No. 07 CR 2112

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

THE STATE OF KANSAS,

Plaintiff,

v.

GEORGE R. TILLER,

Defendant.

BRIEF OF *AMICI CURIAE* KANSAS SENATORS KARIN BROWNLEE, LES DONOVAN, SR., MARK GILSTRAP, TIM HUELSKAMP, PHILLIP JOURNEY, JULIA LYNN, PEGGY PALMER, DENNIS PYLE, RALPH OSTMEYER, AND SUSAN WAGLE AND KANSAS REPRESENTATIVES J. DAVID CRUM, OWEN DONOHOE, BENJAMIN HODGE, STEVE HUEBERT, S. MIKE KIEGERL, LANCE KINZER, RAY MERRICK, ROB OLSON, VIRGIL PECK, JR., AND ARLEN SIEGFREID IN SUPPORT OF PLAINTIFF

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I. U.S. SUPREME COURT PRECEDENT SUPPORTS K.S.A. § 65-6703(a)

A. State Interest Is Substantial After Viability

The current bedrocks of abortion jurisprudence are *Planned Parenthood v. Casey* and *Gonzales v. Carhart*, which have both affirmed and refined *Roe v. Wade*. *Gonzales*, 167 L. Ed. 2d 480 (2007); *Casey*, 505 U.S. 833 (1992) (noting at 871 that the central purpose of *Roe* pertained to *pre-viability* abortions); *Roe*, 410 U.S. 113 (1973). According to these decisions, states have "substantial" interests in protecting women and unborn children after viability. *See, e.g., Gonzales*, 167 L. Ed. 2d at 501.

In *Casey*, the Court affirmed the basic premises of *Roe*, but rejected *Roe's* trimester framework because it undervalued the states' interests in potential life. *Casey*, 505 U.S. at 878, 873; *see also Gonzales*, 167 L. Ed. 2d at 502 ("*Casey* rejected… the interpretation of *Roe* that considered all previability regulations … unwarranted). Instead, the Court repeatedly emphasized that, ***the later in pregnancy that an abortion occurs, the more state-regulated and restricted that abortion can be***. *Casey*, 505 U.S. at 869, 879. In fact, the Court stated that "[i]in 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; *see also Doe v. Bolton*, 410 U.S. 179, 198-99 (1973) (indicating that women are substantially responsible for the risks incurred when waiting until late in pregnancy for abortions).

Paramount to the Court's discussion in *Casey* was the states' interests in fetal life after viability—which the Court concluded had improperly been given little to no weight in the years following *Roe*. *Casey*, 505 U.S. at 870-71. To that end, the Court overruled

two of its own previous decisions, holding that "[e]ven in the earliest stages of pregnancy, the State may enact rules and regulations" affecting abortions. *Id*. at 870, 872, 881 (stating that cases after *Roe* went too far in striking abortion regulations); *see also Gonzales*, 167 L. Ed. 2d at 502 ("Casey overruled the holdings in two cases because they undervalued the State's interest in potential life.").

A state can further its legitimate interest in protecting the unborn by enacting legislation that expresses a preference for childbirth over abortion. *Casey*, 505 U.S. at 883. "Measures aimed at ensuring that [her] choice contemplates the consequences for the fetus do not necessarily interfere" with a woman's rights under *Roe*. *Id*. at 873. Here, the two-physician requirement challenged by the Defendant in K.S.A. § 65-6703(a) is simply a regulation which protects children from medically unnecessary abortions by ensuring the procedure is medically necessary, thereby expressing the State's interest in childbirth over abortion.

States are also free to enact regulations aimed at protecting the health and safety of women seeking abortion. *Casey*, 505 U.S. at 878. For example, a state has a "substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth." *Id*. at 882. Here, because the risks to women increase as the gestational age of the baby increases (*i.e*., post-viability abortions are more dangerous than first trimester abortions),[1] the State has a legitimate interest in ensuring that procedures are in place protecting women seeking post-viability abortions.

[1] This is medically undisputed. *See, e.g.*, Planned Parenthood, *Procedures* (2006), *available at* http://www.plannedparenthood.org (last visited Aug. 1, 2007) ("Earlier abortions are easier and safer than abortions later in pregnancy.").

A second-physician requirement ensures that a woman receives an accurate medical evaluation from a physician other than the one who stands to benefit financially from her abortion; this is particularly acceptable in the post-viability context, where the State may assert significant interests in the unborn child's life as well as in the woman's health. Under *Casey*, attempting to ensure that a woman is protected and understands the consequences of her decision by requiring confirmation of medical necessity by a second physician furthers the State's legitimate interest of reducing risk to that woman. *Casey*, 505 U.S. at 882.

