IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,

Plaintiff,

vs

GEORGE R. TILLER,

Defendant.

Case No. 07 CR 2112

OPINION

This matter comes on for hearing upon the defendant's motion to dismiss the charges herein alleging that K.S.A. 65-6703(a) is unconstitutional under both the Constitution of the United States and the Constitution of the State of Kansas. The defense is challenging the statute on a number of constitutional grounds that need to be analyzed and addressed individually. Both the State and Amici Curiae briefs have been filed defending the statute.

The defendant is charged with 19 misdemeanor counts, alleging that he performed illegal late term abortions on women that were carrying viable fetuses without a documented referral from a physician with whom he was not legally or financially affiliated. 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."

An "abortion" is defined under the Act as "the use of any means to intentionally terminate a pregnancy except for the purpose of causing a live birth." K.S.A. 65-6701(a). "Viable" is defined as "that stage of gestation when, in the best medical judgment of the attending physician, the fetus is capable of sustained survival outside the uterus without the application of extraordinary medical means." K.S.A. 65-6701(k). The Act, however, does not define "legally or financially affiliated."

Historical Progression of Abortion Rights

Before addressing each of the specific constitutional issues which are raised in the motion, it is helpful to review the history of abortion jurisprudence in this country. The United States Supreme Court first established a woman's constitutional right to an abortion in *Roe v. Wade*, 410 U.S. 113 (1973). It involved a suit by an unmarried pregnant woman (hereinafter "Roe") living in Texas who wished to terminate her pregnancy. Texas had enacted criminal abortion statutes prohibiting the procurement of an abortion except with respect to one procured or attempted by medical advice for the purpose of saving the life of the mother. Roe sought a declaratory judgment that the Texas statutes were unconstitutional on their face and an injunction restraining the defendant Wade from enforcing the statutes.

The United States Supreme Court in *Roe* recognized a number of competing interests: a woman's privacy interest in determining whether or not to

terminate her pregnancy, a State's interest in preserving and protecting the health of pregnant women, and a State's interest in protecting the potentiality of human life.

With regards to the first interest, the Court stated that a woman's privacy interest is not absolute and "some state regulation in areas protected by that right is appropriate." *Id.* at 154. At some point in a woman's pregnancy, the Court believed the State's interests become sufficiently "compelling" to sustain regulation of the factors that govern the abortion decision. *Id.*

The Court then created the "Trimester Test" to determine when a State's interest becomes sufficiently "compelling" to sustain abortion regulation. The Trimester Test was stated as follows:

> 1.) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> 2.) For the stage subsequent to the approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> 3.) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164–165.

Appling the Trimester Test to the Texas abortion statutes, the Court concluded the "statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, 'saving' the

mother's life, the legal justification for the procedure." *Id.* at 164. As a result, the Court struck the statute down as violative of the *Due Process Clause of the Fourteenth Amendment.*

Towards the end of its opinion, the Court included some language pertaining to physicians performing abortions:

> "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available."

Id. at 165-66.

The Court released the *Roe v. Wade* decision in conjunction with *Doe v. Bolton*, 410 U.S. 179 (1973). *See Bolton*, 410 U.S. at 165 (noting both opinions are to be read together). *Bolton* involved a Georgia abortion statute that, among other things, required a physician administering an abortion to obtain a concurrence by at least two other physicians. The Court concluded the concurrence requirement violated the United States Constitution. In discussing the concurrence requirement, the Court stated:

> "The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. Again, no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with patients' needs and unduly infringes on the

> physician's right to practice. The attending physician will know when a consultation is advisable – the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that 'reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications."

Id. at 199-200 (citations omitted).

The United States Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) nearly twenty years after *Roe v. Wade* and *Doe v. Bolton*. The Court noted that "19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*." *Id.* at 844.

While making substantial modification to its prior ruling, the Court declined to overrule *Roe v. Wade* and made clear that "the essential holdings of *Roe v. Wade* should be retained and once again reaffirmed." *Id.* at 846. The Court then stated that the essential holdings consisted of three parts:

> (1) A recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interest are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.
>
> (2) A confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health.

(3) The principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

The Court, however, decided in *Casey* to abandon the trimester framework of *Roe v. Wade*. The Court believed "[t]he trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*." *Id.* at 873. The Court stated "that portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases." *Id.* at 871.

The Court replaced the trimester framework with an undue burden standard that provides a more "appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Id.* at 876. Under the undue burden standard, "[o]nly where state regulation imposes an undue burden on a woman's ability to make [an abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* at 874. The Court also stated that a finding of an undue burden essentially means that a regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

In drawing the line at viability the Court noted that it "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Id.* at 870.

The Court also affirmed *Roe v. Wade's* holding that post-viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.* at 879.

