on three grounds—as a facial violation; as overbroad; and as vague. The district court considered each of these claims in ruling against the League's motion for a temporary injunction. As set forth below, because we resolve the League's appeal on this issue exclusively on overbreadth grounds, we need not address the League's claimed facial violation or vagueness challenge. The League also previously included a claim that the law also violated the right to association protected in section 3, but they have waived that claim by focusing in briefing and argument exclusively on the speech right, which lies solely in section 11. *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (issues not adequately briefed are deemed waived or abandoned).

Section 11 of the Kansas Constitution Bill of Rights provides:

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights; and in all civil or criminal actions for libel, the truth may be given

in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

In our decision on standing, we noted that it was unnecessary for us to consider the League's argument that the Kansas Constitution provides broader speech protections than does the First Amendment to the United States Constitution. This was so because even under traditional First Amendment jurisprudence, the League had demonstrated standing to challenge the law. *Schwab*, 317 Kan. at 815. This remains true now that we are properly postured to consider the merits because we resolve the League's claim under existing First Amendment overbreadth precedent. Therefore, we need only note that the speech protections afforded by section 11 are, at a minimum, coextensive with the First Amendment. Thus, we will not consider in this case whether section 11 provides additional speech protections.

Under the First Amendment overbreadth doctrine, "[i]f the challenger demonstrates that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep,' then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid." *United States v. Hansen*, 599 U.S. 762, 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023).

As we recently explained in an unrelated overbreadth challenge:

"First, we interpret the language of the challenged law to determine its scope. See *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) ('The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.'). If the scope of the law extends to prohibit protected activity, we next decide whether the law prohibits a substantial amount of protected activity judged in relation to the law's plainly legitimate sweep. *Williams*, 299 Kan. at 920; see also *Williams*, 553 U.S. at 297; *Ferber*, 458 U.S. at 771 (recognizing the substantiality requirement applies not just to conduct, but equally to overbreadth challenges involving pure speech and speech-related conduct). Finally, if we find substantial overbreadth, we look to see whether there is a satisfactory method of severing the law's constitutional provisions from its unconstitutional provisions. *Trotter*, 316 Kan. at 320-21." *City of Wichita v. Griffie*, 318 Kan. 510, 522-23, 544 P.3d 776 (2024).

Because the lower court's consideration of the League's overbreadth challenge occurred in the context of a motion for a temporary injunction, we must also take into account our standard of review over such rulings. When a party alleges a district court erred in ruling on a motion for a temporary injunction, appellate courts review the decision for an abuse of discretion. *Downtown Bar and Grill v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). A district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.

State v. Campbell, 317 Kan. 511, 529, 532 P.3d 425 (2023). When legal questions of constitutional and statutory interpretation arise, our review is plenary. *State v. Dunn*, 304 Kan. 773, 819, 375 P.3d 332 (2016).

We focus our analysis of the lower court's decision on the second factor—did the district court commit an error of law? The League maintains that K.S.A. 25-2438(a)(2) and (3) criminalize speech regardless of whether the speaker is intending to impersonate an election official. The State disagrees, arguing that the statute sweeps only unprotected impersonation into its net. The State relies on the "knowingly" language in the statute, arguing that this language limits the statute's reach to actions "*designed* to convey the false impression" the actor is an election official. (Emphasis added.) If the district court properly interpreted the statute to *only* regulate unprotected speech, its decision on the temporary injunction motion was not an abuse of discretion. If, however, the statute extends to speech protected by the First Amendment, then the lower court erred as a matter of law which amounts to an abuse of discretion under our well entrenched standard of review.

The lower courts accepted the State's interpretation of the statute. The district court ruled that (a)(2) and (3) criminalize claiming "through knowing conduct, to be something one is not" or making "knowing false representations." Based on this interpretation, it held that the provisions do not implicate protected speech activity because "falsely representing that one is speaking on behalf of the government or impersonating a government officer is not protected conduct."

In *League I*, the Court of Appeals did not rule on the district court's decision that the League was unlikely to prevail because the panel majority concluded the League lacked standing to challenge the law. But in the process, the panel interpreted the challenged provisions in a similar way, reading it to criminalize only "nefarious or deceptive" conduct. *League I*, 62 Kan. App. 2d at 321-22. In this way, both lower courts read into the statute an intent to deceive or misrepresent.

On review, we disagreed. To resolve the standing question, we were required to decide whether the League had a credible fear of prosecution. We thus provided a definitive interpretation of the statute, including whether the law contained an implicit "reasonable listener" standard that might have limited its reach to only intentional misrepresentation activities. We concluded, on the plain language of the statute, that it does not:

> "The actus reus of the two challenged subsections—that is, the verbs—are to 'give[ ] [an] appearance' and to 'cause [a] person to believe.' The necessarily subjective and interpretive process inherent in these verbs are what disturb the nonprofits and allegedly chill their constitutionally protected activities. The State (and the lower courts) contend that the mens rea of 'knowingly' in K.S.A. 25-2438(a) effectively side-steps the innocent listener mistake.
>
> "But again, the nonprofits are not consoled. They argue persuasively that based on their experience, they 'know' that a certain percentage of the people they encounter will make the innocent listener mistake. . . . And they ask, how can the known possibility of an innocent or unreasonable listener mistake alter the fundamental nature of the speech from protected to unprotected? Put another way, can a listener's mistake—whether innocent or in fact entirely unreasonable—turn otherwise honest speech into fraud?
>
> "The answer must be no. But why? Because, in this context, in order to fall outside constitutional protections, the speech at issue must be deceptive, fraudulent, or otherwise false, at its heart. [Citations omitted.]" *Schwab*, 317 Kan. at 817-18.

We ultimately held that "when the Legislature criminalizes speech and does not—within the elements and definitions of the crime—provide a high degree of specificity and clarity demonstrating that the only speech being criminalized is constitutionally unprotected speech, the law is sufficiently unclear to confer pre-enforcement standing on a plaintiff challenging the law." 317 Kan. at 821.

Now on the merits, the State continues to argue the statute restricts only unprotected speech—that is, intentional misrepresentations and deceptive behavior. The First Amendment prohibits the government from restricting protected speech unless it does so within constitutional boundaries. In *Schwab*, we observed that content-based speech is constitutionally protected "unless the speech at issue falls within a narrowly defined category of constitutionally unprotected speech." 317 Kan. at 815; see also *Reed v. Town of Gilbert*, 576 U.S. 155, 172, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) (when the government regulates content-based speech, the regulation is subject to strict scrutiny).

Restrictions on unprotected speech, however, do not trigger First Amendment guarantees. See *New York v. Ferber*, 458 U.S. 747, 764, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). Such unprotected speech "may be freely restricted by the state so long as the regulations fall within the scope of its police power." *Schwab*, 317 Kan. at 815. Unprotected categories of speech include fraud, obscenity, defamation, incitement, speech integral to criminal conduct, fighting words, true threats, speech presenting some grave and imminent threat the government has the power to prevent, and child pornography. 317 Kan. at 815-16.

We said that "[t]he parties do not dispute that K.S.A. 25-2438(a) is a content-based restriction that *attempts* to prohibit a type of fraud—which as a historically recognized category of unprotected speech, the government may legitimately restrict without running afoul of the First Amendment." 317 Kan. at 817. To clarify, the "type of fraud" at issue here is the impersonation of an election official.

As an aside, we emphasize that for purposes of this decision, we have assumed without deciding that the impersonation of a public official is, in fact, unprotected speech. See *United States v. Chappell*, 691 F.3d 388, 395 (4th Cir. 2012) (statute prohibiting impersonation of police prohibited "a species of identity theft in which there is little or no communicative value," and was "far from significantly compromising 'recognized First Amendment protections'"); *Commonwealth v. Crawford*, 254 A.3d 769, 779 (Pa. Super. Ct. 2021) (finding that the prohibited conduct in a law

criminalizing impersonation of a veteran for profit was unprotected as a form of fraud). As will be demonstrated, our interpretation of the false representation provision relieves us of the need to explicitly decide that question.

We then zeroed in on the heart of the parties' dispute—which was strictly a matter of statutory interpretation. And we characterized that dispute as whether "the plain language of the statute actually does" criminalize only the impersonation of an election official. *Schwab*, 317 Kan. at 817. As always, we look first to the plain language of the statute to determine whether it restricts only unprotected speech—as the State claims—or whether it extends to speech protected by the First Amendment. *State v. Toliver*, 306 Kan. 146, 150, 392 P.3d 119 (2017) ("When the statutory language is plain and unambiguous, an appellate court simply interprets the language as it appears, without speculating and without reading into the statute language not readily found there.").

As before, we discern from the plain language used by the Legislature that it included no intent to misrepresent or deceive requirement in the statute. As such, it sweeps up protected speech in its net. That is, the League is correct that the law criminalizes honest speech which is "known" to cause occasional misunderstandings or misperceptions on the part of the listener. This is even more evident when one considers K.S.A. 21-5202(i), which provides "[a] person acts 'knowingly' . . . with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result." And the League already knows its past innocent acts have caused people to mistakenly believe that League personnel are election officials despite the League's efforts to avoid that confusion. The district court thus erred and its faulty statutory interpretation infected each portion of its free speech analysis, and we conclude that it abused its discretion by making an error of law when it denied the League's motion for a temporary injunction.

To obtain a temporary injunction, a movant must establish (1) a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the

plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest. *Downtown Bar and Grill*, 294 Kan. at 191. The district court stopped its analysis at the first step.

We now turn to consider whether the League has satisfied the first prong of the temporary injunction test by showing a substantial likelihood of prevailing on the merits of their overbreadth challenge. To determine whether a law is overbroad, we apply the three-step facial overbreadth standard as recently articulated in *Griffie*. At the first step, we have already held the scope of K.S.A. 25-2438(a) extends to protected speech that is not fraudulent or deceptive. The League is rightfully concerned with potential innocent and unreasonable listener mistakes and has provided evidence and well pled facts—which at this stage, we accept as true—that show those instances do occur and are not altogether uncommon.

We therefore find the amount of protected activity that is reached by K.S.A. 25-2438(a)(2) and (3) could be substantial in relation to the statute's goal of prohibiting impersonation of an election official. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."). As such, we find the League has demonstrated a substantial likelihood of eventually prevailing on the merits. A severance analysis is not required in this instance because the League has only challenged subsections (2) and (3). Subsection (1) is not properly before us in this action.

Because the district court concluded the League failed to establish a substantial likelihood of eventually prevailing on the merits, it did not address the remaining prongs of the temporary injunction analysis. Because we find the League has made a sufficient showing at the first step, we reverse and remand for the district court to make necessary factual findings in order to consider and rule on the remaining four prongs of the temporary injunction test.

Signature Verification Requirement

In their petition, the League argues the signature verification requirement and the ballot collection restriction infringe on what they style the "right to vote" which they claim is protected by sections 1 and 2 of the Kansas Constitution Bill of Rights and article 5, section 1 of the Kansas Constitution. The League asserted that, because the "right to vote" is a fundamental right, the government must show the infringement withstands strict scrutiny and that the State could not sustain that burden. The district court disagreed and dismissed the petition for failure to state a claim upon which it could grant relief.

In *League II*, the Court of Appeals reversed the district court. It ruled the lower court erred in applying a federal standard to a claim that state action violated the Kansas Constitution's protections on the "right to vote." Citing *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 663, 440 P.3d 461 (2019), it held that voting under the Kansas Constitution is a fundamental right and, consequently, any impairment of that right should be subject to strict scrutiny. It ruled that, under this test, the League had properly stated a claim for relief. *League II*, 63 Kan. App. 2d at 204-13.

We exercise unlimited review when evaluating whether a district court erred by granting a motion to dismiss for failure to state a claim. *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021). We assume the League's well-pleaded facts and allegations to be true and view them in a light most favorable to the plaintiffs. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019). Stated another way, at the motion to dismiss stage, we ask: If everything the plaintiffs have pled is true, are they entitled to relief? If yes, a motion to dismiss should not be granted.

We begin our discussion by clarifying that the "right to vote" is not an unenumerated "natural right" protected by section 1 of the Kansas Constitution Bill of Rights. Rather, suffrage is universally understood as a political right. See, e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006) (right to vote is a political right); *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other

basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) (right to vote "not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights"); *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971) ("The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. The right is pervasive of other basic civil and political rights, and is the bed-rock of our free political system."); *Hammond v. Brinkman*, 173 Kan. 406, 408, 246 P.2d 345 (1952) (noting "'political rights'" include the right to vote); *State ex rel. Parker v. Corcoran*, 155 Kan. 714, 721, 128 P.2d 999 (1942) (same); *Wheeler v. Brady*, 15 Kan. 26, 33, 1875 WL 763 (1875) (recognizing that women possess the same political right to vote in school district elections as men). Given this, the Court of Appeals erred when it analyzed the question under our existing section 1 jurisprudence.

Turning to section 2 of the Kansas Constitution Bill of Rights, it provides in full:

> "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency."

We agree with Justice Rosen's dissent that section 2 states clearly one of our most cherished principles of government—"[a]ll political power" comes from "the people," and through that power, the people have "instituted" "free government[]" for the people's "equal protection and benefit." Kan. Const. Bill of Rights, § 2; 318 Kan. at 812 (Rosen, J., concurring in part and dissenting in part). This states one of the most foundational political ideas of our democratic system, and it informs the entire edifice of lawmaking in a free society. Over 150 years ago, we elucidated the principle this way:

"In this country it is universally acknowledged and insisted upon, that the people are the original source and fountain of all civil and political power; that neither the whole government, nor any department thereof, possesses any inherent power; that the people are sovereign, and the different departments of the government are simply agencies, through which the people exercise that sovereignty; and that all the power that can be exercised by any department of the government is merely delegated power which it derives from the people. The State government derives its powers from the people solely by virtue of the State Constitution. This constitution is the letter of attorney or chart of authority from the people to the government and to the different departments thereof. Hence, in order to ascertain what power is delegated to the government, and to each of its departments, we must look to the constitution itself." *Coleman v. Newby*, 7 Kan. 82, 86, 1871 WL 696 (1871).

At the heart of section 2, then, is the notion of *delegated* power. But how, precisely, is such power transferred—or delegated—from the people to a free government? On this question, section 2 is silent. This is not an oversight or deficit of section 2's foundational statement of principle, because at the outset, the very *act* of "constituting" a state is self-evidently the *mechanism* by which free governments obtain delegated power. In other words, it is axiomatic that free governments exercise what powers they possess as *agents* of the people, having properly received such power at "birth" through a "constituting" process of delegation. So, the initiatory "chart of authority from the people to the government" is "the constitution itself." 7 Kan. at 86.

But "the people," in constituting the state, were not blind watchmakers, content to wind a clock and simply let it run. Ours is not a self-perpetuating state—it is neither hereditary nor does it enjoy the power to select its own successors. Though such a system could be consistent with section 2's initial, constituting act of delegation, we know from the text of that initiatory act that the people intended to *continue* constituting that state, at regular intervals, through ongoing and perpetual subordinate acts of delegation. We generally call such acts of ongoing delegation "elections" and "appointments."

Elections, and the controlled and constitutionally defined process of voting that in the aggregate creates an "election," are the principle post-constitutional mechanism of delegation by which the people grant power to their representative office holders. We can thus say that while the Constitution creates the *offices* of free

governments—that is the seats of delegated power, largely contained in the three great departments of the executive, legislative, and judicial branches—it is by elections that the people most regularly and persistently delegate power to *officers* who will, for a time, occupy the constitutional offices. Certain other officers receive their delegation of the people's power through a constitutionally created process of *appointment*.

Section 2 does not address itself directly to these perpetual post-constitutional acts of delegation. Rather, it simply declares that delegation for the equal protection and benefit of the people is the operating system of our free government. We must look elsewhere in the people's charter to find how, precisely, the mechanism of delegation works. For this, we need not look hard, for the answer is woven throughout the people's constituting act.

It is noteworthy that the mechanisms of delegation often require voting by the populace, but not always. For example, while the Constitution provides for the election by popular vote of some public officers, it designates that other constitutional officers will be appointed, and it grants authority to the Legislature to provide for the appointment of nonconstitutional officers. Kansas Supreme Court Justices, for example, initially achieve office through an appointment system specifically set forth in article 3 of the Kansas Constitution. Yet it remains true that justices on this court also exercise power that is delegated to them from "the people." The delegation to the Legislature to designate other officers that can be appointed can be found in multiple constitutional provisions. See Kan. Const. art. 2, § 18 ("The legislature may provide for the election *or appointment* of all officers and the filling of all vacancies not otherwise provided for in this constitution." [Emphasis added.]); Kan. Const. art. 15, § 1 ("All officers whose election *or appointment* is not otherwise provided for, shall be chosen *or appointed* as may be prescribed by law." [Emphases added.]).

In the same way, some constitutional officers are delegated power through *limited* (as opposed to popular) elections. A very small electorate chooses the Senate President and the Speaker of the House. See Kan. Const. art. 2, § 8 ("Each house shall elect its presiding officer."). While a limited professional class enjoys the

privilege of electing the Chairperson of the Supreme Court Nominating Commission. See Kan. Const. art. 3, § 5(e) (The chairperson shall be "chosen from among their number by the members of the bar who are residents of and licensed in Kansas."). And finally, in rare circumstances, some achieve an office through *succession* when a vacancy occurs mid-term and another office holder automatically ascends to the vacant seat. See Kan. Const. art. 1, § 11 ("When the office of governor is vacant, the lieutenant governor shall become governor."). These are all examples of delegated power, perfectly consistent with section 2, that do not require popular elections.

Where popular elections are required—by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere)—the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands. See Kan. Const. art. 4, § 1 ("Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide*." [Emphasis added.]). And, while setting forth the specific and required qualifications for all electors in the Constitution, the people empowered the Legislature to "provide by law for proper proofs of the right of suffrage." See Kan. Const. art. 5, §§ 1, 4.

The issues raised in this appeal relate to the mode of voting and proof of the right to suffrage—matters addressed in articles 4 and 5. That is, the questions before us relate directly to the "how" of delegated power—the mechanisms by which the people continue to choose office holders who will occupy the seats of delegated power—not to the very existence of delegated power as guaranteed by section 2. Thus, having understood that various mechanisms of ongoing delegation may be chosen by the people in their initial constituting act, we must look only to articles 4 and 5 to analyze issues relating to the mode of voting and to the right of suffrage (including necessary proofs of that right).

In doing so, our analysis is consistent with the widely accepted statutory interpretive principle that a specific provision controls over a more general one. See, e.g., *In re E.J.D.*, 301 Kan. 790, 794, 348 P.3d 512 (2015). This principle is at times helpful in the realm of constitutional interpretation as well, and we find it

to be so in this instance. See *City of Tulsa v. Southwestern Bell Telephone Co.*, 75 F.2d 343, 351 (10th Cir. 1935) ("It is a well-settled rule of construction that where there is, in an act or Constitution, a specific provision relating to a particular subject, such provision will govern in respect to that subject as against general provisions in the act or Constitution, although the latter standing alone would be broad enough to include the subject to which the more particular provision relates."); *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 199, 16 P.3d 757 (2001) ("'It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.'"); *State ex rel. One Person One Vote v. LaRose*, ___ N.E.3d ___, 2023 WL 4037602, at *5 (Ohio 2023) ("'[S]pecial [constitutional] provisions relating to a subject will control general provisions in which, but for such special provisions, the subject might be regarded as embraced.'") (quoting *Akron v. Roth*, 88 Ohio St. 456, 461, 103 N.E. 465 [1913]).

As we have made clear, articles 4 and 5 more specifically, concretely, and plainly concern voting rights than does the general statement of principle set forth in section 2 which does not—by its plain terms—address itself to voting. As a matter of political philosophy, the broad and foundational concept of delegated power does not necessarily even include elections. (We note that the League's equal protection claims—which do arise under section 2—are addressed at a later point in this opinion.)

Here, the parties have not discussed article 4, although some of their arguments relate to the mode of voting. But the League has asserted violations of article 5. The verification processes relating to mailed or absentee ballots have been recognized by this court as the "proofs" allowed under article 5, section 4 of the Kansas Constitution. See, e.g., *Burke v. State Board of Canvassers*, 152 Kan. 826, Syl. ¶ 6, 833, 107 P.2d 773 (1940) (statute requiring absentee voter return form affidavit with ballot verifying voter's election precinct, voter's place of residence, whether voter is duly registered, and that voter personally marked the ballot is "a valid exercise of the power conferred on the Legislature" under the constitutional provision stating that the Legislature shall pass laws necessary for "'ascertaining by proper proofs citizens who shall be

entitled to the right of suffrage'"); *Lemons v. Noller*, 144 Kan. 813, 826, 63 P.2d 177 (1936) (Legislature may require absentee electors "file a written request for a ballot, the request to contain proofs of his right to vote."). Thus, our focus is limited to interpreting and enforcing the specific guarantees of article 5.

We pause here to briefly address the arguments made by our colleagues in dissent. The dissenters' criticisms fall wide of the mark. While most of their vigorously asserted non sequiturs do not merit a response, we discern that two discrete points in reply may assist the reader.

First, the dissents insist we have ignored past precedent from our court holding that section 2 protects a fundamental right to vote. The caselaw does not bear this out. The dissents cannot point to anywhere in the Kansas Reports where this court held that section 2 protects a fundamental right to vote. It simply is not there. Consider the key passage from *Harris v. Shanahan* relied on by the dissenters. There, we wrote that the Kansas Constitution declares that "every qualified elector of the several counties is given the right to vote for officers that are elected by the people, and he is possessed of equal power and influence in the making of laws which govern him." 192 Kan. 183, 204, 387 P.2d 771 (1963). The *Harris* court then merely cited to section 2 as support for this statement. And of course, citizens being "possessed of equal power and influence" is properly considered part of the "equal protection" guarantees found in the second sentence of section 2. 192 Kan. at 204. Today's decision does not conflict with any of our past precedent, though we are more precise and rigorous in how we concretely describe our constitutional provisions and how they function together to guarantee and protect the people's constituting decision to form a government of limited and delegated powers.

Second, one gets the impression reading the dissents that they think of the "right to vote" in talismanic terms, as though it were a kind of superpower of citizenship, to be wielded in times of trouble whenever and wherever desired. Our view is both more realistic and practical as well as more legally and constitutionally precise. There can be no "right to vote" unless there is *first* a "right to elect." The dissents cannot demonstrate—and they do not even try—that section 2 guarantees a "right to elect." Because how

could it? Such a guarantee is flatly contradicted by the numerous other provisions of the Constitution (discussed above) establishing paths to political office that do not require an election. Rather, the "right to elect" is found in concrete and specific provisions of the Constitution or statutes which set forth with precision exactly which public office or constitutional amendment or ballot question is subject to election and when. It is only *after* a "right to elect" exists that certain citizens are guaranteed the "right to be an elector" under article 5 for specific elections.

But just because the right to vote is not protected in our Bill of Rights does not mean that constitutional voting guarantees are somehow weak or ineffective. Quite the contrary. The article 5 right protected by the Kansas Constitution is an *enumerated political right*. As an expressly enumerated right, article 5 provides the strongest possible constitutional protections. For 140 years this court has recognized that the Legislature violates the article 5 right—which is more precisely referred to as a "right to suffrage," meaning a right to be a qualified elector in any election called by the state or its political subdivisions—if it imposes any extra-constitutional qualifications to the precisely defined right to suffrage. *State v. Butts*, 31 Kan. 537, 555, 2 P. 618 (1884).

The panel thus erred by straying into a "fundamental rights" mode of analysis and by deciding to apply strict scrutiny under sections 1 and 2 of the Kansas Constitution Bill of Rights. Instead, determining whether the article 5 right to suffrage has been violated is subject to our test set forth in *Butts*, 31 Kan. at 554-56.

In *Butts*, the challengers claimed that a voter registration act violated the article 5 right to suffrage. That registration act required that for a person to be able to vote, they must register in person with the city clerk at the clerk's office and provide their name, age, occupation, and place of residence. It further required voters to complete their registration at least 10 days before election day. Under the act, a person who was otherwise qualified, but not registered, would not be allowed to participate in the election. 31 Kan. at 551-52.

The *Butts* court found that the registration provision did not deprive any citizen of their article 5 right to suffrage but was in-

stead a reasonable regulation under which that right may be exercised. In so deciding, the court looked to the language of article 5 itself which "requires" that the Legislature set forth by law the "'proper proofs'" necessary to ascertain "'who shall be entitled to the right of suffrage.'" 31 Kan. at 554 (quoting Kan. Const. art. 5, § 4). And if "the legislature has the right to require proof of a man's qualification, it has a right to say when such proof shall be furnished, and before what tribunal; and unless this power is abused the courts may not interfere." 31 Kan. at 555-56. The "proper proofs" contemplated by article 5 may include any *reasonable* provision for ascertaining who is entitled to vote—that is, who is a qualified elector under article 5:

> "Requiring a party to be registered, is not in any true sense imposing an additional qualification, any more than requiring a voter to go to a specific place for the purpose of voting, or requiring him to prove by his own oath or the oaths of other parties his right to vote when challenged, or than requiring a naturalized foreigner to present his naturalization papers. Each and all of these are simply matters of proof, steps to be taken in order to ascertain who are and who are not entitled to vote. . . . If the legislature has the right to require proof of a man's qualification, it has a right to say when such proof shall be furnished, and before what tribunal; and unless this power is abused the courts may not interfere." 31 Kan. at 554-56.

In other words, the test pronounced in *Butts* provides that the Legislature may validly make registration (or the provision of other "proper proofs") a prerequisite to the act of voting, but in so doing, the Legislature cannot "under the pretext of securing evidence of voters' qualifications . . . cast so much burden as really to be imposing additional qualifications" on the right to suffrage. 31 Kan. at 554. Accordingly, to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, the law must be shown to unreasonably burden the right to suffrage. Such unreasonable burdens, as a matter of law, bear no reasonable relationship to the Legislature's lawful role of providing proper proofs but instead amount to extra-constitutional and de facto qualifications on the right to suffrage. If a law is shown to violate the *Butts* test—i.e., if it imposes any additional de facto qualifications not

expressly set forth in article 5 on the right to become an elector—the law is unconstitutional.

This mode of review for an enumerated right differs significantly from the tiered scrutiny analysis typically used to evaluate regulations on unenumerated rights—whether they be designated "fundamental" or not. Put simply, if a law violates the article 5 right to suffrage, it is unconstitutional, full stop. See *State ex rel. Smith v. Beggs*, 126 Kan. 811, 814-15, 271 P. 400 (1928) (holding statute requiring additional qualification on voter at general election by demanding a declaration of party affiliation was invalid under Kan. Const. art. 5, § 1). Once an extra-constitutional qualification on the right to suffrage is found, courts need not permit the government an opportunity to satisfy a balancing test, even such a stringent one as strict scrutiny.

To answer this simple question—does the signature requirement impose an extra-constitutional qualification on the right of suffrage?—we must, following *Butts*, turn to article 5, section 4, which envisions that the "legislature shall provide by law for proper proofs of the right of suffrage." Kan. Const. art. 5, § 4. This provision makes clear that our framers understood reasonable regulations requiring proper proofs were not the equivalent of imposing a new qualification on the right to be an elector. So, the reasonable imposition of a proper proof—i.e., "steps to be taken in order to ascertain who and who are not entitled to vote," 31 Kan. at 554—cannot violate the article 5 right because it is not an extra-constitutional qualification. It is instead a means of establishing the existing, and still necessary, qualifications. See *Burke*, 152 Kan. 826, Syl. ¶ 6; *Lemons*, 144 Kan. at 822, 824.

Ensuring that all Kansas voters are properly qualified to be electors is just as important as ensuring that no extra-constitutional qualifications are imposed. This is so because of the axiomatic reality that permitting an unqualified elector has much the same effect as prohibiting a qualified one. Each of these outcomes disenfranchises the genuine vote of someone who is qualified to vote. See 144 Kan. at 819 ("When the constitutional convention of Kansas met in 1859, its members were well aware that a determined effort was being made by the antislavery and proslavery forces to dominate the form of government of the then territory . . . . Such

elections as were had were held under difficulty and each side accused the other of procuring votes from persons not entitled."). We read article 5 and *Butts* to be singularly focused on achieving the goal of ensuring that no qualified elector will have his or her vote "not count" either by *actually* not counting it, or by having its effect *diluted* by the counting of illegitimate votes.

The Kansas Constitution thus gives the Legislature authority to pass reasonable laws allowing election officials to ascertain whether a citizen possesses the qualifications required of an elector—which "includes the ability to require a potential voter to identify himself or herself in some fashion, thereby answering the question, 'Are you who you say you are, a constitutionally qualified elector?'" *League of Women Voters Educ. Network v. Walker*, 357 Wis. 2d 360, 376, 851 N.W.2d 302 (2014); see also *Capen v. Foster*, 12 Pick. 485, 492, 29 Mass. 485, 491 (1832) ("The constitution, by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing these qualifications, must at some time be had by those who are to decide on them. The time and labor necessary to complete these investigations must increase in proportion to the increased number of voters; and indeed in a still greater ratio in populous commercial and manufacturing towns, in which the inhabitants are frequently changing, and where of necessity many of the qualified voters are strangers to the selectmen."). Therefore, we must ask: Is the imposition of the signature requirement an impermissible new qualification on the right to be an elector which unreasonably burdens the right of suffrage or is it reasonably related to the Legislature's constitutional duty to ensure a fully qualified electorate?

The signature verification requirement prohibits election officers from counting advance ballots that do not have a signature or that have a signature that does not match the signature on file unless the voter corrects the deficiency. It requires the election officer to attempt to contact the voter first—to enable a cure—and makes an exception for voters with a disability. Kansas law includes many other "proper proof" provisions. For example, a person voting at a polling place is required to provide their name, address (if required), signature, and a valid form of identification.

K.S.A. 2023 Supp. 25-2908(b). Likewise, the signature verification requirement at issue here is "simply [a] matter[] of proof—steps to be taken in order to ascertain who and who are not entitled to vote." *Butts*, 31 Kan. at 554.

It is reasonable for the Legislature to impose such proof requirements because it is important for election officials to determine whether a person is who they say they are—which again, is not an extra-constitutional elector qualification, "but rather, it is a mode of identifying those who possess constitutionally required qualifications." *Walker*, 357 Wis. 2d at 378 (upholding law requiring photo identification to vote as a valid proper proof); see also *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952-53 (7th Cir. 2007) (upholding a state law requiring photo identification to vote, in part because it helps deter voting fraud which "impairs the right of legitimate voters to vote by diluting their votes"), *aff'd* 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008); *Promote the Vote v. Secretary of State*, 333 Mich. App. 93, 120-24, 958 N.W.2d 861 (2020) (upholding state law requiring proof of residency to vote because requirement was not an "additional obligation" on the right to vote, but rather a proof that the person is a "qualified elector").

The League suggests there are instances when the failure of proof—a faulty signature match—disenfranchises a qualified elector. The *Butts* court recognized and addressed this practical reality:

> "It is true isolated instances may occur where a party through absence or sickness is unable to register, and so loses his vote, but the same result may follow where any failure to produce the required evidence occurs. A naturalized foreigner may lose his naturalization papers, and the court where he was naturalized may be at the very extreme of the land, and so, for the lack of the legal evidence of his naturalization, he may lose his vote . . . ." *Butts*, 31 Kan. at 555.

Critically, *Butts* recognized that these are not truly disenfranchisements, but "in both cases, the matter is simply one of a lack of evidence." 31 Kan. at 555. Noting that there is no "special virtue in the mere day of election," *Butts* makes it clear that citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and that a failure to do so does not mean that citizen has been disenfranchised. 31 Kan. at 555-56.

So here, the signature verification requirement at issue is properly categorized as a reasonable effort by the Legislature to provide "proper proofs" of the right to be a qualified elector. It does not impose a new qualification on the right to suffrage because its burdens are reasonably related to the Legislature's duty and prerogative to provide proper proofs. As such, the regulation is not an extra-constitutional "abuse" of the Legislature's authority to provide for proper proofs and in these circumstances, "courts may not interfere." 31 Kan. at 556. The district court did not err in granting the motion to dismiss the League's article 5 claim, though the district court's rationale was incorrect. See *State v. McCroy*, 313 Kan. 531, 539, 486 P.3d 618 (2021) (affirming lower court as right for the wrong reason).

Our analysis, however, cannot end here. Simply because a law does not violate article 5 does not mean that any regime of proper proofs is permissible. In designing a process of providing proper proofs, the Legislature still must comply with other constitutional guarantees such as those of equal protection and due process.

The Kansas equal protection guarantee provides that "all free governments are . . . instituted for [the people's] equal protection and benefit." Kan. Const. Bill of Rights, § 2. We are "guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment of the federal Constitution when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights." *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022).

Equal protection requires "similarly situated individuals should be treated alike." *State v. Gaudina*, 284 Kan. 354, 372, 160 P.3d 854 (2007). It "does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." 284 Kan. at 372. To comply with equal protection in the context of providing "proper proofs" of the right to be a qualified elector, any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment. See *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 31 L.

Ed. 2d 274 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Reynolds*, 377 U.S. at 565 (equal protection requires "uniform treatment of persons standing in the same relation to the governmental action questioned or challenged"); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966) ("[T]he right of suffrage 'is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.'"). If the determination of proper proofs is subject to arbitrary and non-uniform standards, different citizens will be treated differently in violation of equal protection. See *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) (equal protection of the laws means that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another").

Moreover, any required proper proofs must also comply with due process. Section 18 of the Kansas Constitution Bill of Rights provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." The phrase "remedy by due course of law" is "tied to due process concerns." *In re Marriage of Soden*, 251 Kan. 225, 233, 834 P.2d 358 (1992); see also *Hanson v. Krehbiel*, 68 Kan. 670, Syl. ¶ 2, 75 P. 1041 (1904) (Section 18 provides for "due course of procedure" and "a fair hearing."). To comply with due process guarantees, any proper proofs devised by the Legislature must include reasonable notice to the voter and an opportunity to be heard at a meaningful time and in a meaningful manner by providing an opportunity to contest the disqualification of otherwise valid absentee ballots and to cure deficiencies based on an apparent discrepancy between the voters' signatures and sample signatures available to election officials. E.g., *Democracy N.C. v. N.C. State Bd. of Elec.*, 476 F. Supp. 3d 158, 228 (M.D.N.C. 2020); *League of Women Voters of South Carolina v. Andino*, 497 F. Supp. 3d 59, 69 (D.S.C. 2020); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990).

Because we are at a motion to dismiss stage of the proceeding, we accept all allegations in the petition as true. *Kudlacik*, 309 Kan. at 790. The League claims that these provisions are incapable of being enforced in a manner that is not arbitrary and violative of equal protection and due process because the statute does not explicitly require training on signature matching, it does not contain any standards for determining what constitutes a mismatch, and it lacks a standard for notice and the opportunity to cure defects.

The League has made a colorable claim—accepting the allegations in the petition as true—that the signature requirement is not sufficiently uniform or objective, and that the notice and cure provisions are not reasonable. See, e.g., *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1, 16-17, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018) (in a challenge to a prohibition on wearing anything "political" inside a polling place on election day, held that the State must "be able to articulate some sensible basis for distinguishing what may come in from what must stay out," and declaring the use of "unmoored" terms and "haphazard interpretations . . . in official guidance" rendered the restriction infirm).

Because we are at a motion to dismiss stage of the proceeding, we will not deny the League their full opportunity to prove up their claims as a matter of evidence in the district court. Accordingly, we reverse the district court's grant of the State's motion to dismiss on the equal protection and due process claims. The League must have an opportunity to test the signature requirement against the proper legal standard: Does the signature requirement (and its implementing regulations and policies, such as those promulgated in K.A.R. 7-36-9, K.A.R. 7-36-7 [2023 Supp.], and K.A.R. 7-36-3) achieve reasonable uniformity on objective standards, and does it provide reasonable notice of defects and an opportunity to cure? We reverse and remand to the district court for that determination.

Ballot Collection Restriction

Finally, we turn to the ballot collection restriction. The League argues the ballot collection restriction infringes on the right to suffrage, the right to engage in political speech, expressive conduct, and association. As above, though the League raised a section 3 associational claim against the ballot collection restriction in their petition, it was not briefed and is therefore deemed abandoned. *Russell*, 306 Kan. at 1089.

The League first claims that the restriction imposes an unreasonable infringement of the right to suffrage because some Kansans must vote by having another person collect and deliver their ballot. In *League II*, the Court of Appeals, applying strict scrutiny, agreed and held the League had pled facts showing the ballot collection restriction impairs the right to vote. It reasoned that because "[n]ot all voters can make a trip to the polls," the restriction is "a limitation that prevents votes from being cast and counted." *League II*, 63 Kan. App. 2d at 212.

Again, the Court of Appeals erred in applying the strict scrutiny standard to this claim. As above, the proper test to apply when a plaintiff challenges a law as infringing on the article 5 right to suffrage is the *Butts* test. Under that test, we evaluate whether the state has imposed what amounts to a new qualification on the right to be an elector. *Butts*, 31 Kan. at 554-56.

Viewing the pleadings in the light most favorable to the League, we conclude they have not pled that the ballot collection restriction amounts to a new qualification on the right to be an elector. K.S.A. 2023 Supp. 25-2437's limitation on the number of advanced ballots that may be delivered by one person can in no way be characterized as an added qualification on the right to be an elector. Rather, it is a regulation of the mechanics of an election. These matters are governed by article 4 of our Constitution, and the League has not asserted an article 4 violation. Voters have numerous avenues available to deliver their ballots. See K.S.A. 2023 Supp. 25-433 (providing instructions for mailing of ballots, including postage directions); K.S.A. 2023 Supp. 25-1122(c) (providing instructions for applying for advance voting ballot by mail). As such, we affirm the district court's grant of the State's motion to dismiss the League's article 5 claim—though as above, the decision was correct for the wrong reason.

Likewise, the League's speech claim against the ballot collection requirement fails because the proscribed activity—the delivery of ballots—is not speech or expressive conduct. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 405, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (warning that not all conduct is "expressive" for purposes of the First Amendment); *Spence v. Washington*, 418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974) (same);

United States v. O'Brien, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

Restrictions on the number of advance ballots one person may deliver does not, in isolation, inhibit speech at all; indeed, ballot deliverers are no more engaged in speech than is the postal service when it delivers packages. See, e.g., *Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018) (state law regulating collection of voters' early mail ballots did not implicate First Amendment right to speech); *Feldman v. Arizona Secretary of State's Office*, 843 F.3d 366, 392 (9th Cir. 2016) (collecting ballots is not expressive conduct); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013) (The "receipt and delivery of completed voter-registration applications" is not expressive conduct.).

Justice Rosen's dissent relies on *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988), to reach the opposite conclusion. There, the United States Supreme Court struck down a Colorado ban on paying petition circulators, reasoning that those who circulate petitions for ballot initiatives are engaged in core political speech. His dissent relies on this holding and equates the actions of petition circulators with the actions of those who deliver advance ballots.

We find these two distinct acts readily distinguishable. The Colorado law at issue in *Meyer* was a "limitation on political expression" because circulation of an initiative petition itself "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 420-21. And the circulator "in almost every case" would need to explain "the nature of the proposal and why its advocates support it," which is "interactive communication concerning political change," or "'core political speech.'" 486 U.S. at 421-22.

The same cannot be said of Kansas' advance ballot delivery restriction. The restriction "does not regulate something that the Plaintiffs use to speak and thereby target or burden that speech. Unlike the ink that a party uses to create written speech, or the

money or people that a party uses to create oral speech," the delivery of completed ballots "is not a speech 'input.' [Citations omitted.]" See *Lichtenstein v. Hargett*, 83 F.4th 575, 586-87 (6th Cir. 2023) (distinguishing Tennessee's ban on distributing the official state form for applying to vote absentee from the petition circulation in *Meyer* which "limited the 'direct one-on-one communication' that all agree is pure political expression"). While the League's underlying activities do qualify as protected political speech, nothing in the Kansas statute "in any way restricts [their] actual oral or written speech about" voting. 83 F.4th at 586. "Soliciting, urging and persuading the citizen to vote are the forms of the canvasser's speech, but only the voter decides to 'speak' by registering." *Voting for America, Inc. v. Steen*, 732 F.3d 382, 390 (5th Cir. 2013). Just so here—the advance ballot is the core political speech of the voter, not the League, and "'[o]ne does not "speak" in this context by handling another person's "speech."'" 732 F.3d at 390.

Nor does the ballot collection restriction "make the creation of this speech 'more costly' and thereby reduce its volume under the basic laws of supply and demand." *Lichtenstein*, 83 F.4th at 586. Rather, the ballot collection restriction only proscribes the number of completed ballots one may return—implicating merely the "administrative mechanisms through which eligible voters" return their ballot—and has no effect on the League's political speech. See *VoteAmerica v. Raffensperger*, 609 F. Supp. 3d 1341, 1355 (N.D. Ga. 2022) (state law regulating absentee ballot applications did not involve political speech because it did not "require the type of interactive debate and advocacy that the Supreme Court found constituted core political speech in *Meyer*"). The League "may still explain their missions in full and educate voters" because the restriction "limits only non-expressive conduct." See *Priorities USA v. Nessel*, 628 F. Supp. 3d 716, 726-27 (E.D. Mich. 2022) (finding a Michigan law that restricted possession of signed absentee voter ballot applications by persons other than the applicant to extend only to non-expressive conduct, rendering First Amendment protections inapplicable). The League is not barred from engaging in speech relating to their mission—"[t]o the contrary, they can engage in those communications as often

as—and in whatever form—that they desire." *Raffensperger*, 609 F. Supp. 3d at 1355.

We agree with the State that "the statute does not prevent any individual from speaking to another person, nor does it impose any content restriction on such speech" and thus "impacts neither speech nor expressive conduct." On the pled facts, we affirm the district court's grant of the State's motion to dismiss on this claim because the actual collection and return of a ballot, in isolation, is not political speech or expressive conduct.

Judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.

* * *

ROSEN, J., concurring in part and dissenting in part: I write separately because, in my view, both individual determinations and broad holdings of the majority's opinion misstate the law of this state, ignore key aspects of the plaintiffs' case, and endanger the basic rights of Kansas voters to participate in the political process. Today the court majority strips Kansans of our founders' ultimate promise that the majority will rule and that the government it empowers will answer to its calls. It staggers my imagination to conclude Kansas citizens have no fundamental right to vote under their state constitution. Admission to the United States was predicated on a constitutional guarantee of a republican form of government. Over 160 years later, this court removes that guarantee. I cannot and will not condone this betrayal of our constitutional duty to safeguard the foundational rights of Kansans.

I write separately for many reasons. First, I agree with the plaintiffs' position that section 2 of the Kansas Constitution Bill of Rights protects a right to vote and that they have set forth facts to show the signature verification requirement and the ballot collection restriction violate this protection. Second, I disagree with the majority's conclusion that the signature verification requirement is a "law for proper proofs," so it is not an additional qualification in violation of article 5, and its characterization of the requirement as such throughout its equal protection and due process analyses.

318 Kan. at 802; Kan. Const. art. 5, § 4. The plaintiffs have set forth facts to show this is not a law for proper proofs and it indeed imposes an additional qualification on the right to be an elector. Third, while I agree the plaintiffs failed to establish facts showing the ballot collection restriction violates article 5, the illogical analysis the majority uses to get there opens the door to unconstitutional restrictions on the voting rights of Kansans. Fourth, I agree the plaintiffs have established facts showing the signature verification requirement would violate Equal Protection and Due Process guarantees, but I reject the new standards the majority appears to set for evaluating such claims. Fifth, I disagree with the majority's conclusion that the plaintiffs failed to state a claim for relief that the ballot collection inhibits core political speech; I believe the plaintiffs met that challenge. Finally, I reject the majority's holding that physical ballot collection and delivery can never be protected as expressive conduct.

I concur in the majority's holding that the plaintiffs are substantially likely to prevail on the merits of their claim that the false representation provision violates the right to free speech. I also concur in its decision to reverse the dismissal of the plaintiffs' claim against the signature verification requirement. But this is where I leave the majority.

Voting Rights Under Section 2 of the Kansas Constitution Bill of Rights

The plaintiffs argued the Kansas Constitution protects the right to vote in three provisions: section 1 of the Kansas Constitution Bill of Rights, which proclaims, "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness"; section 2 of the Kansas Constitution Bill of Rights, which proclaims, "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit"; and article 5, section 1 of the Kansas Constitution, which deems as a "qualified elector" "[e]very citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote."

The majority concludes voting is a political right, not a natural one, so section 1 offers it no protection. I agree. The majority then affirms that article 5, section 1 affixes the qualifications of an elector and the Legislature can add nothing more. I agree with this in general, although I reject some of the majority's analysis as it pertains to how a legislature might contravene this mandate, as I explain in more detail below. But, to begin, I turn to the plaintiffs' claim that section 2 of the Kansas Constitution Bill of Rights protects a right to vote.

I consider their claim pivotal and would hold that section 2 provides the plaintiffs with a separate basis for pursuing relief. The language and history of section 2 demonstrate the Kansas Constitution empowers Kansas citizens with a constitutional right to majority rule through the vote.

Section 2 of the Kansas Constitution Bill of Rights declares: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

This or similar language is included in the Declaration of Independence and all but one other state constitution. This language is universally understood as an "express commitment to popular sovereignty." Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 869 (2021).

The concept of popular sovereignty is nothing new; its roots can be found in Aristotle's political writings. Bartrum, *The People's Court: On the Intellectual Origins of American Judicial Power*, 125 Dick. L. Rev. 283, 289 (2021). This idea grew and matured, and it found full expression with John Locke. Locke posited that people are, by nature, free, equal, and independent but could consent to being governed. Locke argued that "when any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein *the majority have a right to act* and conclude the rest." (Emphasis added.) Locke, Two Treatises of Government Bk. II, § 95.

The United States Supreme Court has opined that this Lockean philosophy expresses "[t]he people's ultimate sovereignty" and framed the basis of the Declaration of Independence.

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 820, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015); see also Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. Pitt. L. Rev. 189, 193 (1990) (Declaration of Independence "draws directly on the political theories of John Locke," which "provided a comprehensive rationale not only for the American Revolution . . . but also for the founding of a new nation."). Almost every state, including Kansas, included the language of the Declaration of Independence in their constitutions, thereby cementing their commitment to the ideals of Lockean popular sovereignty. See *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. at 869 (all but one state constitution includes same or similar language from Declaration of Independence). Kansas guarantees its commitment to function according to those ideals in section 2 of its Bill of Rights.

This court has long held that the declarations of rights in the Bill of Rights are judicially enforceable, meaning the government may not contravene whatever rights the provisions describe. *Winters v. Myers*, 92 Kan. 414, 428, 140 P. 1033 (1914) (section 2, "while declaring a political truth, does not permit legislation which trenches upon the truth thus affirmed"); *Atchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, 665, 3 P. 284 (1884) (the Kansas Bill of Rights "limit[s] the power of the Legislature" so that "no law can be sustained which trenches upon the rights guaranteed by them, or which conflicts with any limitation expressed in them"); see also *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 634, 440 P.3d 461 (2019) (discussing enforceability of Kansas Constitution Bill of Rights).

This venerable history demonstrates section 2 of the Kansas Constitution Bill of Rights prohibits the governing body from usurping the people's political power. In our republican form of government, this power takes form through majority vote. It follows that section 2 prohibits government action that inhibits majority rule through the vote.

The Supreme Court of California has expressed a similar sentiment with regard to its own constitution:

"The Constitution of this State was created and adopted by a free people in order to secure to themselves and their posterity the blessings of liberty. In the declaration of rights . . . it is declared that all political power is inherent in the people; that government is instituted for the protection, security and benefit of the people . . . . The Constitution secures to the citizen the right of suffrage, without which he could not exert his political power, and without which he would be impotent to secure to himself the full enjoyment of life, liberty and property." *Knowles v. Yates*, 31 Cal. 82, 87, 1 P.L.M. 149 (1866).

Two distinguished law professors and scholars of constitutional law agree in an amicus brief to this court that section 2 "identifies popular sovereignty and self-government as the document's animating principles." They further explain the Kansas Constitution continues to highlight the central importance of majority rule through suffrage in the provisions that follow. "To facilitate self-rule," the professors point out, "the Constitution establishes democratically accountable elected institutions . . . and places the power to approve constitutional amendments and to call a constitutional convention directly in the people's hands . . . ." (citing constitutional provisions providing for election of executive offices and legislators, retention elections of justices, and recall of executive and legislative officials, and providing for constitutional amendments and conventions). The professors posit that "[t]he franchise is the linchpin of the people's Constitution. It ensures that the people truly choose their representatives and provides them opportunities to express their collective will." They counsel that, in expressing the central importance of voting, the text of the Constitution demands its "steadfast[] protect[ion]."

This court expressed a similar sentiment in 1963 when it cited section 2, along with section 1 of the Kansas Constitution Bill of Rights, in support of the notion that "[w]ithin the express and implied provisions of the Constitution of Kansas every qualified elector of the several counties is given the *right to vote* for officers that are elected by the people, and he is possessed of equal power and influence in the making of laws which govern him." (Emphasis added.) *Harris v. Shanahan*, 192 Kan. 183, 204, 387 P.2d 771 (1963).

History reveals not only that section 2 protects the right to majority rule through the right to vote, but that this protection is meant to be quite robust. One scholar explains that, as the states

formed and drafted their constitutions during the revolutionary period,

"suffrage was defined as a constitutional issue: all of the early state constitutions (except that of Delaware) treated the right to vote as a matter of fundamental—and thus constitutional—law, rather than statute law. Implicit in this treatment was the notion that suffrage requirements ought to be durable and difficult to change; legislatures and governors alone were not entrusted with the power to tamper with the right to vote. In theory at least, the franchise could be broadened or narrowed only through constitutional revision or amendment." Keyssar, The Right to Vote: The Contested History of Democracy in the United States, p. 17 (revised ed. 2009).

The notion that suffrage was a critical right only grew in the time leading up to Kansas' founding. Between 1776 and 1850, economic and class lines began to blur, and widespread migration diversified the makeup of the nation's inhabitants, leaving much of the country ineligible to vote. In response, those with voting power slowly dismantled the property and citizenship requirements originally imposed on voting. Keyssar, The Right to Vote, p. 28-31. During this time, "more and more Americans came to believe that [male] people . . . were and ought to be sovereign and that the sovereign 'people' included many individuals who did not own property. Restrictions on the franchise that appeared normal or conventional in 1780 came to look archaic in subsequent decades." Keyssar, The Right to Vote, p. 35.

It was against this backdrop that the drafters composed the Kansas Constitution, and, unsurprisingly, the free state founders took an expansive view (for the time) of suffrage. They granted it to any white male 21 or older who lived in Kansas for six months and was a United States citizen or an immigrant who had declared his intention to become a citizen. Kan. Const. art. 5, § 1 (1859). It disqualified from voting those "under guardianship, . . . insane . . . [or] convicted of treason or felony, unless restored to civil rights," and any "solider, seaman or marine." Kan. Const. art. 5, §§ 2, 3 (1859). And it directed the Legislature to pass "laws as may be necessary for ascertaining by proper proofs, the citizens who shall be entitled to the right of suffrage" established by the Constitution. Kan. Const. art. 5, § 4 (1859).

This latter provision was added by amendment and originally rejected until the delegate who offered it explained

"it is to authorize and require the Legislature to pass a registry law . . . . A doubt is entertained in the mind of some whether the Legislature have the right to pass a registry law, unless there is a constitutional provision to authorize it. In order to relieve the case from all doubt, I propose this section." Proceedings and Debates of the Kansas Constitutional Convention (Drapier ed. 1859), reprinted in Kansas Constitutional Convention 513 (1920).

After this explanation, the registry provision was adopted. Kansas Constitutional Convention, 513.

This history supports the plaintiffs' position that the drafters of the Kansas Constitution intended the Kansas Constitution to steadfastly protect the right to suffrage. So impenetrable did the drafters regard this right to effect majority rule, they thought it necessary to explicitly grant the Legislature the power to enact a registry law in article 5, section 4. I would recognize the drafters' commitment to robustly protect popular sovereignty through the vote and hold that any impairment of section 2 must withstand our most "searching" of standards—strict scrutiny. *Hodes*, 309 Kan. at 663 (deciding strict scrutiny applies to infringements of natural rights because it is most rigourous standard available).

This leads to one of the defendants' most strongly asserted arguments: almost anything could impair someone's right to vote, so election-related legislation cannot be subject to strict scrutiny review; it must instead be given great deference lest "chaos reign and public confidence in the democratic process diminish."

To that, the plaintiffs responded that "benign election regulations" do not impair the right to vote protected by section 2 of the Kansas Constitution Bill of Rights. They argued before us that the court should subject to strict scrutiny review only that legislation which creates a "systemic burden" on the right to vote.

The plaintiffs offer an apt barometer for measuring whether legislation invades the rights protected by section 2's commitment to majority rule. Legislation that burdens voting for all or many qualified electors endangers the people's collective power. If the Legislature takes this step, it must produce a compelling reason for doing so and prove its action is narrowly tailored to furthering that interest. Less impactful legislation may still be constitutionally problematic because it falls outside the Legislature's police power or imposes additional qualifications on the right to vote in

contravention to article 5, section 1, but it does not run afoul of section 2 of the Bill of Rights.

I would hold the plaintiffs have pleaded facts sufficient to state a claim that the signature verification requirement and the ballot collection restriction impair the right to majority rule through the vote in section 2.

According to the plaintiffs' facts, some voters will be disenfranchised by the signature verification requirement because their signatures will be erroneously flagged as a mismatch, and election officials will fail to contact those voters. This is an obvious burden. See *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (signature verification requirement that would result in some valid ballots being cast out imposed "serious burden" on right to vote). And the plaintiffs' facts suggest it could be a burden to a great many voters. They assert in the 2020 general election, over 450,000 voted by mail and over 350,000 submitted advance voting ballots in person. They further asserted that signature matching is consistently unreliable and that laypersons misidentify authentic signatures as forgeries at least 26 percent of the time. This puts a few hundred thousand qualified voters at risk of total disenfranchisement. These are enough facts to get the plaintiffs beyond the motion to dismiss stage on their claim the signature verification requirement burdens the right to majority rule through the vote in section 2.

As for the ballot collection restriction, the plaintiffs' facts indicate it threatens to cut off voting access for "many" qualified electors. The plaintiffs assert that Kansans across the state rely on others to deliver their ballots in order to cast a vote, "includ[ing] . . . voters in western Kansas where mailboxes are often centrally located in communities far away from individual homes, [and] Native voters living on tribal lands who may have to travel for hours on unpaved roads to access mail services or election offices. . . ." They also assert this would cut off voting for "'several hundred'" voters in Concordia who live in group homes and rely on a few volunteers to deliver all their ballots. They further pleaded that "communities of faith . . . often collect and deliver ballots from shut-ins, the elderly, the disabled, and others who are restricted in their movements." They reported that "many Kansans

with disabilities" have difficulty remembering or physically managing to mail ballots, so they rely on delivery by a volunteer. Finally, the plaintiffs asserted that they deliver ballots for "those Kansans with limited access to transportation, work commitments, school schedules, and family care responsibilities that would otherwise prevent them from voting." Again, the plaintiffs have pleaded facts sufficient to state a claim that the ballot collection restriction impairs the right to majority rule through the vote in section 2. I would reverse the district court's dismissal of this claim.

The majority paints a much different picture of section 2. Although it extols its express statement that "all political power is inherent *in the people*" as "one of our most cherished principles of government," it writes it into functional irrelevance. See 318 Kan. at 794. The majority begins by telling us, "At the heart of section 2 . . . is the notion of *delegated power*." 318 Kan. at 795. It then sets off on a discussion of how the people delegate this power—through election or appointment *by elected officers*—and the mechanics of those processes. It concludes by telling us that section 2 is inapplicable here because the challenged legislation is about how to delegate power, "not to the very existence of delegated power as guaranteed by section 2." 318 Kan. at 797.

The majority's analysis is startling for many reasons. First, it describes section 2 as a "statement of principle," 318 Kan. at 795, presumably meaning it is unamenable to judicial enforcement. In other words, the majority asserts the political power of the people is simply a "glittering generality" that has no practical implications for Kansas voters. But this stands in stark contrast to previous declarations from this court. See *Atchison Street Rly. Co.*, 31 Kan. 660, Syl. ¶ 1 ("The bill of rights is something more than a mere collection of glittering generalities; some of its sections are clear, precise, and definite limitations on the powers of the legislature, and all other officers and agencies of the state; and while others are largely in the nature of general affirmations of political truths, yet all are binding on legislatures and courts, and no act of the legislature can be upheld which conflicts with their provisions, or trenches upon the political truths which they affirm.").

But perhaps more concerning is the majority's interpretation of section 2 as a *delegation* of power without any recognition of the power the people *retain*. Under the foundational notions of popular sovereignty, which our history shows section 2 was meant to capture, the people may assign their power to a governing body, but "there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them." Locke, Two Treatises of Government Bk. II, § 149. The majority quietly sweeps this key principle under the rug. In so doing, it unburdens itself of the people's ultimate sovereignty and clears a path to its conclusion that section 2 has nothing to do with voting. This dangerous repainting of our constitutional guarantees is nothing short of astonishing.

The majority also tells us the challenged legislation relates only to "how" the people delegate their power, not the "existence" of delegated power, so section 2 is inapplicable. This disingenuous reframing of the plaintiffs' claim ignores completely their allegation that the challenged statutes deprive the people of their ability to vote, i.e., wield their retained power. The majority's casual erasure of this claim through its revisionist lens does a disservice to not only the plaintiffs, but also our continuing jurisprudence and our democratic institution. I join my colleague Justice Standridge in her apt criticism of this portion of the majority's analysis.

Finally, the majority seems to decide that, even if there were some protections for voting in section 2, they are not specific or explicit enough to enforce because article 5 speaks more directly to voting. Again, I join my colleague in her condemnation of this seemingly new approach to constitutional interpretation.

The majority assures us its nullification of the constitutional protection of majority rule "does not mean that constitutional voting guarantees are somehow weak or ineffective" because we still have article 5, which affixes the qualifications of an elector and "provides the strongest possible constitutional protections." 318 Kan. at 800. This is a hollow protection. Of what value is being an elector if one has no constitutional right to vote? And if there is no right to vote, how are the people to assert their political

power? How will the majority rule? The silence by the majority on this crucial question is deafening.

Voting Rights Under Article 5 of the Kansas Constitution

I find further error in the majority's analysis of that "strong" article 5 protection. Section 1 of article 5 provides that "[e]very citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." The majority declares this provision protects a "right to be a qualified elector" and thereby prohibits the Legislature from adding "any extra-constitutional qualifications to the precisely defined right to suffrage." 318 Kan. at 800. Then, cloaked in its assertion that article 5, section 1 provides steadfast protection, the majority concludes the plaintiffs have failed to submit a claim that the signature verification requirement or ballot collection restriction violates this protection.

I agree article 5, section 1 affixes the qualifications one must have to be an elector, thereby prohibiting the Legislature from adding anything more. But I find confusing the framework the majority sets out for analyzing claims under article 5, and I disagree with its conclusion that the plaintiffs failed to state a claim for relief that the signature verification requirement violates its protections. And while I agree the plaintiffs failed to submit facts to show the ballot collection restriction is an additional qualification in violation of article 5, I am troubled by how the majority got there.

I turn first to the majority's framework for article 5 claims, which shifts like the sands of the desert and makes it impossible for a hopeful voter to gain any solid footing. Early in its analysis the majority announces, "to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, *the law must be shown to unreasonably burden the right to suffrage.*" (Emphasis added.) 318 Kan. at 801. It observes that article 5, section 4 provides that the "legislature shall provide by law for proper proofs of the right of suffrage," but opines that "unreasonable burdens, as a matter of law, bear no reasonable relationship to the

Legislature's lawful role of providing proper proofs." 318 Kan. at 801.

But the majority abandons this framework. While it initially declared "unreasonable burdens" cannot be laws for proper proof, it later announces that laws for proper proof cannot be unreasonable burdens. 318 Kan. at 802 ("reasonable regulations requiring proper proofs [are] not the equivalent of imposing a new qualification on the right to be an elector" and, thus, "cannot violate the article 5 right"). In yet another iteration of the proper test, the majority appears to announce legislation violates article 5 if it is a new qualification *and* it unreasonably burdens the right to vote. 318 Kan. at 803 ("we must ask: Is the imposition of the signature requirement an impermissible new qualification on the right to be an elector which unreasonably burdens the right of suffrage"). And in a final adjustment to its approach, the majority announces a law does not violate article 5 if "its burdens are reasonably related to the Legislature's duty and prerogative to provide proper proofs." 318 Kan. at 805. I cannot discern from the majority's opinion what a voter needs to show to convince a court that legislative action has violated article 5. I can only hope future litigants have better luck.

In the absence of any discernable description of what a court *should* do, I turn to what the majority *did* in its analysis. True to its initial bait and switch, the majority spends no time considering the burdens of the signature verification requirement or the ballot collection restriction in its analysis. It first concludes the signature verification requirement is authorized by article 5, section 4 as a reasonable law for proper proofs. It cites *State v. Butts*, 31 Kan. 537, 2 P. 618 (1884), in support.

In *Butts*, this court held that a preelection day registry requirement did not violate article 5, section 1 as an additional qualification to being an elector. It relied on article 5, section 4, concluding that this provision "manifestly contemplates a registration prior to the day of election." *Butts*, 31 Kan. at 554. It held that any "reasonable provision for" "ascertaining beforehand by proper proof of the persons who should, on the day of election, be entitled to vote" was a proper exercise of article 5, section 4. 31 Kan. at 554.

It reasoned the registry provision at issue was constitutional because there were "ample facilities for registering . . . and the opportunities for registering [were] continued down to within a reasonable time of the election day." 31 Kan. at 554.

The signature verification requirement is not a "law for proper proof" as contemplated by section 4. This provision directs the Legislature to establish a mechanism for ascertaining that hopeful voters hold the qualifications of an elector, i.e., they are 18 years old, are a citizen of the United States, and reside within the voting area in which they hope to vote. *Butts*, 31 Kan. at 554 ("Obviously, what was contemplated [by article 5, section 4] was the ascertaining beforehand by proper proof of the persons who should, on the day of election, be entitled to vote."); see Kan. Const. art. 5, § 1; *Wycoff v. Board of County Commissioners*, 191 Kan. 658, 669, 383 P.2d 520 (1963) (quoting *Butts* to support notion that "'it is well settled in this state that the legislature may require registration as a prerequisite to the right to vote'"); Kansas Constitutional Convention, 513 (delegate who offered section 4 explaining it is meant "to authorize and require the Legislature to pass a registry law").

The signature verification requirement at issue before us now is not a mechanism of proper proofs through which the State may ascertain that hopeful voters hold the qualifications of an elector. The voter to whom an advance or mail-in ballot is attributed has already registered and established they are a qualified elector entitled to the right of suffrage. The signature verification requirement demands something more.

The majority claims this court has previously held that "[t]he verification processes relating to mailed or absentee ballots have been recognized by this court as the 'proofs' allowed under article 5, section 4," citing to *Burke v. State Board of Canvassers*, 152 Kan. 826, Syl. ¶ 6, 833, 107 P.2d 773 (1940), and *Lemons v. Noller*, 144 Kan. 813, 826, 63 P.2d 177 (1936). 318 Kan. at 798-99. But neither case supports the majority's position.

Burke held that legislation directing the county clerk to determine whether people applying for absentee ballots had the requisite voter qualifications was a law for proper proof as contemplated by article 5, section 4. It explicitly distinguished this from the state board of canvassers' responsibility to handle already-cast

absentee ballots and "determine that the person whose vote is to be counted is the same person who was certified by the county clerk as a qualified elector." *Burke*, 152 Kan. 826, Syl. ¶ 5. The latter was not challenged and thus the *Burke* court passed no judgment on whether it was a valid exercise of section 4. Similarly, in *Lemons*, the court opined that the Legislature may require that applications for absentee ballots contain "proofs" of a hopeful voter's qualifications. *Lemons*, 144 Kan. at 826. It said nothing of whether the Legislature could require further validation after the ballot had been cast.

Nonetheless, the majority concludes the signature verification requirement is a demand for proper proofs as contemplated by article 5, section 4 and then quickly decides it is reasonable because it is "important." 318 Kan. at 802. Its reasonableness conclusion rests on its declaration that "[e]nsuring that all Kansas voters are properly qualified to be electors is just as important as ensuring that no extra-constitutional qualifications are imposed" because "permitting an unqualified elector has much the same effect as prohibiting a qualified one." 318 Kan. at 802. "Each of these outcomes disenfranchises the genuine vote of someone who is qualified to vote." 318 Kan. at 802. In support, the majority observes that members of the Kansas Constitutional Convention of 1859 were aware antislavery and proslavery forces accused each other of "'procuring votes from persons not entitled.'" 318 Kan. at 802-03.

The majority is in a china shop swatting with a hammer at imaginary flies. I have problems with this policy-laden endeavor. First, the signature verification requirement does not ferret out whether the voter who sent in the ballot has the requisite qualifications for voting. As discussed earlier, the voter to whom the ballot is ascribed has already established those qualifications. Because the legislation does not do what the majority says is so important, that cannot serve as the basis for the majority's determination that it is "important" and thus "reasonable." Second, even if the legislation were to function as a check for requisite qualifications, the plaintiffs' facts indicate Kansas has no problem with unqualified individuals trying to vote. The Secretary of State's of-

fice reported that "Kansas did not experience any widespread, systematic issues with voter fraud, intimidation, irregularities or voting problems" in 2020. The majority cites a problem with unqualified voters trying to vote in 1859, which may have made legislation to counter that problem important or reasonable *in 1859*. But elections have evolved in 160 years, and there is no evidence we face that problem today. In contrast, the plaintiffs have submitted facts indicating the signature verification requirement disenfranchises qualified electors in Kansas. I cannot see how it can thus be "important" and "reasonable" because this court thinks it addresses a problem that *does not exist*.