In *Gonzales*, the Court reaffirmed these central holdings of *Casey*. *See Gonzales*, 167 L. Ed. 2d at 508-10. Furthermore, the Court *directly tied* the medical regulation of abortion to a state's interest in ensuring a woman is fully informed before making the abortion decision—*even when the regulation does not require that information be given to a woman*. *Id*. at 510-11. Noting that regret, severe depression, and loss of esteem can follow abortion, the Court concluded that "the state has an interest in ensuring that so grave a choice is well-informed," and concluded that a *ban not even requiring medical information be given to the woman* can further that informational interest. *Id.*; *see also Casey*, 505 U.S. at 882 (concluding that a lack of proper information can result in devastating psychological consequences for the woman). Even more relevant, then, is K.S.A. § 65-6703(a), a *regulation* which works to ensure that women are well-informed by ensuring a proper medical need, and as such it falls within the State's substantial interests in regulating post-viability abortions and should be upheld under *Gonzales*.

In summary, the standard applicable to the case at hand is that, after viability, a state may promote its interest in potential human life by regulating and even proscribing

abortion, unless necessary to preserve the mother's life or health. *Casey*, 505 U.S. at 879. An undue burden does not exist if there is no substantial obstacle for the mother. *Id*. at 878. K.S.A. § 65-6703(a) is a post-viability law. As such, Kansas has compelling interests in protecting both women and unborn children from the harms of abortion, especially a post-viability abortion. It imposes no undue burden and must be upheld. *See* Part I.B.

Of importance here is that the abortions *banned* in *Gonzales* were both pre- and post-viability, and yet the partial birth abortion ban—a *ban*, as opposed to the mere *regulation* here[2]—was still upheld against Constitutional challenges. *Gonzales*, 167 L. Ed. 2d at 508. That lends all the more credence to the constitutionality of K.S.A. § 65-6703(a), which only affects post-viability abortions.

B. Extra Cost Or Delay Do Not Constitute Undue Burdens

Measures affirming the life of the unborn or protecting the health and welfare of women may be burdensome without being unconstitutional. "Regulations which do no more than create a structural mechanism by which the State… may express profound respect for the life of the unborn [and/or protect the health of women] are permitted," so long as there is no substantial obstacle for the woman. *Casey*, 505 U.S. at 877-78. An abortion regulation is not unconstitutional simply because it places a restriction on women. "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Casey*, 505 U.S. at 873. A burden is not of necessity a substantial obstacle, and the abortion "right" is not a right "without interference from the

[2] Counsel's understanding is that the prohibition of post-viability abortions in K.S.A. § 65-6703 is not challenged, but merely a regulatory provision in that statute is.

State." *Id*. at 875, 887. Here, women are not in any way prevented from obtaining abortions by seeing two physicians. A woman may still obtain medically necessary abortions under the Act. There is no substantial obstacle, no undue burden.

When considering the standard regarding late-term abortions, this Court should keep in mind that increased cost and delay *do not* constitute undue burdens. The Supreme Court specifically stated that it does not matter if a law makes it more difficult or expensive to procure an abortion when that law has a valid purpose—which, as here, includes the promotion of childbirth over abortion. *Casey*, 505 U.S. at 874, 886. Only an undue burden can invalidate a law—and increased cost, delay, or difficulty *do not* constitute undue burdens. *Id*. at 874, 885-86

Further, in upholding a challenge to a 24-hour waiting period before abortion, the Court acknowledged that, in the vast majority of cases, a 24-hour delay creates *no appreciable health risk*. *Id*. at 885. Thus, not only are increased cost and difficulty not unduly burdensome, but any alleged risks proffered by the Defendant do not support a claim that K.S.A. § 65-6703(a) is unduly burdensome.[3] It is of importance here that Kansas mandates a constitutional 24-hour reflection period before a woman obtains an abortion. Thus, it is entirely feasible that a woman can see one physician, wait 24 hours, and then see the performing physician at the time of the abortion. A woman must already have two constitutionally-required doctor visits. There is no reason why these visits can not be with two unrelated physicians.

[3] Moreover, Defendant likely offers no real-life examples of medical risk resulting from the provision. Such a hypothetical facial attack is invalid under *Gonzales*. 167 L. Ed. 2d at 515.