In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the United States Supreme Court rejected a claim by various doctors that the Partial-Birth Abortion Ban Act of 2003 (hereinafter the "BPA Act") facially violated the United States Constitution. The BPA Act prohibits "knowingly performing a partial-birth abortion . . . that is [not] necessary to save the life of a mother. *Id.* at 1614 (citing 18 U.S.C. § 1531(a)). The BPA Act defines a partial-birth abortion as only including one of the several abortion procedures: the intact D&E procedure.

The Court in *Gonzales* reaffirmed and applied the *Casey* undue burden standard to the BPA Act. The Court determined that the BPA Act was not void for vagueness and did not impose an undue burden from any overbreadth. The Court believed that "[u]nlike the statutory language in *Stenberg* that prohibited the delivery of a 'substantial portion' of the fetus---where a doctor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. Doctors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability." *Id.* at 1628. In addition, the Court stated that "[t]his conclusion is buttressed by the intent that

must be proved to impose liability. The Court has made clear that scienter requirements alleviate vagueness concerns." *Id.*

Additionally, the Court concluded that the Act's failure to allow the banned procedure's use where necessary for the mother's health did not have the effect of imposing an unconstitutional burden of the woman's abortion rights because safe medical options were available. *Id.* at 1638.

Does the Act Place an Unconstitutional Burden on a Physician's Right to Practice Medicine?

The Defendant relies on *Doe v. Bolton*, 410 U.S. 179 (1973), in contending the Act is an unconstitutional burden on a physician's right to practice medicine. As previously mentioned, the Supreme Court's decision in *Bolton* was released on January 22, 1973, the same day as *Roe v. Wade*, 410 U.S. 113 (1973).

If *Bolton* were to be viewed in isolation, the Kansas Abortion Act would be unconstitutional because "[r]equired acquiescence by co-practitioners has no rational connection with patients' needs and unduly infringes on the physician's right to practice." *Bolton*, 410 U.S. at 199–200. There is no other voluntary medical or surgical procedure for which Kansas requires confirmation by two other physicians. If a physician is licensed to practice in Kansas, *Bolton* mandates he or she is recognized by the State as capable of exercising acceptable clinical judgment. If a physician fails in this, *Bolton* instructs that professional censure and deprivation of his or her license are available remedies. However, there have

been a number of subsequent decisions suggesting that *Bolton* is no longer dispositive.

One of the factors the Court relied upon in *Bolton* for striking down the Georgia statute was that there was no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians. In *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court, when discussing the Hyde Amendment, stated: "Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally but not for certain medically necessary abortions. Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Id.* at 325. Similarly in *Maher v. Roe*, 432 U.S. 464 (1977) the Court said: "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." *Id.* at 480.

In 1983, the Supreme Court decided *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983). The Supreme Court upheld a Missouri statute which required a second physician to be in attendance during a post-viability abortion. *Id.* at 483–84. As the Kansas Senators point out in their *Amici Curiae* brief, the Court noted that "[g]iven the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances [of a post-viability abortion] is unconstitutional. . . . We believe the second-physician requirement reasonably furthers the State's compelling interest in protecting lives of viable fetuses." *Id.* at 485–86.

While the purpose of the second physician was different in the Missouri statute than in the Kansas statute, *Ashcroft* is nevertheless important in showing that the Supreme Court has modified the strict prohibition language of the *Bolton* decision.

Moreover, the Supreme Court in *Casey* included the following excerpt which suggests the physician's rights to practice medicine are not as paramount as indicated in *Bolton*:

> "Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure."

Casey, 505 U.S. at 884

In *Gonzales*, the Supreme Court noted that "Congress [in enacting the Partial Birth Abortion Act] was concerned . . . with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion." *Gonzales*, 127 S. Ct. at 1633. After citing congressional findings, the Court stated, "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Id.* (citations omitted). The Court also determined that under its precedents, "it is clear the State has a significant role to play in regulating the medical profession." *Id.* Thus, the Supreme Court

has included language in its opinions post-*Bolton* that suggests *Bolton's* rationale may no longer be dispositive.

Additionally, lower courts have had to decide whether physician concurrence requirements are constitutional. One of the first cases cited by the State is *Doe v. Deschamps*, 461 F. Supp. 682 (D. Mont. 1976). At the outset, it is important to note that this decision was decided after *Bolton* and *Roe v. Wade* but before *Casey*. The Court in *Deschamps* addressed challenges to the Montana Abortion Control Act, including a challenge to a requirement that a physician obtain the consent of two additional physicians before performing an abortion not necessary to save the woman's life in cases where the woman is carrying a viable fetus. *Id.* at 684.