In a final unsettling twist to its analysis, the majority basically acknowledges that under the plaintiffs' facts, the signature verification requirement will result in legally cast ballots not being counted. But it then confidently asserts that this "does not mean that citizen has been disenfranchised." 318 Kan. at 804. No, the majority declares, "citizens wishing to exercise the right of suffrage" simply failed to "meet the reasonable requirements of the Legislature." 318 Kan. at 804. This is the citizen who has already proved they were a qualified elector and followed every one of the Legislature's requirements for voting. Their vote is not counted because of someone else's error. This is disenfranchisement.

I have concluded that the signature verification requirement is not a law for proper proofs. While this does not lead automatically to the conclusion that the legislation is an additional qualification in violation of article 5, section 1, I believe the plaintiffs have asserted facts that show it is. According to the plaintiffs, citizens who have already proved they are qualified electors and who have legally cast a ballot will be stripped of this status because they failed to produce a signature that an election official believes is a "match" to an earlier signature. This is an "extra-constitutional qualification," 318 Kan. at 801, that impairs the right to qualified elector status guaranteed by article 5.

The majority also concludes the ballot collection restriction cannot violate article 5, section 1. I agree that, in this case, the plaintiffs have not asserted facts that show the ballot collection restriction amounts to an additional qualification to being an elector and, consequently, the article 5 claim fails. As discussed, it may

create a systemic burden for qualified electors seeking to vote, but it does not place additional requirements on whom the government deems a qualified elector.

However, I question the majority's path of analysis. Again, while the majority initially announced that "unreasonable burdens" violate article 5, it spends no time evaluating the burdens the plaintiffs have pleaded. Instead it calls the ballot collection restriction a "regulation of the mechanics of an election." 318 Kan. at 808. It tells us that "[t]hese matters are governed by article 4" and shuts the door because "the League has not asserted an article 4 violation." 318 Kan. at 808.

I do not follow the majority's logic. It appears to decide the ballot collection restriction cannot violate article 5 because it might violate article 4. But this cannot be right. State action can violate more than one constitutional provision. See, e.g., *Ernest v. Faler*, 237 Kan. 125, 138, 697 P.2d 870 (1985) (Kansas statute violated equal protection and due process). The majority acknowledges as much in this case by addressing the plaintiffs' claims under multiple provisions of the Kansas Constitution.

Perhaps the majority is deciding that article 4 authorizes the ballot collection restriction without giving us any analytical framework or discussion. It implies as much when it says "[v]oters have numerous avenues available to deliver their ballots." 318 Kan. at 808. But this, of course, contradicts the plaintiffs' facts; they've alleged that, for many, delivery by a volunteer is the only option and that limiting the number of ballots that can be collected by a single volunteer cuts off their avenue for voting.

Or, perhaps, the majority means to hold that anything that can be characterized as a regulation of the mechanics of an election can never be an additional qualification on the right to vote. But this too must be untrue. Suppose the Legislature does away with all accommodations for voters who need help accessing the polls or completing a ballot. This is a regulation on the mechanics of an election, but it surely adds an additional qualification to being an elector.

Ultimately, I cannot say for sure what path the majority takes to decide the ballot collection restriction does not violate article 5, section 1. That alone strikes me as a notable problem.

In sum, I believe the text and history of section 2 of the Kansas Constitution Bill of Rights show it was meant to protect majority rule through the vote. Consequently, government action that imposes a systemic burden on voting access should be upheld only if the government shows it withstands strict scrutiny. The plaintiffs have asserted facts that would establish the signature verification requirement and the ballot collection restriction impose systemic burdens on the right to vote. The plaintiffs' facts also establish that the signature verification requirement imposes an "extra-constitutional qualification on the right to be an elector" in contravention of article 5, section 1. 318 Kan. at 801-02.

Equal Protection and Due Process

I turn now to the majority's analysis of the plaintiffs' equal protection and due process claims. The plaintiffs asserted the signature verification requirement violates their right to equal protection because it subjects legally cast ballots to non-uniform treatment throughout the state. The majority appears to agree legislation must not value one vote over that of another through arbitrary and non-uniform treatment. 318 Kan. at 806 ("If the determination of proper proofs is subject to arbitrary and non-uniform standards, different citizens will be treated differently in violation of equal protection.") (citing *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525, 148 L. Ed. 2d 388 [2000]). It concludes the plaintiffs have set forth facts sufficient to show the signature verification requirement does not meet these demands. I agree. But I disagree with the inexplicable change the majority makes to the standard of evaluation it directs the district court to apply upon remand. It instructs the court to look for "reasonable uniformity upon objective standards." 318 Kan. at 805. I do not know where this language comes from, and I would not substitute it for the standard articulated by the United States Supreme Court in *Bush v. Gore*. I would direct the district court to utilize the standard as articulated: whether "[h]aving once granted the right to vote on equal terms, the State . . . by later arbitrary and disparate treatment, value[d] one person's vote over that of another." 531 U.S. at 104-05.

The plaintiffs also asserted that the signature verification requirement violates the right to procedural due process because it

denies a liberty interest without the required process, i.e., "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *State v. Wilkinson*, 269 Kan. 603, 608, 9 P.3d 1 (2000). The majority appears to agree the legislation denies a liberty interest; it focuses only on whether the plaintiffs set forth facts sufficient to show the statute does not offer due process. It concludes the plaintiffs have done so.

I agree the signature verification requirement denies a liberty interest, and thus it must offer due process before such denial. I also agree the plaintiffs have set facts sufficient to show it fails to offer such process. But, again, I disagree with the toothless standard the majority sets forth for evaluating the claim as it moves forward. Instead of directing the district court to look to whether voters will receive "notice and an opportunity to be heard at a *meaningful* time and in a *meaningful* manner," (emphasis added) *Wilkinson*, 269 Kan. at 608, the majority declares the district court should look to whether the legislation provides "reasonable notice of defects and an opportunity to cure." 318 Kan. at 807. Again, I do not know where the majority finds this standard, and I would not use it in place of established law.

The Right to Free Speech Under Section 11 of the Kansas Constitution Bill of Rights

Finally, I consider the majority's handling of the plaintiffs' claim that the ballot collection restriction violates their right to free speech under section 11 of the Kansas Constitution Bill of Rights. The plaintiffs argued that volunteers speak messages of civic participation and engagement when they collect and deliver ballots, and that the restriction limits their ability to spread this message. The majority abruptly concludes this claim must fail because "the delivery of ballots . . . is not speech or expressive conduct" and so "[r]estrictions on the number of advance ballots one person may deliver does not, in isolation, inhibit speech at all." 318 Kan. at 809. I diverge from the majority's analysis and dissent from its conclusion that the plaintiffs failed to state a claim for relief that the ballot collection restriction violates section 11.

The majority's analysis and its holding are short-sighted and conflict with United States Supreme Court precedent. In *Meyer v.*

Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988), the Court struck down a prohibition on paying petition circulators as violating the First Amendment. It explained that the conversations that petition circulators have when seeking signatures, as well as the petition itself, constitute core political speech entitled to First Amendment protection. The Court held that prohibitions on paying circulators restrict this speech in part because it "limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach." *Meyer*, 486 U.S. at 422-23. The Court found it immaterial that it was not the actual speech that the law prohibited, and that the "appellees remain free to employ other means to disseminate their ideas." *Meyer*, 486 U.S. at 424. According to the Court, the prohibition nonetheless implicated protected speech because it impeded "access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Meyer*, 486 U.S. at 424.

The plaintiffs have asserted that volunteers engage in actual speech that constitutes core political speech, or "interactive communication concerning political change," *Meyer*, 486 U.S. at 422, when they collect and deliver ballots. They have also asserted that a limit on collecting only 10 inhibits their "ability to disseminate their message" because it means ballot collectors will only get to speak with 10 people. Under the Court's reasoning in *Meyer*, the plaintiffs have pleaded facts sufficient to state a claim that the ballot collection restriction "reduc[es] the total quantum of speech on a public issue," *Meyer*, 486 U.S. at 423, thereby impeding the exercise of free speech in violation of section 11 and requiring the defendants show the legislation withstands strict scrutiny. See *Meyer*, 486 U.S. at 420 (laws burdening core political speech subject to "exacting scrutiny"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 n.10, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (describing exacting scrutiny applied in *Meyer* as "strict scrutiny").

The majority concludes the present case is distinguishable from *Meyer* because the ballot collection restriction "'does not regulate something that the Plaintiffs use to speak and thereby target or burden that speech," "[n]or . . . 'make the creation of this speech

"more costly" and thereby reduce its volume under the basic laws of supply and demand.'" 318 Kan. at 810 (quoting *Lichtenstein v. Hargett*, 83 F.4th 575, 586-87 [6th Cir. 2023]).

I agree the ballot collection restriction does not restrict something the plaintiffs use to speak; but neither did the regulation in *Meyer*—the regulation in *Meyer* prohibited paying people to circulate the plaintiffs' speech while leaving them free to continue to do so. The regulation was nonetheless burdensome to the plaintiffs' speech because it lessened the number of people willing to spread the plaintiffs' message, thereby reducing its volume. Similarly, the ballot collection restriction lessens the number of people to whom the plaintiffs' volunteers will speak, thereby reducing the volume of their message.

Furthermore, while it is true the ballot collection restriction does not make speech more costly, that is a distinction without a difference at this motion to dismiss stage. The point is that the restriction reduces the volume of speech. In *Meyer*, the regulation made it more costly to spread the plaintiffs' message so, naturally, it reduced the volume of speech. Here, the plaintiffs have asserted that the ballot collection restriction lessens the number of people to whom the plaintiffs' volunteers will speak, thereby reducing the volume of the plaintiffs' speech. The plaintiffs should get a chance to prove this claim.

I address one final error in the majority's free speech analysis: its opinion that the physical collection and delivery of ballots itself (as distinct from speech that occurs during that activity) cannot be expressive conduct protected by section 11. The majority holds it cannot be expressive because it is no different from the postal service delivering a package. While the plaintiffs have not offered facts in this case to indicate the physical collection and delivery of ballots alone is expressive conduct protected by the Constitution, I disagree that it can never be so.

Conduct can be protected speech if it is meant to express a message and that message can be understood by others. *Cressman v. Thompson*, 719 F.3d 1139, 1149 (10th Cir. 2013) (under "*Spence-Johnson*" test conduct is expressive and protected by First Amendment if it is meant "to convey a particularized message" and there is "a great likelihood that the message would be understood by those who viewed the symbolic act or display"). In *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 888-89 (D. Kan. 2021), the district court of Kansas concluded

mailing personalized advance voting ballots constituted expressive conduct that qualified as core political speech. It reasoned the applications conveyed a pro-advance mail voting message and that the recipients were likely to understand that. See also *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 816-17 (E.D. Mich. 2020) (paying for transportation that would get voters to the polls was political expression because it was an effort "to encourage political activity").

Thus, the sweeping assertion that the physical collection and delivery of ballots will never be expressive conduct protected by section 11 is out of line with settled caselaw. Equally flimsy is the declaration that ballot delivery is analogous to a postal worker delivering a package. The differences between a volunteer collecting and returning a ballot for a fellow citizen while spreading a message of civic engagement and a government official fulfilling the duties of their job are too obvious to put on the page.

Nonetheless, the plaintiffs did not offer facts sufficient to show the physical collection and delivery of ballots is expressive conduct. They asserted volunteers "communicate [a] message of civic participation and engagement" and "encourage[] others to exercise their fundamental right to vote" through ballot delivery assistance. It is unclear through the petition whether the volunteers intend to convey this message through the collection and delivery itself or if they express this message with actual speech while collecting and delivering. But even if one could infer the former, the plaintiffs did not offer any facts indicating people who witnessed this activity understand this to be the message. This defeats any claim in this case that the ballot collection and delivery itself is expressive conduct.

In sum, I would affirm the Court of Appeals holding that the district court erred in dismissing the plaintiffs' claim that the ballot collection restriction violates the right to free speech in section 11 of the Kansas Constitution Bill of Rights. They have pleaded facts sufficient to show the legislation inhibits the core political speech in which they engage while collecting and delivering ballots.

Conclusion

Today I join the majority in some of its analysis and part of its decision. But I do not follow their slim majority down the path it takes

away from our founders' dedication to popular sovereignty. By nullifying section 2 of the Kansas Constitution Bill of Rights, the majority gives the governing body—the body created to work *for the people*—the power to override the collective will and transform our democracy into rule by the few for the few. I will not join my four colleagues on that ill-fated journey.

* * *

BILES, J., concurring in part and dissenting in part: The Kansas Constitution explicitly sets forth—and absolutely protects—a citizen's right to vote as the foundation of our democratic republic, so it is serious business when a government official in one of our 105 counties rejects an otherwise lawful ballot just by eyeballing the signature on the outside envelope. See K.S.A. 25-1124(b), (h). I write separately because I find it difficult to track what the majority opinion says in this regard, and while I very much agree with Justices Rosen and Standridge, they don't quite capture what I see as the majority's limitations and modest successes.

I've done this before when a majority provided meager direction for applying its standard and what guidance it did provide in my view was more confusing than clarifying—leaving "the trial court to fend for itself." See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 682, 440 P.3d 461 (2019) (Biles, J., concurring). I do so again today because I see that happening here, and the district court needs to sort all this out in short order as the election season looms.

The majority opinion does not overrule prior caselaw.

This is important. I suspect the majority opinion is written as it is—with lengthy sections lacking citation to legal authority—to preserve its meager four votes. See, e.g., 318 Kan. at 795-97 (rationalizing how section 2 does not expressly protect a right to vote); 318 Kan. at 799-800 (providing no right to vote exists without the Constitution or a statute providing a right to elect). But in ruling as it does, the majority does not confront substantive Kansas caselaw that must take a prominent role on remand. For instance, consider *Provance v. Shawnee Mission U.S.D. No. 512*, 231 Kan. 636, 641, 648 P.2d 710 (1982), in which a unanimous court declared 42 years ago:

"The 'compelling state interest' standard, as it has come to be called, is applied whenever the classification interferes with the exercise of a fundamental right under the Constitution. . . . We agree the right to vote for elected representatives is fundamental 'because statutes distributing the franchise constitute the foundation of our representative society.' [Citations omitted.]"

There, the statute's validity was challenged solely under the federal Constitution; our caselaw, dealing with the state Constitution, is sprinkled with similar statements. See 318 Kan. at 814-17 (Rosen, J., concurring in part and dissenting in part); 318 Kan. at 844-45 (Standridge, J., concurring in part and dissenting in part). Notable among these cases are: *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971) ("Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized.") and *Harris v. Shanahan*, 192 Kan. 183, 204, 387 P.2d 771 (1963) ("Within the express and implied provisions of the Constitution of Kansas every qualified elector of the several counties is given the right to vote for officers that are elected by the people, and he is possessed of equal power and influence in making of the laws which govern him [under] Bill of Rights, Kansas Constitution, Sections 1, 2."). They remain good law, even though the majority dwells on concepts it styles as "delegation of power" and "proper proofs." 318 Kan. at 794-97, 800-03.

It is well established that once a court establishes a point of law, both the same court and lower courts will generally follow that precedent in later cases. See *State v. Sherman*, 305 Kan. 88, Syl. ¶ 2, 378 P.3d 1060 (2016) ("The application of stare decisis ensures stability and continuity—demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law."). And when it is time to step away from a prior case, we do so only after demonstrating we are clearly convinced it was originally erroneous or is no longer sound, and that departing from that precedent will result in more good than harm. 305 Kan. 88, Syl. ¶ 3. My point is that we don't avoid caselaw by implication, so the majority's failure to tackle stare decisis to distance itself from cases like *Provance*, *Moore*,

and *Harris* means they still inform the scrutiny and guiding principles the district court must comply with on remand to protect the vote. And while the majority asserts *Harris* cites section 2 only for equal protection purposes, *Harris* plainly shows section 2 protects the political right to vote—as opposed to section 1's protection of natural rights. See *Harris*, 192 Kan. at 188 (citing Kan. Const. Bill of Rights, §§ 1, 2).

As this case returns to the district court, the majority requires the State implement procedures establishing reasonable notice to a voter and an opportunity to be heard at a meaningful time and in a meaningful manner to contest the disqualification of otherwise valid ballots and to cure deficiencies based on an apparent signature discrepancy. 318 Kan. at 806. That is a tall order. The majority explains the State cannot succeed in "ensuring that no qualified elector will have his or her vote 'not count' either by *actually* not counting it, or by having its effect diluted by the counting of illegitimate votes." 318 Kan. at 803.

In other words, the likelihood of having a ballot discarded for signature mismatch must be the same in Wyandotte County as in Gove County.

With these requirements in mind, cases like *Provance*, *Moore*, and *Harris* must work in harmony with the majority's crafted test from *State v. Butts*, 31 Kan. 537, 555, 2 P. 618 (1884). See 318 Kan. at 800-02. The law under scrutiny in *Butts* required every city clerk in a first- and second-class city give a voter registry certificate to a properly registered person, having listed their name, age, occupation, and residence in the pollbook prior to election. That law set objective standards applying uniformly across the state, which the *Butts* court noted in upholding the challenged law. Cf. Black's Law Dictionary 1291 (11th ed. 2019) (defining "objective" as "based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions").

My argument is simply that all our caselaw comes into play as the State explains on remand how each local election official across 105 Kansas counties can "uniformly" and "objectively" target a citizen's ballot for disqualification, while achieving what the majority describes as "the strongest possible constitutional protections." See 318 Kan. at 800.

The "false representation" provision must die a quick death.

This court unanimously agrees the district court misread the statutory scheme when it concluded the League did not have a substantial likelihood of prevailing on the merits. 318 Kan. at 791 ("The district court['s] . . . faulty statutory interpretation infected each portion of its free speech analysis, and we conclude that it abused its discretion by making an error of law when it denied the League's motion for temporary injunction.").

But unlike my colleagues, I would not remand the temporary injunction issue to analyze the remaining factors before enjoining K.S.A. 25-2438(a)(2) and (a)(3), because all of the factors so strongly favor the League. See *Downtown Bar and Grill v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012) (five factors considered for issuing a temporary injunction). What the majority leaves for the district court to do wastes precious time. This is a free speech issue brought under section 11 of our Constitution's Bill of Rights, applying familiar law borrowed from federal First Amendment principles. It should go without saying that those who promote in good faith voter registration and participation in our elections cannot do so in fear of criminal prosecution—ever. But that is what this statute does, and the League's arguments on the remaining factors required for a temporary injunction were not seriously challenged by the State, so what's the point? If the State has something to argue here, it can do so when the time comes to consider making the injunction permanent.

Signature verification presents a tough row to hoe for the State.

Our court held long ago, "The primary object of an election law, which transcends all other objects in importance, is to provide means for effective exercise of suffrage." *Hooper v. McNaughton*, 113 Kan. 405, 407, 214 P. 613 (1923). One such means is the Advanced Voting Act, K.S.A. 25-1117 et seq., and its provision for how people can vote before a regular election day. See K.S.A. 25-1119(a) ("Any registered voter is eligible to vote by advance voting ballot on all offices and to vote by advance voting ballot on questions submitted on which such elector would otherwise be entitled to vote."). Advanced voting in Kansas has been authorized since 1967, and since it remains an approved statutory procedure,

Kansans are entitled to rely on it as an "effective exercise of suffrage." 113 Kan. at 407. This means a law authorizing government officials to toss out ballots must withstand a demonstrably rigorous stress test.

As the majority explains, the current statutes—left unaided by administrative regulations promulgated to save them—fail if left standing alone. See 318 Kan. at 805-07. Let me illustrate the lax statutory language. Subsection (h) authorizes disenfranchisement of the advance ballot voter:

> "Subject to the provisions of subsection (b), *no county election officer shall accept an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records*, except that verification of the voter's signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter's registration form. Signature verification may occur by electronic device or by human inspection. *In the event that the signature of a person on the advance voting ballot envelope does not match the signature on file in the county voter registration records, the ballot shall not be counted*." (Emphases added.) K.S.A. 25-1124(h).

Meanwhile, subsection (b) provides a less-than-precise process for the soon-to-be-disenfranchised advance ballot voter to cure improperly rejected ballots:

> "The county election officer *shall attempt to contact* each person who submits an advance voting ballot where there is no signature or where the signature does not match with the signature on file and allow such voter the opportunity to correct the deficiency *before the commencement of the final county canvass*." (Emphases added.) K.S.A. 25-1124(b).

This court unanimously agrees the district court misread these statutes, just as it did the false representation provision. For example, the district court held—despite express statutory language to the contrary—that "county election officials *must notify* an advance ballot voter of a missing signature or signature mismatch and provide an opportunity to cure before the commencement of the final county canvass." (Emphasis added.) That is plainly false. The statute only requires, "The county election officer *shall attempt to contact* each person . . . where the signature does not match . . . ." (Emphasis added.) K.S.A. 25-1124(b). On remand,

with the primary and general elections quickly approaching, the district court has no room for further errors.

Even so, subsection (h) could not be more subjective—it obviously fails the majority's uniform and objective standard because its language leaves each of our 105 county officials to exercise this authority on their own. And it is virtually certain that unguided practices will emerge to reject legitimate ballots without any accountability. This will disenfranchise a voter through no fault of their own or force them to bear additional burdens to cure the product of a haphazard process. Such a result is contrary to our state's defining principles. See *Harris*, 192 Kan. 183, Syl. ¶ 11 ("Under the republican form of government prescribed in the Constitution of Kansas, every citizen and qualified elector is entitled to a vote.").

On remand, the Secretary of State's administrative regulations will need to do the heavy lifting to save these statutes, if they even can. See K.S.A. 25-440 (Secretary of State may adopt rules and regulations relating to advance voting ballots and the voting thereof); see, e.g., K.A.R. 7-36-1 et seq. (absentee and advance voting). To that end, the litigation going forward must focus on how these regulations reliably and uniformly sift out the feared fraudulent ballots by objective means without denying legitimate voters their fundamental right to vote. This consideration necessarily includes analyzing the procedures and protections employed to issue an advance ballot, as well as carefully scrutinizing how a mismatched signature is flagged, how effectively the soon-to-be-disenfranchised voter is notified, and whether they are given a meaningfully reasonable opportunity to cure the perceived problem *before* the ballot is discarded.

The district court will need to find evidence that the State's implementation of advance balloting constitutes an "effective exercise of suffrage" before approving such a process. See *Hooper*, 113 Kan. at 407. We must not sacrifice legitimate ballots cast by eligible voters to defend against a canard.

To sum up, the proceedings on remand must embrace our prior caselaw and give practical meaning to such declarations as:

"The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution

and laws. The right is pervasive of other basic civil and political rights, and is the bed-rock of our free political system." *Moore*, 207 Kan. at 649.

* * *

STANDRIDGE, J., concurring in part and dissenting in part: In a troubling decision with far-reaching implications, the majority paradoxically holds that section 2 of the Kansas Constitution Bill of Rights—which states "[a]ll political power is inherent in the people, and all free governments are founded on their authority"—does not, in fact, protect the right to vote as this court has long held. To justify this puzzling holding, the majority construes section 2 as a mere general declaration of the people in delegating their power to government and finds the substantive right to vote is protected under article 5 instead. In doing so, the majority reframes plaintiffs' section 2 claim as a challenge to voting "mechanisms" without regard to the effect of this ends-justifies-the-means approach on plaintiffs' actual claim. The majority's section 2 decision defies history, law, and logic and is just plain wrong. Thus, while I join the majority in holding that the plaintiffs demonstrated a likelihood of prevailing on the merits of their false representation claim and in remanding the plaintiffs' signature verification requirement to consider whether it complies with constitutional guarantees of equal protection and due process, I dissent from the majority's analysis and decision on the plaintiffs' section 2 claims.

While I agree with the main points made by Justice Rosen and Justice Biles, I write separately to highlight some key flaws in the majority's analysis. First, in holding section 2 is merely a foundational political idea and not a substantive right to vote, the majority departs from this court's long-standing precedent recognizing voting as a substantive right grounded in the essence of a republican form of government. To arrive at this conclusion, the majority ignores this court's established rules of constitutional construction and, as a result, contravenes the framers' and adopters' clear intent. Next, the majority unilaterally and improperly reframes plaintiffs' section 2 claim so that it can apply its proposed test under article 5. Finally, the majority's article 5 analysis fails in that it incorrectly states the test announced in *State v. Butts*, 31 Kan. 537, 2 P. 618

(1884), to determine when a restriction on voting unconstitutionally burdens the right to vote.

1. *Section 2 substantively protects the people's right to vote.*

Applying this court's established rules of constitutional construction, it is patently clear that the framers and adopters of the Kansas Constitution intended section 2 to substantively protect the people's right to vote. This conclusion is bolstered by the Constitution's structure and ordering, which places the Bill of Rights before the Articles. For over 60 years, this interpretation of section 2 has been our precedent. Without even a hint that it's doing so, the majority overturns this precedent today. See *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971) (citing *Harris v. Shanahan*, 192 Kan. 183, 387 P.2d 771 [1963]).

1.1. *Rules of constitutional construction*

The majority acknowledges that the source of all political power is the people of Kansas and thus the government's ability to act on their behalf depends exclusively on their authority. See 318 Kan. at 795. Yet the majority still concludes the people's right to participate in the political process by voting is not protected by section 2 of the Kansas Constitution Bill of Rights because:

- Section 2 is merely a general declaration of "the foundational political principle of delegated power from the people to their free government." 318 Kan. 777, Syl. ¶ 3.
- "The Kansas Constitution contemplates achieving section 2's on-going and perpetual delegation of power through varied mechanisms, including popular elections, limited elections, appointments, and succession." 318 Kan. 777, Syl. ¶ 5.
- "Section 2 of the Kansas Constitution Bill of Rights does not address itself to these mechanisms of delegation. To find the controlling law of popular elections, we must look instead to the specific provisions in articles 4 and 5." 318 Kan. at 777, 778, Syl. ¶ 6.

Significantly, this court previously rejected an interpretation of section 1 similar to the majority's interpretation of section 2

here. In *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), the dissent suggested the inalienable natural rights granted to the people in section 1 of the Kansas Constitution Bill of Rights are nothing more than "a blanket guarantee to all Kansans of the first rights of republican self-government," which the dissent described as "the right to participatory consent to government for the benefit of the common welfare, on the one hand, and the right to otherwise be free from arbitrary, irrational, or discriminatory regulation that bears no reasonable relationship to the common welfare, on the other." 309 Kan. at 766 (Stegall, J., dissenting).

After applying this court's long-standing rules of constitutional construction, the *Hodes* court soundly rejected this interpretation, holding the drafters and the adopters intended section 1 of the Kansas Constitution Bill of Rights to substantively protect each person's individual inalienable natural rights from encroachment by the State. Yet the majority fails to mention, let alone apply, rules of constitutional construction before eliminating section 2 as a source of substantive political rights. This bears repeating: in deciding the Kansas Constitution Bill of Rights does not protect the right to vote, the majority does not perform the necessary analysis to faithfully interpret this founding document. Therefore, I undertake this essential inquiry myself in the context of the right to vote. I begin where the majority should have—with our rules of constitutional construction, which were clearly articulated over 80 years ago in *Hunt v. Eddy*:

- "'The fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it.'" 150 Kan. 1, 5, 90 P.2d 747 (1939).
- "'A constitutional clause must be construed reasonably to carry out the intention of the framers.'" 150 Kan. at 5.
- "In determining [the true intent of the framers and adopters] courts are not restricted and limited by a mere technical interpretation of the exact words employed but are required to place upon the constitutional provision involved a construction which will take into account the attendant circumstances." 150 Kan. at 5.
- "'[A constitutional clause] should not be construed so as to defeat the obvious intent if another construction equally in accordance with the words and sense may be adopted which will enforce and carry out the

intent. The intent must be gathered from both the letter and spirit of the document.'" 150 Kan. at 5.

- "Where the purpose of the framers of constitutional provisions is clearly expressed it will be followed by the courts. Where terms of such provisions are not entirely free from doubt, they must be construed as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption, and the words employed should be given a practical interpretation which will give them effective operation and suppress the mischief at which they were aimed." 150 Kan. 1, Syl. ¶ 3.

Summarized, this court must reasonably construe the language of our Constitution to give effect to the framers' and adopters' intent, accounting for the historical circumstances at the time of drafting. In doing so, the court must consider the object, scope, and "spirit" of the provision, not merely the technical language or "letter" of the text. Naturally, to glean the intent of the framers and adopters, the court starts with the language of section 2:

"§ 2. Political power; privileges. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kan. Const. Bill of Rights, § 2.

Section 2, entitled "Political power," begins with a clear expression of popular sovereignty: "All political power is inherent in the people, and all free governments are founded on their authority," meaning the people of Kansas are the source of all state political power. Thus, the government only has the power expressly delegated to it by the people of this state. Implied in this arrangement is the expectation that the people retain the right to meaningfully participate in the democratic process. This logically extends to the right to vote. By its very nature, the right to vote is an essential feature of democracy because it allows the people to influence government decisions and actions by electing (and removing) their representatives and expressing preferences on public policy matters put before the electorate. Therefore, the right to vote is implicitly protected under section 2's expression of popular sovereignty.

In conjunction, we consider the historical circumstances in which this provision was drafted. The Kansas Constitution was adopted in 1859 by a convention of delegates representing the

people of the Kansas Territory. Kansas Constitution, Resolutions. At the time, Kansas was a frontier state grappling with issues related to slavery, suffrage, and democratic representation. From the historical record, it is clear the framers and adopters sought to address these concerns, voting chief among them. Kansapedia, https://web.achive.org/web/20190621020221/https://www.kshs.org/kansapedia/kansas-constitutions/16532. This is also reflected by the placement of popular sovereignty at the top of the Bill of Rights, second only to the natural inalienable rights provision under section 1. It is hard to imagine the framers and adopters did not mean for this provision to carry any substantive weight in the form of judicially enforceable rights.

Although section 2 does not explicitly use the term "vote," its reference to popular sovereignty conveys the obvious purpose of the provision is to protect this principle, which includes the right to vote. Indeed, it is unreasonable to conclude otherwise, as the majority has done, that the framers and adopters *did not* intend the Bill of Rights to protect the right to vote—the fundamental means by which the people participate in a representative democracy.

In essence, the majority paradoxically holds that section 2 guarantees the people's sovereign right to participate in government but that this guarantee applies only if section 2 specifically identifies (enumerates) the mechanism in which the right to participate in government can be exercised. Of course, section 2 does not enumerate any specific mechanisms in which the people can exercise their sovereign right to participate in government. Thus, the majority's holding renders section 2 of our Kansas Constitution Bill of Rights meaningless.

Despite the magnitude of this decision—which can be broadly read to reject the principle that rights can be implicitly protected by the Kansas Constitution—the majority's underlying legal analysis is minimal:

- Section 2 is limited to a general declaration of the people delegating their power to government;
- the Kansas Constitution "contemplates" various mechanisms through which the people can delegate their power (popular elections [voting], limited elections [voting], appointments, and succession); and

- section 2 does not specifically "address" these mechanisms (voting, appointment, and succession) so the court must look instead to the specific provisions in articles 4 and 5. See 318 Kan. 777, 778, Syl. ¶¶ 3-6.

Although made in the context of section 2, the reasoning underlying the majority's unprecedented decision refusing to recognize unenumerated constitutional rights plainly casts doubt on prior (and future) decisions of this court recognizing them in other provisions of the Kansas Constitution. See *Hodes*, 309 Kan. at 646 ("At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination"—enabling decisions "that affect one's physical health, family formation, and family life."); *State v. Calderon*, 270 Kan. 241, 245, 13 P.3d 871 (2000) (a defendant's constitutional right to be present includes an implicit right to have trial proceedings translated); *Saucedo v. Winger*, 252 Kan. 718, 729, 850 P.2d 908 (1993) (implicit in the constitutional right to a civil trial is the right to a fair trial); *State v. Cunningham*, 222 Kan. 704, 706, 567 P.2d 879 (1977) (implicit in section 10 of the Kansas Constitution Bill of Rights is not only the right to representation by competent counsel, but also the right to self-representation); *Wilson v. Kansas Children's Home and Service League*, 159 Kan. 325, 328, 154 P.2d 137 (1944) (recognizing natural right of parents to custody of their minor children); *Babb v. Rose*, 156 Kan. 587, 589, 134 P.2d 655 (1943) (recognizing natural right of persons to hold and manage property and that statutes in derogation of these natural rights are to be strictly construed); *Lemons v. Noller*, 144 Kan. 813, 828, 63 P.2d 177 (1936) (constitutional right to vote in secret is implied from provision requiring elections by ballot); *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297, 301, 76 P. 848 (1904) (constitutional right of employer to discharge employee implicit with constitutional property rights); *State v. Bohan,* 19 Kan. 28, 31, 1877 WL 963 (1877) (law of self-defense founded upon the natural right of every man to protect his own life against unlawful assault).

These decisions recognize the framers' and adopters' intent to protect from government infringement not only specific enumerated rights, but those unenumerated rights inherent in the broader declarations of our Bill of Rights. As this court declared just 25 years after the Kansas Constitution was adopted by the voters:

"The bill of rights is something more than a mere collection of glittering generalities: some of its sections are clear, precise and definite limitations on the powers of the legislature and all other officers and agencies of the state . . . *while others are largely in the nature of general affirmations of political truths, yet all are binding on legislatures and courts, and no act of the legislature can be upheld which conflicts with their provisions, or trenches upon the political truths which they affirm*." (Emphasis added.) *Atchison Street Rly. Co. v. Mo. Pac. Ry. Co.*, 31 Kan. 660, Syl. ¶ 1, 3 P. 284 (1884).

In other words, the framers and adopters of the Kansas Constitution deliberately chose to express general affirmations of political truths to protect individual rights from government intrusion rather than exhaustively enumerate specific rights.

To conclude otherwise would render many sections in our Bill of Rights null and void, an absurd result. A categorical denial of constitutional protection for unenumerated rights not only defies our rules of construction, but it also contradicts the plain language of section 20, which states:

"§ 20. Powers retained by people. This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." Kan. Const. Bill of Rights, § 20.

By wrapping up the previous 19 sections of the Bill of Rights with this section, the framers and adopters conveyed their intent to protect both enumerated and unenumerated rights retained by the people not otherwise specifically ("herein") delegated. This relationship between the power of the people and that of the government is explained in *Wright v. Noell*, 16 Kan. 601, 603, 1876 WL 1081 (1876):

"'All political power is inherent in the people,' and all powers not delegated by the constitution remain with them. These truths, which lie at the foundation of all republican governments, are distinctly asserted in our own bill of rights, §§ 2 and 20. By the constitution the people have granted certain powers, and to that extent have restricted and limited their own action. But beyond those restrictions, and except as to matters guarded by absolute justice, and the inherent rights of the individual, the power of the people is unlimited."

The framers' and adopters' rationale for protecting both enumerated and unenumerated rights from government intrusion was rooted in a profound understanding of the delicate balance between government authority and individual liberties. By articulating broad principles and fundamental values, such as "life, liberty, and the pursuit of happiness" and "[a]ll political power is inherent in the people [upon which] all free governments are founded," they allowed for flexibility over time. See Kan. Const. Bill of Rights, §§ 1, 2. These principles could adapt to changing circumstances and evolving societal norms without requiring constant amendments. The Constitution became a living document, capable of addressing unforeseen challenges. Enumerating every right explicitly would have been impractical and limiting. The framers recognized that new rights might emerge, and rigid lists could inadvertently exclude essential protections. Instead, they chose a principled framework that could accommodate both existing and future rights. And general affirmations acted as a check on government authority. By emphasizing principles like limited government, separation of powers, and checks and balances, they aimed to prevent any single branch from becoming tyrannical. These principles indirectly protected individual rights. In essence, the framers sought a delicate equilibrium: acknowledging fundamental truths while allowing room for interpretation and growth. Their wisdom lies in creating a framework that endures while respecting the adaptability of human rights and governance.

The majority's decision, in stark contrast to the original intent of the Constitution's drafters, undermines the very principles on which our foundational document was crafted. Instead, the majority's decision supports the rationale that recently led the current United States Supreme Court to hold there is no longer a federal constitutional right to abortion, overturning decades of precedent. See *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 231, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment."). By dis-

carding almost 50 years of precedent, the *Dobbs* decision jeopardizes not only the right to abortion but also the right to access contraception, the right to interracial marriage, and the right to marriage equality—all of which were previously held by the Court to be unenumerated privacy rights under the United States Constitution. Like the decision in *Dobbs*, the majority's decision here to reject the principle that rights can be implicitly protected by the Kansas Constitution Bill of Rights places the stability of our legal framework in jeopardy. The deeply troubling consequences of the majority's decision cannot be overstated.

In short, had the majority followed the well-established rules of constitutional construction, it could not reasonably have concluded that section 2 is limited to a general principle of delegated political power. To arrive at its conclusion, the majority had to ignore these rules and did so in the following ways:

- It failed to reasonably construe section 2 to give effect to the intent of the framers and adopters;
- It applied a technical interpretation of the exact words employed rather than accounting for the attendant circumstances existing when the framers adopted section 2;
- It defeated the obvious intent of the framers and adopters when another construction consistent with the words and the purpose of section 2 could be adopted to enforce and carry out the drafters' intent;
- It construed section 2 to defeat its evident purpose rather than considering how the language used would function in practical situations to suppress the mischief at which the law was aimed; and
- It construed section 2 as a "glittering generality" conferring no substantive rights, which necessarily means there are no rights within this provision to prevent the Legislature or the courts from infringing.

1.2. *Kansas Constitution's structure and ordering*

The conclusion that the framers and adopters intended to substantively protect the right to vote in section 2 is bolstered by the

Kansas Constitution's unique structure and ordering. Our Constitution does not begin with an enumeration of the powers of government. Rather, it leads with a Bill of Rights which affirmatively grants substantive, individual rights to the people of Kansas such as freedom of speech, religious liberty, speedy trial, and due process. Chief among these are the inalienable natural rights under section 1, and the right of the people to exercise their inherent political power under section 2. To hold that the right to vote is not included among these essential rights secured at the forefront of our founding documents is simply incomprehensible. But if there is any doubt that the right to vote is protected, I reiterate that section 20, the closing provision of the original Bill of Rights, puts that to rest by making clear that the list of enumerated rights is not the universe of rights possessed by the people. Again, the majority ignores section 20's mandate today by its holding and, by extension, calls into question all unenumerated rights implied by our Constitution.

It is only after presenting the Bill of Rights that the Kansas Constitution proceeds to the Articles which delegate limited powers to the three branches of government. Unlike the Bill of Rights, the Articles do not *grant* any rights; instead, they establish the roles and functions of the three branches. To that end, the Articles expressly define the scope of each branch's power, ensuring a check-and-balance system and separation of powers framework, and restricting the extent to which government can impose on individual rights protected under the Bill of Rights. By organizing the Kansas Constitution in this way, the framers and adopters prioritized the guarantee and protections of these rights. See *Hodes*, 309 Kan. at 660-61 ("By this ordering, demonstrating the supremacy placed on the rights of individuals, preservation of these . . . rights is given precedence over the establishment of government.").

Given the obvious purpose and scope of the Articles to set clear limits on the branches of government, it is particularly strange that the majority has found the right to vote is *only* protected under the Articles. Granted, article 5 covers "Suffrage," but the superficial logic ends there since this provision tells us only

how the government can infringe upon the right to vote and does not affirmatively provide for the right itself.

1.3. *Kansas Supreme Court precedent*

Kansas Supreme Court precedent also reinforces the conclusion that the framers and adopters of the Kansas Constitution intended section 2 to substantively protect the people's right to vote. As Justice Rosen rightly points out, this court has interpreted the Bill of Rights for over 100 years as being a judicially enforceable document, not a mere "declaration" as the majority holds today. 318 Kan. at 819 (quoting *Atchison Street Rly. Co.*, 31 Kan. 660, Syl. ¶ 1).

Justice Rosen also cites to *Harris v. Shanahan*, which held the individual right to vote is inherent in the republican form of government created by the state Constitution and specifically protected under sections 1 and 2:

> "Within the express and implied provisions of the Constitution of Kansas every qualified elector of the several counties is given the right to vote for officers that are elected by the people, and he is possessed of equal power and influence in the making of laws which govern him. (Bill of Rights, Kansas Constitution, Sections 1, 2.)." 192 Kan. at 204.

Less than a decade later in *Moore v. Shanahan*, this court reaffirmed *Harris* and the robust constitutional protections of the right to vote as implicit in popular sovereignty:

> "The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. The right is pervasive of other basic civil and political rights, and is the bed-rock of our free political system. Likewise, it is the right of every elector to vote on amendments to our Constitution in accordance with its provisions. This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted. Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized." 207 Kan. at 649.

The *Moore* court emphasized that the right to vote under the Kansas Constitution is fundamental and pervasive, that protecting this right is crucial because it forms the bedrock of our free political system, and that any alleged restriction or infringement on the

right to vote strikes at the heart of orderly constitutional government. Today, without even an explanation, the majority overturns this precedent.

1.4. *Conclusion*

The majority performs no part of the analysis necessary to faithfully construe section 2 before eliminating—forever—section 2 as a source of *any* substantive political rights. First, the majority fails to construe section 2's language to give effect to the framers' and adopters' intent to provide such protection. Second, the majority disregards the distinction between the Bill of Rights, which affirmatively grants individual rights, and the Articles, which delegate limited powers to government to restrict interference with individual rights protected under the Bill of Rights. Third, the majority ignores two lines of precedent established by this court: (1) section 2 protects the substantive *implied* right to vote and (2) the Kansas Constitution protects unenumerated rights. In sum, the majority's interpretation of section 2—and its path for getting there—undermines the framers' and adopters' intent, is irreconcilable with this court's historical interpretation of section 2, and is completely contrary to a republican form of government.

2. *Reframing plaintiffs' section 2 claim without prior notice*

The plaintiffs have alleged at every stage of this litigation that the challenged laws violate the substantive right to vote protected in section 2. In a vigorous exercise of mental gymnastics, the majority arbitrarily converts plaintiffs' claims

> *from* ones alleging that the challenged laws infringe on their section 2 right to exercise sovereign power by voting
>
> *to* ones alleging that the challenged laws are unreasonable *mechanisms* under article 5 of choosing to whom they will delegate their sovereign powers.

The majority's unilateral decision to convert plaintiffs' claims is improper for several reasons. First, voting is not merely a procedural mechanism; it is the lifeblood of representative government. Second, I am confused about where exactly the majority stands on

section 2 at this point. On the one hand, the majority could be doubling down on its holding that section 2 is merely a general declaration authorizing the people to delegate their power to government. On the other hand, the majority could be stating an alternative holding: section 2 *does* confer a substantive right to vote as an exercise of sovereign power but, as reframed by the majority, plaintiffs fail to state an actionable claim alleging the challenged laws infringe on that right. If it is the former, I have already explained why the majority's interpretation conflicts with the framers' intent and is irreconcilable with this court's historical interpretation of section 2.

But if it is the latter, problems arise. For example, the majority reframes plaintiffs' section 2 claims to article 5 claims without prior notice or opportunity for the litigants to brief the issue as the majority has modified them. This lack of fair notice undermines the principles of procedural due process and fairness. The adversarial process relies on both parties presenting their arguments and evidence within an established framework. When the court unilaterally restructures the issue, it disrupts this process. The court's role is to facilitate a fair contest between opposing sides, not to unilaterally redefine the dispute. The parties briefed and argued the section 2 substantive-rights issue at the district court, the Court of Appeals, and before this court. Deviating from the agreed-upon issue presented harms the integrity of the litigation and significantly departs from established legal norms.

Moreover, litigants have a right to a fair and impartial hearing, including consideration of all relevant legal arguments. The court's failure to decide a constitutional issue leaves the litigant without a resolution, which may result in the litigant being unable to assert that right effectively in future cases through a procedural barrier. Relevant here, plaintiffs face the possibility on remand that they will not prevail on their claimed violations of the right to vote under section 2 (equal protection), section 18 (due process), and article 5 (suffrage). If that happens, what exactly is the status of their section 2 claim? Has it been resolved on the merits under these facts, creating a procedural bar to future litigation of their section 2 claim? More broadly, does it create a procedural bar for others to litigate a section 2 claim under similar facts? Under the

legal standard created by the majority, how does a plaintiff allege a section 2 substantive voting rights claim upon which relief can be granted?

As the questions above demonstrate, an unresolved constitutional issue properly presented for decision can detrimentally impact a litigant's rights and create uncertainty for other litigants facing similar issues. It also creates uncertainty for the district courts and the courts of appeal, who may struggle to apply consistent legal standards. When courts avoid deciding critical constitutional questions, it erodes public trust and litigants may lose confidence in the legal system's ability to safeguard their rights, undermining the legitimacy of the judiciary.

My confusion about the majority's position on section 2 aside, I am perplexed by the majority's decision to reframe the issue at all. As reframed, the issue presented is whether the challenged laws are unreasonable mechanisms under article 5 that infringe on the right to choose a representative to whom a person will delegate sovereign powers. But as noted by the majority at the outset of the opinion, plaintiffs already claim the challenged laws violate the right to vote under article 5. So reframing plaintiffs' section 2 claim not only (potentially) leaves that claim unaddressed, but the analysis is duplicative of what the majority would have had to conduct anyway.

3. The right to vote under article 5 and the Butts *test*

Remember, the majority holds that only expressly enumerated rights in section 2 are protected, and voting (or the mechanism of voting) is not an expressly enumerated right in section 2. Yet the majority finds voting *is* an expressly enumerated right in article 5 of the Kansas Constitution and, as such, is entitled to the "strongest possible constitutional protections." See 318 Kan. 777, 778, Syl. ¶ 7. To establish the enumerated right to vote protected by article 5 has been violated, the majority holds a plaintiff must show the challenged law imposes an "extra-constitutional qualification" to qualify as an elector as defined in section 1 of article 5. In presenting the factors for the court's consideration in this "ex-

tra-constitutional qualification" test, the majority relies on its interpretation of the holding in *State v. Butts*, 31 Kan. 537, 2 P. 618 (1884).

I agree article 5 protects the people's right to vote. But the majority's finding that the right to vote is an enumerated right in article 5 is demonstrably false. Moreover, the majority incorrectly states the test announced in *Butts* to determine when a state restriction on voting unconstitutionally burdens the right to vote under article 5.

3.1. *The right to vote is implied by article 5*

Having dispensed with our traditional rules of constitutional construction, the majority summarily finds the substantive right to vote in Kansas is one "expressly enumerated right," 318 Kan. at 800, under the following language of article 5 of the Kansas Constitution:

> "§ 1. Qualifications of electors. Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector.
>
> . . . .
>
> "§ 4. Proof of right to vote. The legislature shall provide by law for proper proofs of the right of suffrage." Kan. Const. art. 5, §§ 1, 4.

I am confused. Despite thorough examination of these provisions, I find no express language conferring upon individuals the right to participate in the democratic process by casting their ballots. Section 1 precisely defines the qualifications of electors in terms of citizenship, age, and residency requirements. And section 4 requires the Legislature to create laws that establish appropriate methods for verifying a person's eligibility to participate in elections. Nowhere in these provisions is there detailed language expressly conferring the right to vote.

Yet one can easily construe an *implicit* (unenumerated) right to vote from both section 1's precisely defined qualifications of electors (citizenship, age, and residency requirements) and section 4's legislative responsibility to establish clear procedures for verifying an elector's qualifications. So why does the majority insist that article 5 states an expressly enumerated right to cast a ballot to vote when the language addresses only the qualifications of

electors and the Legislature's duty to verify those qualifications? Because it is the only way the majority can distinguish (1) its decision that article 5 protects the right to vote as expressly enumerated from (2) its decision that section 2 of the Bill of Rights does not protect the right to vote because it is only implied. Thus, it may appear as if the majority is presenting a false narrative to reach a desired outcome.

I find one more issue addressed by the majority confusing in this section. In an apparent matter of first impression, the majority applies a rule of strict statutory interpretation—that a specific provision controls over a more general one—to constitutional construction. First, the majority compares the affirmative rights in section 2 of the Bill of Rights to the powers and limitations of government under article 5. Then, the majority holds the "more specific[], concrete[], and plainly" appearing rights guaranteed by article 5 control over "the general statement of principle set forth in section 2 which does not—by its plain terms—address itself to voting." 318 Kan. at 798.

My confusion is two-fold. First, it appears (again) that the majority finds section 2 *does* protect every elector's portion of sovereign power to vote *but* the general nature of this protection yields to article 5 because the language there specifically addresses elections and the necessary qualifications of people who vote. Of course, if this is true, the majority's finding here contradicts its earlier findings that section 2 *does not* provide substantive protection for the right to vote.

My second point of confusion is a conclusion implied by the majority's finding: that when two separate but compatible constitutional provisions provide protection from government overreach, the provisions can never work together to complement each other. Instead, the court must limit protection to that afforded by the more specific protection and deny protections afforded by the more general provision. See 318 Kan. 797-98. If this is, in fact, a rule of law the majority intends to state as a matter of first impression, I strongly disagree with its adoption. Constitutional provisions can sometimes overlap, addressing similar rights from different angles. An example is *Griswold v. Connecticut*, 381 U.S. 479, 484-85, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). There, the

United States Supreme Court held that the Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the inferred right of marital privacy within:

- The First Amendment's right of association.
- The Third Amendment's prohibition against quartering soldiers during peacetime without the owner's consent.
- The Fourth Amendment's safeguards against unreasonable searches and seizures.
- The Fifth Amendment's safeguards against self-incrimination.
- The Ninth Amendment's safeguards protecting unenumerated rights.
- The Fourth and Fifth Amendment's protection of privacy as a fundamental right.

Here, the majority confines its analysis to pitting the individual political rights granted in section 2 against the State's interest in conducting elections in article 4 and the qualifications of electors in article 5. The majority fails to analyze the scope or interplay between these two constitutional provisions. Without such an analysis, the majority's claim that the right to vote is controlled by article 5 to the exclusion of section 2 lacks any factual or logical foundation.

3.2 *The* Butts *test*

Section 1 of article 5 of the Kansas Constitution provides: "Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector."

Section 4 of article 5 directs the Legislature to "provide by law for proper proofs of the right of suffrage."

The majority holds these provisions substantively protect the people's right to vote and the test to determine whether this right has been violated was set forth almost 140 years ago in *Butts*. Here is how the majority describes the *Butts* test:

"[T]he test pronounced in *Butts* provides that the Legislature may validly make registration (or the provision of other 'proper proofs') a prerequisite to the act of voting, but in so doing, the Legislature cannot 'under the pretext of securing evidence of voters' qualifications . . . cast so much burden as really to be imposing

additional qualifications' on the right to suffrage. 31 Kan. at 554. Accordingly, to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, the law must be shown to unreasonably burden the right to suffrage. Such unreasonable burdens, as a matter of law, bear no reasonable relationship to the Legislature's lawful role of providing proper proofs but instead amount to extra-constitutional and de facto qualifications on the right to suffrage. If a law is shown to violate the *Butts* test—i.e., if it imposes any additional de facto qualifications not expressly set forth in article 5 on the right to become an elector—the law is unconstitutional." 318 Kan. at 801.

Once again, I admit to confusion, this time in understanding the elements of the *Butts* test as construed by the majority. So I broke the paragraph down into component parts to figure it out.

To prevail on a claim that the article 5 right to suffrage has been violated:

- The plaintiff must show that the challenged law imposes a new, extra-constitutional qualification on the right to be an elector beyond that precisely defined in section 1 (identity, citizenship, age, and residency).
- A law that imposes a new, extra-constitutional qualification on the right to be an elector beyond that precisely defined in section 1 (identity, citizenship, age, and residency) unreasonably burdens the right to suffrage.
- A law that unreasonably burdens the right to suffrage, as a matter of law, bears no reasonable relationship to the Legislature's lawful role of providing proper proofs but instead amounts to extra-constitutional and de facto qualifications on the right to suffrage.
- A law that imposes any additional de facto qualifications not expressly set forth in section 1 (identity, citizenship, age, and residency) is unconstitutional.

Condensed to its component parts, the majority's rather complicated interpretation of *Butts* boils down to the following test: A challenged law violates the article 5 right to vote only when it imposes a new, extra-constitutional qualification for electors that bears no reasonable relationship to a demand for proper proof of identity, citizenship, age, and residency.

With all due respect, the majority inaccurately interprets the test as expressed by the *Butts* court. The majority's bright-line test considering only the reasonableness of a challenged law as it relates to proof of identity, citizenship, age, and residency is not supported by the court's analysis in *Butts*. Instead of a bright-line test, *Butts* requires courts to employ a balancing test to weigh the degree to which the challenged law burdens the constitutional right to vote against the Legislature's responsibility to ensure qualification of an elector through proper proofs. See 31 Kan. at 554. Let me explain.

The law challenged in *Butts* required annual registration to vote, in person, at the city clerk's office at least 10 days before an election. The plaintiffs alleged this law placed an additional qualification on the right to vote. The court disagreed, finding the law was a reasonable provision to ascertain beforehand, by proper proofs, who should be entitled to vote on the day of election. The court compared the registration obligations in the challenged law to obligations requiring a voter to go to a specific place to vote, to provide an oath if the right to vote is challenged, or to provide naturalization papers upon request. Thus, the court ultimately held the annual registration to vote, in person, at the city clerk's office at least 10 days before an election did not impose an additional qualification on the right to vote. 31 Kan. at 554. So far, this tracks the majority's interpretation of the test.

Significantly, however, the *Butts* court went on to specifically contemplate unduly burdensome registration requirements that it *would* construe to impose additional qualifications on the right to vote. See 31 Kan. at 554 ("Doubtless, under the pretense of registration and under the pretext of securing evidence of voters' qualifications, laws might be framed which would cast so much burden as really to be imposing additional qualifications."). As an example, the court contemplated a law that required annual voter registration for all Kansans on January 1 at the state capitol in Topeka. Acknowledging this registration requirement similarly would have been intended to ascertain beforehand, by proper proofs, who should be entitled to vote on the day of election, the court indicated this particular requirement would cast so much burden as really to be imposing additional qualifications. 31 Kan.

at 554-55 ("The legislature cannot, by, in form, legislating concerning rules of evidence, in fact, overthrow constitutional provisions.").

The analysis in *Butts* reflects a balance between the importance of reasonable voter registration processes while ensuring the processes do not unduly restrict voting rights. See 31 Kan. at 555 ("But where ample facilities for registering are furnished, and the opportunities for registering are continued down to within a reasonable time of the election day, then it cannot be said that mere rules of evidence are abused."). The majority's bright-line test considering only the reasonableness of a challenged law as it relates to proof of identity, citizenship, age, and residency disregards the *Butts* balancing test, which weighs the degree to which the challenged law burdens the constitutional right to vote against the Legislature's responsibility to ensure proper proofs. To construe *Butts* as the majority does—as a test to determine whether a challenged law simply bears a reasonable relationship to the proper proofs of identity, citizenship, age, and residency—is to construe the Legislature's authority to demand proper proofs as unlimited in scope without any consideration of the burden this demand would create on casting a ballot. As an example, compare:

- a law requiring annual registration to vote, in person, at the city clerk's office at least 10 days before an election to
- a law requiring biannual registration to vote, in person, at the state capitol at least 100 days before an election.

Under the majority's erroneous interpretation of *Butts*, the two versions of the law cited above either bear a reasonable relationship to the proper proofs of identity, citizenship, age, and residency or they do not. In either case, the burden on the right to vote that may be caused by the second option is irrelevant. Of course, the hypothetical I pose is indistinguishable from the one contemplated in *Butts*, which the court described as a law framed "under the pretense of registration and under the pretext of securing evidence of voters' qualifications" but "cast so much burden as really to be imposing additional qualifications." 31 Kan. at 554.

Although *Butts* adopted a balancing test, it did not address the standard of review courts should apply in weighing the competing

interests, likely because the case was decided before the strict scrutiny, intermediate scrutiny, and rational basis standards were developed as a way to evaluate the constitutionality of a law. But the right to vote has long been considered a fundamental right under the United States Constitution. See *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 59 L. Ed. 2d 230 [1979]); *Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). And voting is considered a fundamental right under the Kansas Constitution as well. See *Hodes*, 309 Kan. at 657 ("The Kansas Constitution initially denied women the right to vote in most elections, to serve on juries, and to exercise other rights that we now consider fundamental to all citizens of our state."); *Provance v. Shawnee Mission U.S.D. No. 512*, 231 Kan. 636, 641, 648 P.2d 710 (1982) ("the right to vote for elected representatives is fundamental 'because statutes distributing the franchise constitute the foundation of our representative society'"); *Moore*, 207 Kan. at 649 ("the right of suffrage is a fundamental matter").

As a fundamental right, this court has held government restrictions on voting are subject to the highest level of judicial review to determine whether they further the government's identified compelling interest and are narrowly tailored to that end. *Moore*, 207 Kan. at 649 ("Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized."); see also *State v. Ryce*, 303 Kan. 899, 948, 957, 368 P.3d 342 (2016), *aff'd on reh'g* 306 Kan. 682, 396 P.3d 711 (2017) ("The highest level of scrutiny, 'strict scrutiny,' applies to judicial review of statutes implicating fundamental rights guaranteed by the Constitution."); *State v. Risjord*, 249 Kan. 497, 501, 819 P.2d 638 (1991) (same); *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058 (1987) (same). Thus, whether substantive violations under section 2, equal protection violations under section

18, or substantive violations under article 5, the plaintiffs' claims alleging violation of their fundamental right to vote are subject to strict scrutiny, even under *Butts*.

In sum, the majority's misinterpretation of *Butts* is not merely a fundamental error isolated to this case; it has far-reaching implications for voting rights and the democratic process. Combined with the majority's broader decision weakening the constitutional rights of Kansans under the Bill of Rights, today's decision could alter fair elections and deprive the people of their right to participate in the political process for the foreseeable future.

State v. Moeller

No. 124,611

STATE OF KANSAS, *Appellee*, V. DAVID W. MOELLER, *Appellant.*

(549 P.3d 1106)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Death of Defendant Does Not Automatically Abate Appeal*. Kansas precedent establishes that the death of a criminal defendant during the appeal of his or her conviction does not automatically abate the appeal but may render some issues moot.

2. CIVIL PROCEDURE—*Doctrine of Stare Decisis—Application*. Under the doctrine of stare decisis, once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Even so, this court will overturn precedent, no matter how longstanding, if it is clearly convinced the rule of law was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.

3. SECURITIES—*Statutory Meaning of "Fraud" and "Deceit."* As used in the securities fraud statute, K.S.A. 17-12a501(3), the words "fraud" and "deceit" carry their ordinary meanings.

4. SAME—*Kansas Uniform Securities Act—Investment Contract Is Type of Security—Four Elements*. Under the Kansas Uniform Securities Act, K.S.A. 17-12a101 et seq., an investment contract is a type of security. An investment contract consists of four elements: (1) an investment of money; (2) in a common enterprise; (3) with the expectation of profits; and (4) from the efforts of others.

5. SAME—*Investment Contract Definition in Statute—Common Enterprise Shown by Horizontal Commonality or Vertical Commonality*. For purposes of an investment contract as defined in K.S.A. 17-12a102(28)(D) under the Kansas Uniform Securities Act, K.S.A. 17-12a101 et seq., a common enterprise may be shown either by horizontal commonality—an enterprise common to a group of investors—or by vertical commonality—an enterprise common to the investor and the seller, promoter, or some third party.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 30, 2023. Appeal from Jefferson District Court; CHRISTOPHER ETZEL, judge. Oral argument held March 27, 2024. Opinion filed June 7, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: In *State v. Hollister*, 300 Kan. 458, Syl. ¶ 1, 329 P.2d 1220 (2014), this court held that the death of a criminal defendant during the appeal of his or her conviction does not automatically abate the appeal but may render some issues moot. And the doctrine of stare decisis directs us to adhere to this precedent in subsequent cases raising the same legal issue. Nevertheless, we may depart from established precedent under certain conditions. This appeal requires us to decide whether stare decisis warrants our continued adherence to *Hollister*. We conclude it does.

David Moeller was convicted of securities fraud after finagling an acquaintance out of $9,500 by promising an investment opportunity in a new business that never materialized. Moeller appealed, arguing there was insufficient evidence to support his conviction. But he died during the pendency of his appeal. Applying *Hollister*, the Court of Appeals held Moeller's death did not render his appeal moot. The panel thus addressed the merits of Moeller's sufficiency challenge and affirmed his conviction and sentence. *State v. Moeller*, No. 124,611, 2023 WL 4278212, at *2-5 (Kan. App. 2023) (unpublished opinion). Defense counsel petitioned for review, arguing that we should overrule *Hollister* and that the panel erred in concluding his conviction was supported by sufficient evidence.

Today, we continue to adhere to *Hollister* under the doctrine of stare decisis. For one, we are not clearly convinced *Hollister* was originally erroneous. Furthermore, we are not clearly convinced that more good than harm would come from departing from *Hollister*. *Hollister* strikes a fair balance between the competing interests in a criminal appeal, and any alternative approach would raise problems of its own.

We also hold the State presented sufficient evidence to support Moeller's conviction for securities fraud under K.S.A. 17-12a501(3). Moeller argues the State failed to prove he violated that statute because the trial evidence does not show he engaged in "an act [of] . . . fraud or deceit" upon the victim, nor does it

show the transaction between Moeller and the victim involved a security as that term is defined by law. K.S.A. 17-12a501(3); see also K.S.A. 17-12a102(28) (defining "security"). But Moeller's argument essentially asks us to reweigh the evidence, which appellate courts do not do. When viewed in the light most favorable to the State, the evidence was sufficient to support Moeller's conviction. We thus affirm Moeller's conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND

Diane Brunner gave Moeller a check for $9,500 to invest in a new business that would manufacture and sell the "Blade Caddy," a carrying case for saw blades. There was no new business. Instead, Moeller used the money to pay off a personal financial obligation, and he never fully reimbursed Brunner. After a bench trial, Moeller was convicted of securities fraud, sentenced to 24 months' probation, and ordered to pay $5,500 in restitution to Brunner and $513 in court costs and fees. Moeller appealed, arguing there was insufficient evidence to support his conviction. The evidence supporting his conviction will be discussed in more detail in Issue II along with the merits of his sufficiency challenge.

After both parties filed their opening briefs, the Court of Appeals issued an order indicating it "ha[d] become aware of information suggesting that [Moeller] died after filing this appeal." The Court of Appeals directed both defense counsel and the State to investigate whether Moeller had died and to inform the court of the results of their investigations. In his response, defense counsel provided an order from the district court terminating Moeller's probation because of his death. Defense counsel also disclaimed the ability to conduct a more extensive investigation in a timely manner and thus he did not definitively confirm or deny Moeller's death. The State responded by providing confirmation of a death certificate for Moeller. 2023 WL 4278212, at *2.

In its decision, the panel found Moeller had died, but also chastised defense counsel for not conducting a more extensive investigation and not providing a definitive answer on whether Moeller had died. 2023 WL 4278212, at *2. Nonetheless, the panel held the appeal was not moot under *Hollister* because the only issue Moeller raised—sufficiency of the evidence to support his

conviction—could exonerate him. *Moeller*, 2023 WL 4278212, at *2; see *Hollister*, 300 Kan. at 458-59 (court may address issues that may exonerate defendant). And the panel affirmed Moeller's convictions. *Moeller*, 2023 WL 4278212, at *3-5.

Defense counsel petitioned for review, asking us to revisit the abatement rule in *Hollister*. He also petitioned for review of the panel's holding that sufficient evidence supported Moeller's conviction.

We granted review, and we heard oral argument on March 27, 2024. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

I. *We Adhere to* Hollister *Under the Doctrine of Stare Decisis*

The main issue in this appeal is whether we should continue to adhere to *Hollister*. Defense counsel asks us to overrule that decision and adopt the doctrine of abatement ab initio. Under that doctrine, "a criminal defendant's death abates the appeal and all proceedings from the beginning of the criminal case." *Hollister*, 300 Kan. at 465. Thus, in jurisdictions that follow the doctrine, the appellate court not only abates the appeal but also vacates the conviction and remands the case for the district court to dismiss the indictment. See, e.g., *United States v. Libous*, 858 F.3d 64, 66 (2d Cir. 2017). Alternatively, defense counsel asks us to allow the appeal to continue as to all issues after substitution of a party for the deceased defendant.

The State responds that we should continue to adhere to *Hollister*. It argues *Hollister* is sensible and allows both the defendant and the State to vindicate important rights. The State also adamantly opposes adoption of the doctrine of abatement ab initio, arguing the doctrine harms both the public generally and crime victims specifically.

A. *Standard of Review and Relevant Legal Framework*

Because this issue involves consideration of a court policy developed through court precedent, our review is unlimited. See *State v. Hilton*, 295 Kan. 845, 849, 286 P.3d 871 (2012) ("A court policy necessarily comes about through prior opinions of the court, *i.e.*, the moot-

ness doctrine developed through court precedent. Accordingly, our review is unlimited."); *State v. May*, 293 Kan. 858, 862, 269 P.3d 1260 (2012) ("To the extent our decision involves . . . the interpretation and application of prior court precedent, we are resolving questions of law and, thus, exercising unlimited review.").

Under the doctrine of stare decisis, "'once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised.'" *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 (2004). "Stare decisis—while not a 'rigid inevitability'—serves as a 'prudent governor on the pace of legal change.'" *McCullough v. Wilson*, 308 Kan. 1025, 1035, 426 P.3d 494 (2018). Even so, "this court will overturn precedent, no matter how longstanding, if it is "'clearly convinced [the rule of law] was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.'"" 308 Kan. at 1036.

To address the abatement question, we first review the historical development of our abatement policy before conducting the stare decisis analysis.

B. *Development of Our Abatement Policy*

In two cases issued in the early years of Kansas' statehood, this court declined to abate a criminal appeal after the defendant's death. See *State v. Ellvin*, 51 Kan. 784, Syl. ¶ 1, 33 P. 547 (1893); *State v. Fisher, Adm'r*, 37 Kan. 404, 15 P. 606 (1887). In both cases, the defendant's death did not abate the judgment of costs and this court considered the merits of the appeal. *Ellvin*, 51 Kan. at 789; *Fisher*, 37 Kan. 404.