The Court has upheld requiring two doctor visits; no undue burden results here. *Casey*, 505 U.S. at 885-86 (holding two doctor visits constitutional). If a state can require two physician visits 24 hours apart before any abortion takes place, there is no reason why, in the post-viability context, that a state cannot require two different physicians at those two appointments.

Furthermore, while many women travel to receive abortions from the Defendant, the Court in *Casey* rejected arguments that a restriction's likely practical effect of delaying an abortion by *more than 24 hours* is unduly burdensome. Even noting that such women are often financially disadvantaged, travel long distances, and must offer account for absence to family members and employers, delays over 24 hours do not constitute undue burdens. *Id.*

The Court noted that all abortion regulations interfere to some degree with the abortion "right," but that does not make those regulations unconstitutional; and court decisions that strike regulations which do not deprive women of the actual abortion decision go too far. *Casey*, 505 U.S. at 875. Not all government intrusion is unwarranted, and not all burdens "on the right to decide" are "undue." *Casey*, 505 U.S. at 875-76. Here, mere delay, cost, and difficulty do not constitute an undue burden.

C. Abortion May Be Treated Differently From Other Medical Procedures

Furthermore, abortion is inherently different from other medical procedures and can constitutionally be treated differently than other medical procedures. In *Harris v. McRae*, the Supreme Court held that a state government can distinguish between abortion and "other medical procedures" because "abortion is inherently different" and "no other

procedure involves the purposeful termination of potential life." 448 U.S. 297, 325 (1980).

This holding has been reiterated in other courts. *See, e.g., Britell v. U.S.*, 372 F.3d 1370, 1381 (Fed. Cir. 2004) (noting that *McRae* is consistent with other Supreme Court decisions); *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, 317 F.3d 357, 361 (4th Cir. 2002) ("Because the regulation [requiring admitting privileges and referral arrangements of abortionists] did not strike at the abortion-decision itself, we also applied a rational-basis standard … and concluded that South Carolina had a rational basis for regulating abortion clinics while not regulating other healthcare facilities," because "abortions are 'inherently different from other medical procedures….'") (citing *Roe* and *McRae*); *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 258 (Tex. 2002) (stating that because abortion involves a potential life, it has no parallel in other medical treatment methods). Thus, any assertion that K.S.A. § 65-6703(a) should be struck because it treats abortion differently than other medical procedures is without merit.

Moreover, the Court in *Casey* held that states may require that women be given certain information even when that information has "no direct relation to her health." *Casey*, 505 U.S. at 882. Thus, even if the Defendant asserts that there is no medical reason for a concurring second physician, the potential informational quality of a second opinion in the post-viability context makes that assertion meaningless under *Casey* and *Gonzales*. Measures may be enacted favoring childbirth over abortion, even when those measures do not further a maternal health interest. *Casey*, 505 U.S. at 886.

D. Physician Rights Are Not Paramount

Finally, the physician's rights are not paramount in the abortion decision and should not be considered by this court. In *Casey*, the court confirmed this basic premise, holding that the physician-patient relationship is derivative of the woman's position. *Casey*, 505 U.S. at 884. A physician has no greater right in the abortion context than his or her patient—and as demonstrated above, K.S.A. § 65-6703(a) does not place an undue burden on the woman. Because a woman's challenge would fail here, so would the Defendant's.

In addition, precedent makes clear that "the State has a significant role to play in regulating the medical profession." *Gonzales*, 167 L. Ed. 2d at 509. The Court in *Casey* held that, standing alone (as here), limits on physician discretion are not reason to invalidate an abortion regulation. *Casey*, 505 U.S. at 886. Moreover, there is disagreement as to when fetal life becomes viable, whether post-viability abortions are medically necessary, etc.; and "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 167 L. Ed. 2d at 513; *see also generally id*. (discussing diverging medical opinions).

Gonzales affirms and emphasizes these points. Where a state "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 the life of the unborn. *Gonzales*, 167 L. Ed. 2d at 509-10. "What is at stake is the woman's right to make the

ultimate decision, not a right to be insulated from all others [including consulting physicians] in doing so." *Casey*, 505 U.S. at 877.

II. ANY CLAIMS THAT COURTS HAVE NOT UPHELD MULTIPLE-PHYSICIAN LAWS ARE INCORRECT

A. Courts Have Upheld Multiple-Physician Requirements

While the Supreme Court did not pass on the merits of a multiple-physician requirement in *Casey*, it did uphold a reporting regulation that required the reporting of the "physician (and the second physician where required)." *Casey*, 505 U.S. at 900. The Court found that the information required in the reporting requirement—including a possible two-physician requirement—constitutional because that information related to health. *Id*.