The Court concluded that "[s]tanding alone, the language in *Bolton* suggests that any requirement for the concurrence of additional physicians would be invalid." *Id.* at 688. The Court noted, however, that the opinions of *Bolton* and *Roe v. Wade* are to be read together and then cited the following exert from *Roe v. Wade*: "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention." *Id.* The Court then held that the Montana statute is permissible under the language used in *Roe v. Wade*, in part because the Montana's statute is limited to trimester after viability:

> "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 justification.' *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.

The next decision, *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1983) is a pre-*Casey* decision that addressed the constitutionality of an Illinois Abortion Act. The Illinois Abortion Act, among other things, conditioned an abortion upon "consultation with at least two other physicians not related to or engaged in practice with the attending physician." *Id.* at 1320. The Court concluded that "[t]he additional consultations have no rational connection to either the patient's or the fetus's needs. Though the will of the woman is no longer dispositive after viability, the medical standard established in the first clause [of the act] and the physicians' standard of care, is sufficient to assure the state's interest in preserving fetal life. If the attending physician fails to exercise acceptable clinical judgment, professional censure and deprivation of his license are available remedies." *Id.* at 319 (citing *Bolton*).

Another decision is a post-*Casey* opinion: *Women's Medical Professional Corp v. Voinovich*, 911 F. Supp. 1051, 1087–88 (S.D. Ohio 1995), *aff'd* 130 F.3d 187 (6th Cir. 1997), *cert denied* 523 U.S. 1036 (1998). This case involved an Ohio statute which required, among other things, that if a doctor determined that a post-viability abortion is necessary to save the life of the mother, or to avoid a

serious risk, the physician performing the abortion must obtain at least one other doctor's concurrence in writing. The Court found *Bolton* controlling, stating that the State had made no arguments as to why it should not apply. *Id.* at 1088. As a result, the Court granted a preliminary injunction but did not finally decide the constitutionality of the multiple-physician requirement.

On appeal, the Sixth Circuit did not address the multiple physician requirement; rather, the Sixth Circuit struck the entire post-viability ban because it lacked a health exception. *Voinovich*, 130 F.3d at 203, 206, 209–10 (6th Cir. 1997).

The next opinion is another post-*Casey* decision: *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 (11th Cir. 1999). The statute at issue in this case was the Alabama Partial Birth Abortion Act of 1997, which included a requirement that a "physician obtain the concurrence of a second physician in the necessity for the abortion." *Id.* at 1462. The motion before the Court was a motion to dismiss.

The Court recognized that the statute struck down in *Bolton* regulated both pre-viability and post-viability abortions and, as a result, "the [Supreme] Court did not account for the state's strong post-viability interest in potential life when it invalidated the two-doctor concurrence requirement. By contrast, this court must evaluate the Alabama post-viability abortion statute in relation to the state's compelling interest, and will so uphold this provision so long as it reasonably furthers that interest unless the plaintiffs can show that it impedes the attending

physician's ability to ensure that material health remains his paramount consideration" *Id.* The Court, however, denied the motion to dismiss because there was still the possibility that the plaintiffs could establish that the concurrence requirement unduly increases the medical risks faced by women who require post-viability abortions. *Id.* On appeal, the Eleventh Circuit only addressed whether Alabama's Eleventh Amendment sovereign immunity barred the suit in federal court against the Governor, the Attorney General, and the District Attorney challenging the Alabama Act. *Pryor*, 180 F.3d at 1329.

Finally, there is the case of *Poe v. Menghini*, 339 F. Supp. 986 (D. Kan. 1972). This case was decided in 1972, well before *Bolton*, *Roe v. Wade*, *Casey*, and *Gonzales*. The Kansas statute as issue in this case involved a three physician requirement. The Court found that statute unconstitutional because no medical purpose appeared to be served by the requirement and "in the Court's opinion, [the state's interest in protecting the unborn embryo will] be better served by preserving the traditional patient-physician relationship and by reliance on the self-discipline and professional ethics and integrity of the medical profession." *Id.* at 995.

While *Bolton* has not been specifically overruled in subsequent decisions, it has been substantially modified at least as it relates to viable fetuses. Although *Bolton* found no logical reason to treat an abortion procedure any different than other medical procedures, the later decision in *Harris* found that abortion is different because it involves the purposeful termination of potential life. In

Ashcroft the Court ruled that a second-physician requirement reasonably furthers the State's compelling interest in protecting lives of viable fetuses.

Once a fetus becomes viable, the physician's focus must change. He must balance the potentiality of life as it is compatible with the health of the mother. It is not unreasonable for the State to require a second physician's opinion to weigh the interests of both.

