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**IN THE DISTRICT COURT**  
**— SEDGWICK COUNTY, KANSAS —**

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**STATE OF KANSAS,**

**Plaintiff,**

v.

**CASE NO. 07 CR 2112**

**GEORGE R. TILLER,**

**Defendant.**

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**Reply To The Defendant's  
Amended Motion To Dismiss**

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The Kansas Legislature, through statute, has expressed a profound interest in protecting potential life. It chose to demonstrate that interest by requiring an unbiased second opinion on the extent of the injury a woman would suffer by carrying a pregnancy to term. To be sure, when facing a serious illness, many Kansans will obtain a second opinion as a matter of course. Requiring such an opinion from an unbiased physician before allowing the termination of a viable fetus does not unduly burden a woman's right to choose. To the contrary, it is a rational choice by the Legislature to ensure that one physician – acting alone or in concert with others – may not unilaterally evade the statute's restrictions.

The statute at issue is constitutional. The Defendant's Motion to Dismiss should be denied, and this matter should be set for trial.

APPEARS NOW the State of Kansas, by and through Paul J. Morrison, Attorney General,  
Stephen R. McAllister, Solicitor General, Jared S. Maag, Deputy Solicitor General, and Veronica

Dersch, Assistant Attorney General, and in reply to the defendant's Amended Motion to Dismiss, submit the following:

(1) Defendant has moved for dismissal of the above-titled action on the grounds that (A) K.S.A. 65-6703(a) is unconstitutional, and (B) the State's prosecution is based upon an interpretation of the statute that is contrary to its plain language. Def. Mot., 1. Neither argument has merit. Thus, Defendant's motion should be denied and this case permitted to proceed accordingly.

(2) Defendant mounts both a facial and an as applied challenge to the statute in question. K.S.A. 65-6703(a) reads as follows:

"No person shall perform or induce an abortion when the fetus 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 the abortion and both physicians determine 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 impairment of a major bodily function of the pregnant woman."

Thus, the only abortions at issue here are those involving a viable fetus, i.e. those that could survive outside the womb.

#### A Second Physician Requirement Is Constitutional

(3) Defendant's first argument is that the statute is unconstitutional simply because it requires the concurrence of more than one physician in order to perform a post-viability abortion.

Defendant's motion to dismiss, however, conflates various constitutional claims and standards in arguing that the statute should be invalidated. Fundamentally, Defendant fails to articulate and address the constitutional review standard established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and further refined and developed very recently in *Gonzales v. Carhart*, 127 S.Ct. 1610 (Apr. 18, 2007), the latter a case in which the

Supreme Court upheld the constitutionality of a federal partial-birth abortion ban that precludes doctors from utilizing altogether a particular method for late-term abortions. Indeed, it is critical to this Court’s evaluation of Defendant’s claims that the proper constitutional standard be identified at the outset.

(4) In *Casey*, the Supreme Court abandoned the formalistic trimester framework of *Roe v. Wade*, 410 U.S. 113 (1973), in favor of an undue burden standard that provides a more “appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.” *Casey*, 505 U.S. at 876. Under the “undue burden” formulation, a state’s regulation of pre-viability abortions survives constitutional attack unless it places a “substantial obstacle” in the path of a woman seeking an abortion. *Id.* at 877. Thus, for pre-viability abortions, the standard for judging the constitutionality of any particular regulation is whether the statute imposes an undue burden on a woman’s access to an abortion.<sup>1</sup>

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As stated above, the *Casey* Court rejected the strict scrutiny analysis applied in post-*Roe* decisions in favor of the undue burden test. 505 U.S. at 871. The language in *Casey* strongly suggests that the undue burden analysis applies *only* in the pre-viability context. *Id.* at 878 (“[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion *before the fetus attains viability.*”) (emphasis supplied). *Casey* is less clear, however, on what standard applies post-viability, though it is clear the standard is probably a lower one than “undue burden.” There has been some confusion in the federal courts regarding the standard for post-viability abortion regulations. *See e.g., Women’s Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997) (recognizing lack of authority as to whether *Casey* analysis applies to post-viability challenges); *cf. Jane L. v. Bangerter*, 102 F.3d 1112, 1115-18 (10<sup>th</sup> Cir. 1996) (applying *Casey* to post-viability regulation).

In its most recent abortion decision, the United States Supreme Court again failed to clarify whether a lesser standard applies when evaluating a challenge to a post-viability regulation, in that case a congressional ban on post-viability use of the D&X procedure. *Gonzales v. Carhart*, 127 S.Ct. 1610, 1632 (Apr. 18, 2007) (“Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional ‘if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’” [internal citation omitted]. Essentially, it appears that the Supreme Court concluded the regulation at issue in *Gonzalez* satisfied the undue burden standard, even though it involved post-viability procedures. The same is true in this case.