Many years later, in *State v. Jones*, 220 Kan. 136, 551 P.2d 801 (1976), the court revisited its abatement policy. It explained that while many other jurisdictions had adopted the doctrine of abatement ab initio, Kansas had historically allowed appeals to continue, citing *Fisher* and *Ellvin*. *Jones*, 220 Kan. at 137. The *Jones* court also reasoned it was in the interests of both the defendant's family and society to review the appeal on its merits:

"A defendant's conviction is at this stage in midair. The judgment of conviction is not final due to the pendency of an appeal. While death moots the sentence, renders impossible a new trial, and abates any fine imposed, the matter of costs remains. The state and the defendant (not to mention his family) have endured the strain, the tribulation and the expense of trial and appeal. Oftentimes rights other than those of an individual defendant are involved. The right to inherit, or to take by will or otherwise, may be affected. K.S.A. 1975 Supp. 59-513. The family of the defendant and the public have an interest in the final determination of a criminal case." 220 Kan. at 137.

Jones thus held that the deceased defendant's appeal "should be adjudicated upon the merits." 220 Kan. at 137. See also *State v. Salts*, 288 Kan. 263, 265, 200 P.3d 464 (2009) (defendant's death 12 days after his notice of appeal was filed did not render his direct appeal moot); *State v. Burnison*, 247 Kan. 19, 32, 795 P.2d 32 (1990) ("[I]n Kansas the death of a defendant does not abate his direct appeal as it is in the interest of the public that the issue[s] raised on appeal be adjudicated upon the merits.").

Then our course changed slightly in *State v. Karson*, 297 Kan. 634, 304 P.3d 317 (2013). There, the court again reiterated that a defendant's death does not automatically abate an appeal. But it also signaled that not all issues survive the death of an appellant, stating: "The issues *may* be fully reviewed and adjudicated when doing so is in the public interest or when it is in the interest of the appellant's family and estate." (Emphasis added.) 297 Kan. 634, Syl. ¶ 1. The *Karson* court opted to address the merits of the appeal because the issues raised presented matters of public importance. 297 Kan. at 638.

The next year, in *Hollister*, we solidified the approach suggested in *Karson*—that not all issues raised in a criminal appeal would be addressed after a defendant's death. We recognized *Karson*'s approach was "consistent with this court's broader approach to addressing moot issues in other contexts." *Hollister*, 300 Kan. at 467. So, based on mootness jurisprudence, *Hollister* identified several criteria for appellate courts to apply in determining which issues to address when a criminal defendant dies during the pendency of an appeal. "[A]n appellate court should consider whether an issue: (1) is of statewide interest and of the nature that public policy demands a decision, such as those issues that would exonerate the defendant; (2) remains a real controversy; or (3) is

capable of repetition." 300 Kan. at 467. And *Hollister* held "[o]nly issues meeting one of these criteria should be addressed." 300 Kan. at 467.

Applying those criteria in *Hollister*, the court addressed only the defendant's challenge to the sufficiency of the evidence because it was the only issue that might exonerate him—that is, an issue that remained a real controversy. We held the defendant's other claims of trial error would not exonerate him; rather, a finding of error "would require a remand for a new trial . . . but a new trial would be impossible given [the defendant's] death." 300 Kan. at 467. We also held the other issues were too case-specific to settle any issues of statewide interest or capable of repetition. 300 Kan. at 467.

Then-Justice Luckert dissented. She acknowledged Kansas courts had traditionally held that the death of a criminal defendant during the pendency of an appeal does not automatically abate the appeal, but she argued the flaw in this approach is that "without the defendant there is no one to pursue the appeal." 300 Kan. at 472 (Luckert, J., dissenting). She also noted that other jurisdictions allowing appeals to continue provide for substitution, but Kansas had no procedural mechanism to substitute a party for the deceased defendant in a criminal appeal. 300 Kan. at 473 (Luckert, J., dissenting). Then-Justice Luckert would have "follow[ed] the lead of the federal courts and most other courts and appl[ied] the doctrine of abatement *ab initio*." 300 Kan. at 474 (Luckert, J., dissenting).

These decisions confirm the court's long-standing commitment to the rule that criminal appeals do not automatically abate upon the death of the defendant. See *Karson*, 297 Kan. at 637. And over 10 years ago in *Karson* and *Hollister*, we refined this approach by adding certain criteria to limit the issues an appellate court may address out of mootness concerns. See *Hollister*, 300 Kan. at 467.

Defense counsel now asks us to overrule *Hollister* and adopt a different approach to handling criminal appeals after a defendant's death. To do so, however, we would need to be clearly convinced *Hollister* was originally erroneous or unsound due to changing conditions and that more good than harm would come

from departing from established precedent. *McCullough*, 308 Kan. at 1036. Moeller has not persuaded us that any of these conditions have been met.

C. *Stare Decisis Warrants Our Continued Adherence to* Hollister

As part of our stare decisis analysis, we must first consider whether *Hollister* was originally erroneous or is no longer sound due to changing conditions and then assess whether more good than harm would come from overruling the precedent. See *McCullough*, 308 Kan. at 1036.

1. *We Are Not Clearly Convinced* Hollister *Was Originally Erroneous or Is Unsound Due to Changing Conditions*

Defense counsel urges us to overrule *Hollister* because he believes it creates ethical and practical problems for attorneys appointed to represent criminal defendants on appeal. Counsel claims "the application of *Hollister* by the Court of Appeals in this case and others requires appointed counsel to conduct factual investigation regarding their own clients (even though appointed counsel lacks investigative resources) and report potentially adverse facts to the appellate court." According to counsel, the panel's order directing him to investigate Moeller's death created a conflict of interest between him and his client and required him to disclose potentially confidential communications. And he claims these problems stem from *Hollister* because under that decision, the defendant's death is now an "adverse fact" because it may prevent an appellate court from addressing all issues raised by the defendant on appeal.

It is unclear to us whether the Court of Appeals' order created an ethical dilemma for defense counsel. We note that the Kansas Rules of Professional Conduct (KRPC) allow (but do not require) an attorney to reveal information relating to the client's representation in response to a court order. See KRPC 1.6(b)(4) (2024 Kan. S. Ct. R. at 333); see also KRPC 1.6, comment 25 (2024 Kan. S. Ct. R. at 338). If an attorney believes a court order requires him or her to reveal information protected from disclosure, the attorney

may assert that claim in his or her response. KRPC 1.6, comment 23 (2024 Kan. S. Ct. R. at 337). And in the event of an adverse ruling, the attorney may seek review. KRPC 1.6, comment 23 (2024 Kan. S. Ct. R. at 337). This procedure was not followed in this case.

In any event, the argument is a red herring as it pertains to a stare decisis analysis. Any purported ethical dilemma arises from a Court of Appeals practice that is not mandated by *Hollister*. *Hollister* did not impose an obligation on criminal defense attorneys to investigate and report on a client's death. Nor does *Hollister* compel courts to order criminal defense attorneys to do so. Thus, we are unpersuaded that the purported ethical conflict created by the panel's order establishes that *Hollister* was originally erroneous.

Furthermore, *Hollister* is consistent with our mootness jurisprudence. We have held that "'[a]n appellate court may sometimes elect to entertain issues which, although moot, are subjects of real controversy and include issues of statewide interest and importance'" or are "capable of repetition." *Smith v. Martens*, 279 Kan. 242, 244, 106 P.3d 28 (2005). The criteria identified in *Hollister* accurately reflect this jurisprudence.

We recognize the *Hollister* rule does not answer the question of who is left to pursue the appeal. As then-Justice Luckert pointed out, a criminal defendant's death "leaves no one as the appellant and [the defendant's] attorney without a client." *Hollister*, 300 Kan. at 473 (Luckert, J., dissenting). And because the attorney-client relationship is one of agency and ordinarily ends with the client's death, the attorney generally lacks authority to continue to act on behalf of the deceased defendant. See *State v. Dickens*, 214 Kan. 98, 102, 519 P.2d 750 (1974). Nor does the defendant's death "transform the State—as representative of the public—into an appellant." *Hollister*, 300 Kan. at 473 (Luckert, J., dissenting). And "Kansas statutes do not provide a criminal procedure for substituting a party in a criminal defendant's appeal." 300 Kan. at 473 (Luckert, J., dissenting).

But the question of who has authority to pursue a criminal appeal after the defendant's death is a separate question from

whether *Hollister*'s abatement rule was originally erroneous or unsound due to changing legal conditions. In fact, some states that allow substitution in criminal appeals also apply the same criteria in *Hollister* to decide which issues remain justiciable controversies. See *State v. Reed*, 248 Ariz. 72, 80-81, 456 P.3d 453 (2020) (allowing substitution in criminal appeal after defendant's death but also applying criteria identified in *Hollister*). So, resolving the open question of who has authority to pursue a criminal appeal after the defendant's death would not answer the first prong of our stare decisis framework.

Moreover, *Hollister* has not proven to be unworkable, notwithstanding the unresolved question of who is left to pursue the appeal. See *State v. Sims*, 308 Kan. 1488, 1504, 431 P.3d 288 (2018) (this court is "not constrained to follow precedent when 'governing decisions are unworkable or are badly reasoned'"). Kansas courts have applied *Hollister* in several cases, allowing some appeals to proceed as to certain issues while finding others entirely moot. Compare *State v. Belt*, 305 Kan. 381, 382, 381 P.3d 473 (2016) (addressing some of defendant's issues on appeal after defendant's death but dismissing others as moot); *State v. Lingenfelter*, No. 121,953, 2021 WL 1836441, at *2-4 (Kan. App. 2021) (unpublished opinion) (same), with *State v. Baker*, No. 119,832, 2020 WL 1649850, at *7 (Kan. App. 2020) (unpublished opinion) (dismissing all issues raised by defendant as moot after defendant's death); *State v. Cada*, No. 111,440, 2016 WL 367999, at *2 (Kan. App. 2016) (unpublished opinion) (same). And neither the appellate courts nor the parties in those cases identified any difficulty in applying *Hollister*.

As for changing conditions, there have been no developments in our mootness jurisprudence that would undermine the rationale of *Hollister*. See, e.g., *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020) (recognizing Kansas courts will address issues that are otherwise moot but are capable of repetition and present concerns of public importance). And Kansas has always been among a minority of states that allow criminal appeals to continue after a defendant's death. See *Hollister*, 300 Kan. at 466 (recognizing that "Kansas and a few other states" allow appellate courts to consider the merits of the appeal after a defendant dies); see also *State v. Al*

Mutory, 581 S.W.3d 741, 752-55 (Tenn. 2019) (collecting cases). Thus, there has been no trend away from our current approach that would suggest *Hollister* is now unsound.

2. *We Are Not Clearly Convinced More Good Than Harm Would Come from Overruling* Hollister

We are also not clearly convinced more good than harm would come from overruling *Hollister* because *Hollister* strikes a fair balance between the numerous competing interests at stake in a criminal appeal. See *McCullough*, 308 Kan. at 1036 (court may depart from precedent if clearly convinced more good than harm would come from overruling it). For example, some states dismiss criminal appeals upon the death of the defendant, leaving the conviction intact. See *Commonwealth v. Hernandez*, 481 Mass. 582, 590 n.14, 118 N.E.3d 107 (2019) (listing cases). But this approach disregards the defendant's right to appeal. And while that right is statutory and not constitutional, see *State v. Rocheleau*, 307 Kan. 761, 763-64, 415 P.3d 422 (2018), it is nevertheless "an integral part of the judicial process." *Hollister*, 300 Kan. at 474 (Luckert, J., dissenting); see also *Al Mutory*, 581 S.W.3d at 754 (recognizing "state courts have allowed appeals as of right from a conviction to continue because they find the right to appeal is far too valuable to be lost at death").

A defendant's family will often have an interest in the outcome of an appeal as well. Criminal convictions and sentences are often accompanied by a financial component, such as restitution, and these financial obligations may fall upon the defendant's estate in the event of the defendant's death. See *State v. Carlin*, 249 P.3d 752, 764 (Alaska 2011). "The right to inherit, or to take by will or otherwise, may be affected" by the criminal conviction. *Jones*, 220 Kan. at 137; see K.S.A. 2023 Supp. 59-513. And the defendant's family may also want to vindicate the name and reputation of their deceased relative. See *State v. Makaila*, 79 Haw. 40, 45, 897 P.2d 967 (1995). Simply dismissing the appeal after the defendant's death would disregard these interests.

Abating ab initio, on the other hand, would serve the interests of the defendant and the defendant's family, but it would disregard the interests of other parties. For instance, abating ab initio would

ignore the State's interest in maintaining the defendant's conviction. See *State v. Gleason*, 349 So. 3d 977, 981 (La. 2022) (recognizing "the state has an interest in preserving a presumptively valid conviction"); *Makaila*, 79 Haw. at 45 (same). And vacating a potentially valid conviction could have negative consequences for victims not only emotionally but also financially when restitution is ordered as part of the judgment. See *Al Mutory*, 581 S.W.3d at 749; see also *Wheat v. State*, 907 So. 2d 461, 463 (Ala. 2005) (noting trend away from abatement ab initio likely to continue as "*the courts and public begin to appreciate the callous impact such a procedure necessarily has on the surviving victims of violent crime*").

We believe our current approach as exemplified in *Hollister* ably balances the competing interests of all the relevant parties. By not simply dismissing the appeal, the defendant and the defendant's family still have an opportunity to challenge the conviction and, in some cases, to ensure the constitutionality of criminal proceedings. See, e.g., *Karson*, 297 Kan. at 638 (addressing deceased defendant's claim that a law enforcement search violated the defendant's state and federal constitutional rights because the claim presented question of public importance). And by not abating ab initio, our current approach honors the interests of the State and any victims.

Defense counsel argues more good than harm would come from overruling *Hollister* in favor of the doctrine of abatement ab initio. We recognize abatement ab initio is the rule in federal courts, at least as to appeals as of right. *Libous*, 858 F.3d at 66. And about a third of our sister states and the District of Columbia follow the doctrine. See *People v. Schaefer*, 208 Cal. App. 4th 1283, 1287, 146 Cal. Rptr. 3d 497 (2012); *People v. Johnson*, 499 P.3d 1045, 1047 (Colo. 2021); *Lee v. United States*, 257 A.3d 1023, 1024 (D.C. 2021); *People v. Robinson*, 187 Ill. 2d 461, 464, 719 N.E.2d 662 (1999); *State v. Holbrook*, 261 N.W.2d 480, 481 (Iowa 1978); *State v. Carter*, 299 A.2d 891, 895 (Me. 1973); *State v. Burrell*, 837 N.W.2d 459, 470 (Minn. 2013); *State v. Mott*, 569 S.W.3d 555, 556 (Mo. Ct. App. 2019); *State v. Campbell*, 187 Neb. 719, Syl., 193 N.W.2d 571 (1972); *State v. Poulos*, 97 N.H. 352, 354, 88 A.2d 860 (1952); *People v. Nowell*, 80 Misc. 3d 689,

695, 195 N.Y.S.3d 413 (Sup. Ct. 2023); *State v. Dixon*, 265 N.C. 561, 562, 144 S.E.2d 622 (1965); *State v. Marzilli*, 111 R.I. 392, 393, 303 A.2d 367 (1973); *State v. Clark*, 260 N.W.2d 370, 370-71 (S.D. 1977); *State v. Free*, 37 Wyo. 188, 188, 260 P. 173 (1927).

But there has been a marked trend away from abatement ab initio among the states in recent years. See *Nowell*, 80 Misc. 3d at 695-706 (recognizing trend away from abatement ab initio but ultimately adhering to binding precedent adopting doctrine); *Al Mutory*, 581 S.W.3d at 748 n.7, 750. Since we issued *Hollister*, five states have explicitly overruled precedent applying the doctrine of abatement ab initio. See *Gleason*, 349 So. 3d at 982-83; *Hernandez*, 481 Mass. at 599; *Payton v. State*, 266 So. 3d 630, 640 (Miss. 2019); *Al Mutory*, 581 S.W.3d at 750; *Majors v. State*, 465 P.3d 223, 225 (Okla. Crim. App. 2020). And one state declined to adopt the doctrine as a matter of first impression. *State v. Isaak*, 988 N.W.2d 250, 253-54 (N.D. 2023).

Indeed, many courts consider the doctrine to be out-of-step with modern trends toward recognizing victims' rights and providing restitution. See *Al Mutory*, 581 S.W.3d at 749; *Payton*, 266 So. 3d at 639. Kansas has enacted constitutional and statutory protections to victims in criminal proceedings. See Kan. Const. art. 15, § 15(a); K.S.A. 74-7333 (entitled "[b]ill of rights for victims of crime"). And Kansas statutes generally require sentencing courts to impose restitution as a part of a defendant's sentence. K.S.A. 21-6604(b)(1); K.S.A. 21-6607(c)(2). We are not persuaded abatement ab initio is consistent with these constitutional and statutory protections.

Defense counsel also suggests more good than harm would come from overruling *Hollister* and following those states that allow a criminal appeal to continue after the defendant's death with substitution of another party. As we noted above, the question of who has authority to pursue a criminal appeal after the defendant dies is separate from the question of whether our position on abatement is correct.

Moreover, many of these states have procedural rules that allow for substitution of a party during the pendency of an appeal. See, e.g., *Fiveash v. State*, 458 S.W.3d 774, 775 n.1 (2015);

Makaila, 79 Haw. at 45; *Surland v. State*, 392 Md. 17, 36, 895 A.2d 1034 (2006); *Payton*, 266 So. 3d at 640-41; *State v. McGettrick*, 31 Ohio St. 3d 138, 142, 509 N.E.2d 378 (1987); *State v. Webb*, 167 Wash. 2d 470, 478, 219 P.3d 695 (2009). Kansas currently has no such rule. See *Hollister*, 300 Kan. at 473 (Luckert, J., dissenting) (noting "Kansas statutes do not provide a criminal procedure for substituting a party in a criminal defendant's appeal").

To overcome this obstacle, defense counsel argues K.S.A. 2023 Supp. 60-225 provides for substitution in criminal appeals. That statute allows for substitution after a party's death in civil cases. K.S.A. 2023 Supp. 60-225(a). And the statute has been applied in civil appeals. See *Seal v. Seal*, 212 Kan. 55, 56, 510 P.2d 167 (1973); *Long v. Riggs*, 5 Kan. App. 2d 416, 418, 617 P.2d 1270 (1980), *overruled on other grounds by Graham v. Herring*, 297 Kan. 847, 305 P.3d 585 (2013).

Even though K.S.A. 2023 Supp. 60-225 is a rule of civil procedure, defense counsel notes we have "held in the past that the code of civil procedure may apply in criminal proceedings when the code of criminal procedure provides no contrary provisions." *State v. Edwards*, 299 Kan. 1008, 1016, 327 P.3d 469 (2014). And under K.S.A. 22-3606, the Legislature has provided that the statutes and rules governing civil appeals apply to criminal appeals.

We question the wisdom of applying a rule of civil procedure to this criminal appeal because doing so may create more problems than it solves. For instance, could the State move for substitution under the statute even if no other party wished to prosecute the appeal? Would the substituted party have a right to appointed counsel? And who would pay for the attorney's services if there were insufficient funds in the defendant's estate? We believe these contingencies are best addressed through the rule-making or legislative process rather than by judicial fiat. See *Hernandez*, 481 Mass. at 599-600 (declining to interpret rule of civil procedure as allowing substitution in criminal appeals because "[g]iven the practical considerations involved . . . the Legislature would be the appropriate body to adopt that particular approach").

In the end, *Hollister* ably synthesizes a long-established court policy on the treatment of criminal appeals after a defendant's

death with our mootness jurisprudence. It also establishes an appropriate equilibrium among the opposing interests involved in a criminal appeal. *Hollister* was issued 10 years ago and in that time the decision has not proven to be difficult to administer or otherwise unworkable. We are not convinced that *Hollister* was originally erroneous or unsound due to changing conditions. And we are not persuaded that defense counsel's proposed alternatives would be superior to our current approach to abatement issues. Thus, we continue to adhere to *Hollister* under the doctrine of stare decisis.

II. *There Was Sufficient Evidence to Support Moeller's Conviction*

Next, Moeller argues there is insufficient evidence to support his conviction for securities fraud under K.S.A. 17-12a501(3). This issue is not moot because a potential finding of insufficient evidence would be the first step toward exonerating Moeller, and under *Hollister* and our mootness doctrines, exoneration remains a "case or controversy"
even after death. See 300 Kan. at 468. But before addressing the merits of Moeller's sufficiency challenge, we will review some additional relevant facts and identify the relevant legal framework applicable to Moeller's challenge.

A. *Additional Facts*

Moeller had a business buying surplus inventory from stores and reselling it for a profit. He arranged to buy $9,500-worth of carpet remnants from Carpet Factory and resell them. Moeller later claimed the carpet remnants he picked up were not the ones he originally agreed to buy so he did not pay for them. Carpet Factory reported the incident to law enforcement, and the State charged Moeller with felony theft.

While Moeller's theft charges were still pending, Moeller spoke with one of his employees, Mike Maxie, and Maxie's ex-girlfriend, Diane Brunner. Brunner had just cashed out her IRA and was looking to invest the money somewhere. Brunner understood "investing" to mean "make money off my money."

Moeller told Brunner about his business idea "Blade Caddy," which she assumed was a carrying case for a saw blade. Moeller said he needed a few investors to get the business started. While Moeller did not specifically ask Brunner for money, he told Brunner, "[Y]ou have to put in money for this investment if you want to invest in this." He explained there would not be any profits for a few months while he got the business off the ground, but then he would repay any money she invested along with some of the profits. Brunner thought it sounded like a good idea, but she was not sure she could trust Moeller because she did not know him very well. She asked Maxie, and he said he thought it was a legitimate investment. Brunner wrote Moeller a check for $9,500 and wrote "Blade Caddy" on the memo line. Brunner wrote the check expecting to get her money back plus some of the profits based on how well the product sold.

The next day, Moeller cashed Brunner's check and used the proceeds to obtain a cashier's check to pay the outstanding balance Moeller owed to Carpet Factory. After Moeller repaid Carpet Factory, his theft charge was dismissed.

Over the next several months, Moeller repaid Brunner about $3,000 but only after Brunner pestered him about the status of her investment. She eventually reported the incident to the Kansas Securities Commission, and Special Agent Chad Entsminger investigated the complaint. During a phone call, Moeller told Entsminger that Brunner had not made an investment; rather, the two had made a personal deal based on an idea he had that could make them both some money. He denied the deal had anything to do with Blade Caddy, and he claimed he had had nothing to do with Blade Caddy for 20 years. In a later phone call, Moeller told Entsminger that Brunner had "invested" but Moeller had paid back some of Brunner's money. Moeller also mentioned there were two other investors, but he did not specify what Brunner and the other investors had invested in.

The State charged Moeller with securities fraud, or in the alternative, theft by deception. The case went to a bench trial. The State called several witnesses including Brunner and Special Agent Entsminger. Moeller also testified in his own defense. He explained he had originally patented the Blade Caddy in 1989 but the patent was now expired. He denied asking Brunner to invest

in Blade Caddy. Rather, he said he told Brunner he would like to borrow some money, but he never told her what the money was for. He also claimed the money was just a loan, and he had paid Brunner back in full.

The district court found Moeller guilty of securities fraud under K.S.A. 17-12a501(3). On appeal, the Court of Appeals affirmed Moeller's conviction, concluding it was supported by sufficient evidence. *Moeller*, 2023 WL 4278212, at *3-5.

Moeller now challenges the panel's holding. He claims the evidence does not show he acted with "fraud or deceit" within the meaning of the securities fraud statute. He also argues his transaction with Brunner was simply a loan and did not involve a security.

B. *Standard of Review and Relevant Legal Framework*

"When a criminal defendant challenges the sufficiency of the evidence used to support a conviction, an appellate court looks at all the evidence 'in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.'" *State v. Harris*, 310 Kan. 1026, 1030, 453 P.3d 1172 (2019). An appellate court generally will not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. Pepper*, 317 Kan. 770, 777, 539 P.3d 203 (2023).

To the extent this issue also requires interpretation of statutes, that is a question of law subject to unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021). Additionally, Kansas has adopted the 2002 Uniform Securities Act, and we "often look to decisions from other courts as persuasive authority when interpreting uniform laws." *State v. Lundberg*, 310 Kan. 165, 170-71, 445 P.3d 1113 (2019).

C. *Moeller's Conduct Meets the Definition of "Fraud or Deceit"*

Moeller was convicted of violating K.S.A. 17-12a501(3), which provides, "It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly . . . to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person."

Moeller first argues the evidence fails to show he engaged in "an act [of] . . . fraud or deceit" within the meaning of K.S.A. 17-12a501(3) because the evidence does not show he said anything to Brunner that misled or deceived her in order to obtain her money. The panel rejected this argument, holding "Moeller's diversion of Brunner's 'investment' to take care of his personal financial obligations amounted to . . . [an] act . . . of 'fraud' or deceit'" under the statute. *Moeller*, 2023 WL 4278212, at *3.

Moeller bases his argument on the interpretation of the words "fraud or deceit" in K.S.A. 17-12a501(3). When interpreting statutes, our guiding principle is that the Legislature's intent governs if that intent can be ascertained. *State v. Strong*, 317 Kan. 197, 203, 527 P.3d 548 (2023). "In ascertaining legislative intent, courts begin with the statute's plain language, giving common words their ordinary meaning. If, however, the statute's language is ambiguous, courts may consult canons of construction to resolve the ambiguity." 317 Kan. at 203.

The Kansas Uniform Securities Act (the Act), K.S.A. 17-12a101 et seq., provides only that the terms "fraud," "deceit," and "defraud" as used in the Act are not limited to common law deceit. K.S.A. 17-12a102(9). This suggests the words "fraud" and "deceit" as used in K.S.A. 17-12a501(3) bear their "'ordinary, contemporary, common meaning[s]'" rather than a specific legal meaning. *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017). And we have recognized dictionaries are a good source for the ordinary meanings of words. 306 Kan. at 851. Black's Law Dictionary defines "fraud" as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment" and "deceit" as "[t]he act of intentionally leading someone to believe something that is not true; an act designed to deceive or trick." Black's Law Dictionary 802, 510 (11th ed. 2019).

Here, the evidence shows Moeller's actions were designed to deceive or trick Brunner. Brunner testified Moeller told her about the Blade Caddy business as an investment opportunity, and she wrote a check to him for the purpose of investing in that business. Her testimony is corroborated by the check, on which she had written "Blade Caddy" on the memo line. Both witness testimony

and documentary evidence show Moeller did not invest that money in the Blade Caddy business. Instead, he used Brunner's money to repay Carpet Factory. In turn, Moeller's theft charges were dismissed. Furthermore, there was no evidence Moeller devoted any time or money to the Blade Caddy business besides securing a patent over 20 years earlier. Viewing this evidence in a light most favorable to the State, a rational fact-finder could conclude Moeller engaged in an act that operated as a fraud or deceit on Brunner.

Moeller claims the evidence is insufficient because he never said anything to Brunner about Blade Caddy. He also highlights Brunner's testimony that she would not have invested if Maxie had not told her it was a good investment. But these arguments are just invitations to reweigh the evidence, which appellate courts do not do. *Pepper*, 317 Kan. at 777. Furthermore, even if Moeller had not made any fraudulent or deceitful representations to induce Brunner's investment at the outset, his act of cashing Brunner's check and using the money to pay off a personal financial obligation provides sufficient evidence of a deceitful act under K.S.A. 17-12a501(3). And while Brunner may not have agreed to hand over her money without Maxie's approval, that fact does not render Moeller's conduct any less fraudulent or deceitful.

D. *The Transaction Between Brunner and Moeller Involved the Sale of a Security in the Form of an Investment Contract*

Moeller next challenges the sufficiency of the evidence proving his fraudulent conduct occurred "in connection with the offer, sale, or purchase of a security." K.S.A. 17-12a501. The State charged Moeller with committing securities fraud in connection with the sale of a security in the form of an investment contract. See K.S.A. 17-12a102(28) (defining "security" to include investment contracts). And the Court of Appeals held the evidence was sufficient to show Moeller's transaction with Brunner was an investment contract. *Moeller*, 2023 WL 4278212, at *4-5. Moeller challenges the panel's conclusion, arguing the evidence shows Brunner loaned him the money for an unspecified purpose, not in connection with a security, i.e., an investment contract.

For purposes of the Act, K.S.A. 17-12a102(28)(D) defines an "investment contract" as "an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor." This statutory definition essentially codifies a four-part test this court adopted to determine if a particular financial transaction constitutes an investment contract. See *Activator Supply Co. v. Wurth*, 239 Kan. 610, 617, 722 P.2d 1081 (1986) (citing *State ex rel. Owens v. Colby*, 231 Kan. 498, 646 P.2d 1071 [1982]) ("investment contract" requires: [1] an investment of money; [2] in a common enterprise; [3] with the expectation of future profits; and [4] from the efforts of others.); see also *Colby*, 231 Kan. at 502-04 (adopting test for investment contracts under federal securities law set forth in *S.E.C. v. Howey Co.*, 328 U.S. 293, 301, 66 S. Ct. 1100, 90 L. Ed. 1244 [1946]). Thus, to establish that Moeller's fraud occurred in connection with a security, the State needed to establish the existence of an investment contract by proving the following elements: (1) Brunner made an investment; (2) in a common enterprise; (3) with the expectation of profits; and (4) those profits were to be derived primarily from the efforts of another.

Moeller challenges the sufficiency of the evidence supporting the first two elements of an investment contract—that is, whether Brunner made an investment and whether that investment was in a common enterprise. But we agree with the Court of Appeals' conclusion that the State presented sufficient evidence as to both elements.

First, the evidence was sufficient to show Brunner made an investment. The term "investment" is not statutorily defined, but we have interpreted the term in the context of the Act to mean that an "investor must commit his assets to the enterprise in such a manner as to subject himself to financial loss." *Wurth*, 239 Kan. at 617 (citing *Hector v. Wiens*, 533 F.2d 429, 432 [9th Cir. 1978]).

Moeller likens his case to *State v. Hood*, 255 Kan. 228, 873 P.2d 1355 (1994). There, a man entered a written contract to purchase a percentage of his cousin's interest in a restaurant. The cousin then used the money from the sale for personal purposes. The Kansas Office of the Securities Commissioner concluded the

two men had entered an investment contract and the cousin's conduct constituted securities fraud. But this court disagreed, explaining nothing in the terms of the written contract specified that the money from the sale was to be invested in the restaurant or to become part of its capital. 255 Kan. at 232-33.

Moeller claims that like *Hood*, he did not tell Brunner he would use the money for Blade Caddy. But this argument views the evidence in a light most favorable to Moeller, contrary to our standard of review. According to Brunner, Moeller told her he needed investors to get the Blade Caddy business off the ground and she would need to put money in if she wanted to invest in the business. She wrote "Blade Caddy" in the memo line of the check she gave to Moeller. And Special Agent Entsminger testified Moeller used the word "invest" when describing Brunner's act of giving Moeller money. Viewing this evidence in a light most favorable to the State, the evidence establishes that Brunner invested in Moeller's fabricated startup.

Moeller also argues Brunner did not make an "investment" because she did not subject herself to financial loss. He relies on Brunner's testimony indicating she did not intend to lose money and would not have invested in Blade Caddy if she thought she might lose money. But viewed in a light most favorable to the State, this testimony suggests Brunner expected Blade Caddy to be profitable—it does not prove she was not at risk of financial loss. See *S.E.C. v. Rubera*, 350 F.3d 1084, 1090 (9th Cir. 2003) (even though investors gave money to pay phone management program hoping to yield financial gains and program offered buyback option, investors still subjected themselves to financial loss because they took on risk that individual phones would not be profitable, or the entire enterprise would fail).

Second, Moeller argues the State failed to show his transaction with Brunner involved a common enterprise. K.S.A. 17-12a102(28)(D) defines a "common enterprise" as "an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party or other investors."

As Moeller notes, courts have recognized a common enterprise may be shown in two different ways: (1) horizontal commonality—an enterprise common to a group of investors; and (2) vertical commonality—an enterprise common to the investor and the seller, promoter, or some third party. See *Hocking v. Dubois*, 885 F.2d 1449, 1455 (9th Cir. 1989). Some jurisdictions require horizontal commonality to establish a common enterprise while other jurisdictions recognize both horizontal and vertical commonality. Compare *Stenger v. R.H. Love Galleries, Inc.*, 741 F.2d 144, 146 (7th Cir. 1984) ("This Circuit has strictly adhered to a 'horizontal' test of common enterprise, under which multiple investors must pool their investments and receive pro rata profits."), with *S.E.C. v. Infinity Group Co.*, 993 F. Supp. 321, 322 n.1 (E.D. Pa. 1998) (noting several federal circuit courts recognize vertical as well as horizontal commonality).

We have not had occasion to interpret the statutory definition of "common enterprise" to determine the test for commonality under the Act. But the plain language of K.S.A. 17-12a102(28)(D) defines "common enterprise" to include both vertical and horizontal commonality. See *Strong*, 317 Kan. at 203 (when interpreting statutes, courts first look to plain language). Vertical commonality is encompassed in the phrase "an enterprise in which the fortunes of the investor are interwoven with those of . . . the person offering the investment [or] a third party." K.S.A. 17-12a102(28)(D). And horizontal commonality is encompassed in the phrase "an enterprise in which the fortunes of the investor are interwoven with those of . . . other investors." K.S.A. 17-12a102(28)(D). And the statute's use of the phrase "either . . . or . . ." indicates the presence of just one type of commonality is sufficient to satisfy this element. See Garner, Garner's Modern English Usage 383 (5th ed. 2022) ("*either . . . or . . .*" frames two alternatives). Thus, the State can prove the existence of a common enterprise under the Act by proving either horizontal commonality or vertical commonality. See *State v. Brown*, 295 Kan. 181, 196-97, 200, 284 P.3d 977 (2012) (if statute lists options within a means, State need only provide sufficient evidence of one option to sustain conviction).

And here, there is sufficient evidence of vertical commonality—that is, an enterprise in which Brunner's fortunes were interwoven with Moeller's. See K.S.A. 17-12a102(28)(D); see also *Hocking*, 885 F.2d at 1455 (vertical commonality is shown by an enterprise common to the investor and the seller, promoter, or some third party). Brunner testified Moeller said he needed the money to get his Blade Caddy business started and once product began to sell, Brunner would receive a share of the profits. Thus, Brunner's prospect for financial gain was dependent on the success of Moeller's business. Because there is sufficient evidence of vertical commonality, the State provided evidence sufficient to establish the "common enterprise" element under K.S.A. 17-12a102(28)(D), and we need not address whether there was sufficient evidence of horizontal commonality.

Moeller insists the evidence shows the money Brunner gave him was a loan and not an investment. And he testified to this fact at trial. But Brunner repeatedly testified that she "invested" or made an "investment" in Blade Caddy and that Moeller said she would receive her money back plus a portion of the profits. She also testified that Moeller said it would take several months for the business to get off the ground before it would generate profits for distribution. And when Moeller spoke with Special Agent Entsminger, Moeller did not describe the transaction as a loan. Rather, he said Brunner had "invested." Resolving all questions of credibility in favor of the State, as we must do, this evidence would support a finding that Brunner made an investment in a common enterprise. See *State v. Kuykendall*, 264 Kan. 647, 651, 957 P.2d 1112 (1998) (On sufficiency review, "all questions of credibility are resolved in favor of the State.").

Moeller does not contest the sufficiency of the evidence supporting the final two elements of an investment contract—that Brunner expected to profit and that the profit would come from the efforts of others. And our independent review of the record confirms there was sufficient evidence to support these elements.

As a result, the State presented sufficient evidence to sustain Moeller's conviction for securities fraud under K.S.A. 17-12a501(3).

Judgment of the Court of Appeals affirming the judgment of the district court is affirmed.

* * *

LUCKERT, C.J., dissenting: For the reasons more fully explained in my dissent in *State v. Hollister*, 300 Kan. 458, 472-74, 329 P.3d 1220 (2014), I dissent. Regardless of the policy reasons for the majority's position, without a statutory process for continuing a criminal case after the defendant's death, Kansas appellate courts lack authority—or a statutory process—to consider this appeal.

State v. Lamia-Beck

No. 124,433

STATE OF KANSAS, *Appellee*, v. CODY MICHAEL LAMIA-BECK, *Appellant*.

(549 P.3d 1103)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Revised Sentencing Guidelines Act—Illegal Sentence if Drawn from Incorrect Sentencing Grid Block*. Under the Revised Kansas Sentencing Guidelines Act, K.S.A. 21-6801 et seq., when a sentence is drawn from an incorrect sentencing grid block, it is presumptively illegal.

Review of the judgment of the Court of Appeals in an unpublished opinion filed February 3, 2023. Appeal from Pottawatomie District Court; JEFFREY R. ELDER, judge. Oral argument held February 1, 2024. Opinion filed June 14, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Peter Maharry, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Jodi Litfin, deputy district attorney, argued the cause, and *Derek Schmidt*, attorney general, was with her on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: Cody Michael Lamia-Beck pleaded no contest to second-degree murder, and the district court imposed a sentence. Soon after, the district court ruled the sentence was illegal because it was generated from an incorrect sentencing grid. The court resentenced Lamia-Beck to a longer sentence. Lamia-Beck appealed, arguing the original sentence was legal because it fell within the correct sentencing range, so the district court lacked jurisdiction to impose a new one. The Court of Appeals affirmed the district court. We granted Lamia-Beck's petition for review and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2019, Lamia-Beck pleaded no contest to second-degree murder, a severity level one person felony. In exchange, the State agreed to dismiss a separate case against him. The parties agreed to recommend the high number in the appropriate grid block as a sentence.

At sentencing, Lamia-Beck did not object to a criminal history score of "I." The presentence investigation report (PSI) described the sentencing range for a severity level 1 crime and a criminal history of I to be 138, 146, and 154 months. The State told the court that "[p]ursuant to the plea agreement, the parties are recommending the aggravated range of 154 months . . . ." Lamia-Beck's attorney responded: "[T]hat is the parties' agreement that that the court sentence him to the aggravated number imposed in presumption of prison . . . ." The district court sentenced Lamia-Beck to 154 months' imprisonment, which it described as "the maximum sentence the law would allow."

Three days after sentencing, the State moved to correct an illegal sentence. The State explained the sentencing range in the PSI mistakenly corresponded with the drug offense grid rather than the nondrug offense grid, so the described sentencing range had been incorrect. The nondrug offense grid directed a sentencing range of 147, 155, and 165 months for Lamia-Beck's crime and criminal history, so the court should have sentenced him to 165 months if it was aiming for the high number in accordance with the parties' recommendations. Thus, the State reasoned, the 154-month sentence was illegal.

Lamia-Beck responded that the 154-month sentence was not illegal because, even though it was not the high number in the correct grid block, it still fell within the correct presumptive range of 147-165 months. Because the sentence was not illegal, Lamia-Beck argued, the district court lacked jurisdiction to resentence him.

The district court agreed with the State. It held that the original sentence was illegal because "the defendant was sentenced under the drug grid, rather than the nondrug grid." The court resentenced Lamia-Beck to 165 months' imprisonment. Lamia-Beck appealed.

The Court of Appeals affirmed the district court. *State v. Lamia-Beck*, No. 124,433, 2023 WL 1487802 (Kan. App. 2023) (unpublished opinion). We granted Lamia-Beck's petition for review.

ANALYSIS

The district court concluded Lamia-Beck's original sentence was illegal, thereby securing its jurisdiction to resentence Lamia-

Beck. The Court of Appeals agreed the original sentence was illegal based on this court's decision in *State v. Hankins*, 304 Kan. 226, 372 P.3d 1124 (2016), which it considered controlling.

Standard of Review

The issue we face generates questions of jurisdiction, statutory interpretation, and the legality of a sentence. These are legal questions subject to de novo review. See *State v. Johnson*, 317 Kan. 458, 461, 531 P.3d 1208 (2023) (statutory interpretation and the legality of a sentence are legal issues subject to unlimited review); *State v. Hall*, 298 Kan. 978, 982-83, 319 P.3d 506 (2014) (jurisdiction questions are legal questions subject to de novo review).

Discussion

Once a district court sentences a defendant, it loses jurisdiction to modify that sentence unless it is illegal or "to correct arithmetic or clerical errors." *State v. Johnson*, 309 Kan. 992, 996, 441 P.3d 1036 (2019); *State v. Lehman*, 308 Kan. 1089, 1093, 427 P.3d 840 (2018) ("An illegal sentence may be corrected" at any time "regardless of whether one or more parties may have had a hand in arriving at the illegality."); K.S.A. 21-6820(i) (district court retains authority to correct illegal sentence even postsentencing). Both parties agree this case thus turns on whether Lamia-Beck's 154-month sentence was illegal.

An "illegal sentence" is one that is "imposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced." K.S.A. 22-3504(c)(1). The district court here had jurisdiction to impose the original sentence, and the sentence was not ambiguous. Thus, Lamia-Beck's sentence was illegal only if it did not conform to the applicable statutory provision in character or punishment.

This court has held that ""applicable statutory provision' in K.S.A. 2022 Supp. 22-3504(c)(1) is limited to those statutory provisions that define the crime, assign the category of punishment,

or involve the criminal history classification axis." *Johnson*, 317 Kan. at 461-62.

The relevant statutory provisions here are the following: K.S.A. 21-6815, which provides that a sentencing court "shall" impose the presumptive sentence unless reasons exist for a departure; K.S.A. 21-6803(q), which defines the presumptive sentence as the sentence "provided in a grid block for an offender classified in that grid block;" K.S.A. 21-6804(a), which holds Lamia-Beck's grid block and describes a presumptive sentencing range for him of 147-165 months; and K.S.A. 21-6804(e)(1), which gives the sentencing court authority to select a number anywhere within the presumptive sentence range in that grid block but recommends it choose the middle number for usual cases and the upper and lower for mitigating or aggravating circumstances.

The parties disagree on what it means to "conform" to these provisions. The State argues that, under *Hankins*, a sentence does not conform to these provisions when the court generates the sentence from an incorrect grid block. The Court of Appeals agreed. Lamia-Beck contends the sentence's genesis does not matter and that it conforms so long as the resulting number falls anywhere within the range in the offender's grid block.

Hankins supports the State's position. There, the court determined the defendant's presumptive sentencing range was 68 to 77 months based on a criminal history score of "G." From this range, the court sentenced Hankins to 68 months' imprisonment. Hankins appealed the sentence, arguing it was illegal because the court had incorrectly calculated his criminal history score. With a correct criminal history score, Hankins argued, his presumptive sentencing range was 61-71 months. The State argued that even if that was true, Hankins' sentence of 68 months could not be illegal because it still fell within the alleged correct sentencing range.

This court agreed the sentencing court had incorrectly scored Hankins' criminal history. It then rejected the State's argument that the sentence was nonetheless legal because it would still be within the correct sentencing range. It reasoned:

"[T]he KSGA defines 'presumptive sentence' as 'the sentence provided in a grid block for an offender *classified in that grid block* by the combined effect of the crime severity ranking of the current crime of conviction and the offender's criminal history.' (Emphasis added.) K.S.A. 21-4703(q). The judge did not select the

68-month sentence from within the grid block for which Hankins was classified, negating its status as a presumptive sentence, i.e., a sentence that conforms to the statutory provision." *Hankins*, 304 Kan. at 238.

The court then explained that the statute was also out of conformity with K.S.A. 2010 Supp. 21-4704(e)(1), now codified at K.S.A. 21-6804(e)(1).

"Moreover, a sentencing judge is to select the middle number in the grid block in the usual case and 'reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure.' K.S.A. 2010 Supp. 21-4704(e)(1). Consequently, the fact that the mitigated sentence imposed from the incorrect grid block is less than the potential aggravated sentence from the correct grid block does not legalize an otherwise illegal sentence." *Hankins*, 304 Kan. at 238.

Hankins is sound. To "conform" to applicable statutory provisions, a sentence must "be in accord or agreement" with those provisions. Webster's New World College Dictionary 313 (5th ed. 2018). K.S.A. 21-6815 directs the district court to impose the "presumptive sentence" unless the circumstances warrant a departure. A presumptive sentence is "the sentence provided in a grid block for an offender classified in that grid block . . . ." K.S.A. 21-6803(q). When a sentence comes from a different grid block, it is not in accord with these provisions.

Lamia-Beck insists this is incorrect because the raw number of a sentence is the only thing that matters, and so long as that number can be found in the correct grid block, it conforms to the applicable statutory provision.

We disagree. Because a grid block provides a range of sentences, it does not dictate the exact sentence a court must impose. Instead, K.S.A. 21-6804(e)(1) directs the district court to use its discretion to select a sentence from within the provided range. It recommends a sentencing court use the middle range sentence only in the "usual case" and turn to the upper and lower numbers in the case of aggravating and mitigating factors. K.S.A. 21-6804(e)(1). Thus, a sentence is more than a raw number; it is a number resulting from the exercise of the district court's discretion within the confines of a dictated range. This is why a sentence is presumptive only if it is drawn from the correct range. Otherwise, the district court has not appropriately exercised its discretion in

conformity with the relevant statutory provisions. Thus, under the Revised Kansas Sentencing Guidelines Act, K.S.A. 21-6801 et seq., when a sentence is drawn from an incorrect sentencing grid block, it is presumptively illegal.

We affirm the principles announced in *Hankins*. As in *Hankins*, the sentencing court here drew Lamia-Beck's sentence from an incorrect grid block, thus "negating its status as a presumptive sentence" and making it presumptively illegal. *Hankins*, 304 Kan. at 238. No other statutory provisions legalized this sentence, so the district court was correct when it held it had jurisdiction to resentence Lamia-Beck to a legal sentence. The Court of Appeals was correct when it agreed.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

No. 127,196

In the Matter of CARL F.A. MAUGHAN, *Respondent*.

(549 P.3d 1134)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding— One-year Suspension.*

Original proceeding in discipline. Oral argument held May 10, 2024. Opinion filed June 14, 2024. One-year suspension.

Alice L. Walker, Deputy Disciplinary Administrator, argued the cause, and *Gayle B. Larkin*, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

No appearance by respondent.

PER CURIAM: This is an original attorney discipline proceeding against the respondent, Carl F.A. Maughan, of Wichita, an attorney admitted to practice law in Kansas in September 1997.

On October 6, 2023, the Office of the Disciplinary Administrator (ODA) filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). On that same day, the ODA filed a notice of hearing advising the respondent that a hearing on the formal complaint was scheduled for December 7, 2023.

On October 27, 2023, the respondent filed an answer to the formal complaint. On November 23, 2023, the respondent filed a proposed probation plan.

On December 7, 2023, a panel of the Kansas Board for Discipline of Attorneys held the hearing on the formal complaint. The respondent appeared pro se. At the beginning of the hearing, the parties informed the panel of their stipulation to the facts alleged in the complaint and that, based on those facts, the respondent's conduct violated KRPC 1.7 (2023 Kan. S. Ct. R. at 342) (shall not represent a client if the representation involves a concurrent conflict of interest), KRPC 1.8 (2023 Kan. S. Ct. R. at 350) (shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to client), KRPC 1.15 (2023 Kan. S. Ct. R. at 372) (shall

hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property), and KRPC 8.4(d) (2023 Kan. S. Ct. R. at 433) (engage in conduct that is prejudicial to the administration of justice). As a result of the stipulation, the panel received evidence to consider aggravating and mitigating factors to assist in making recommendations for discipline. The panel set forth its findings of fact and conclusions of law, along with its recommendation on disposition, in a final hearing report, the relevant portions of which are set forth below.

"*Findings of Fact*

. . . .

"*2016-CR-001428 Criminal Case*

"10. On May 6, 2016, a vehicle occupied by B.B. and T.A. struck another vehicle, killing two occupants and seriously injuring the other occupants. B.B. was charged in Sedgwick County District Court criminal case number 2016-CR-001428 with two counts of involuntary manslaughter, severity level four felonies; three counts of aggravated battery, severity level five felonies; one count of aggravated battery, a severity level eight felony; and one count of driving while license is suspended, a class B nonperson misdemeanor.

"11. T.A. was injured in the crash and identified as a victim in the criminal complaint.

"12. After the May 6, 2016, crash, T.A. and her husband, G.A., contacted the respondent and offered to pay the respondent to represent B.B. in 2016-CR-001428.

"13. The respondent agreed to represent B.B., and G.A. paid the respondent a flat fee of $30,000.00. The respondent deposited the payment directly into his operating account, not his trust account.

"14. When the respondent's representation of B.B. began in May 2016, the respondent also represented T.A. On April 11, 2016, T.A. hired the respondent to represent her in a Sedgwick County traffic case. That representation concluded on February 16, 2017. The respondent had also represented T.A. in previous criminal cases.

"15. On May 20, 2016, a first appearance was held in the 2016-CR-001428 matter. Sean Hatfield, an associate with the respondent's firm at the time, observed the first appearance but did not enter his appearance.

"16. On May 23, 2016, the respondent and Mr. Hatfield were listed in the court's records as attorneys for B.B. in the criminal matter. That same day, Mr. Hatfield entered an appearance on B.B.'s behalf. The respondent filed an entry of appearance on B.B.'s behalf on September 20, 2016. Although the respondent's entry of appearance was filed much later, he was the attorney who primarily handled the representation of B.B. from May 2016 forward.

"17. On October 5, 2016, a preliminary hearing was held. At the beginning of the hearing, the State notified the district court that at the conclusion of the presentation of evidence, the State planned to ask the court to bind B.B. over on the crimes charged, and, if the evidence established probable cause, two alternative counts of second-degree reckless murder, severity level two person felonies.

"18. T.A. testified for the State during the preliminary hearing, identifying B.B. as the driver of the vehicle that caused the crash.

"19. During the preliminary hearing, the respondent argued that the State's charges against B.B. should be dismissed because T.A. was driving the vehicle when the crash occurred.

"20. The district court authorized the State to file the new second-degree reckless murder charges, found probable cause, and ultimately set the case for trial.

"21. On May 5, 2017, a motion hearing was held, during which the respondent disclosed to the district court his previous representation of T.A. The respondent said that he had signed waivers from both T.A. and B.B. The court encouraged the respondent to file the waivers; however, the respondent did not do so.

"22. During the motion hearing, the respondent moved to suppress T.A.'s testimony. The respondent stated, '[e]ven through [*sic*] I have a written waiver and I don't represent her—I have represented her in the past. I felt sort of residual, needed [*sic*] to kind of protect her.' The motion to suppress was denied.

"23. During the disciplinary hearing, the respondent testified that T.A. was in the courtroom when he made that statement to the district court. The respondent testified that he made the above statement during the motion hearing to send a signal and to encourage T.A. to seek counsel for advice on asserting her Fifth Amendment right not to testify in the proceeding. The respondent said he believed it would be to both B.B.'s and T.A.'s benefit if T.A.'s testimony was suppressed.

"24. T.A. did ultimately testify during the jury trial. The respondent said during the disciplinary hearing that he thoroughly cross-examined T.A. and did not hold back during cross-examination because T.A. was a former client.

"25. B.B. testified at the jury trial that he had pulled the vehicle over and moved to the backseat of the car prior to the crash. B.B. further testified that while he was in the backseat, he felt the car accelerate and assumed T.A. had

moved into the driver's seat.

"26. B.B. was found guilty of all counts and sentenced to 728 months in prison and 6 months in jail.

"27. B.B. appealed the conviction. During the appeal, B.B. moved to stay appellate briefing and remand the matter to the district court for a *Van Cleave* hearing to determine if the respondent provided ineffective representation based on the conflict of interest. The Court of Appeals granted the motion.

"*Van Cleave Proceeding and Client Waivers*

"28. The *Van Cleave* hearing was held on June 13, 2019. The issue of client waivers came up during the *Van Cleave* hearing.

"29. During the disciplinary investigation, the respondent provided his computer file for the B.B. case to the disciplinary administrator's office. A document titled '2017_01_25_waiver of conflict_[B.B.]' was found in the respondent's file. This document was a waiver signed b[y] T.A. on September 21, 2026, which stated:

'I, [T.A.], am a former client of the Maughan law group and a potential witness in the above captioned case. I am aware that the above named defendant is being represented by the Maughan Law Group. I am aware that this creates a potential for a conflict of interests and have been fully apprised of the nature of the potential conflict of interest. Specifically, I have been advised that if I cam [*sic*] called as a witness in the above captioned case the Maughan Law Group will have an obligation to represent the best interests of the defendant and that the interests of the defendant in this case may conflict with my personal interests. Being fully aware of the nature of this conflict and having been advised that I have a right to seek independent counsel for advice on this matter, I hereby waive any potential conflict of interest arising from the Maughan Law Group's representation of [B.B.] and me.'

"30. In his file, the respondent also had a draft document titled '2016_05_23_Client Consent to 3rd Party Payment,' which included B.B[.]'s name and reference to the 2016-CR-001428 case. This document was unsigned.

"31. Further, there was a draft in the respondent's file titled '2016_05_23_new engagement letter FLAT FEE_1,' which included B.B.'s name and reference to the 2016-CR-001428 case. This document was also unsigned.

"32. The engagement letter stated that the flat fee of $30,000.00 was considered a minimum fee and was earned immediately upon undertaking the representation. The letter further advised B.B. that G.A. and T.A. had agreed to pay the $30,000.00 retainer on B.B.'s behalf.

"33. Finally, there was a draft document titled '2016_05_23+Third party fee agreement ltr,' which included G.A. and T.A.'s names and referenced B.B. and the 2016-CR-001428 case. This document was not signed.

"34. In his response to the initial complaint, the respondent described his defense strategy and acknowledged that it created a conflict of interest between his representation of B.B. and T.A. The respondent described the defense strategy as:

'[T]he only alternative explanation was to suggest that [T.A.] May [*sic*] have been driving. Such a suggestion is inherently adverse to [T.A.]. It is also adverse to [T.A.] as it would require, the use of my past representation of her (specifically on prior DUI and other traffic cases) in order to help bolster the defense and suggest to the jury that the theory was plausible enough to create reasonable doubt.'

"35. The respondent further stated, 'I clearly believed, and acted, as if the waiver freed me from loyalty to [T.A.] and thereby allowed me to zealously, diligently and competently represent [B.B.].' Also, 'the prior representation of [T.A.] afforded me a knowledge of her history and record which others may not have had. This allowed me to be more aggressive on cross examination.'

"36. Moreover, the respondent said that 'the waiver I had from [T.A.] allowed me to discard any prior duty of loyalty which may have prevented me from zealous representation of [B.B.] and therefore alleviated any taint of adversity the prior representation may have had.'

"37. When asked about T.A.'s waiver during the *Van Cleave* hearing, the respondent was unable to remember what day T.A. signed the waiver. However, the respondent testified, 'I don't recall exactly when it was done. I know that it was done. I had the signed waiver, and I was not going to be proceeding in any substantive manner without it.'

"38. In the respondent's computer file for the B.B. [*sic*] there were also two draft documents titled '2016_0921_WAIVER OF CONFLICT [B.B.]' and '20170518 [B.B.] WAIVER OF CONFLICT.'

"39. The '2016_0921_WAIVER OF CONFLICT [B.B.]' draft included a case caption for the 2016-CR-001428 case in Sedgwick County District Court and stated:

'I, [B.B.], am being represented by the Maughan Law Group in the above captioned case. I am aware that a potential witness in this case, [T.A.], is a former client of the Maughan law group. I am aware that this creates a potential for a conflict of interests and have been fully apprised of the nature of the potential conflict of interests. Specifically, I am aware that Maughan Law Group has a certain obligation of loyalty to their clients and their former clients. If [*sic*] [T.A.'s] interests and my own interests may be in conflict. Being fully aware of the nature of this conflict and having been advised that I have a right to seek independent counsel for advice on this matter, I hereby waive any potential conflict of interest arising from the Maughan Law Group's representation of [T.A.] and me.'

"40. The '20170518 [B.B.] WAIVER OF CONFLICT' draft included a case caption for the 2016-CR-001428 case in Sedgwick County District Court and stated:

'I, [B.B.], am a client of the Maughan law group and the defendant in the above captioned case. I am aware that the a [*sic*] key witness, [T.A.], is a long time former client of Carl Maughan and the Maughan Law Group. I am aware that this creates a potential for a conflict of interests and have been fully apprised of the nature of the potential conflict of interest. Specifically, I have been advised that [T.A.'s] status as a client generally creates an obligation of loyalty to her on the part of the lawyers of the Maughan Law Group. It is my understanding that [T.A.] waived any conflict of interest that may arise as a result of Maughan Law Group's representation of me and I am satisfied that the attorneys of the Maughan Law Group have been released from their duty of loyalty to [T.A.]. Nevertheless an appearance of a conflict of interest exists[.] Being fully aware of the nature of this conflict and having been advised that I have a right to seek independent counsel for advice on this matter[,] I hereby waive any potential conflict of interest arising from the Maughan Law Group's prior representation of [T.A.] and their current representation of me in this matter.'

"41. Neither of the drafts were signed by B.B. The respondent did not have any waiver signed by B.B. in his file.

"42. The respondent testified during the disciplinary hearing that he knew that he had written waivers for both T.A. and B.B., but did not know why a signed waiver for B.B. was not in his file.

"43. The respondent testified similarly during the *Van Cleave* hearing. Further, during that hearing, the respondent testified that:

'It was discussed multiple times, because I know it was even brought up in the midst of trial when [T.A.] took the stand, and I believe also at the prelim where I wanted her to be on the record as to what the relationship between [T.A.] and I was and that we had a signed waiver from both parties, but, yeah, my recollection is that we had this discussion about a waiver of conflict several times throughout the case.'

"44. When asked during the *Van Cleave* hearing about the respondent's discussion with B.B. about a conflict of interest, B.B. testified that the respondent 'just mentioned that since he represented [T.A.] before numerous times that there might be a conflict, but he was going to talk to the judge about it and see what would transpire after that.'

"45. B.B. further said that the respondent used the words 'conflict of interest' in a meeting but never really elaborated on it. B.B. said he did not 'understand what a conflict of interest was.'

"46. When asked during the *Van Cleave* hearing why the respondent did not file the waivers he said he had with the district court in May 2017 when the court directed him to do so, the respondent testified, 'I guess I have no real excuse, other than I was a single attorney working a murder case on my own and there are lots of the movie [*sic*] parts, and I simply didn't get around to actually complying with the Court's order.'

"47. On July 14, 2020, the district court heard oral arguments and ruled that B.B. and T.A. both freely, knowingly, and voluntarily waived the conflict after being adequately informed of the conflict of interest. Further, the district court held that B.B. and T.A. both waived the respondent's conflict both orally and in writing. The court found

that the respondent obtained conflict waivers from both B.B. and T.A. consistent with the Kansas Rules of Professional Conduct.

"48. Further, the district court ruled that the fee charged for B.B.'s representation and paid by T.A. and G.A. was not unreasonable and did not create a conflict of interest.

"49. The respondent testified during the disciplinary hearing that he would not have moved forward with any substantive representation of B.B. without a signed waiver from both T.A. and B.B. The respondent further said that he may have shredded the paper copy of B.B.'s signed waiver before saving it.

"50. The respondent further testified that in 2016 and 2017, he experienced several professional and personal issues that impacted his ability to practice law. In mid-2016, the respondent's longtime assistant left for another job. After that, the respondent employed several part time assistants, but those assistants were not familiar with his scanning and filing procedures for client files. The respondent suspected that some of the waivers may not have been saved because his typical filing process was interrupted by staffing changes during this time.

"51. In addition, in early 2017, the sole other attorney at the respondent's firm, an associate, left the practice for other employment. This left the respondent as the sole attorney at his firm.

"52. Also, in 2016 the respondent's wife was deployed as part of her army reserve unit, leaving the respondent to care for their two children on his own. The respondent had also filed to run for a district court judge position around that time, was in the process of having a new house built, was moving to the new residence, and had just been asked by the State Board for Indigent Defense Services to handle criminal defense appeals that the state appellate defender office was unable to take. The respondent testified that he did not understand the volume [of] work the Board intended to send him, which wound up being approximately 200 appellate cases. The respondent said that he and his associate were filing approximately two briefs per week in 2016 and that year was the busiest time of the respondent's professional life.

"53. The respondent testified that during his representation of B.B. he was barely coping with everything and was likely dealing with depression.

"*Van Cleave Appeal*

"54. On December 10, 2021, the Court of Appeals reversed the district court's *Van Cleave* ruling and remanded the matter for a new trial. In its unpublished memorandum opinion, the Court of Appeals held that: 'While [T.A.] was not a codefendant, Maughan acted like she should become one. Maughan presented a theory of defense which directly inculpated his former and current client, thereby making his representation of [B.B.] directly adverse to [T.A.]. See KRPC 1.7(a)(1).'

"55. Further, the Court of Appeals held, 'We also cannot say the predicament Maughan entered did not objectively create a substantial risk that his representation of [B.B.] would be materially limited by his responsibilities to [T.A.]. See KRPC1.7(a)(2).'

"56. The Court of Appeals further held that B.B.'s written waiver was insufficient on its face and that:

'[B.B.] did not waive his right to a conflict-free attorney. [Citation omitted.] Based on the record before us, we cannot find [B.B.] was informed and aware of the risks associated with Maughan's representation, nor can we find [T.A.'s] waiver sufficiently freed Maughan to provide conflict-free representation to [B.B.].'

"57. The Court of Appeals held that the district court's finding that the respondent's representation of B.B. was not adversely affected by the conflict was not supported by substantial competent evidence.

"58. The Court of Appeals also held that the district court erred in finding that the respondent's flat-fee structure did not create a conflict.

'The failure of either written waiver to mention the fee arrangement is significant because, under KRPC 1.8 (2021 Kan. S. Ct. R. 345), [B.B.] had to waive the conflict created by [T.A] and [G.A.'s] payment of his legal fees in writing. While the *Van Cleave* court analyzed the fee agreement under KRPC 1.5 (finding it to be reasonable), KRPC 1.8 is also implicated.'

"59. The Court of Appeals ultimately concluded: 'Because we find Maughan had an actual conflict of interest (which [B.B.] did not waive) that adversely affected Maughan's representation, [B.B.'s] convictions must be reversed, and we remand for a new trial with different counsel.'

"60. During the disciplinary hearing, the Sedgwick County prosecutor who handled B.B.'s case, Aaron Breitenbach, testified that after the Court of Appeals remanded the case, the matter was set back to square one. The case was scheduled for preliminary hearing the day following the disciplinary hearing, December 8, 2023.

"61. The individuals in the vehicle that B.B. and T.A.'s vehicle crashed into were two employees of a business that assists with development and independence of adults with intellectual disabilities as well as three individuals who were clients of the company being transported by the employees. The media covered the case closely.

"62. Mr. Breitenbach testified that family members of both deceased victims attended a number of the original pretrial hearings, were present for the original trial, and were engaged throughout the process. There was also some engagement by the two employee victims and the family of the remaining surviving victim. Several of these victims and family members are now reengaged in the process and will appear again for the remanded proceeding.

"63. Mr. Breitenbach also testified that the district attorney's office has had some difficulty locating some of the witnesses now since more than seven years have passed since the crash. Because some witnesses have been difficult to locate, concern over how a jury will evaluate the case under these circumstances, and not wanting to place undue stress on the victims and families of the deceased victims, the district attorney's office is considering a plea agreement that would involve lower charges and/or less time in custody than was originally considered.

"64. Mr. Breitenbach said that B.B. has remained in custody from his arrest in May 2016 to present. B.B. was transferred to KDOC custody after sentencing in the original proceeding but was brought back to the Sedgwick County Jail after the remand in May 2022. Mr. Breitenbach testified that the county jail is used more as a short-term placement so that defendants can be close to the court their case is being handled in and that KDOC is a long-term placement with more programs and opportunities for rehabilitation for inmates.

"*Conclusions of Law*

"65. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.7 (conflict of interest: current clients), 1.8 (conflict of interest: current clients: specific rules), 1.15 (safekeeping property), and 8.4(d) (misconduct prejudicial to the administration of justice), as detailed below.

"KRPC 1.7

"66. KRPC 1.7 provides:

'(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.'

'(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.'

"67. The rules do not permit the respondent to represent clients with conflicting interests without taking certain steps. In this case, there was a conflict of interests between B.B. and T.A.

"68. Under KRPC 1.7(a)(2), the respondent had certain responsibilities to T.A. as a current and former client. Under KRPC 1.6 and KRPC 1.9(c), the respondent was prohibited from using information relating to his prior representation of T.A. to T.A.'s disadvantage or to reveal information relating to his representation of T.A. While the respondent claimed that he had no duty of loyalty to T.A. after she signed the waiver, the fact remained that he still had obligations to T.A. as a current and former client.

"69. A lawyer is prohibited from representing a client when there is a concurrent conflict of interest unless 'each affected client gives informed consent, confirmed in writing.' KRPC 1.7(b)(4). "'Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of any reasonably available alternatives to the proposed course of conduct.' KRPC 1.0(f). "'Confirmed in writing" when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.' KRPC 1.0(b).

"70. While the respondent claimed that the waiver T.A. signed absolved him of all obligations to T.A., there is no evidence that the respondent's responsibilities to T.A. were waivable or, if they were, that T.A. was properly informed of what information the respondent knew from his representation of her that could be used to her disadvantage. The written waiver itself did not specify the risks or reasonable alternatives associated with the proposed representation of B.B. Notably, the respondent said that T.A. should consult with an attorney about her rights under the Fifth Amendment when it came to her testimony in B.B.'s trial, because the respondent recognized that T.A. faced risks of her own in the case.

"71. Further, there is a lack of evidence that B.B. was properly informed of the conflict between the respondent's obligations to T.A. and his representation of B.B. The respondent was unable to produce a written waiver signed by B.B. But, more importantly, the draft waivers in the respondent's file do not adequately address the conflict and there was no other evidence that B.B. was properly informed of the conflict, the risks associated with [t]he conflict, or any reasonable alternatives.

"72. The hearing panel agrees with the Court of Appeals' application of KRPC 1.7 to the respondent's representation of B.B[.], including its holding that the respondent had a conflict that was not properly waived by B.B. The hearing panel additionally concludes that the respondent had a conflict that was not properly waived by T.A.

