

**In the Supreme Court of the State of Kansas**

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HODES & NAUSER, M.D.S, P.A., HERBERT C. HODES, M.D.,  
AND TRACI LYNN NAUSER, M.D.,

*Plaintiffs-Appellees,*

v.

DEREK SCHMIDT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE  
STATE OF KANSAS, AND STEPHEN M. HOWE, IN HIS OFFICIAL CAPACITY AS  
DISTRICT ATTORNEY FOR JOHNSON COUNTY,

*Defendants-Appellants.*

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Appeal from the District Court of Shawnee County  
Honorable Larry D. Hendricks, Judge  
District Court Case No. 2015-CV-490

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**BRIEF AMICI CURIAE OF THE  
CONSTITUTIONAL ACCOUNTABILITY CENTER AND THE  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS  
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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## INTEREST OF *AMICI CURIAE*

*Amicus* Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees.

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

CAC and the ACLU-KS have a strong interest in this case and the questions it raises about the scope of the Kansas Constitution's protection of substantive fundamental rights and whether the Kansas

Constitution protects substantive fundamental rights at least as strongly as the U.S. Constitution.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

S.B. 95 prohibits the most commonly used method of abortion after the first trimester and thus substantially burdens a woman's right to enjoy personal autonomy and bodily integrity. Kansas argues that this law does not violate Section 1 of the Kansas Constitution, which broadly guarantees that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," because Section 1 "was never intended to be a source for unenumerated, substantive rights." Response of Appellants to Appellees' Supplemental Br. at 4. This is wrong. Section 1 of the Kansas Constitution guarantees, at minimum, the full scope of liberty and equal dignity for all protected by the Fourteenth Amendment of the U.S. Constitution, and that protection includes a woman's right to get an abortion.

Section 1 of the Kansas Constitution's Bill of Rights and Section 1 of the Fourteenth Amendment share a common design: both were written to incorporate the principles of liberty and equality set forth in

the Declaration of Independence and thereby guarantee broad protection of substantive fundamental rights. Both guarantees therefore ensure that all persons enjoy the full promise of liberty and “equal dignity in the eyes of the law,” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015), in keeping with the principles spelled out in the Declaration of Independence.

Consistent with this history, this Court has affirmed for more than a century that the Kansas Constitution’s guarantee of equal and inalienable rights contained in Section 1 and of equal protection contained in Section 2 “are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.” *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22, 28 (2005) (quoting *Farley v. Englelken*, 241 Kan. 663, 667, 740 P.2d 1058, 1061 (1987)); *State v. Wilson*, 101 Kan. 789, 168 P. 679, 682 (1917); Respondent’s Supplemental Br. at 9 (collecting cases). Section 1 of the Kansas Constitution’s Bill of Rights has never been read, as the State now urges, to give the people of Kansas fewer rights than does the Fourteenth Amendment of the U.S. Constitution.

The State argues, and the dissenting opinion of the court below concluded, that the Kansas Constitution should not be interpreted to protect a woman’s right to choose abortion because “the language of § 1 of the Kansas Constitution Bill of Rights is not the same as the language of the Fourteenth Amendment.” *Hodes & Nauser, M.D.s v. Schmidt*, 52 Kan. App. 2d 274, 338-39, 368 P.3d 667, 703 (Kan. Ct. App. 2015) (Malone, J., dissenting); Appellants Supplemental Br. at 10-11. That may be true, but it is a distinction without a difference. As history shows, despite the different language chosen, both the Fourteenth Amendment of the U.S. Constitution and Section 1 of the Kansas Constitution’s Bill of Rights were designed to ensure broad protection of substantive fundamental rights—not limited to rights specifically enumerated elsewhere—in order to vindicate the Declaration’s promise of the full scope of liberty. In line with this text and history and this Court’s precedent giving the Kansas Constitution an interpretation coextensive with the Fourteenth Amendment, this Court should hold that the Kansas Constitution protects a woman’s right to choose abortion and strike down S.B. 95 as a violation of that right.

## ARGUMENT

### **THE TEXT AND HISTORY OF SECTION 1 OF THE KANSAS CONSTITUTION'S BILL OF RIGHTS AND SECTION 1 OF THE FOURTEENTH AMENDMENT PROTECT SUBSTANTIVE FUNDAMENTAL RIGHTS IN LINE WITH THE DECLARATION OF INDEPENDENCE.**

Section 1 of the Kansas Constitution provides that “[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” KS Const. § 1.

