

No. 03-90198-S

**IN THE
SUPREME COURT OF THE
STATE OF KANSAS**

STATE OF KANSAS
Plaintiff-Appellee

vs.

JONATHAN D. CARR
Defendant-Appellant

APPELLANT'S REPLY BRIEF TO SUPPLEMENTAL BRIEF OF APPELLEE

Appeal from the District Court of Sedgwick County, Kansas
Honorable Paul Clark, Judge
District Court Case No. 00 CR 2979

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Argument

Reply argument I: Because the Kansas death penalty infringes on the fundamental right to life, strict scrutiny applies. And the State has abandoned any attempt to carry the burden of strict scrutiny.

Summary of Argument

The State’s supplemental brief ultimately acknowledges “[t]he plain language of Section One establishes a right to life, but that right is not absolute.” (Supplemental Brief of Appellee, 13.) The further arguments presented by the State do nothing to refute the point that the right to life “[a]lthough not absolute . . . 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.” *Hodes & Nausser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 614, 440 P.3d 461 (2019).

The State’s argument regarding “criminal processes” relies on a skewed take on 14th Amendment federal due process analysis, ignoring the textual and historical differences of §1, and this Court’s analysis in *Hodes*.

The State’s reliance on the *State v. Kleypas (Kleypas I)*, 272 Kan. 894, 1051-52, 40 P.3d 139 (2001) opinion’s rejection of §1 as an absolute bar on the death penalty misreads *Kleypas I*, *Hodes*, and Mr. Carr’s argument. Throughout its brief the State continually misframes Mr. Carr’s argument as requesting an absolute ban on the death penalty. Instead, Mr. Carr’s argument is that the rights protected by §1 are not an absolute bar on governmental action, but do require the government satisfy the demands of strict scrutiny when infringing such fundamental rights. Just as §1’s right to bodily integrity recognized in *Hodes* required strict scrutiny of S.B. 95, §1’s right to life requires

strict scrutiny of governmental action designed to infringe life.

Finally, the State has completely abandoned, and therefore waived, *any* attempt to carry the burden to show Kansas' death penalty is narrowly tailored to serve compelling governmental interests. The State has not even requested a remand hearing so it can try.

Because strict scrutiny applies, and the State abandoned any attempt to defend Kansas' death penalty under that standard, this Court now can – and indeed must – find the State failed to carry its burden to justify its infringement on Mr. Carr's §1 right to life. The Kansas death penalty is unconstitutional as applied to Mr. Carr.

1. The State's broad argument that fundamental rights cannot apply to "criminal processes" is based on language from the Federal Constitution that is not present in the Kansas Constitution. Strict scrutiny is the standard for infringement of fundamental rights by governmental action whether in criminal or civil law.

1.A: This Court should reject the State's argument to abandon independent construction of §1.

The State argues this Court should abandon the *Hodes* framework when it comes to "criminal processes" because *Chapman v. United States*, 500 U.S. 453, 464-65 (1991) – a case that addressed a 14th Amendment equal protection analysis of a purported "right to be free from deprivations of liberty as a result of arbitrary sentences" – applied a rational basis test. However, *Chapman*, and other cases citing *Chapman*, did not speak to Kansas' unique constitutional rights under §1 nor did they address the intent of Kansas' framers. See *Hodes*, 309 Kan. at 688 (Biles J., concurring) ("As both the majority and dissent point out, section 1 of the Kansas Constitution Bill of Rights differs from any federal counterpart, so the measure for deciding when its protections can be invoked does

not necessarily mirror federal caselaw.”) This Court should reject the State’s suggestion to overrule *Hodes*, and abandon its right to independently construe Kansas’ constitution.