(5) *Casey* is important not only for endorsing the “undue burden” standard, but also for its reaffirmation of the State’s strong interest in regulating post-viability abortions. Indeed, the Court in *Casey* lamented and corrected the Court’s occasional failure to recognize fully the “State’s ‘important and legitimate interest in potential life’” in cases subsequent to *Roe*. 505 U.S. 871 (citing *Roe*, 410 U.S. at 163). The Court in *Casey* went so far as to overrule both *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), as cases in which the Court itself had failed to accord sufficient weight to the State’s interest in potential life.

Thus, *Casey* and *Gonzalez* make clear that the State has substantial and, in some instances, paramount interests in protecting and preserving human life, especially once the point of viability is reached. Defendant, however, does his utmost in his motion both to ignore and to undervalue the Court’s fundamental holdings in both *Casey* and *Gonzalez*. In reality, *Roe v. Wade* is not even the starting point anymore for constitutional analysis of abortion regulations, and it certainly is not the ending point. Indeed, all cases striking down abortion regulations prior to *Casey* are potentially unreliable precedents, and Defendant’s reliance on such decisions merits very careful attention. Fundamentally, Defendant’s motion ignores the critical cases—*Casey* and *Gonzalez*—that control the outcome in this case.

(6) In *Gonzales v. Carhart*, the Court considered whether the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (18 U.S.C. 1531 (Supp. III 2003)) was facially invalid. 127 S.Ct. at 1619. Writing for the majority, Justice Kennedy framed the question as follows: “. . . we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.” *Id.* at 1627. In answering that question in the

affirmative, the Court emphasized, arguably even more so than in *Casey*, the State’s paramount interest in regulating post-viability abortions, declaring that “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman.” *Id.* at 1633.

Further, the Court held that:

“Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”

*Id.*

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“The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.”

*Id.* at 1634.

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“Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.”

*Id.* at 1638.

(7) Thus, in light of *Gonzalez*, the questions presented in this case are whether the two physician requirement under K.S.A. 65-6703(a) has a rational basis and whether it places a

“substantial obstacle” in the path of a woman seeking an abortion?<sup>2</sup> Clearly, the statute has any number of rational justifications and, as explained more fully below, the two physician requirement does not impose a “substantial obstacle” for a woman seeking an abortion. Simply put, the Kansas statute readily survives any appropriate level of constitutional scrutiny.

(8) Defendant relies heavily upon cases that predate *Casey* and *Gonzales* to support his position that the referring physician requirement runs afoul of the Constitution. Indeed, he boldly asserts that “every challenge to state laws requiring concurring or referring physicians has been sustained,” Def. Mot., 2 (emphasis supplied), a contention that is demonstrably false.

Instead, at least one federal court has upheld a physician concurrence requirement against constitutional challenge, and other cases certainly suggest that requiring the concurrence of a single physician could be constitutional. For example, in *Doe v. Deschamps*, 461 F.Supp. 682 (D.Mont. 1976), the Court addressed various challenges to the Montana Abortion Control Act, including a challenge to a requirement of physician concurrence for late term abortions. *Id.* at 687. Under Montana’s law, post-viability abortions were prohibited unless the physician determined that the abortion was necessary to preserve the life or health of the mother. Additionally, two other licensed physicians were required to examine the patient and concur in writing with the judgment of the physician performing the abortion. *Id.*

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The Court in *Gonzales* criticized the use of facial challenges to abortion legislation, finding that the “proper means to consider exceptions is by as-applied challenge.” 127 S.Ct. at 1638. The Court recognized, but chose to avoid, the controversy that exists regarding the burden imposed on those who seek to invalidate abortion regulations, *see United States v. Salerno*, 481 U.S. 739 (1987) (“no set of circumstances test”) versus, *Casey*, 505 U.S. at 895 (“large fraction test”), opting to apply *Casey*’s “large fraction” test. *Gonzales*, 127 S.Ct. at 1639. There is significant debate as to whether the *Salerno* test survived the *Casey* decision and its application of the “large fraction” test. *See e.g., Cincinnati Women’s Services, Inc. v. Taft*, 468 F.3d 361, 367-369 (6<sup>th</sup> Cir. 2006) (noting that every circuit but one has utilized *Casey*’s test rather than *Salerno*’s more restrictive “no set of circumstances test”).