There is an important point that *Roe, Bolton,* nor any of the subsequent decisions have addressed. If reliance is placed upon intra-professional and judiciary remedies for doctors that are not exercising the proper judgment in authorizing abortions involving viable fetuses, who is going to make the complaint and how is it going to be investigated? The doctor is certainly not going to question his own decision. The woman receiving the abortion in unlikely to complain since she is the one seeking the abortion. That is quite unlike other medical procedures where the patient has the knowledge and motivation to report improper conduct of a physician. Furthermore, investigation of possible improper conduct is significantly restricted. *Alpha Medical Clinic v. Anderson,* 280 Kan. 903 (2006); *Tiller v. Corrigan,* 182 P3d. 719 (2008).

Does the Act Violate a Woman's Right to Obtain an Abortion?

The Defendant also contends that a woman's constitutional rights, implicated by her right to choose to continue or terminate pregnancy, are infringed by a requirement that she have multiple physicians reviewing her case.

In light of *Casey* and *Gonzales*, the Kansas Act would be tested under the "undue burden" standard if it applied to pre-viability abortions. A careful review of these decisions reveal that the Court has not indicated the test that would apply in the case of post-viability abortions. The Kansas Act only applies to post-viability abortions. The Supreme Court, however, has indicated that a State's interests are stronger post-viability than pre-viability.

In *Casey*, for example, the Court stated that the later in pregnancy an abortion occurs, the more state-regulated and restricted that abortion can be. *Casey*, 505 U.S. at 869. The Court stated "[i]n some broad sense . . . a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.* at 870. Moreover, the Court affirmed *Roe v. Wade's* holding that post-viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.* at 879.

There are few federal decisions addressing the standard in the context of post-viability abortions. In *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997), the Sixth Circuit stated that the only court to address this issue thus far was the Tenth Circuit in *Jane v. Bangerter* and that the Tenth Circuit applied *Casey's* undue burden standard. However, a review of the *Jane* decision would indicate that the Sixth Circuit misinterpreted the decision.

In *Jane v. Bangerter*, 102 F.3d 1112 (1996), the abortion provision at issue set viability at a twenty week gestational period. The party wishing to invalidate

the abortion provision contended that the Court's rejection of strict scrutiny in *Casey* was directed only to pre-viability abortions and that the strict scrutiny standard still governs in the context of post-viability abortions. *Id.* at 1115. In response, the Tenth Circuit noted that "[w]e believe this argument misperceives the nature of the alleged constitutional flaw." The Tenth Circuit did apply the pre-viability test, but only because the statute at issue "impact[ed] the choice of a woman whose fetus remains nonviable after twenty weeks from conception. The section therefore is most properly analyzed under the standard applicable to previability regulations." Thus, the only reason the Court applied the undue burden standard was because the provision covered both pre-viability and post-viability abortions; the Court did not state it would apply the undue burden standard to a provision covering only post-viability abortions.

The State notes that *Casey* is less clear on what standard applies post-viability, though it is clear the standard is probably a lower one than "undue burden." Since the State has an increased interest on account of the potentiality of human life with a viable fetus it would certainly not be a higher standard. In absence of direction from the appellate courts on this issue, this court should first evaluate whether the statute would violate the undue burden standard.

Under the undue burden standard, "[o]nly where state regulation imposes an undue burden on a woman's ability to make [an abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Casey*, 505 U.S. at 874. The Court has also stated that a finding of an undue burden essentially means that a regulation "has the purpose or effect of

placing a substantial obstacle in the part of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

The Defendant contends the Kansas Act will result in an increased delay, expense and risk to a woman by forcing her to obtain a referring physician letter or second physician requirement, whether from a Kansas physician or otherwise. The Defendant cites the following cases to support his contention: *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1983), *James*, 984 F. Supp. 1404 (M.D. Ala. 1998), and *Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995).

Wynn and *James* have been summarized above. *Voinovich* is also summarized above, but the Defendant cites the following language in the district court's opinion that is relevant to this issue:

> "[T]he requirement that a second physician concur "in good faith [and] in the exercise of reasonable medical judgment" imposes criminal and civil liability on such concurring physicians who act according to their best clinical judgment, without any criminal intent. This is likely to create a chilling effect which will deter physicians from concurring, in writing, that an abortion is medically necessary; this will chill the performance of abortions which are necessary to preserve the life and health of the mother."

Id. at 1087.

The Kansas statute does not have the same criminal and civil liability placed on the concurring physician as set forth in the Ohio statute.

Regarding Defendant's contention of undue expense and delay, the Kansas referral requirement does not rise to the level of a substantial obstacle. The Supreme Court in *Casey* upheld a provision requiring a 24-hour waiting period. A 24 hour waiting period has the practical effect of requiring a woman to make at

least two doctor visits. The Court concluded this was not an undue burden and stated that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted." *Id.* at 877–78. In adopting this rationale, the Court stated:

> "As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. (citations omitted). The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."