Indeed, as the State argued to this Court in *Hodes*, “As a starting point, although some state constitutions contain declarations similar to the Declaration of Independence – as Kansas does in Section 1 – no state has a constitution identical in scope or history to Kansas.” (Response of Appellants to Appellees Supplemental Brief in *Hodes*, No. 114,153 at 9-10). Thus, “any sound analysis of the Kansas Constitution cannot come from observing the actions of other state courts under their unique and different constitutional texts and histories, but rather must be ‘based on the uniqueness of our state, our Constitution, and our longstanding jurisprudence.’” (Response of Appellants to Appellees Supplemental Brief in *Hodes*, No. 114,153 at 12 [internal quotation omitted].) In fact, in *Hodes*, the State requested this Court interpret §1 as distinct from the 14th Amendment and other State constitutions, based on Kansas’ unique constitutional text and history, which this Court thoroughly did. (Supplemental Brief of Appellants at 10-11; Response of Appellants to Appellees Supplemental Brief in *Hodes*, No. 114,153 at 12). See *Hodes*, 309 Kan. at 706 (2019) (Biles J., concurring) (“Both the majority and the dissent devote nearly 108 pages discussing historical lineage for those words.”). The State now does a complete about-face from its stance in *Hodes* and asks this Court to treat §1 identically to the 14th Amendment. But see *State v. Lawson*, 296 Kan. 1084, 1091–92, 297 P.3d 1164 (2013) (“allowing the federal courts to interpret the Kansas Constitution seems inconsistent with the notion of state sovereignty.”).

At the State’s urging or otherwise, *Hodes* did recognize §1’s textual and historical

distinction from the 14th Amendment. *Hodes*, 309 Kan. at 624-27. In particular, the 14th Amendment’s due process clause is entirely absent from §1, “In other words, the text of section 1 demonstrates an emphasis on substantive rights—not procedural rights.” *Hodes*, 309 Kan. at 627. Thus, §1 “describes rights that are broader than and distinct from those in the Fourteenth Amendment.” *Hodes*, 309 Kan. at 622.

That distinction is key because, in general terms, federal jurisprudence treats the procedural rights to due process for the taking of liberty as fulfilled upon a valid conviction, and there is no further substantive due process liberty interest regarding punishment. See, e.g., *Chapman*, 500 U.S. at 465. See also *Medina v. California*, 505 U.S. 437, 443 (1992) (noting that in criminal law the Court views the Due Process Clause as having limited impact beyond the specific enumerated rights). Indeed, federal case law historically considered a prisoner to be a “slave of the State” devoid of any rights. *Shaw v. Murphy*, 532 U.S. 223, 228 (2001); See also U.S. Const. amend. XIII (Banning slavery except as punishment for a crime). That is a notion that – as discussed later – Kansas’ founders expressly rejected. See Kan. Const. Bill of Rts. §6 (Banning slavery unconditionally, allowing only involuntary servitude as punishment for a crime duly convicted). Contrary to the State’s position, §1 – dealing with enumerated substantive rights, without distinguishing based on punishment or conviction status – provides something entirely different from federal due process.

This Court should reject the State’s argument, inconsistent with even its own argument in *Hodes*, to employ 14th Amendment framework to this issue, while ignoring the textual, and historical differences between the 14th Amendment and §1.

1.B: The State’s “sound reasoning”, detached from the language of the Kansas Constitution and its history, does no better.

Beyond asking this Court to simply apply the federal test, the State also argues that – disconnected from either the text or Kansas history – “sound reasoning” supports a rational basis test. (Supplemental Brief of Appellee, 7.) However, the State’s reasoning is contrary to *Hodes* and would functionally overrule that decision if adopted.

The State reasons that rational basis review is appropriate because Kansas’ death penalty is not an “immediate infringement” of the fundamental right to life. The State seems to argue that an infringement of a fundamental right need only satisfy rational basis so long as the rights violation is contingent on violating a criminal statute. Of course, if that were the case, *Hodes* would have applied a rational basis test as the infringement on the right to bodily autonomy would not actually occur until the doctors violated S.B. 95 – taking “some volitional action to violate a criminal statute.” (Supplemental Brief of Appellee, 7.) Indeed, *Hodes* is clearly about the impact of criminalizing medical practices through S.B. 95, without a requirement of immediate infringement, or even a specific degree of infringement. See *Hodes*, 309 Kan. at 669, (“once a plaintiff proves an infringement—regardless of degree—the government’s action is presumed unconstitutional.”). Obviously, no one was arguing it was inherently the doctors’ rights to perform those specific medical procedures. See, e.g., *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 618, 576 P.2d 221 (1978) (practice of medicine not a fundamental interest under Constitution; therefore, traditional rational relationship test applied). The infringement of fundamental natural rights was established by the impact of

criminalizing those medical procedures, not because the doctors had a specific right to perform the medical procedures. *Hodes*, 309 Kan. at 672. The State’s “sound reasoning” would functionally overrule *Hodes*.