The court upheld the Montana regulation. In so doing, the court acknowledged that the Supreme Court’s decision in *Doe v. Bolton*, 410 U.S. 113 (1973), the companion case to *Roe*, “[s]tanding alone . . . suggests that any requirement for the concurrence of additional physicians would be invalid.” *Deschamps*, 461 F.Supp. at 688. The court, however, correctly recognized that *Bolton* does not stand alone, and when read in conjunction with *Roe* and its reasoning, the court concluded that Montana’s regulation was permissible. That conclusion is even more correct in light of *Casey* and *Gonzalez*, the reasoning of which the court essentially foreshadowed, when it declared:

Up to the point of fetal viability the abortion decision must be left to the pregnant woman and her attending physician with but the minimal kind of State regulation approved in this opinion. After the fetus becomes viable, however, the emphasis switches, and the concern is for the preservation of the ‘potentiality of life’ compatible with the health of the mother. ‘State regulation protective of fetal life after viability thus has both logical and biological justifications.’ *Roe*, 410 U.S. at 163. The will of the woman and her physician are no longer of primary consideration. Medical judgments may vary greatly in this complex area, and the State may properly require more than the opinion of the woman’s attending physician to insure that the potentiality of life is not destroyed.

*Id.* at 688.

(9) Thus, contrary to Defendant’s assertion, not every challenge to a state law requiring a concurring physician has succeeded.<sup>3</sup> Moreover, the *Deschamps* court’s reasoning tracks the Supreme Court’s eventual and most recent decision in *Gonzales*, which stressed that “[u]nder [our] precedents it is clear the State has a significant role to play in regulating the medical profession.”

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The Montana statute remains in effect today. Under Mont. Code Ann. § 50-20-109(2), a post-viability abortion “may be performed only to preserve the life or health of the mother and only if: (a) the judgment of the physician who is to perform the abortion is first certified in writing by the physician, setting forth in detail the facts relied upon in making the judgment; and (b) two other licensed physicians have first examined the patient and concurred in writing with the judgment. The certification and concurrence in this subsection [ ] are not required if a licensed physician certifies that the abortion is necessary to preserve the life of the mother.”

*Gonzales*, 127 S.Ct. at 1633. Indeed, the Kansas law’s requirement of a second physician referral for post-viability abortions fits firmly within those regulations deemed constitutional.

(10) *Bolton* does not bear the weight that Defendant attempts to place upon it. First, *Bolton* involved a law that applied both to pre- and post-viability abortions. The Kansas law, by stark contrast, addresses only post-viability abortions — a circumstance in which the State’s interests are obviously at their greatest. Second, *Bolton* was decided two decades before *Casey* and almost three-and-a-half decades before *Gonzalez*, both of which significantly altered abortion jurisprudence.

Lastly, the *Bolton* majority relied on reasoning—that the Georgia statute at issue treated abortion differently from other medical procedures, 410 U.S., at 199—which the Supreme Court has long since repudiated. Indeed, as a general matter, Defendant’s motion to dismiss relies heavily on that discredited rationale in challenging the Kansas law on substantive due process, equal protection and right to travel grounds. *See, e.g.*, Def. Mot., 3 (comparing the statute at issue here to the Kansas statute regarding “do not resuscitate” orders, K.S.A. 65-4944). Equating post-viability abortions to any other medical procedure is simply untenable. Like the imposition of the death penalty, abortion is simply a situation that the Supreme Court long has recognized is unique. *See, e.g., Harris v. McRae*, 448 U.S. 297, 325 (1980) (“Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.”); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (“The simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life.”); *see also, City of Akron*, 462 U.S. at 464 (O’Connor, J., dissenting) (remarking that the Court has “expressly rejected the view that differential treatment of abortion requires invalidation of regulations.”).

(11) Likewise, the district court decision in *Women’s Medical Professional Corp. v. Voinovich*, 911 F.Supp. 1051 (1995), *aff’d* 130 F.3d 187 (6<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998), offers little support to Defendant, because that court based its opinion entirely upon *Bolton*, which suffers from all of the significant flaws just identified.<sup>4</sup>

(12) For the same reasons, Defendant’s insistence that *Wynn v. Scott*, 449 F.Supp. 1302 (N.D.Ill. 1978), controls is wrong. Indeed, the *Wynn* court recognized a difference between pre- and post-viability regulations, and that Illinois’ burden in justifying a post-viability regulation was lesser. More importantly, *Wynn*, like so many of the cases on which Defendant relies, was decided prior to both *Casey* and *Gonzales*. Consequently, the *Wynn* court invoked a constitutional standard no longer valid. Indeed, it appears likely, if not certain, that the Illinois law at issue in *Wynn* would be upheld in light of *Casey* and *Gonzalez*.