Id. at 873-74.

Given the State of Kansas' strong interest in regulating post-viability abortions, the only way this Court could conclude the Kansas Act creates a substantial obstacle is by finding, like the Court in *Wynn v. Scott*, the additional referral has no rational connection to either the patient's or the fetus's needs. But *Wynn v. Scott* was decided before *Casey*, and the Supreme Court in *Casey* concluded that "psychological well-being is a facet of health" and "[i]n attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating

psychological consequences, that her decision was not fully informed." *Id.* at 882. A second physician requirement arguably ensures that a woman receives more information about her decision from another physician who does not stand to benefit financially from the abortion. The potentiality of life is certainly a rational connection to the benefit of the fetus. Requiring that physician to be licensed in Kansas is reasonable so that he is under the regulation of the State.

While the proper test to evaluate the constitutionality of post-viability abortion laws may be something less than the undue burden test, for the reasons stated above this court finds that the Kansas Act would in any event meet that standard.

Is the Act Unconstitutionally Vague?

The Defendant argues that K.S.A. 65-6703 does not provide sufficient notice or definition as to the type of permissible affiliations between physicians which might be deemed criminal by a prosecutor. As previously mentioned, the Act does not define "legally or financially affiliated." The Defendant contends there is no guidance in the statute as to what activities constitute either legal or financial affiliation and that this ambiguity in the reporting statute is underscored by the fact that the Board of Healing Arts has reviewed Dr. Tiller's medical procedures and has found that his practices meet the requirements of law.

The Fourteenth Amendment's guarantee of due process prohibits laws so vague that persons "of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Smith v.* Goguen, 415 U.S. 566,

572. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Gonzales*, 127 S. Ct. at 1628.

The legislature need not define an offense with "mathematical certainty" 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). In *Gonzales*, the Supreme Court concluded the PBA Act satisfied the vagueness inquiry because "it sets forth 'relatively clear guidelines as to prohibited conduct' and provides 'objective criteria' to evaluate where a doctor has performed a prohibited procedure'" and because "[d]octors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability." *Gonzales*, 127 S. Ct. at 1628. In addition, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The State argues that "legally or financially affiliated" are not technical terms beyond the purview of ordinary understanding, nor are they terms capable of multiple, incongruous definitions. *See Steffes v. City of Lawrence*, 160 P.3d 843, 851 (2007) ("A statute . . . will not be declared void for vagueness and uncertainty where it employs words commonly used or having a settled meaning in law."). The State defines "affiliate" under the American Heritage Dictionary as meaning "1. To adopt or accept as a subordinate associate. 2. To associate

(oneself) as a subordinate, subsidiary, or member with. . . . To associate or connect oneself." The State also defines "affiliate" using the Merriam-Webster online Dictionary as "to bring or receive into close connection as a member or branch, or to associate as a member." The State then cites Black's Law Dictionary for "affiliate" in the legal sense: "A corporation that is related to another corporation by share holdings or other means of control; a subsidiary, parent, or sibling corporation." Thus, according to the State, any person of common intelligence and ordinary understanding would know "legally affiliated" simply means a formal, legally recognized business association and "financially affiliated" means financially interconnected or subordinate.

With regards to the Board of Healing Arts investigation, the State notes that the investigation clearly focused on Defendant's care of the particular patient and the ultimate case of death. Moreover, the State claims that the committee that reviewed the Defendant's conduct did not possess the information the Attorney General reviewed in bringing the present charges.

The Kansas Act is not as clear as the PBA in *Gonzales*, which created criminal liability only upon delivery of a fetus pass an anatomical landmark. The Defendant also bolsters his argument by noting that the Act lacks a scienter requirement. The Supreme Court in *Gonzales* recognized that a scienter requirement may "alleviate vagueness concerns" and that the scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion." *Gonzales*, 127 S. Ct. at 1628.

The State suggests that the Kansas Act does contain an implied scienter requirement because 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.

Alternatively, the State argues that even if the statute lacked a scienter requirement, it would still be constitutional. The State cites *Steffes*, a Kansas Supreme Court case that provided:

> "The 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 v. City of Lawrence, 284 Kan. 380, 390 (2007).

There is authority which concludes that a scienter requirement may be implied. In *Morissette v. United States* 342 U.S. 246 (1952), for example, the Court read a scienter requirement into a federal larceny statute, stating: "Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.". *Id.* at 262.

Additionally, in *Turney v. State*, 936 P.2d 533, (1997) the Alaska Supreme Court adopted an argument that the criminal statute contained an implied scienter

requirement because "such knowledge is an historic requirement of the offense." *Id.* at 541.