"73. The respondent stipulated that he violated KRPC 1.7.

"74. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.7.

"KRPC 1.8

"75. KRPC 1.8(f) permits a lawyer to accept compensation for representing a client from one other than the client only under certain circumstances:

'(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.'

"76. 'If . . . the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7.' KRPC 1.8, Cmt. 12. 'Under Rule 1.7(b), the informed consent must be confirmed in writing.' KRPC 1.8, Cmt. 12.

"77. In a letter to B.B. dated May 23, 2016, the respondent discussed payment of $30,000.00 by G.A. and T.A. for his representation of B.B. The letter was not signed by B.B., but even if it was, nothing in the letter informed B.B. of the risks and reasonable alternatives associated with the respondent's acceptance of the flat fee payment from G.A. and T.A. to represent B.B. The letter made no mention of T.A.'s involvement as a witness in the case, T.A.'s having been in the vehicle with B.B., or the defense strategy to argue that T.A. was driving when the crash occurred.

"78. B.B. was not properly informed of the nature of the conflict that payment of the $30,000.00 flat fee by G.A. and T.A. posed and did not provide informed consent to the payment arrangement, confirmed in writing, as required under Rule 1.8.

"79. Further, the respondent stipulated that he violated KRPC 1.8.

"80. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.8.

"KRPC 1.15(a)

"81. Lawyers must properly safeguard their clients' property. KRPC 1.15(a) specifically provides, in part, that:

'(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas.'

"82. In this case, the respondent failed to properly safeguard the $30,000.00 flat fee paid for B.B.'s representation by depositing it into his operating account instead of his trust account.

"83. The respondent testified that, while he has since learned that this is not permitted under the rules, he considered the $30,000.00 earned upon receipt. However, review of *In re Thurston* clarifies that the KRPC do not permit this:

'A lawyer may charge a flat fee to a client for a specific task to be undertaken. When the flat fee is paid to the lawyer, it must be deposited into the lawyer's trust account and the fee cannot be withdrawn until it is earned. Since a flat fee is not earned until completion of the task, the entire flat fee must remain in the lawyer's trust account until that task is completed unless the lawyer and client

otherwise agree to partial withdrawals based upon the amount earned for completion of specified subtasks.' *In re Thurston*, 304 Kan. 146, [149], 371 P.3d 879 (2016).

"84. The respondent had not yet earned the fee when he deposited these funds into his operating account and commingled them with his own funds.

"85. Further, the respondent stipulated that he violated KRPC 1.15.

"86. Accordingly, the hearing panel concludes that the respondent failed to properly safeguard the $30,000.00 flat fee paid by G.A. and T.A. for B.B.'s representation, in violation of KRPC 1.15.

"KRPC 8.4(d)

"87. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d).

"88. The respondent engaged in conduct that was prejudicial to the administration of justice when he undertook the representation of B.B., at the same time he represented T.A. in another matter, and accepted payment for that representation from G.A. and T.A. without ensuring all parties were properly informed of the risks and alternatives to the arrangement.

"89. As a result of the respondent's conduct, not only must a second trial be held, but the case reverted back to the beginning of the respondent's representation of B.B., with a second preliminary hearing occurring the day after this disciplinary hearing was held. Mr. Breitenbach testified that this placed an undue burden on resources of the criminal justice system, the State's witnesses, and the victims and their families.

"90. The respondent stipulated that he violated KRPC 8.4(d).

"91. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(d).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

"92. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

"93. *Duty Violated*. The respondent violated his duty to his clients B.B. and T.A., to the legal profession, and to the legal system.

"94. *Mental State*. The respondent knowingly violated his duty.

"95. *Injury*. As a result of the respondent's misconduct, the respondent caused injury to the legal system and the legal profession by casting doubt on his representation of B.B. to the extent that B.B.'s case had to be retried. This injured B.B., by having to endure a new trial, as well as all of the witnesses and victims who will have to go through the process for a second time. B.B. was further injured by the uncertainty over whether his counsel represented conflicting interests. Further, B.B. has spent an extended time in custody with the uncertainty of how his case will resolve and in a facility that offers fewer opportunities to inmates than he otherwise would have been placed. T.A. was also injured through the respondent's use of information learned during his representation of T.A. in his questioning of her and his attempt to show that T.A. was the driver of the vehicle that caused the crash.

"96. In addition to the above-cited factors in Standard 3, the hearing panel has thoroughly examined and considered the following Standards:

'4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.'

'4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.'

'4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.'

'7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.'

'7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.'

"Aggravating and Mitigating Factors

"97. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

"98. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on two occasions. On April 18, 2007, the respondent was placed on diversion for violation of KRPC 1.3 (diligence). On December 29, 2010, the respondent was placed on diversion for violation of KRPC 3.1. The respondent successfully completed both diversions, and those matters were dismissed.

"99. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.7 (conflict of interest: current clients), 1.8 (conflict of interest: current clients: specific rules), 1.15 (safekeeping property), and 8.4(d) (misconduct prejudicial to the administration of justice). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"100. *Vulnerability of Victim*. As the defendant in a criminal case being held in custody, B.B. was vulnerable to the respondent's misconduct. B.B. had applied for representation by the public defender's office, but said that an attorney from that office never showed up. The respondent did, however, show up at the jail and said he would represent B.B. With what probably appeared as limited options for counsel, B.B. preferred to have retained counsel represent him. Further, the victims and families of the victims in the criminal matter were vulnerable to the respondent's misconduct. It has led to their having to participate in the criminal process for a second time in the same case.

"101. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1997. At the time of the misconduct, the respondent has been practicing law for approximately 19 years. The hearing panel concludes that the respondent had substantial experience in the practice of law when the misconduct occurred.

"102. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present:

"103. *Absence of a Dishonest or Selfish Motive*. The respondent's misconduct does not appear to have been motivated by dishonesty or selfishness.

"104. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. The respondent was dealing with multiple professional and personal struggles that contributed to his misconduct. The respondent had lost his longtime legal assistant and eventually his only associate attorney, leaving him as a solo practitioner by the time of trial. Further, the respondent's case load was significantly increased due to his agreeing to accept around 200 appeal matters from the State Board of Indigent Defense services. Further, the respondent's wife was deployed overseas for one year during this time, leaving him to care for their two children on his own. At this same time the respondent was also running for a district judge position, building a new house, and moving his belongings to his family's new residence. The respondent testified that this was the busiest time of his professional career and he was barely coping during this time. It is clear the respondent's personal and professional struggles caused him to be less aware of his responsibilities under the KRPC and contributed to his misconduct.

"105. *Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct*. In his proposed probation plan, filed on November 23, 2023, the respondent offers to pay $1,500.00 to the Kansas Victim's Compensation fund. The respondent testified during the disciplinary hearing that he has not paid this yet. If payment to this or a similar organization is made, the hearing panel would consider this a mitigating factor.

"106. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The respondent fully cooperated with the disciplinary process. Additionally, the respondent admitted the facts that gave rise to the violations and stipulated during the disciplinary hearing that he violated KRPC 1.7, 1.8, 1.15, and 8.4(d). The hearing panel concludes that this is a mitigating factor.

"107. *Remorse*. At the hearing on this matter, the respondent expressed genuine remorse for having engaged in the misconduct. The respondent understood that his conduct violated the rules and had a negative impact on the criminal case overall. The hearing panel concludes this is a mitigating factor.

"108. *Remoteness of Prior Offenses.* The misconduct which gave rise to the respondent's two prior diversions in 2007 and 2010 is remote in time and character to the misconduct in this case. The hearing panel concludes this is a mitigating factor.

"109. *Adjustments to the Respondent's Professional Career*. The respondent has adjusted his professional career from one where he was at higher risk for the type of misconduct involved in this case to working for a single employer. The hearing panel considers this as evidence that the respondent has carefully considered and is aware of the circumstances that contributed to his misconduct and has adjusted his work in an attempt to ensure it does not happen again. The hearing panel concludes this is a mitigating factor.

"110. *Recognition of conflict of interests*. While the respondent did not properly address the conflict of interests involved in representing B.B., the respondent was, at least, aware that they may be an issue. Further, the respondent brought it up with the district court with the district attorney's office, B.B., and T.A. present in court in order to make all parties aware the conflict existed. The district court did not find that the conflict prevented the respondent from representing B.B., but directed the respondent to file copies of the written waivers with the court. While his attempt to address the conflict was not ultimately effective, the hearing panel considers this a mitigating factor.

"*Recommendation of the Parties*

"111. The disciplinary administrator recommended that the respondent be suspended for a period of six months, with the suspension being stayed while the respondent is placed on probation for 12 months under the terms of the respondent's proposed probation plan, filed November 23, 2023.

"112. The respondent recommended that he be placed on probation for 12 months under the terms of the respondent's proposed probation plan, filed November 23, 2023.

"*Discussion*

"113. When a respondent requests probation, the hearing panel is required to consider Rule 227, which provides:

'(d) Restrictions on Recommendation of Probation. A hearing panel may not recommend that the respondent be placed on probation unless the following requirements are met:

(1) the respondent complies with subsections (a) and (c) and the proposed probation plan satisfies the requirements in subsection (b);

(2) the misconduct can be corrected by probation; and

(3) placing the respondent on probation is in the best interests of the legal profession and the public.'

"114. The respondent developed a workable, substantial, and detailed plan of probation. The respondent provided a copy of the proposed plan of probation to the disciplinary administrator and each member of the hearing panel at least 14 days prior to the hearing on the formal complaint. The respondent put the proposed plan of probation into effect prior to the hearing on the formal complaint by complying with each of the terms and conditions of the probation plan. The misconduct, in this case, can be corrected by probation. Placing the respondent on probation is in the best interests of the legal profession and the citizens of the State of Kansas.

"115. While the hearing panel concludes that the probation plan is adequate to meet the requirements of Rule 227, the haring [*sic*] panel further recommends that the respondent be required under the plan to enter into a monitoring agreement with KALAP and follow all recommendations of KALAP under that agreement. The respondent testified that his mental health has suffered during the time of the misconduct, which may continue to the present. The hearing panel recommends that the respondent work with KALAP to address those concerns.

"116. Further, the hearing panel recommends that it be a condition of his probation that the respondent notify both his probation supervisor and the disciplinary administrator's office within 14 days if during the term of probation he no longer works for a single employer and returns to the private practice of law.

"*Recommendation of the Hearing Panel*

"117. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of six (6) months. The hearing panel further recommends that the suspension be stayed and the respondent be placed on probation for a period of twelve (12) months according to the terms of the respondent's proposed probation plan, adding the suggestions of the hearing panel regarding KALAP monitoring and reporting to his supervisor and the disciplinary administrator's office if the respondent returns to private practice.

"118. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

In a disciplinary proceeding, this court considers the evidence, the panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020); see Supreme Court Rule 226(a)(1)(A) (2024 Kan. S. Ct. R. at 279). "'Clear and convincing evidence is "evidence that causes the factfinder to believe that 'the truth of the facts asserted is highly probable.'"'" 312 Kan. at 218.

The respondent was given adequate notice of the formal complaint, to which he filed an answer. The respondent filed no exceptions and, in fact, stipulated to the underlying facts supporting the alleged violations. Therefore, the panel's factual findings are considered admitted. Supreme Court Rule 228(g)(1), (2) (2024 Kan. S. Ct. R. at 281-82).

The respondent also stipulated to the alleged violations, but even if he had not, the evidence before the hearing panel clearly established the charged misconduct violated KRPC 1.7 (2024 Kan. S. Ct. R. at 339) (shall not represent a client if the representation involves a concurrent conflict of interest), KRPC 1.8 (2024 Kan. S. Ct. R. at 347) (shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client), KRPC 1.15 (2024 Kan. S. Ct. R. at 372) (shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property), and KRPC 8.4(d) (2024 Kan. S. Ct. R. at 430) (engage in conduct that is prejudicial to the administration of justice).

After the hearing panel issued its report, the Clerk of the Appellate Courts set the case for oral argument under Rule 228(i) (2024 Kan. S. Ct. R. at 286). The Clerk of the Appellate Courts filed an affidavit on May 15, 2024, providing the following information. On March 27, 2024, the Clerk sent to the respondent's registered address, by regular and certified mail, a copy of the 2024 May docket of the Kansas Supreme Court scheduling the respondent's case for oral argument on Friday, May 10, 2024, at 10:30

a.m. See Rule 206(n) (2024 Kan. S. Ct. R. at 258) (requiring attorneys register contact information including residential and business addresses). The Clerk received a return receipt bearing the signature of Katy Beedles confirming the certified mail was delivered. On April 15, 2024, the Clerk sent to the respondent by regular and certified mail, return receipt requested, an appearance letter confirming the matter had been set on the Supreme Court's May 2024 docket and advising the respondent that he should be in the Supreme Court Courtroom no later than 10:15 a.m. on Friday, May 10, 2024. The address used for the mailing of the appearance letter was the same as the address used in the mailing of the docketing notice and notice of oral argument. As of the date of his affidavit, May 15, 2024, the Clerk had not received a return receipt from the mailing of the appearance letter.

The Clerk states in his affidavit that, at approximately 10:15 a.m. on the morning of May 10, 2024, the respondent called the Office of the Clerk of the Appellate Courts advising that he knew he was scheduled to appear on the 10:30 a.m. docket but was having car trouble an hour away from Topeka. The respondent ultimately failed to appear for the argument on May 10, 2024. The court determined it was appropriate to proceed without respondent's appearance, as respondent had actual notice of the charges pending against him, as evidenced by his stipulation to the underlying facts and the alleged violations, and actual notice of oral argument in his case scheduled for Friday, May 10, 2024, at 10:30 a.m., as evidenced by the return receipt of certified mail and the information provided by the respondent to the Clerk on the morning of the scheduled argument.

Given the respondent's stipulation to the underlying facts alleged and the resulting violations, the only issue left for us to resolve is the appropriate discipline. At the time of the hearing before the panel, the Disciplinary Administrator recommended the respondent be suspended for a period of 6 months, with the suspension being stayed while the respondent is placed on probation for 12 months under the terms of the respondent's proposed probation plan filed November 23, 2023. The respondent recommended he be placed on probation for 12 months under the terms of the respondent's proposed probation plan filed November 23,

2023. The hearing panel ultimately adopted the Disciplinary Administrator's recommendation with the additional suggestion of KALAP monitoring and the respondent reporting to his supervisor and the Disciplinary Administrator's office if the respondent returns to private practice.

At oral argument, however, the Deputy Disciplinary Administrator changed the Disciplinary Administrator's initial recommendation. Instead of a 6-month suspension stayed pending successful completion of a 12-month probation plan, the Deputy Disciplinary Administrator recommended a 1-year suspension with a required reinstatement hearing. In withdrawing the recommendation of probation and recommending an extended term of suspension with a reinstatement hearing, the Deputy Disciplinary Administrator highlighted the respondent's failure to comply with Supreme Court Rule 227(f)(2) (2024 Kan. S. Ct. R. at 281). This rule requires a respondent seeking probation to file with the Supreme Court and serve the Disciplinary Administrator—at least 14 days before oral argument—a copy of an affidavit describing the respondent's compliance with each condition of the respondent's proposed probation plan to date. We have reviewed the docket sheet in this matter and, as alleged, we find the respondent failed to file his affidavit certifying compliance with the terms of the proposed probation plan.

We have carefully considered the panel's factual findings and legal conclusions, to which the respondent stipulated. We also have considered the respondent's failure to comply with Supreme Court Rule 227(f)(2) (2024 Kan. S. Ct. R. at 281). In light of this evidence, as well as the ABA Standards for Imposing Lawyer Sanctions, we order the respondent's license be suspended for one year and that the respondent undergo a reinstatement hearing under Supreme Court Rule 232 (2024 Kan. S. Ct. R. at 290) before his petition for reinstatement will be considered by this court.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Carl F.A. Maughan is suspended for a period of one year from the practice of law in the state of Kansas, effective from the date this opinion is filed, with

the requirement that he undergo a reinstatement hearing under Supreme Court Rule 232 before his petition for reinstatement will be considered by this court.

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to the respondent and that this opinion be published in the official Kansas Reports.

In re Samsel

No. 127,197

In the Matter of MARK A. SAMSEL, *Respondent*.

(549 P.3d 1122)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Two-year Suspension Stayed.*

Original proceeding in discipline. Oral argument held May 8, 2024. Opinion filed June 14, 2024. Two-year suspension stayed, conditioned upon successful participation and completion of two-year probation period.

Matthew J. Vogelsberg, Chief Deputy Disciplinary Administrator, argued the cause, and *Amanda G. Voth*, Deputy Disciplinary Administrator, was on the formal complaint for the petitioner.

Mark A. Samsel, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Mark A. Samsel, of Wellsville. Samsel received his license to practice law in Kansas on September 24, 2010. Samsel is also a licensed attorney in Missouri, admitted in 2011.

On October 31, 2023, the Disciplinary Administrator's office filed a formal complaint against Samsel alleging violations of the Kansas Rules of Professional Conduct. The complaint stemmed from Samsel's behavior and actions as a substitute teacher for an art class at Wellsville High School and subsequent conduct during administrative proceedings regarding his substitute teaching license.

On December 7, 2023, the parties entered into a summary submission agreement under Supreme Court Rule 223(b) (2024 Kan. S. Ct. R. at 275) (summary submission is

"[a]n agreement between the disciplinary administrator and the respondent," which includes "a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken").

In the summary submission agreement, the Disciplinary Administrator and Samsel stipulate and agree that Samsel violated the following Kansas Rules of Professional Conduct (KRPC):

- KRPC 8.4(b) (2024 Kan. S. Ct. R. at 430) (misconduct—criminal act reflecting adversely on fitness);
- KRPC 8.4(e) (2024 Kan. S. Ct. R. at 430) (misconduct—ability to influence improperly); and
- KRPC 8.4(g) (2024 Kan. S. Ct. R. at 430) (misconduct—reflecting adversely on fitness to practice law).

FACTUAL AND PROCEDURAL BACKGROUND

We quote the relevant portions of the parties' summary submission below.

"Findings of Fact—Petitioner and Respondent stipulate and agree that Respondent engaged in the following misconduct:

. . . .

"DA 13,711

"3. On April 28, 2021, Respondent Mark Samsel substitute taught in art class at Wellsville High School. Respondent, then working as an attorney and state representative, had also obtained his emergency substitute teaching license on May 12, 2020.

"4. During fifth hour art class, Respondent started the class by playing music as the students entered the classroom and telling the students that he 'had the floor' unless someone else raised their hand and was recognized, and that it was going to be 'the most uncomfortable class of [their] life.' He then proceeded to do many things throughout the class period that made some students uncomfortable.

"5. Respondent talked about God, the devil, suicide, and mental health. He told the class that God was speaking through him. Some students later reported feeling uncomfortable, to the point that some of them left the room for a break.

"6. Respondent seemed focused on one student in particular: T.E. Respondent acknowledges this and states that he had known T.E. for many years. Respondent stated T.E. was disrupting the classroom without being recognized and repeatedly disregarded Respondent's requests, including to leave the classroom and calm down or go to the principal's office. At one point, Respondent grabbed T.E. from behind and lifted him up.

"7. During the class period, Respondent also pushed T.E. against the wall. T.E. reported this caused him to get a mark(s) on his back.

"8. Respondent also kicked or kneed T.E. in the groin area. T.E. laid on the ground after Respondent kicked him.

"9. Respondent asked T.E. if it hurt and told T.E. he could go to the nurse to have her check 'it' for him. Respondent also told D.W., a classmate, he could 'check [T.E.'s] nuts for him.'

"10. In an interview with law enforcement, T.E. stated that Respondent grabbed him by the shoulders and shoved him against the wall. T.E. stated he did not want to be touched and was scared by what had happened. He stated that about ten minutes later, Respondent approached him and told him he was going to kick him in the 'balls.' T.E. stated that another ten minutes went by when Respondent kicked T.E. in the groin with his right foot. T.E. winced over in pain and felt confused.

"11. J.G. stated that during the class period, Respondent bent over and grabbed J.G. by the shoulders, asking her whether she had mental health problems. J.G. stated she felt scared because she had PTSD and did not like people grabbing her. She thought Respondent was going to hurt her.

"12. While the class period progressed, one of the students texted her mom, who was a teacher at the middle school, stating that Respondent was 'crazy,' and that he had 'just hardcore kicked [T.E.] in his balls.' Even though the student's mom was teaching, she alerted administration.

"13. As part of its investigation, law enforcement interviewed Respondent the following day, April 29, 2021.

"a. Respondent advised law enforcement he believed it was his mission from God to save kids from suicide. He identified numerous kids he believed to be struggling with anxiety and depression.

"b. Respondent demonstrated that he 'barely grabbed' T.E. by the shoulders, told him to stop, and then let go when T.E. got close to the wall. Respondent stated he heard T.E. had a bruise, opined that T.E. bruises 'softly,' but that 'God works in mysterious ways.'

"c. He told law enforcement: 'Even though I didn't want to do any of the things I did right there and this is what's going to end me up in a manic hospital probably, because it has all the appearances of a psychotic episode, or manic episode and I know because I did have them in the past but I went through doctors . . . and I've been healthy for, shoot, probably almost a full year now.'

"d. Respondent explained he had a crystal-clear moment, and believed God was telling him what he was supposed to do. He believed God had told him 'twice' that he could act physically toward T.E.

"14. Law enforcement arrested Respondent and he was charged with three counts of misdemeanor battery, all class B person misdemeanors. The criminal complaint listed the victims of the batteries as T.E. (two counts) and J.G. Both victims were [minors].

"15. Following the incident in the classroom, Respondent posted a story on SnapChat, stating the entire incident was planned to send a message about mental health and teenage suicide. The message stated that God planned it and that many of the kids were

in on it. However, according to interviews conducted by law enforcement, none of the students interviewed knew about any 'plan' or staged the event ahead of time.

"16. On May 24, 2021, Respondent emailed the Office of the Disciplinary Administrator (ODA), advising the ODA that he had been formally charged with three counts of misdemeanor battery.

"17. Respondent pled guilty on September 13, 2021, to an Amended Complaint that contained three counts of disorderly conduct, all class C nonperson misdemeanors.

"18. On that same day, the district court placed Respondent on 12 months' probation with a 90-day underlying sentence. As conditions of probation, Respondent could not have contact with the victims and had to write them apology letters. He was also ordered to comply with mental health treatment and to take all prescribed medications.

"19. In Respondent's response, dated October 29, 2021, he stated he was suffering from 'a manic episode with psychotic effects (break from reality) in the classroom caused by the stress, agitation, and pressure of both the events leading up to that day in the classroom and the day of.' Due to this, he believed he was supposed to 'stage an outrageous event to bring attention to mental health, especially for kids.' He continued: 'After asking the student to stop several times and even backing away from him, the agitation and stress continued and created a grandiose scheme in my mind that I—working along with these kids—was supposed to stage an outrageous event to bring attention to mental health, especially for the kids. Because I told the student exactly what I was going to do before I did anything . . . , and then he continued to step at me to push me in the chest again, my mind interpreted all this as part of the grandiose plan.'

"20. During an interview with Mr. Tom Stratton (former Director of Investigations with the ODA) in April 2022, Respondent advised he had been in a manic bipolar state for a few days before April 28, 2021, and for a few months after.

"21. Respondent successfully completed probation in his Franklin County criminal case on September 13, 2022.

"22. T.E., through his father, filed a civil case against Respondent, Board of Education Unified School District of Franklin County, and Morgan Hunter Corporation. The case was filed in Franklin County District Court, court case number FR-2022-CV-000039. The case settled around September 2023, and no documents or admissions were filed as part [of] the settlement agreement. The terms of the settlement are confidential and not known to the ODA.

"DA 13,748

"23. Respondent obtained an emergency substitute teaching license on May 12, 2020.

"24. Based on the foregoing incident that had occurred on April 28, 2021, Dr. Mischel Miller, Director of the Kansas State Department of Education's Teacher Licensure and Accreditation team, filed a complaint with the Kansas State Board of Educa-

tion's Professional Practices Commission, alleging that Respondent had engaged in professional misconduct. The complaint from the Kansas State Department of Education (KSDE) was dated June 15, 2021.

"25. The filing of the KSDE complaint triggered administrative proceedings. These administrative proceedings are investigated and prosecuted by KSDE. Scott Gordon serves as counsel to KSDE. The Kansas State Board of Education (KSBE) acts as the decision-maker regarding the license.

"26. Respondent entered his appearance as counsel on behalf of himself and requested a hearing.

"27. Respondent also filed a request for discovery, request for settlement, and request to dismiss the complaint. The date on the certificate of service for these requests was July 5, 2021. None of these motions were on his State of Kansas legislative representative letterhead.

"28. On July 20, 2021, during a prehearing conference, certain deadlines in the administrative proceedings were set, in addition to the date and time of the hearing.

"29. That same afternoon or shortly thereafter, Gordon and Respondent spoke via phone. Gordon reported that he advised Respondent that his client's position was that Respondent's misconduct was severe enough that it was not appropriate for Respondent to remain licensed as a teacher. Gordon reported that he also explained that he represented the Kansas State Department of Education as the complainant, and that it was the Kansas State Board of Education that would make a determination regarding his license. Gordon stated that Respondent seemed to understand the distinction, and appreciated the clarification on the relationship between his client and the Board.

"30. A little over a week later, on July 30, 2021, Respondent sent an email to Gordon, Commissioner of Education Dr. Randy Watson, and Dr. Miller. As the Commissioner of Education, Dr. Watson was the appointed Chief Administrative Officer over the Kansas State Department of Education. Dr. Watson and Dr. Miller are the employees of Gordon's client, the KSDE (the investigative and prosecution entity).

"a. The body of the email stated: 'Please find attached a letter for your consideration.' It was signed: 'Mark A. Samsel, Samsel Law LLC' with his law firm's logo.

"b. Attached to the email was a letter on Respondent's legislative letterhead. The top of the letterhead stated: 'State of Kansas House of Representatives' with 'Mark Samsel' and '5th District.' The subject line was 'Kansas (Emergency) Substitute Teaching License and Renewal.'

"c. In his letter, Respondent welcomed an opportunity to speak with the three of them in person, noting that Gordon 'expressed that KSDE might not be interested in such a meeting, so I don't want to seem as though I'm undercutting

him. *However, I also know we must work together, including in the Kansas Legislature and House Education Committee*.' (Emphasis added.)

"d. He continued: 'Either way, I pray this letter sheds some light on what transpired and may *help lead all of us to work collaboratively for positive change in Kansas*, hopefully to a day where we can again lead the nation in mental health, service, and education, as Osawatomie State Hospital proudly did over a century ago.' (Emphasis added.)

"e. Respondent's 11-page letter detailed his personal mental health struggles. He stated that he shared the information about his mental health not asking for sympathy, but for perspective and the reason he believed God had called him to shed light on mental health issues. He continued: 'In my frequent work in this area, it is partly why we focus on "the whole child." *If we work together in this moment, I genuinely believe we can bring so much good to Kansas and the world*.' (Emphasis added.)

"f. Respondent referenced his legislative work throughout the letter.

"i. Following a paragraph about his mental health, he stated: 'I hope you will thoroughly consider the surrounding circumstances. Those days both before and after the incident are the most stressful of the entire legislative session. By way of example, on April 8, 2021, I forcefully opposed Senate Bill (SB) 55, which Governor Laura Kelly described as "send[ing] a devastating message . . . to children and their families . . . who are already at a higher risk of bullying, discrimination, and suicide."'

"ii. 'I publicly—in speech and vote—took a powerful position in support of our kids, LGBT community, and mental health, this truth was of no concern to those controlling the media channels.'

"g. After asking 'whether KSDE has a policy involving mental health or other conditions,' Respondent requested the KSDE to 'give serious consideration to these public policy questions of great importance. As I noted above, it is difficult to accept that a single incident of a mental health injury should warrant a permanent, lifelong sanction and ban. *My concern is amplified considering my longstanding commitment and record of supporting the very things for which KSDE stands, namely the kids and our public educators, at times working alongside Deputy Commissioner Dale Dennis*.' (Emphasis added.)

"h. He concluded the letter by stating: 'Given the circumstances, I genuinely would like to work with KSDE to promote our common and shared goals rather than remain in an adversarial position.'

"31. Respondent voluntarily surrendered his substitute teaching license on August 3, 2021, and the Board accepted the voluntary surrender.

"32. Gordon filed a complaint with the ODA, received on August 19, 2021, related to the letter outlined above.

"33. Respondent responded to the complaint on September 16, 2021. He noted in his response that he surrendered his substitute teaching license on his legislative letterhead, and generally denied wrongdoing.

"Conclusions of law—Petitioner and Respondent stipulate and agree that Respondent violated the following Kansas Rules of Professional Conduct:

"KRPC 8.4(b) (misconduct—criminal act reflecting adversely on fitness);
"KRPC 8.4(g) (misconduct—reflecting adversely on fitness to practice law); [and]
"KRPC 8.4(e) (misconduct—ability to influence improperly)[.]

"Applicable aggravating and mitigating circumstances—Petitioner and Respondent stipulate and agree that the following aggravating and mitigating factors apply:

"34. Aggravating circumstances:

"a. *Multiple offenses*: Respondent violated KRPC 8.4(b), KRPC 8.4(g), and KRPC 8.4(e).

"b. *Vulnerability of victim*: Two recognized ABA subparts are relevant: 1) the victims were high school children; 2) Respondent had a fiduciary duty to the students he was substitute teaching; there was an unequal power relationship.

"i. Respondent was initially charged with three counts of battery against two high school students, but later pled to three counts of disorderly conduct. Both high school students were [minors]. Respondent was the only adult in the classroom of high school students and was responsible for the classroom as the substitute teacher.

"c. *Illegal conduct*: Respondent was charged with three counts of misdemeanor battery, which was later pled down to three counts of disorderly conduct, class C nonperson misdemeanors. The Franklin County District Court sentenced Respondent to 90 days underlying and 12 months probation. Respondent was successfully discharged after serving one year of probation.

"35. Mitigating circumstances:

"a. *Absence of a prior disciplinary record*: Respondent has been an active member of the Kansas bar and in good standing since September 10, 2010, with no prior instance of professional misconduct.

"b. *Absence of dishonest or selfish motive*: Evidence shows Respondent was suffering from undiagnosed Bipolar Disorder at the time of the incidents and there is no evidence to suggest he had a dishonest or selfish motive.

"c. *The present and past attitude of the attorney as shown by his cooperation during the proceeding and his full and free acknowledgment of the transgressions, evidenced as follows*:

"i. Respondent self-reported the April 28, 2021, incident, and has been fully cooperative in the disciplinary process.

"ii. In 2018 and prior to the instances giving rise to professional misconduct, Respondent had voluntarily sought treatment for unknown mental health problems—later determined to be Bipolar Disorder—and cooperated fully with medical providers. Prior to the instances giving rise to professional misconduct, Respondent had no knowledge of the predominant mental defect, Bipolar Disorder, or its manic or psychotic symptoms, underlying or causing the professional misconduct. Prior to the instances giving rise to professional misconduct, Respondent had sought help from and cooperated with KALAP, a pattern which

has continued. Respondent has consistently sought help from Dr. Lambert since August 2018, and aside from the timeframe which underlies the professional misconduct in which Respondent was suffering from severe, prolonged manic and psychotic effects, he has fully relied on and followed his doctor's recommendations.

"iii. Respondent has worked with a KALAP monitor since April 2023.

"d. *Previous good character and reputation in the community including any letters from clients, friends, and lawyers in support of the character and general reputation of the attorney*. Respondent was a Missouri Valley College outstanding alumni in 2015. He also had previously made partner at Lathrop and Gage.

"e. *Mental disability or chemical dependency including alcoholism or drug abuse when*:

"i. *there is medical evidence that the respondent is affected by a mental disability;*

"1. On October 2, 2023, Respondent's psychiatrist ('Doctor') provided a written report indicating that Respondent has been under his consistent care and treatment since August 7, 2018.

"2. Doctor stated that he was aware of Respondent's active disciplinary matters as a licensed attorney including those matters pertaining to events on April 28, 2021, and July 30, 2021.

"3. Doctor indicates that his letter is intended to address certain specific issues that pertain to the disciplinary matters and provide his professional opinion regarding Respondent's mental health during the timeframe that includes those courses of events.

"4. First, Doctor opines that Respondent is affected by mental disability, Bipolar Affective Disorder—Type I.

"5. Prior to March 2021, Doctor notes that he treated Respondent principally for depression, anxiety, and insomnia, but had also diagnosed Respondent with Unspecified Mood Disorder. Doctor further indicates that he discussed with Respondent the possibility that he may have Bipolar Disorder, but that Respondent had not yet demonstrated a clear period of hypomania or mania to justify a diagnosis of Bipolar Disorder.

"6. Beginning in March 2021, Doctor reports that he began receiving information from collateral sources describing symptoms that raised concern that Respondent was experiencing a manic episode.

"7. Toward late March 2021, Doctor describes additional reports from collateral sources of changes in Respondent's behavior that were atypical of Respondent, most notably impulsively spending money.

"8. On April 2, 2021, Doctor notes that he visited with Respondent, who downplayed the concerns. Respondent reported a few symptoms potentially consistent with mania, most notably irritability and a decreased need for sleep, but also reported that the symptoms lasted only a couple days occurring during an increased period of stress at the Legislature. Doctor reports that they discussed the possibility of manic symptoms and the potential need for treatment changes.

"9. Then, in late April 2021, Doctor notes that Respondent's family phoned in reporting worsening of Respondent's condition and a desire for him to be seen at a psychiatric facility with concerns about his state of mind.

"ii. *the mental disability caused the misconduct;*

"1. On April 29, 2021, Doctor reports that he spoke with Respondent, which was the day after Respondent's incident while substitute teaching on April 28, 2021. During the phone call, Doctor reports that Respondent demonstrated no insight into his condition, which Doctor states that he attempted to explain to Respondent is often a significant problem during a manic episode (i.e. by definition, without sufficient insight patients are effectively unaware of an active mental health change/decline and the need for treatment).

"2. During the April 29, 2021, visit, Doctor states that Respondent's lack of insight was most evident when Respondent informed Doctor that he could understand why others around him might think he was experiencing mania, but felt he was fine and did not need treatment.

"3. Over the next few days, Doctor received continued reports from Respondent's family and friends of concerns about Respondent's mental health and erratic behavior, including statements and actions that were categorically bizarre for Respondent.

"4. During a telehealth visit on May 4, 2021, while accompanied by another state legislator, Doctor reports that Respondent explicitly exhibited mania with psychosis during the visit, such as identifying 'divine province' as the explanation for the incident on April 28, 2021. Doctor recommended that Respondent immediately present for psychiatric evaluation, hospitalization, and initiation of medication treatment for mania with psychosis. Doctor notes that Respondent expressed appreciation for Doctor's concern, but Respondent's lack of insight and impaired reasoning and judgment led Respondent to defer treatment.

"5. On May 11, 2021, Doctor states that he met with Respondent again, but Respondent continued to display lack of decision-making capacity by deferring medication treatment and denying authorization for Doctor to speak with any family members about his condition or treatment. Respondent's family had continued to report behavior and statements consistent with an ongoing manic episode and a hope to pursue involuntary hospitalization or other measures.

"6. Second, Doctor opines that during the time of the events in question, predominately on April 28, 2021, and thereafter, Respondent was experiencing a manic episode with psychotic symptoms, most notably grandiose delusions. In Doctor's opinion, Respondent's 'misconduct,' as well as other conduct over the course of time, occurred because he was experiencing severe, prolonged manic symptoms as well as delusional grandiosity.

"7. Doctor concludes that, in other words, Respondent's mental disability caused the misconduct. According to Doctor's opinion, due to the disabling mental health condition, Respondent did not recognize that he was experiencing manic or psychotic symptoms and was unable to understand the nature of his action during the symptomatic period and the potential consequences of those actions.

"iii. *the respondent's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and*

"1. Third, Doctor opines that Respondent's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful remission of symptoms.

"2. After May 11, 2021, Doctor reports that Respondent had several appointments with him during which the manic symptoms began to improve. Doctor indicates that Respondent regained some degree of insight and started medication treatment in September 2021.

"3. Doctor reports that although the manic episode and related psychotic symptoms eventually resolved, Respondent began to experience a depressive episode as part of Bipolar Disorder. Doctor notes that Respondent continued to experience impairment caused by Bipolar Disorder until he started the medication lithium on February 16, 2022, after other medication treatments proved ineffective.

"4. Since February 16, 2022, Doctor reports that Respondent has responded well to the prescribed treatment and has demonstrated a meaningful and sustained period of successful remission of symptoms (rehabilitation would not be the appropriate psychiatric/medical term in this context as no 'chemical dependency' was ever involved).

"iv. *the recovery arrested the misconduct and recurrence of that misconduct is unlikely;*

"1. Fourth and finally, Doctor opines that Respondent's recovery has arrested the misconduct and recurrence of any misconduct is unlikely. Doctor notes that treatment has proven effective to achieve remission of Bipolar Disorder symptoms. Doctor observes that, in other words, Respondent has not experienced any periods of depression or mania since starting lithium.

"2. Doctor further opines that a recurrence of the underlying 'misconduct' is unlikely for two primary reasons. First, Respondent has experienced a clearly beneficial and sustained response to lithium, which Doctor anticipates will continue. Second, having now experienced severe manic symptoms with psychosis and being aware of his diagnosis/condition, Respondent is much more aware of his need for ongoing treatment for Bipolar Disorder and more receptive to treatment changes, if needed.

"f. *Imposition of other penalties or sanctions*: 1) Franklin County case FR-2021-CR-000129; and 2) Franklin County case FR-2022-CV-000039.

"i. The Franklin County Attorney's Office filed charges against Respondent on May 17, 2021. The complaint charged Respondent with three misdemeanor counts of battery naming two of the high school students as victims. The Franklin County Attorney's Office filed an amended complaint on September 15, 2021, which charged Respondent with three counts of disorderly conduct, which Respondent pled to. Respondent was placed on 12 months['] probation with Court Services, which he successfully completed on September 13, 2022.

"ii. T.E., through his father C.E., filed a civil suit on April 27, 2022, against Respondent, Board of Education Unified School District No. 289 Franklin County, and Morgan Hunter Corporation d/b/a Morgan Hunter Education. That suit was settled around September 2023, with the terms of the settlement agreement remaining confidential and unknown to the Office of the Disciplinary Administrator.

"g. *Remorse*

"i. Respondent apologized to the two high school students and further, after remission of the Bipolar Disorder symptoms, publicly apologized, including in an interview and lengthy article published by the Kansas City Star. The apology included a transparent account of his mental health.

"Recommendation for Discipline—Petitioner and Respondent stipulate and agree that the following discipline should be imposed:

"36. A period of suspension of Respondent's license to practice law for a period of 12 months, STAYED, and placement on probation for 12 months. Probation would be subject to the terms and conditions of Respondent's plan of probation and KALAP monitoring agreement, which are incorporated herein by reference.

"37. Terms and conditions of the 12 months of probation shall include:

"a. Compliance with Rules of Professional Conduct

"i. Respondent shall not engage in conduct that violates the Rules of Professional Conduct.

"ii. Receipt of a complaint by the Office of the Disciplinary Administrator during the probation term alleging that Respondent has violated the Rules of Professional conduct does not, in itself, constitute a violation of the terms of probation; and

"iii. In the event the ODA receives a complaint during Respondent's participation in the probation program or otherwise opens or commences a disciplinary investigation, the term of the probation shall be extended until such charge has been investigated and a determination made by the ODA or regional disciplinary committee regarding disposition of such matter.

"b. Mental Health Treatment

"i. Respondent has been under the care of a clinician already at the time of the inception of probation. Respondent will comply with the treatment recommendations prescribed by Dr. Garrett Lambert, M.D.

"ii. Respondent shall remain under the care of Dr. Lambert for treatment of Bipolar I Disorder or any other mental health issues that are identified throughout the term of his probation. Respondent shall comply with any counseling or medication directives given by his treatment provider.

"iii. Respondent will sign releases so that any records can be provided to the Disciplinary Administrator's Office and to his KALAP monitor at any time. Respondent will provide documentation confirming his compliance with treatment recommendations as directed by the assigned Deputy Disciplinary Administrator.

"iv. Prior to any change of treatment providers, Respondent shall obtain the approval from his KALAP monitor and director of KALAP.

"c. Voluntary KALAP Monitoring Agreement

"i. Respondent has been monitored by Calvin 'Cal' Williams since April 28, 2023. Cal Williams is a full-time lawyer in private practice located in Salina, Kansas, and has practiced law for 45 years. He graduated from Washburn School

of Law in 1978. Although the monitoring agreement is effective through April 2024, Respondent agrees that it will be effective throughout the duration of his probation in the disciplinary matter.

"ii. Respondent agreed to use alcohol in a moderate and legal manner, to take medications only as prescribed, and to comply with the directions of the prescribing health professional.

"iii. Respondent agreed to report to the director of KALAP and to the monitor, any incidences of his failure to abide by any provision of the agreement.

"iv. Respondent agreed to meet with the monitor monthly, or as otherwise directed by the monitor, throughout the duration of the agreement.

"v. Respondent agreed to continue therapy with Dr. Lambert, as he deems appropriate and necessary. Respondent agreed to not discontinue therapy without first consulting both the doctor and the KALAP program director. However, as part of the Probation Plan, Respondent agrees to continue therapy with Dr. Lambert throughout the duration of probation.

"vi. Respondent agreed to continue medication management with his current prescribing physician and to follow recommendations.

"vii. Respondent agreed to a release of information to the director of KALAP and for his monitor to make written or oral reports regarding Respondent's compliance or noncompliance.

"viii. Respondent agreed to a daily regimen of self-care, as outlined in the monitoring agreement.

"ix. Respondent shall deliver a copy of the probation plan to KALAP.

"x. Should the monitor discover any violations of the Kansas Rules of Professional Conduct, he shall include such information in a report to the Disciplinary Administrator's Office in order for the Disciplinary Administrator's Office to investigate these violations.

"d. Standard Terms

"i. Respondent shall attend any scheduled meetings with the Office of the Disciplinary Administrator and meet any deadlines set by the Office of the Disciplinary Administrator.

"ii. Respondent certifies he has read and is familiar with his obligations under the Kansas Rules of Professional Conduct. Respondent shall not violate the provisions of his probation or the Kansas Rules of Professional Conduct. In the event Respondent violates any of the terms of his probation or any of the terms of the Kansas Rules of Professional Conduct during the probationary period, Respondent shall immediately report such violations to the Disciplinary Administrator.

"iii. The KALAP monitor shall be acting as an agent and volunteer of the Court while monitoring Respondent, and is afforded all immunities by Supreme Court Rule 233(j).

"iv. Respondent shall continue to cooperate with the Disciplinary Administrator's Office. If the Disciplinary Administrator requires any further information, Respondent shall timely provide said information.

"v. Respondent shall pay the costs in an amount to be certified by the Disciplinary Administrator's Office.

. . . .

"Additional stipulations agreed to by the Petitioner and Respondent:

"42. Respondent waives his right to a hearing on the formal complaint as provided in Supreme Court Rule 223(b)(4).

"43. The parties agree that no exceptions to the findings of fact and conclusions of law will be taken.

"44. Pursuant to Supreme Court Rule 223(d), a copy of this Summary Submission Agreement will be provided to complainant Scott Gordon. Gordan will have 21 days to provide the disciplinary administrator with his position regarding the agreement.

"45. A copy of this Summary Submission Agreement, along with a copy of the complainant's position, will be forwarded to the Chair of the Board for the Discipline of Attorneys for his review under Supreme Court Rule 223(e). The parties understand and agree that if the Summary Submission Agreement is rejected by the Board chair, this matter will proceed to a disciplinary hearing pursuant to Supreme Court Rule 222.

"46. The parties agree that if the Summary Submission Agreement is approved by the Board chair, the hearing on the formal complaint will be cancelled, and the case will be docketed with the Supreme Court under Supreme Court Rule 228. The parties will be required to appear before the Supreme Court for oral argument.

"47. Respondent understands and agrees that pursuant to Supreme Court Rule 223(f), this Summary Submission Agreement is advisory only and does not prevent the Supreme Court from making its own conclusions regarding rule violations or imposing discipline greater or lesser than the parties' recommendation.

"48. The parties agree that the exchange and execution of copies of this Agreement by electronic transmission shall constitute effective execution and delivery of the Agreement and that copies may be used in lieu of the original and the signatures shall be deemed to be original signatures."

DISCUSSION

In a disciplinary proceeding, this court generally considers the evidence, the disciplinary panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see also Supreme Court Rule 226(a)(1)(A) (2024 Kan. S. Ct. R. at 279) (a misconduct finding must be established by clear and convincing evidence). "Clear and

convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."'" *In re Morton*, 317 Kan. 724, 740, 538 P.3d 1073 (2023).

The Disciplinary Administrator provided Samsel with adequate notice of the formal complaint. The Disciplinary Administrator also provided Samsel with adequate notice of the hearing before the panel, but he waived that hearing after entering into the summary submission agreement. The Kansas Board for Discipline of Attorneys approved the summary submission and canceled the formal hearing under Rule 223(e)(2). As a result, the factual findings in the summary submission are deemed admitted. See Supreme Court Rule 228(g)(1) (2024 Kan. S. Ct. R. at 285) ("If the respondent files a statement . . . that the respondent will not file an exception . . . the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent.").

Rule 223 establishes the following requirements for a valid summary submission agreement:

"An agreement between the disciplinary administrator and the respondent to proceed by summary submission must be in writing and contain the following:

(1) an admission that the respondent engaged in the misconduct;
(2) a stipulation as to the following:
(A) the contents of the record;
(B) the findings of fact;
(C) the conclusions of law, including each violation of the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office; and
(D) any applicable aggravating and mitigating factors;
(3) a recommendation for discipline;
(4) a waiver of the hearing on the formal complaint; and
(5) a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken." Rule 223(b) (2024 Kan. S. Ct. R. at 275).

Here, the written summary submission agreement contained all the information required under Rule 223. See Rule 223(b). And the summary submission and the parties' stipulations before us establish by clear and convincing evidence the charged conduct violated KRPC 8.4(b), (e), and (g). Thus, we adopt the findings and conclusions set forth in the summary submission.

The remaining issue is deciding the appropriate discipline. The parties jointly recommend a one-year suspension of Samsel's

license, and that the suspension be stayed and Samsel be placed on probation for one-year. But an agreement to proceed by summary submission is advisory only and does not prevent us from imposing discipline greater or lesser than the parties' recommendation. Rule 223(f).

After full consideration, we hold that a two-year suspension is the appropriate discipline under the circumstances. We acknowledge respondent's mental health was a contributing factor to his misconduct, and he has made significant progress in this respect upon diagnosis and adherence to a successful treatment protocol. But given the nature of the underlying conduct, we believe a suspension of more than one year is warranted. Cf. *In re Harrington*, 296 Kan. 380, 394, 293 P.3d 686 (2013) (imposing two-year suspension on attorney convicted of battery, driving under the influence, and obstruction of official duty); *In re Frahm*, 291 Kan. 520, 531, 241 P.3d 1010 (2010) (imposing three-year suspension on attorney convicted of driving under the influence and two counts of aggravated battery). Respondent's license is thus suspended for two years.

The suspension is stayed conditioned on respondent's successful performance and completion of two years' probation, subject to the terms and conditions of the probation plan and KALAP monitoring agreement. Additionally, to ensure that respondent is best positioned to succeed and that the public is adequately safeguarded while respondent practices law in a solo practice setting, the two years' probation is also subject to a practice supervision plan approved by the Disciplinary Administrator's office.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Mark A. Samsel is suspended for two years, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2024 Kan. S. Ct. R. at 278) for violations of KRPC 8.4(b), (e), and (g). The suspension is stayed conditioned upon Samsel's successful participation and completion of a two-year probation period. Probation will be subject to the terms set out in the probation plan and KALAP monitoring agreement referenced in the parties' summary submission agree-

ment and the practice supervision plan as approved by the Disciplinary Administrator's office. No reinstatement hearing is required upon successful completion of probation.

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this opinion be published in the official Kansas Reports.

State v. Harris

No. 124,844

STATE OF KANSAS, *Appellee*, v. DARRICK S. HARRIS, *Appellant*.

(550 P.3d 311)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*DNA Testing Not Required if Not Requested by Defendant*. K.S.A. 21-2512 does not require a district court to order DNA testing a defendant does not ask for.

2. SAME—*State Not Required to Retain Possession of DNA Evidence under Statute*. K.S.A. 21-2512 does not impose a duty on the State to retain physical possession of nonbiological evidence it previously gathered in a case.

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Submitted without oral argument February 3, 2023. Opinion filed June 21, 2024. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, was on the briefs for appellant.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Darrick S. Harris was convicted of first-degree murder of a guard and aggravated battery of another guard committed during a prison melee in 1993. He is serving a hard 40 life sentence for the murder and a 15-years-to-life sentence for the aggravated battery. This court affirmed Harris' convictions in *State v. Harris*, 259 Kan. 689, 915 P.2d 758 (1996). The facts underlying the conviction are set out in that opinion.

Under K.S.A. 21-2512, Harris recently petitioned the district court for forensic testing of objects—weights, billiard balls, and clothing—used in the murder. Harris hoped such testing would locate currently unknown biological material on those objects, and that this biological material could then be subject to DNA testing. In its response, the State claimed it no longer had possession of the items. An extensive search, including requests to the KBI, the Department of Corrections, the Leavenworth County Attorney's Office, and both the district and appellate court clerks' offices,

failed to produce the items or provide any information about where the items were located. The State noted that a few biological swabs existed, including a swab of the steel weight. In responsive pleadings, however, Harris insisted he was not seeking retesting of the swabs.

At a hearing, the district court determined Harris' motions were moot because none of the items that he sought to have tested were still in the State's actual or constructive possession. Harris followed up on the mootness ruling by filing a motion requesting discharge from incarceration. He alleged that the State's inability to comply with his request for DNA testing created an adverse inference that his DNA was not present, which should be deemed sufficient to constitute exoneration.

At a subsequent hearing, various individuals who had or might have had custodial responsibilities for the missing weight testified about what might have happened to it.

The gist of their testimony was that the Department of Corrections had policies and procedures for tracking evidence in its possession and for disposing of evidence no longer deemed necessary for cases, but those policies and procedures had inexplicably not been followed with the steel plate and other physical evidence. The witnesses testified they had searched extensively for the plate without success and had no idea what might have become of it.

Following the evidentiary hearing and argument, the district court denied the motion to release Harris from custody, holding there was no evidence the State acted in bad faith in failing to preserve the evidence. Harris took an appeal directly to this court under K.S.A. 22-3601(b)(3). As explained below, we affirm the district court as being right for the wrong reason.

DISCUSSION

On appeal, Harris' claim for relief arises squarely under the due process protections afforded by the Fourteenth Amendment to the United States Constitution. Essentially, Harris argues that the State's failure to retain physical evidence—the steel weight in this instance—deprived him of a statutory remedy and thus violated his due process rights. Secondarily, Harris argues the district court

erred by not sua sponte ordering the DNA testing of the biological material that was in the State's possession.

We can dispose of the second issue first, in summary fashion. Below, Harris not only did not argue for testing of the swabs, he explicitly informed the court it was not what he was seeking. In district court briefing, he announced: "Defendant is not seeking the retesting of the blood stains that were previously tested. Defendant is seeking testing of the objects (i.e., clothing, weight plates, and billiard balls) for the presence of biological material other than blood, such as skin cells, etc. This kind of testing was never done." K.S.A. 21-2512 does not require a district court to order testing a defendant does not ask for. There is therefore no basis for appellate relief with respect to the biological material in the State's possession.

As for Harris' spoliation claim, the parties and the district court agreed below that a due process analysis under *Arizona v. Youngblood* was appropriate. 488 U.S. 51, 57-58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). That case addressed a pretrial loss of potentially exculpatory evidence. In *Youngblood*, the Supreme Court held that a defendant's due process right to have access to potentially exculpatory evidence before trial is implicated only when state actors lose such evidence by exercising bad faith. 488 U.S. at 57-58. And Kansas caselaw has followed the *Youngblood* rule. Unless a defendant shows bad faith on the part of the police, the failure to preserve potentially useful evidence before trial does not constitute a denial of due process. *State v. Johnson*, 297 Kan. 210, 218, 301 P.3d 287 (2013).

Thus, the district court elected to submit the facts to a due process analysis. It conducted a hearing and ultimately concluded the State's various custodial agencies did not act in bad faith. But a recent decision from this court makes it clear that Harris has no statutory spoliation claim under K.S.A. 21-2512 with respect to nonbiological material that may have been in the State's possession at one time. See *State v. Angelo*, 316 Kan. 438, 518 P.3d 27 (2022). Without any statutory basis for his spoliation claim, Harris cannot hitch his broader due process caboose to the engine of our state postconviction DNA-testing statute.

K.S.A. 21-2512 permits defendants convicted of first-degree murder or rape to petition for DNA testing of biological material related to

the investigation or prosecution that resulted in the conviction. Before such testing can be ordered, the biological material to be tested must be in the State's possession. As we held in *Angelo*, "the scope of K.S.A. 2021 Supp. 21-2512 is not unlimited." 316 Kan. at 451. One of the statute's boundaries is that it

> "limits the scope of testing to '*any biological material*' that is related to the case, in the actual or constructive possession of the State, and which was not previously tested or can be retested with new DNA techniques that are more accurate and probative. . . . Eligible petitioners may request DNA testing of biological material only. The plain language of subsection (a) does not contemplate or provide for testing of other physical evidence to determine whether biological material is present." 316 Kan. at 452.

With this in mind, we went on to explain:

> "As for the State's preservation duty, once the prosecution has notice of the petition, it must take necessary steps to ensure that 'biological material that *was secured* in connection with the case is preserved.' K.S.A. 2021 Supp. 21-2512(b)(2). This statutory language is important in two respects. First, like subsection (a), it focuses on 'biological material' specifically, rather than items of evidence generally. Second, the plain language requires the State to preserve only biological material that 'was secured in connection with the case.' K.S.A. 2021 Supp. 21-2512(b). The Legislature's use of the past-tense phrase, 'was secured,' makes clear the Legislature intended the State only preserve the 'biological material' it previously secured in its investigation or prosecution of the defendant. The plain language cannot be read to impose a duty on the State to call its crime scene investigators back in to examine or re-examine the physical evidence and determine whether any of those items contain biological material that the prosecution had not previously 'secured.' [Citations omitted.]" 316 Kan. at 453-54.

The statutory framework as explained in *Angelo* makes clear that the State's duty to preserve evidence begins after a petitioner files an allegation that biological material exists which would satisfy the statutory threshold requirements. The State has no duty under the statute to re-examine the nonbiological physical evidence in its possession, let alone to examine physical items that are not in its possession to determine whether biological material is or is not present. See 316 Kan. at 452. But that is exactly what Harris now claims.

Here, the objects on which Harris alleges there is biological material are no longer in the custody of the State, leaving Harris with no remedy under K.S.A. 21-2512. The State already tested the objects and secured the biological material it obtained. There is thus no relief available to Harris under our postconviction DNA-testing regime. The statute does not contemplate, and certainly does not provide, a spoliation remedy for nonbiological evidence.

Accordingly, on these facts Harris has no claim under K.S.A. 21-2512. If he did, we would be creating an obligation on the State—arising not out of the Constitution, but out of K.S.A. 21-2512—to keep *all* physical evidence it ever gathers in any case on the off chance it might hold untested biological material. This directly contradicts the plain language of the statute and our holding in *Angelo*.

Because K.S.A. 21-2512 does not provide a vehicle for a claim on the facts presented here, Harris' constitutional due process spoliation allegations must stand on their own if they are to be properly considered on their merits. Viewed through this lens, Harris' suit can, at best, be construed as a claim for postconviction relief under K.S.A. 60-1507. But the murder and initial conviction in this case occurred nearly 30 years ago and this court affirmed his conviction in 1996. *Harris*, 259 Kan. at 691. Harris waited 23 years to bring his spoliation due process claim. As such, even construed in the light most favorable to Harris as a motion under K.S.A. 60-1507, the claim is procedurally barred by the one-year time limitation of K.S.A. 2023 Supp. 60-1507(f)—and Harris has presented no argument for an exception.

Thus, to the extent Harris asserts a claim under our postconviction DNA-testing statute, he has not stated a proper claim for relief. To the extent we were to consider Harris' true constitutional claim, it is procedurally barred. The district court's denial of Harris' motion was thus correct, though for the wrong reason. See *State v. McCroy*, 313 Kan. 531, 539, 486 P.3d 618 (2021) (affirming lower court as right for the wrong reason).

Affirmed.

* * *

ROSEN, J., concurring: I agree with the majority's ultimate conclusion that Harris is not entitled to the relief he seeks. I am troubled, however, by certain analytic determinations that the majority makes along the way to reach its conclusion. I voice my concerns not because the facts of this case suggest either bad faith on the State's part or a likelihood of finding exonerating evidence on Harris' part. I see no evidence of bad faith, and I see essentially no indication that Harris would obtain any relief even if the weight had been located. But I am concerned about absolute statements in the majority's opinion that may preclude

remedies in future cases if the State does act in bad faith, either intentionally or through gross negligence. And I can foresee situations in which convicted individuals might be exonerated if physical objects were available for testing under K.S.A. 21-2512.

The majority misconstrues what Harris is seeking. He does not seek testing of nonbiological materials; he seeks testing of biological materials retrieved from a nonbiological item. DNA rarely exists in a pure state detached from nonbiological things. It exists on swabs, on bed linen, on plastic cups, and on countless other objects. Potentially, it also exists on weights that are used as murder weapons. To hold that K.S.A. 21-2512 does not apply to testing such items for DNA evidence renders the statute nearly meaningless.

The majority misleadingly avers that the "State already tested the objects and secured the biological material it obtained." 318 Kan. at 929. Yes, the State tested blood residue on the weight to determine whether it was the blood of a victim or of a perpetrator. But the State did not swab other parts of the weight to determine whether Harris' DNA was on the weight, which is the testing that Harris requests. Harris contended the plate could plausibly contain traces of DNA from the contact with all the various people who handled it. There is no indication that the State carried out this kind of comprehensive testing, and the State does not assert that this testing took place.

From this point on, State actors will not only have little incentive to retain evidence used to obtain convictions; they will have great incentive to dispose of such evidence. I posit a hypothetical scenario: a victim testifies that her assailant used her hairbrush to comb his beard. After an individual is tried and convicted, the accused requests DNA testing of hairs from the brush. Concerned that such testing might exonerate the accused, law enforcement tosses the brush into a lake. Under the majority opinion, this is not a problem. After all, it is a nonbiological item that the State disposed of, which is not subject to the terms of K.S.A. 21-2512. Furthermore, even a deliberate sabotage of the statute's purpose has no remedy. While the majority vaguely hints at some kind of due process claim, it envisions no realistic way of bringing such a claim.

As a consequence, I am concerned that the majority's construction of rights under K.S.A. 21-2512 encourages loss of exculpatory evidence and potentially denies innocent people the relief the statute seeks to promote. The district court examined the circumstances under well-established due process analysis, and the State agreed with that analysis. I think the district court and the State were right. Under that analysis, Harris did not prevail, and I therefore agree with the majority in denying him the relief he seeks on appeal.

No. 125,535

STATE OF KANSAS, *Appellee,* v. DAVID CORNELL BENNETT JR., *Appellant.*

(550 P.3d 315)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Late Appeal May Be Allowed under* Ortiz*—Requirements*. *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982), may allow a late appeal if a criminal defendant (1) was not informed of his or her right to appeal, (2) was not furnished an attorney to perfect an appeal, or (3) was furnished an attorney who failed to perfect an appeal.

Appeal from Labette District Court; STEVEN A. STOCKARD, judge. Submitted without oral argument November 3, 2023. Opinion filed June 21, 2024. Affirmed.

Clayton J. Perkins, *Caroline M. Zuschek*, and *Kathryn D. Stevenson*, of Capital Appellate Defender Office, were on the briefs for appellant.

Kristafer R. Ailslieger, deputy solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: David Cornell Bennett Jr. pled guilty to one count of capital murder and three counts of premeditated first-degree murder pursuant to a plea agreement in

December 2017. As part of that agreement, the State agreed to dismiss other charges for rape and criminal threat and Bennett agreed to waive his appellate rights. Bennett did not attempt to subsequently file any timely appeal.

On June 30, 2020, Bennett filed a pro se motion requesting a hearing under *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982). In his motion, Bennett alleged that he was entitled to file an out-of-time appeal because his appointed counsel did not file his direct appeal as requested following his sentencing hearing. The State argued that even if Bennett's counsel failed to file an appeal, Bennett had already waived his appellate rights under the plea agreement. Bennett filed a pro se response alleging that his counsel was ineffective during plea negotiations.

On May 20, 2022, the district court held a hearing on Bennett's pro se motion. The district court appointed counsel for Bennett

and he was able to present evidence, in the form of his own testimony, that he had directed counsel to file a timely notice of appeal; that he did not believe he had waived his appellate rights; and that he did not understand the extent to which he waived his appellate rights under the plea agreement.

The State called one of Bennett's attorneys as a witness. That attorney testified that he believed Bennett had signed an especially comprehensive "blanket waiver of appeal"; that he had discussed these provisions with Bennett; and that he had been concerned Bennett was not taking them seriously, so he really had to "slow him down and make [Bennett] go through the document." The attorney also testified that Bennett did contact him after sentencing, but unequivocally stated that Bennett did not ask him to file a direct appeal.

The district court denied Bennett's motion, finding that evidence presented at the hearing and in the record supported a finding that Bennett clearly waived his appellate rights and failed to allege why he should be entitled to an *Ortiz* hearing. The district court found the attorney's testimony credible; that Bennett had understood the waiver; did not ask any questions about it; signed it; and did so freely and voluntarily with the advice of counsel. The district court also specifically held that Bennett's testimony lacked credibility, and he was trying to undo what he had knowingly done.

Bennett appealed the district court's denial of his pro se motion to this court. He offers two arguments for why he is entitled to an *Ortiz* hearing. First, he argues that his waiver of appellate rights was ambiguous both on its face and on the record as a whole and therefore the waiver was not effective as a blanket waiver. Second, he reiterates his argument that he is entitled to a late appeal under the criteria set forth in *Ortiz*.

A district court's decision on whether an exception under *Ortiz* applies in a given case is reviewed on appeal under a dual standard. We review the facts underlying the district court's ruling for substantial competent evidence. The legal conclusion made by the district court on those facts as to whether the exception applies is reviewed de novo. *State v. Smith*, 312 Kan. 876, 887, 482 P.3d 586 (2021).

Bennett has not established ambiguity during his plea process.

The relevant language from Bennett's plea agreement states:

"As a condition of this negotiated resolution, and as recognized by *State v. Patton*, 287 Kan. 200 (2008), the defendant agrees to waive his right to appeal or collaterally attack, under Kansas state statutes, the prosecution, convictions, sentence or terms set forth in this plea agreement. In addition, the defendant waives his right to pursue habeas corpus claims under the Federal Constitution, statutes or case law interpreting the same. Further, Defendant David Cornell Bennett Jr. agrees to waive his right to pursue any claim that the above and foregoing negotiated plea agreement violates the bar under the Kansas and Federal Constitutions to double jeopardy, statutes or case law interpreting the same."

Additionally, Bennett signed an "Entry of Plea" which contained the following term:

"I understand that despite my plea of guilty, I retain a limited right to appeal. I may not directly appeal my conviction, and I understand the appellate courts generally will not directly appeal my conviction, and I understand the appellate courts generally will not entertain an appeal from (a) an agreed-upon sentence approved by the court on the record, (b) a presumptive sentence, or (c) the denial of a departure motion. In any appeal, however, I may challenge my criminal history score and any crime severity level determinations that affect my sentence. I may appeal from a sentence that departs from the presumptive sentence. I understand that any appeal must be filed within fourteen days of the date sentence is imposed and that I must timely tell my attorney about my desire to appeal. If I cannot afford an attorney or the costs of an appeal, the court will appoint an attorney to represent me and will order that any relevant transcripts be provided to my attorney."

At the plea hearing, Bennett stated that he had conferred with his counsel about the terms of the plea agreement. Bennett also stated that he had signed the plea agreement; that he understood the agreement; and that he had conferred with counsel about the agreement. The court also directly asked Bennett "do you understand that if you thought your Constitutional rights were violated, that by entering this plea, you're waiving any claims, including any appeal?" to which Bennett answered, "Yes."

At sentencing in February 2018, Bennett appeared in person with counsel. Bennett waived his right to allocution and to be present during the sentencing hearing, and the district court accepted his waiver. The State specifically requested that Bennett be in the courtroom for required court advisories, including those related to his appellate rights, and the State requested the court also direct

Bennett's counsel to reiterate those advisories to Bennett. The district court then informed Bennett that he had 14 days to appeal adverse rulings, *to the extent he had not waived that right*. The court likewise reminded Bennett's counsel to inform Bennett he would have 14 days to exercise whatever appellate rights he had not waived.

A district court must ensure that the defendant understands the consequences of entering a plea. *State v. Moses*, 280 Kan. 939, 948-49, 127 P.3d 330 (2006). The language of a written plea agreement alone cannot satisfy the requirement that the district court *personally* inform the defendant of the consequences of the plea. "[T]he failure to strictly comply with K.S.A. 22-3210 may be reversible error *unless* a review of the entire record demonstrates that the plea was knowingly and voluntarily made and otherwise accepted by the trial judge in compliance with the statute." *State v. Ebaben*, 294 Kan. 807, 816, 281 P.3d 129 (2012). Courts must look at the entire plea process to determine whether the defendant understood the nature and consequences of his or her plea. *State v. Reu-El*, 306 Kan. 460, 473-74, 394 P.3d 884 (2017).

Bennett argues that the totality of the proceedings created an ambiguity as to what appellate rights he retained. In making this argument, he claims that because the State and the district court specifically made efforts to inform him of his "appellate rights," including the 14-day deadline for making a direct appeal, this created ambiguity and confusion as to whether any rights actually existed.