(13) Defendant further suggests that the Kansas referral requirement “forces a trade-off between maternal health and fetal survival.” Def. Mot., 5. He maintains that the statute, as applied, “will result in an increased delay, expense and risk to a woman by forcing her to obtain a referring physician letter or second physician concurrence, whether from a Kansas physician or otherwise.” Def. Mot., 5. He further suggests that non-residents will be required to obtain three physician

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Defendant seems to suggest that the Court of Appeals’ decision in *Voinovich* settled the two physician requirement question. See Def. Mot., 4. If that is Defendant’s position, it is wrong. The Court of Appeals never resolved the constitutionality of the two physician requirement; instead, it held that the entire post-viability ban was unconstitutional. 130 F.3d at 31; see *Summit Medical Associates, P.C. v. James*, 984 F.Supp. 1404, 1461 n. 45 (M.D.Ala. 1998), *aff’d in part, rev’d in part, sub nom. Summit Medical Associates P.C. v. Pryor*, 180 F.3d 1326 (11<sup>th</sup> Cir. 1999), *infra* (recognizing that the Sixth Circuit did not reach the second physician requirement issue). The *James* decision is interesting in that the court there also disagreed with the *Voinovich* district court’s decision that *Bolton* controlled the physician referral matter. *Id.* at 1461 n. 45. Thus, as already demonstrated above, Defendant’s suggestion that the lower courts have been consistent on this issue, Def. Mot., 2, is misleading and overstated, at best.

opinions given that both doctors under the statute must be Kansas residents. Def. Mot., 5.

Defendant's arguments regarding non-residents are completely misplaced here for one very simple reason — none of the records in this case even remotely suggest or demonstrate that the women involved were referred to Defendant in a manner contemplated by the statute. That is to say, no file contained information from any physician, Kansas or otherwise, which concluded that a continuation of the pregnancy would either endanger the life of the mother or would cause the mother to suffer a substantial and irreversible impairment of a major bodily function. All decisions that the fetus should be terminated were made by the defendant and Dr. Neuhaus. Unless and until Defendant can demonstrate that the referral requirement imposes an undue burden in a large fraction of relevant cases, Kansas may rely upon its legitimate interest in regulating the medical profession in order to promote respect for life—which includes the life of an unborn but viable fetus—to enact and enforce the two physician requirement. *Gonzales*, 127 S.Ct. at 1633.

(14) Defendant also contends that *Summit Medical Associates, P.C. v. James*, 984 F.Supp. 1404 (M.D.Ala. 1998), *aff'd in part, rev'd in part, sub nom. Summit Medical Associates P.C. v. Pryor*, 180 F.3d 1326 (11<sup>th</sup> Cir. 1999), demonstrates that the Kansas physician referral requirement is unconstitutional. But, as with the other cases on which Defendant relies, a careful reading of *James* belies Defendant's position.

(15) In *James* various abortion providers brought suit against Alabama state officials challenging the State's Partial-Birth Abortion Ban Act and Abortion of Viable Unborn Child Act. The Governor and Attorney General thereafter sought to dismiss the action, which the Court granted in part, denied in part and additionally referred certified questions to the Alabama Supreme Court. *Id.* at 1463-64. Among the many issues the Court addressed was one regarding whether a second

physician concurrence for a post-viability abortion under Alabama’s law violated the Constitution. *Id.* at 1462. The Court recognized, but chose not to follow, the Supreme Court’s decision in *Bolton*, finding that “the Court [in *Bolton*] did not account for the state’s strong post-viability interest in potential life when it invalidated the two-doctor concurrence requirement.” *Id.* The Court instead chose to apply the reasoning set forth in *Planned Parenthood Ass’n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983), and evaluated the Alabama post-viability abortion statute in light of the state’s compelling interest in preserving life. In so doing, the Court held that the two physician requirement might be constitutional so long as it did not impose an undue burden on women seeking an abortion, an issue the Court left for a trial on the merits, stating as follows:

In view of the *Bolton* Court’s misgivings about requiring doctors to obtain concurring opinions concerning the necessity of performing an abortion, this court is unwilling to conclude, as a matter of law, that the Alabama statute’s second physician concurrence provision *reasonably* furthers the state’s interest in potential life without impermissibly undermining the attending physician’s ability to devote his primary attention to safeguarding the pregnant women’s health. If the plaintiff’s can establish that this provision unduly increases the medical risks faced by women who require post-viability abortions by, for instance, imposing substantial delays on the process or discouraging certain physicians from performing such abortions, they may prevail on the merits of this challenge at trial. Accordingly, the court finds that the plaintiffs have stated a claim regarding the alleged unconstitutionality of the Alabama post-viability abortion statute’s second-physician-concurrence requirement.