Regarding whether a scienter requirement is required in abortion statutes, the case law seems to support the position that a scienter requirement is not necessary. In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Supreme Court stated that "we need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." *Id.* at 396. In *Voinovich v. Women's Medical Professional Corp.*, 523 U.S. 1036 (1998), the Supreme Court denied a petition for writ of certiorari from the Sixth Circuit. The Sixth Circuit had found an Ohio abortion statute unconstitutional because the "combination of . . . objective and subjective standards without a scienter requirement" renders the medical necessity exception unconstitutionally vague. In the dissent for denial of certiorari, Justice Thomas, joined by Justice Rehnquist and Justice Scalia, stated that the Supreme Court has "never held that, in the abortion context, a scienter requirement is mandated by the Constitution." And finally, in *Gonzales* the court provided that a scienter requirement may "alleviate vagueness concerns." *Gonzales*, 127 S. Ct. at 1628. Thus, a scienter requirement is a factor in the void-for-vagueness analysis but is probably not a necessity.

Neither party cited the statute that sets forth the guiding principles of criminal intent under the Kansas Criminal Code. K.S.A. 21-3201(a) provides as follows:

> "Except as otherwise provided, a criminal intent is an essential element of every crime defined by this code. Criminal intent may be established by proof that the conduct of the accused person was intentional or reckless. Proof of intentional conduct shall be required to establish criminal intent, unless the statute defining the crime expressly provides that the prohibited act is criminal if done in a reckless manner."

That statute is followed by another provision that sets forth exceptions to the criminal intent requirement. K.S.A. 21-3204 states:

> "A person may be guilty of an offense without having criminal intent if the crime is: (1) A misdemeanor, cigarette or tobacco infraction or traffic infraction and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described; or (2) a violation of K.S.A. 8-1567 or 8-1567a and amendments thereto."

The Kansas Supreme Court has discussed this statute in a prosecution under the Kansas Healing Arts Act for a violation of K.S.A. 65-2803 in *State v. Montjoy*, 257 Kan. 163 (1995). The defendants were charged with practicing the healing arts without a license, a class B misdemeanor. The question was whether the trial court erred by instructing the jury that criminal intent was a required element of the offense. The Court found that under the common-law rule which requires the element of criminal intent there is a well-recognized exception for public welfare offenses. They held that the purpose of this criminal statute is to protect the public from the unauthorized practice of the healing arts and under the public welfare doctrine, does not require the element of criminal intent. The Court rejected the statutory provisions found in K.S.A. 21-3201 and K.S.A. 21-3204 on the grounds that the statute prosecuted is not a crime set out in the Kansas Criminal Code. I believe that the Court was in error in applying the common law and rejecting this statute. K.S.A. 21-3102(2) provides that "unless

expressly stated otherwise, or the context otherwise requires, the provisions of this code apply to crimes created by statute other than in this code."

This position is supported by later Kansas Supreme Court decisions. In the case of *State v. Lewis*, 263 Kan. 843 (1998) the Court applied this provision of the code in a prosecution outside the Kansas Criminal Code where it stated:

> "Thus, it is clear that the intent requirement of K.S.A. 21-3201 applies regardless of whether the criminal offense is found in the criminal code or elsewhere in the statutes."

Id. at 853.

This same interpretation is found in *State v. Thomas*, 266 Kan. 265 (1998). The public welfare doctrine under the common law might well apply in this case were it not for the specific statutory provisions.

In examining the provisions of K.S.A. 21-3204 which recognizes the exceptions where absolute liability may apply, there appear to be two requirements. The present case would meet the first requirement in that it is a misdemeanor prosecution. It must then be determined whether the second criteria is met in that "the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described." This provision has been interpreted in the Kansas Supreme Court case of *State v. JC Sports Bar, Inc.*, 253 Kan. 815 (1993). The Court had to determine whether the language of the criminal statute "knowingly or unknowingly permit" created absolute liability. The Court ruled:

> "Does the statute clearly indicate a legislative purpose to impose absolute liability as required by K.S.A. 21-3204? We think not. If that had been the intent, it would have been a simple matter to write the statute accordingly." *Id.* at 823.

In reviewing the provisions of K.S.A. 65-6703, there is nothing that would indicate a legislative intent to create absolute liability. Therefore, the provisions of K.S.A. 21-3201 apply and criminal intent is required to be proven in this case.

The defendant specifically complains that the term "affiliated" is unconstitutionally vague. While there are no cases in Kansas that discuss this specific term relating to vagueness, the defense has cited cases from other jurisdictions. In each of these cases there is a distinction in that the word "affiliated" is not associated with any modifier like "legally affiliated" or "financially affiliated". The word "affiliated" standing alone is much more subject to a vagueness argument since it does not explain what type of affiliation.