The State also argues that because punishment and the criminal statutes are “inextricably intertwined” no punishment can infringe a fundamental right unless the criminal statute first infringes a fundamental right. (Supplemental Brief of Appellee, 7.) That argument is nonsensical.¹ If punishment and the criminal statute are inextricably intertwined, then it makes no sense to treat infringements of rights differently if they come through the statute prohibiting the conduct or the statute imposing the punishment. Further, *Hodes* speaks more generally of “governmental action” violating a fundamental right, without the limitations the State now seeks to put in place. *Hodes*, 309 Kan. at 672. A governmental action can occur in many forms, criminalizing protected behavior, violating the right to life, etc. It’s the action, and the impact, not the form that is clearly important in *Hodes* and in §1. This Court should reject the State’s “sound reasoning” arguments.

1.C: *Hodes* was a case involving criminal law and criminal processes.

The State additionally attempts to avoid the idea that the rights in §1 are fundamental rights, as explained in *Hodes*, by arguing that the opinion did not

¹ The State’s argument is also premised on the terrifying concept that the legislature is free to use criminal law to circumvent all fundamental rights. For example, the State appears to argue that the §1 fundamental right to life may be voided by the legislature as a consequence of any crime, so long as the legislature has a rational basis to do so. Likewise, the State’s argument hinges on the idea that those convicted of crimes may have any fundamental rights violated so long as the legislature deems it so. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (Forced sterilization of criminals).

specifically address the death penalty and does not apply to “criminal processes.” (Supplemental Brief of Appellee, 5-6.) This is incorrect. *Hodes* addressed the constitutionality of S.B. 95 a law that, *inter alia*, criminalized certain medical procedures. 309 Kan. at 672. Likewise, *Hodes* relied upon several criminal cases in discussing its framework without making a civil/criminal distinction. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 395 (1992); *Roe v. Wade*, 410 U.S. 113, 154-55 (1973) (invalidating criminal law forbidding abortion except to save mother's life); *State v. Limon*, 280 Kan. 275, 284, 122 P.3d 22 (2005); *State v. Ryce*, 303 Kan. 899, 957, 368 P.3d 342 (2016); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (discussed in concurring opinion). The *Hodes* opinion even at times spoke about rights being infringed using criminal terms. See *Hodes*, 309 Kan. at 672 (“Imprisonment, for example, obviously impairs the right to liberty.”).

Contrary to the State’s argument, *Hodes* was largely about the impact of criminal processes on fundamental rights. Mr. Carr now argues that same framework simply extends to the explicit, and fundamental, right to life protected by §1.

1.D: While this is not a right to liberty case, examining the treatment of the right to liberty reinforces the unique and fundamental position of the right to life.

The State’s argument is also a straw man attack, focusing more on the right to liberty than the right to life and attempting to lump the two rights together. (Supplemental Brief of Appellee, 6-8, 10.) The State claims all criminal sentences could be subject to a “‘right to life’ or ‘right to liberty’ challenge.” (Supplemental Brief of Appellee, 10.) Of course, only criminal sentences involving the State killing a person would seem to be

subject to a right to life challenge, and liberty is not at issue in this case. Were liberty actually at issue, the State would almost certainly differentiate the rights to life and liberty. The State would also likely argue that liberty is an ambiguous term with more limited impact than the straw man it has set up here. See, *e.g.*, Webster's American Dictionary of the English Language (1828) (Defining ten different types of “Liberty”).

While the right to liberty is not at issue in this case—and this Court should reserve that §1 analysis for a case where it *is* at issue—its treatment, both in *Hodes* and in the history and text of the Kansas Constitution, even further supports the unique position of the right to life.