*Id.* at 1462 (emphasis in original). Thus, the *James* opinion simply allowed the clinics to survive a motion to dismiss; it did not hold that the second-physician-concurrence requirement was necessarily nor automatically unconstitutional.

(16) Much like the other cases Defendant relies upon, *James* too is suspect in light of *Gonzales*, which unequivocally emphasizes the States’ interest in regulating the medical profession “in order to promote respect for life, including the life of the unborn.” *Id.* at 1633. To be sure, if an

entire procedure can be banned, as the Supreme Court held in *Gonzales*, a requirement of a second physician falls far short of creating an obstacle that could be considered an “undue burden.”

(17) Fundamentally, Defendant fails to recognize and address the significance of both *Casey* and *Gonzales*. Nor do any of the lower court decisions on which he relies actually help him. Simply put, the requirement of a physician referral is both rational and does not impose an undue burden upon a woman seeking a post-viability abortion from Defendant. Indeed, the State’s interest in a requirement that a second legally and financially unaffiliated physician concur in the need to terminate a viable life is both reasonable and important, given the State’s strong post-viability interest in preserving potential life, as well as its interest in regulating the medical profession. These interests cannot be lightly nor arbitrarily disregarded by this or any other court. Thus, K.S.A. 65-6703(a)’s physician referral provision is constitutional.

#### The Statute Is Not Vague

(18) Defendant further contends that K.S.A. 65-6703(a) is unconstitutionally vague. Def. Mot., 7. That argument is also without merit. It is a well settled principle of American law that “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *United States v. Lanier*, 520 U.S. 259, 265 (1997). Thus, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). *See also Steffes v. City of Lawrence*, \_\_\_ Kan. \_\_\_, 160 P.3d 843, 850 (2007); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

In order to satisfy due process, a criminal statute must be sufficiently clear to give a person

of “ordinary intelligence a reasonable opportunity to know what is prohibited.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). To satisfy this requirement, the legislature need not define an offense with “mathematical certainty” (*Grayned*, 408 U.S. at 110), but need only provide “relatively clear guidelines as to the prohibited conduct.” *Posters N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994).

(19) Defendant alleges that the provision of K.S.A. 65-6703(a) that prohibits a physician from performing a post-viability abortion unless the physician “has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion . . .” is unconstitutionally vague. His argument centers on the term “affiliated.” He asserts that since the statute does not define what is meant by “legally or financially affiliated,” physicians are left to guess as to what activities might constitute legal or financial affiliation. But these are not technical terms beyond the purview of ordinary understanding, nor are they terms capable of multiple, incongruous definitions. “A statute or ordinance will not be declared void for vagueness and uncertainty where it employs words commonly used or having a settled meaning in law.” *Steffes*, 160 P.3d at 851.

The term “affiliate,” in ordinary usage, means “1. To adopt or accept as a subordinate associate. 2. To associate (oneself) as a subordinate, subsidiary, or member with. . . . – *intr.* To associate or connect oneself.” THE AMERICAN HERITAGE DICTIONARY 84 (2d College ed.). The Merriam-Webster Online Dictionary defines affiliate as follows: “a. to bring or receive into close connection as a member or branch, b. to associate as a member.” Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/affiliate>. In legal usage, “affiliate” means: “A corporation that is related to another corporation by share holdings or other means of control; a

subsidiary, parent, or sibling corporation.” BLACK’S LAW DICTIONARY 45 (6<sup>th</sup> ed.).

Thus, the term “legally affiliated,” as used in the statute, simply means a formal, legally recognized business association. This would include, for example, physicians who are part of the same corporation, or who practice together in a partnership or limited liability company. These are commonly recognized and understood business associations used across the spectrum of American commerce. Any person of common intelligence would understand K.S.A. 65-6703(a) to apply to such relationships. In this context, “legally affiliated” is not an obscure or vague term that leaves reasonable people guessing as to its meaning.

Neither is the term “financially affiliated.” Applying ordinary understanding and giving the words their ordinary meaning, this term simply means financially interconnected or subordinate. In other words, the statute requires a referral from a second physician who is not financially connected to or dependent on the physician performing the abortion, and therefore, has no financial stake in the performance of the procedure. Any person of common intelligence and ordinary understanding reading the statute would gather this obvious meaning. There is nothing vague about it.