Adopted in 1859 in the wake of the events of Bleeding Kansas—a bitter and often bloody battle over whether Kansas would be organized as a slave state—the Framers of the Kansas Constitution turned to the immortal words of the Declaration of Independence to ensure that “the widest liberty is enjoyed” and “to secure to every individual perfect freedom to enjoy in safety and tranquility the rights and blessings of that existence,” calling the principles of liberty and equality inscribed in the Declaration “the political bible of every citizen of the United States.” *See Kansas Constitutional Convention: A Reprint of the Proceedings and Debates of the Convention Which Framed the Constitution of Kansas at Wyandotte in July 1859*, at 185, 186, 283 (1920). The authors of the Kansas Constitution recognized that “it was not until 1776, when that

memorable Declaration of ours came into existence, that the people cut loose from a narrow conception of humanity, and entered upon that broad field of human liberty.” *Id.* at 184.

Kansas’s decision to incorporate the language of the Declaration of Independence into its state constitution was a common one among the states. By 1868, “twenty-four of the thirty-seven state constitutions . . . contained provisions guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type.” Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 *Tex. L. Rev.* 1299, 1303 (2015); *id.* at 1306 & n.41 (citing the Kansas Constitution as one of these state constitutions). As history shows, from the Founding on, Americans wrote these fundamental principles of liberty into their own state constitutions, insisting that the Declaration’s principles were not merely aspirational, but stated substantive limitations on the power of government, which were critical to ensuring the full scope of liberty to the people. *See id.* at 1312-24. Inalienable rights guarantees, as the California Supreme Court observed in an 1857 ruling, were not “lightly incorporated . . . as one of

those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.” *Billings v. Hall*, 7 Cal. 1, 6 (1857).

The people of Kansas had good reason to turn to these foundational principles of liberty in writing the Kansas Constitution of 1859. In the mid-1850s, the Kansas territorial legislature passed a host of laws that violated basic principles of individual liberty to make Kansas hospitable to slavery. See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 32-33 (1986). The actions of the territorial legislature were such an affront to constitutional principles of liberty that the Republican Party platform of 1856 insisted that “the dearest Constitutional rights of the people of Kansas have been fraudulently and violently taken from them” and demanded “the maintenance of the principles promulgated in the Declaration of Independence,” calling them “essential to the preservation of our Republican institutions.” See American Presidency Project, *Republican Party Platform of 1856*, available at

<http://www.presidency.ucsb.edu/ws/?pid=29619>. In 1859, in the wake of the events of Bleeding Kansas, when the people of Kansas wrote a new State Constitution they demanded that the state be required to observe the principles at the Declaration's core, ensuring that the "widest liberty is enjoyed," *Kansas Constitutional Convention, supra*, at 185, by the people of Kansas.

Concerns about violations of substantive fundamental rights also motivated the Framers of the Fourteenth Amendment, who sought to enshrine the same substantive protections contained in the Declaration of Independence into the U.S. Constitution. Thus, less than a decade after the people of Kansas incorporated the Declaration of Independence into their State Constitution, the American people wrote the same principles into the U.S. Constitution, establishing broad protections of substantive fundamental rights and equality for all. Written in 1866 and ratified in 1868, the Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring), and to secure for the nation the "new birth of freedom" that President

Abraham Lincoln had promised at Gettysburg, *see* Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863). Central to that task was the protection of the full range of personal rights essential to liberty.

While the language chosen by the Framers of the Fourteenth Amendment differs from that contained in the Kansas Constitution, it was adopted for the same reason as Section 1 of the Kansas Bill of Rights: to enforce the Declaration’s promise of liberty and equality for all. Rather than incorporate directly into the Constitution the language of the Declaration—as the authors of the Kansas Constitution did—the Framers of the Fourteenth Amendment added to the U.S. Constitution overlapping guarantees of liberty and equality, forbidding any state from “mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States” or “depriv[ing] any person of life, liberty, or property, without due process of law” or “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

The original meaning of Section 1’s overlapping guarantees was to “forever disable” the states “from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the

United States, and to all persons who may happen to be within their jurisdiction.” Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). “The great object of the first section of th[e] amendment,” Senator Jacob Howard explained, is “to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.” *Id.* The Fourteenth Amendment wrote into the Constitution the idea that “[e]very human being in the country, black or white, man or woman . . . has a right to be protected in life, in property, and in liberty.” *Id.* at 1255. The principles at the heart of the Declaration were repeatedly cited as forming the core of the Fourteenth Amendment’s design. The Framers understood that “slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure.” *McDonald*, 561 U.S. at 807 (Thomas, J., concurring).

In the House debates, Representative Thaddeus Stevens quoted Section 1 of the Fourteenth Amendment and explained that its guarantees “are all asserted, in some form or another, in our DECLARATION or organic law.” Cong. Globe, 39th Cong., 1st Sess.