Bennett's arguments do not hold up to cursory inspection. First, as stated above, the district court was required under *Patton* to give those disclaimers. *State v. Patton*, 287 Kan. 200, Syl. ¶ 6, 195 P.3d 753 (2008) (procedural due process requires the court to inform the defendant of their appellate rights). Second, those disclaimers reference appellate rights only *to the extent they had not been waived*. Thus, these disclaimers functioned as a warning and reminder that Bennett had actually signed a waiver.

Bennett further argues that the language found in the "Entry of Plea" conflicts with the language in the plea agreement, creating more procedural ambiguity. He relies on two Court of Appeals cases to support his argument: *State v. Bennett*, 51 Kan. App. 2d

356, 347 P.3d 229 (2015), and *State v. Shull*, 52 Kan. App. 2d 981, 381 P.3d 499 (2016).

In *Bennett* the defendant challenged her waiver of her right to have a jury for the departure phase of her sentencing. 51 Kan. App. 2d at 357. The court found that because the defendant was never informed of this specific right, she did not consent to its waiver. 51 Kan. App. 2d at 363. The court also found that certain language throughout the proceedings created a legitimate ambiguity. For example, her plea document stated: "'I may appeal from a sentence that departs from the presumptive sentence.'" 51 Kan. App. 2d at 365. The sentencing judge additionally stated that she had 14 days to appeal her sentence, and that error was never corrected. This is especially relevant, since the departure from a presumptive sentence is precisely what she was trying to appeal. Further, her lack of understanding regarding her appellate waiver was evidenced by her timely attempt to appeal.

In *Shull* the defendant signed a plea agreement waiving his right to appeal his sentence. Both the defendant and the State requested an upward durational departure. Although the defendant received the exact sentence he requested, he claimed it was illegal. He appealed, arguing that the district court did not provide substantial and compelling reasons justifying that durational departure as required by statute. The court relied on *Bennett* to determine that the plea agreement was ambiguous. The facts were similar to *Bennett* in that the court specifically informed the defendant that he had a right to appeal a durational departure and that error was never corrected. Thus, the court's mistake created an ambiguity. 52 Kan. App. 2d at 989.

The facts in the present case are materially different. While some language may be shared between documents in all three cases, the overall context differs. In the present case, Bennett was properly well informed of his rights and what he was waiving. He received the sentence contemplated in the plea agreement. He filed no timely appeal. He is not attempting to appeal based on a right that he was specifically and erroneously informed that he retained. And even if we were to agree with Bennett that the language of the plea agreement itself leaves open the potential for

appeal of some issues (such as ineffectiveness of counsel, restitution, and registration requirements), Bennett has not explained why he should be allowed to appeal on any of these grounds two and a half years out of time.

Bennett has not shown that he could qualify for a late appeal.

"*State v. Ortiz* . . . may allow a late appeal if a criminal defendant (1) was not informed of his or her right to appeal, (2) was not furnished an attorney to perfect an appeal, or (3) was furnished an attorney who failed to perfect an appeal." *Patton*, 287 Kan. 200, Syl. ¶ 3. Addressing each in turn, Bennett has made no credible claim that he would be entitled to relief.

The first *Ortiz* exception requires a three-part burden-shifting analysis. First, the defendant must demonstrate from the transcripts that the sentencing judge failed to adequately communicate the required information about the right to appeal. If that is shown, the State bears the burden of proving the defendant nevertheless possessed actual knowledge of the required information by some other means. If the State is unable to make this showing, the defendant must then prove that had the defendant been properly informed, a timely appeal would have been pursued. *State v. Smith*, 303 Kan. 673, 678, 366 P.3d 226 (2016).

First, as established by Bennett's own briefs, trial transcripts, and his counsel's testimony, the court informed Bennett more than once about his appellate rights—specifically the lack thereof. This was why the State requested that Bennett be present at sentencing, even though he had waived that right. The court further instructed Bennett's counsel to discuss Bennett's appellate rights with Bennett. The district court found that Bennett knowingly waived his rights, and that his testimony to the contrary was not credible. Those findings are supported by substantial competent evidence. Thus, the first *Ortiz* exception does not apply.

Bennett was provided a team of counsel from the Death Penalty Defense Unit. Thus, the second *Ortiz* exception does not apply.

The third Ortiz exception includes consideration of the effectiveness of counsel, including whether counsel misinformed the client of the existence of appealable issues. *State v. Shelly*, 303

Kan. 1027, 1051, 371 P.3d 820 (2016). In *Albright v. State*, 292 Kan. 193, Syl. ¶ 5, 251 P.3d 52 (2011), we held that K.S.A. 60-1507 movants who have counsel are entitled to effective assistance of that counsel, and if counsel's performance was deficient for failure to file a timely notice of appeal, as a remedy a K.S.A. 60-1507 movant should be allowed to file an out-of-time notice of appeal.

While Bennett argues that he asked counsel to file a timely appeal, counsel directly refutes that claim. The district court found his counsel's testimony to be credible. We find the court's conclusion is supported by substantial competent evidence. Bennett has not provided any credible explanation why it took two and a half years to file his pro se motion.

Taken together, we agree with the district court's summarization that Bennett is simply trying to undo what he knowingly did.

Affirmed.

No. 124,130

HODES & NAUSER, MDs, P.A.; and TRACI LYNN NAUSER, M.D., *Appellees*, v. KRIS KOBACH, 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, *Appellants*.

(551 P.3d 37)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Law-of-the-Case Doctrine—Restricts Relitigation of Issue Already Decided in Same Case.* The law-of-the-case doctrine restricts a party from relitigating an issue already decided on appeal in successive stages of the same proceeding.

2. SAME—*Law-of-the-Case Doctrine—Exceptions.* Exceptions to the law-of-the-case doctrine are when (1) a subsequent trial produces substantially different evidence; (2) a controlling authority has made a contrary decision regarding the law applicable to the issues; or (3) the prior decision was clearly erroneous and would work a manifest injustice.

3. KANSAS CONSTITUTION—*Section 1 of Bill of Rights—Fundamental Right to Personal Autonomy.* Section 1 of the Kansas Constitution Bill of Rights protects a fundamental right to personal autonomy, which includes the right to decide whether to terminate a pregnancy.

4. CONSTITUTIONAL LAW—*Impairment of Right to Terminate Pregnancy—Strict Scrutiny*. Impairment of the right to terminate a pregnancy must withstand strict scrutiny. The plaintiff carries the burden to show government action impairs this right.

5. SAME—*Impairment of Right to Terminate Pregnancy—Government's Burden to Show Impairment Withstands Strict Scrutiny*. Once the plaintiff shows government action impairs the right to terminate a pregnancy, the burden shifts to the government to show that this impairment withstands strict scrutiny. Under the strict scrutiny standard, the government must show three things: (1) it has a compelling interest; (2) the challenged action actually furthers that interest; and (3) it does so in a way that is narrowly tailored.

6. LEGISLATURE—*Compelling Government Interests—Level of Specificity*. Government interests are more likely to be compelling when they are concrete and exhibit some level of specificity, rather than broad and open to wide interpretation and inclusion of a great array of concerns.

7. COURTS—*Considerations in Deciding If Law Is Narrowly Tailored.* Courts consider one or more of the following three components in deciding

whether a law is narrowly tailored: whether the government's action is necessary, whether the government's action is underinclusive, and whether the government's action is overinclusive.

8. LEGISLATURE – *Government Interest – Actual Evidence to Withstand Strict Scrutiny.* The government must rely on actual evidence to show its action withstands strict scrutiny.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Oral argument held on March 27, 2023. Opinion filed July 5, 2024. Affirmed.

Anthony J. Powell, solicitor general, argued the cause, and *Brant M. Laue*, former solicitor general, *Jeffrey A. Chanay*, former chief deputy attorney general, *Dwight R. Carswell,* deputy solicitor general, *Shannon Grammel*, former deputy solicitor general, and *Derek Schmidt*, former attorney general, were on the briefs for appellants.

Jiaman Wang, pro hac vice, of Center for Reproductive Rights, of New York, New York, argued the cause, and *Genevieve Scott*, pro hac vice, of the same organization, *Paul Rodney*, pro hac vice, of Arnold & Porter Kaye Scholer LLP, of Denver, Colorado, and *Teresa A. Woody*, of The Woody Law Firm P.C., of Kansas City, Missouri, were with her on the brief for appellees.

The opinion of the court was delivered by

ROSEN, J.: This case returns after we held in 2019 that the Kansas Constitution protects a fundamental 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." Government infringement of that right must withstand strict scrutiny. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 614, 440 P.3d 461 (2019) (*Hodes I*). We remanded the case to the district court to apply this standard to whatever evidence the parties offered so it could determine whether legislation banning the most common method of second-trimester abortion violates this protection. The district court found the only evidence offered demonstrated there was "no reasonable alternative" to that procedure. It held the State failed to carry its burden to show the

legislation was constitutional and imposed a permanent injunction. This is the direct appeal from that decision. We affirm the district court's order.

FACTUAL AND PROCEDURAL HISTORY

In 2015, the Kansas Legislature enacted S.B. 95. *Hodes I*, 309 Kan. at 614; K.S.A. 65-6741 et seq. S.B. 95 effectively bans a common method of second-trimester abortion called Dilation and Evacuation except when a D & E is "necessary to preserve the life of the pregnant women" or to prevent a "substantial and irreversible physical impairment of a major bodily function of the pregnant woman." K.S.A. 65-6743(a). The bill was scheduled to go into effect on July 1, 2015. K.S.A. 65-6741.

But on June 1, 2015, Herbert C. Hodes, M.D., Traci Lynn Nauser, M.D., and Hodes & Nauser, MDs, P.A., (Providers), doctors who perform D & E abortions in Kansas, sued. They contended sections 1 and 2 of the Kansas Constitution Bill of Rights protect a right to abortion and that S.B. 95 violates this right. The Providers filed a motion for temporary injunction to prevent S.B. 95 from taking effect while the case moved forward.

The defendants (then Derek Schmidt as the Attorney General of Kansas and Stephen Howe as the district attorney for Johnson County, now Kris Kobach as the Attorney General of Kansas and Howe) (the State) opposed the temporary injunction. The State argued there is no right to abortion under the Kansas Constitution. Alternatively, the State argued even if there is a Kansas constitutional right to abortion, S.B. 95 did not violate that right because alternative methods of second-trimester abortion are available.

The district court granted the temporary injunction after concluding the Providers were substantially likely to prevail on their claim that S.B. 95 violates the Kansas Constitution Bill of Rights. It concluded the Kansas Constitution protects a right to abortion to the same extent the federal Constitution protected a right to abortion at that time. The State immediately appealed from this

temporary injunction to the Court of Appeals under K.S.A. 2014 Supp. 60-2102(a)(2).

Sitting en banc, an evenly divided Court of Appeals affirmed the district court. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan. App. 2d 274, 368 P.3d 667 (2016). Seven judges concluded the Kansas Constitution protects a right to an abortion and concluded the injunction should be affirmed. 52 Kan. App. 2d at 275. Six of those judges applied an undue burden standard developed in *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). *Hodes*, 52 Kan. App. 2d at 290-91. Judge Atcheson concurred but believed a standard akin to strict scrutiny was more appropriate. 52 Kan. App. 2d at 328. The seven remaining judges dissented, concluding there was no right to an abortion under the Kansas Constitution. 52 Kan. App. 2d at 330. Because the panel split evenly on the result, the district court was affirmed. 52 Kan. App. 2d at 295. The State appealed to this court.

We affirmed the temporary injunction. We ruled section 1 of the Kansas Constitution Bill of Rights protects a right to choose whether to continue a pregnancy. But we departed from the lower courts' application of the undue burden standard. Because section 1 "identifies rights distinct from and broader than those listed in the Fourteenth Amendment," the federal standard provided a less rigorous method for considering whether government action violated the Kansas Constitution. *Hodes I*, 309 Kan. at 624. We reasoned that strict scrutiny, as the "most searching of . . . standards," was the better test to utilize when considering whether the government would be permitted to curtail a fundamental right protected by section 1. 309 Kan. at 663. We explained, "Under our strict scrutiny standard, the State is prohibited from restricting that right unless it can show it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest." 309 Kan. at 680.

We agreed with the district court's holding that the plaintiffs were substantially likely to succeed on their claim that S.B. 95 violates the Kansas Constitution. Although we ruled that strict scrutiny, rather than the undue burden standard used by the district

court, is the appropriate test, we reasoned that applying strict scrutiny would not change the outcome because strict scrutiny is more demanding on the State and thus a less rigorous standard for the plaintiffs to meet. *Hodes I*, 309 Kan. at 677.

We remanded the case to the district court with instructions to proceed to the full merits of the case so both sides could present evidence and arguments supporting their respective positions. We explained that, upon remand, "the State is certainly free to assert any interests it believes compelling and show how S.B. 95 is narrowly tailored to those interests." *Hodes I*, 309 Kan. at 680-81.

Back before the district court, the parties filed a joint stipulation dismissing plaintiff Herbert Hodes, who retired during the appellate proceedings. The parties entered discovery, during which the Providers served the State with requests for production of documents and interrogatories. The State served no written discovery on the Providers. The Providers disclosed three fact and expert witnesses: Plaintiff Dr. Nauser; Dr. Anne Davis, a medical expert in obstetrics and gynecology; and Dr. Thomas Cunningham, an expert in clinical ethics, bioethics, philosophical ethics, and philosophy of medicine. The State did not depose any of the Providers' witnesses. The Providers deposed the State's only disclosed expert, but the State later withdrew that witness "given the failure of our own expert." After discovery closed, the parties filed cross-motions for summary judgment.

In its motion, the State argued three legally compelling interests motivated S.B. 95: (1) promoting respect for the value of, and the dignity of, human life, born or unborn; (2) protecting the interests of innocent third parties; and (3) regulation and protection of the medical profession and the medical care provided to Kansans. It asserted S.B. 95 furthers these interests by banning the most "undignified" method of second-trimester abortion. To its motion, the State attached legislative testimony in opposition to and in support of S.B. 95 as "illustrative facts of the information that was before the legislature when it was considering the bill," but acknowledged this information was "not offered as claiming the truth or anything, but just illustrating what the legislature had in mind and the—the purposes and interests it was contemplating while it was considering the bill itself."

In the Providers' motion, they argued the State failed to show any of its asserted interests are compelling or that S.B. 95 furthers those interests. The Providers also argued that, even if the State had met this burden, it failed to show S.B. 95 was narrowly tailored to the asserted interests. The Providers attached to its motion expert and fact declarations under oath from their three expert witnesses.

On April 7, 2021, the district court granted summary judgment for the Providers. It held the uncontroverted facts showed S.B. 95 does not withstand strict scrutiny and consequently violated section 1 of the Kansas Constitution Bill of Rights.

In its ruling, the district court observed that Kansas law prohibits abortion after viability except "when the abortion is 'necessary to preserve the life of the pregnant woman' or 'continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman.'" It found that doctors in Kansas perform the D & E between 14 weeks from the last menstrual period and viability, and that it is the safest and most common form of second-trimester abortion. The court's findings described the procedure:

"[During a D & E], first, the cervix is dilated; next, a combination of suction and forceps or the safest surgical instrument is used to remove the fetus, placenta, and uterine lining. Dr. Davis said usually, because the cervix is narrower than the fetus, some separation of fetal tissue occurs as the physician withdraws the fetal tissue and brings it through the cervix."

The district court found as uncontroverted facts:

"27. The risk of death to the mother associated with childbirth in the United States is approximately 14 times higher than that associated with abortion, estimated to be 8.8 per 100,000 live births compared to 0.7 per 100,000 abortion procedures.

"28. Abortion-related death of the mother is lower than that for other common outpatient medical procedures, such as colonoscopy (2.9 deaths per 100,000 procedures).

"29. Major complications occur in less than 1% of D & E cases. The low complication rate for second trimester abortion is, in large part, attributable to the low complication rate for the D & E method itself.

"30. D & E can be performed on an outpatient basis in a clinical setting at a lower cost than other second trimester procedures performed after 14 weeks' gestation."

The court also made findings about the State's proposed alternatives to the D & E procedure—labor induction and delivery, inducing fetal demise prior to a D & E through digoxin injection, inducing fetal demise prior to a D & E through potassium chloride (KCl) injection, and inducing fetal demise prior to a D & E through umbilical cord transection. The court found generally that these alternatives are more dangerous, untested, or would be impossible in some cases. It also found there is no consensus on what constitutes a dignified abortion procedure and that a ban on the D & E was at odds with medical ethics.

The district court combined the State's asserted interests in "promoting respect for, the value of, and the dignity of human life, born or unborn" and "protecting the interests of innocent third parties" after noting the State had acknowledged these interests "are related enough to collapse into one category to be considered together." After fusing these interests and making its factual findings, the district court issued the following rulings:

The State proved it has a compelling interest in "promoting respect for the value and dignity of human life, born and unborn."

The State failed to prove it has a compelling interest in "regulating the medical profession and maintaining the ethical integrity of the medical profession."

S.B. 95 is not narrowly tailored to the State's compelling interest in promoting respect for the value and dignity of human life, born and unborn.

Regarding its rejection of the State's positions, the court explained:

"The interest in regulating the medical profession is certainly legitimate and important. But Defendants fail to persuade that it is an interest that is extremely weighty, urgent, or rare on the same level as the government's interest in the value and dignity of human life. It is Defendants' burden to establish a compelling State interest in regulating the medical profession in this context, and they have failed to carry it.

. . . .

"The essence of Defendants' narrow tailoring argument is that even with enforcement of the Act there are other second trimester abortion options available. The burden is on the Defendants to demonstrate narrow tailoring not just in theory, but in fact. Defendants assert that a woman seeking a second trimester abortion can either elect another procedure or seek an alternative means of fetal demise prior to the D&E. The problem with this argument lies with the evidence

(or lack thereof) before the Court. The evidence is that because of its safety record and availability in an outpatient setting, D&E is a standard method of abortion and the most commonly used abortion procedure beginning at approximately 14 to 15 weeks LMP. . . .

. . . .

". . . Defendants offer no facts and little argument about how these alternatives for bringing death promote greater respect for the value and dignity of human life as a substitute for D&E; instead, they offer only a theory. The facts do not demonstrate that the net effect of the Act will be to bring a more dignified death to the unborn child before it is removed from the mother's body. . . ."

The State appealed to this court under K.S.A. 60-2101(b) (state statute held unconstitutional). It did not dispute the district court's factual findings. Instead, it urged us to overrule our earlier decision and hold the Kansas Constitution does not protect a right to abortion. Absent that, the State contends S.B. 95 withstands strict scrutiny review.

On August 2, 2022, Kansas voters rejected a proposed constitutional amendment to add language stating, in part, that the state Constitution "does not create or secure a right to abortion." The proposal failed by a vote of 385,014 (40.84%) in favor to 557,837 (59.16%) against. The ballot explained that a "No" vote "would make no changes to the constitution of the state of Kansas, and could restrict the people, through their elected state legislators, from regulating abortion by leaving in place the recently recognized right to abortion."

DISCUSSION

We affirm our earlier decision that section 1 protects a right to decide whether to terminate a pregnancy.

The State devoted much of its brief to inviting us to reverse our earlier ruling in this case that the Kansas Constitution protects a right to abortion. We decline the invitation.

A linchpin of the common law is that earlier decisions guide courts and parties as to the state of the law in the present and the future.

"It seems to have been recognized from the very beginning of adjudicated cases in England that the reasonable expectations of men, built upon the distinct and solemn pronouncement of a judge or court should not be demolished at the whim of any successor; and, that to permit such practice would ultimately cause law to

lose its significance as a rule of conduct, making a litigant's adventure in court akin to a journey into a wilderness of confusion." Evans, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 23 Denver L. Rev. 32, 35 (1946).

This principle takes its most vivid expression in the law-of-the-case doctrine, which restricts a party from relitigating an issue already decided on appeal in successive stages of the same proceeding. *State v. Parry*, 305 Kan. 1189, Syl. ¶ 1, 390 P.3d 879 (2017). Courts adhere to the law of the case ""to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts. [Citations omitted.]"" 305 Kan. at 1194.

The law-of-the-case doctrine is intended to prevent continued re-argument and avoid, "in short, Dickens's *Jarndyce v. Jarndyce* syndrome," where a case does not end until the money to pay fees runs out. *McIlravy v. Kerr-McGee Coal Corp*., 204 F.3d 1031, 1035 (10th Cir. 2000). It also "discourages litigants from filing subsequent appeals in hopes of obtaining a more sympathetic panel." *United States v. Agofsky*, 516 F.3d 280, 283 (5th Cir. 2008). In *Entek GRB, LLC v. Stull Ranches, LLC*, then judge Gorsuch wrote:

> "Law of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation. It's a pretty important thing too. Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again." *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1240 (10th Cir. 2016).

One circumstance under which the law-of-the-case doctrine comes into play is when a second appeal is brought in the same case. In that instance, the first decision is generally the settled law of the case on all questions involved in the first appeal, and "reconsideration will not normally be given to those questions." *Parry*, 305 Kan. at 1195. An argument once made to and resolved by an appellate court becomes "the law" in that case and generally cannot be challenged in a second appeal. *State v. Collier*, 263 Kan. 629, Syl. ¶ 3, 952 P.2d 1326 (1998).

Courts generally recognize only three exceptions allowing departure from the law of the case. "These exceptions apply when (1) a subsequent trial produces substantially different evidence, (2) a controlling authority has made a contrary decision regarding the law applicable to the issues, or (3) the prior decision was clearly erroneous and would work a manifest injustice. [Citations omitted.]" *State v. Kleypas*, 305 Kan. 224, 245, 382 P.3d 373 (2016).

The State ardently argues our earlier decision was flat-out wrong, thereby appearing to invoke the third exception. It most certainly does not invoke the first exception because the State presented no evidence on remand and the Providers' evidence was consistent with its sworn testimony from the preliminary injunction stage.

We have observed the need for the discretionary power to reconsider a prior ruling under limited circumstances. "If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally." *Railway Co. v. Merrill*, 65 Kan. 436, 451, 70 P. 358 (1902). See also *Hudson v. Riley*, 114 Kan. 332, 335, 219 P. 499 (1923) ("If there was error in the ruling it is competent for the court to correct it, and especially where it can be done before the litigation in which it occurred has been finally terminated."). But the State has given us no reason to revisit our ruling in this case.

The relevant exception to the law-of-the-case doctrine requires a showing that the original decision was clearly erroneous. The State has made no such showing. The questions it seeks to relitigate were addressed in extensive analysis in our first ruling. And the few cases it cites that have been decided since that ruling—one interpreting the federal Constitution and one interpreting the Iowa Constitution—do not control or even bring into question our interpretation of the Kansas Constitution Bill of Rights. See *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) (reexamining federal Fourteenth Amendment precedent and holding it does not protect a right to abortion); *Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710, 715 (Iowa 2022), *reh'g denied* July 5,

2022 (reexamining Iowa Constitution's due process clause and deciding it does not require strict scrutiny review while leaving undecided what constitutional standard should replace it). And at oral argument, the State referred us to *Whole Women's Health v. Paxton*, 10 F.4th 430 (5th Cir. 2021), a post-*Dobbs* Fourteenth Amendment decision, to suggest we use its facts to fill the State's evidentiary gap here.

We acknowledge the makeup of this court has changed since our last decision. But even a subsequent court's disagreement with an earlier court's reasoning or conclusion does not invoke by itself an exception to the doctrine. See *Cromwell v Simons,* 280 F. 663, 674, *cert. denied* 258 U.S. 630 (2d Cir. 1922) (changed makeup of court is not sufficient grounds for reversing earlier holdings in a case).

Finally, we note the State had the opportunity to request a rehearing or modification of our first decision and present its arguments at the time we issued the opinion, but it did not avail itself of that opportunity. See Supreme Court Rule 7.06 (2023 Kan. S. Ct. R. at 51) (procedure for motions for rehearing or modification). The State essentially makes such a request now, well beyond the 21-day limit set out in the rule, without any justification for ignoring the earlier opportunity. We will not entertain this untimely request now, especially considering the State's failure to assert any new authority indicating our ruling was clearly erroneous.

We stand by our conclusion that section 1 of the Kansas Constitution Bill of Rights protects a fundamental right to personal autonomy, which includes a pregnant person's right to terminate a pregnancy. The State must show any infringement of that right withstands strict scrutiny. *Hodes I*, 309 Kan. at 680 ("Under our strict scrutiny standard, the State is prohibited from restricting that right unless it can show it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest.").

S.B. 95 violates section 1 of the Kansas Constitution Bill of Rights.

When a party asserts state action violates the right to terminate a pregnancy under section 1 of the Kansas Constitution Bill of

Rights, the burden lies with the plaintiff to show an impairment of the right. If the plaintiff makes this showing, the burden shifts to the government to prove the impairment furthers a compelling state interest and is narrowly tailored to furthering that interest. *Hodes I*, 309 Kan. at 671-72.

The State concedes S.B. 95 impairs the right to abortion. It also does not dispute the district court's detailed factual findings. But it claims S.B. 95 withstands constitutional scrutiny because it is narrowly tailored to further two compelling government interests. It describes those two compelling interests as: "promoting respect for, the value of, and the dignity of human life, born or unborn" and "regulation and protection of the medical profession and the medical care provided to Kansans."

The district court rejected the State's position in part. It agreed the State's interest in "promoting respect for the value and dignity of human life, born or unborn" was compelling. But it concluded S.B. 95 is not narrowly tailored to that interest. It further ruled the State failed to show it has a compelling interest in the regulation and protection of the medical profession and the medical care provided to Kansans.

Our well-settled standard governs review of a district court's grant of summary judgment.

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo." *GFT Lenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

The parties agree there is no genuine issue of material fact in the record. They disagree about whether the uncontested material facts show S.B. 95 withstands strict scrutiny.

Our strict scrutiny inquiry requires the State prove three things: (1) it has a compelling interest; (2) the challenged action

actually furthers that interest; and (3) it does so in a way that is narrowly tailored. *Hodes I*, 309 Kan. at 680; *Hodes & Nauser v. Stanek*, 318 Kan. 995, 1005, 551 P.3d 62 (2024).

The first prong requires the government show its asserted interest is compelling. In *Hodes I*, we described a compelling interest as "one that is 'not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.'" *Hodes I*, 309 Kan. at 663. The Supreme Court has described a compelling interest as one "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). In other words, "'[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'" *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530, 65 S. Ct. 315, 89 L. Ed. 430 [1945]).

Interests are more likely to be legally compelling when they are concrete and exhibit some level of specificity, rather than broad and open to wide interpretation and inclusion of a great array of concerns. In *Stanek*, we acknowledged this. We concluded courts should avoid more generic statements of government interest that amount to little more than advancing a "commendable goal" because they make meaningful judicial review more elusive and provide "little, if any, guidance on how to determine whether an interest articulated by the State is a compelling one under the strict scrutiny framework." *Stanek*, 318 Kan. at 1015. We also questioned "whether an interest articulated in the abstract is enough to establish the compelling nature of that interest," and noted that "[r]equiring only a theoretical government interest creates the potential for arbitrary results." *Stanek,* 318 Kan. at 1017.

As one legal commentor has opined, "it will frequently be crucial how the government's interest is defined," in part because "the narrow tailoring inquiry will be left untethered if there is too little attention to exactly what the government's purportedly compelling interest is." Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1325 (2007). As we discuss below, the narrow tailoring prong of strict scrutiny requires "'[p]recision of regulation.'" *State v. Ryce*, 303 Kan. 899, 956-57, 368 P.3d 342 (2016). It is undoubt-

edly difficult, if not impossible, to effectively regulate in the interest of something that is amorphous or capable of encompassing countless sub-interests.

If the government can establish an interest as compelling, it must tackle the second step in our analysis and show its regulation *furthers* that compelling interest See *Holt v. Hobbs*, 574 U.S. 352, 362-64, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015) (strict scrutiny requires government action "actually further[ed]" asserted interest); *Carey v. Population Servs., Intl.*, 431 U.S. 678, 690-91, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (legislation could not withstand strict scrutiny because it did not serve the State's asserted interests); Galloway, *Basic Substantive Due Process Analysis*, 26 U.S.F. L. Rev. 625, 640 (1992) ("The 'compelling interest' prong of strict scrutiny requires not only that the government have a compelling interest, but also that the government's conduct 'further' that interest, i.e., the conduct must be a substantially effective means for advancing that interest.").

Showing that its action furthers its asserted interest can be crucial to the government's success. In *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 627, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016), *abrogated by Dobbs*, 597 U.S. 215, the government's failure to produce evidence showing that abortion legislation furthered an interest in "maternal health" was key to the Supreme Court's conclusion that the law was unjustified when compared to the burden it created on the right to abortion. There, the government argued that legislation requiring doctors to have admitting privileges to hospitals to provide abortions did not advance any interest in patient health when the evidence showed that abortion "'was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.'" *Hellerstedt*, 579 U.S. at 610-11. Legislation requiring all abortion facilities to meet surgical-center standards also failed to further an interest in maternal health because the evidence made it clear that the requirement would not create "'better care or . . . more frequent positive outcomes.'" *Hellerstedt*, 579 U.S. at 582. Although the Court in *Hellerstedt* was applying a form of the undue burden test, its evidence-based approach to the furtherance question provides an instructive tool for our application of the

same question within the strict scrutiny test. See *Hodes I*, 309 Kan. at 701 (Biles, J., concurring) (opining that test in *Hellerstedt* captures strict scrutiny test described by majority).

The third prong of strict scrutiny requires the government action be narrowly tailored in its furtherance of the compelling interest. This requires "'[p]recision of regulation.'" *Ryce*, 303 Kan. at 957 (quoting *Natl. Assn. for Advancement of Colored People v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 [1963]). Courts often break this analysis into one or more of three components.

The first component considers whether the action is necessary or, in other words, "the least restrictive alternative." See *Republican Party of Minn. v. White*, 536 U.S. 765, 775, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) (to be narrowly tailored, a statute must not "unnecessarily circumscribe protected expression"); *Burson v. Freeman*, 504 U.S. 191, 199, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) ("To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest."); *Boos v. Barry*, 485 U.S. 312, 329, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (even if action serves government interest, it is not narrowly tailored if "a less restrictive alternative is readily available"); *United States v. Brandon*, 158 F.3d 947, 960 (6th Cir. 1998) (narrow tailoring requires government action be "least restrictive . . . means of satisfying" compelling interest); Fallon, 54 UCLA L. Rev. at 1326 ("The first element of the narrow tailoring requirement insists that infringements of protected rights must be necessary in order to be justified . . . [i.e.] the government's chosen means must be 'the least restrictive alternative' that would achieve its goals.").

The second component considers whether the action is underinclusive, meaning "it fails to regulate activities that pose substantially the same threats to the government's purportedly compelling interest as the conduct that the government prohibits." Fallon, 54 UCLA L. Rev. at 1327. Underinclusive regulations do not withstand strict scrutiny because they "'diminish the credibility of the government's rationale' for infringing on constitutional rights and generate suspicion that the selective targeting betrays an impermissible motive." Fallon, 54 UCLA L. Rev. at 1327 (quoting *City*

of Ladue v. Gilleo, 512 U.S. 43, 52, 114 S. Ct. 2038, 129 L. Ed. 2d 36 [1994]). See also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) ("'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited'"); *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448-49, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015) (explaining "underinclusiveness can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint'" and "reveal that a law does not actually advance a compelling interest"); *Bishop v. Smith*, 760 F.3d 1070, 1081-82 (10th Cir. 2014) (ban on same-sex marriage not narrowly tailored because it is underinclusive; government contends ban serves interest in children being raised by biological parents but fails to address other contexts in which children will be raised by non-biological parents); *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 135 (Minn. 2014) (to be narrowly tailored, "a statute can be neither overinclusive nor underinclusive; rather, it must be 'precisely tailored to serve the compelling state interest'").

The third component considers whether the action is overinclusive, meaning it regulates activity that does not affect the government's asserted interest. Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417, 2422 (1996); see also *Citizens United v. Fed. Election Commonwealth*, 558 U.S. 310, 362, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (statute prohibiting corporations from funding speech supporting political candidates was overinclusive in relation to interest in preventing dissenting shareholders from being compelled to fund corporate speech because it applied to all corporations, including those with a single shareholder); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 121, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (law requiring person convicted of a crime to give income from any writings describing the crime to victims and creditors was overinclusive as means for ensuring victims are compensated from proceeds of crime because law applied to all works, even if description of the crime was tangential and because the definition of person convicted of a crime was broad enough to include any author who admitted to crime

regardless of accusation or conviction); *Bishop*, 760 F.3d at 1082 (ban on same-sex marriage not narrowly tailored because it is overinclusive; ban goes well beyond serving interest in ensuring children raised by biological parent—it denies same-sex couples fundamental right to marry); *State v. Burnett*, 93 Ohio St. 3d 419, 429, 755 N.E.2d 857 (2001) ("'A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy.'" [quoting *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)]).

Sometimes courts examine all three of the narrow tailoring components. See *Burson*, 504 U.S. at 206-07 (considering whether statute prohibiting solicitation of votes and campaign materials within 100 feet of polling place was necessary, overinclusive, or underinclusive); *Cahaly v. Larosa*, 796 F.3d 399, 405-06 (4th Cir. 2015) (considering all three components); *Welchen v. Bonta*, 630 F. Supp. 3d 1290 (E.D. Cal. 2022) (same). But courts often deem just one or two considerations to be fatal to the narrow tailoring analysis, leaving no reason for the court to consider the remaining components. See *Simon & Schuster, Inc.*, 502 U.S. at 121 (holding law was not narrowly tailored and thus unconstitutional because it was overinclusive); *Boos*, 485 U.S. at 329 (law is not narrowly tailored because "less restrictive alternative is readily available").

A robust argument from the government that its action or legislation is precisely tailored to furthering its interests will rely on actual evidence of such precision. This is especially true in cases like this when the state is legislating within the medical field. See *Hodes I*, 309 Kan. at 701 (Biles, J., concurring) (noting "the pivotal role expert testimony typically plays in medically related litigation").

With this description of the strict scrutiny test in mind, we now apply its principles to the State's arguments.

Even if S.B. 95 furthers a compelling interest in promoting the value and dignity of human life, born and unborn, the State has failed to show S.B. 95 is narrowly tailored toward that end.

The State has argued S.B. 95 furthers a compelling interest in promoting the value and dignity of human life, born and unborn, and that it is narrowly tailored to that end. It offered no evidence to support its

claims. Although it advanced one witness, it withdrew that witness after the Providers deposed them. The Providers offered expert and fact declarations under oath from three witnesses, but the State deposed none of them.

In place of evidence, the State made legal arguments and offered its own opinion on the morality of a D & E. It asserted it has a compelling interest in promoting the value and dignity of all human life, born and unborn, because it has such an interest in a person who has been born, and in Kansas, a fetus is synonymous with a person who has been born. It relied on K.S.A. 65-6732, often referred to as the "personhood statute" to equate a fetus with a person who has been born. This statute provides that "the life of each human being begins at fertilization" and requires Kansas laws to "be interpreted and construed to acknowledge on behalf of the unborn child . . . all the rights, privileges and immunities available to other persons, citizens and residents of this state" subject to the federal and Kansas Constitutions. K.S.A. 65-6732(a), (b). The State argued S.B. 95 furthers its interest in promoting the value and dignity of human life because it prohibits a "grotesque, demeaning, dehumanizing procedure." It claimed the legislation is narrowly tailored toward that end because it allows for other methods of second-trimester abortion, includes exceptions for preserving the pregnant patient's life and for preventing irreversible impairment to major bodily functions, and limits who is liable under the statute.

But given the lack of any new evidence from the State and the extensive analysis of our earlier decision, the district judge aptly questioned the State during a hearing on the summary judgment motions what it thought was "left for the district court here to do?" The State responded:

"Given the failure of our expert witness and our inability to—our failure to present additional evidence through an expert who remains up for consideration here, I—I would agree that the State has not put forward any additional evidence as the remand from the court—the Supreme Court. . . . [T]he one thing I think that's left before this Court to analyze that didn't really get treatment in the Supreme Court opinion is to recognize, and this would be contrary to the discussions in Judge Atcheson's opinion, but to recognize the dignity and—and value of life that the unborn has under Kansas law and the significance of that—that personhood and that dignity when evaluating the constitutionality of abortion regulation and expanding the legal conversation beyond just maternal autonomy."

The court then asked the State to "say that was something that this Court wanted to do. In the legal analysis, and given the record before the Court, then what?" The State answered:

> "Well I—I can offer Judge is on the inevitable appeal of any such order recognizing that compelling state interests, the Appellate Courts would have the opportunity to evaluate whether that sits properly with their interpretation of *Hodes*. I recognize that we don't have a witness to question further presented by the defense to further embellish that in a trial setting and that the—the record before the Court of Appeals would be only expanded from its initial look by the arguments made in the briefs themselves."

The district court accepted half of the State's arguments. It agreed S.B. 95 furthers a compelling interest in promoting respect for the value and dignity of human life, born and unborn. But it ruled S.B. 95 is not narrowly tailored to furthering that interest.

We take a different route to the same end. We will not decide today whether the district court was correct to sanction this interest as compelling and to conclude S.B. 95 furthers it. We take this route because of two aspects of the record before us which prevent a thorough review of an issue that has potentially far-reaching precedential effect.

First, the interest articulated by the State is a broadly stated aspirational interest that has many nuances and facets reaching beyond D & E's and second-trimester abortion. Yet the State has painted with a broad brush and relied almost exclusively on K.S.A. 65-6732. The State insists its interest is compelling because the people of Kansas have "openly expressed" through their elected representatives the notion that life begins at fertilization. But that argument runs face first into the August 2022 vote of the people overwhelmingly rejecting a proposed constitutional amendment to give those same elected representatives unfettered regulatory control over abortion.

Considerable authority suggests the State cannot create a compelling interest through legislation. See *Hodes*, 52 Kan. App. 2d at 311 (Atcheson, J., concurring) (a "statute cannot . . . alter the constitutional rights secured in [section] 1 [because] the legislature cannot mandate how the courts construe constitutional protections"); *Gryczan v. State*, 283 Mont. 433, 454, 942 P.2d 112 (1997) ("[T]he courts are [not] bound to simply acquiesce" when

the "legislature has enacted as law what may be a moral choice of the majority" because the "Constitution guarantee[s] to all persons, whether in the majority or in a minority, those certain basic freedoms and rights which are set forth in the Declaration of Rights."). And courts must guard their role in the separation of powers that distinguish our form of government. *Harris v. Shanahan*, 192 Kan. 183, 207, 387 P.2d 771 (1963) ("this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas").

Moreover, the State's interest, as stated, is so generic as to mean anything the State wants it to mean when it needs to justify anything it would want to do. And that does not protect the fundamental right of bodily autonomy, or for that matter any other fundamental right. For example, this phrasing could justify government force to compel someone to donate a body organ if doing so would save a life. Or it could return us to the days of R.S. 1923, 76-149 through 76-155, authorizing in Kansas sterilization of the "insane," epileptic, or "feeble-minded" as justified by "the interests of the higher general welfare"); cf. L. 1965, ch. 477, § 1 (repealing R.S. 1923, 76-149).

Second, the State has not presented even a scintilla of evidence that S.B. 95 *furthers* the stated interest. We have made clear that in ascertaining whether an action "directly promotes valid state interests . . . findings must be based on evidence, including medical evidence, presented in judicial proceedings. Mere deference to legislative or administrative findings or stated goals would be insufficient." *Hodes I*, 309 Kan. at 700 (Biles, J., concurring); see also *Hellerstedt*, 579 U.S. at 610 (legislation did not further an interest in patient health when the State failed to provide evidence showing there "was no significant health-related problem that the new law helped to cure").

Nevertheless, we decline to address this undeveloped point because we can affirm the district court on the basis of its holding that S.B. 95 is not narrowly tailored to its asserted end. See *Stanek*, 318 Kan. at 1017-18 (assuming without deciding that protecting maternal health may be a compelling state interest since the district court made no factual findings about the state's compelling interest as to that interest). In sum, we assume without deciding

that the State's asserted interest in promoting respect for the value and dignity of all human life, born and unborn, is compelling and that S.B. 95 furthers that interest. We move to the third prong of our strict scrutiny test.

A single component of the narrow tailoring inquiry illustrates the State's failure to carry its burden. The record created by the parties clearly indicates S.B. 95 is underinclusive.

The State argues S.B. 95 is narrowly tailored because it prohibits an undignified manner of abortion while leaving other abortion procedures available, creates exceptions for life and health, and limits who is liable for a violation. But the State offered nothing to demonstrate D & E is distinguishable from those other forms of abortion. Thus, based on the record we have, S.B. 95 "fails to regulate activities that pose substantially the same threats to the government's purportedly compelling interest." *Fallon,* 54 UCLA L. Rev. at 1327.

The State claims the D & E is "particularly barbaric" and "particularly offensive to the value and dignity of human life" compared to other forms of abortion. Not only did the State fail to produce evidence in support of this assertion, but it also failed to counter the Providers' evidence to the contrary.

The State advanced four alternatives to the D & E: labor induction and delivery, inducing fetal demise prior to a D & E through digoxin injection, inducing fetal demise prior to the D & E through KCl injection, and inducing fetal demise prior to a D & E through umbilical cord transection. The district court found from the plaintiffs' facts that hysterotomy is another possible second-trimester abortion technique.

To complete labor induction and delivery, physicians use medication to induce labor and the pregnant patient vaginally delivers the fetus in a hospital setting over the course of anywhere from five hours to three days. A hysterotomy "entails an incision through the woman's abdomen and uterus."

To achieve fetal demise prior to a D & E through digoxin injection, physicians use a spinal needle to inject digoxin through the patient's abdomen, vagina, or cervix, into either the amniotic fluid or the fetus. It can take up to 24 hours for digoxin to cause

demise, and it is not 100% effective, thus sometimes requiring a second injection.

To achieve fetal demise prior to a D & E through KCl injection, physicians administer the injection via needle through the pregnant patient's abdomen, cervix, or vagina, into the fetal heart.

And to achieve fetal demise prior to a D & E through umbilical cord transection, physicians break the amniotic sac, remove the amniotic fluid, locate the umbilical cord, and transect the cord.

The State claims each of its suggested methods is more dignified than the D & E, but no evidence supports this. The Providers' expert in biomedical ethics noted there is no agreement on human dignity in health care generally or regarding the "termination of a fetus prior to viability." He described the State's "position that certain methods of inducing fetal demise are more dignified than standard D & E" as "baseless."

Another of the Providers' experts explained that in one study, 81% of patients who were offered the option to induce fetal demise by digoxin injection prior to a D & E declined. She stated other studies indicate when some patients "expressed such a preference, those studies were limited to instances in which women had no alternative but to undergo a demise procedure . . . and many women had incorrect perceptions about the procedure, including that the injection would make the abortion easier and less painful for them." The doctor noted that in her own experience, "once patients understand the risks and details of the induced demise procedure, the large majority of women express a strong desire to avoid a demise procedure." The expert also stated, "There is no medical basis to suggest that it is more dignified to induce fetal demise prior to performing a D & E."

While the State claims the D & E is more offensive than other abortion procedures, it offered nothing to support this view or to counter the Providers' evidence indicating that no method of abortion is more dignified than another. Consequently, S.B. 95 is underinclusive because it fails to curtail activity that poses the same threat to the State's asserted interest as does the D & E.

The district court utilized similar reasoning. It held that S.B. 95 is not narrowly tailored because, even if the D & E is undignified, "so is death by induced labor or caesarean section prior to

viability, cutting the umbilical cord, or injecting lethal chemicals into the womb or into the heart of the unborn child." The court reasoned: "Defendants offer no facts and little argument about how these alternatives for bringing death promote greater respect for the value and dignity of human life as a substitute for D & E; instead, they offer only a theory."

The State calls this result "puzzling," arguing that "the objection seems to be that the Act is *too* narrowly tailored and that it would need to prohibit a broader range of abortion procedures to be constitutional." But the State misses the point of the underinclusivity consideration. Prior to joining the Supreme Court, Justice Kagan explained, in the context of considering whether regulations on speech are narrowly tailored, "if a restriction applies to less speech than implicates the asserted interest . . . the concern grows that the interest asserted is a pretext." Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 453-54 (1996). In other words, the underinclusivity is not what is constitutionally offensive. Underinclusivity *reveals* something constitutionally offensive: that the true interest animating the government's action is likely illegitimate. See *Shapiro v. Thompson*, 394 U.S. 618, 631, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), ("If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'") *overruled for other reasons by Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); Spece & Yokum, *Scrutinizing Strict Scrutiny*, 40 Vt. L. Rev. 285, 299 (2015) ("Interests are illegitimate if they are patently prohibited by the Constitution, as with a mere desire to deter the exercise of a fundamental right.").

The State offered nothing in support of its position that S.B. 95 actually targets the harm it alleges. It has thus failed to carry its burden to show S.B. 95 is narrowly tailored to further any compelling interest in promoting respect of the value and dignity of human life, born and unborn. See *Doe v. City of Albuquerque*, 667 F.3d 1111, 1134 (10th Cir. 2012) (municipality's failure to produce any evidence that action inhibiting free speech was narrowly

tailored to its asserted interest meant summary judgment for plaintiffs was appropriate).

We will now consider the State's second asserted interest to decide whether S.B. 95 withstands strict scrutiny.

The State failed to show S.B. 95 furthers any interest in the regulation and protection of the medical profession and the medical care provided to Kansans.

The State argued in the district court that S.B. 95 also furthers a compelling interest in "the regulation and protection of the medical profession and the medical care provided to Kansans" and that it is narrowly tailored toward that end. The district court concluded the State failed to show this is a compelling interest. It observed that other courts have held that regulating and protecting the medical profession is a legitimate interest. But it ruled the State failed to present any evidence or authority this interest is compelling.

Again, the State has advanced a broad interest capable of encompassing a wide range of goals and concerns. Throughout its briefing and arguments, it characterizes this interest as protecting a fetus from the medical community, protecting pregnant patients from the medical community, and protecting the integrity of the medical community. The State's failure to advance a specific and concrete interest alone suggests to us the district court was correct when it ruled the State failed to prove this interest is compelling. But, again, we need not wade into the depths of that discussion because the State's abject failure to produce any evidence supporting its position results in a clear failure to show S.B. 95 furthers any interest in protecting the integrity of the medical profession or in patient safety. See *Cornelio v. Connecticut*, 32 F.4th 160, 173 (2d Cir. 2022) (Government's failure to produce any evidence resulted in failure to show that action abridging free speech materially advanced asserted interests so district court's dismissal of plaintiff's claim was error.).

As the district court found and the State did not contest, S.B. 95 eliminates a safe and common medical procedure and leaves patients subject to procedures that are rarely used, are untested, and are sometimes more dangerous or impossible. The district

court's findings in support of this general assessment were numerous. For example, regarding labor induction and delivery, the court found:

"[I]nduced labor abortions must be performed on an inpatient basis in a hospital, can take up to 2 to 3 days, and are more expensive than outpatient D & E. . . . [A] prolonged induction poses an increased risk of infection compared with D & E. Although serious complications are rare, complications occur more often in inductions than in D & E procedures. . . . [I]nduction requires women to go through labor, offers less predictable timing, and may fail or cause uterine rupture. Following an induction, between 10 to 33% of women have retained placenta and must undergo an additional medical procedure to have it removed."

Regarding the State's suggestion that doctors could induce fetal demise through digoxin or KCl injection prior to a D & E, the court found:

"There is virtually no research on the use of digoxin to induce fetal demise prior to 18 weeks. . . . Research to date on the administration of digoxin to induce fetal demise prior to a D & E finds no clear medical benefit, but has shown increased risks of infection, vomiting, unplanned fetal delivery outside a medical facility, and hospitalization. Though rare, digoxin toxicity poses an extreme risk, with documented incidence of hyperkalemic paralysis, which can be fatal. Some women also have contraindications for digoxin injections, and digoxin injections are less likely to be successful on obese women or women with uterine fibroids, both of which are common. . . . [I]njections prior to 18 weeks would likely have even higher failure rates, and it may be technically impossible to do an intrafetal injection. . . . [I]f fetal demise does not occur in the expected time period after the first digoxin injection, a second injection would be necessary to induce fetal demise. Dr. Davis and Dr. Nauser were not aware of any published information showing that multiple doses of digoxin to induce demise is either safe or effective. Dr. Davis opined that requiring physicians to perform a digoxin injection prior to 18 weeks or to provide a second injection, and delay the procedure even further, is untested and confers even greater risk. . . . It is Dr. Nauser's medical judgment that, as to induction of demise using digoxin prior to 18 weeks in particular, and given the lack of study on the topic, performing such procedures amounts to experimenting on patients.

"[Inducing fetal demise through KCl injection] requires a high level of skill and is typically performed by Maternal-Fetal Medicine OB-GYNs in a hospital setting using ultrasound guidance, following a specialized fellowship to gain advanced training and extensive practice. Training to perform KCl injections is not part of obstetrics and gynecology residency training, and it is not part of the training program of family planning fellowships. KCl carries risks, including maternal cardiac arrest and infection. It can also be even more technically challenging or impossible in women with obesity or uterine fibroids. There are no

studies on the failure or complication rate of KCl injection performed by physicians without specialized training or in outpatient settings."

And regarding the State's position that doctors could transect the umbilical cord to achieve fetal demise before a D & E, the district court found

"there is no established medical benefit from performing umbilical cord transection. . . . Dr. Davis said it is likely that attempting this procedure would carry risks of pain, uterine perforation, infection, and bleeding. This method is not 100% reliable. Dr. Davis said transecting the cord prior to D & E to induce fetal demise cannot be accomplished in every case. . . . Because attempting to transect the umbilical cord necessarily entails breaking the amniotic sac and draining the amniotic fluid, a provider would be compelled to either proceed with performing the D & E procedure, or delay performing the D & E to attempt another method of inducing demise, which would expose the patient to heightened risk of serious complications such as pain, uterine perforation, infection and hemorrhage. Dr. Nauser said that attempting to induce demise using another method such as digoxin injection after the failure of umbilical cord transection is not the subject of any study."

In short, S.B. 95 does not further patient safety, it compromises patient safety.

The State acknowledges the evidence supporting this conclusion. In response, the State urged us at oral argument to look outside of the factual record in this case to a factual record in another case from a different *jurisdiction, Paxton*, 10 F.4th 430, that the State claimed has a fact pattern more favorable to its position. We are bewildered by this request and will not entertain it. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013) ("It is well-settled that the burden is on a party to designate a record sufficient to present its points to the appellate court and to establish its claims. . . . When facts are necessary to an argument, the record must supply those facts . . . .").

The State also insists S.B. 95 serves an interest in maintaining the integrity of the medical profession by ensuring "the perception of the practice of medicine in Kansas as one that is life-affirming, not grotesque" through a ban on a procedure "the State sees . . . as unnecessarily brutal and inhumane."

But the State has not established S.B. 95 is inconsistent with medical ethics. In fact, the factual record reveals the opposite. The Providers' experts attested that S.B. 95 harms the integrity of the

medical profession because it prohibits doctors from offering a safe and common method of abortion with no patient benefit and will force physicians to administer more dangerous procedures.

Dr. Davis explained, "D & E is extremely safe. Major complication occurs in less than 1% of D & E cases." She noted "D & E can be performed on an outpatient, ambulatory basis in a clinic setting at a lower cost than any other second-trimester procedure performed after approximately 15 weeks gestation." "Because of its impressive safety record and its availability in an outpatient setting," Dr. Davis explained, "D & E remains a standard method, and is the most commonly used method for abortion after approximately 14-15 weeks." Dr. Nauser explained why prohibiting the D & E conflicts with medical ethics:

"Forcing women to undergo procedures with greater costs, harms, and risks, and which in many instances are still experimental, is inconsistent with medical ethics. Rather than serving the integrity or wellbeing of the profession, the Act requires patients to undergo an invasive, unnecessary procedure that is inconsistent with the advice of their physician, or be prevented from accessing abortion entirely."

The district court made factual findings along these lines:

"Cunningham opined, and Dr. Nauser agreed, that under fundamental principles of medical ethics, physicians should not require patients to undergo medically unnecessary procedures in order to obtain other care.

"Cunningham opined, and Dr. Nauser and Dr. Davis agreed, that under these principles, women seeking D & E procedures prior to 18 weeks should not be subjected to an untested and unstudied procedure.

"Cunningham opined, and Dr. Nauser agreed, that the Act denies Dr. Nauser's patients the autonomy to freely choose among medically appropriate treatment options and will undermine the physician-patient relationship by forcing Dr. Nauser to comply with a government mandate that she does not believe is in her patients' best interests."

The State acknowledges "[o]thers can disagree" with its opinion that a ban on D & E eliminates a procedure that is "brutal and inhumane," thereby furthering an interest in maintaining the integrity of the medical profession. It argues what matters is that "it has deemed" the D & E so.

We disagree. The State may have an opinion, but what matters is the evidence. And the Providers' evidence showed S.B. 95 may

cause a patient to "lose faith in the medical profession when she discovers that she will be denied a procedure (D & E), or subjected to additional procedures (fetal-demise procedures), for no medical reason whatsoever but rather for reasons of pure paternalism." *Bernard v. Individual Members of Ind. Med. Licensing Bd.*, 392 F. Supp. 3d 935, 958-59 (S.D. Ind. 2019) (holding a ban on D & E does not further an interest in protecting the integrity of the medical profession), *vacated in accordance with Dobbs*, 597 U.S. 215. The State has failed to show S.B. 95 furthers any interest in the medical care provided to Kansans or the integrity of the medical profession.

CONCLUSION

The State has not carried its burden to establish S.B. 95 is narrowly tailored to furthering any compelling interest. We affirm the district court's grant of summary judgment for the Providers. We strike K.S.A. 65-6741 et seq., as argued before the district court, as an unconstitutional violation of section 1 of the Kansas Constitution Bill of Rights.

WALL, J., not participating.

* * *

WILSON, J., concurring: I concur in the judgment.

The text of section 1 of the Kansas Constitution Bill of Rights states: "All men are possessed of equal and inalienable natural rights, *among which* are life, liberty, and the pursuit of happiness." (Emphasis added.) In my view, the text's inclusion of the phrase "among which" makes clear in plain language that all people have natural rights *beyond* the rights to life, liberty, and the pursuit of happiness.

During oral arguments before this court, the State agreed that bodily autonomy is an inalienable natural right. The decision to have an abortion certainly implicates a pregnant woman's bodily autonomy.

All abortions terminate a woman's pregnancy. To be specific, S.B. 95 only limits the *method* by which an otherwise legal abor-

tion may be effected. Plaintiffs allege this limit imposes an unconstitutional restriction on the woman's natural, section 1, constitutional rights. The State suggests otherwise. The majority and the dissent use different approaches to determine whether S.B. 95 violates the Kansas Constitution, with the majority concluding S.B. 95 unconstitutionally violates the woman's natural right.

The State also agrees the question of whether the Kansas Constitution defines a fetus, or unborn child, as a person is not before us in this case. The instant controversy therefore involves when and how the government may infringe on the exercise of a woman's natural right to bodily autonomy, rather than the question of how that bodily autonomy right may conflict with natural rights held by others.

I write separately because I believe S.B. 95 is unconstitutional, though for a different reason than the majority. In my view, this purported law is unconstitutionally vague, leaving a doctor vulnerable to criminal culpability, while providing dubious notice and insufficient explanation to the doctor of what conduct is criminalized. Thus, prosecutors and juries determine retroactively when and how S.B. 95's rules are violated.

I acknowledge this issue was not briefed by the parties, but I write separately because the constitutionality of S.B. 95 is before us, and the principle of judicial economy compels me to highlight what I consider to be a fatal constitutional infirmity with S.B. 95. See *James v. United States*, 550 U.S. 192, 230, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007) (Scalia, J., dissenting) (suggesting the Armed Career Criminal Act's residual clause was unconstitutionally vague even though neither James nor his amici pressed the issue); *Com. v. Berryman*, 437 Pa. Super. 258, 297 n.10, 649 A.2d 961 (1994) (Cirillo, J., dissenting) (raising vagueness sua sponte because "the appellee has challenged, in general, the constitutionality of the statute, and, more importantly, in order to avoid substantial injustice, I find it necessary to address this argument"); *Ramirez v. State*, 104 S.W.3d 549, 551-52 (Tex. Crim. App. 2003) (Womack, J., concurring) (concurring in the judgment affirming the district court but for a different reason than the majority); Anderson, *Right for Any Reason*, 44 Cardozo L. Rev. 1015, 1042 (2023) ("Not only does affirmance on alternative grounds promote

judicial economy in the particular case by avoiding waste of resources where the outcome is certain, but it also promotes judicial economy on a larger scale by reducing the number of successful appeals and therefore reducing congestion of court dockets.").

"Whether a statute is constitutional is a question of law subject to unlimited review. This court presumes that statutes are constitutional and resolves all doubts in favor of passing constitutional muster. If there is any reasonable way to construe a statute as constitutionally valid, this court has both the authority and duty to engage in such a construction. [Citations omitted.]" *In re A.B.*, 313 Kan. 135, 138, 484 P.3d 226 (2021) (quoting *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 [2015]).

S.B. 95 is contained in K.S.A. 65-6741 to K.S.A. 65-6749. K.S.A. 65-6743(a) prohibits "dismemberment abortion" and sets forth exceptions to the prohibition; K.S.A. 65-6742 gives pertinent definitions; K.S.A. 65-6745 sets forth the civil cause of action against doctors and others who violate K.S.A. 65-6743; and K.S.A. 65-6746 sets forth the criminal action against doctors and others who violate K.S.A. 65-6743.

K.S.A. 65-6743(a) states:

"(a) No person shall perform, or attempt to perform, a dismemberment abortion on an unborn child unless: (1) The dismemberment abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman. No condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that would result in her death or in substantial and irreversible physical impairment of a major bodily function."

K.S.A. 65-6742 states:

"As used in K.S.A. 65-6741 through 65-6749, and amendments thereto:

"(a) 'Abortion' means the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.

"(b)(1) 'Dismemberment abortion' means, with the purpose of causing the death of an unborn child, knowingly dismembering a living unborn child and extracting such unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors or similar instruments that, through

the convergence of two rigid levers, slice, crush or grasp a portion of the unborn child's body in order to cut or rip it off.

(2) The term 'dismemberment abortion' does not include an abortion which uses suction to dismember the body of the unborn child by sucking fetal parts into a collection container, although it does include an abortion in which a dismemberment abortion, as defined in subsection (b)(1), is used to cause the death of an unborn child but suction is subsequently used to extract fetal parts after the death of the unborn child.

"(c) 'Knowingly' shall have the same meaning attributed to such term in K.S.A. 21-5202, and amendments thereto.

"(d) 'Medical emergency' means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the woman or for which a delay necessary to comply with the applicable statutory requirements will create serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function."

K.S.A. 65-6745 states:

"(a) A cause of action for civil damages against a person who has performed a dismemberment abortion in violation of K.S.A. 65-6743, and amendments thereto, may be maintained by the following persons, unless, in a case where the plaintiff is not the woman upon whom the abortion was performed, the pregnancy resulted from the plaintiff's criminal conduct:

(1) A woman upon whom a dismemberment abortion has been performed in violation of K.S.A. 65-6743, and amendments thereto;

(2) the father of the unborn child, if married to the woman at the time the dismemberment abortion was performed; or

(3) the parents or custodial guardians of the woman, if the woman has not attained the age of 18 years at the time of the abortion or has died as a result of the abortion."

K.S.A. 65-6746 states:

"Upon a first conviction of a violation of K.S.A. 65-6743, and amendments thereto, a person shall be guilty of a class A person misdemeanor. Upon a second or subsequent conviction of a violation of K.S.A. 65-6743, and amendments thereto, a person shall be guilty of a severity level 10, person felony."

Kansas courts recognize two types of vagueness challenges: facial and as applied. A facial challenge requires the challenger to "establish that no set of circumstances exists under which the Act would be valid." *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107

S. Ct. 2095, 95 L. Ed. 2d 697 [1987]). It is "an attack on a statute itself as opposed to a particular application." *Los Angeles v. Patel*, 576 U.S. 409, 415, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015). On the other hand, an as applied challenge focuses on the statute's constitutionality as applied to a particular factual scenario. See *State v. Harris,* 311 Kan. 816, 829, 467 P.3d 504 (2020) (Biles, J., dissenting) ("This analysis is untethered from the circumstances of Harris' case and that has not been the way we have previously assessed similar vagueness challenges. We have looked instead to the particular facts of the case, but not other circumstances born from the imagination.").

Though the parties have not given us a vagueness analysis, it is my view that S.B. 95 cannot withstand scrutiny under *either* type of challenge. I do not believe any set of factual circumstances would render S.B. 95 constitutional.

In *Harris*, we outlined the two hurdles a statute must clear to rebut concerns of vagueness. 311 Kan. at 821. First, does the statute's language "fairly put people on notice as to the conduct proscribed? Are the words used common and understandable enough to allow persons of ordinary intelligence to easily grasp their meaning?" *Harris*, 311 Kan. at 822. This notice requirement arises from "the due process requirements of the Fourteenth Amendment." 311 Kan. at 821.

Second, does the statute "'provide explicit standards for those who apply them' . . . [so it will not] amount to an 'impermissibl[e] delegat[ion]' of 'basic policy matters' by the legislative branch to 'policemen, judges, and juries for resolution on an ad hoc and subjective basis'"? *Harris*, 311 Kan. at 821 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 [1972]). This concern is rooted in the separation of powers doctrine. 311 Kan. at 821.

Regarding the first vagueness hurdle of notice, the abortion procedure prohibited is called a "dismemberment abortion." Though the purpose of all abortion procedures is to cause the termination and removal of a fetus, the purpose of the abortion procedure prohibited in S.B. 95 is essentially a subset of that general aim. Here, the purpose is to cause the termination through the "knowing" separation, or *dis*memberment, of one "member" of the

fetus from another "member" and removal of "fetal parts." The "dismemberment" of "fetal parts" must be done with a levered instrument.

There are exceptions to the above-described prohibition. They are: (1) the "dismemberment" procedure is necessary to preserve the mother's life, or (2) "a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman." K.S.A. 65-6743(a). But these exceptions fail to clearly notify physicians of their applicability. S.B. 95 does not define "necessary" or "substantial." More, whether a major bodily function is "irreversibly" impaired is a fact, rather than subjective or objective opinion, but that fact may not be obvious at the time of the procedure. The statute, therefore, fails to notify a physician about *when* an exception arises. See *State v. Norris*, 226 Kan. 90, 93, 595 P.3d 1110 (1979) ("This conduct prohibited by the statute is not vague or indefinite. The appellant should have had no trouble in understanding what conduct on his part was prohibited.").

Setting aside the first prong of our vagueness test—notice—S.B. 95 runs afoul of the second, and "more important," concern. *Harris*, 311 Kan. at 822 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 [1983]). That concern is arbitrary enforcement. To illustrate, it is worth comparing other Kansas statutes governing abortion or abortion methods.

First, K.S.A. 65-6703(a), the statute proscribing abortion after viability, provides:

> "No person shall perform or induce, or attempt to perform or induce an abortion when the unborn child is viable unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing, or attempting to perform or induce the abortion and both physicians provide a written determination, *based upon a medical judgment arrived at using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances and that would be made by a reasonably prudent physician, knowledgeable in the field, and knowledgeable about the case and the treatment possibilities with respect to the conditions involved*, that: (1) The abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman. No condition shall be deemed to exist if it is based on a claim or diagnosis that

the woman will engage in conduct that would result in her death or in substantial and irreversible physical impairment of a major bodily function." (Emphasis added.)

Second, K.S.A. 65-6724(a), the statute prohibiting abortion after the fetus is "pain-capable" (meaning the gestational age of 22 weeks or more [K.S.A. 65-6723]), provides:

"No person shall perform or induce, or attempt to perform or induce an abortion upon a pain-capable unborn child unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing, or attempting to perform or induce the abortion and both physicians provide a written determination, *based upon a medical judgment arrived at using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances and that would be made by a reasonably prudent physician, knowledgeable in the field, and knowledgeable about the case and the treatment possibilities with respect to the conditions involved*, that: (1) The abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function." (Emphasis added.)

Third, K.S.A. 65-6721(a), the statute proscribing partial birth abortions, provides:

"No person shall perform or induce a partial birth abortion on an unborn child unless such person is a physician and has a documented referral from another physician who is licensed to practice in this state, and who is not legally or financially affiliated with the physician performing or inducing the abortion and *both physicians provide a written determination, based upon a medical judgment that would be made by a reasonably prudent physician, knowledgeable in the field and knowledgeable about the case and the treatment possibilities with respect to the conditions involved*, that the partial birth abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." (Emphasis added.)

These three statutes contain exceptions to abortion prohibitions. Each includes language indicating that the medical judgment of a reasonably prudent physician is at least one factor in determining whether an exception is met. This additional context is wholly absent from S.B. 95. Again, S.B. 95 provides:

"(a) No person shall perform, or attempt to perform, a dismemberment abortion on an unborn child unless: (1) The dismemberment abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman. No condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that would result in her death or in substantial and irreversible physical impairment of a major bodily function." K.S.A. 65-6743(a).

Who, then, determines when an exception to the prohibition exists and the "dismemberment" procedure may be performed? And what are the principles guiding that determination? S.B. 95 defines "medical emergency," which includes a consideration of "reasonable medical judgment," but the term "medical emergency" is not found as an exception to the procedure's prohibition or anywhere in the remainder of S.B. 95's statutes. S.B. 95's exceptions to the basic prohibition of the "dismemberment" procedure are silent concerning any reference to either an objective or subjective consideration of the physician's training and experience.

Generally, abortion surgeries are performed by a physician, who must have a certain level of education, skill, and expertise. Things can go awry during any surgery. What if something goes wrong during an abortion operation—such as unforeseen bleeding, a drop in blood pressure, unexpected pain, sudden unconsciousness—and the doctor determines a surgical procedure that may involve separation of fetal "members" of a living fetus is necessary to save the life of the mother?