(20) The defendant suggests that his association with Dr. Neuhaus has been sanctioned by the Board of Healing Arts (BOHA) as a result of an investigation conducted by BOHA into the death of a patient on whom Defendant performed an abortion. Def. Mot., 10, Ex. A. That investigation clearly focused on Defendant’s care of the particular patient and the ultimate cause of death. While the letter indicates that the BOHA believed that Defendant satisfied all legal requirements with respect to that patient, the committee that reviewed Defendant’s conduct did not possess the information the Attorney General reviewed in bringing the present charges. Consequently, Defendant’s assertion that the BOHA has cleared him of any potential claim of malfeasance

regarding whether he employs a legally and financially unaffiliated second physician to concur in deciding to perform post-viability abortions in general is misleading and inaccurate. Rather, the charges here are based on hard evidence that establishes the legal and financial affiliation between Dr. Neuhaus and Defendant.

#### The Statute Satisfies Any Scierter Requirement

(21) In arguing vagueness, Defendant also asserts that K.S.A. 65-6703(a) lacks a scierter requirement. Def. Mot., 11. He posits that, under the statute, he could be punished even if he has “a good faith – or reasonable – belief that the second physician is not legally and financially affiliated.” Def. Mot., 12. Defendant is grasping at straws. The plain meaning of the challenged portion of the statute clearly includes an implied scierter. Quite simply, one cannot unknowingly enter into a formal legal affiliation, nor can one unwittingly enter into a financial affiliation. The process of doing either requires purposeful, knowing actions.

That one cannot unknowingly enter into a legal affiliation probably needs no further discussion. By its very nature, a legal affiliation requires some measure of legal formalism and process that necessarily requires knowing action. Simply put, one does not unwittingly form a corporation or partnership or other legal entity with another person.

While a financial affiliation may not, perhaps, be as formal as a legal affiliation, it also, by its nature, requires knowing, intentional action. Although a financial affiliation can be formed by doing no more than paying someone else to perform an action (thus, rendering them financially subordinate), the act of paying requires knowledge and intent. Indeed, even the most basic financial transaction requires some level of forethought, cost-benefit analysis, and knowing action. And clearly, more complicated and/or formalized financial affiliations require even greater levels of

knowledge and intent. One cannot unknowingly conduct financial negotiations and transactions, and thus, one cannot unwittingly enter into a financial affiliation. It simply cannot be done.

Accordingly, the plain language of the statute includes an implied scienter requirement. The plain language conveys to abortion providers that they cannot rely on the referral of a physician whom they pay or who otherwise has a financial stake in the abortion provider's practice. There is no guesswork involved in determining who can and cannot provide the necessary referral. Under no reasonable construction of the Kansas law is there any sort of trap for a Kansas physician acting in good faith. Thus, the statute only punishes knowing criminal conduct.

(22) Moreover, even if the statute lacked a scienter requirement, it would still be constitutional. The Supreme Court has “never held that, in the abortion context, a scienter requirement is mandated by the Constitution.” *Voinovich v. Women’s Medical Professional Corp.*, 523 U.S. 1036 (1998) (Thomas, J., dissenting). Further, the Kansas Supreme Court just recently emphasized that:

[t]he legislature may, for protection of the public interest, require persons to act at their peril, and may punish the doing of a forbidden act without regard to the knowledge, intention, motive, or moral turpitude of the doer. There is no constitutional objection to such legislation, the necessity for which the legislature is authorized to determine.

*Steffes*, 160 P.3d at 851 (quoting *State v. Logan*, 198 Kan. 211, 216, 424 P.2d 565 (1967) and *State v. Avery*, 111 Kan. 588, 590, 207 P. 838 (1922)).

Thus, although a scienter requirement may “alleviate vagueness concerns,” *Gonzales*, 127 S.Ct. at 1628, the absence of a scienter requirement does not necessarily or automatically render a statute unconstitutionally vague. In the instant case, the challenged language of K.S.A. 65-6703(a) is not vague and includes a scienter requirement, but even if construed as lacking a scienter

requirement, the statute is not void for vagueness.

The Term “Physician” Is Appropriately Defined

(23) For his final vagueness argument, Defendant engages in tortured logic in an effort to persuade the court that the term “physician”, as defined at K.S.A. 65-6701, does not apply to that very same term as used in K.S.A. 65-6703(a), and thus “physician” in 65-6703(a) is undefined. Defendant’s argument is without merit.

A fundamental rule of statutory construction is that the intent of the legislature governs when that intent can be ascertained from the statute. When a statute is plain and unambiguous, a court must give effect to the statute’s language as written, and judicial interpretation must be reasonable and sensible to effect legislative design and intent. *State v. Lewis*, 263 Kan. 843, 847, 953 P.2d 1016 (1998).