In *Planned Parenthood v. Ashcroft*, the Supreme Court upheld a Missouri statute requiring that a second physician be in attendance during a post-viability abortion, thereby rejecting the argument that such a requirement distorts the doctor-patient relationship. 462 U.S. 476, 483-84 (1983). The Court stated:

> [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 the lives of viable fetuses…."

Ashcroft, 462 U.S. at 485-86. The Missouri requirement and K.S.A. § 65-6703(a) are genuinely analogous, especially in light of the Court's conclusions in *Casey* and *Gonzales* that post-viability restrictions act to preserve both maternal health and fetal life by providing the woman with an opportunity to receive medically accurate information.

Additionally compelling are the lower court decisions which have upheld requirements similar to K.S.A. § 65-6703(a). In *Midtown Hosp. v. Miller*, the court denied a restraining order against a third trimester requirement that "the physician and two consulting physicians certify that the abortion is necessary in their best clinical judgment to preserve the life or health of the woman." 36 F. Supp. 2d 1360, 1362 (N.D. Ga. 1997). The parties later settled, stipulating that the act would only be enforced in post-viability circumstances. *Midtown Hosp. v. Miller,* 36 F. Supp. 2d 1360 (N.D. Ga. 1998).

In *Doe v. Deschamps*, the District of Montana upheld a provision requiring two doctors to agree with the attending physician that a post-viability abortion is necessary to preserve the woman's life or health. 461 F. Supp. 682 (D. Mont. 1976). After noting that *Doe v. Bolton, discussed infra*, "failed to distinguish between the changing degree of state interests" during pregnancy, the court held that *Doe* and *Roe* must be read together—and emphasized that *Roe* stated that the State may regulate and even prescribe abortion during the "stage subsequent to viability":

> 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…. The will of the woman and her physician are no longer of primary consideration. Medical judgments may vary 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 685, 687-88 (citing *Roe*, 410 U.S. at 163, 164-65).

Finally, in *Roe v. Harris*, an attorney fees case before the Supreme Court of Idaho, that court related that earlier in the case, the trial court upheld a two-physician

certification requirement for welfare funding of abortions. 917 P.2d 403 (Idaho 1996). Note that this result affected both pre- and post-viability abortions.

Thus, this sample of cases as well as the analysis in Part I demonstrate that this court would not be alone[4] or without rock solid justification in determining that K.S.A. § 65-6703(a) is constitutional under the U.S. Constitution.

B. Decisions Striking Similar Laws Are Outdated Or Inapposite[5]

Defendant may cite cases striking multiple-physician requirements in the abortion context. However, cases decided without the guidance of *Casey* and *Gonzales* are outdated. In addition, the facts of some cases make those cases inapposite.

Multiple-physician requirements are not new. In 1972, the District of Kansas considered a *three*-physician requirement in all abortions. *Poe v. Menghini*, 339 F. Supp. 986, 988 (D. Kan. 1972). Already, the regulation is distinguishable; it applied to *all abortions* (as opposed to only post-viability abortions, where the state interest is significant) and required three (as opposed to only two) physician certifications. *Id*. Additionally, the thrust of the challenge involved the classification of therapeutic abortions apart from other procedures—a classification which is demonstrated constitutional in Part I.C. *Id*. at 992, 995. The court saw no purpose served other than

[4] Moreover, Kansas is not alone in requiring two- or three-physician concurrence in the abortion context. At least 12 states require some form of physician concurrence. In addition, at least 12 states require second-physician attendance. State-by-state research on file with Counsel.

[5] Because the motion is sealed, Counsel relies on news reports, experience, and speculation as to what cases Defendant cites.

thwarting abortions, but this neglects the medical information benefits clearly laid out in *Casey* and *Gonzales*, as shown in Part I. *Id*. at 995. Second, the court found that the regulation infringed on the doctor-patient relationship, which is not a legitimate concern in this context, as shown in Part I.D. *Id*. at 995. Thus, *Poe* fails to support Defendant's motion.