Under the plain language of S.B. 95, it is unclear if the physician's medical opinion on the matter is sufficient to allow her to perform the procedure she deems necessary without risk of civil liability or criminal culpability. The statute provides no standard for the physician to ascertain legal versus illegal action before she takes that action. See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 391, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (finding a section of a Pennsylvania abortion act that requires the physician to determine whether a fetus is viable vague because it was unclear whether the statutory language imposed an objective standard or a mixed subjective and objective standard), *abrogated on other grounds by Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215,

142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022); *Smith v. Goguen*, 415 U.S. 566, 578, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974) ("This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause."); *Karlin v. Foust*, 188 F.3d 446, 466 (7th Cir. 1999) ("Just as AB 441's 'reasonable medical judgment' standard clearly provides the standard to which physicians must conform their conduct, that same standard provides the guideline pursuant to which prosecutors, state licensing authorities, and civil plaintiffs can seek to hold physicians liable for erroneous emergency medical determinations."); *Planned Parenthood Great Northwest v. State*, 171 Idaho 374, 445-50, 522 P.3d 1132 (2023) (rejecting an argument that an abortion statute's "medical emergency" exception was vague and open to arbitrary enforcement when the exception included the objective standard "in reasonable medical judgment," and also rejecting a similar argument related to the affirmative defense of saving the mother's life because the affirmative defense included the subjective standard of the physician's "good faith medical judgment" that was "based on the facts known to the physician at the time").

Instead, the physician will be vulnerable to the retroactive analysis of prosecutors and juries who may conclude the procedure was not necessary based on a standard other than reasonable medical judgment and the physician's good faith assessment, or even not necessary based on their own personal convictions. Put simply, the physician has no idea how her actions will be judged. Despite the possibility that ill-advised inaction or insufficient action may lead to negative consequences for her woman patient, the physician may be hesitant to act as she believes she should if, by doing so, she risks civil or criminal liability for herself under the restrictions of S.B. 95. See *Harris*, 311 Kan. at 823 ("Whether or not a person is arrested, charged, and convicted for violating a law must depend more on objective and discernable legal rules than on the mere discretion, guesswork, or whim of government officials."). Ironically, the physician's hesitation to violate S.B. 95 may then expose her to medical malpractice tort liability.

Because S.B. 95 does not put the standard for appropriate action within the operating physician's reasonable medical judgment, or even announce *any* standard for determining when its

rules are violated, the Legislature, through S.B. 95, impermissibly transfers determination of the physician's civil and criminal liability to prosecutors, judges, and juries. See *Sessions v. Dimaya*, 584 U.S. 148, 182, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018) (Gorsuch, J., concurring) ("Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions."); *State v. Ingham*, 308 Kan. 1466, 1483, 430 P.3d 931 (2018) (Stegall, J., concurring) ("Vague laws give police officers, prosecutors, judges, and juries the authority to decide what the law is on an ad hoc basis—all without the political accountability inherent in the legislative process.").

S.B. 95 does not "'provide explicit standards' for enforcement" and, therefore, is unconstitutionally vague. *Harris*, 311 Kan. at 822. Because there are no standards to guide conduct, there are no factual circumstances where S.B. 95 is valid. I see no reasonable way to construe the statute to avoid this concern because it is not this court's role to read a standard into the text of S.B. 95, particularly when the Legislature has shown its ability to impose such a standard in other related statutes. *In re Estate of Gardiner*, 273 Kan. 191, 214, 42 P.3d 120 (2002) ("We do not read into a statute something that does not come within the wording of the statute."); *Rooney v. Horn*, 174 Kan. 11, 16, 254 P.2d 322 (1953) ("Had the legislature by the original act or the amendment of 1947 intended to include merchandise vending machines it could have easily done so either in the original act or the amendment of 1947. The fact that it did not do so is persuasive that it was not the intention to include them.").

In my view, the Legislature's omission of any discernable standard means the physician's expert decision will inevitably be second-guessed by prosecutors, judges, and juries applying a personal and ultimately mysterious standard to the physician's conduct. But in our structure of government the Legislature makes the law, not those charged with enforcing it. Accordingly, I am convinced the constitutional presumption we normally attach to statutes is overcome by S.B. 95's improper delegation of the Legislature's role to "'establish minimal guidelines to govern law enforcement.'" *Harris,* 311 Kan. at 822 (quoting *Kolender v. Lawson*, 461

U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 [1983]). I would reject S.B. 95 on these grounds alone.

* * *

STEGALL, J., dissenting: I dissent from today's opinion for all the reasons set forth at length in my dissent to our earlier opinion in *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 707-78, 440 P.3d 461 (2019) (*Hodes I*) (Stegall, J., dissenting). There, I explained that the majority's imagined section 1 of the Kansas Constitution Bill of Rights bears no resemblance at all—in either law or history—to the actual text and original public meaning of section 1. I explained that the "majority's decision is so consequential because it fundamentally alters the structure of our government to magnify the power of the state—all while using that power to arbitrarily grant a regulatory reprieve to the judicially privileged act of abortion" and that henceforth in Kansas, abortion will be "the judicially preferred policy tail wagging the structure of government dog." 309 Kan. at 707, 778 (Stegall, J., dissenting). As such, "the settled and carefully calibrated republican structure of our government must give way, at every turn, to the favored policy." 309 Kan. at 778 (Stegall, J., dissenting). And here we are.

Beyond that "brief summary . . . I will not swell the [Kansas] Reports with repetition of what I have said before." *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 981, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (Scalia, J., concurring in part and dissenting in part). Instead, I make two limited observations, and will leave it at that.

First, it is noteworthy that the majority cannot bring itself to acknowledge the government's compelling interest in unborn human life. Yes, the majority maneuvers around this problem by skipping it in favor of its narrow tailoring analysis. But the truth is, the majority doesn't answer this question because it is so decidedly troublesome to the majority's new section 1 regime. For the majority, an interest in protecting unborn life—including the dignity of that life—is only "aspirational" with "many nuances and facets" that have "potentially far-reaching precedential effect." *Hodes & Nauser, MDs v. Kobach*, 318 Kan. 940, 958, 551 P.3d 37 (2024) (*Hodes II*). For those unfamiliar with legalese, this translates to, "We don't want to tie our hands with such inconveniences."

Second, the dominant theme of the *Hodes I* opinion was the court's unsubstantiated allegation that both history and the Legislature had waged an unjust "war on women." 309 Kan. at 709 (Stegall, J., dissenting). S.B. 95 was "described as the moral equivalent of legalized wife beating and spousal rape" and the majority claimed that "'the prevailing views justifying' these long-since-discredited misogynistic practices were 'manifested in a majority' of the drafters and ratifiers of the Kansas Constitution and of the Kansas legislators who criminalized abortion in 1862." 309 Kan. at 708 (Stegall, J., dissenting).

But now, I cannot help but notice that pregnant women have been quietly—decisively—evicted from this court's abortion jurisprudence. Replaced, it would seem, with genderless "pregnant person[s]" and "pregnant patients." *Hodes II*, 318 Kan. at 950, 963. Indeed, the only time pregnant women appear in today's decision, they are embalmed within quotations marks—indicating, I suppose, the prejudice and anachronism of the dust bin.

What is going on one wonders? The reader will, no doubt, understand.

I dissent.

State v. Alston

No. 124,471

STATE OF KANSAS, *Appellee*, v. DAVONTRA LEONARD ALSTON, *Appellant*.

(551 P.3d 116)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Convictions for Premeditated First-Degree Murder under Aiding and Abetting Theory and Conspiracy to Commit First-Degree Murder Not Duplicitous.* A conviction for premeditated first-degree murder under an aiding and abetting theory is not duplicitous of a conviction for conspiracy to commit first-degree murder even when the two convictions are based on the same act. Even if the two convictions involve a single act of violence, they are different offenses because the convictions arise from violations of different statutes with different elements. The convictions thus do not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution or § 10 of the Kansas Constitution Bill of Rights and are not prohibited under K.S.A. 21-5109(d) or (e).

2. SAME—*Defendant's Motion for New Trial—Appellate Review*. K.S.A. 22-3501 empowers a district court to grant a defendant's motion for new trial if required in the interest of justice. Appellate courts review a district court's denial of a motion for new trial for abuse of discretion, which occurs if an action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. The party seeking the new trial has the burden of demonstrating an abuse of discretion.

Appeal from Shawnee District Court; DAVID DEBENHAM, judge. Oral argument held November 1, 2023. Opinion filed July 5, 2024. Affirmed.

Michelle A. Davis, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Jodi Litfin, deputy district attorney, argued the cause, and *Kris W. Kobach*, attorney general, was with her on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: Davontra Alston was convicted by a jury of premeditated first-degree murder, felony first-degree murder, conspiracy to commit first-degree murder, and criminal discharge of a firearm at an occupied vehicle for his participation in the 2020 shooting death of D'Angelo Payne in Topeka. In this direct appeal of the jury verdict, Alston argues his conviction for premeditated first-degree murder under an aiding and abetting theory is duplic-

itous of his conviction for conspiracy to commit first-degree murder. He contends this means the State has charged him in multiple counts for committing a single offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. He also contends the district court abused its discretion in denying his motion for new trial in which he argues the State mischaracterized evidence, the district court erroneously admitted hearsay evidence, and the State committed prosecutorial error.

We reject Alston's claims and affirm his convictions.

FACTUAL AND PROCEDURAL BACKGROUND

The State's theory of prosecution was that Alston conspired with Diquan Clayton, who is Alston's cousin, and James Boatwright to murder Payne and that he aided and abetted Boatwright and others in the murder. The State built a circumstantial case based on evidence that Clayton and Alston resented Payne's relationship with Danielle Morrison and they felt Payne had disrespected Morrison, Alston, and his family. At the time of Payne's murder, Clayton had a romantic relationship with Morrison, and she lived with Alston and his family. But she had previously had a romantic relationship with Payne, and they shared a car. Some other background helps explain the basis for the State's two theories about the source of the conflict between Payne and Alston.

First, as to the theory Payne had been disrespectful, weeks before Payne's murder, he came to Alston's house to retrieve the car from Morrison. Morrison refused to give him the keys, and Payne stood outside the house, yelling Morrison's name, and kicking the door. Alston later learned of the incident and expressed his view that Payne's conduct had been disrespectful to him and his family. He told Morrison that Payne would need to pay for his conduct and should not return to the house.

Second, Payne and Clayton had a history of tense, jealous interactions. Payne sent pictures of guns to Clayton and had Morrison tell Clayton that Payne wanted to meet up and fight. Clayton replied that he "didn't have time for it." Even so, evidence supported the theory that Clayton resented Morrison's ongoing contact with Payne. This resentment affected Alston's feelings and

behavior as well, according to the State. The State emphasized that Alston and Clayton are cousins who grew up together and considered each other brothers to the point Alston viewed an enemy of Clayton as an enemy of his.

On the day Payne died, he came to Alston's house to speak with Morrison. He parked next door, and Morrison joined him in the car where they discussed their relationship. Clayton and Alston were initially inside Alston's house with Alston's family and others while Morrison was in the car, but Clayton left to get some food. Clayton texted Morrison, but she did not answer because she did not have her phone with her. One of the texts said: "He said you better get out the car that MF finna get shredded."

After talking with Payne for about an hour, Morrison returned to the house. She heard Alston say "he was leaving now in a Ford Taurus," but she did not know who Alston was speaking to. Clayton had also returned, and Morrison heard Alston say to Clayton, "[M]y nigga' James doesn't play." A while later, Alston was laughing and showing his phone to Clayton but would not let Morrison see the phone. Eventually, Morrison was able to look at the phone and saw a text from an unknown number that said, "[J]ob done." She later saw news reports on Facebook about a shooting and noticed posts from Alston's Facebook accounts showing a laughing reaction to the news.

While all this was taking place Boatwright was hanging out with some other men. Boatwright received a phone call, after which he asked one of the other men to take him to "make a play." The man took the request to mean that Boatwright wanted to possibly sell drugs. A third man joined them, and they got into Boatwright's car with Boatwright in the front passenger seat. They drove to Alston's residence. After seeing there were no cars parked nearby, they left.

As they drove, they spotted Payne's car. Occupants in Boatwright's car fired shots toward Payne as they drove by. Police responded to the shots and found Payne's wrecked car. Inside, Payne was dead from a gunshot to the back of his head.

The driver of Boatwright's car was later arrested, and he told police Boatwright was involved in the shooting. Police searched Boatwright's home and found a firearm that matched some shell

casings found at the shooting scene. But testing determined that firearm did not shoot the bullet that killed Payne.

The police's investigation also led them to interview Alston. He denied knowing Boatwright, but he borrowed a detective's phone to make a call. During the call, he said the police "had James." The police also obtained cell phone and social media records for Alston, Boatwright, Clayton, Morrison, and the others. These records reflected several text messages, Facebook messages, or phone calls exchanged between Alston and Boatwright and Clayton and Boatwright, including communications around the time of Payne's death. Some of these communications were incriminating, as were statements they made to others. For example, when Alston was asked by another of his cousins if he was at the location of the shooting, Alston replied that he was not there, and he added that he has "people who do that for him." The State argued that statement and others proved Alston conspired to commit murder and that he had issued the order to act.

The jury convicted Alston based on this circumstantial evidence. Before sentencing, Alston moved to dismiss the murder and conspiracy convictions as multiplicitous. Alston argued his conviction for conspiracy to commit premeditated murder "covers all the conduct alleged by the State which was attributable directly to" him and his remaining three convictions should be set aside.

Alston also filed a motion for a new trial, alleging several trial errors. The district court denied both motions but determined Alston's felony murder conviction merged with his first-degree premeditated murder. The district court sentenced Alston to life with a mandatory minimum sentence of 618 months in prison for his conviction of premeditated first-degree murder and concurrent sentences for conspiracy to commit first-degree murder and criminal discharge of a firearm at an occupied vehicle.

Alston appealed. This court's jurisdiction is proper. K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals); K.S.A. 22-3601(b) (direct appeals to the Supreme Court of class A felony, life sentence imposed, or off-grid crime); K.S.A. 21-5402(b) (first-degree murder is an off-grid person felony).

ISSUE 1: ALSTON'S CONVICTIONS ARE NOT MULTIPLICITOUS.

We first address Alston's contention that sentencing him for both first-degree premeditated murder under an aiding and abetting theory and conspiracy to commit first-degree murder violated his constitutional right to be free from double jeopardy. The basis for Alston's argument is the double jeopardy principle that prohibits punishing a criminal defendant twice for the same offense. See *State v. Crudo*, 318 Kan. 32, 43, 541 P.3d 67 (2024); *State v. Schoonover*, 281 Kan. 453, 467, 133 P.3d 48 (2006). To determine whether multiple punishments relate to the same offense when convictions arise under different statutes, Kansas courts apply a well-established two-part test. Double jeopardy does not attach unless both prongs of the test are met. *Schoonover*, 281 Kan. 453, Syl. 15.

Under the first prong, Kansas courts ask whether multiple convictions arise from the same conduct; we often refer to this as the unitary conduct prong. *Schoonover*, 281 Kan. 453, Syl. ¶ 15. Here, the ultimate criminal act is the shooting and killing of Payne. That killing was the object of the premeditated first-degree murder charge and was the alleged overt act required to prove the conspiracy. But no evidence suggests that Alston pulled the trigger and shot Payne. Instead, the State relied on evidence it argues proved Alston's involvement in a conspiracy to commit the murder and to prove he aided and abetted the person who fired the lethal shot. The State summarized this evidence during its closing argument by telling the jury it proved that Alston gave "directions, commands, orders to the person who will eventually murder Mr. Payne, and convey[ed] that information to the people who eventually [had] to drive to" Alston's house where Payne was sitting in the car. From there, those individuals drove by Payne's car and fired the deadly shot. The parties agree this unitary conduct underlies both counts, and the record supports that conclusion. Alston has thus met the first prong of the test.

Under the second prong, if, as here, the convictions arise from different statutes, Kansas courts apply the same-elements test to determine whether the defendant was twice found guilty of the same offense. Under that test we examine "'whether each offense contains an element not contained in the other; if not, they are the

"same offense" and double jeopardy bars additional punishment and successive prosecution.'" 281 Kan. at 467 (quoting *United States v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 [1993]). On the other hand, if the elements of the statutes differ, the defendant is not punished twice for the same offense and double jeopardy does not attach. 281 Kan. at 467.

To examine the elements, we must interpret the involved statutes, an examination that presents us with a question of law. 281 Kan. at 462.

The two statutes involved here are K.S.A. 21-5402, which defines the elements of premeditated first-degree murder, and K.S.A. 21-5302, which defines a conspiracy. As relevant to Alston's charges, K.S.A. 21-5402 defines murder in the first degree as

- "killing of a human being"
- "[i]ntentionally, and with premeditation." K.S.A. 21-5402(a)(1).

K.S.A. 21-5302(a) defines a conspiracy as

- "an agreement with another person"
- "to commit a crime or to assist in committing a crime."

The statute adds that "[n]o person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a co-conspirator."

This review reveals that murder and conspiracy are not the same offense because each contains elements not included in the other. Murder does not require the involvement of more than one person, but conspiracy does. And murder penalizes killing, while conspiracy penalizes the agreement. As this court has said, conspiracy is a separate crime from the substantive offense the conspirators agree to commit "because the agreement itself is the harm and deserves punishment." *State v. Cottrell*, 310 Kan. 150, 155, 445 P.3d 1132 (2019). Thus, the Double Jeopardy Clause does not bar separate punishments for the substantive crime of murder and for conspiracy to commit the murder. See *Pereira v. United States*, 347 U.S. 1, 11, 74 S. Ct. 358, 98 L. Ed. 435 (1954)

("It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both.").

That long-standing analysis does not fit this situation, according to Alston, because the State pursued a first-degree murder count premised on aider and abettor liability charges. He emphasizes that the State asked the district court to instruct the jury on the concept of aiding and abetting by listing all the statutory alternatives for aiding and abetting liability, and the district court granted the request. Under those alternatives, "[a] person is criminally responsible for a crime committed by another if such person, acting with the mental culpability required for the commission thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime." K.S.A. 21-5210(a). Alston argues that procuring another to commit the crime equates to conspiring. This overlap, he contends, makes the two crimes multiplicitous. But Alston acknowledges that this court rejected his argument in *State v. Mincey*, 265 Kan. 257, 963 P.2d 403 (1998).

In *Mincey*, the defendant was convicted of aiding and abetting attempted first-degree murder and conspiracy to commit first-degree murder, as well as aiding and abetting aggravated robbery and conspiracy to commit aggravated robbery. The evidence established that the defendant agreed to rob someone, discussed killing the victim if necessary, and helped her coconspirators plan the crime. She then argued the conspiracy count duplicated charges based on aiding and abetting the same substantive offenses. In a straightforward statutory analysis like that outlined above, the court found that aiding and abetting the substantive crimes and conspiracy had different elements and were not multiplicitous charges. "Conspiracy requires an agreement to commit a crime, while aiding and abetting requires actual participation in the act constituting the offense." 265 Kan. at 266.

We note that *Mincey*, 265 Kan. at 266, includes dicta that can be confusing. The court speculated about what its holding might have been had the defendant only helped plan the crime—that is, if both convictions rested on a single act—and concluded a double

jeopardy problem might arise. This dictum conflates the unitary or same conduct test with the elements test, something we disapproved of about eight years later in *Schoonover*, 281 Kan. at 492-95.

In *Schoonover*, we noted that this court had developed two divergent lines of multiplicity cases, one line held that two counts merged when they arose from a single act and the other line used the two-prong test of unitary conduct plus an analysis of whether the statutes set out differing elements. We concluded the single act/merger line did not reflect the holdings of the United State Supreme Court, and we rejected use of the single act (same conduct) as an appropriate double jeopardy test when used as the sole test. We clarified that due process was violated only when two punishments were imposed for a single offense, which requires meeting the two prongs of unitary conduct *and* having multiple statutes that require the same elements of proof. See *Schoonover*, 281 Kan. 492-95.

Defining a single offense under this two-prong test adheres to *Mincey*'s holding that "[c]onspiracy and aiding and abetting another offense are not multiplicitous." That is because "[e]ach offense requires proof of an element not required by the other." *Mincey*, 265 Kan. at 266.

Mincey's holding also follows the caselaw of the United States Supreme Court and many other courts that recognize the same evidence—such as evidence of an agreement—often proves both a conspiracy and the theory that the defendant aided and abetted the commission of the underlying, substantive crime. These cases emphasize that while the same evidence can prove both crimes, the government can prove a defendant aided and abetted a crime without proving the defendant conspired with others. The United States Supreme Court explained, "The essence of the conspiracy charge is an agreement" but "[a]iding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy." *Pereira*, 347 U.S. at 11-12. The United States Supreme Court thus concluded that double jeopardy does not prevent convicting a defendant of a substantive crime based

on evidence the defendant aided and abetted the person who committed the crime and convicting the defendant of conspiring to commit the substantive crime. "[T]he charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical." 347 U.S. at 11-12.

Federal courts applying *Pereira* have reiterated this point by noting that under federal criminal law "the typical case of aiding and abetting . . . involves a 'knowing concert of action pursuant to agreement.'" But that does not mean double jeopardy prevents a conviction of conspiracy as well as a conviction for a substantive crime that depends on an aiding and abetting theory. *United States v. Herbert*, 698 F.2d 981, 985 (9th Cir. 1983). This is true "even where the evidence adduced serves 'double duty' in establishing the elements of both offenses." *United States v. Cowart*, 595 F.2d 1023, 1033 (5th Cir. 1979). Imposing sentences for two convictions—one as a conspirator and one as a principal under an aiding and abetting theory—thus does not violate double jeopardy principles. See, e.g., *United States v. Blanton*, 531 F.2d 442, 444 (10th Cir. 1975). *Mincey* and our holding today reflect the caselaw of the United States Supreme Court and other federal courts recognizing that the difference in the elements of the two offenses means the counts are not multiplicitous and do not violate the Double Jeopardy Clauses of the United States and Kansas Constitutions even if evidence of an agreement is used to prove both.

Finally, Alston argues he is entitled to relief under two provisions of K.S.A. 21-5109, a statute relating to multiple convictions, even if his constitutional argument fails. He specifically cites subsection (d), which addresses the relationship between general and specific offenses, and subsection (e), which states the identical offense doctrine. We conclude neither provision requires us to set aside his convictions.

The first of these subsections, K.S.A. 21-5109(d), prohibits convictions for two crimes based on the same conduct "when crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." As we have discussed, while there may

be overlap between the proof of aiding and abetting and conspiracy, the two statutes are aimed at different evils and serve different purposes with one aimed at the agreement and the other holding the defendant liable as a principle for a substantive crime regardless of whether the defendant agrees with others to commit the crime. *Cottrell*, 310 Kan. at 155. We conclude that a conviction for first-degree murder proved under a theory of aiding and abetting and a conviction for conspiracy to commit murder are convictions for different kinds of conduct. Neither is more general nor more specific than the other because each targets a different theory of liability. The two statutes therefore fall outside the prohibitions of K.S.A. 21-5109(d).

This brings us to K.S.A. 21-5109(e), the second subsection Alston cites. It provides, "A defendant may not be convicted of identical offenses based upon the same conduct." We see nothing in this language that supports interpreting K.S.A. 21-5019(e) to provide different protections against multiplicitous offenses than the protections already provided by constitutional protections against double jeopardy. In fact, K.S.A. 21-5109(e) codifies the caselaw that applies the identical (or same) offense doctrine applied by both the United States Supreme Court and this court. See *Schoonover*, 281 Kan. at 467 (quoting *Dixon*, 509 U.S. at 696, for the proposition that the double jeopardy test asks "'whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution'"). Alston's arguments focus exclusively on his unitary conduct and ignore the statutory requirement that the two convictions must involve the "same offenses." Our caselaw emphasizes that the "Fifth Amendment's prohibition against multiple prosecution and punishment for the 'same offence' is a different concept from a prohibition against multiple prosecution or punishment for the 'same conduct.'" *Schoonover*, 281 Kan. at 465. K.S.A. 21-5109(e) adopts the "same offense" terminology. Thus, contrary to Alston's argument, K.S.A. 21-5109(e) provides him no greater protection than granted him under the Double Jeopardy Clauses of the United States and Kansas Constitutions. As we have discussed, conspiracy and murder

under an aiding and abetting theory are not the same offense. *Pereira*, 347 U.S. at 11-12; *Mincey*, 265 Kan. at 266.

Each of Alston's arguments about multiplicity essentially asks us to abandon the same-elements test and instead focus solely on the facts of his case. We reject the invitation to stray from the well-established tests used by this court and by the United States Supreme Court. See *Pereira*, 347 U.S. at 11; *Schoonover*, 281 Kan. at 467. Alston's convictions do not violate double jeopardy constitutional protections, nor do they conflict with K.S.A. 21-5109.

ISSUE II: ALSTON IS NOT ENTITLED TO A NEW TRIAL.

After the verdict, Alston filed a motion for a new trial, alleging that the following errors mandated a new trial in the interests of justice:

(a) The State published a slide to the jury that inaccurately recounted a detective's testimony.

(b) The district court erred in allowing a witness to testify about her observation of a text message from an unknown sender.

(c) And the prosecutor erred in using examples to illustrate reasonable doubt.

K.S.A. 22-3501 empowers a district court to grant a new trial on a defendant's motion "if required in the interest of justice." Appellate courts review a district court's denial of a motion for new trial for abuse of discretion. *State v. Breitenbach*, 313 Kan. 73, 97, 483 P.3d 448 (2021). An abuse of discretion occurs when an action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Alston as the movant has the burden of demonstrating an abuse of discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021). We conclude he failed to meet this burden.

a. Misstatement of Evidence

The State presented testimony by a detective, who created a slide presentation that showed a timeline of events related to Payne's murder. One of the slides purported to quote Morrison saying she overheard Alston tell Clayton that "[m]y nigga James [allegedly referring to James Boatwright] don't play. They get

things done." When the slide was displayed, Alston's counsel objected, arguing it did not reflect Morrison's trial testimony because she testified only that she heard Alston say, "My nigga James don't play." The State immediately agreed to correct the slide and did so. Without further objection or a motion for mistrial, the testimony continued.

In his postconviction motion, Alston argues displaying the words "[t]hey get things done" to the jury was prejudicial because those words imply that Alston had asked others to do the shooting. He contends that once those words were published to the jury the damage was done and would remain in the jurors' minds.

In ruling on Alston's motion, the district court judge disagreed and determined the prosecutor's mistake did not require a new trial. The judge found no evidence of bad faith and concluded the statement did not mislead the jury. The judge noted that the State recognized the mistake and quickly took the slide down and corrected it. Alston does not argue the judge made an error of fact in recounting what occurred at trial. Nor does he argue the judge made an error of law. Instead, he argues the judge reached an unreasonable conclusion. Our review of the record convinces us that the judge reached a conclusion consistent with the entire record when he determined the State had not acted in bad faith and the jury was not misled by the brief display of the extra words. The State cured the misstatement, and the jury could observe the difference in wording. While the judge did not immediately admonish the jury to not consider the first version (and was not asked to), the judge later instructed the jury to disregard anything not supported by evidence. And jurors are presumed to follow such instructions. *State v. Brown*, 316 Kan. 154, 170, 513 P.3d 1207 (2022). Nothing suggests they failed to follow the instruction.

We see no error of law, no error of fact, or anything arbitrary, unreasonable, or fanciful in the district court's denial of Alston's motion for new trial because of the erroneous quotation on the slide. Cf. *State v. Thomas*, 307 Kan. 733, 415 P.3d 430 (2018) (prosecutorial error in misstating evidence was harmless beyond a reasonable doubt when defense attorney clarified testimony in closing and district court instructed jury to disregard any statement not supported by evidence). We affirm the district court's decision

to reject Alston's contention that the erroneous slide required setting aside the verdict and granting a new trial.

b. Hearsay

Next, Alston seeks a new trial because the district court judge admitted evidence that Alston now argues is hearsay. The State introduced this evidence during Morrison's testimony when she testified that she noticed Alston showing his phone to Clayton and laughing. Alston would not let Morrison see his phone. But later she saw his phone and a text from an unknown phone number that said, "[J]ob done." Alston's counsel did not object to this testimony. During cross-examination he asked Morrison about the text but only to verify that she did not recognize the phone number.

On appeal, Alston does not explain how either the district court judge or this court could grant a new trial when no objection was made at trial given that K.S.A. 60-404 prohibits setting aside a verdict or reversing a judgment based on the erroneous admission of evidence unless a timely objection has been made. See *State v. Solis*, 305 Kan. 55, 62-63, 378 P.3d 532 (2016) (timely objection required to preserve evidentiary claims for appellate review). We hold that Alston's failure to object to the admission of the text message at trial means the district court was precluded by K.S.A. 60-404 from setting aside the judgment and granting a new trial. We thus conclude the district court did not err in denying Alston's motion for new trial on this basis.

c. Prosecutorial Error

Finally, Alston argues the prosecutor erred when presenting the State's case to the jury. Generally, a prosecutor is allowed wide latitude "'to conduct the State's case in a manner that does not offend the defendant's constitutional right to a fair trial.'" *State v. Coleman*, 318 Kan. 296, 302, 543 P.3d 61 (2024). Prosecutors exceed their wide latitude when they do such things as "misstate the law applicable to the evidence, comment on witness credibility, or shift the burden of proof to the defendant." 318 Kan. at 302. When prosecutorial error is alleged, we consider the statements in context to determine whether the prosecutor erred. 318 Kan. at 302.

If the prosecutor errs, a reviewing court considers whether the error is reversible. Courts apply the traditional constitutional harmless error standard to determine reversibility. 318 Kan. at 302-03 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967]). "Under that test, 'prosecutorial error is harmless if the State can demonstrate "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict."'" *Coleman*, 318 Kan. at 303 (quoting *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 [2016], which quoted *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011]).

Alston alleges the prosecutor erred during voir dire when discussing the concept of reasonable doubt with the jurors. He cites two specific passages and contends the prosecutors "undermined the beyond a reasonable doubt standard through the 'extreme and ridiculous' examples" used.

In the first passage, the prosecutor asked whether jurors saw a difference between a reasonable doubt and all doubt. Several jurors responded that they understood the difference and explained their reasoning and their understanding of the two concepts. After several jurors spoke, one juror suggested there was a difference between reasonable and unreasonable doubt. A prosecutor responded by saying, "Sure . . . what if somebody stands up and says, well, the defendant didn't commit the crime. Body snatching aliens did it. And if the State . . . cannot prove that these aliens don't exist [, w]ould you say that that's an unreasonable doubt?" After that brief exchange, the prosecutor returned to the difference between beyond a reasonable doubt and beyond all doubt, without further talking about a line between reasonable and unreasonable doubt. Throughout voir dire and again during closing arguments, the prosecutor stressed the State had the burden to prove the facts beyond a reasonable doubt. For example, near the end of the State's questions to prospective jurors, a prosecutor said the State "cannot and we will not define what beyond a reasonable doubt means, but there is one thing that we can say, and that is beyond a reasonable doubt does not mean the same thing as beyond all doubt."

The district court judge, in denying Alston's motion for new trial, noted the context for the mention of the alien body snatchers. He also observed that the prosecutors never attempted to define beyond a reasonable doubt and correctly stated the law—both during voir dire and closing arguments. Alston does not dispute this conclusion but labels the alien body snatcher example as ridiculous, suggesting it trivialized the State's burden of proof. We disagree. If anything, the example did the opposite and suggested that an unreasonable doubt was something extreme and outrageous—like body snatching aliens. The prospective jurors' responses suggested they understood that reasonable doubt did not need to be outrageous and extreme but could be anything that caused the jury to reasonably doubt the State's case. They mentioned common and legitimate reasons that might cause them to have a reasonable doubt—the State's failure to prove an element, a noncredible witness, a witness with an apparent bias, contradictory evidence, the frailties of eyewitness accounts, and other potential weaknesses in the State's case.

In the context used, we find no error in the State using a body snatching alien as an example of unreasonable doubt.

The second voir dire passage about which Alston complains relates to a prosecutor's explanation of circumstantial evidence. The prosecutor asked a juror to imagine that the juror could not see out the windows but heard thunder and saw someone covered with water and holding an umbrella. The prosecutor asked the prospective juror, "What would you infer is going on outside?" The prospective juror answered, "Thunderstorm." Later, during closing arguments, the prosecutor cited the example again and observed, "You can't directly see it, but you know what it is through circumstantial evidence. . . . We're asking you to do the same thing in this case," conceding the State had little direct evidence and its case rested on circumstantial evidence. The prosecutor later reminded the jury that "it is not our job to give you our opinions about the credibility of the witnesses or the evidence. It is your job to decide what weight to give to that evidence."

Again, we fail to see how the State's example undermined the concept of beyond a reasonable doubt. The example explained the concept of circumstantial evidence—that is, "any evidence that

"'tends to prove a fact in issue by proving other events or circumstances which afford a basis for a reasonable inference by the jury of the occurrence of the fact in issue.'" *State v. Corbett*, 281 Kan. 294, 309, 130 P.3d 1179 (2006) (quoting *State v. Evans*, 275 Kan. 95, 105, 62 P.3d 220 [2003]). All the prosecutor did was suggest one could reasonably infer there was a thunderstorm from the known facts of an umbrella, a wet person, and the sound of thunder. The prosecutor did not draw parallels to the case, except to the extent of saying the jury would be asked to consider facts and infer guilt from those known facts. The prosecutor did not step outside the wide latitude of appropriate argument.

We see no error, let alone reversible error, in the statements complained of on appeal. We thus see no abuse of discretion in the district court's denial of Alston's motion for new trial based on prosecutorial error.

Alston, in wrapping up his arguments for a new trial, contends the cumulative effect of the errors requires us to grant him relief. But we have not found even a single error and thus need not engage in a cumulative error analysis. See *State v. Lowry*, 317 Kan. 89, 100, 524 P.3d 416 (2023) ("The cumulative error rule does not apply if there are no errors or only a single error.").

We find no basis for granting a new trial.

CONCLUSION

Alston's convictions of first-degree murder and conspiracy to commit murder were not multiplicitous. Nor did the district court abuse its discretion when it denied Alston's motion for a new trial. We thus affirm Alston's convictions.

Affirmed.

No. 125,051

HODES & NAUSER, MDs, P.A., and TRACI LYNN NAUSER, M.D., *Appellees*, v. JANET STANEK, in Her Official Capacity as Secretary of the Kansas Department of Health and Environment; STEPHEN M. HOWE, in His Official Capacity as District Attorney for Johnson County, Kansas; and KRIS KOBACH, in His Official Capacity as Attorney General for the State of Kansas, *Appellants*.

(551 P.3d 62)

SYLLABUS BY THE COURT

1. JURISDICTION—*Two-Part Standing Test—Cognizable Injury and Causal Connection*. Kansas courts use a two-part standing test. First, the party who claims standing must show a cognizable injury. Second, the party must establish a causal connection between the cognizable injury and the challenged conduct. A cognizable injury, or an injury in fact, occurs when the party personally suffers an actual or threatened injury because of the challenged conduct.

2. STATUTES—*Challenge to Statute's Constitutionality—Appellate Review.* A challenge to a statute's constitutionality presents a question of law subject to unlimited review.

3. SAME—*Supreme Court—Final Authority Whether Statute Is Constitutional.* The Kansas Supreme Court is the final authority on whether a Kansas statute violates the Kansas Constitution.

4. KANSAS CONSTITUTION— *Section 1 of Bill of Rights—Protects Natural Right of Personal Autonomy—Includes Right to Abortion.* Section 1 of the Kansas Constitution Bill of Rights protects an inalienable natural right of personal autonomy, which includes the right to abortion. The unique and profound attributes of the decision to have an abortion are integral to a woman's inalienable natural right of personal autonomy under section 1; thus, laws that infringe on the right to abortion are subject to strict scrutiny.

5. SAME—*Section 1 of Bill of Rights—Plaintiff's Burden to Prove Challenged Law Infringes on Protected Right.* Under strict scrutiny, the initial burden is on the plaintiff to prove a challenged law actually infringes on a constitutionally protected right under section 1 of the Kansas Constitution Bill of Rights. Any degree of actual infringement on such a right—however slight—triggers strict scrutiny.

6. SAME—*Section 1 of Bill of Rights—Proof by Plaintiff of Infringement of Protected Right—State Must Defend Law under Strict Scrutiny.* Once a plaintiff proves actual infringement of a protected right under section 1, the court presumes the law is unconstitutional and the burden shifts to the

State to defend the challenged law under strict scrutiny. Strict scrutiny requires the State to prove (a) the existence of a compelling government interest, (b) its actions further that compelling interest, and (c) its actions do so in a way that is narrowly tailored.

7. CONSTITUTIONAL LAW—*Compelling Interest Rarer than Legitimate and Important Interests.* A compelling interest is extremely weighty, possibly urgent, and rare—much rarer than merely legitimate interests and rarer too than important interests.

8. LEGISLATURE—*Regulations Must Advance State's Compelling Interest—Requires Evidence Presented in Judicial Proceedings*. Once the State establishes an interest as compelling, the State must show any regulations it claims further that interest do *so in fact*, not merely in theory, and the regulations are a substantially effective means for advancing the State's identified compelling interest. A court's determination about whether the State met this burden must be based on evidence presented in judicial proceedings. Mere deference to legislative or administrative findings or stated goals is insufficient.

9. STATUTES—*Legislative Intent—Court's Interpret from Statute's Text.* A severability clause is merely an aid, and courts must still divine the intent of the Legislature from the statute's text. Legislative intent is the touchstone of statutory interpretation.

10. STATUTES—*Review of Legislative Enactment—Severability Test.* For parts of a legislative enactment to survive a severability analysis, the State must prove (a) the Legislature would have passed the enactment at issue without the objectionable portion and (b) the enactment can still operate effectively to carry out the Legislature's intent without the stricken portion. The severability test is inapplicable when the entire statutory scheme is objectionable.

Appeal from Shawnee District Court; MARY E. CHRISTOPHER, judge. Oral argument held March 27, 2023. Opinion filed July 5, 2024. Affirmed.

Anthony J. Powell, solicitor general, argued the cause, and *Brant M. Laue*, former solicitor general, *Jeffrey A. Chanay*, former chief deputy attorney general, *Dwight R. Carswell,* deputy solicitor general, *Shannon Grammel*, former deputy solicitor general, *Kurtis K. Wiard*, assistant solicitor general, and *Derek Schmidt*, former attorney general, were with him on the briefs for appellants.

Caroline Sacerdote, pro hac vice, of Center for Reproductive Rights, of New York, New York, argued the cause, and *Hillary Schneller*, pro hac vice, of the same organization, and *Teresa A. Woody*, of The Woody Law Firm P.C., of Kansas City, Missouri, were with her on the brief for appellees.

The opinion of the court was delivered by

STANDRIDGE, J.: At issue are a series of statutes and implementing regulations ("Challenged Laws") relating to licensure of abortion provider facilities. An abortion care facility and its doctors ("Providers") challenged the constitutionality of the Challenged Laws and requested the Shawnee County District Court enjoin the State from enforcing them. The district court issued a temporary order enjoining enforcement of the Challenged Laws pending a final judgment.

After discovery, the parties filed cross-motions for summary judgment. The district court granted the Providers a declaratory judgment and issued a permanent injunction restraining the State from enforcing the Challenged Laws. The district court held (1) the Challenged Laws infringe on a woman's fundamental right to personal autonomy guaranteed under section 1 of the Kansas Constitution Bill of Rights and are thus subject to strict scrutiny, (2) the Challenged Laws do not survive strict scrutiny because they do not further the State's identified compelling interest and are not narrowly tailored to that end, (3) no part of the Challenged Laws can operate independently under the statute's severability clause, and (4) the Challenged Laws violate the equal protection provisions of the Kansas Constitution.

The State appeals and we affirm. As explained, the State failed to meet its evidentiary burden to show the Challenged Laws further its identified compelling interest in protecting maternal health and regulating the medical profession as it relates to maternal health. Without this showing, the Challenged Laws do not survive strict scrutiny and are constitutionally infirm. We decline the State's request to sever the unconstitutional licensure requirements because the State failed to meet its burden to show severability is proper under applicable Kansas law. Finally, we deem it unnecessary to address the district court's finding of an equal protection violation because we are affirming the district court's decision on grounds that the State failed to satisfy its burden to show the Challenged Laws further a compelling state interest.

FACTUAL AND PROCEDURAL BACKGROUND

Hodes & Nauser, MDs, P.A., operates the Center for Women's Health (CWH), a medical practice providing obstetrical and gynecological care, including abortion care. Dr. Traci Nauser is a board-certified obstetrician-gynecologist licensed to practice medicine in Kansas. She provides abortion care up to 21.6 weeks LMP (21 weeks and 6

days since the patient's last menstrual period). Along with her practice at CWH, Dr. Nauser provides hospital-based care to patients who need services in that setting including antepartum care; vaginal and cesarean deliveries; postpartum care; obstetrical and gynecological surgeries; and labor inductions. Dr. Nauser's father, Dr. Herbert Hodes, founded CWH in 1978 and practiced there until his 2017 retirement. CWH has provided abortion care in the same physical facility for more than 30 years.

The Kansas Board of Healing Arts has long regulated licensed clinicians like Dr. Hodes and Dr. Nauser and the care they provide at medical offices like CWH. The Board's regulations define medical "office" as "any place intended for the practice of the healing arts in the State of Kansas." K.A.R. 100-25-1(f). Board regulations specifically exclude hospitals, ambulatory surgical centers (ASCs), or recuperation centers from its definition of medical office because those facilities already are licensed and regulated by the Kansas Department of Health and Environment (KDHE). K.A.R. 100-25-1(f).

Relevant to CWH, Board regulations include standards for maintaining cleanliness; infection control and the disposal of biological waste; maintaining drugs, supplies, and medical equipment; maintaining the safety of the physical facility; reporting hospital transfers; investigating and disciplining clinicians; and administering sedation or anesthesia, including local and general anesthesia, as well as spinal and epidural blocks. K.A.R. 100-25-1 et seq. The district court found CWH complied with these applicable standards of care for providers of office-based surgery. It also found CWH followed the clinical standards set out by the American College of Obstetricians and Gynecologists, the leading medical professional organization for OB/GYNs in the United States, and the National Abortion Federation, the leading medical professional association for clinicians providing abortion care in North America.

Despite preexisting Board regulations governing licensed clinicians working in a clinic providing office-based surgery, the Legislature in 2011 passed S.B. 36, which created a new KDHE licensing requirement targeting medical facilities that provide abortion care. See K.S.A. 65-4a01 et seq. S.B. 36 defines facility as "any clinic, hospital or ambulatory surgical center, in which any

second or third trimester elective abortion, or five or more first trimester elective abortions are performed in a month, excluding any abortion performed due to a medical emergency." K.S.A. 65-4a01(g). Given hospitals and ambulatory surgical centers are already required to be licensed by KDHE, the practical effect of the new law is limited to creating a KDHE licensing regimen for clinics providing abortion care.

As required by S.B. 36, KDHE adopted temporary regulations to carry out its purpose. See K.S.A. 65-4a09. The 30-page temporary regulations included extensive requirements for all aspects of medical abortion facilities including staffing, procedures, equipment, and physical environment. Two days before the effective date, the Providers sued in federal court challenging the constitutionality of S.B. 36 and the temporary regulations. The federal court entered a preliminary injunction preventing the State from enforcing them. See *Hodes & Nauser v. Moser*, No. 2:11-cv-02365-CM-KMH (D. Kan. July 1, 2011) (order granting preliminary injunction). After the temporary regulations expired in October 2011, the Providers dismissed the federal suit. *Hodes & Nauser*, No. 2:11-cv-02365-CM-KMH (D. Kan. July 19, 2012) (order dismissing case with prejudice).

KDHE then adopted permanent regulations, which were set to take effect in November 2011. See K.A.R. 28-34-126 to K.A.R. 28-34-144. But before the permanent regulations could take effect, the Providers filed this case in state court challenging the constitutionality of S.B. 36 and its permanent regulations. The Providers requested a temporary injunction to enjoin the State from enforcing them pending final judgment. The district court granted that request. The parties later agreed the State would not enforce S.B. 36 or the permanent regulations pending final judgment.

In 2015, the Legislature repealed one provision of the statutory scheme—K.S.A. 2014 Supp. 65-4a10—and enacted an amended version. See L. 2015, ch. 84, § 1. Relevant here, the original version of K.S.A. 65-4a10, in effect from 2011 through June 10, 2015, required the prescribing physician be physically present in the same room as the patient when a drug is administered to induce an abortion. The 2015 amended statute is substantially the

same as the original version but added exceptions to the in-person medication requirement for in-hospital, induced-labor abortions and for medical emergencies.

Four years later, the State moved to clarify or dissolve the temporary injunction. First, the State sought clarification on whether the 2011 Agreed Order not to enforce S.B. 36 pending final judgment applied to K.S.A. 2015 Supp. 65-4a10. In the alternative, the State sought to dissolve the injunction as it applied to K.S.A. 2015 Supp. 65-4a10, arguing the Providers lacked standing to challenge that particular statutory provision because they acknowledged in discovery they were complying with its requirements. The district court denied the requested relief. The State appealed, claiming jurisdiction under K.S.A. 2020 Supp. 60-2102(a)(2), which authorizes immediate appeals from any order granting, refusing, modifying, dissolving, or continuing an injunction. The Court of Appeals held it lacked jurisdiction because the district court's order did not grant, refuse, modify, dissolve, or continue the injunction. As a result, the Court of Appeals dismissed the appeal as prematurely filed. *Hodes & Nauser, MDs v. Norman*, No. 121,046, 2021 WL 520661, at *11-12 (Kan. App. 2021) (unpublished opinion).

In 2019, this court decided *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019) (*Hodes I*). There, we held section 1 of the Kansas Constitution Bill of Rights protects an inalienable natural right to personal autonomy, which includes the right to abortion. 309 Kan. at 614. And we held laws that infringe on the right to abortion are subject to strict scrutiny. 309 Kan. at 665.

After the parties completed discovery in March 2021, they filed competing motions for summary judgment. Following oral argument on the motions, the district court denied the State's motion for summary judgment and granted summary judgment for the Providers. In its ruling, the district court found:

- Abortion is one of the safest types of medical care provided in the United States. Both abortion-related mortality (death) and abortion-related morbidity (non-fatal complications) are very rare.

- Abortion is approximately 14 times safer than carrying a pregnancy to term. The Centers for Disease Control and Prevention reported in 2015 that the legal abortion-related mortality rate was 0.7 deaths per 100,000 procedures. Mortality from childbirth is 8.8 deaths per 100,000 live births.
- Abortion-related mortality is also significantly lower than that for other common outpatient medical procedures, such as colonoscopy (5 deaths per 100,000 procedures) and some plastic surgeries (1.7 deaths per 100,000 procedures).
- Serious non-fatal complications of abortion as currently performed at outpatient facilities are extremely rare. In a recent study examining about 55,000 abortions, the incidence of major complications was 0.23%.
- Nearly one in four women in the United States will obtain an abortion in their lifetimes.

The district court struck down all the Challenged Laws, finding (1) they infringed on a woman's fundamental right to personal autonomy guaranteed under section 1 of the Kansas Constitution Bill of Rights, (2) the Challenged Laws do not survive strict scrutiny because they do not further the State's identified compelling interest and are not narrowly tailored to that end, (3) none of the Challenged Laws can operate independently under the statute's severability clause, and (4) the Challenged Laws violate the equal protection provisions of the Kansas Constitution. The court declared the Challenged Laws unconstitutional and issued a permanent injunction restraining the State from enforcing them.

The State moved to alter or amend the district court's decision, arguing the Providers lacked standing to challenge K.S.A. 65-4a10 (the medication-in-person requirement) because the Providers acknowledged in discovery they were complying with it. The district court denied the motion, finding an injury existed because Dr. Nauser was complying with the statute only to avoid potential criminal prosecution and action against her license.

The State appealed to this court under K.S.A. 60-2101(b) (directing appeal to Kansas Supreme Court when state statute held unconstitutional).

STANDING

The State's notice of appeal includes the district court's order denying its motion to alter or amend the court's judgment. In that motion, the State argued the Providers lacked standing to challenge K.S.A. 65-4a10, as amended—the statute dictating that a physician prescribing RU-486 (mifepristone) or any other abortion-inducing drug must be in the same room as the patient when administered. The State's rationale to the district court for challenging the Providers' standing was that the Providers were complying with the medication-in-person doctor requirement.

Although the State's notice of appeal asserts it is appealing from the district court's standing decision on the medication-in-person requirement, the State's appellate brief mentions it only in the context of factual background and fails to raise or brief standing as a substantive issue. By failing to raise or brief the standing issue, the State appears to have abandoned any challenge to the district court's decision on standing. See *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018) ("Where the appellant fails to brief an issue, that issue is waived or abandoned."). That said, standing is a component of subject matter jurisdiction and this court has an obligation to ensure we have jurisdiction. See *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 916, 296 P.3d 1106 (2013) (appellate court has a duty to question jurisdiction on its own initiative and exercises unlimited review over jurisdictional issues). Thus, we will address it.

Kansas courts use a two-part standing test. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 680, 359 P.3d 33 (2015). To show standing, a party "'must show a cognizable injury and establish a causal connection between the injury and the challenged conduct.'" *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). A cognizable injury, or an injury in fact, occurs when the party personally suffers an actual or threatened injury because of the challenged conduct. *KNEA v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017). For a matter to be justiciable, the parties must have "adverse legal interests that are immediate, real, and amenable to conclusive relief." *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 678.

Under the Kansas standing test, the Providers must show they suffered an actual or threatened injury stemming from the statutory medication-in-person requirement. In its response to the State's motion to alter or amend judgment, the Providers claim they suffer a threatened injury because, under this statute, they will face penalties—including, but not limited to, revocation of their license to practice medicine and revocation of the license to operate their facility—if a physician does not comply with the medication-in-person requirement. See K.S.A. 65-4a10(d) ("A violation of this section shall constitute unprofessional conduct under K.S.A. 65-2837."); K.S.A. 65-2836(b) (A licensee's medical license may be revoked, suspended, or limited upon a finding that the licensee has committed an act of unprofessional conduct.); K.S.A. 65-4a02(a) ("A facility shall be licensed in accordance with K.S.A. 65-4a01 through 65-4a12."); K.S.A. 65-4a08(a), (c) (Operating an abortion facility without a license is a class A nonperson misdemeanor, with no requirement of culpable mental state, and constitutes unprofessional conduct under K.S.A. 65-2837.). Thus, this is a pre-enforcement challenge.

The State does not dispute that the statutory penalties for violating the medication-in-person requirement include medical license revocation and inability to obtain and maintain an abortion facility license. Instead, the State argued the Providers fail to show a cognizable injury resulting from the medication-in-person requirement because they are choosing to comply with it. But the State's argument is based on misapplication of the standing test, which recognizes an injury in fact for purposes of standing when a party personally suffers not just an actual injury, but also a threatened injury because of the challenged conduct. *League of Women Voters of Kansas v. Schwab*, 317 Kan. 805, 813, 539 P.3d 1022 (2023) (recognizing Kansas' traditional standing rule for pre-enforcement challenges). Simply put, a plaintiff need not break a law to challenge it. See *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) (expressing federal pre-enforcement standing rule which Kansas has adopted) ("The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory . . . conditions" and therefore "assert[s] a sufficiently direct threat of personal detriment."); see also *303 Creative LLC v. Elenis*, 600 U.S. 570, 589, 143

S. Ct. 2298, 216 L. Ed. 2d 1131 (2023) (noting the plaintiff had to "either speak as the State demands or face sanctions for expressing her own beliefs").

In its order denying the State's motion to alter or amend judgment, the district court found an injury existed because Dr. Nauser was complying with the statute only to avoid potential criminal prosecution and action against her license. The district court relied on Dr. Nauser's testimony stating she complies with the medication-in-person requirement only because of "the uncertainty caused by the State regarding whether this [medication-in-person] requirement was in effect or not." "Otherwise," she testified, "I would plan to have a nurse or another qualified person administer mifepristone while I could attend to other needs in the office, just as I do with other medications." On appeal, the State does not dispute Dr. Nauser's testimony or the district court's findings in this regard.

We agree with the district court's analysis and find the Providers have met their burden to show they have standing to challenge K.S.A. 65-4a10, as amended.

ANALYSIS

The State challenges the district court's decision to grant summary judgment for the Providers and to strike down the Challenged Laws as unconstitutional. The State argues (1) the district court erred in finding the Challenged Laws infringe on the right to abortion; (2) even if they infringe on the right to abortion, the district court erred in finding the Challenged Laws do not survive strict scrutiny; (3) the district court erred by ignoring the statute's severability clause and striking down the Challenged Laws in their entirety; and (4) the district court erred in finding the Challenged Laws violate the equal protection provisions of the Kansas Constitution.

Standard of review

A challenge to a statute's constitutionality presents a question of law subject to unlimited review. *State v. Robison*, 314 Kan. 245, 248, 496 P.3d 892 (2021). The Kansas Supreme Court is the final authority on whether a Kansas statute violates the Kansas Constitution. See *Harris v. Shanahan*, 192 Kan. 183, 206-07, 387 P.2d 771 (1963) ("In the

final analysis, this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas.").

An appellate court reviews a summary judgment decision de novo, applying the same legal standard as the district court. *Schreiner v. Hodge*, 315 Kan. 25, 30, 504 P.3d 410 (2022). Summary judgment is appropriate only when the pleadings, depositions, affidavits, and other supporting materials filed with the court show no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. 315 Kan. at 30.

A. *Strict scrutiny constitutional framework*

In *Hodes I*, this court held section 1 of the Kansas Constitution Bill of Rights protects an inalienable natural right to personal autonomy, which includes the right to decide whether to continue (or terminate) a pregnancy. 309 Kan. at 650. We also held laws that infringe on the right to abortion are subject to strict scrutiny. 309 Kan. at 665, 671. Under strict scrutiny, the initial burden is on the plaintiff to prove a challenged law actually infringes on a constitutionally protected fundamental right under section 1. Any degree of actual infringement—however slight—triggers strict scrutiny. Once a plaintiff proves a statute infringes on a constitutionally protected fundamental right under section 1, the court presumes the law is unconstitutional and the burden shifts to the State to defend the law under strict scrutiny. Strict scrutiny requires the State to prove (a) the existence of a compelling government interest, (b) its actions further that compelling interest, and (c) its actions do so in a way that is narrowly tailored. 309 Kan. at 669.

Today, in *Hodes & Nauser, MDs v. Kobach* (*Hodes II*), 318 Kan. 940, 950-51, 551 P.3d 37 (2024), we reaffirmed the strict scrutiny constitutional framework used in *Hodes I* set forth above. Thus, we apply it here to determine the constitutionality of the Challenged Laws.

1. The asserted right at stake

The district court found the asserted right implicated by the Challenged Laws—that target only facilities that provide abortion care—is the right to abortion, which is protected under section 1 of the Kansas Constitution Bill of Rights. As this court held in

Hodes I, the ability to decide whether to continue or terminate a pregnancy (have an abortion) is integral to a woman's exercise of her inalienable natural right of personal autonomy under section 1. 309 Kan. at 631, 635, 646 ("Denying a pregnant woman the ability to determine whether to continue a pregnancy would severely limit her right of personal autonomy."). As an inalienable natural right of personal autonomy with profound and unique attributes, the right to decide to have an abortion is a fundamental right subject to strict scrutiny. See *Hodes I*, 309 Kan. at 636, 645, 647, 650, 663, 681, 685 (Strict scrutiny "applies when a fundamental right is implicated."). Thus, we agree with the district court that the asserted right is protected under section 1 and strict scrutiny applies.

Given the various issues raised in the separate opinions of Justices Stegall and Wilson regarding the relationship between natural and fundamental rights in terms of applying strict scrutiny, we find it helpful to review the analysis in *Hodes I* on that issue before moving on to discuss infringement. Relevant here, the court began its opinion with a broad summary of its holdings:

> "Included in that limited category [of inalienable natural rights in section 1 of the Kansas Constitution Bill of Rights] is 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. Although not absolute, this right is fundamental. Accordingly, the State is prohibited from restricting this right unless it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest. And we thus join many other states' supreme courts that recognize a similar right under their particular constitutions." 309 Kan. at 614.

In the body of the opinion, the court provided legal analysis to support its holding that personal autonomy is protected under section 1 as an inalienable natural right and the decision to continue or terminate a pregnancy is included within that right. Emphasizing that section 1 of the Kansas Constitution Bill of Rights differs from any federal counterpart, the court did not use the United States Supreme Court standard for deciding whether the asserted right is protected as fundamental under section 1. See 309 Kan. at 623-27. See also *Washington v. Glucksberg*, 521 U.S. 702,

721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (Before a right can be deemed fundamental under the Due Process Clause of the Fourteenth Amendment, it must be "deeply rooted in this Nation's history and tradition, and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"). Instead, the court articulated its own standard for deciding whether the asserted right is entitled to protection under section 1 of the Kansas Constitution Bill of Rights.

> "As discussed, we reach our conclusion that section 1 of the Kansas Constitution Bill of Rights protects a woman's right to make decisions about whether she will continue a pregnancy based on several factors. These include an analysis of natural rights, Lockean principles, the caselaw of Kansas, the rationale and holdings of court decisions from other jurisdictions reviewing broad constitutional natural rights provisions or other provisions similar to ours, and the history of early statutes limiting abortion in Kansas. These factors lead us to conclude that section 1's declaration of natural rights, which specifically includes the rights to liberty and the pursuit of happiness, protects the core 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 Kansans to make their own decisions regarding their bodies, their health, their family formation, and their family life. Pregnant women, like men, possess these rights." 309 Kan. at 660.

Only after engaging in this analysis did the court conclude that the decision to continue or terminate a pregnancy is protected under section 1 as an inalienable natural right of personal autonomy. After completing this analysis, the court equated its holding that personal autonomy is a natural inalienable right to one that personal autonomy is a fundamental right. See 309 Kan. at 674 (calling personal autonomy "fundamental" after concluding it is protected under section 1 as a natural inalienable right). The court then set forth in detail its reasons for adopting strict scrutiny as the standard for assessing infringement on the right.

Thus, regarding the relationship between natural and fundamental rights, *Hodes I* dictates that the right to abortion is subject to strict scrutiny because it is an exercise of the inalienable natural right of personal autonomy protected by section 1 of the Kansas Constitution Bill of Rights, which is a fundamental right.

2. *Infringement*

The district court found the Providers met their burden to prove the Challenged Laws infringe on a woman's fundamental right to abortion. The court cited uncontroverted evidence to support this finding. Missing from the district court's discussion, however, is the standard of proof it used in finding the Providers met their burden to prove infringement. In *Hodes I*, we held any evidence of infringement on a fundamental right protected under section 1 satisfies a plaintiff's burden to prove infringement under the strict scrutiny framework. 309 Kan. at 669 ("[O]nce a plaintiff proves an infringement—regardless of degree—the government's action is presumed unconstitutional."). Although any degree of infringement is sufficient, we held a plaintiff must show the government action *actually* impairs a fundamental right protected under section 1 to meet the burden of proof for infringement. An unsupported claim that government action *appears* to impair the section 1 right is not enough to satisfy this burden. See 309 Kan. at 672 ("[B]efore a court considers whether a governmental action survives this [strict scrutiny] test, it must be sure the action actually impairs the right. In some cases, it will be obvious that an action has such effect. Imprisonment, for example, obviously impairs the right to liberty. In other cases, the court may need to assess preliminarily whether the action only appears to contravene a protected right without creating any actual impairment.").

In distinguishing between an actual impairment and an appearance of impairment, we cited *Planned Parenthood of Southeastern Pa. v. Casey*, where the United States Supreme Court stated that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Hodes I*, 309 Kan. at 672 (citing *Casey*, 505 U.S. 833, 873, 112 S. Ct. 2791, 120 L. Ed. 2d 674 [1992], *overruled in part by Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 [2022]). We cited to this statement in *Casey* to support our distinction between an actual impairment and an appearance of impairment. But we did not adopt it as a standard to prove impairment. When read in context, the statement in *Casey* is analytically intertwined with its decision to

change the standard of review in abortion cases from the traditional tiered-scrutiny analysis to the "undue burden" test. Under that test, an abortion law or regulation is unconstitutional if "its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. at 878. The undue burden test focuses on the legitimacy of the regulation and the extent to which it interferes with the right to access abortion care.

In *Hodes I*, however, we specifically rejected the undue burden test in favor of the traditional tiered-scrutiny analysis. Unlike the undue burden test, strict scrutiny analysis focuses on the *nature* of the right at stake, not the *extent* to which the right is infringed:

> "In essence, the undue burden test emphasizes the governmental interest by simply balancing it against the individual rights of Kansans. This is instead of starting with an emphasis on the individual's rights and requiring the government to establish its compelling interest and to prove its action is narrowly tailored to serve that interest—even if the infringement is slight. And by placing their acknowledgment of these individual rights in the first section of Kansans' Bill of Rights, the drafters and adopters of our Constitution made clear the rights are foremost." *Hodes I*, 309 Kan. at 670.

Given its focus on the nature of the right at stake, the standard of proof for infringement under strict scrutiny set forth in *Hodes I* is clear: once a plaintiff proves an actual infringement—*regardless of degree* and *even if the infringement is slight*—the government's action is presumed unconstitutional, and the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it. 309 Kan. at 669-70. See also *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 643, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) (Thomas, J., dissenting) ("A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment."), *abrogated by Dobbs,* 597 U.S. 215. We reaffirm the *Hodes I* infringement standard here.

We now apply that standard to determine whether the Providers met their burden to show the Challenged Laws actually infringe on a woman's fundamental right to an abortion—regardless of degree and however slight. The State presents two arguments to support its claim the Providers failed to meet their burden. First, the State argues there is no infringement because the

Challenged Laws do not impose an unqualified ban on abortion care to patients; instead, the State asserts they merely require the Providers to comply with the Challenged Laws. Second, the State argues there is no infringement because, even if the Providers cannot comply with the Challenged Laws, the patients can seek abortion care elsewhere in the state.

We disagree. Both arguments incorrectly assume government infringement on a woman's right to abortion can be established *only* by an unqualified ban on all abortion. But as we just discussed, any degree of infringement—however slight—on a fundamental right protected under section 1 triggers strict scrutiny. And as the district court found, the Providers proved the Challenged Laws infringe on a woman's right to abortion. The court explained:

"For example, Dr. Nauser stated the Challenged Laws 'will make it more difficult, if not impossible, for CWH to continue offering abortion care.' Dr. Nauser indicated the Challenged Laws will force CWH to see fewer patients, cause CWH patients to face higher costs, or result in unjustifiably delayed and obstructed services. Dr. Nauser identified other burdens imposed by the Challenged Laws, summarized next:

- Staffing and monitoring restrictions imposed by K.A.R. 28-34-135(m); K.A.R. 28-34-138(c); K.A.R. 28-34-138(f); K.A.R. 28-34-139(a)(2); and K.A.R. 28-34-137(c) increase the costs of services and delay a patient's ability to receive services.
- Recovery-related restrictions imposed by K.A.R. 28-34-139(a) burden patients by requiring them to stay at least twice as long as is medically necessary and delays a patient's ability to receive services because less patients can be scheduled in one day. Similarly, the requirements of K.A.R. 28-34-133(b)(7) of a 'nurse station with visual observation of each patient in the recovery area' impose staffing and building structure burdens that would also cause delays or prohibit the services offered altogether.
- Board of Pharmacy registration restrictions imposed by K.A.R. 28-34-135(n) would impose financial burdens on CWH.
- Requirements for the administration of mifepristone imposed by K.S.A. 65-4a10(b)(1) restrict a physician's ability to tend to other patients by prohibiting other qualified staff from administering the medication.
- Medical waste regulations imposed by K.A.R. 28-34-127(c) threaten CWH's ability to maintain its current medical waste contract, which would result in the closure of CWH.
- Equipment and facility requirements imposed by K.A.R. 28-35-135(a)(2); K.A.R. 28-35-135(a)(5); K.A.R. 28-35-135(a)(6); K.A.R.

28-35-135(a)(8); K.A.R. 28-34-135(e)(2); and K.A.R. 28-34-135(d) require abortion clinics to purchase unnecessary supplies.

"In their motion for summary judgment, the defendants state, 'there is no evidence that any part of the Act or any regulation has had or will have any effect on a woman's ability to decide whether to continue her pregnancy.' The defendants go on to say there 'is no evidence that any patient will have difficulty contacting another abortion provider in Kansas regarding her decision whether to continue her pregnancy if plaintiffs do not comply with the Act or the Regulations.'

"With respect to the defendants' second point, the plaintiffs have provided evidence that Dr. Nauser is one of the only clinicians in the area who possesses the experience and expertise required to work with women facing certain medical complications or fetal diagnoses. Further, the Supreme Court of Kansas has already determined that a restriction that 'threatens the already small number of providers willing to perform' certain abortions also impairs a person's natural rights. *Hodes & Nauser*, 309 Kan. at 672.

"Also important, as the plaintiffs illustrate in their responsive brief, 'a law infringes the right to abortion not only when it forces a person to seek care elsewhere.' Instead, restrictions that merely delay access to abortion impair a fundamental right. See *Hodes & Nauser*, 309 Kan. at 672 (finding impairment of a natural right due to the implication that S.B. 95 'will delay or completely prevent the exercise' of the fundamental right of abortion).

"As a result, it is not difficult for this Court to conclude the Challenged Laws infringe on a woman's right to access legal abortion services. See *Ragsdale v. Turnock*, 841 F.2d 1358, 1370 (7th Cir. 1988) (finding restrictions that caused delay and raised the costs of the services impaired the right at stake)."

Based on the infringement standard of proof in *Hodes I*, we conclude the Providers met their burden to show the Challenged Laws actually infringe on a woman's right to abortion, which is protected by section 1 of the Kansas Constitution Bill of Rights. Having done so, the burden shifts to the State to defend the law under strict scrutiny.