In the K.S.A., Article 67 — Abortion — is part of Chapter 65 which covers all matters related to public health. Article 67 covers K.S.A. 65-6701 through K.S.A. 65-6721. Under K.S.A. 65-6701 there are eleven (11) definitions that are “used in this act.” The term “act” refers to L. 1992, Ch. 183 which prohibits post-viability abortions unless the “physician” performing the abortion obtains a referral from another “physician”. *Id.* at § 3. “Physician” is defined in § 1 of Ch. 183 as a person licensed to practice medicine and surgery in Kansas.

Another well-recognized rule of statutory construction is that “Identical words or terms used in different statutes on a specific subject are interpreted to have the same meaning in the absence of anything in the context to indicate that a different meaning was intended. *Williams v. Bd. of Education*, 198 Kan. 115, 124, 422 P.2d 874 (1967). Applying the above rules of statutory construction to the present argument, the Defendant’s suggestion here that the term “physician” in

65-6703 somehow remains undefined is simply without merit. There is nothing to suggest that the legislature intended to apply a different meaning to the term “physician” in K.S.A. 65-6703. Indeed, a legislative decision to do so runs counter to any notion of logic or relative measure of consistency.

In short, the Defendant’s claim here is wholly without merit as demonstrated by reasonable statutory construction in combination with supporting case law.

#### The Statute Does Not Violate The Right To Travel

(24) Defendant also argues that K.S.A. 65-6703(a) violates the constitutional “right to travel” and constitutional privileges and immunities protections, at least if interpreted to require the concurrence of two Kansas-licensed physicians. *See* Def. Mot. 12 - 15. These, arguments, too, must fail, because K.S.A. 65-6703(a) does not violate anyone’s right to travel nor deprive anyone of privileges and immunities the Constitution protects.

(25) As explained by the Supreme Court, the constitutional “right to travel” has three components: “[1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.” *Saenz v. Roe*, 526 U.S. 498, 500 (1999). None of these aspects of the right to travel are violated by K.S.A. 65-6703(a)—even if it is understood to require the referral of a Kansas-licensed physician in addition to Defendant—and indeed two aspects of the right to travel are not even potentially implicated here. Specifically, K.S.A. 65-6703(a) in no way restricts the ability of anyone to enter or leave Kansas, and it makes no distinctions based on Kansas residency, or lack thereof, whatsoever. Thus, the first and third aspects identified in *Saenz* are not even conceivably implicated here.

Rather, Defendant's argument appears to be that non-residents seeking post-viability abortions in Kansas are treated differently than Kansas residents, a proposition that simply fails on the basis of its factual premise. Even if K.S.A. 65-6703(a) is interpreted to require referral by a Kansas-licensed physician, the statutory burden is legally the same on any woman seeking a post-viability abortion in Kansas. Adopting Defendant's interpretation of the statute for the sake of argument, it is apparent that, whether a woman is a resident of Kansas, Missouri, Colorado, New York, California, Alaska, Hawaii, or any other state, all the statute would legally require is that another Kansas-licensed physician besides Defendant provide a determination for a post-viability abortion. That requirement would be the same for all women—the statute does not require that a non-resident have an additional referral from a doctor not licensed in Kansas. It may be that sometimes such would be the case, but it is not a statutory requirement, nor would it be necessary for a non-resident woman to obtain the opinion of a third doctor in order for a non-resident to avail herself of Defendant's post-viability abortion services. There is no apparent reason why a non-resident could not obtain such a referral from a Kansas-licensed physician without ever obtaining an opinion from a doctor in some other state.

(26) Thus, Defendant's right to travel argument is a red herring, as the cases he cites further demonstrate. Defendant relies on a durational residency restriction case (*Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974)), a free speech case (*Bigelow v. Virginia*, 421 U.S. 809 (1975)), and a case that involved physical obstruction of access to medical clinics performing abortions and in which no constitutional violation ultimately was found. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). None of these cases, nor the principles for which they stand, assist Defendant in any way in this case. K.S.A. 65-6703(a) does not impose durational

residency requirements that, for example, would require a woman to reside in Kansas a certain period of time before obtaining an abortion, nor does it restrict anyone's speech regarding abortion or abortion services. Indeed, most of the Supreme Court's "right to travel" cases have involved durational residency requirements imposed regarding the ability to vote or access to government benefits such as welfare or tax breaks. The situation in this case involves no government services or benefits nor residency requirements. Rather, it is far afield from anything the Supreme Court has ever recognized as even a potential right to travel problem.