While the Kansas appellate courts have not dealt with vagueness arguments regarding this term, the following are examples of language that was found to be vague and unconstitutional: *State v. Meinert*, 225 Kan. 816 (1979) "unjustifiable physical pain" (endangering a child prosecution); *State v. Kirby*, 222 Kan. 1 (1977) "endangering of life" (criminal injury to persons); *City of Altamont v. Finkle*, 224 Kan. 221 (1978) "exhibition of speed or acceleration" (racing on highways); *Lima v. City of Ulysses*, 28 Kan.App.2d 413 (2000) "unnecessarily loud" "excessive" "mentally annoying" "disturbing" (noise ordinance); *State v. Conley*, 216 Kan. 66 (1975) "fondling or touching" (indecent liberties with a child); *State v. Adams*, 254 Kan. 436 (1994) "misconduct" (official misconduct). In the following cases the terms were not found to be vague: *State v. Fisher*, 230 Kan. 192 (1981) "unreasonably causing or permitting a child under the age of eighteen years to be placed in a situation in which its life,

body or health may be injured or endangered" (endangering a child); *State v. Mitchell*, 23 Kan.App.2d 413 (1997) "extreme indifference to the value of human life" (second degree murder); *State v. Moore*, 38 Kan.App.2d 980 (2008) "dangerous knife" (criminal use of weapons); *Boyles v. City of Topeka*, 271 Kan. 69 (2001) "unsightly appearance" (public nuisance); *State v. Kee*, 238 Kan. 342 (1985) "induce official action" (making a false writing).

The presence of a scienter requirement in the Kansas abortion statute helps alleviate vagueness concerns as recognized in *Gonzales*. But even without it, a person of normal intelligence should be able to understand the common meaning of the term "legally or financially affiliated". These are not considered terms of art within the legal profession. The statute is therefore not unconstitutionally vague.

Does the Act Violate a Citizen's Right to Travel?

The Defendant contends that requirement a woman to be seen by two separate physicians in Kansas violates the "right to travel" because even if a woman has a referral from a physician in another state, wholly independent from the Kansas provider and certifying her eligibility, the woman cannot travel to Kansas to obtain an abortion from the Defendant.

The Supreme Court has provided that the "right to travel" has three components" [first,], the right of a citizen of one State to enter and to leave another State, [second,] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and [third,], 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).

There are no reported cases that are directly on point of this issue. As the State mentions, the Defendant relies on cases that are not on point. In *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), the Supreme Court struck down a durational requirement pertaining to an indigent's right to receive medical care. The Defendant argues that it stands to reason that a residence requirement would be a far less egregious limit on the right to travel than the requirement that one obtain two referrals from Kansas physicians before a post-viability abortion can be performed. Defendant makes similar contentions with the remainder of the cases he cites. *Bigelow v. Virginia*, 421 U.S. 809 (1975) (a free speech case); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (physical obstruction to access to an abortion and other medical services).

In examining the components of the *Saenz* case it would clearly appear that the first and third elements are not in issue. The abortion statute does not prevent the right of a citizen of another state from entering and leaving the State of Kansas. Likewise, it does not prevent a traveler from electing to become a citizen of the State of Kansas and be treated like the other citizens of Kansas. The defense is apparently referring to the second element and alleges that a citizen of another state is not being treated as a welcome visitor and rather as an unfriendly alien. On account of the similarities in arguments, this issue will be analyzed jointly with the next issue raised by the defendant.

Does the Act Violate the Privileges and Immunities Clause of the United States Constitution?

Defendant suggests that if the definition of physician is read to only include Kansas licensed physicians, the Act violates the privileges and immunities clause of the United States Constitution. The Privileges and Immunities clause of the United States Constitution guarantees "the citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states." U.S. Const. art IV, § 2. "The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 382 (1978) (citing *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 511 (1939).

The defendant argues that if a woman obtains a referral from a doctor out of state, she cannot travel to Kansas and obtain an abortion from a Kansas physician. She would be required to see two Kansas physicians first. However, if a Kansas resident has a referral from an out of state doctor to obtain an abortion, she will also have to see two doctors in Kansas. There is no requirement that any woman must first see a doctor out of state and obtain a referral before visiting the two Kansas doctors. The out of state resident may only visit two doctors if both of them are licensed in the State of Kansas. Furthermore, the State of Kansas has a legitimate interest in requiring the two physicians be licensed in this state since it would have no control over sanctioning doctors licensed in another state.

The Kansas abortion law does not discriminate against out of state residents and restrict their right to travel as guaranteed by the Constitution of the United States.

Does the Act Violate the Kansas Constitution?

The Defendant contends the Kansas Act violates the Kansas Constitution. The Defendant focuses on the following provisions: section 1 of the Bill of Rights, which provides that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness, " and Article 2, § 16 which prohibits any one bill from containing more than one unrelated topic.