2459 (1866). Likewise Representative George Miller explained that the Due Process and Equal Protection Clauses are “so clearly within the spirit of the Declaration of Independence . . . that no member of this House can seriously object to it.” *Id.* at 2510. Others invoked the Declaration’s words, stressing that the Fourteenth Amendment’s guarantees of liberty and equality would help ensure the full promise of liberty and end state-sponsored discrimination. “How can he have and enjoy equal rights of ‘life, liberty, and the pursuit of happiness’ without ‘equal protection of the laws?’ This is so self-evident and just that no man . . . can fail to see and appreciate it.” *Id.* at 2539. In the Senate debates, Senator Luke Poland pointed out that the twin guarantees of due process and equal protection represented “the very spirit and inspiration of our system of government,” explaining that they were “essentially declared in the Declaration of Independence.” *Id.* at 2961.

Over the course of the debates in the 39th Congress, speakers time and again affirmed the Amendment’s roots in the Declaration. *See id.* at 1074 (“Our fathers started with a new doctrine and a new theory. They threw aside the postulates of aristocracy, and started out on the plan of instituting government to protect natural and personal rights.”);

*id.* at 1616 (discussing efforts for “the purpose of establishing liberty and equality on the principles of the Declaration of Independence”); *id.* at 1839 (urging “to build into law the doctrines of the Declaration of Independence”).

In short, the Fourteenth Amendment would be “the gem of the Constitution” because “it is the Declaration of Independence placed immutably and forever in our Constitution.” See Hon. Schuyler Colfax, “My Policy Revisited: Necessity of the Constitutional Amendment” (Aug. 7, 1866), *in Cincinnati Commercial*, Aug 9, 1866, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 14 (1866).

Thus, Section 1 of the Fourteenth Amendment was designed to incorporate the promises contained in the Declaration of Independence and guarantee the full scope of substantive fundamental rights and equality in line with the Declaration’s promise. Section 1 of the Kansas Constitution, which was also adopted to guarantee the Declaration’s promises to the people of Kansas and even used the same language contained in the Declaration, should be interpreted to provide protection for substantive fundamental rights that is at least as strong

as that provided by the Fourteenth Amendment. As this Court has long held, the Kansas Constitution’s affirmation of “equal and inalienable rights” is “given much the same effect as the clauses of the Fourteenth Amendment relating to due process of law and equal protection” and are “equally broad” in their protection. *See Wilson*, 168 P. at 682; Respondents Supplemental Br. at 9. Text, history, and court precedent therefore all point to one conclusion: the Kansas Constitution, at minimum, guarantees the protection of substantive fundamental rights to the same broad extent as the U.S. Constitution does, and thus necessarily protects a woman’s right to choose abortion.

The State makes two arguments to avoid this conclusion, urging this Court to hold that the Kansas Constitution offers less protection for individual rights than do analogous provisions of the U.S. Constitution. These arguments should fail.

First, the State makes much of the fact that the Kansas Constitution “is devoid of any reference to ‘due process,’” Appellants Supplemental Br. at 10, but it ignores that the Kansas Constitution broadly guarantees “equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” This language, quite

explicitly, protects “inalienable natural rights,” *i.e.*, substantive fundamental rights. The State’s argument that “Section 1 was never intended to provide positive rights or protection,” Appellants Supplemental Br. at 12, finds no support in the text of the Kansas Constitution, which is written in broad, sweeping terms and is designed, like the Fourteenth Amendment of the U.S. Constitution, to protect the full range of substantive fundamental rights—not limited to those enumerated elsewhere in the Constitution—including basic rights to liberty, personal dignity and autonomy, and bodily integrity at the core of the abortion right. *See Planned Parenthood v. Casey*, 505 U.S. 833, 851-53, 857 (1992).

Second, the State claims that the Kansas Constitution should not be interpreted to protect a woman’s right to choose abortion, observing that “abortion was illegal in Kansas at the time the constitution was ratified.” Appellants’ Supplemental Br. at 10-11. But the United States Supreme Court has time and again rejected such arguments, explaining that “there is a realm of personal liberty which the government may not enter.” *Casey*, 505 U.S. at 847. The Kansas Constitution contains a promise of liberty at least as strong as that provided by the Fourteenth

Amendment. The State’s crabbed view of liberty—which turns a blind eye to women’s rights to self-determination, equality, and bodily integrity—cannot be squared with the Kansas Constitution’s sweeping guarantee of “equal and inalienable natural rights” or its Framers’ design to ensure that “the widest liberty is enjoyed,” *Kansas Constitutional Convention, supra*, at 185.

### CONCLUSION

For the foregoing reasons, this Court should affirm the temporary injunction issued by the district court.

Respectfully submitted,

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## Certificate of Service

I hereby certify that copies of the foregoing Brief *Amici Curiae* of the Constitutional Accountability Center and the American Civil Liberties Union Foundation of Kansas in Support of Plaintiffs-Appellees and Affirmance was sent by electronic mail, per agreement of the parties, addressed to the following counsel, on September 27, 2016:

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