In 1973 in *Doe v. Bolton*, the Supreme Court considered a three-physician requirement which applied to *all* stages of pregnancy and ultimately required the participation of *six* physicians in the abortion—a far cry from the mere two-physician requirement in Kansas. 410 U.S. at 183, 199 (1973). In addition, the provision involved *first trimester* abortions. *Id*. at 198. This is clearly distinguishable from K.S.A. § 65-6703(a), which only affects post-viability abortions—the stage when states may even proscribe abortion. *See* Part I. *Doe* also relied on the outdated assumption that abortion cannot be treated differently from other procedures, contrary to the Supreme Court's later holdings, as shown in Part I.C. *Doe*, 410 U.S. at 199.

Wynn v. Scott is also a pre-*Casey*, pre-*Gonzales* decision, lacking guidance from those decisions. 449 F. Supp. 1302 (N.D. Ill. 1978). *Wynn* is immediately questionable, because the court struck basic informed consent requirements that have been upheld in *Casey* and its progeny. *See id*. at 1316-17. Additionally, the regulation required three physicians—again different from the mere two physicians required here, which is easily defensible as a legitimate medical interest under *Casey* and *Gonzales*. *See* Part I. While the statute did involve post-viability abortions, the court incorrectly neglected to acknowledge the medical value in a multiple-physician requirement. *Wynn*, 449 F. Supp. at 1319. The court also complicated the analysis by focusing on assertions of vagueness,

which must be analyzed separately from whether a multiple-physician requirement is generally constitutional. *Id*. After discussing the *Deschamps* decision, the court chose not to follow it.[6] *Id*. at 1320.

Use of *Women's Med. Prof. Corp. v. Voinovich* is also suspect, because that court ruled that a state may not limit post-viability abortions to situations where only the mother's physical health is threatened; but *Gonzales* ruled that a "health" exception is not required. *Gonzales*, 167 L. Ed. 2d at 514; *Voinovich*, 911 F. Supp. 1051, 1081 (S.D. Ohio 1995). The court then relied exclusively on *Doe* and on the physician's discretion, which is improper as demonstrated above. *Voinovich*, 911 F. Supp. at 1087-88. Importantly, *Voinovich* only granted a preliminary injunction; it did not finally decide the constitutionality of the multiple-physician requirement at issue. *See generally, id*.

In addition, on appeal, the Sixth Circuit did not follow the lower court's reasoning and did not look at the constitutionality of the multiple-physician regulation; instead, it struck the entire post-viability ban because it found the medical emergency and necessity exceptions vague and, contrary to *Gonzales*, because it did not contain a health exception. *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 203, 206, 209-10 (6th Cir. 1997). There is no such concern here.[7] And even under the language there, a woman in Kansas

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[6] Because *Deschamps* is used in *Wynn*, any use of *Wynn* while simultaneously claiming that there are no cases upholding multiple-physician requirements is patently false.

[7] While the medical emergency exception in K.S.A. 65-6703 appears in a different subsection, it can be deemed applicable to subsection (a) because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales*, 167 L. Ed. 2d at 507 (citation omitted).

will "still be free to choose to have an abortion" once she sees two physicians. *Id*. at 208.

Finally, in *Summit Med. Assoc. v. James*, the court only considered (and denied) a motion to dismiss; it *did not decide the constitutionality* of a two-physician requirement. 984 F. Supp. 1404, 1462 n.48 (M.D. Ala. 1998). It only articulated that it could not, under those circumstances, conclude that the requirement at issue furthered the state interest without interfering with a physician's duty to the woman. *Id*. at 1462. It did instruct, however, that the plaintiff must demonstrate unduly burdensome medical risks in order to prevail on the merits; here, there are no unduly burdensome medical risks. *Id*.; *see* Part I.

In evaluating the requirement, the court noted that prior Supreme Court decisions—including *Doe v. Bolton*—were not dispositive in the case, because those decisions did not take into account the state's strong post-viability interests. *Id*. at 1461-62. To that end, it disagreed with the district court's treatment of *Doe* in *Voinovich* and acknowledged that the Sixth Circuit did not reach the issue. *Id*. at 1461 n.45.

In summary, each of these decisions—and any others potentially offered by Defendant—must be read in light of *Casey* and *Gonzales*. None of the lower court decisions are mandatory authority to this Court, and each are outdated or inapposite; *Casey* and *Gonzales*, however, are controlling.

CONCLUSION

K.S.A. § 65-6703(a) is constitutional under the U.S. Constitution.

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CERTIFICATE OF SERVICE

I hereby certify that on _____, I served one paper copy of the foregoing Brief of *Amici Curiae* to counsel listed below by depositing said copy in U.S.P.S. first-class mail, postage paid.

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