



**TESTIMONY OF LETITIA HARMON
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IN OPPOSITION TO HCR 5004
KANSAS HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS
MARCH 21, 2019**

Thank you, Chair Barker, and members of the Committee for affording us the opportunity to provide testimony on HB 5004.

The American Civil Liberties Union (ACLU) of Kansas is a non-partisan, non-political membership organization dedicated to preserving and strengthening the constitutional liberties afforded to every resident of Kansas. We work to preserve and strengthen our constitutional rights and freedoms through policy advocacy, litigation, and education. We proudly serve over 40,000 supporters in Kansas and represent more than 1.7 million supporters nationwide.

We urge you to oppose HCR 5004 as it is an unsound change to the constitution with far-reaching legal ramifications.

Religious belief cannot dictate constitutional law

Everyone has the right to their deeply held convictions and personal beliefs. Many of these beliefs and practices are consistent with a scientifically verifiable good to society. However, when such scientific and generalized good cannot be shown, legislation should not alter to accommodate a religious conviction that may not be held by all, yet will impact all.

We respect the beliefs of our fellow Kansans who believe that eating pork is wrong, but we should not pass legislation to criminalize the eating of bacon. We respect the beliefs of our fellow Kansans who believe in reincarnation, but we must not pass legislation to hold citizens responsible for what they did in a past life. We respect the beliefs of our fellow Kansans who believe that a fertilized egg is a life, but we must not pass legislation to grant personhood to a zygote. There is no scientific reason to justify any of these above deeply held convictions being written into policy. Not only is there a half century of law that precludes this, but it has far-reaching implications when applied to any statute that mentions a "person."

1. Interference with the Absolute Right to Refuse Treatment

First Amendment religious liberty requires that a competent adult may refuse medical treatment on religious grounds. Kansas law already extends this rule, for example, to parents refusing to provide medical care to their children based on religious objection. K.S.A. 2017 Supp. 38-2202(t)(3) ("A parent will not be considered neglectful for withholding "specified medical treatment" if the parent does so in the course of "legitimately practicing [his or her] religious beliefs.") But fetal personhood grants states blanket authority to intervene in a woman's medical decisions concerning her pregnancy and

childbirth over religious objection, including forced cesarian sections, etc. This presents significant problems for religious liberty in addition to straightforward bodily autonomy. Rather than protecting religious practice, this constitutional amendment would be directly contrary to it.

2. Obligation to Deliver Healthy Baby

Acknowledging the personhood of a fetus means that women who fail to carry a pregnancy through to a live birth or who injure a fetus even accidentally could be brought up on homicide charges. Getting into a car accident, attempting suicide, drug or alcohol use, taking medication that impacts the fetus, etc. would constitute manslaughter charges.

This treats women merely as a vessel for life and would expose them to criminal liability for any number of life circumstances that may impact a pregnancy. Beyond this, many normal activities, if they adversely affect a fetus, may be cause for criminal charges to be brought against a pregnant woman, such as lifting something heavy, getting out of bed when supposed to be on bed rest, etc.

Many women struggle with miscarriage as a naturally occurring phenomenon, but we have seen in other states that prosecutions for homicide result where fetal personhood is recognized. Nor is there any criminal defense under the law for protecting maternal life or other health that would block prosecution. This criminalizes behavior during pregnancy and creates an adverse relationship between mother and fetus.¹

However, the Kansas Supreme Court has made clear that state homicide statutes including crimes against persons should not be read to include harm to non-viable fetuses.²

"Based on the belief that he had an obligation to give a fetus a chance for life, a judge in Washington, D.C., ordered a critically ill 27-year-old woman who was 26 weeks pregnant to undergo a cesarean section, which he understood might kill her. Neither the woman nor her baby survived.

In Iowa, a pregnant woman who fell down a flight of stairs was reported to the police after seeking help at a hospital. She was arrested for "attempted fetal homicide."

In Utah, a woman gave birth to twins; one was stillborn. Health care providers believed that the stillbirth was the result of the woman's decision to delay having a cesarean. She was arrested on charges of fetal homicide.³

In Louisiana, a woman who went to the hospital for unexplained vaginal bleeding was locked up for over a year on charges of second-degree murder before medical records revealed she had suffered a miscarriage at 11 to 15 weeks of pregnancy."⁴

¹ Pregnant, and No Civil Rights, By Lynn M. Paltrow and Jeanne Flavin:

https://www.nytimes.com/2014/11/08/opinion/pregnant-and-no-civil-rights.html?_r=1

² See *State v. Trudell*, 243 Kan. 29, 37-39 (Kan. 1988) ("we hold the district court did not err in ruling that the term "human being" in K.S.A. 1987 Supp. 21-3405a does not include a fetus").

³ Marie Diamond, *Pregnant Women Who Lose Babies Face Criminal Charges in Mississippi, Alabama*, (July 1, 2011, 12:25 PM), <http://thinkprogress.org/justice/2011/07/01/256823/pregnant-women-criminal-charges/>.

⁴ See also Nat'l Advocates for Pregnant Women, *Truthout Covers NAPW and Our Cases*, June 2012 Archives, (June 15, 2012), <http://advocatesforpregnantwomen.org/blog/2012/06/>

3. Tort Claims by Non-Viable Fetuses

The Kansas Supreme Court has already found, with good reason, that non-viable fetuses cannot sue in damages for negligence. *Humes v. Clinton*, 246 Kan. 590, Syl. ¶¶ 1-2 (Kan. 1990) (“A nonviable fetus, incapable of independent life, is not a distinct entity; rather, its life is an integral part of its mother's life.” [...] No survival action may be maintained to recover for alleged pain and suffering of an unborn, nonviable fetus”).

This rule makes practical sense. One can only imagine the civil liability claims a non-viable fetus could raise. If there could actually be tort charges, they could be against doctors treating mothers for any number of care decisions, against mothers for healthcare decisions made while pregnant, and even against a mother for ordinary accidents such as falling down the stairs. Surely it would be absurd to grant a non-viable fetus such standing to sue.

Every woman who becomes pregnant struggles through mounds of information, social pressure and judgment, medical advice from multiple and occasionally dissenting providers, in an attempt to make sound decisions for herself and her future child. HCR 5004 potentially criminalizes her for decisions made in good faith and in an attempt to live her own life with agency and in good health.

We strongly urge you to oppose HCR 5004 on the grounds of unconstitutionality and incompatibility with Kansas' own statutes.

Other resources:

IMAGINING A BRAVE NEW WORLD: TOWARDS A NUANCED DISCOURSE OF FETAL PERSONHOOD, 35 *Women's Rights L. Rep.* 357

Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability Among Fetal Pain and Fetal Homicide Laws, 25 *Hastings Women's L.J.* 39