#### The Statute Does Not Violate The Privileges and Immunities Clause

(27) Equally misplaced is Defendant's invocation of the Privileges and Immunities Clause of Article IV, § 2 of the Constitution. That provision is simply a non-discrimination provision that does not itself create substantive rights. Rather, this provision was intended to keep states from discriminating in some respects against non-residents who might cross their borders. *See, e.g., Hague v. Committee for Industrial Organization*, 307 U.S. 496, 511 (1939) ("The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.").

Thus, under this provision, it would be difficult to argue that a State could prohibit the doctors it licenses from providing any medical services to non-residents. That said, the Supreme Court long has made clear that *discrimination against* citizens of other states is a prerequisite for application of the Privileges and Immunities Clause. *See, e.g., Zobel v. Williams*, 457 U.S. 55, 59 n. 5 (1982) (giving state residents refunds on the basis of their length of residence could not violate the Privileges and Immunities Clause because Alaska was not discriminating against *non-residents*, just between categories of residents). As explained above, nothing in K.S.A. 65-6703(a) draws any distinctions or imposes any differential requirements on women seeking post-viability abortions *on*

*the basis of their state citizenship or residency.* Again, Defendant’s factual premise—that the law treats non-residents differently—is simply untrue here, leaving him with no foundation on which to build any plausible privileges and immunities claim.

The Statute Does Not Violate The Kansas Constitution

(28) In Part II of his motion, Defendant makes cursory arguments that K.S.A. 65-6703(a) violates the Kansas Constitution in various respects. These arguments are largely a rehash of his federal constitutional claims—particularly his vagueness argument—and in any event have no merit. Defendant suggests, without explaining, that the statute violates equal protection, but there has to be some sort of discrimination for equal protection to require anything other than a rational basis for a law and, as explained previously, Defendant has failed to show how K.S.A. 65-6703(a) discriminates in any way. Further, Defendant’s vagueness arguments are the same as those he made under the U.S. Constitution and are unmeritorious for the reasons explained previously.

(29) Defendant also argues that the bill in which the physician affiliation amendment appears contains more than one subject in violation of Art. 2, § 16 of the Kansas Constitution by virtue of the inclusion of a provision amending the prohibition on assisted suicide. (See L. 1998, Ch. 142, § 15 and § 3 respectively).

Art. 2, § 16 of the Kansas Constitution states in relevant part that:

“No bill shall contain more than one subject, except appropriation bills and bills for revision or codification of statutes. The subject of each bill shall be expressed in its title . . . *The provisions of this section shall be liberally construed to effectuate the acts of the legislature.*” (Emphasis supplied).

“The purposes of the ‘one-subject’ constitutional provision have been stated many times: ‘They include the prevention of a matter of legislative merit from being tied to an unworthy matter,

the prevention of hodge-podge or log-rolling legislation, the prevention of surreptitious legislation, and the lessening of improper influences which may result from intermixing objects of legislation in the same act which have no relation to each other.” *Unified School Dist. No. 229 v. State*, 256 Kan. 232, 268, 885 P.2d 1170 (1994) (quoting *Garden Enterprises, Inc. v. City of Kansas City*, 219 Kan. 620, 622, 549 P.2d 864 (1976)).

Additionally, the Kansas Supreme Court has made it very clear that, “Article 2, § 16, of the Kansas Constitution should not be construed narrowly or technically to invalidate proper and needful legislation, and where the subject of the legislation is germane to other provisions, the legislation is not objectionable as containing more than one subject or as containing matter not expressed in its title. This provision is violated only where an act of legislation embraces two or more dissimilar and discordant subjects that cannot reasonably be considered as having any legitimate connection with or relationship to each other.” *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, Syl. ¶ 8, 831 P.2d 958 (1992).

This enactment criminalizes activities that facilitate the termination of life through assisted suicide and post-viability abortions. Quite clearly the enactment embraces subjects that have a legitimate connection to each other, i.e. the termination of viable life. As Art. 2, § 16 of the Kansas Constitution is to be liberally construed to effectuate legislative enactments, the enactment, of which K.S.A. 65-6703 is a part, easily passes constitutional muster.

#### Conclusion

(30) WHEREFORE, as the defendant has failed to establish that K.S.A. 65-6703(a) violates either the federal or state constitution, his motion must be overruled.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served on this 7<sup>th</sup> day of August, 2007, and that I caused one (1) copy each of the above and foregoing Reply to be hand-delivered on the following:

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and the original and one (1) copy of the reply were simultaneously hand-filed with:

**Clerk of the District Court**  
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