MONNAT &
SPURRIER
CHARTERED

ATTORNEYS AT LAW

Daniel E. Monnat
Stan Spurrier
Anne L. Ethen
Laura B. Shaneyfelt
James R. Pratt
Megan A. Kimbrell

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

THE STATE OF KANSAS, Plaintiff	)	
v.	)	Case No. 07 CR 2112
GEORGE R. TILLER, Defendant.	)	

PURSUANT TO CHAPTER 21
KANSAS STATUTES ANNOTATED

MOTION TO DISMISS

Comes now the defendant, Dr. George Tiller, by and through his attorneys, Lee Thompson of Thompson Law Offices; and Daniel E. Monnat of Monnat & Spurrier, Chartered, and pursuant to K.S.A. § 22-3208, moves to dismiss the above-captioned action on the grounds that: (1) it is brought pursuant to an unconstitutional provision of the referenced statute; and (2) the state's prosecution is based on an interpretation contrary to the plain language of the statute; and (3) the statute is unconstitutionally void for vagueness.

200 West Douglas, Suite 830
Olive W. Garvey Building
Wichita, Kansas 67202
TEL (316) 264-2800
FAX (316) 264-4785
www.monnat.com

I. The language of K.S.A. 65-6703(a) requiring the opinion of a "referring physician" violates the Constitution of the United States of America.

The United States Supreme Court has specifically invalidated statutory schemes requiring concurrence of more than one physician in the context of both pre- and post-viability abortions under the *Bolton* trimester-based analytic framework. *See Doe v. Bolton*, 410 U.S. 179, 199, 93 S.Ct. 739, 751, 35 L.Ed.2d 201 (1973). To our knowledge every other case which has challenged a similar statutory provision has been invalidated. *See Wynn v. Scott,* 449 F. Supp. 1302, 1320 (N.D. Ill. 1983); *Summit Medical Associates, P.C. v. James*, 984 F. Supp. 1404 (M.D. Ala. 1998); and *Women's Medical Professional Corp. v. Voinovich,* 911 F.Supp. 1051, 1087 –1088 (S.D.Ohio, 1995), *aff'd* 130 F.3d 187 (6th Cir. 1997), *cert. denied,* 523 U.S. 1036, 118 S.Ct. 1347, 140 L.Ed.2d 496 (1998). These cases, decided at different times and even under different standards, together with the other reasons set out below mandate a dismissal of the charges in this case.

A. A statutory requirement of a second physician in order to perform a post viability abortion is an unconstitutional burden on a physician's right to practice medicine.

Even prior to the issuance of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and *Bolton,* supra, the late federal Judge Frank Theis struck down an earlier iteration of Kansas abortion law in *Poe v. Menghini*, 339 F.Supp.

986 (D.Kan. 1972). In *Poe,* later cited by the United States Supreme Court in both *Roe* and *Bolton*, Judge Theis struck down the requirement that three physicians concur on the necessity of an abortion (whether pre- or post-viability) based on the fact that the legislature arbitrarily classified the abortion procedure and that the classification bore no reasonable relation to a compelling state interest. *See id.* at 995. Further, the court found the provision interfered with the physician's fundamental right to administer necessary health care to patients. *See id.* at 996. As such, the court found the requirement violative of the equal protection clause of the 14th Amendment and violative of the 1st, 9th, and 14th Amendments protecting the rights of physicians, as well as other citizens to pursue a chosen profession free from unnecessary interference from the state. The court reasoned that the right of the physician was infringed upon in that the statutory scheme subordinated the attending physician's judgment to that of two other physicians without showing that it effectively advances a legitimate interest. *See Id.*

In *Doe v. Bolton*, the Supreme Court struck down a statutory requirement that a physician performing abortions obtain the concurrence of two additional physicians that the abortion was medically necessary. *Bolton,* 410 U.S. at 198-200, 93 S.Ct. at 750-751. In *Bolton*, the Court noted that the defendants failed to identify any other voluntary medical procedure which was subject to the two physician concurrence requirement. As such, the Court found the requirement

lacked any rational connection to the patient's needs and, as such, unduly infringed on the physician's right to practice medicine. *Id.* at 199. With respect to Kansas law, we know of no other medical procedure which requires a concurring opinion prior to performing a voluntary or necessary procedure. Indeed, even the determination for a "Do Not Resuscitate" order may be directed by one physician. *See* K.S.A. § 65-4944.