In *Hodes*, this Court indicated that imprisonment does infringe upon the right to liberty, and should therefore trigger the same fundamental rights analysis. See *Hodes*, 309 Kan. at 672. Because *Hodes* acknowledged that strict scrutiny applies to the liberty right, it has necessarily also acknowledged that it would not be an overly burdensome task to apply it to that right. See, *e.g.*, Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U.L. Rev. 781, 822-849 (1994) (discussing impact of strict scrutiny on imprisonment); See also *Johnson v. California*, 543 U.S. 499, 515 (2005) (“The fact that strict scrutiny applies ‘says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.’”).

As to our Kansas Constitutional history and text, limiting the legislature’s ability to punish was clearly on the minds of some of the founders, as William Hutchinson—who chaired the “Preamble and Bill of Rights” Committee of the Wyandotte Constitutional

Convention—explained in his committee report:

“If we examine the history of the criminal records of the past, we shall find the fact staring us in the face, that wherever the most restrictive laws have been passed, there the most crime has been committed. Crimes have multiplied in proportion to the stringency and restrictiveness of laws.” Proceedings and Debates of the Kansas Constitutional Convention (Drapier ed., 1859), reprinted in *Kansas Constitutional Convention 185* (1920) (hereinafter “Convention”).

Further discussion of the liberty right also illustrates that, while there may be textual grounds to limit the understanding of “liberty” under §1, those grounds do not apply to the right to life. Particularly, §6 of the Kansas Bill of Rights provides a distinct framework for understanding the framers’ views on the interactions of liberty, punishment, and due process of law, stating:

“There shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted.”

That declaration begins by recognizing an absolute ban on slavery, even as punishment for crime. See Green, *Duly Convicted: The Thirteenth Amendment As Procedural Due Process*, 15 *Geo. J.L. & Pub. Pol’y* 73, 79 (2017) (Recognizing Kansas’ constitution as one of the few categorically banning slavery, unlike the 13th Amendment). Thus, the Kansas framers recognized that even those punished for crimes are not slaves of the State devoid of any fundamental rights, and are not owned by the State. cf. *Shaw v. Murphy*, 532 U.S. 223, 228 (2001); *Ruffin v. Cmmw.*, 62 Va. 790, 796 (1871) (Such slaves to the state are “civilly dead”). Rather, in §6, the framers only provided for punishment up to the conditions of involuntary servitude, a framework akin to the prisoner being forced into labor until they have satisfied their debt. See Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 *Seattle U.L. Rev.* 869, 883

(2012); *Bailey v. Alabama*, 219 U.S. 219, 242-43 (1911) (describing peonage systems). A full analysis of the distinctions between the rights retained by those subjected to involuntary servitude, and the complete forfeiture of rights that was slavery, is beyond the scope of this issue. Suffice to say, the framers rejected the concept that all rights can be forfeited as punishment for crime, as would be the case with slavery, and, instead, recognized a limited forfeiture of liberty rights, *i.e.* involuntary servitude, *aka* hard labor, as punishment for crime.

Under §6, punishment is also contingent upon being “duly convicted” a term that was, at the time, used synonymously with due process of law. Green, *Duly Convicted*, 15 Geo. J.L. & Pub. Pol'y at 90-96. Thus, §6 is the only point in the Kansas Constitution in which the framers spoke about what punishments can be lawfully inflicted once the requirements of due process are satisfied. Those punishments are specifically a deprivation of liberty, but not a deprivation of life.

The State’s argument largely comes down to asking this Court to add a clause into §1 that says our fundamental rights apply “except for the punishment of crime, whereof the party shall have been duly convicted.” The framers discussed adding similar language, but ultimately did not. *Convention* at 273, 275-76, 282. While they included language in §6 dealing with the infringement of liberty rights, our framers chose to leave the right to life “inalienable”. In as much as the State sets up a straw man argument involving the right to liberty, there may be textual grounds to limit the understanding of the liberty right in §1. However, when it comes to the right to life, the limiting language that the State is asking this Court to read into §1 is simply not there.