But before turning to strict scrutiny, we pause to address the dissent's cataclysmic premonition that a "massive swath of government action" will suddenly be put "on the chopping block of strict scrutiny" based on our holding that any degree of actual infringement on a fundamental right under section 1 triggers strict scrutiny. See *Stanek*, 318 Kan. at 1064. Admittedly, it is hard to decide which of the dissent's scatter-shot claims warrant a response and which should simply be ignored given that its narrative strays so far afield from the constitutional framework we rely upon here. Yet the dissent's hyperbolic panic sounding a false alarm should not go unanswered.

The dissent warns that "government regulation *always* 'infringes' upon access to whatever good or service is being regulated," which means from this point forward all government regulation necessarily will be subject to strict scrutiny analysis and "most of the laws governments enact will fail a strict scrutiny analysis." *Stanek*, 318 Kan. at 1058, 1061-62. Suggesting the courthouse doors are now wide open to litigants bringing suit for the slightest infringement on access to goods and services that may marginally be related to personal autonomy, the dissent predicts a future without regulations governing medical procedures, food supplies, restaurants, drug use and possession, tattoos and piercings, use of car seat belts, motorcycle helmets, beauty and barber services, student vaccinations, assisted suicide, self-administration of medication by students, and public nudity.

First, it has been over five years since we adopted this infringement standard in our section 1 constitutional framework, and the dissent's dire prediction that countless Kansas regulations will be challenged and struck down for failing strict scrutiny analysis has failed to materialize.

Second, the dissent's prediction is based on a faulty underlying premise: that our decision in *Hodes I* broadly declares all activities related, however tangentially, to personal autonomy are protected under section 1. To arrive at this conclusion, the dissent interprets our holding in *Hodes I* as unlimited in scope, when in fact the opposite is true: we performed our section 1 analysis in *Hodes I* in the specific context of deeply personal reproductive health decisions, the profound significance of which directly affects a woman's entire lifespan. In doing so, this court conducted an exhaustive review of our founding documents, the historical record, and relevant scholarship on the meaning and scope of natural rights. See *Hodes I*, 309 Kan. at 623-46. Ultimately, this court held that section 1 guarantees women, like men, the inalienable natural right to personal autonomy, which includes the fundamental right to an abortion:

"At issue here is the inalienable natural right of personal autonomy, which is the heart of human dignity. It encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination. It allows each of us to make decisions about medical treatment and family formation, including whether

to bear or beget a child. For women, these decisions can include whether to continue a pregnancy. Imposing a lower standard than strict scrutiny, especially mere reasonableness, or the dissent's 'rational basis with bite'—when the factual circumstances implicate these rights because a woman decides to end her pregnancy—risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making. It cheapens the rights at stake. The strict scrutiny test better protects these rights. [Citation omitted.]" 309 Kan. at 671.

In an effort to justify its interpretation of the *Hodes I* holding as unlimited in scope, the dissent attempts to draw a false equivalence between *any activity* involving one's body and the intimate, personal, and profound act of deciding to have an abortion. In doing so, the dissent completely ignores the fact that this court's analysis in *Hodes I* examined the inalienable natural right to personal autonomy in the specific context of abortion, which necessarily limited the scope of its holding. Without a similar legal analysis to determine whether the activities posited by the dissent are included in the meaning of personal autonomy as contemplated by section 1, the dissent's claim that laws infringing on those activities will be subject to strict scrutiny is specious at best. As the *Hodes I* court demonstrated of the right to abortion, each asserted right must be carefully examined and evaluated independently in the context of its own unique implications on an inalienable natural right found under section 1. See *Hodes I*, 309 Kan. at 623-46.

For example, the dissent sarcastically asks, "Surely the government does not have a compelling interest in who trims my beard?" *Stanek*, 318 Kan. at 1063. The dissent trivializes and attempts to minimize the fundamental nature of a woman's decision to continue or terminate a pregnancy by comparing it to a man's decision to grow or trim a beard. This facetious comparison is both inappropriate and denigrating to women faced with decisions between childbirth and abortion, a decision we hope the dissent would agree is "'fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman.'" *Hodes I*, 309 Kan. at 647 (quoting *In re T.W.*, 551 So. 2d 1186, 1193 [Fla. 1989]).

Because of the unique and profound attributes of the right to abortion and because denying this right "would severely limit" a

woman's inalienable natural right to personal autonomy protected under section 1 of the Kansas Constitution Bill of Rights, the *Hodes I* court held—in the context of the right to abortion, which was the specific issue presented for decision—that the right to abortion is a fundamental right deserving of strict scrutiny protection. 309 Kan. at 647, 669, 681. See also 309 Kan. at 685 (Biles, J., concurring) (quoting *Women of the State of Minn. v. Gomez*, 542 N.W.2d 17, 27 [1995] ["We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion."]). The limited scope of the *Hodes I* holding is evident from the very outset of that decision in the synopsis, which we recite here:

> "Section 1 of the Kansas Constitution Bill of Rights provides: 'All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.' We are now asked: Is this declaration of rights more than an idealized aspiration? And, if so, do the substantive rights include a woman's right to make decisions about her body, including the decision whether to continue her pregnancy? We answer these questions, 'Yes.'
>
> "We conclude that, through the language in section 1, the state's founders acknowledged that the people had rights that preexisted the formation of the Kansas government. There they listed several of these natural, inalienable rights—deliberately choosing language of the Declaration of Independence by a vote of 42 to 6.
>
> "Included in that limited category is 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. Although not absolute, this right is fundamental. Accordingly, the State is prohibited from restricting this right unless it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest." 309 Kan. at 613-14.

Therefore, we reaffirm today what this court held above in *Hodes I*: the inalienable natural right of personal autonomy under section 1 of the Kansas Constitution Bill of Rights allows a woman to make her own decisions regarding whether to have an abortion and, although not absolute, this right is fundamental. Accordingly, laws that actually infringe on the right to abortion, regardless of the degree of infringement, are subject to strict scrutiny. 309 Kan. at 614.

3. Strict scrutiny

Once a plaintiff proves an actual infringement of a protected right under section 1, the court presumes the law is unconstitutional and the burden shifts to the State to defend the challenged law under strict scrutiny. *Hodes I*, 309 Kan. at 669. Strict scrutiny requires the State to prove (1) the existence of a compelling government interest, (2) its actions further that compelling interest, and (3) its actions do so in a way that is narrowly tailored. 309 Kan. at 670.

a. *Compelling government interest*

In both *Hodes I* and *Hodes II*, we described a compelling interest as "one that is 'not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.'" *Hodes I*, 309 Kan. at 663; *Hodes II*, 318 Kan. at 952. The United States Supreme Court has described a compelling interest as one "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

Unfortunately, these descriptive modifiers provide little, if any, guidance on how to determine whether an interest articulated by the State is a compelling one under the strict scrutiny framework. See, e.g., *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 186, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023) (explaining that compelling interests subject to strict scrutiny need to be amenable to meaningful judicial review, not simply "commendable goals"). Courts across the country, including ours, generally appear to deal with the absence of a clear standard of proof either by summarily deciding the interest is compelling or by "assuming without deciding" the articulated government interest is compelling. These courts then decide the constitutional challenge as a question of whether the State proved the challenged laws further the government interest in a way that is narrowly tailored. See, e.g., *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 193, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017) (assuming without deciding that compliance with the Voting Rights Act is a compelling government interest); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171, 135 S.

Ct. 2218, 192 L. Ed. 2d 236 (2015) (assuming without deciding that preserving the Town's aesthetic appeal and traffic safety are compelling governmental interests); *Missourians for Fiscal Accountability v. Klahr*, 892 F.3d 944, 952 (8th Cir. 2018) (assuming without deciding that preventing violation of campaign committee deadline is a compelling government interest); *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 559 (4th Cir. 2013) (assuming without deciding that preserving agricultural land, water quality, and open space and managing traffic and noise in the rural density transfer zone is a compelling government interest); *Green Party of Connecticut v. Garfield*, 616 F.3d 189, 213 (2d Cir. 2010) (assuming without deciding that preventing contractors and lobbyists from bundling contributions is a compelling government interest); *Bey v. Rasawehr*, 161 Ohio St. 3d 79, 94, 161 N.E.3d 529 (2020) (assuming without deciding that protecting civil-stalking victims from fear of imminent physical harm or mental distress is a compelling government interest); *State v. Planned Parenthood of the Great NW*, 436 P.3d 984, 1004 (Alaska 2019) (assuming without deciding ensuring financial viability of Medicaid is a compelling government interest); *Wagner v. City of Garfield Heights*, 675 Fed. Appx. 599, 607 (6th Cir. 2017) (unpublished opinion) (assuming without deciding that aesthetic appeal and traffic safety is a compelling government interest).

In its appellate brief, the State cites to its motion for summary judgment to assert the Challenged Laws are justified by two compelling government interests: (1) protecting maternal health and safety and (2) regulating the medical profession. But unlike the argument submitted to us, the State's motion for summary judgment to the district court asserted only one compelling government interest: the health and safety of women.

"In the abortion context specifically, the [United States] Supreme Court has stated repeatedly that the State has a legitimate interest from the outset of pregnancy in protecting the health of the woman. . . .

"The State's interest in protecting the health of a pregnant woman also arises in the context of the State's longstanding interest in regulating the medical profession. [Citations omitted.]"

Following the State's lead, the district court found the State was asserting the health and safety of pregnant women as its only compelling government interest, with the interest in regulating the medical profession as an associated factor:

> "The defendants maintain the State has a valid interest in protecting the health of pregnant women, which is encompassed in its broader interest in promoting the health and safety of all its residents. The defendants further claim the State's interest in protecting the health of pregnant women is linked with its 'longstanding interest in regulating the medical profession.'"

As for maternal health and safety, the district court relied on an Iowa Supreme Court decision to summarily announce that "[t]here is little question the health of pregnant women or nonpregnant women—and of Kansas residents, more generally—is a compelling interest." (Citing *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 239-40 [Iowa 2018], *overruled by Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 [Iowa 2022].) But the court held the State failed to meet its burden to establish that regulating the medical profession—as an associated factor in the context of abortion care to protect women's health and safety—is a compelling state interest.

While the State's articulated interest in protecting maternal health may be compelling as a theoretical matter under the *Hodes I* and *Hodes II* definition, we question whether an interest articulated in the abstract is enough to establish the compelling nature of that interest under the strict scrutiny framework. Requiring only a theoretical government interest creates the potential for arbitrary results when courts decide under strict scrutiny whether the interests are compelling—i.e., extremely weighty, possibly urgent, and rare. But because the district court did not make any factual findings about the compelling nature of the State's interest in protecting maternal health, we will assume without deciding that protecting maternal health may be a compelling state interest.

Like maternal health, the government regulation of the medical profession—as an associated factor in the context of abortion care to protect women's health—also may be compelling as a theoretical matter. But because the district court found the State failed

to meet its burden in this regard and did not make any factual findings about the compelling nature of the State's interest on this issue, we will assume without deciding that regulation of the medical profession—as an associated factor in the context of abortion care to protect women's health—may be a compelling state interest.

b. *Furthering the compelling interest*

Once the government has established an interest as compelling, it must also show its regulation *furthers* that compelling interest. *Hodes II*, 318 Kan. at 953 (citing *Holt v. Hobbs*, 574 U.S. 352, 362-64, 135 S. Ct. 853, 190 L. Ed. 2d 747 [2015] [strict scrutiny requires government action "actually further[ed]" asserted interest]; *Carey v. Population Servs., Int'l*, 431 U.S. 678, 691, 97 S. Ct. 2010, 52 L. Ed. 2d 675 [1977] [legislation could not withstand strict scrutiny because it did not serve the State's asserted interests]; Galloway, *Basic Substantive Due Process Analysis*, 26 U.S.F. L. Rev. 625, 640 (1992) ["The 'compelling interest' prong of strict scrutiny requires not only that the government have a compelling interest, but also that the government's conduct 'further' that interest."]).

To satisfy that burden, the government must show its regulations "'further the identified state interest that motivated the regulation not merely in theory, but in fact.'" *Hodes I*, 309 Kan. at 696 (Biles, J., concurring; quoting *Planned Parenthood of the Heartland*, 915 N.W.2d at 239-40); *Ernest v. Faler*, 237 Kan. 125, 138, 697 P.2d 870 (1985) (statute found unconstitutional because "the legislative means selected does not have a real or substantial relation to the objective sought"); Galloway, 26 U.S.F. L. Rev. at 638 (to show government conduct furthers compelling interest under strict scrutiny framework, "the conduct must be a substantially effective means for advancing that interest").

In deciding whether regulations are, in fact, substantially related to the objective sought and are a substantially effective means for advancing the government's identified interest, the court's "findings must be based on evidence, including medical evidence, presented in judicial proceedings. Mere deference to

legislative or administrative findings or stated goals would be insufficient." *Hodes I*, 309 Kan. at 700 (Biles, J., concurring); see also *Hellerstedt*, 579 U.S. at 582 (legislation did not further an interest in patient health when the State failed to provide evidence of a "significant health-related problem that the new law helped to cure"). As we stated in *Hodes II*:

> "Showing that its action furthers its asserted interest can be crucial to the government's success. In *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 627, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016), *abrogated by Dobbs*, 597 U.S. 215, the government's failure to produce evidence showing that abortion legislation furthered an interest in 'maternal health' was key to the Supreme Court's conclusion that the law was unjustified when compared to the burden it created on the right to abortion. There, the government argued that legislation requiring doctors to have admitting privileges to hospitals to provide abortions did not advance any interest in patient health when the evidence showed that abortion '"was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure."' *Hellerstedt*, 579 U.S. at 610-11. Legislation requiring all abortion facilities to meet surgical-center standards also failed to further an interest in maternal health because the evidence made it clear that the requirement would not create '"better care or . . . more frequent positive outcomes."' *Hellerstedt*, 579 U.S. at 582. Although the Court in *Hellerstedt* was applying a form of the undue burden test, its evidence-based approach to the furtherance question provides an instructive tool for our application of the same question within the strict scrutiny test. See *Hodes [I]*, 309 Kan. at 701 (Biles, J., concurring) (opining that test in *Hellerstedt* captures strict scrutiny test described by majority)." *Hodes II*, 318 Kan. at 953-54.

In this case, the district court held the State failed to meet its evidentiary burden to show the Challenged Laws further its stated interest in protecting the health and safety of women. In support of this holding, the court noted (1) the State provided no evidence to show the existence of a health- or safety-related problem the Challenged Laws help to cure; (2) the State provided no evidence to show why the Challenged Laws are needed above and beyond existing Board of Healing Arts regulations governing the practice of medicine at medical offices and clinics that perform abortions; and (3) the State provided no evidence to show why medical offices and clinics performing abortions need targeted restrictions when other clinics performing comparable or more risky medical procedures do not require the same added oversight.

On appeal, the State claims the district court erred in finding it failed to meet its burden. Yet the State's argument is limited to

two sentences addressing the duplicative nature of the regulations: "But the fact that other regulations currently in place also further these interests does not mean that additional regulations do not. The Clinic Regulations will make abortions safer through more targeted regulation." Notwithstanding the State's concession on redundancy, the dissent paints a picture suggesting abortion procedures are somehow less regulated than other comparable medical procedures. But there is no evidentiary support for that, which the State concedes. The district court's findings leave no room for doubt that the Challenged Laws impose medically unnecessary requirements for no apparent reason other than to burden a particular type of health care.

Nor does the State assert—let alone provide medical evidence to establish—that (1) there is a "significant health-related problem" the Challenged Laws "helped to cure" or (2) the Challenged Laws provide any more protection than that provided by the existing Board of Healing Arts regulations governing the practice of medicine at medical offices and clinics like the one here. See *Hellerstedt*, 579 U.S. at 610, 615. Indeed, there simply is no evidence in the record from which to conclude the Challenged Laws provide any necessary benefit to the health and safety of women seeking abortions in Kansas. The State failed to meet its evidentiary burden to establish the Challenged Laws, individually or collectively, further its interest in protecting the health and safety of women or in regulating the medical profession as it relates to maternal health. Without evidence to establish the Challenged Laws further the State's identified compelling interests, the statutory scheme making up the Challenged Laws does not survive strict scrutiny and is constitutionally infirm.

Although this effectively ends our inquiry, our review of the summary judgment record shows the Providers presented uncontroverted evidence to prove many provisions within the Challenged Laws do *not* further the State's interest in protecting maternal health or in regulating the medical profession as it relates to maternal health. We review that evidence below. For ease of reference, we group the statutes and regulations by category of re-

striction imposed and then cite evidence from the record undermining the State's assertion that the requirement furthers a compelling state interest.

Medication-in-person requirement

Requirement: If used to induce an abortion, the drug mifepristone must be administered to the patient in the physical presence of the physician. K.S.A. 65-4a10(b).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- Experts*, including the State's expert*, agree there is no reason for a clinician to be physically present when mifepristone is administered to patients for any reason.
- The requirement does not apply (1) when clinicians provide mifepristone for a purpose other than inducing an abortion, including when the drug is provided to manage miscarriage or (2) when clinicians provide mifepristone in a medical office, clinic, or facility performing less than five first-trimester abortions per month and no second- and third-trimester abortions. See K.S.A. 65-4a01(g).

Gestational age 22 weeks or more

Requirement: Except in the case of medical emergency, an abortion performed when the gestational age of the unborn child is 22 weeks or more must be performed in a licensed hospital or ambulatory surgical center. K.S.A. 65-4a07.

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- Plaintiffs' experts agree abortion procedures during the second trimester (weeks 14 to 27) may be safely performed in a properly equipped and staffed office setting. There is no medical reason to require different settings for such a procedure. The State does not present any evidence to the contrary.

Waivers and exemptions

Requirement: Medical offices or clinics providing abortion care are not eligible to receive a waiver under the Challenged Laws. K.S.A. 65-4a02(g).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- Hospitals and ASCs providing abortion care are eligible for a waiver of requirements under the Challenged Laws when the KDHE determines such waiver "will have no significant adverse impact on the health, safety or welfare of the patients." K.S.A. 65-4a02(g).

Requirement: Medical offices, clinics, or facilities performing five or more first-trimester abortions per month or any second- and third-trimester abortions, excluding any abortion performed due to a medical emergency, must comply with the Challenged Laws. K.S.A. 65-4a01(g).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- Medical offices, clinics, or facilities performing less than five first-trimester abortions per month and no second- and third-trimester abortions are exempt from complying with the Challenged Laws. K.S.A. 65-4a01(g).

Staffing

Requirement: Only physicians can perform an abortion. K.S.A. 65-4a10(a).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- Clinicians who are not physicians, such as certified nurse midwives, may provide care at a maternity or birth center in connection with a pregnancy deemed low risk for a poor outcome. See K.S.A. 65-503 et seq.; K.A.R. 28-4-1300 et seq.

Requirement: Any physician performing an abortion must have admitting privileges at a hospital within 30 miles of the facility. K.S.A. 65-4a08(b); K.S.A. 65-4a09(d)(3); K.A.R. 28-34-132(b)(2).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- The State's designated KDHE representative, Joseph Kroll, testified in his deposition that a physician performing an abortion can send a patient to a hospital even if the physician does not have admitting privileges.
- The State's other designated KDHE representative, Angela Jirik, testified in her deposition that existing regulations governing ASCs provide two options for patient transfers: (1) a transfer agreement with a hospital or (2) a physician's admitting privileges at a hospital. Neither of these options has a requirement the hospital be located within 30 miles of the ASC. See K.A.R. 28-34-52b(g).
- Preexisting Kansas Board of Healing Arts regulations require a physician performing any office-based surgery or special procedure to have (1) a plan for the timely and safe transfer of patients to a prespecified medical care facility within a reasonable proximity if extended or emergency services are needed, (2) a transfer agreement with the specified medical care facility, or (3) admitting privileges at the specified medical care facility. K.A.R. 100-25-3(e)(1).

Requirement: A physician performing a pelvic exam must have another staff person in the room, even if the physician performing the exam is a female. K.S.A. 65-4a09(d)(4); K.A.R. 28-34-137(c). Only a licensed health professional can provide postoperative monitoring and care. K.S.A. 65-4a09(d)(5). A licensed health professional must make a good-faith effort to contact a patient within 24 hours after a procedure to assess recovery. K.S.A. 65-4a09(g)(8); K.A.R. 28-34-141(a). Medications can be administered to patients only by a facility physician or a facility health professional. K.A.R. 28-34-135(m). Both a physician and at least one health professional must be available to each patient throughout the abortion procedure, even when no anesthesia is used.

K.A.R. 28-34-138(c). Health professionals must monitor patients' vital signs throughout the abortion procedure, even when no anesthesia is used. K.A.R. 28-34-138(f).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- None of these provisions are included in licensing regulations governing an ASC, where care similar to, or more complex than, abortion is performed.
- Experts, *including the State's expert*, agree there is no justification for applying these provisions solely to facilities at which abortion care is provided.
- Experts, *including the State's expert*, agree none of these restrictions are necessary for safe abortion care.

Requirement: Medical offices, clinics, or facilities performing five or more first-trimester abortions per month or any second- and third-trimester abortions, excluding any abortion performed due to a medical emergency, must comply with specific and itemized rules and regulations concerning sanitation, housekeeping, maintenance, staff qualifications, medical screening questions and evaluations of patients, type and number of required supplies and equipment, medical records and incident reporting, laboratory and recovery room procedures, the abortion procedure itself, the physical facility, and reasonable efforts to secure patient follow-up care. K.S.A. 65-4a09.

Evidence undermining the State's claim that these requirements further its interest in maternal health:

- Medical offices, clinics, or facilities performing less than five first-trimester abortions per month and no second- and third-trimester abortions are exempt from complying with K.S.A. 65-4a09. See K.S.A. 65-4a01(g).
- Out of the 50+ separate sub-subsections in K.S.A. 65-4a09 setting forth specific and itemized rules and regulations governing abortion care facilities as listed above, only 4 have a similar provision in the licensing regulations

governing ASCs, where care similar to, or more complex than, abortion is performed.

- Compare K.S.A. 65-4a09(b)(11) (In an abortion care facility, there must be "adequate areas for the secure storage of medical records and necessary equipment and supplies.") with K.A.R. 28-34-57(i) (In an ASC, "[a]dequate space, facilities, and equipment shall be provided for completion and storage of medical records.").
- Compare K.S.A. 65-4a09(d) (in abortion care facility, requiring designation of a medical director, demonstrable competence of physicians performing procedures, availability of physician with admitting privileges at an accredited hospital located within 30 miles of the facility is available; another individual present in room during pelvic exam; registered nurse, nurse practitioner, and licensed practical nurse or physician assistant be present and remain at facility when abortions are performed to provide postoperative monitoring and care until each patient who had an abortion that day is discharged) with K.A.R. 28-34-53(h)(2) ("The governing authority [of an ASC] shall ensure that the ambulatory surgical center . . . has an adequate number of qualified personnel.").
- Compare K.S.A. 65-4a09(d)(5) and (g)(3), (4) (in abortion care facility, requiring a registered nurse, nurse practitioner, licensed practical nurse or physician assistant to be present and remain at the facility when abortions are performed to provide postoperative monitoring and care until each patient who had an abortion that day is discharged; a licensed health professional trained in the management of the recovery area and capable of providing basic cardiopulmonary resuscitation and related emergency procedures to remain on the premises of the facility until all patients are discharged; a physician or a nurse who is advanced in cardiovascular life support certified to remain on the premises of the facility until all patients

are discharged and to facilitate the transfer of emergency cases if hospitalization of the patient or viable unborn child is necessary; and a physician or nurse to be readily accessible and available until the last patient is discharged) with K.A.R. 28-34-50(b) ("Before discharge from an [ASC], each patient shall be evaluated by a physician for proper anesthesia recovery.").

- Compare K.S.A. 65-4a09(e) (in an abortion care facility, requiring medical screening and evaluation of each patient to document full medical history, including allergies, obstetric and gynecologic history, past surgeries, full physical examination, appropriate laboratory tests including urine and blood or ultrasound examination, anemia test, and Rh typing unless written documentation provided) with K.A.R. 28-34-57(a), (d) (ASC patient medical records shall contain the following information, *if applicable*: patient identification, consent, and history; lab, radiology, anesthesia, surgical, tissue, consultation, and progress reports; doctor orders; a description of care given to patient based on the type of surgery; the signature or initials of authorized personnel on notes or observations; the final diagnosis; the discharge summary; the discharge instructions to the patient; a copy of transfer form; and the autopsy findings).

Post-procedure

Requirement: First-trimester abortion patients must be kept in recovery at least 30 minutes, even when no sedation is used. K.A.R. 28-34-139(a)(3)(A). The medical office must have a recovery area with a nurse's station providing visual observation of each patient, even when no sedation is used. K.S.A. 65-4a09(g); K.A.R. 28-34-133(b)(7)(A). Reasonable efforts must be made to ensure the patient returns 12 to 18 days after any abortion for a subsequent examination so the physician can confirm the pregnancy terminated. A brief description of the efforts made, including the date, time, and identification by name of the staff member must be included in the patient's medical record. K.S.A. 65-

4a10(c). Any follow-up visit after a pregnancy termination must include a urine pregnancy test, even if the facility uses an ultrasound or physical exam to confirm termination of pregnancy in the follow-up visit. K.A.R. 28-34-141(b)(3).

Evidence undermining the State's claim that these requirements further its interest in maternal health:

- State law imposes no minimum recovery times for any other patients who obtain other care in Kansas. For example, there is no minimum recovery time for a patient who has had a first-trimester dilatation and curettage procedure in the context of miscarriage care, regardless of the facility in which it is performed.
- Experts, *including the State's expert*, agree there is no medical reason for imposing minimum recovery times on patients who have had abortions, but not patients who have obtained other care—including patients who have had essentially the same procedure to complete a miscarriage.
- None of these provisions apply to ASCs, where care similar to, or more complex than, abortion is performed.
- Experts, *including the State's expert*, agree there is no justification for applying these provisions solely to facilities at which abortion care is provided.
- Experts, *including the State's expert*, agree none of these restrictions are necessary for safe abortion care.

Mandated disclosure of medical waste contractor

Requirement: A facility must identify the biomedical waste company it contracts with and submit written documentation of medical waste removal procedures. K.A.R. 28-34-127(c)(3).

Evidence undermining the State's claim that these requirements further its interest in maternal health:

- State law does not require non-abortion medical offices to disclose and provide written documentation of their arrangements with biomedical waste companies. See K.A.R. 28-29-27 et seq.

Equipment

Requirement: Abortion facilities must maintain a stock of specific equipment including child-size face masks, catheters in various sizes, child-size oral airways, child-size nasal cannulas, nasogastric tubes, and intraosseous needles. K.A.R. 28-34-135(c), (d), (e).

Evidence undermining the State's claim that these requirements further its interest in maternal health:

- None of these provisions apply to health care facilities providing similar or more complex care than abortion. See, e.g., K.A.R. 28-34-50 et seq. (ASC regulations).
- Several provisions of the Challenged Laws require abortion facilities to buy unnecessary equipment and supplies that will go unused, expire, and need to be purchased again.

Medical records

Requirement: Abortion facilities must give KDHE broad access to patient medical records, including patient-identifying information. K.A.R. 28-34-144(c).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- State law does not require non-abortion medical offices to give KDHE broad access to patient medical records, including patient-identifying information. See K.A.R. 100-25-1 et seq.
- Kansans seeking abortion have a strong interest in maintaining the confidentiality of their medical records. Many CWH patients, particularly those obtaining abortions, would experience substantial stress and anxiety if they learned their identities and medical records would be open to extensive review by KDHE employees. The risk of exposure of patients' medical records could deter them from accessing abortion at CWH or in the State.

Board of Pharmacy registration

Requirement: Abortion facilities maintaining a stock of controlled

drugs must register with the Board of Pharmacy. K.A.R. 28-34-135(n).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- Kansas-licensed clinicians who practice in non-abortion medical offices are permitted to maintain and administer controlled drugs, without registering with the Board of Pharmacy, so long as they are registered with the United States Drug Enforcement Administration. See K.S.A. 65-1635. Controlled drugs used in connection with abortion care are the same as those used in other gynecological procedures performed at non-abortion medical offices (or medical offices providing less than five first-trimester abortions) in the state.

Unannounced inspections

Requirement: KDHE must make at least two inspections of an abortion facility each calendar year to implement and enforce K.S.A. 65-4a01 through K.S.A. 65-4a12, with at least one inspection made without providing notice to the facility, during business hours. K.S.A. 65-4a05(a).

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- Pre-existing Kansas Board of Healing Arts regulations require the Board to enforce regulations governing the practice of medicine by making all necessary investigations relative to such enforcement. K.S.A. 65-2864.
- State law does not require unannounced inspections during business hours of other KDHE-licensed facilities, non-abortion medical offices, or medical offices providing less than five first-trimester abortions and no second or third trimester abortions. See K.S.A. 65-433 (stating that KDHE "shall make or cause to be made such inspections and investigations as deemed necessary").

Severe penalties

Requirement: The Challenged Laws subject abortion facilities to severe criminal and licensure penalties. See K.S.A. 65-4a06(a), (f), and K.S.A. 65-4a08.

Evidence undermining the State's claim that this requirement furthers its interest in maternal health:

- ASC and hospital regulations do not include criminal penalties, civil liability, or fines for non-compliance, and KDHE testified that its current enforcement mechanisms are sufficient.
- These severe penalties do not apply to the provision of care in medical offices where comparable care is provided. See K.S.A. 65-2836; K.S.A. 65-2837 (stating grounds for clinician license revocation).

In sum, all experts—including the State's expert—agree existing abortion care is extremely safe and comparable in terms of safety to gynecological and non-gynecological procedures to which the Challenged Laws have no application. The Providers point out the State identified no health or safety incident in the nearly 10 years since the Challenged Laws were enjoined, let alone any incident that the Challenged Laws would have addressed.

As we held above, the Challenged Laws do not survive strict scrutiny and are unconstitutional because the State failed to meet its evidentiary burden to establish the Challenged Laws, individually or collectively, further its interest in protecting the health and safety of women or in regulating the medical profession as it relates to maternal health. Our holding is supported by uncontroverted evidence in the record that affirmatively contradicts—for many provisions—the State's claim that those provisions further the State's identified compelling interests. Our holding makes it unnecessary to address the State's claim that it narrowly tailored the Challenged Laws to serve compelling state interests.

B. Severability

The district court struck the Challenged Laws in their entirety, finding they imposed a comprehensive and interdependent statutory and regulatory scheme that could not be severed. The State claims the district court erred by ignoring the statute's severability clause and striking down the Challenged Laws in their entirety. The State urges us to reverse the district court's severability decision, sever any unconstitutional provision, and let the rest of the Challenged Laws stand.

The touchstone for severability is legislative intent. "[F]or determining legislative intent, the severability clause 'is an aid merely; not an inexorable command.'" *Gannon v. State*, 304 Kan. 490, 520, 372 P.3d 1181 (2016) (citing *Dorchy v. State of Kansas*, 264 U.S. 286, 290, 44 S. Ct. 323, 68 L. Ed. 686 [1924]). Under our well-established two-part test for severability, the court may sever the unconstitutional provisions from the statute and leave the remainder in force and effect "'[i]f from examination of a statute it can be said that [1] the act would have been passed without the objectionable portion and [2] if the statute would operate effectively to carry out the intention of the legislature with such portion stricken.'" *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1023, 850 P.2d 773 (1993) (quoting *Felten Truck Line, Inc. v. State Board of Tax Appeals*, 183 Kan. 287, 300, 327 P.2d 836 [1958]). In *Thompson*, we also reaffirmed this century-old standard:

"""While it is undoubtedly true that a statute may be constitutional in one part, and unconstitutional in another, yet this rule obtains only where the two parts are separate and independent; and where they are so related that the latter is a condition of, a compensation for, or an inducement to, the former, or where it is obvious that the legislature, having respect to opposing rights and interests, would not have enacted one but for the other, then the unconstitutionality of the latter avoids the entire statute.""" 252 Kan. at 1024 (quoting *In State, ex rel., v. Consumers Warehouse Market*, 185 Kan. 363, 372, 343 P.2d 234 [1959], which in turn quoted *Central Branch Union Pac. R.R. Co. v. Atchison, T. & S.F. R.R. Co.*, 28 Kan. 453, Syl. ¶ 1, 1882 WL 1067 [1882]).

According to the State, the Legislature's stated purpose in enacting the abortion provider facility licensing statutes was to protect maternal health and regulate the medical profession as it relates to maternal

health. In the preceding section, we held the Challenged Laws unconstitutional in their entirety because the State failed to meet its evidentiary burden under strict scrutiny to establish the Challenged Laws, individually or collectively, further its stated interest. Under our severability test, we are now required to ask (1) whether the Legislature would have passed the Challenged Laws without the objectionable portions and (2) whether the Challenged Laws would carry out the intention of the Legislature if the objectionable portions were severed. But these questions become irrelevant when, as here, the entire statutory scheme is objectionable based on a lack of evidence to establish *any* of the Challenged Laws further a compelling state interest.

Yet we found uncontroverted evidence in the record affirmatively contradicting the claim that the Challenged Laws furthered the State's interest for these provisions: K.S.A. 65-4a01(g), K.S.A. 65-4a02(g), K.S.A. 65-4a05(a), K.S.A. 65-4a06(a) and (f), K.S.A. 65-4a07, K.S.A. 65-4a08, K.S.A. 65-4a09, K.S.A. 65-4a10(a)-(c). If we were to use this as a benchmark for identifying the objectionable provisions of the Challenged Laws, we would be left with these provisions for which there was no affirmative evidence in the record contradicting the State's unsubstantiated claim that they further its stated compelling interest:

- K.S.A. 65-4a01 (except for subsection [g], this provision defines words and phrases in the abortion licensing statutes, usually by cross-referencing other statutes);
- K.S.A. 65-4a02 (except for subsection [g], this provision addresses the process for seeking licensure, the associated fees, and the length a license is valid);
- K.S.A. 65-4a03 (this provision addresses the procedure for annual license renewal);
- K.S.A. 65-4a04 (this provision discusses facility naming conventions, how changes in ownership can affect licensure, and what to do when a facility changes ownership);
- K.S.A. 65-4a05(b) (this subsection protects from public disclosure patient identification information received by KDHE through inspections or otherwise);
- K.S.A. 65-4a06(b)-(e) (these subsections grant KDHE the authority to deny, suspend, or revoke a facility's license upon a finding by KDHE that the facility violated the substantive

laws, rules, or regulations relating to the operation or maintenance of a facility);

- K.S.A. 65-4a11 (this provision states that nothing in the abortion licensing statutes should be construed as creating or recognizing a right to abortion); and
- K.S.A. 65-4a12 (this provision is the general severability clause).

Applying our two-step severability test, we would find it improper to sever. When separated out, the contradicted provisions generally appear to be the more substantive provisions of the abortion facility licensing statutory scheme and the uncontradicted provisions appear to be the procedural mechanisms for administering and enforcing the substantive provisions. As for the first step, we doubt the Legislature would have passed a procedural mechanism for administering and enforcing a substantive licensing scheme without any underlying substantive licensing requirements. Doing so would render the procedural mechanisms meaningless, and we presume the Legislature does not intend to enact meaningless legislation. *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014). As for the second step of the test, the procedural mechanisms for administering and enforcing a licensing scheme—without any underlying substantive facility requirements—would not carry out the Legislature's intent to regulate the safety of abortion facilities.

To recap, our two-step severability test is inapplicable when, as here, the entire statutory scheme is objectionable based on a lack of evidence to establish any of the Challenged Laws further a compelling state interest. But having identified the objectionable portions of the Challenged Laws in our analysis, we would find it improper to sever the objectionable portions because the Legislature would not have passed the Challenged Laws without them and, when severed, the remaining provisions would not carry out the Legislature's intent to regulate the safety of abortion facilities.

Having determined the abortion facility licensing statutory scheme is unconstitutional as a whole, the corresponding regulations are necessarily null and void because the KDHE has no power to implement regulations in the absence of an enabling statute.

C. Equal protection

As its final argument, the State claims the district court erred in granting summary judgment to the Providers based on its finding that the Challenged Laws violate the equal protection provisions of the Kansas Constitution. But we need not address the State's challenge to the district court's alternative equal protection ruling because we affirm the district court's summary judgment decision on grounds that the State has failed to meet its evidentiary burden to establish the Challenged Laws further its stated compelling interests.

CONCLUSION

- The Providers met their burden to show the Challenged Laws infringe on the right to an abortion recognized in *Hodes I*, 309 Kan. 610.
- We assume without deciding that protection of maternal health and regulation of the medical profession as it relates to maternal health may be compelling state interests.
- We find the State failed to meet its evidentiary burden to show the Challenged Laws further its interests in protection of maternal health and regulation of the medical profession as it relates to maternal health.
- We find it improper to sever the unconstitutional substantive licensure requirements from the statute.
- We decline to address the equal protection issues.
- We affirm the district court's decision to grant summary judgment to the Providers.

Affirmed.

WALL, J., not participating.

* * *

ROSEN, J., concurring: Justice Wilson suggests in her concurrence that our decision "may be retreating" or "changing" the holding in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, Syl. ¶ 15, 440 P.3d 461 (2019) (*Hodes I*), holding that personal autonomy is "fundamental," and that we do so in an attempt to sneakily change the law and avoid the dissent's predictions. *Stanek*, 318 Kan. at 1049. It does not. In the majority opinion, we explain that, in *Hodes I*, the court "equated its holding that personal autonomy is a natural inalienable right to one

that personal autonomy is a fundamental right." 318 Kan. at 1007. We reiterate "the right to abortion is subject to strict scrutiny because it is an exercise of the inalienable natural right of personal autonomy protected by section 1 of the Kansas Constitution Bill of Rights, which is a fundamental right." 318 Kan. at 1008. Thus, we do not "change" the holding that personal autonomy is a fundamental right subject to strict scrutiny. Whether one describes a right as a natural one protected by section 1 or a fundamental one protected by section 1, the right receives rigorous protection under our Bill of Rights. No matter the label we give it, infringements of that right are subject to strict scrutiny.

I trust lower courts and their ability to follow the analytical path we laid out in *Hodes I* to decide whether a right falls within section 1's protective sphere. As we discuss in the majority opinion, if a litigant argues that the state has infringed the right to personal autonomy, a court will identify the interest at stake, analyze whether, like abortion, that interest has profound and unique attributes that bring it within section 1's meaning of personal autonomy. 318 Kan. at 1006. If it does, infringements upon that right are subject to strict scrutiny. Lower courts have been analyzing and applying the decisions from this court and others for over a century. I have full confidence in their ability to continue.

* * *

BILES, J., concurring: I concur in the majority's analysis and result without any reservation. I write separately only to discuss something not addressed by the majority decision—the dissent's misappropriation of my earlier concurrence in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 682-706, 440 P.3d 461 (2019) (*Hodes I*). The dissent's offending paragraph from my perspective states:

"The majority finds these regulations infringe upon the right to an abortion. In the language of our decision in *Hodes I*, the government has encroached upon the 'natural right of personal autonomy' protected by section 1, which 'is fundamental and thus requires applying strict scrutiny.' *Hodes I*, 309 Kan. 610, Syl. ¶ 15. Specifically, the majority notes that 'once a plaintiff proves an actual infringement—regardless of degree and even if the infringement is slight—the government's action is presumed unconstitutional and the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law

to serve it.' *Stanek*, 318 Kan. at 1009. A legal standard one member of the majority recently firmly rebuffed. See *Hodes I*, 309 Kan. at 688, 692-93 (Biles, J., concurring) (arguing that the *Hodes I* majority 'simply toss[ed] around strict scrutiny nomenclature . . . and then hop[ed] for the best' and concluding that the majority's 'strict scrutiny jurisprudence will also have potentially unsettling ripple effects in other areas of Kansas law' because the standard is so 'vulnerable' to judges' 'subjective[]' opinions)." *Stanek*, 318 Kan. at 1056.

Even a cursory review of my *Hodes I* concurrence cannot reasonably lead to the dissent's characterization, arrived at by assembling fragments of what I wrote in a 24-page concurrence. *Hodes I*, 309 Kan. at 682-706. But let's set aside comparisons to Mary Shelley's classic novel and get to the point. The central theme to my *Hodes I* concurrence jumps out in its opening paragraph—something I would think is hard to miss:

"I concur in the result. I do so because the majority decision provides little guidance for applying strict scrutiny—very rarely used in Kansas—as a meaningful constitutional measure for this legislation. And what guidance it does provide confuses rather than clarifies. For all practical purposes, the majority leaves the trial court to fend for itself. In my view, an issue as troubling as this one requires us to be more instructive. Toward that end, I suggest what our state test should look like using an evidence-based analytical model taken from *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016)." 309 Kan. at 682-83.

My thesis was—and still is—that the *Hodes I* majority at that point in the litigation did not sufficiently guide the district court on remand in how to apply its strict scrutiny standard. So I advocated for an evidence-based analysis to cut through the State's rhetoric that cloaks its stunning lack of proof for an issue of such consequence. And, of course, the *Stanek* and *Hodes II* majorities today use that evidence-based approach to conclusively show the legislation at issue has no credible medical or evidentiary basis. *Stanek*, 318 Kan. at 1020 ("[T]here simply is no evidence in the record from which to conclude the Challenged Laws provide any necessary benefit to the health and safety of women seeking abortions in Kansas."); *Hodes II*, 318 Kan. at 966-67. In that same vein, my *Hodes I* concurrence explained:

"Pregnant women, like the rest of us, have protected liberty interests fully rooted in our Kansas Constitution. No one can reasonably deny that. Yet the record so far indisputably shows S.B. 95 does more than significantly constrain a woman's access to abortion. It is a governmental edict denying pregnant women

the safest and most routine medical procedure available for its purpose in the second trimester—a procedure elected by approximately 600 women in Kansas annually. And the justification for this prohibition is that the government professes to prefer less routine, more physically invasive medical options without offering actual evidence at the temporary injunction hearing to support this preference. Those who think there is no role for our state Constitution when government flexes this kind of muscle should be very afraid about what comes next." *Hodes I*, 309 Kan. at 685-86.

Taking the dissent's snippets from my concurrence (underlined below in the quotations) in order, the first discusses "tossing around" strict scrutiny nomenclature and hoping "for the best." My *Hodes I* concurrence says:

"The *Hellerstedt* model I suggest effectively secures the constitutional protections considered today in a manner commensurate with what is at stake. And for me, the articulation that follows is necessary because it avoids simply tossing around strict scrutiny nomenclature like 'compelling state interest' or 'narrowly tailored to further that compelling state interest' without giving those concepts contextual substance and then hoping for the best. 309 Kan. at 614, 663, 678, 680-82 (majority). Litigation such as this is factually intensive and often medically based so an abstract, textbook approach is counterproductive. This is where the majority decision leaves the district court in a lurch." (Emphasis added.) *Hodes I*, 309 Kan. at 688.

In context, this simply reiterates my central thesis that embraces an evidence-based model early in the litigation to show the district court how to correctly apply the facts to the law on remand.

Next, the dissent picks up this phrase about "unsettling ripple effects," from the following paragraph:

"Pre-Casey federal strict scrutiny jurisprudence will also have potentially unsettling ripple effects in other areas of Kansas law touching on abortion access. See, e.g., K.S.A. 65-6709 (requiring informed consent). Compare *Casey*, 505 U.S. at 882 (plurality opinion) (holding informed consent provisions requiring 'truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus' did not impose undue burden), with *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 764, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (holding informed consent provisions were facially unconstitutional for requiring patient to be informed of '"detrimental physical and psychological effects"' and '"particular medical risks"' of abortion, because it tended to 'increase the patient's anxiety, and intrude upon the physician's . . . professional judgment'). The majority signals this consequence when citing to McDonald, *A Hellerstedt Tale: There and Back Again*?, 85 U. Cin. L. Rev. 979, 1005-06 (2018), regarding scrutiny of governmental persuasion regulations. 309 Kan. at 669-70. I simply do not

understand why the majority would stop short in explaining what its ruling today means." (Emphasis added.) *Hodes I*, 309 Kan. at 692.

As readily seen, the point is that the *Hodes I* majority had not yet developed how federal strict scrutiny jurisprudence might affect a right arising solely under the Kansas Constitution, which was something it should have done sooner rather than later.

Finally, we have this passage making the same point, from which the dissent extracts "vulnerable" and "subjective":

"But if the majority is really open to such claims being considered 'compelling' state interests, I fail to see how this remains a 'strict scrutiny' standard and not equally as vulnerable to 'leaving judges to subjectively gauge' what is a state interest as the majority complains now occurs with federal undue burden under *Casey*. 309 Kan. at 666. The majority decision is fraught with these mixed signals, which the trial court will need to decode before it can proceed." (Emphases added.) *Hodes I*, 309 Kan. at 693.

Despite the dissent's suggested aspersions, and its attempt to enlist my help in that effort, I concur fully in the majority's evidence-based analysis and result in both this appeal and *Hodes II*. My bottom line in these cases is the same as it always has been:

"[W]e must apply what 'liberty' and 'inalienable natural rights' mean in the real world today for a pregnant woman. In doing so, that necessarily demonstrates meaningful limitations on the government's ability to elbow its way into the decisions she must make concerning her pregnancy." *Hodes I*, 309 Kan. at 706.

* * *

WILSON, J., concurring: Today the majority concludes many regulations on abortion providers impermissibly burden the natural and fundamental right to determine whether to continue a pregnancy. To reach this conclusion, the majority identifies the nature of this right, and then finds the regulations fail under a strict scrutiny analysis. I concur with the majority's conclusion. I write separately to explain how I reached this outcome and to express concerns about the majority's reasoning.

In *Hodes & Nauser, MDs v. Schmidt,* 309 Kan. 610, 440 P.3d 461 (2019) (*Hodes I*), which is affirmed today in *Hodes & Nauser, MDs v. Kobach*, 318 Kan. 940, 950, 551 P.3d 37 (2024), we held section 1 of the Kansas Constitution Bill of Rights is a judicially enforceable provision that recognizes rights broader than the

rights guaranteed by the 14th Amendment to the United States Constitution. Section 1 provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." The text of this provision acknowledges *natural* rights, which are conceptually distinct from *fundamental* rights.

Natural rights are inherent and pre-political rights possessed by each person. See Black's Law Dictionary 1583 (11th ed. 2019) ("A right that is conceived as part of natural law and that is therefore thought to exist independently of rights created by government or society, such as the right to life, liberty, and property."). According to natural rights theorists, "rights and laws derive from the nature of the universe and exist independently of our knowledge of them. We discover what these rights are through correct reasoning." Wilkins*, Should Public Education Be a Federal Fundamental Right?* 2005 B.Y.U. Educ. & L.J. 261, 263 (2005). Natural rights protect "an ability to act in a particular area." Wilkins, 2005 B.Y.U. Educ. & L.J. at 264; Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 Const. Comment. 93, 108 (1995) ("The concept of natural rights . . . asks . . . what moral 'space' or 'jurisdiction' each person requires in order to pursue the good life in society with others.").

Natural rights are often distinguished from positive rights, which are rights that come from government. Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution,* 15 Tex. L. Rev. Online 115, 123 (2019) ("Founding-era Americans identified other fundamental rights beyond retained natural rights, as Campbell explains, namely positive rights that derived not from the state of nature but political society itself."); Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 908 (1993) ("By definition, therefore, natural rights did not conventionally include acquired rights—rights existing only under civil government."). Examples of positive rights include due process, habeas corpus, the right to a jury trial, and the right to vote. Campbell, *Republicanism and Natural Rights at the Founding,* 32 Const. Comment. 85, 92, 99 (2017); Croy & Lemke, *An*

Unnatural Reading: The Revisionist History of Abortion in Hodes v. Schmidt, 32 U. Fla. J.L. & Pub. Pol'y 71, 72 (2021).

John Locke, an Enlightenment theorist referenced heavily in *Hodes I*, "believed that all men, in a state of nature, possessed certain inherent natural rights and retained those rights when they contracted to be governed." Parker, *The Pledge Protection Act and the Conflicting Fundamental Rights Limitation on the Article III Power to Control the Supreme Court's Appellate Jurisdiction*, 54 Loy. L. Rev. 467, 474 (2008); see also Campbell, *Republicanism and Natural Rights at the Founding,* 32 Const. Comment. at 87-90 (outlining the relationship between natural rights and social contract theory).

The creation of Kansas was such a contract to be governed and required the people to cede *some* natural rights to the government to maintain an orderly, collectively beneficial society. See *Wright v. Noell*, 16 Kan. 601, 603, 1876 WL 1081 (1876) ("By the constitution the people have granted certain powers, and to that extent have restricted and limited their own action."); Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1317-18 (2015) ("Mason endorsed the Lockean ideal that all men retain some of their natural rights after subscribing to the social compact, in contrast to the idea put forth by Thomas Hobbes and Jean-Jacques Rousseau that men surrender all their natural rights to the sovereign in exchange for security and public order."); Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429, 451 (2004) ("At the time of the Founding, almost no one claimed or believed that one surrenders all one's natural rights up to government, but only those that were necessary. One cannot infer, then, from the fact that some natural rights were surrendered up, that other rights still retained by the people can be denied or disparaged with impunity."); Mancil, *Reviving Elusive Rights: State Constitutional Unenumerated Rights Clauses as Bounded Guarantors of Fundamental Liberties*, 19 Geo. J.L. Pub. Pol'y 281, 296 (2021) ("Lockean philosophy, which dominated colonial political thinking, inspired the construction of a constitution based on separation of powers and

the reservation to the people all rights the sovereign did not explicitly assume.").

But even so, section 1's language is clear the people retain other, non-ceded natural rights. And because section 1's "among which" language clarifies that the provision recognizes natural rights *beyond* life, liberty, and the pursuit of happiness, in *Hodes I* we faced the task of identifying an unenumerated natural right.

To interpret our Constitution, we first look to the constitutional text, and "[w]hen the words themselves do not make the drafters' intent clear, [we] look to the historical record, remembering "'the polestar . . . is the *intention* of the *makers* and *adopters*.'" *Hodes I,* 309 Kan. at 623 (quoting *Hunt v. Eddy*, 150 Kan. 1, 5, 90 P.2d 747 [1939]). Applying this test, we considered the debates and conversations that occurred at the Wyandotte Convention—the gathering that led to the creation of the Kansas Constitution, which was later ratified by voters in October 1859. *Hodes I,* 309 Kan. at 625, 627-28. Research revealed that section 1's language came from the Declaration of Independence. Thomas Jefferson, the author of the Declaration, based the language on the Virginia Declaration of Rights of 1776, which was written by James Madison. 309 Kan. at 639. Both Madison and Jefferson were familiar with the intellectual landscape of the time, including the writings of William Blackstone, Sir Edward Coke, and John Locke. These legal and philosophical thinkers were considered, as well as cases from our court and others, to determine the meaning of section 1. 309 Kan. at 639-44.

The *Hodes I* majority first concluded section 1 guarantees a natural right to personal autonomy, and explained "[f]ew decisions impact our lives more than those about issues that affect one's physical health, family formation, and family life." *Hodes I*, 309 Kan. at 645. Section 1 guarantees that both men and women have these rights, and therefore "[d]enying a pregnant woman the ability to determine whether to continue a pregnancy would severely limit her right of personal autonomy." 309 Kan. at 646. The court rejected the argument that early Kansas laws criminalizing abortion undermined this conclusion. 309 Kan. at 650-60.

In summary:

"[Numerous] factors lead us to conclude that section 1's declaration of natural rights, which specifically includes the rights to liberty and the pursuit of happiness, protects the core 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 Kansans

to make their own decisions regarding their bodies, their health, their family formation, and their family life. Pregnant women, like men, possess these rights." *Hodes I*, 309 Kan. at 660.

Next, the majority considered how to evaluate an infringement of this right, and explained the natural right to personal autonomy was *fundamental.* See *Hodes I*, 309 Kan. at 661-71. Though natural rights and fundamental rights share a family resemblance, contemporary United States Supreme Court precedent disentangles these concepts. Cf. Parker, *The Pledge Protection Act and the Conflicting Fundamental Rights Limitation on the Article III Power to Control the Supreme Court's Appellate Jurisdiction*, 54 Loy. L. Rev. 467, 474 ("This contemporary understanding of fundamental rights stems from the concept of natural rights, which guided the formation of the federal republic."); Broyles, *Doubting Thomas: Justice Clarence Thomas's Effort to Resurrect the Privileges or Immunities Clause*, 46 Ind. L. Rev. 341, 359 (2013) ("The deep misgivings concerning natural rights has led to a Supreme Court that, for decades, has ignored or denied the relevance of natural rights as a legitimate source for understanding fundamental rights.")

In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 237, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022), the Court explained that an unenumerated right in the United States Constitution is fundamental if it is "'deeply rooted in [our] history and tradition'" and "it is essential to our Nation's 'scheme of ordered liberty.'" To make this determination, the Court conducts "a careful analysis of the history of the right at issue." 597 U.S. at 238. If a right is fundamental, then government infringement on that right must pass strict scrutiny analysis, where the government prevails if it "can show '"a subordinating interest which is compelling"' and that the infringement . . . is 'narrowly tailored to serve' that interest." *State v. Ryce*, 303 Kan. 899, 957, 368 P.3d 342 (2016) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438-39, 83 S. Ct. 328, 9 L. Ed. 2d 405 [1963]). See Wilkins, 2005 B.Y.U. Educ. & L.J. at 265 ("The reason we care whether a right, natural or positive in nature, is also a 'fundamental' right is because a 'fundamental' right is afforded great Constitutional protection under the Fourteenth Amendment Due Process and Equal Protection Clauses.").

Though in *Hodes I* we were not interpreting the United States Constitution and were not bound by Court precedent when considering the parameters of section 1, the majority concluded strict scrutiny was the appropriate test to evaluate government infringement on the right to personal autonomy, which includes the right to decide whether to continue a pregnancy. *Hodes I,* 309 Kan. at 662-71; see also Levy, *Constitutional Rights in Kansas after* Hodes & Nauser, 68 U. Kan. L. Rev. 743, 762-63 (2020) (outlining the various reasons we found strict scrutiny appropriate).

I explain these details to illustrate the complexity of the issues here, underlying today's decision about abortion regulations in Kansas. The majority's template for *how* to evaluate the regulations is rooted in the various holdings of *Hodes I. Hodes & Nauser, MDs v. Stanek*, 318 Kan. 995, 1006, 551 P.3d 62 (2024) ("Today . . . we reaffirmed the strict scrutiny constitutional framework used in *Hodes I* set forth above. Thus, we apply it here to determine the constitutionality of the Challenged Laws."). Accordingly, my first consideration here must be whether the *Hodes I* majority was correct.

Based on my review, I agree that section 1 of the Kansas Constitution Bill of Rights is a judicially enforceable provision from which rights emanate that are broader than the rights contained within the 14th Amendment to the United States Constitution. But still, unlike the majority, I confront three more questions pertinent to the specific issue before us of whether the Challenged Laws are unconstitutional: (1) whether the text of section 1 recognizes a *natural right* to personal autonomy; (2) if so, whether that natural right includes the right to decide whether to continue a pregnancy; and (3) if so, whether *either* of those rights is also *fundamental* and therefore strict scrutiny analysis must be applied to any government action burdening the right.

In my view, the answers to these questions are far from clear. See Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 907 (1993) ("Natural rights and natural law are ideas that frequently seem to have something in common with the elusive shapes of a Rorschach test. They are suggestive of well-defined, recognizable images, yet they are so indeterminate that they permit us to see in them what we are inclined to

see."). Particularly compelling are two lines of criticism directed at the holdings of the *Hodes I* majority.

First, early territorial and state law criminalized abortion. See *Hodes & Nauser, MDs v. Schmidt,* 52 Kan. App. 2d 274, 340, 368 P.3d 667 (2016) (Malone, C.J., dissenting), *aff'd* 309 Kan. 610 (2019). As noted above, our standard of review requires us to ascertain the intent of the framers when evaluating our constitutional text. I find it likely these laws would have informed the Wyandotte delegates' views on the rights contained in section 1. I question whether the methodology of moving beyond the intent of the delegates to legal and philosophical texts appropriately applied our governing standard. See Levy, *Constitutional Rights in Kansas After* Hodes & Nauser, 68 U. Kan. L. Rev. 743, 774 ("In light of the court's analysis, the recognition of such rights would not depend on the specific understanding of the framers and ratifiers of the Kansas Constitution, but rather upon a broader analysis of the philosophical, historical, and jurisprudential foundations of the right."). And I am skeptical the delegates had Locke, Blackstone, and Coke in mind as they debated the language of the provision that ultimately became section 1. *Hodes I*, 309 Kan. at 628. More likely, their understanding of natural rights was shaped by the legal and social landscape of Kansas at the time. As such, when considering the framer's *intent*, I am not certain the *Hodes I* majority accurately divined the scope of section 1.

Second, even assuming the *Hodes I* majority used the proper methodology, commentators have suggested the majority's reading of these authors was incomplete and erroneous. There is evidence the authors the majority relied on viewed abortion as wrong, which undermines the majority's conclusion that the right to decide whether to continue a pregnancy is included within the natural and fundamental right to personal autonomy. Croy & Lemke, *An Unnatural Reading: The Revisionist History of Abortion in* Hodes v. Schmidt, 32 U. Fla. J.L. & Pub. Pol'y at 82-91 (arguing the *Hodes I* majority erroneously concluded Locke, Coke, and Blackstone supported its understanding that the natural right to bodily autonomy included the right to have an abortion, and also arguing the *Hodes I* majority omitted other key sources).

Having weighed these concerns against the reasoning of the *Hodes I* majority, it is likely I would have dissented in *Hodes I*. But I do not address these questions as a matter of first impression. I confront these issues with *Hodes I* already decided. Consequently, the related doctrines of stare decisis and law-of-the-case must be weighed as part of my analysis here. Those doctrines ultimately govern my decision.

"The doctrine of stare decisis provides that 'points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised.'" *State v. Clark*, 313 Kan. 556, 565, 486 P.3d 591 (2021). The doctrine "'ensures stability and continuity—demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law.'" *State v. Sherman*, 305 Kan. 88, 108, 378 P.3d 1060 (2016) (quoting *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 [2004]). Though not a "'rigid inevitability,'" stare decisis is a "'prudent governor on the pace of legal change.'" *State v. Davidson*, 314 Kan. 88, 93, 495 P.3d 9 (2021) (quoting *State v. Jordan*, 303 Kan. 1017, 1021, 370 P.3d 417 [2016]). We are compelled to follow precedent unless we are """clearly convinced [that the rule] was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."'" *Davidson*, 314 Kan. at 93 (quoting *Sherman*, 305 Kan. at 108).

Under the law-of-the-case doctrine, "'once issues are decided by the court, those issues should not be relitigated or reconsidered unless they are clearly erroneous or unless some manifest injustice has been imposed.'" *State v. Collier*, 263 Kan. 629, 633, 952 P.2d 1326 (1998) (quoting *Renfro v. City of Emporia, Kan.*, 732 F. Supp. 1116, 1117 [D. Kan. 1990], *aff'd* 948 F.2d 1529 [1991]). Like stare decisis, the law-of-the-case doctrine supports stability by emphasizing finality and preventing infinite relitigation. *Collier*, 263 Kan. at 631.

Regardless of whether I would have joined the majority when *Hodes I* was first decided, I cannot say I am clearly convinced the decision was entirely wrong, or that the core holdings of *Hodes I*

are no longer sound because of changing conditions and more good than harm will come by overruling our section 1 jurisprudence. In fact, I believe the opposite to be true.

Aside from interpreting the law, a judge's primary obligation is to protect the rule of law. One aspect of this is maintaining the stability and predictability of our legal system. Kansans deserve to know that laws, both those that touch the intimate aspects of our lives and those that do not, will not simply be cast aside when new personalities join this court. To do so would undermine the public's confidence in this court, and reasonably lead to the conclusion that the appointment of court members is simply an exercise of political gamesmanship. This court must be understood "as an institution, rather than a collection of individuals," and this understanding informs my decision to recognize the core holdings of *Hodes I* as binding on my decision today. See *State v. Davidson*, 314 Kan. 88, 95, 495 P.3d 9 (2021) (Standridge, J., concurring) ("[A] change in the membership of this court cannot, in and of itself, justify a departure from the basic principle of stare decisis."); see also *Cromwell v Simons,* 280 F. 663, 674, *cert. denied* 258 U.S. 630 (2d Cir. 1922) (observing that a personnel change on the court, "although it changed the minority view of the former hearing into the majority view at this hearing, does not in itself warrant the court in disregarding 'the law of the case' as it was determined by the court when the case was here before").

But that's not all. Another equally important consideration in why stare decisis and the law-of-the case compel my conclusion is that Kansans, through their elected officials and in person, have *acted* in response to *Hodes I.* Perhaps most notably, Kansans spoke on the topic in August 2022, when nearly 60 percent of Kansas voters rejected the "Value Them Both" constitutional amendment. This vote did not dispute the majority's position in *Hodes I* and can be interpreted to approve it. And we have explained "[t]he doctrine of stare decisis is particularly compelling in cases where . . . the legislature is free to alter a statute in response to court precedent with which it disagrees but declines to do so." *State v. Quested*, 302 Kan. 262, 278, 352 P.3d 553 (2015). Similar logic applies profoundly to a rejected constitutional amendment.

Consider everything that has happened, relating directly to the background and consequence of *Hodes I*. These occurrences demonstrate the design and strength of our structure of government, with three equal and independent branches—legislative, executive, and judicial—each having checks and balances against the power of the others to ensure that no branch will ever have total control over the laws in our country and our state. A bill limiting a particular abortion procedure was passed (legislative branch). The bill was not vetoed (executive branch). The bill became law. A lawsuit was filed by persons affected by the law, asking the judicial branch to declare the law unconstitutional and therefore void. The law was interpreted to impede a natural and fundamental right (judicial branch). That interpretation of the law was challenged by a constitutional amendment proposal passed by a two-thirds majority of the Legislature. That proposed amendment to our state Constitution was taken directly to the only entity having the power to override all three branches—the people themselves—to determine whether the people's Constitution, as interpreted, should be changed. The people spoke with their votes. Since the proposed amendment failed, our state Constitution was not changed; the judicial interpretations of the "old" Constitution remained valid. Though some were grievously disappointed, the *process* envisioned by Jefferson, Madison, and the rest of our founders *worked.* The results were accepted by the people, and Kansas showed the world how things are done in a successful democracy.

To entirely upturn our section 1 jurisprudence in this context would be unacceptably disruptive and signal that the stability of our legal system is ultimately based on the whims of individual members of this court. To me, these considerations are more significant than my personal view on the accuracy of *Hodes I.* The issues are too complex for me to suggest in good faith that the decision was *clearly* erroneous. And the risk of tarnishing the legitimacy of this court, as well as my concerns about undermining the stability of our legal system, lead me to believe that voting against the constitutional framework applied today would do more harm than good. Accordingly, I conclude I am bound by *Hodes I* and that today's majority reached the correct result.

However, I pause to explain that, based on the majority opinion in this case and *Hodes II*, I am not sure that *all* of *Hodes I* remains good law. As such, I believe it is necessary to clarify the *Hodes I* core holdings I am compelled to follow.

As described above, *Hodes I* concluded personal autonomy was a natural *and* fundamental right. And since the right to continue a pregnancy was included in personal autonomy, that right was also natural *and* fundamental. Today's *Hodes II* majority, which is comprised of the same four justices as *Stanek*'s majority, reiterates: "We stand by our conclusion that section 1 of the Kansas Constitution Bill of Rights protects a fundamental right to personal autonomy, which includes a pregnant person's right to terminate a pregnancy. The State must show any infringement of that right withstands strict scrutiny." *Hodes II*, 318 Kan. at 950.

In both *Hodes II* and *Stanek*, the majorities do not disturb the *Hodes I* core holdings that (1) personal autonomy is a natural right; (2) the right to decide whether to continue a pregnancy is included in the natural right of personal autonomy; and (3) the natural right to determine whether to continue a pregnancy is fundamental. *Hodes II*, 318 Kan. at 950; *Stanek*, 318 Kan. at 1000, 1005.

But today's majority in *Stanek* may be retreating from the holding that personal autonomy is fundamental. See *Hodes I*, 309 Kan. 610, Syl. ¶ 15 ("The natural right of personal autonomy is fundamental and thus requires applying strict scrutiny."). Several examples illustrate this point, some of which omit this holding and others that may describe it differently. First, syllabus paragraph four provides:

> "Section 1 of the Kansas Constitution Bill of Rights protects an inalienable natural right of personal autonomy, which includes the right to abortion. The unique and profound attributes of the decision to have an abortion are integral to a woman's inalienable natural right of personal autonomy under section 1; thus, laws that infringe on the right to abortion are subject to strict scrutiny." *Stanek*, 318 Kan. 995, Syl. ¶ 4.

The majority reiterates this point in the opinion's body:

> "In 2019, this court decided *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019) (*Hodes I*). There, we held section 1 of the Kansas Constitution Bill of Rights protects an inalienable natural right to personal autonomy, which includes the right to abortion. 309 Kan. at 614. And we held laws that infringe on the right to abortion are subject to strict scrutiny." *Stanek*, 318 Kan. at 1000.

But later in this opinion, the majority says something else. It describes the relationship between personal autonomy as a *natural right* and personal autonomy as a *fundamental right* in three ways. First, the majority notes the *Hodes I* "court equated its holding that personal autonomy is a natural inalienable right to one that personal autonomy is a fundamental right." *Stanek*, 318 Kan. at 1007. Second, in a parenthetical, the majority cites *Hodes I* and explains the majority "call[ed]" personal autonomy fundamental. *Stanek*, 318 Kan. at 1007. Third, the majority describes the *Hodes I* court as "dictat[ing] that the right to abortion is subject to strict scrutiny because it is an exercise of the inalienable natural right of personal autonomy protected by section 1 of the Kansas Constitution Bill of Rights, which is a fundamental right." *Stanek*, 318 Kan. at 1008. These statements may serve to subtly recast the holdings in *Hodes I* and *Hodes II* into a more palatable form—a form unburdened by the consequences today outlined in Justice Stegall's perceptive and powerful dissent.