B. As applied, K.S.A. § 65-6703(a) violates a woman's right to obtain aAn abortion.

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. The Kansas statute, as construed, 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. Indeed, a construction of the Kansas law which requires the referring physician to be one licensed in Kansas forces non-resident women and their families to seek, compensate and receive *three* opinions that a substantial and irreversible impairment of a major, mental or physical bodily function will occur unless her post-viability pregnancy is terminated. These three opinions are her own physician in her home state who referred her to Dr. Tiller, another Kansas physician who must be licensed to practice in Kansas, and Dr. Tiller. As construed by the state in this case, the woman is required to travel to a

strange state in which she may or may not have any ties and attempt to obtain a physician referral and finding that an abortion is necessary when the physician-patient relationship is new and temporary. Such a requirement renders meaningless her relationship with, and the findings of, her treating physician, and such a result is clearly prohibited by *Bolton*.

The "referral" requirement forces a trade-off between maternal health and fetal survival. The time required to obtain such opinions and the expense are unjustified. This is an unconstitutional infringement on a woman's right to choose to terminate her pregnancy. Under either the *Roe* strict scrutiny test or the undue burden test of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992[1]) this is a violation of the woman's right.

Similar statutes, when tested, have routinely been invalidated. Illinois law which conditioned an abortion upon "consultation with at least two other physicians not related to or engaged in practice with the attending physician" was found to be unconstitutional. *Wynn v. Scott,* 449 F. Supp. 1302, 1320 (N.D. Ill. 1983). The court reached this conclusion even though, unlike *Bolton*, the Illinois statute was limited to abortions after viability, a fact which might render the state's burden of justifying such a restriction easier to meet. *Id.* at 1321. Even given this

[1] Casey addressed pre-viability abortion. Thus, the strict scrutiny requirement of Roe remains in tact for the analysis of post-viability abortion restrictions.

distinction, the court found that the statute was not narrowly drawn to express only a legitimate state interest at stake. It held, with respect to both the state's interest in preserving maternal health after the first trimester and the interest in preserving fetal health after viability, that there was "no direct relationship between either interest and the number of physicians participating in the decision." *Id.* at 1319.

The same result has occurred in cases decided in the "post trimester" era of analyses of abortion rights. In 1998, the federal courts invalidated an Alabama statute which required the concurrence of "another licensed physician" with respect to any post viability abortion based on preventing death of "substantial and irreversible impairment of a major bodily function of the woman." 1975 Ala.Code §26-22-3(c)(2). In *Summit Medical Associates, P.C. v. James*, 984 F. Supp. 1404 (M.D. Ala. 1998) the court was unwilling to concede, as a matter of law, that Alabama'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." *Id.* at 1462.

Other courts have reached the same result. In fact, we could not express the argument any better than the federal court upholding an injunction of a similar Ohio statute:

In *Doe v. Bolton,* the Supreme Court struck down a Georgia statute which required a physician to obtain confirmation of his decision to perform an abortion, from two other doctors. The Court reasoned that this requirement interfered with the physician's clinical judgment and discretion:

The statute's emphasis ... is on the attending physician's 'best clinical judgment that an abortion is necessary.' That should be sufficient. The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge .... 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 a patient's needs and unduly infringes on the physician's right to practice.
410 U.S. at 199, 93 S.Ct. at 751.

This holding by the Supreme Court appears to govern the analysis of the concurrence requirement in this case, and Defendants have made no argument as to why it should not so apply. Accordingly, this Court finds that Plaintiff has demonstrated a substantial likelihood of success of showing that the second physician concurrence requirement in House Bill 135 is unconstitutional, because it impermissibly interferes with the physician's discretion.

Additionally, it appears to this Court that this requirement may be unconstitutional for the same reasons which render the medical emergency definition likely to be unconstitutional; to wit, the 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 own 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 or health of the mother. Accordingly, this Court finds that Plaintiff has demonstrated a substantial likelihood of success of showing that the second physician concurrence requirement in House Bill 135 is unconstitutional, because it is likely to chill the performance of post-

viability abortions which are necessary to preserve the life or health of the mother.

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, 118 S.Ct. 1347, 140 L.Ed.2d 496 (1998).

c. The referring physician requirement is violative of a citizen's basic liberty interest: the right to travel freely in inter-state commerce.

Requiring a woman to be seen by two separate physicians in Kansas before exercising her constitutional right to an abortion is an unconstitutional impairment of her right to travel freely among the states. This right is a liberty interest protected by the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. In addition, certain aspects of the right may also implicate the equal protection clause of the Fourteenth Amendment.

The United States Supreme Court has specifically overruled, for example, duration residency requirements as violative of the Constitution. Among those cases is one in which the right of an indigent to receive medical care was premised upon a one-year residency in Arizona. This restriction was ruled to violate the right to travel. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). It stands to reason that a residence requirement, which in and of itself does not restrict the right to come and go from a state, 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.

