

IN THE SUPREME COURT OF THE STATE OF KANSAS

HODES & NAUSER, MDs, P.A.; 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. )  
 \_\_\_\_\_ )

Case No. 21-124130-S

MOTION TO STAY BRIEFING

Appellants Derek Schmidt and Stephen Howe move to stay all proceedings in this case until the August 2, 2022, election on the Value Them Both Amendment to the Kansas Constitution, which is now less than 10 months away.<sup>1</sup> If approved by the voters, the Value Them Both Amendment would provide that there is no state constitutional right to abortion, thus eliminating the legal basis for this suit.

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its own docket with economy of time and effort for itself, for counsel, and for litigants.” *Henry v. Stewart*, 203 Kan. 289,

<sup>1</sup> The Value Them Both Amendment was approved as 2021 House Concurrent Resolution 5003 (HCR 5003) by the two-thirds majorities of each house of the Legislature as required by Article 14 of the Kansas Constitution. See 2021 Journal of the Kansas Senate at 118 (January 28, 2021); 2021 Journal of the Kansas House at 106-07 (January 22, 2021). HCR 5003 provides for an August 2, 2022 special election to be held in conjunction with the 2022 primary election. HCR 5003, § 3.

292, 454 P.2d 7 (1969) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). Kansas courts frequently stay proceedings when a decision in another case might affect the outcome of the case before the court. *See, e.g., State v. Appleby*, 289 Kan. 1017, 1025-26, 221 P.3d 525 (2009) (noting that this Court stayed its decision until the resolution of two cases pending in the United States Supreme Court); *State v. Easley*, No. 116,204, 2018 WL 3320202 at \*1 (Kan. App. 2018) (noting that the Kansas Court of Appeals stayed briefing until cases pending in this Court were decided); *State v. Jones*, No. 117,597, 2018 WL 3077589 at \*2, (Kan. App. 2018) (unpublished) (noting that the parties agreed to stay the case in the district court to avoid “needlessly wasting the Court’s time and resources until the Kansas Supreme Court directly addresses the issue” in pending cases).

Similarly, a stay is appropriate here because the voters’ decision whether to adopt the Value Them Both Amendment could affect the outcome of this case. Plaintiffs’ claims in this lawsuit arise solely under the Kansas Constitution and are based on the “right of personal autonomy” first recognized on appeal from the temporary injunction in this case. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019); Petition, ¶¶ 43-58. If the Value Them Both Amendment is approved by the voters, the following new section would be added to the Kansas Constitution Bill of Rights:

§ 22. Regulation of abortion. Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not

limited to, laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother.

HCR 5003, § 1. The Value Them Both Amendment would therefore eliminate the entire legal basis for Plaintiffs' claims.

Proceeding with this appeal while a vote on the Value Them Both Amendment is pending risks needlessly wasting the time and resources of the parties and this Court. In addition, it is unlikely that this appeal will conclude before the August 2, 2022, election in any event. If the Value Them Both Amendment is adopted, any additional proceedings will have been for nothing. A stay of proceedings is in the interest of judicial economy and would allow the people of Kansas to express their will on this important constitutional question before potentially unnecessary litigation occurs.

Accordingly, Appellants move to stay all proceedings in this case until after the August 2, 2022, election.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2021, I electronically filed this document with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record. Courtesy copies were also sent via email to:

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