1.F: Conviction status does not change §1’s application of substantive rights.

In sum, contrary to the State’s argument, §1 plainly does not distinguish between violations of fundamental rights stemming from criminal law and violations stemming from other governmental actions. Accordingly, the State is prohibited from restricting the right to life “unless it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest.” *Hodes*, 309 Kan. at 614.

2: The State’s reliance on *Kleypas I* and §9 is misplaced.

2.A: There is no conflict between *Hodes*, *Kleypas I*, and Mr. Carr’s current argument.

The State also argues that the application of strict scrutiny to the right to life is cut off by *Kleypas I*’s recognition that the right to life in §1 is not an absolute bar on the death penalty. 272 Kan. at 1051-52. But Mr. Carr has never argued an absolute bar. Instead, as Mr. Carr argued in his motion requesting supplemental briefing on this issue, the *Hodes* framework and *Kleypas I*’s holding work in conjunction. In *Kleypas I*, 272 Kan. at 1051, this Court rejected the defendant’s argument that §1 conferred an *absolute* right to life, meaning that no person could be put to death *ever*. *Hodes* subsequently provided needed clarity of this issue, recognizing that the rights protected by §1 “[a]lthough not absolute . . . [are] fundamental” and the State must satisfy strict scrutiny to justify their infringement. *Hodes*, 309 Kan. at 614. Thus, infringement of a fundamental right, though not per se barred by §1, still requires that the State meet the demands of strict scrutiny. *Hodes* and *Kleypas I* are not in conflict, *Hodes* simply reveals the analytical distinction that was missing in the *Kleypas I* argument.

Contrary to the State's assertion that Mr. Carr is arguing for an absolute bar on the death penalty, Mr. Carr instead argues that, under the *Hodes* framework, the death penalty could be constitutional so long as the State satisfied the burden of strict scrutiny. Mr. Carr argues only that Kansas' current death penalty process cannot satisfy strict scrutiny, not that Kansas has never met that standard in the past, or that a new process could never meet that standard. This argument is consistent with the holdings in *Kleypas I* and *Hodes*, as well as the plain language of §1, the framers' intent, and the constitutional history.

2.B: The State asks this Court to interpret one phrase in the Kansas Constitution in order to provide a governmental right to kill.

The State further argues that the singular reference to "capital offenses" in the bail provision of §9 functions to essentially guarantee a governmental right to the death penalty. But see, *Kleypas I*, 272 Kan. at 1048 (declining to view §9 as imposing constitutional stature on the death penalty); *State v. Peeler*, 321 Conn. 375, 411, 140 A.3d 811 (2016) (Palmer, J. concurring) (Noting an express reference to capital punishment in a state constitution "implies at most that the death penalty is not unconstitutional per se, at all times and under all circumstances."). That argument is relevant only as a response to an argument that the death penalty is categorically impermissible, which Mr. Carr does not argue.

Finally, the State does not ask this Court to actually construe multiple constitutional provisions together. Instead, the State asks this Court to only construe the Kansas Constitution in light of the sole reference to capital offenses. The State ignores all

other constitutional provisions as discussed in Mr. Carr’s brief, including other references to due process rights and punishment.² This Court should reject the State’s request to construe §9 out of context in order to guarantee a governmental right to kill.

2.C: The right to life is not absolute, but it is fundamental.

As the State’s brief ultimately concedes, “The plain language of Section One establishes a right to life, but that right is not absolute.” (Supplemental Brief of Appellee, 13.) The further arguments presented in the State’s brief do nothing to refute the point that, like other rights protected by § 1 of the Kansas Constitution Bill of Rights, the right to life “[a]lthough not absolute . . . 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.” *Hodes*, 309 Kan. at 614.

3: The State has waived any argument that it can meet strict scrutiny. They did not brief it. They did not request remand. They did not even try.