In addition, the United States Supreme Court has held that a state may not restrict advertising in its state for abortion services in another state. The Court stated:

> Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, Tr. of Oral Arg. 29, prosecute them for going there. See *United States v. Guest*, 383 U.S. 745, 757-759, 86 S.Ct. 1170, 1177-1178, 16 L.Ed.2d 239 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328- 1330, 22 L.Ed.2d 600 (1969); *Doe v. Bolton*, 410 U.S., at 200, 93 S.Ct. at 751. Virginia possessed no authority to regulate the services provided in New York-the skills and credentials of the New York physicians and of the New York professionals who assisted them, the standards of the New York hospitals and clinics to which patients were referred, or the practices and charges of the New York referral services.

Bigelow v. Virginia, 421 U.S. 809, 821 (1975).

If a state cannot regulate the services provided in another state, and if a state cannot prevent a citizen from traveling to another state to obtain an abortion, there are very serious problems with one state placing unnecessary and undue burdens on the rights of citizens of another state to travel to Kansas to obtain an abortion. The United States Supreme Court has recognized that "The right to travel includes the right to unobstructed interstate travel to obtain an abortion and other medical services ...." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 312-313, 113 S.Ct. 753, 782 (U.S.,1993).

D. If read to require a Kansas referring physician, the law constitutes an unconstitutional restriction on privileges and immunities guaranteed to each and every citizen of the United States of America.

The definition of "physician", if read as construed by the state, is an unconstitutional restriction on the Privileges and Immunities guaranteed to citizens of the United States.

The Privileges and Immunities clause of the United States Constitution guarantees that "the citizens of each state shall be entitled to all Privileges and Immunities of citizen in the several states." U. S. Constitution, Article IV, § 2. This provision appears in the State's Relation Article. This is the same Article which embraces the "Full Faith and Credit Clause, the Extradition Clause...., the provisions for the Admission of New States, the Territory and Property Clause and the Guarantee Clause." *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371, 379, 98 S.Ct. 1852, 188, 56 L.Ed.2d 354 (1978).

In *Bolton*, the Court struck down the requirement contained in the Georgia statute that only Georgia residents be permitted to obtain abortion services in Georgia. The court found that just as the Privileges and Immunities clause protects persons who enter other states supply their trade, so must it protect persons who enter Georgia seeking the medical services available there. The Court reasoned that a contrary holding would mean that the state could limit to its own residents the general medical care available within its borders. Such a result was

unacceptable. *Bolton*, 410 U.S. at 200.

In this instance, residents of other states are treated differently than residents within the State of Kansas. By way of illustration, a woman who resides in Jefferson City, Missouri and is treated by a physician in Jefferson City and diagnosed with a pregnancy which would result in a substantial and irreversible impairment of her physical or mental function, versus a woman in Topeka who receives the same diagnosis, will be treated differently in the application of the law. This result is prohibited by the Privileges and Immunities Clause of the United States Constitution.

V. Any interpretation of K.S.A. 65-6703(a) requiring that a referring physician be licensed in Kansas is either contrary to the plain language of the statute of constitutionally invalid as impermissibly vague.

A. This prosecution is based on a construction at odds with the plain language of the statute.

The definition of "physician" used in the 1992 law and codified at K.S.A. 65-6701 is described as a definition "as used in this act." The original "act" to which this provision refers is L. 1992, Ch. 183, a session law with ten separate sections. The entirety of Chapter 183 obviously constitutes the "act". Section 1 of Chapter 183 begins with the language "as used in this act" and the last section of this chapter, Section 10, states that "[t]his act shall take effect and be in force from

and after its publication in the statute book." Thus, "this act" in K.S.A. 65-6701, in pertinent part, refers to the currently enacted versions of K.S.A. 65-6701 through 65-6707. The definitions of K.S.A. 65-6701 are not applicable with respect to amendments of the "act" because if the Legislature intended this result, it could have easily included such language. *See*, e.g., K.S.A. 65-6708 (stating that "K.S.A, 65-6701 and K.S.A. 1997 Supp. 65-6708 to 65-6715, inclusive, and amendments thereto shall be known and may be cited as the woman's right-to-know act"). (Emphasis added.)

Further, the definition of "physician" from K.S.A. 65-6701 does not apply to Section 18 of HB 2531. Specifically, HB 2531 Section 18 is an entirely new section and does not amend, nor is it directed to be included, in any act, let alone L. 1992, Ch. 183. Therefore, none of the definitions of K.S.A. 65-6701 should be applicable to Section 18 because Section 18 has never been a part of, nor does it amend, the "act" referenced in the definitional section. HB 2531 Section 18 lacks a definition for both the terms "viable" and "physician."