Section 1 of the Bill of Rights is the Kansas counterpart to Fourteenth Amendment of the United States Constitution. These arguments appear to be very similar to the federal contentions; the Defendant argues the statue is vague and indefinite. The Kansas Supreme Court has consistently interpreted the provisions of the Kansas Constitution to mirror the provisions of the federal Constitution. In the case of *Alpha Medical Clinic v. Anderson,* 280 Kan. 903 (2006) involving abortion rights, the Court stated:

> "We have not previously recognized – and need not recognize in this case despite petitioners' invitation to do so – that such rights also exist under the Kansas Constitution. But we customarily interpret its provisions to echo federal standards. See, e.g., *State v. Morris,* 255 Kan. 964, 979-81, 880 P.2d 1244 (1994) (double jeopardy provision of federal, Kansas Constitutions 'co-equal'); *State v. Schultz,* 252 Kan. 819, 824, 850 P.2d 818 (1993) (Section 15 of Kansas Constitution's Bill of Rights identical in scope to Fourth Amendment of federal Constitution); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority,* 230 Kan. 404, 426, 636 P.2d 760 (1981) (Section 1 of Kansas Constitution's Bill of Rights

> given the same effect as Equal Protection Clause of Fourteenth Amendment of federal Constitution)."

Id. at 920.

Therefore, the rulings set forth above in this opinion relating to the federal Constitutional issues will be the same as it applies to the Kansas Constitution.

The other issue raised under the Kansas Constitution by the defendant is the provision of Article 2, § 16. The provision states in relevant part that "[n]o bill shall contain more than one subject, except appropriation bills and bills for revisions 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."

The Kansas Supreme Court has stated the purpose of the one-subject constitutional provision is to prevent "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) (citations omitted). As the State points out in its brief, the Kansas Supreme Court has also provided that the provision "should not be construed narrowly or technically to invalidate proper and needful legislation" and "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.*, 831 P.2d 958 (1992).

The Defendant contends this provision is violated because the Kansas Act deals with both assisted suicide and post-viability abortions. Consequently, the Defendant argues there is quite simply no connection between the commission of the crime of assisted suicide, the criminal penalties for this offense, and the licensing consequences for committing assisted suicide and the provision of abortion services to women. The State believes the enactment embraces subjects that have a legitimate connection to each other: the termination of viable life.

The United States Supreme Court has recognized in both *Roe* and *Casey* that the State's compelling interest in regulating post-viable fetuses is the potentiality of human life. Similarly, the Court has also recognized a legitimate state interest in banning assisted suicide. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court stated:

> "The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. (citation omitted). This requirement is unquestionably met here. As the court below recognized, Washington's assisted-suicide ban implicates a number of state interests."

Id. at 728.

The Court then proceeded to recognize in *Glucksberg* the state's "unqualified interest in the preservation of human life." See also *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). The state unquestionably has a legitimate interest in the preservation of human life at both

ends of the spectrum. It is therefore not surprising that restrictions on post-viability abortions and assisted suicides are found in the same piece of legislation. It certainly cannot be said that they do not have "any legitimate connection with or relationship to each other." *Harding v. K.C. Wall Products, Inc., Id.*

Does the Definition for Physician Found in K.S.A. 65-6701 Apply to K.S.A. 65-6703?

The defendant maintains that the definition for the term "physician" found in K.S.A. 65-6701 no longer applies to K.S.A. 65-6703. The argument appears to be that if a statute that is part of an original legislative act is modified by subsequent amendment, then the amended statute is no longer considered to be part of the act unless the legislature clearly states such in the amendment. The defendant cites no authority for this position. It certainly makes more sense to conclude that when a statute is amended that is part of a larger act, it has the effect of amending the act itself.

The State also points out that there is a rule of statutory construction that when identical words or terms are used in different statutes on a specific subject they 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 (1967); *T-Bone Feeders, Inc. v. Martin*, 236 Kan. 641 (1985); *Callaway v. City of Overland Park*, 211 Kan. 646 (1973); *Banister v. Carnes*, 9 Kan.App.2d 133 (1983). For these reasons, the definition for the term "physician" found in K.S.A. 65-6701 does apply to K.S.A. 65-6703.

Conclusion

The defendant's motion to dismiss is based upon a number of challenges to the statute under both the Constitution of the United States and the Kansas Constitution. Abortion jurisprudence in this country has been going through an evolutionary process since *Roe v. Wade* in 1973. In light of the interpretations contained in all of the subsequent decisions, K.S.A. 65-6703 survives all of the constitutional challenges. The motion to dismiss is therefore denied.

Clark V. Owens II
District Judge