Having established that the infringement of the right to life triggers strict scrutiny analysis, this Court would normally move on to consider whether the State can carry its burden to show that Kansas’ death penalty is narrowly tailored to serve a compelling government interest. However, rather than even attempt to carry that burden the State has chosen simply not to brief the issue, abandoning, and therefore waiving, *any* attempt to

² At one point, the State also seems to engage in a brief discussion of original intent while claiming “The founders did not intend for the right to be so broad as to invalidate the death penalty, which was established by law and in practice at the time of the Convention.” (Supplemental Brief of Appellee, 13.) As a matter of history the State’s claim is dubious because while there were some capital offenses on the books during territorial times (most prominently in the slave code installed by the bogus legislature) there is no history of any executions occurring under territorial law. Barry, *Legal Hangings in Kansas*, *Kansas Historical Quarterly*, 279, 281 (Aug. 1950); Hougen, *The De Facto Abolition of Capital Punishment in Kansas, 1872*, *Law in the West* 73, 73 n.2 (1985). The State posits a “practice” that did not occur.

assert that the State can carry the burden to show Kansas' death penalty is narrowly tailored to serve compelling governmental interests. The State does not even request remand for an evidentiary hearing to *try*. See, e.g., *State v. Williams*, 298 Kan. 1075, 1083, 319 P.3d 528 (2014) (Arguments not briefed deemed waived and abandoned). The outrageous implication of this abandonment of any attempt to shoulder its burden is that the State's officers – the prosecutors seeking to execute Mr. Carr – do not believe there is a colorable argument that our death penalty is narrowly tailored to serve any compelling governmental interest. As a corollary, the State, in seeking to impose the death penalty and end human life, appears to believe that the State's death penalty can only survive the lowest tier of judicial review applicable to any governmental action.

Thus, because strict scrutiny applies, and the State has abandoned any attempt to defend Kansas' death penalty under that standard, this Court now can – and indeed must – find the State has failed to carry its burden to justify its infringement on Mr. Carr's §1 right to life. As applied to Mr. Carr, the Kansas death penalty is unconstitutional.

Reply argument II: The Kansas death penalty cannot survive rational basis review.

Finally, the State's arguments regarding rational basis review do not hold water. The State's argument that *Kleypas I* somehow controls the issue is nonsensical as *Kleypas I* did not perform any rational basis review. Regarding incapacitation, the State relies on a footnote from *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) about incapacitation, while ignoring the text of the opinion limiting the governmental interests to deterrence and retribution. Regarding those interests, the State's brief does little to refute the total lack of evidence to support either purpose, and mostly just treats the

matters as open questions subject to legislative deference. (Supplemental Brief of Appellee, 19-21.) Regarding the arbitrary and discriminatory nature of Kansas' death penalty, the State does not refute the fact that Kansas' death penalty has discriminatory impacts, but rather treats that as acceptable. But see *State v. Gregory*, 192 Wash. 2d 1, 5, 427 P.3d 621 (2018) (arbitrary and discriminatory death penalty failed to serve legitimate penological goals); *State v. Santiago*, 318 Conn. 1, 119, 122 A.3d 1 (2015) (Finding State's death penalty no longer contributed to legitimate penological goals as applied). Ultimately, the State's arguments make it clear that Kansas' death penalty cannot survive even a rational basis review, let alone rational basis with bite, which the State entirely fails to address.

Near the conclusion of his initial brief, Mr. Carr recognized that if rational basis review is necessary, he had the burden to present evidence. He therefore requested remand for an evidentiary hearing for that eventuality. The State's brief presents no opposition to that request for a remand hearing. Thus, if rational basis is the standard to apply, remand for an evidentiary hearing is appropriate.

Conclusion

The State's arguments do nothing to refute the point that the right to life is a fundamental right expressly protected by §1. As such, strict scrutiny is appropriate when reviewing the State's scheme to infringe that right by killing people. Because the State fails to even try to carry the burden of strict scrutiny, however, this Court must find that the Kansas death penalty is unconstitutional under §1.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that this reply brief was e-mailed to Boyd Isherwood, Sedgwick County District Attorney's Office, appeals@sedgwick.gov; and Derek Schmidt, Attorney General, ksagappealsoffice@ag.ks.gov on the 7th day of November, 2019.

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