Finally, both Larry Buening of BOHA and Jill Wolters from the Office of the Revisor of Statutes have publicly stated that Section 18 of HB 2531 lacks a definition of the word "physician," when testifying before the interim Legislative Committee meeting at the time of enactment.

B. If not held invalid as contrary to the statute, it is void for vagueness.

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 n.8 (1974)(quoting *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926)). "It is a fundamental component of due process that a law is void-for-vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *accord, Jane L. V. Bangerter,* 61 F.3d 1493, 1500 (10th Cir. 1995), *rev'd and remanded on other grounds sub.nom. Leavitt v. Jane L.,* 518 U.S. 137 (1996).

Vague laws offend due process in two ways. First, they fail to provide the persons targeted by the statute with a "reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Grayned,* 408 U.S. at 108; *Jane L.,* 61 F.3d at 1500 (abortion restriction prohibiting "experimentation on "live unborn children" void for vagueness).

Second, by failing to provide explicit standards by which to assess conduct, vague laws "impermissibly delegate []basic policy matters...for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement." *Grayned,* 408 U.S. at 108-09; *see also Jane L.,* 61 F.3d at 1500

(abortion restriction which "fail[s] to draw a clear line between proscribed and permitted conduct" is unconstitutionally vague). In other words, by failing to define explicitly what conduct is proscribed, vague laws invite arbitrary and discriminatory enforcement. *Kolender v. Lawson,* 4 60 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972).

"[T]he degree of vagueness that the Constitution tolerates...depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498 (1982). Statutes that impose criminal penalties are subjected to a higher standard of certainty in their language than is applicable to other statutes. *See, e.g., Kloneder,* 461 U.S. at 357; *Goguen,* 415 U.S. at 574-75. Moreover, the Constitution demands the greatest clarity from a statute where, as here, "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin,* 439 U.S. 379, 391 (1979)(citations omitted); *see also Baggett v. Bullitt,* 377 U.S. 360, 372 (1964)("the vice of constitutional vagueness is further aggravated" where the statute inhibits the exercise of constitutionally protected freedoms). Vague standards of conduct, coupled with the prospect of arbitrary enforcement, will in many instances cause a person to "'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked." *Baggett,* 377 U.S. at 372 (quoting *Speiser v. Randall,* 357 U.S. 513, 526 (1958)). This consequence

raises special concerns where the vague statute encroaches upon constitutional rights.

K.S.A. 65-6703(a) requires a documented referral from another physician "not legally or financially affiliated with the physician performing or inducing the abortion..." This language does not define what activities might make two physicians "legally or financially affiliated." Does this mean that, as is common in the medical practice, that one physician cannot see patients in the other physician's offices? Does it mean that the physician performing the procedures must rotate between more than one referring physician? Does it mean that the two physicians cannot have an attorney in common? There is absolutely no guidance in the statute as to what activities constitute either legal or financial affiliation–or how a physician might avoid some prosecutor making such a finding.

This ambiguity in the reporting statute is underscored by the fact that the Board of Healing Arts has reviewed Dr. Tiller's medical procedures on a number of occasions and has found that his practices meet the requirements of the law. Yet, the Attorney General's review has apparently led to an opposite conclusion.

Thus, it is not clear what the plaintiffs must do–or must avoid doing--in order to not become "legally or financially affiliated." This type of uncertainty will inevitably cause medical providers to "'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked..'" *See*

Grayned, 408 U.S. at 109 (quoting *Baggett,* 377 U.S. at 372). Abortion providers will fear providing services and referring physicians will fear rendering a medical opinion because they will fear criminal prosecution. Either fear will have a chilling effect on the availability of health care services to women.

For the reasons stated, Defendant respectfully moves that the charges in the captioned case must be dismissed.

Lee Thompson, #08361
Erin C. Thompson, #22117
THOMPSON LAW FIRM, LLC
106 E. 2nd Street
Wichita, Kansas 67202
Telephone: (316) 267-3933
Fax: (316) 267-3901
E-mail:lthompson@tslawfirm.com

By: _____

Daniel E. Monnat (#09363)
Laura Shaneyfelt (#12327)
Monnat & Spurrier, Chartered
200 West Douglas, Suite 830
Wichita, Kansas 67202
(316) 264-2800

By: _____

ATTORNEYS FOR GEORGE M. TILLER, MD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of July, 2007, a true and correct copy of the above and foregoing was sent certified mail, return receipt requested, to:

Paul Morrison, Attorney General
Veronica Dersch, Assistant Attorney General
120 SW 10th Street, Rm. 200
Topeka, KS 66612