I can only imagine the confusion that will occur amongst lower courts and practitioners attempting to square today's two opinions. I share this confusion and believe it is possible that, following the publication of these opinions, the *Hodes I* holding that personal autonomy is a fundamental right has been changed. *Stanek*, 318 Kan. at 1069-73 (Stegall, J., dissenting). Minimally, the precedential value of this holding is attenuated, and I am not certain when or how it binds me or any lower court.

But if this court is going to change a holding of the case that announced the constitutional framework of section 1 of the Kansas Constitution Bill of Rights, then the court should explicitly say so. There is nothing wrong with circumscribing the limits of a previous opinion. But there is something wrong with doing so through a "sleight of judicial hand." *Stanek*, 318 Kan. at 1064 (Stegall, J., dissenting). In effect, Kansans now have two opinions, released on the same day, and joined by the same majority, which may interpret their rights differently. That's a problem.

In his concurrence, Justice Rosen's criticism of my concerns only deepens my concerns. He now provides *another*, slightly different, way of identifying a section 1 fundamental right, as if the "label" as natural or fundamental doesn't matter, and even seems to speak for a majority whose justices do not join in his conclusory

declarations on their behalf. He then cavalierly says he trusts the lower courts to follow the path in *Hodes I*, despite its subtle difference from the analytical paths set forth in *Hodes II and Stanek*. I trust they will try.

Not only that, but the majority and Justice Rosen rely on the newly announced "profound and unique attributes" test to limit the scope of the natural right of personal autonomy. *Stanek*, 318 Kan. at 1006; 318 Kan. at 1035 (Rosen, J., concurring). Again, this appears to be an attempt to sidestep the consequences of Justice Stegall's dissent. Justice Stegall is likely correct that this court's pronouncement in *Hodes I* and *Hodes II* that personal autonomy is a fundamental right will lead to increased litigation to determine this right's parameters. Other commentators have made similar points. Croy & Lemke, *An Unnatural Reading: The Revisionist History of Abortion in* Hodes v. Schmidt, 32 U. Fla. J.L. & Pub. Pol'y at 80 (arguing *Hodes I* "contain[s] no limiting principle"); Levy, *Constitutional Rights in Kansas after* Hodes & Nauser, 68 U. Kan. L. Rev. at 775-76 ("Using a broader conceptual approach to natural rights under section 1, the Kansas courts might be more inclined to treat the right to die as within the scope of personal autonomy and the right to make decisions concerning one's physical health.").

If today's majority is not changing the holding that personal autonomy is fundamental, then another way to avoid far-reaching consequences is to limit how the court defines the natural right to personal autonomy, and thereby clarify the type of personal autonomy that falls under section 1's protective umbrella. By announcing this new test, which in my view has no support in the text of *Hodes I*, the majority seeks to rein in the opinion's scope, narrow the natural right to personal autonomy, and hopefully alleviate Justice Stegall's concern about the "target-rich environment" where any government burden on a right that sounds in personal autonomy would be subject to strict scrutiny. *Stanek*, 318 Kan. at 1064 (Stegall, J., dissenting).

I take no position on the wisdom or accuracy of this new test because this extrapolation into the identity of the fundamental right at issue is unnecessary for today's holding. But I pause to briefly note that the "profound and unique attributes" test will

likely provide little guidance to district courts when Kansans ask them to determine whether an asserted right falls under the natural right of personal autonomy, and thus requires the application of strict scrutiny. A district court will be forced to rely on analogical reasoning that compares the only right at issue in this case—the right to decide whether to continue a pregnancy—to some asserted right in the future. In the past we have criticized district courts for implementing their own factor tests. See *Rivera v. Schwab*, 315 Kan. 877, 907, 512 P.3d 168 (2022) (criticizing the district court for "crafting its own set of 'five non-exclusive factors'" that were "unmoored from precedent"). I fear this new test, without further articulation, requires district courts to do just that.

The majorities in *Hodes I, Hodes II*, and *Stanek* seem to each identify the single right at issue a little differently. And all the confusion created by this imprecision is unnecessary to resolve the issues before us today. Our job is to identify as clearly as possible the nature of the asserted right and the test to be applied. That's what the court did in *Hodes I* and the right asserted here is the same.

Though I am troubled by these developments in our section 1 jurisprudence, I do not depart from the majority's judgment. First, the doctrines of stare decisis and law-of-the-case compel me to apply the constitutional framework for section 1 natural rights claims set forth in *Hodes I*. This framework requires Kansas courts to consider (1) whether the right asserted is a natural right in section 1; and (2) which test should apply to government burdens on the asserted right.

Second, these doctrines require the application of this framework to the specific right in question today: the right to determine whether to continue a pregnancy. *Hodes II* and *Stanek* do not disturb the *Hodes I* core holdings that personal autonomy is a natural right under section 1, and that the right to decide whether to continue a pregnancy is *included* in the natural right to personal autonomy. Further, today's opinions reaffirm that the right to decide whether to continue a pregnancy is also fundamental.

Based on these holdings, I agree with the majority's conclusion because the relevant constitutional framework and applica-

tion of the narrow right asserted *here* to that constitutional framework have already been decided. So, like today's majority, I must apply strict scrutiny to the governmental regulations that are challenged.

I take no issue with the majority's strict scrutiny analysis, which is clarified and improved here with a better test than the one set forth in *Hodes I*, to ascertain whether any infringement on an identified fundamental right at issue passes strict scrutiny muster. This tightened test addresses the concerns in Justice Biles' concurrence in *Hodes I* and will certainly assist trial courts when making necessary findings of fact and conclusions of law. *Stanek*, 318 Kan. at 1036 (Biles, J., concurring).

In the end, though I probably would not have voted with the *Hodes I* majority in the first instance, and though I am concerned about how today's opinions potentially rework portions of *Hodes I*, I am duty bound to follow the clear and essential path illuminated by our precedent. This is necessary to protect the stability, predictability, and trust in our legal system. My decision to do so is further buttressed by the people's vote on this very matter, which can be interpreted as a repudiation of legislative attempts to eliminate the core holdings of *Hodes I*—holdings which survive today's confusing and troubling revisions.

I concur in the judgment of the majority.

* * *

STEGALL, J., dissenting: The saga of this court's section 1 jurisprudence has now taken its bizarre—but predicted—turn. Recall I wrote at the conclusion of my lengthy dissent in *Hodes I* that a legal regime of unrestricted access to abortion is now "the judicially preferred policy tail wagging the structure of government dog" and, as such, every rule and even judicial coherence and consistency will "give way, at every turn, to the favored policy." *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 778, 440 P.3d 461 (2019) (*Hodes I*) (Stegall, J., dissenting). Should proof of this claim be required, one need look no further than the pudding of today's decision. Now, even the holding of *Hodes I* has fallen victim to the machinations of a court dead-set on arbitrary policy-making designed to enshrine *only* court-preferred rights in section

1's guarantees. The betrayal of this court's promise of neutral, uniform, and rational constitutional adjudication is as far-reaching as it is audacious—and its damaging impact on this institution's legitimacy will be felt for years to come.

I recognize the gravity of this language, and the besetting temptation to exaggerate the rhetoric of disagreement. Avoiding that temptation requires disciplining oneself to a process of rigorous, precise, and compelling argument—all the more so when disagreements are sharp. That is what this dissent will now provide. The story is a complex one, requiring a step-by-step accounting of (1) how we got here; (2) the regulatory impact of today's holding; (3) what this court actually held in *Hodes I*; (4) how today's decision breaks faith with the promise of *Hodes I*; and (5) what is left in the aftermath. In the end, the conclusion no judge wants to reach is unavoidable—we are not, here, functioning as a court and we are not writing constitutional law.

How We Got Here—Regulating Abortion Like All Other Medical Procedures

This case was effectively decided five years ago when we found a fundamental right to personal autonomy in section 1 of the Kansas Constitution Bill of Rights. See *Hodes I*, 309 Kan. 610, Syl. ¶ 15. In the meantime, a great deal of political ink has been spilled pretending otherwise. Consider the successful 2022 campaign against the "Value Them Both" constitutional amendment intended to overturn *Hodes I*. The *Hodes II* majority and Justice Wilson's concurring opinion here even cite the margin of victory to buttress their conclusions. *Hodes & Nauser, MDs v. Kobach*, 318 Kan. 940, 947, 551 P.3d 37 (2024) (*Hodes II*); *Hodes & Nauser, MDs v. Stanek*, 318 Kan. 995, 1047, 551 P.3d 62 (2024) (*Stanek*) (Wilson, J., concurring). During the political campaign, however, Kansas was awash with claims that voting "no" on the amendment simply secured a moderate, common-sense, middle-ground status quo on the most divisive social and moral issue of our day.

Ashley All, spokesperson for Kansans for Constitutional Freedom (the principal campaign arm of the "Vote No" effort) told PBS that if the amendment failed, women would be "in the same situation

they're in right now. I mean, we have access to abortion care, but we also have restrictions and reasonable regulations." She went on to claim that she had no expectation that abortion rights would be expanded by *legislation* because "[t]his is about protecting the access we have." Rogin, *Kansas Becomes First State to Hold a Vote on Abortion Rights After* Roe *Reversal*, PBS (Aug. 1, 2022). In the same vein, those in the Vote No coalition told Kansans that a no vote "protects 19 laws that heavily restrict and regulate abortion." Alatidd & Bahl, *Getting Texts on Kansas Abortion Constitution Amendment? Here's What a 'Yes' and 'No' Vote Means*, Topeka Capital-Journal (Aug. 1, 2022).

The news media repeated these claims in story after story. A news article in the Kansas Reflector refuted suggestions made by Value Them Both proponents that the amendment was needed to protect common-sense regulations by saying a no vote "maintains the status quo, in which abortion is legal and regulated" and quoting Kansans for Constitutional Freedom as saying "[w]e all agree that abortion should be regulated like all other medical procedures." Kite, *Anti-Abortion Groups Make Dubious Claims as Kansas Amendment Vote Nears*, Kansas Reflector (July 19, 2022); see also Conlon, *FAQ*: *Getting the Facts Right on the Kansas Abortion Vote*, KMUW (July 22, 2022) (asking the question, "If the amendment fails, would existing abortion restrictions disappear?" and answering, "Likely not . . . .").

But the game is now up. As savvy campaigners knew from the get-go, legislation would not be needed because no regulation of abortion—none—will be permitted by this court under the far-reaching legal regime we announced in *Hodes I*. Dissenting from that decision, I explained at length the nature of the majority's folly. In short, this court has "abandon[ed] the original public meaning of section 1 of the Kansas Constitution Bill of Rights and paint[ed] the interest in unborn life championed by millions of Kansans as rooted in an ugly prejudice." *Hodes I*, 309 Kan. at 707 (Stegall, J., dissenting).

Eviscerating the Regulatory State

I will not rehash the historical and legal dismantling of the majority's imagined section 1, which I set forth fully in *Hodes I* and which remains unrefuted. Instead, I must now turn to examine the implications of the majority's constitutional revolution on the entire regulatory edifice of Kansas law. To begin, let's achieve some clarity about the

specific laws governing abortion providers being struck down in the name of protecting a fundamental right to personal autonomy. They are:

- Kansas Department of Health and Environment (KDHE) must inspect abortion facilities once a year without notice. K.S.A. 65-4a05.
- After 22 weeks, abortions must be performed in a hospital or ambulatory surgical center. K.S.A. 65-4a07.
- Admitting privileges at a nearby hospital are required in order to perform an abortion. K.S.A. 65-4a08.
- In order to perform an abortion in Kansas, the physician must be licensed in Kansas and must examine the patient in person. K.S.A. 65-4a10.
- Only a doctor or other health professional can administer drugs and medications to patients. K.A.R. 28-34-135(m).
- A physician and at least one health professional must be available to each patient throughout the abortion. K.A.R. 28-34-138(c).
- Health professionals must monitor each patient's vital signs throughout the abortion procedure. K.A.R. 28-34-138(f).
- Facilities must have written policies implemented for post-procedure care of patients who are administered local anesthesia. K.A.R. 28-34-139(a).
- There must be a "station with visual observation of each patient in the recovery area." K.A.R. 28-34-133(b)(7)(A).
- If the facility has a stock of controlled drugs, the facility must be registered with the Kansas Board of Pharmacy. K.A.R. 28-34-135(n).
- Airway and fluid management equipment and supplies must be available in the facility, as well as other supplies such as blood pressure cuffs. K.A.R. 28-34-135(c), (e).
- All facilities must comply with local codes and ordinances, provide documentation of a plan to dispose of biomedical waste and human tissue, and be within 30 miles of an accredited hospital. K.A.R. 28-34-127(c).

The majority finds these regulations infringe upon the right to an abortion. In the language of our decision in *Hodes I*, the government has encroached upon the "natural right of personal autonomy" protected by section 1, which "is fundamental and thus requires applying strict scrutiny." *Hodes I*, 309 Kan. 610, Syl. ¶ 15. Specifically, the majority notes that "once a plaintiff proves an actual infringement—*regardless of degree* and *even if the infringement is slight*—the government's action is presumed unconstitutional and the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it." *Stanek*, 318 Kan. at 1009. A legal standard one member of the majority recently firmly rebuffed. See *Hodes I*, 309 Kan. at 688, 692-93 (Biles, J., concurring) (arguing that the *Hodes I* majority "simply toss[ed] around strict scrutiny nomenclature . . . and then hop[ed] for the best" and concluding that the majority's "strict scrutiny jurisprudence will also have potentially unsettling ripple effects in other areas of Kansas law" because the standard is so "vulnerable" to judges' "subjective[]" opinions).

An aside: Justice Biles takes umbrage at having his own words recalled in this dissent, suggesting I have "misappropriat[ed]" them. *Stanek*, 318 Kan. at 1035-36 (Biles, J., concurring). Of course, clever allusions to Mary Shelley's horror fiction aside, I have done no such thing. Justice Biles was right in the first instance to call into question the majority's slip-shod application of strict scrutiny in *Hodes I*, a fact made apparent by the legal mess that is today's opinion. Perhaps an earlier account of Dr. Frankenstein is more apropos—for in true Promethean form Justice Biles "offer[s] . . . a boon and then withhold[s] it." *Prometheus Bound*, Classical Tragedy, Greek and Roman: 8 Plays in Authoritative Modern Translations, p. 163 (Willoughby ed. 1990). But Justice Biles insists he has changed his mind simply because the majority has adopted his "evidence based" approach. Here he blurs the crucial distinction between law and facts. Indeed, I agree with him that (especially in *Hodes II*) the State has badly bungled its case by failing (or refusing) to marshal even a timid evidentiary basis for its claims when it had the full opportunity to do so below. As unfortunate as that may be (and is) for the fate of the State's case, it really tells us nothing about the merits of the majority's chosen

jurisprudential path. Justice Biles' initial skepticism toward the law announced in *Hodes I* scores what amounts to a knock-out blow against the "evidence based" Justice Biles of today. Now back to the point at hand.

So today, applying this standard, the majority concludes the challenged regulations "increase the costs," "cause delays," and "impose financial burdens." *Stanek*, 318 Kan. at 1010. Here the majority has stumbled upon a core truth discovered by the founders of the Austrian School of Economics long ago. Government regulation of a good or service in a market economy—what they called "restrictive measures"—will always have the effect of "diminishing productivity, and thus impairing supply." Mises, Interventionism: An Economic Analysis, p. 29 (1940). That is, the good or service being regulated will become more expensive and less readily available. So yes, government regulation *always* "infringes" upon access to whatever good or service is being regulated.

To sum up this case in ordinary language, the state is telling abortion providers, if you want to do abortions in Kansas, you have to be licensed in Kansas, you have to be present in Kansas, you have to comply with local building codes, you have to be close to a hospital and be able to admit a patient at that hospital in case something goes wrong, you have to watch your patient's vital signs during an abortion, you have to have policies and a building designed to ensure post-procedure care, you have to have the basic medical equipment, and if you want to have controlled substances, you have to tell the Board of Pharmacy. And this court is saying, not so fast, these requirements will make abortions more expensive and less readily available, so they must survive a strict scrutiny analysis.

But wait—one may ask—aren't these essentially the same kinds of things the state requires of all health care providers in Kansas? The answer is, without a doubt, yes. To demonstrate, let's interlace the same list of regulations being struck down today with just a few of the vast variety of mirroring provisions (set forth in italics type) regulating—in the words of Kansans for Constitutional Freedom—"all other medical procedures."

- KDHE must inspect abortion facilities once a year without notice. K.S.A. 65-4a05.
  - *KDHE must inspect each medical facility project approved by the federal "secretary of health, education, and welfare." K.S.A. 65-422.*
  - *Inspections must be made of hospitals and other medical facilities. K.S.A. 65-433.*
  - *Inspections must be allowed any time during business hours any place in the state of Kansas "where drugs are manufactured, packed, packaged, made, sold, offered for sale or kept for sale." K.S.A. 65-1629.*
- After 22 weeks, abortions must be performed in a hospital or ambulatory surgical center. K.S.A. 65-4a07.
  - *Any surgical treatment of the ankle by a podiatrist can only be performed in a medical care facility. K.S.A. 2022 Supp. 65-2002(d).*
- Admitting privileges at a nearby hospital are required in order to perform an abortion. K.S.A. 65-4a08(b).
  - *Admitting privileges at a local hospital are required in order to perform surgery at an ambulatory surgical center. Moreover, the ambulatory surgical center must have a written transfer agreement in place with a local hospital. K.A.R. 28-34-52b(g).*
- In order to perform an abortion in Kansas, the physician must be licensed in Kansas and must examine the patient in person. K.S.A. 65-4a10(a).
  - *Anesthesia can only be provided by an individual that is licensed to administer anesthesia, and before undergoing anesthesia, each patient must have a physical examination. K.A.R. 28-34-56a(d), (h); K.A.R. 28-34-17a(c), (d)(2)-(3).*
  - *In order to perform surgery in an ambulatory surgical center in Kansas, the physician must first have been granted privileges by the governing authority of the center to perform surgical procedures. K.A.R. 28-34-54(e).*
- Only a doctor or other health professional can administer drugs and medications to patients. K.A.R. 28-34-135(m).

- *Medication or treatment can only be administered upon the "written and signed orders of a practitioner who is acting within the scope of that practitioner's license and who is qualified according to medical staff bylaws." K.A.R. 28-34-6a(g)(1).*
- *Only a licensed health professional can administer anesthesia. K.A.R. 28-34-17a(c).*
- *Only a physician or a registered nurse can administer blood and blood products in ambulatory surgical centers. K.A.R. 28-34-52b(e).*

- A physician and at least one health professional must be available to each patient throughout the abortion. K.A.R. 28-34-138(c).
  - *A physician must be available at all times that a patient is receiving or recovering from local, general, or intravenous sedation at an ambulatory surgical center. K.A.R. 28-34-54(g).*
  - *An anesthesiologist or physician must be available and readily accessible while anesthetics of any kind are being administered in an ambulatory surgical center, as well as during the post-anesthesia recovery period until all patients are alert or medically discharged from the post-anesthesia area. K.A.R. 28-34-56a(b)(1).*
  - *A registered nurse must be on duty at all times whenever a patient is in the ambulatory surgical center. K.A.R. 28-34-55a(c).*
- Health professionals must monitor each patient's vital signs throughout the abortion procedure. K.A.R. 28-34-138(f).
  - *Health professionals must observe any patient post-anesthesia for as long as necessary to be secure in the patient's condition. K.A.R. 28-34-17a(d)(4).*
  - *Qualified anesthesia personnel shall be present in the room through the administration of all anesthetics and must "continuously evaluate the patient's oxygenation, ventilation, circulation, and temperature." K.A.R. 28-34-56a(b)(1).*

- Facilities must have written policies implemented for post-procedure care of patients who are administered local anesthesia. K.A.R. 28-34-139(a).
  - *Medical staff must have written policies governing surgical services, including requirements for what circumstances require the presence of what type of medical personnel. K.A.R. 28-34-17b(d).*
  - *"Each patient's status shall be evaluated during anesthesia administration and shall be evaluated by a physician for proper anesthesia recovery before discharge." K.A.R. 28-34-52b(f).*
- There must be a "station with visual observation of each patient in the recovery area." K.A.R. 28-34-133(b)(7)(A).
  - *One registered nurse must be on duty in the recovery room when the room is occupied. K.A.R. 28-34-17b(3).*
- If the facility has a stock of controlled drugs, the facility must be registered with the Kansas Board of Pharmacy. K.A.R. 28-34-135(n).
  - *CLIA certification is required for laboratories performing tests within surgical centers or hospitals. K.A.R. 28-34-11(b); K.A.R. 28-34-59a(b)(1).*
- Airway and fluid management equipment and supplies must be available in the facility, as well as other supplies such as blood pressure cuffs. K.A.R. 28-34-135(c), (e).
  - *Specific medical equipment and supplies must be available in surgical suites, including cardiac monitors, a defibrillator, thoracotomy, and tracheotomy sets. K.A.R. 28-34-17b(c)(2).*
  - *There are also many requirements in place for obstetrical and newborn services such as airway, oxygen, resuscitation, and IV equipment. K.A.R. 28-34-18a(c).*
- All facilities must comply with local codes and ordinances, provide documentation of a plan to dispose of biomedical waste and human tissue, and be within 30 miles of an accredited hospital. K.A.R. 28-34-127(c).

- *Certain forms of medical waste must be disposed of with a person specifically licensed to receive waste. K.A.R. 28-35-223a(b).*

It is true, as the majority points out, that evidence below suggested many of these regulations impose heightened burdens on abortion providers when measured against the "ordinary" regulatory burden borne by other providers. The majority weighs this fact heavily in its strict scrutiny analysis. I take no issue with that, as the actual application of strict scrutiny is not my concern here. It is axiomatic that most of the laws governments enact will fail a strict scrutiny analysis. Schraub, *Unsuspecting*, 96 B.U. L. Rev. 361, 406 (2016) ("We know that strict scrutiny review will invalidate most laws."); Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1274 (2007) ("Most challenged legislation will be upheld as long as it is even rationally related to a legitimate governmental interest . . . [but] strict scrutiny's demand for narrow tailoring or necessity is the most stringent made by any doctrinal test of constitutional validity."). Instead, the similarities of the interlaced regulations—between those governing abortion access and those governing access to other medical procedures—illustrate only that, as alluded to above, *all of these regulations will henceforth be subject to strict scrutiny.*

Even without the striking similarities, the crucial point would remain. Recall the wish of Kansans for Constitutional Freedom "that abortion should be regulated like all other medical procedures." Kite, *Anti-Abortion Groups Make Dubious Claims as Kansas Amendment Vote Nears*, Kansas Reflector (July 19, 2022). Today's decision grants that wish, but perhaps not in the way many people expected.

For indeed, there can be no difference in law—according to the majority's own section 1 jurisprudence in *Hodes I*—between "abortion" as an elective medical procedure and "all other medical procedures." They are identical in that access to all medical procedures must be protected as a fundamental right of personal autonomy. Extracting a tooth? Chemotherapy? Getting a vasectomy? Plastic surgery? Knee replacement? Getting contact lenses? Having an abortion? Chiropractic adjustment? All equally protected by section 1. And yes, the reader will have guessed by

now—all these services are highly regulated in the state of Kansas (as is virtually every single other medical service one can think of). And every such "restrictive measure" has the effect of infringing on one's personal autonomy simply because it will make access to the service more expensive and less accessible than the service would otherwise be in an imagined libertarian utopia where no government regulations whatsoever impede the operation of the free market.

Consider further, as already suggested, that the majority's decision to protect against every slight infringement on personal autonomy cannot be limited—under the holding of *Hodes I*—to medical procedures. Certainly the choice to decide what substances enter one's own body must also directly implicate personal autonomy. Common laws criminalizing drug use and possession immediately come to mind. K.S.A. 21-5709 criminalizes injecting, inhaling, or otherwise introducing a controlled substance into the human body. Every drug conviction in the state must now be subject to a strict scrutiny analysis.

And what about the massive regulatory edifice that is designed to protect our food supply? Surely eating is an activity protected by the fundamental right to personal autonomy! The majority will not shy from vigorously defending the rights of the people to access the food supply of their choice, will it? Because indeed, the state is—every single day—infringing on that right. Every line of regulatory code governing farms, ranches, meat-packing plants, farmer's markets, and back-yard chicken-egg stands makes food more expensive and less readily available. The whole stable of restaurant, meat, dairy, and other inspectors does the same. All now subject to strict scrutiny.

Or what about the right to cut and style one's hair? Surely personal autonomy includes a right to choose whether to have one's eyebrows threaded. But, here again, troublesome regulations stand in the way. See, e.g., K.A.R. 61-1-6 (prohibiting "use of shaving mugs and lather brushes" in barber shops); K.A.R. 61-1-1 (requiring all barber shops to be "open for inspection at any time during business hours to the members of the state board of barber examiners"); K.A.R. 69-6-3 (imposing limits on where a cosmetologist or manicurist license can be used). The list could (and does) go

on. The Kansas Boards of Barbering and Cosmetology may not be long for this world. Surely the government does not have a compelling interest in who trims my beard?

In fact, dozens of other laws regulate a person's right to choose what happens to their body and must—according to the majority's own holding—be subjected to strict scrutiny. Just by way of example, Kansas regulates tattoos and piercings (K.S.A. 65-1953); the use of car seat belts (K.S.A. 8-2503 [a][1]-[2]); the use of helmets while riding motorcycles and motorized bicycles (K.S.A. 8-1598); required student vaccinations (K.S.A. 76-761a[a]; K.S.A. 72-6262[a]); assisted suicide (K.S.A. 21-5407[a][2]); self-administration of medication (K.S.A. 72-6282); and public nudity (K.S.A. 21-5513). There are many more.

A massive swath of government action is now subject to the most rigorous and exacting standard of constitutionality—strict scrutiny. And no legal scholar or judge anywhere has ever even tried to suggest that all or even most of the plainly legitimate ends of government action could possibly survive such a test. None of this is to say that any of these listed regulations (and all others besides) *must* be constitutional. Rather, it illustrates so dramatically the damage the majority has done to the structure of our government by its section 1 jurisprudence. Let the lawsuits commence in this new target-rich environment. The majority has—perhaps unwittingly—put the entire administrative state on the chopping block of strict scrutiny.

Who's Afraid of Hodes I?

The holding of *Hodes I* compels these conclusions—to the majority's great chagrin. Responding to my claims, the majority launches an adjectival offensive accusing me of all kinds of calumny. Mine is a "cataclysmic premonition" that "strays . . . far afield" and results in a "hyperbolic panic." *Stanek*, 318 Kan. at 1012. Clearly, a nerve is struck. What is going on in this back and forth between majority and dissent?

Simply put, when confronted directly in this dissent with the dramatic and almost incomprehensible ramifications of the *Hodes I* rule, the majority loses its nerve. By sleight of judicial hand, the

majority radically changes its holding. It abandons its firm commitment to the "fundamental right of personal autonomy" as soon as the context is shifted away from abortion. Instead, it suggests that some rights of personal autonomy are in fact not fundamental at all. To understand the mystery of this immensely consequential about-face, an in-depth review of our *Hodes I* decision is required.

In its introduction, the *Hodes I* majority states that "through the language in section 1, the state's founders acknowledged that the people had rights that preexisted the formation of the Kansas government." *Hodes I*, 309 Kan. at 614. Then, the majority summarizes that included in those preexisting natural rights is "the right of personal autonomy, which *includes* . . . whether to continue a pregnancy." (Emphasis added.) 309 Kan. at 614. Finally, the *Hodes I* court declares, "[T]his right is fundamental." 309 Kan. at 614. The phrase "this right" references—without a doubt—the "right of personal autonomy." A fact driven home by the majority's decision to enshrine in the syllabus of the case the holding that "[t]he natural right of personal autonomy is fundamental and thus requires applying strict scrutiny." 309 Kan. 610, Syl. ¶ 15.

To gain a detailed understanding of this holding, we must begin by recalling that in *Hodes I*, the district court had imported the federal jurisprudence of a substantive due process "right to privacy" into the Kansas Constitution and had held that "sections 1 and 2 of the Kansas Constitution Bill of Rights, like the Fourteenth Amendment, protect a fundamental right to abortion." 309 Kan. at 620. The *Hodes I* court *reversed* the district court on this point, holding it was an error of law. 309 Kan. at 623-24. Instead, *Hodes I* held that "section 1 of the Kansas Constitution Bill of Rights acknowledges rights that are distinct from and broader than the United States Constitution." 309 Kan. at 624. And that among these broader natural rights "is the right of personal autonomy." 309 Kan. at 624. So the *Hodes I* majority explicitly rejected the idea that the case was limited to deciding whether section 1 protects a right to an abortion, opting instead for the notion that section 1's protections are "broader" and include a "fundamental right" of "personal autonomy" which—the court would later conclude—merely "includes" the right to terminate a pregnancy.

To fully understand both the reason behind the analytical path taken by the *Hodes I* court and its implications, it is important to track the reasoning of that decision closely. First, the court looked to the language of section 1 to observe that this "provision lists certain rights—life, liberty, and the pursuit of happiness—but indicates these are just among the natural rights Kansans possess." 309 Kan. at 625. "The framers made clear the list was not intended to be exhaustive—rather, the listed rights are 'among' the inalienable natural rights recognized by the provision." 309 Kan. at 626. The *Hodes I* majority observed that section 1 contains no parallel to the Fourteenth Amendment's "due process" clause and that as such, "section 1's focus on substantive rights removes from our calculus one of the criticisms of *Roe* and other decisions of the United States Supreme Court relying on substantive due process rights under the Fourteenth Amendment." 309 Kan. at 627.

Here, a crucial insight into the *Hodes I* decision is found. Because the *Hodes I* majority reveals a keen desire to avoid the much-criticized judicial notions of "penumbras" that "emanate" from our federal due process guarantees and coalesce into substantive privacy rights. See *Roe v. Wade*, 410 U.S. 113, 129, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *overruled by Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022). Instead, the majority hoped to firmly ground the substantive protections of section 1 in that provision's text and history. The majority was bound to do so by our precedent—amply discussed in the opinion—demanding a close adherence to the text of the Kansas Constitution. See *Hodes I*, 309 Kan. 610, Syl. ¶ 4 ("Kansas courts look to the words of the Kansas Constitution to interpret its meaning. When the words do not make the drafters' and people's intent clear, courts look to the historical record, remembering the polestar is the intention of the makers and adopters of the relevant provisions.").

By choosing a more disciplined interpretive method, the *Hodes I* court foreclosed the looser and more flexible path taken by federal courts to finding a fundamental right to abortion in vague substantive due process concepts such as a "right to privacy"—a path since overruled by *Dobbs*. This choice necessitated a far more in-depth examination of the text and history of section

1—and most critically required the location of a *broader* right protected by section 1 within which the majority could reach its desired outcome of protecting the "activity" of abortion.

To achieve this, the *Hodes I* majority spends the bulk of its decision analyzing the substantive rights the founders sought to protect—recognizing them as "Lockean natural rights guarantees" which were broadly understood and relied upon at the time of the founding. 309 Kan. at 626. Next, the majority needed to articulate what, precisely, those Lockean natural rights were understood to encompass. In this portion of the decision, abortion never shows up. And why would it? The historical record of people articulating a natural Lockean right to abortion is nonexistent. If abortion had ever been articulated as a natural Lockean right, we can be certain the majority would have zeroed in on this and limited its holding to abortion only. But that path was not available to the majority given its proper and more textually disciplined interpretive commitments. We must keep in mind, the *Hodes I* majority was focused intensely on describing and defining a "natural right" that was "broader" than the right to an abortion, noting repeatedly that "the drafters [of section 1] made no attempt to list all rights; they incorporated the broad concept of natural rights . . . and they expressed a desire to protect those rights from government infringement." 309 Kan. at 629.

And in fact, the historical record is replete with references and paeans to the broad natural Lockean right to "be let alone"—a phrase the majority quotes several times with approval. This right to "be let alone" "describe[s] a wide range of judicially enforceable rights." 309 Kan. at 636. But even this doesn't achieve the necessary specificity for concrete judicial rulemaking, so the court then turned "to the specific questions of what a natural right entails and whether it *includes* a woman's right to decide whether to continue a pregnancy." (Emphasis added.) 309 Kan. at 638-39.

It is here that the *Hodes I* court arrives at the descriptor "personal autonomy." And it does so after careful consideration of many different historical articulations of the right at issue. For example, the court cites decisions as early as 1642 which hold that it is unlawful to require merchants to wear certain clothes because "'it was against the liberty of the subject, for every subject hath

freedom to put his clothes to be dressed by whom he will.'" 309 Kan. at 640.

Citing William Blackstone, Edmund Burke, and James Madison, the majority builds an impressive case that it was widely understood in English common law that "a person has an inviolable interest in the 'safety and liberty' of one's person." 309 Kan. at 640-41. Quoting a decision of the United States Supreme Court in 1891, the *Hodes I* court observed that "'the possession and control of his own person'" is the most "'sacred'" and "'carefully guarded . . . right of every individual.'" 309 Kan. at 641. This "is a component of the 'inviolate personality' of human beings." 309 Kan. at 641-42. Other decisions of state courts were favorably cited to the effect that every person "'has a right to determine what shall be done with his own body'" and "'everyone has a fundamental right to the sole control of his or her person.'" 309 Kan. at 642-43.

The *Hodes I* majority even noted that governments "cannot intrude on a person's control of his or her own body" even "when the State regulates health care." 309 Kan. at 642. Thus, "[a]t the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy." 309 Kan. at 645. And this "natural-law right to control one's own body and to exercise self-determination stands firmly on the shoulders of the Lockean philosophies embraced in section 1's natural rights, which include liberty and the pursuit of happiness." 309 Kan. at 643-44. This is a mere sampling of the exhaustive historical case the *Hodes I* majority marshals for finding a fundamental right to personal autonomy in section 1 of the Kansas Constitution Bill of Rights.

Critically, it is only *after* the *Hodes I* court conducts such a detailed and thorough examination of the text and history of section 1 that it turns to the question of abortion. And here, it cannot be overlooked or understated that the court begins by presuming that the entire analysis summarized above applied *first* to the fundamental right to personal autonomy enjoyed by *men*. We know this—beyond any shadow of a doubt—because before confronting the abortion question proper, the majority felt it necessary to an-

nounce the holding (in a section title no less) that "*Section 1 Guarantees Women, as well as Men, the Right of Personal Autonomy.*" 309 Kan. at 645. Only then, finally, does the court conclude that "[d]enying a pregnant woman the ability to determine whether to continue a pregnancy would severely limit her right of personal autonomy." 309 Kan. at 646. As such, the "natural right of personal autonomy" must "include" the ability to "make health care decisions." 309 Kan. at 649.

If all of this weren't enough to convince a reader (or my colleagues) of the actual holding of *Hodes I*, just pay attention to the stirring conclusion of the decision: "At issue here is the inalienable natural right of personal autonomy, which is the heart of human dignity. . . . [A]ny government infringement of the inalienable natural right of personal autonomy requires the State to establish a compelling state interest and to show that [the regulation] is narrowly tailored to promote it." 309 Kan. at 671.

The Majority Effectively Overrules Hodes I

Everything I've written here about *Hodes I* and its implications is undeniable—that decision is written in black and white, published in the Kansas Reports, and available to judges, lawyers, scholars, and the public for each to draw their own conclusions. *Hodes I* (and now *Hodes II*) make it plain that this court has interpreted section 1 as guaranteeing a fundamental right of personal autonomy: "Section 1 of the Kansas Constitution Bill of Rights protects a fundamental right to personal autonomy, which *includes* the right to decide whether to terminate a pregnancy." (Emphasis added.) *Hodes II*, 318 Kan. 940, Syl. ¶ 3; *Hodes I*, 309 Kan. 610, Syl. ¶ 8. This sentiment is driven home no less than 30 times between *Hodes I* and *II*. *Hodes I*, 309 Kan. 610, Syl. ¶ 8, Syl. ¶ 11, 613, 614, 623, 624, 638, 639, 640, 644, 645, 646, 650, 659, 660, 663, 671, 674, 679, 680; *Hodes II*, 318 Kan. 940, Syl. ¶ 4, 943, 950, 959.

But here, rather than simply applying the holding of *Hodes I* in a neutral and objective way—letting the chips fall where they may—the majority instead has written something entirely new, relieving itself of the obligation to reach its conclusion through a careful analysis of the text and history of section 1 by pretending

that the analysis was completed previously. Indeed, the majority is at such pains to avoid the logical conclusions drawn by this dissent it has fled headlong from the legal framework announced in *Hodes I* (all while claiming to follow that decision) and has written a pretzel-twist opinion that will fool no one.

One fact from today's decisions stands out above all others. The majority in *Hodes I* and *Hodes II* held that the "fundamental right" protected by section 1 is "personal autonomy" defined as "control over one's own body" and over one's "inviolate personality." *Hodes I*, 309 Kan. at 641-42, 644; *Hodes II*, 318 Kan. at 941. While the *same* majority that decided *Hodes II* has, on the very same day, held that *only* a significantly smaller subset of rights associated with personal autonomy—those the majority determines have "profound and unique attributes"—are fundamental and protected by section 1. *Stanek*, 318 Kan. at 1006.

To demonstrate this remarkable contradiction, consider today's holding: "Section 1 of the Kansas Constitution Bill of rights protects an inalienable natural right of personal autonomy . . . . The unique and profound attributes of the decision to have an abortion are integral to a woman's inalienable natural right of personal autonomy . . . thus, laws that infringe on the right to abortion are subject to strict scrutiny." 318 Kan. 995, Syl. ¶ 4. Whatever this is, it is *not* a restatement of the *Hodes I* holding. Entirely absent is the "fundamental rights" bridge from a "natural right" to the application of "strict scrutiny"—replaced with a new, never-before seen "test" by which only rights determined to have "unique and profound attributes" are deemed "fundamental" and subject to strict scrutiny.

To bolster its newfound rule, the majority claims that *Hodes I* held: "As an inalienable natural right of personal autonomy with profound and unique attributes, the right to decide to have an abortion is a fundamental right subject to strict scrutiny." 318 Kan. at 1006. This is simply false. As just meticulously explained above, *Hodes I* held that the right of *personal autonomy* is fundamental, and this right *includes* the choice to terminate a pregnancy. Nowhere in *Hodes I* did this court undertake to decide whether the choice to abort had "profound and unique attributes." Those words never appear in *Hodes I*. Likewise, entirely absent from *Hodes I*

is the idea that only *after* a right sounding in personal autonomy is found to have "profound and unique attributes" is it to be declared "fundamental" and "subject to strict scrutiny." Of particular note, the majority has *never* undertaken an analysis of abortion to determine what its "attributes" might be.

This is because the *Hodes I* decision works in exactly the opposite way. It starts by defining the "broader" natural right of "personal autonomy" which is "fundamental" and only then does it proceed to analyze abortion as an "activity" that may or may not be "included" in that right. And when it determines abortion is such an activity, it does so by weighing its impact on a person's ability to "control" their own "body"—not based on any mystical attributes such an activity may or may not possess.

The majority responds to my qualms with yet another falsehood, declaring that "this court's analysis in *Hodes I* examined the inalienable natural right to personal autonomy in the specific context of abortion, *which necessarily limited the scope of its holding*." 318 Kan. at 1013. This is alternative universe thinking. It is so obviously untrue I am shocked the majority includes it. As I describe above, the bulk of *Hodes I* was about a *man's* fundamental right to personal autonomy in the Lockean natural rights discourse that was written into section 1. So much so that before transitioning to a discussion of abortion, the majority was forced to make a holding that women too have a fundamental right to personal autonomy. In other words, the majority located a fundamental right to personal autonomy in section 1 *before* it concluded that this right extended to women. The "context" of the analysis concerning the fundamental right to personal autonomy in section 1 actually *excludes* abortion—rather than being limited by it.

Nonetheless, the majority plows ahead in its effort to "limit" the holding of *Hodes I* to abortion only. In so doing, it devises a brand-new legal test, invented out of thin air, with no analytical ties to either the text or history of section 1—though its convenience to the majority's cause is undeniable. The "profound and unique attributes" test is so vague, amorphous, and subjective as to eviscerate the clear holding of *Hodes I* and the allegedly cherished fundamental right to personal autonomy right along with it. Now, claims the majority, "each asserted right must be carefully

examined and evaluated independently in the context of its own unique implications on an inalienable natural right found under section 1." 318 Kan. at 1013. And the majority accuses me of failing to perform such an analysis and instead merely drawing a "false equivalence" between other activities sounding in personal autonomy—getting a vasectomy for example—and the "intimate, personal, and profound act of deciding to have an abortion." 318 Kan. at 1013. Finally, the majority explicitly declares that the "limited scope of the *Hodes I* holding" is a woman's "decision[] regarding whether to have an abortion." 318 Kan. at 1014. In all this, the majority is knowingly mis-representing the holding of *Hodes I*. And by so doing, the majority is effectively overruling that decision.

When confronted by all of this, the majority accuses me of "stray[ing] far afield" into "specious" territory. 318 Kan. at 1012-13. But why is it "specious" to hew closely and carefully to the actual holding of *Hodes I*? I suspect the answer is obvious—because the majority cringes at the full implications of *Hodes I* and cannot stomach living in the world wrought by that decision.

So instead, the majority faults my examples, calling them only "marginally . . . related" to personal autonomy. 318 Kan. at 1012. Is the food I eat and the medical care I get *truly* only marginally related to the section 1 right? The majority proves too much. If "personal autonomy" includes access to so-called "abortion care," why wouldn't it likewise include other forms of medical care? A perfectly logical conclusion—one drawn explicitly by the *Hodes I* majority! Recall, the fundamental right as defined by *Hodes I* "includes the right to control one's own body, to assert bodily integrity, and to exercise self-determination." *Hodes I*, 309 Kan. at 680. This fundamental right clearly incorporates far more than the decision to obtain an abortion. I am not twisting the majority's language from *Hodes I*, nor am I putting words in its mouth. I am not splicing and dicing its opinion to suggest it said something it did not in fact state explicitly. No inferential leaps are necessary. The majority cannot possibly deny in good faith that *Hodes I* plainly and simply stated over and over that "the natural right of personal autonomy is fundamental and thus requires applying strict scrutiny." *Hodes I*, 309 Kan. at 663.

Remember too that the *Hodes I* decision indicated that even something as far removed from abortion as choosing what clothes to wear would be protected by the fundamental right to personal autonomy. Why wouldn't it include access to currently forbidden food supplies? Why wouldn't it include the decision to ingest perfectly natural chemical compounds? The majority cannot and will not confront these questions because there simply is no plausible way to legally distinguish them from "abortion care" and remain faithful to the holding of *Hodes I*. To pretend otherwise is to play the proverbial ostrich in the desert sands of our current section 1 jurisprudence.

Making matters much worse, the majority is not content to simply feign ignorance. In its desire to sidestep the inconvenient and damning conclusions set forth here, the majority has been forced to deceive the public about its own core holdings—to the ruin of any coherence in this vastly important area of the law. That the majority thinks it can get away with such double-speak reveals just how far we have strayed from the rule of law. Its response to this dissent amounts to "don't believe your lying eyes." See Orwell, 1984, p. 103 ("The Party told you to reject the evidence of your eyes and ears. It was their final, most essential command."). Here the majority partakes of a kind of revisionist history courts should never participate in, as it fosters the clear impression that judges are hiding the ball from the people they ought to be serving in order to manufacture desired results.

Consider Justice Rosen's separate concurring opinion. There, Justice Rosen simply admits the majority has carelessly tossed about legal concepts, terms of art, and well-defined doctrines in a mish-mash opinion that essentially says—it doesn't matter what our rationale is because *labels don't matter*. *Stanek*, 318 Kan. at 1035 (Rosen, J., concurring) ("Whether one describes a right as a natural one protected by section 1 or a fundamental one protected by section 1, the right receives rigorous protection under our Bill of Rights. No matter the label we give it, infringements of that right are subject to strict scrutiny.").

But contrary to Justice Rosen's claim, "natural rights" and "fundamental rights" are not fungible categories. Each distinct le-

gal concept functions in a separate way to achieve different outcomes in any carefully reasoned legal analysis. Sometimes they can work together, in a two-step process, but not always. To illustrate, we need look no further than the decision in *Hodes I*. There, this court plainly and repeatedly acknowledged the legal distinction between natural and fundamental rights. Indeed, the entire structure of the *Hodes I* opinion illustrates that the concepts of natural and fundamental rights are unique.

> "We conclude that, through the language in section 1, the state's founders acknowledged that the people had rights that preexisted the formation of the Kansas government. There they listed several of these natural, inalienable rights . . .
>
> "Included in that limited category is 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. Although not absolute, this right is fundamental." *Hodes I*, 309 Kan. at 614.

Hodes I made clear many times over that it was the classification of the right as fundamental—not natural—which required the use of strict scrutiny. See 309 Kan. at 663 ("As we have already noted, the natural right of personal autonomy is fundamental and thus requires applying strict scrutiny."). Elsewhere in the majority's section 1 jurisprudence, the analysis has not required moving beyond the first, "natural rights" stage. In *State v. Carr*, 314 Kan. 615, 629, 502 P.3d 546 (2022), *cert. denied* 143 S. Ct. 58 (2023), this court evaluated the right to life under section 1. The court readily concluded that section 1 protected the "natural right" to life but did not proceed to undertake an analysis of whether this natural right was also "fundamental" because the court held that natural rights may be forfeit. See *Carr*, 314 Kan. at 644; but see *Carr*, 314 Kan. at 733 (Stegall, J., concurring) ("[T]he essential effect of the *Hodes* decision is revealed to be what I explained it to be at the time—that 'it fundamentally alters the structure of our government to magnify the power of the state.' That shift—the magnification of state power—is enacted today as we hold that a citizen's limited section 1 rights are 'forfeited when a person's criminal conduct necessitates punishment.' Thus, the majority makes it explicit that a criminal defendant has no section 1 protections at all. Indeed, according to the majority, 'the state's power

to punish' is limited only by 'due process' and 'cruel or unusual' provisions which 'do not arise under section 1.' [Citations omitted.]"). Does the majority believe fundamental rights may also be forfeit, because it doesn't matter what "label we give it"? *Stanek*, 318 Kan. at 1035 (Rosen, J., concurring). Have incarcerated women forfeited the right to abortion?

Contrary to Justice Rosen, federal courts—which pioneered the whole concept of "fundamental rights" animating substantive due process—label a right "fundamental" only to justify the application of a strict scrutiny standard of review. See *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) ("We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. [Citations omitted.]"). The test for fundamental rights is commonly articulated as whether the right is "'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Dobbs*, 597 U.S. at 237-38.

I know Justice Rosen understands this because very recently, in a different case, he wrote:

> "To decide whether targeted legislation has crossed the line triggering a higher level of scrutiny, a court decides whether it implicates a fundamental right or liberty that is "'deeply rooted in this Nation's history and tradition" . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."' *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 [1977]; *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L. Ed. 288 [1937])." *State v. Genson*, 316 Kan. 130, 147, 513 P.3d 1192 (2022) (Rosen, J., dissenting).

But here, Justice Rosen rejects the hallmarks of judicial decision making—careful, studied, precise, and analytical reasoning—with a labels-don't-matter shrug. In so doing, Justice Rosen (like his colleagues in the majority) likewise rejects the *Hodes I* holding that personal autonomy is a fundamental right and retreats to urging district courts to consider whether the "interest at stake . . . has profound and unique attributes." *Stanek*, 318 Kan. at 1035 (Rosen, J., concurring). District court judges will, he trusts, figure it out.

The majority doubles down on Justice Rosen's shrug, claiming that *Hodes I* simply "equated" the holding that personal autonomy is a "natural inalienable right" with the conclusion that personal autonomy is a "fundamental right." See *Stanek*, 318 Kan. at 1007. This is a decidedly odd way for a court to reason. If it were true, the term "fundamental right" as used in *Hodes I* is entirely superfluous—it does no work whatsoever.

Given this, what, exactly, will district courts be figuring out? The majority's new "profound and unique attributes" test could actually result in the exclusion of some cherished rights from the category of "fundamental" rights. Consider speech. The right to free speech is certainly deeply rooted in our history and tradition and essential to our scheme of ordered liberty. See *Thornhill v. State of Alabama*, 310 U.S. 88, 95, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984) (recognizing freedom of speech as "among the most fundamental personal rights and liberties of the people"). But does it have "profound and unique attributes?" Speech is almost always pedestrian and certainly always ubiquitous. Does this mean the right to speech is not fundamental? Not natural?

What about the right to contract previously identified as a natural right in *Hodes I*? *Hodes I*, 309 Kan. at 634. Is this right "unique and profound" or is it also pedestrian and ubiquitous? Perhaps this "natural inalienable right" simply "equates" to a fundamental right subject to strict scrutiny? Has the majority unwittingly subjected all economic regulation to its strict scrutiny regime? Who knows. In a context in which labels and concrete judicial doctrines don't matter, "figuring it out" will amount to nothing more than subjective policy making which will sway with the gravitational pull of each judge's personal preference. Such is the rule we firmly establish today.

Once again, the reader is confronted with the perplexing question—what is going on here? In short, Kansas constitutional law has been rendered a failed state by this court's zeal to preserve a regime of unrestricted access to abortion. And as the managers of this failed state, the justices in the majority are left with no choice but to debase the currency. Today's decision is the equivalent of printing money, adding zeros to old bank notes because labels

don't matter. The rest of us—lower court judges, lawyers, litigants, and Kansans—will be left to cart wheelbarrows full of now meaningless legal words, concepts, and jargon into courts hoping against hope that it will be enough to win the arbitrary favor of whoever happens to be presiding.

The majority has, in essence, treated the law as one giant game of "chicken"—daring judges, lawyers, litigants, and the public we serve to ignore the incoherence in its rulings or else face a baldly announced plan to drive all of section 1 into the ditch labeled "abortion care." I simply cannot accept—and I do not think the Kansas judiciary will accept—this bargain. I choose instead to take *Hodes I* at its word, as all judges must, and conclude that when the Kansas Supreme Court declares that the Kansas Constitution protects a fundamental right of personal autonomy, it means what it says.

Thus, notwithstanding the majority's palpable nervousness at seeing the consequences of its constitutional edicts laid bare, I must proceed as if, in fact, the right to personal autonomy is fundamental. And all the nonsensical talk about first deciding whether an "activity" has "attributes" that are "profound and unique" and only then deciding that such an activity is "fundamental" to the right of personal autonomy is just that—nonsense.

A Case Study in Hair

To illustrate what this looks like, consider a case study. I earlier wondered whether the state could have a compelling interest in who trimmed my beard. This proved too much for the majority's sensibilities. It feigned offense on behalf of pregnant women everywhere, writing "[t]he dissent trivializes and attempts to minimize the fundamental nature of a woman's decision to continue or terminate a pregnancy by comparing it to a man's decision to grow or trim a beard." *Stanek*, 318 Kan. at 1013-14. It accused me of making a "facetious comparison" that is "both inappropriate and denigrating to women faced with decisions between childbirth and abortion." 318 Kan. at 1014. Of course a cursory review of what I wrote makes it clear this is false. Nowhere did I "compare" the *experience* of having an abortion with getting a haircut. This kind

of juvenile moralizing would be ignored but for the light it sheds on the legal questions at issue.

For by "misunderstanding" my point, the majority illustrates its inability to grasp the scope of the framework declared in *Hodes I*. Though I have never sanctioned that framework, I cannot ignore the majority's dismissal of personal autonomy rights it haphazardly brushes off as trivial. The majority's stab at painting me as a bad person inadvertently reveals a damning ignorance about the precise area of law it is attempting to rule on. Is the majority not aware that hair growth, hair removal, and hair styling is one of the most hotly contested, litigated, and legislated upon topics under the umbrella of "personal autonomy"? Apparently, it is not.

It is inexcusable that four justices on this court purporting to make the most consequential decisions about our fundamental law will cover their complete lack of inquiry into the consequences of their decisions with petty and transparently false insults. Since the majority is so incurious, I will spell it out. It turns out that body hair is one of the most personal and intimate expressions of the "inviolate personality" of human beings, often inseparable from religious and racial identities, and always a baseline indicator of a person's expression of individual identity.

Wendy Greene, one of the nation's foremost legal experts on hair discrimination and a legal architect of the federal CROWN Act—an acronym for "Create a Respectful and Open World for Natural Hair"—has declared that how one chooses to style their hair "is a defining feature of their identity and personhood." Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. Rev. 333, 359 (2013). Others have similarly asserted that imposing regulations on one's choice of hair style restricts "bodily autonomy" and erases black culture. Boyd, *Hair Me Out: Why Discrimination Against Black Hair Is Race Discrimination Under Title VII*, 31 Am. Univ. J. of Gender, Social Policy & the Law 75, 103 (2023). Indeed, the decision of how to adorn one's head "is highly personal," and each person may hold different reasons for their choice; some reflect a religious conviction, others choose protective styles to maintain hair health, some embrace certain styles to express a political position, a national or family heritage, or as part

of a cultural identity; some have "simply a personal interest in projecting a special image or character," "and/or . . . a myriad of other personal, financial, medical, religious, or spiritual reasons." NYC Commission on Human Rights: Legal Enforcement Guidance on Race Discrimination on the Basis of Hair, pp. 3-4 (Feb. 2019); *Miller v. School District No. 167, Cook County, Illinois*, 495 F.2d 658, 663 (7th Cir. 1974); see also *Karr v. Schmidt*, 460 F.2d 609, 621 (5th Cir. 1972) (Wisdom, J., dissenting) ("Hair is a purely personal matter—a matter of personal style which for centuries has been one aspect of the manner in which we hold ourselves out to the rest of the world. . . . [H]air is a symbol: of elegance, of efficiency, of affinity and association, of non-conformity and rejection of traditional values.").

In politics too, hair is a potent symbol and expression of political ideals, goals, and persona. In 2015, Representative Katherine Clark—now the high-ranking democratic whip—decided to "go grey"—that is, to stop dying her hair. She faced immediate pushback and implicit claims that her "small bottle of brown hair dye" was the source of her "competence and effectiveness." She rejected this notion entirely and went so far as to explicitly "compare" her choice of hair-style to women's reproductive rights, saying that the "same systems" that lead to government regulation of abortion also "tell us how to wear our hair." Clark, *The Politics of Going Gray*, WBUR (Jan. 13, 2022). Perhaps the majority thinks Representative Clark is also "denigrating . . . women faced with decisions between childbirth and abortion"? *Stanek*, 318 Kan. at 1014. In a similar vein, but from a very different corner of the political landscape, the Wall Street Journal recently reported that Javier Milei—Argentina's populist president—"rocks a mop" that "reflects his nonconformist campaign." Gallagher, *This Politician Just Won Argentina's Primary. His Hair Is Baffling the World*, Wall Street Journal (Aug. 16, 2023).

Regardless of the reasons one may choose a certain hair style, the point is that each person's "right [of] personal appearance is inextricably bound up with the historically recognized right of 'every individual to the possession and control of his own person,' and, perhaps even more fundamentally, with 'the right to be let alone.'" *Kelley v. Johnson*, 425 U.S. 238, 250-53, 96 S. Ct. 1440,

47 L. Ed. 2d 708 (1976) (Marshall, J., dissenting). Is Thurgood Marshall a bad man for thinking that one's personal appearance may be intimately connected to their personal autonomy?

The literature and caselaw is replete with the idea that regulation of hair "divests" individuals of "complete autonomy over deeply personal, political, as well as pragmatic grooming choices." Greene, 8 FIU L. Rev. at 350; see also *Olff v. E. Side Union High School District*, 404 U.S. 1042, 1043-44, 92 S. Ct. 703, 30 L. Ed. 2d 736 (1972) (Douglas, J., dissenting) ("Hair style is highly personal," a "purely private choice," and should be "left to family or individual control and [be] of no legitimate concern to the State"; "[o]ne's hair style, like one's taste for food, or one's liking for certain kinds of music, art, reading, recreation, is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people"); *Domico v. Rapides Par. School Board*, 675 F.2d 100, 101-02 (5th Cir. 1982) (noting cases that have invalidated regulations that "prescrib[e] the choice of coiffure or beard," because citizens "unqualifiedly" have the right "to choose their mode of personal hair grooming within the great host of liberties protected by the Fourteenth Amendment from arbitrary state action."); Pergament, *It's Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 Chi.-Kent L. Rev. 41, 43-44, 48 (1999) ("Although hair is a physiological phenomenon, it is also a social one. Hair is an object of intense elaboration and preoccupation in almost all societies. Hairstyles and rituals surrounding hair care and adornment convey powerful messages about a person's beliefs, lifestyles, and commitments. Inferences and judgments about a person's morality, sexual orientation, political persuasion, religious sentiments and, in some cultures, socio-economic status can sometimes be surmised by seeing a particular hairstyle. . . . Totalitarian governments have used hair as a means of social control. In Nazi Germany, for example, forced 'hair taking' played an intrinsic role in the government's attempts at social control and domination of Jews."); *E. Hartford Ed. Association v. Board of Ed. of Town of E. Hartford*, 405 F. Supp. 94, 98-99 (D. Conn. 1975) (restrictions on hair—such as requiring "remov[al] [of] a beard" or

changing one's hair style—present a "significant invasion of personal choice and individual liberty"), *aff'd* 562 F.2d 838 (2d Cir. 1977).

Academic research aside, cultures across time and space have assigned value and meaning to hairstyles. Consider the literary examples focusing on hair—from Medusa, to the Gift of the Magi, to Rapunzel. Examples abound. "Sampson's locks symbolically signified his virility. Many of the Founding Fathers of this country wore wigs. President Lincoln grew a beard at the suggestion of a juvenile female admirer. Chief Justice Hughes' beard furnished the model for the frieze over the portico of the Supreme Court of the United States proclaiming 'equal justice under law.'" *Olff*, 404 U.S. at 1044 n.2 (Douglas, J., dissenting).

The majority seems to believe that how one chooses to style their hair is inconsequential and not as "fundamental" as the choice to obtain an abortion. As I have just demonstrated, this is patently untrue, as hair is widely regarded to be an intimate expression of inviolate personality and can have substantial societal and cultural significance. But even if we were to suppose that one's hairstyle is indeed a trivial and inconsequential choice, the right to "personal autonomy" afforded to Kansans would certainly be an "incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty." *Richards v. Thurston*, 424 F.2d 1281, 1284-85 (1st Cir. 1970) ("[W]ithin the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes.").

At this point, readers may wonder why I have spent pages discussing government regulation of hair growth, hair removal, and hair styling. It is because in this example—so familiar to every human being—that we find the raw essence of the majority's utter failure distilled to Marx's memorable phrase—the majority's section 1 jurisprudence manifests itself first as tragedy, and second as farce. Marx, *The Eighteenth Brumaire of Louis Bonaparte*, in Karl Marx: Selected Writings, p. 188 (Simon, ed., 1994).

Here we see with a clarity that is rare in the law what the majority stubbornly refuses to reckon with—the thing about *autonomy* is that it is *personal*. And there is no principle available in law to limn its boundaries. In that vacuum, the majority substitutes finger-wagging and manufactured outrage about how morally obtuse and insensitive it is to "compare" some people's expression of personal autonomy to others'. But this is a woefully inadequate foundation upon which to build a legal regime. Who are we to say that hair is not a deep and intimately personal expression of "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), *overruled by Dobbs*, 597 U.S. 215; see also *Lawrence v. Texas*, 539 U.S. 558, 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). Who are we to decide by fiat that one person's control of their own body is profound and protected while another's is silly and unprotected?

Unless and until, of course, the majority concedes that what it is actually doing is not constitutional law at all—but policy-making. Because this is precisely what the majority is doing, and in the process it is usurping the power of policy-making delegated by the people to their representatives in the political branches of government. To be crystal clear: *Hodes I* and *II* demand that once a law is found to impact a right sounding in personal autonomy, it is subject to strict scrutiny. Consequently, all regulations impacting those choices are subject to strict scrutiny under *Hodes I* and *II*. Thus, no matter how badly it offends the majority, under *Hodes I* and *II*, who trims my beard is *in fact* none of the government's business. By suggesting otherwise, the majority's reasoning is revealed in a flash—as was Hans Christian Anderson's fairy-tale emperor—to be an embarrassingly naked exercise in policy-making.

As fate has written things, this year's legislative session in Kansas provides an example of such policy-making in its purest form, concerning the politically charged subject of—yes—hair removal. Scant weeks ago, the Kansas Legislature passed a bill deregulating certain methods of hair removal, only to have it vetoed by Governor Laura Kelly. S.B. 434 (2024). In her veto message,

Governor Kelly explained that deregulation "could lead to safety and sanitation problems. We have a responsibility to protect Kansans—and this deregulation would threaten the health and safety of Kansans." *Governor Kelly Vetoes Bills, Allows One to Become Law Without Signature*, Kansas Office of the Governor (April 12, 2024). So, the fundamental right to personal autonomy—to have control over one's body—guarantees a woman's right to have an unborn child removed from her womb without government regulation, while hair removal "threaten[s] the long-term health and safety of Kansans" and must be regulated by the "expertise" of the Kansas Board of Cosmetology? *Governor Kelly Vetoes Bills, Allows One to Become Law Without Signature*, Kansas Office of the Governor (April 12, 2024). As a matter of policy, these choices may be defensible. As a matter of constitutional law, it is incoherent.

The Aftermath

"The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." *Baker v. Carr*, 369 U.S. 186, 267, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (Frankfurter, J., dissenting); see also *Casey*, 505 U.S. at 865 (without power from the purse or the sword, the authority of the judiciary instead lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the . . . law means and to declare what it demands"); The Federalist No. 78, at 465-66 (Hamilton) (Rossiter ed., 1961); Elliot, *Public Trust Is a Fragile Bond*, 77 Conn. B.J. 41, 42, 43 (2003) ("The fundamental source of judicial power and authority in the United States inevitably is the common consent of the American people that this country is best served by accepting a decision by a court as ending the dispute in which it is rendered. . . . That bond of trust between the people and their judiciary is the sealing wax of the rule of law, and it is all on which the judiciary can rely for the effectiveness of its ministry of justice.").

Today, we have squandered a goodly chunk of that authority. By pretending to *follow* the law while instead *rewriting* the law,

the majority eschews the core competency of constitutional judging—reason, neutrality, and a dedication to truth. It has rejected the obligation to put forth a "sincere effort[] to reason in terms of precepts that transcend the individual case and that are conscientiously seen as governing in all cases within their stated terms." Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. Pa. L. Rev. 907, 909, 929, 930 (1983). Instead, it has engaged in decision-making that simply "sugarcoat[s] an otherwise unpalatable decision," or worse—"obfuscat[es] the real meaning or effect of the decision"—thus "strip[ping] the judicial reasoning of its justificatory power within legal discourse and debas[ing] its stature as controlling authority in future cases." Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 Calif. L. Rev. 1619, 1622 n.12 (2007); see also *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) ("Confidence in a judge's use of reason underlies the public's trust in the judicial institution.").

The public "accept[s] the finality of a court decision because, and only because, it trusts that the results have been reached with impartiality, without prejudice, and in good faith," and this trust "reposed in the judiciary is a fragile thing." Elliot, 77 Conn. B.J. at 43. By "sacrificing reasoning for result," this court has "undercut its overall standing as a principled institution," and once Kansans realize we are "acting as an institution which caters to result-oriented popular demands," we will cease to "enjoy the confidence the public entrusts with [us] as a court of law." Reichman, 95 Cal. L. Rev. at 1629, 1667, n.210.

In short, "[m]aintaining public trust in the judiciary as an institution driven by legal principles rather than political concerns is a structural imperative. The rule of law depends upon it." *Wolfson v. Concannon*, 811 F.3d 1176, 1187-88 (9th Cir. 2016) (Berzon, J., concurring). Unfortunately for Kansans, today our state's high court has undermined its place as a respected institution grounded on legal principles, and risks losing whatever perceived legitimacy we once had. Because of today's decision, no Kansan "can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today." The Federalist No. 78, at 470. The "foundations of public and private

confidence" have been "sap[ped]," and "in its stead universal distrust and distress" will be sure to flower. The Federalist No. 78, at 470.

Conclusion

The majority has accused me of playing Chicken Little to "cataclysmic" effect. *Stanek*, 318 Kan. at 1011-12. Perhaps the majority ought to contemplate the fact that it was *Hodes I* that set this cataclysm in motion. A cataclysm that began by including a wide range of human behavior in the protections afforded by section 1, only to immediately strip those protections away from everyone not a member of the majority's favored class—pregnant women seeking abortions—upon discovering that when exercised by most people most of the time, personal autonomy is simply not "profound" enough to satisfy the majority's moral sense of worthiness. That this remains the only gauge by which such things might be judged is, perhaps, the worst cataclysm of all.

The questions posed by this dissent have been asked not because the future of the regulatory state hangs on their threads (though I suppose it might), but because they open the judicial accounting books and amply demonstrate that the *Hodes I* court's analysis is so far overdrawn as to have utterly bankrupted important judicial concepts and doctrines such as "fundamental rights." Just as pyramid-schemers move assets from place to place to stay one step ahead of creditors, legal auditors searching for fundamental rights in this court's jurisprudence are now confronted with a sophisticated shell game. Now you see them, now you don't.

I decline the majority's offered Hobson's choice—its invitation to perform an illusory analysis of which "activities" include "attributes" that are "profound and unique" and thus considered "fundamental" and "included" in the now watered-down right to personal autonomy. And when, in future cases, the majority chooses to turn a blind eye to government regulations it happens to favor—that is, to fail to extend the plain holdings of its abortion jurisprudence in *Hodes I* and *Hodes II*—we will know a game is afoot. It is a game Justice Sandra Day O'Connor recognized when she wrote that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises

in a case involving state regulation of abortion." *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 814, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (O'Connor, J., dissenting). Only this time, the game will be played in reverse. Having set precedent in the arena of abortion policy, we have already begun to nullify it in anticipation of its dictates proving too absurd and unworkable to apply.

In other words, as predicted in *Hodes I*, a legal regime of unrestricted access to abortion has become "the judicially preferred policy tail wagging the structure of government dog" and, as such, every rule and even judicial coherence and consistency will "give way, at every turn, to the favored policy." 309 Kan. at 778 (Stegall, J., dissenting).

I dissent.