

**COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES
Administrative Hearings Branch
Case No. AHB certificate of need 04-008 SC**

**IN RE: JOHN W. GILBERT, M.D.
Open Stand Up MRI, Florence, Kentucky
Open Stand Up MRI, Hazard, Kentucky
Open Stand Up MRI, London, Kentucky
Open Stand Up MRI, Pikeville, Kentucky**

**AMICUS CURIAE BRIEF OF THE
ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.
AND DR. JAMIE JACOBS**

Comes now the Association of American Physicians and Surgeons, Inc. (the “AAPS”) and Dr. Jamie Jacobs, by and through counsel, and respectfully submits this Amicus Curiae Brief in support of John W. Gilbert, M.D. and Physician Services, PSC (“**Physician Services**”) in the above-captioned matter.

The AAPS was founded in 1943 as a not-for-profit organization. Its purpose is to serve as the voice of the nation’s private physicians. It is funded almost exclusively by its thousands of members, many of whom live and practice within the Commonwealth of Kentucky. The AAPS is dedicated to advocating the highest ethical standards in the practice of medicine and to defending the physician-patient relationship. Its members are deeply concerned about government interference into medical economics, which has driven up the cost of health care. Members of the AAPS also oppose intrusion into their professional

medical judgment in rendering diagnosis and treatment to their patients. The AAPS has a strong interest in defending the rights of patients to pay for physician services without unreasonable state regulation and in protecting the right of physicians to satisfy a patient's requests for life saving treatments chosen by the physician. In particular, the AAPS defends a patient's right to select his or her physician, the physician's freedom of choice in referring patients to other physicians, and a patient's right to receive and all the benefits of full competition for medical services. Hence, it is appropriate for the AAPS to be heard on the issues at the heart of the above-captioned proceeding.

Additionally, the issues at the core of the Affected Parties' challenge to Physician Services' MRI service notably impact a right of Kentucky physicians to practice their profession without illegal and unnecessary regulation by the Cabinet for Health and Family Services, Office of Certificate of Need (the "**Cabinet**"). Under Kentucky law, the Cabinet is not authorized to regulate the manner in which a physician practices medicine within the confines of his private office, including the methods that he or she uses to provide palliative medical care or the technology utilized to diagnose or treat patients. The theories advanced by the Affected Parties operate to chill the ability of Kentucky physicians to effectively practice medicine within their private offices and clinics. Hence, the above-named

physicians also have a significant stake in the outcome of this proceeding and should be heard in this vital matter.

INTRODUCTION

Physician Services is a Kentucky professional services corporation that owns and operates five private physician offices located in Lexington, Florence, London, Hazard and Pikeville, Kentucky. Dr. Gilbert, a neurosurgeon who is duly licensed to practice medicine within the Commonwealth of Kentucky, is the sole shareholder of Physician Services. Dr. Gilbert personally, and through employed physicians and other employees, provides multi-specialty neuroscience medical care at all Physician Services office locations. These services include neuro-imaging, radiology, neurosurgical services, pain medicine, pain management, and counseling services. All Physician Services' locations are wholly-owned, operated, and managed by Physician Services¹ and Dr. Gilbert personally provides physician services (within his specialty) at each office location on a rotating schedule. Several physicians employed by Physician Services also practice at these locations. Physician Services also offers MRI services at each of its physician offices.²

¹ Physician Services has contracted with Soteria Imaging, Inc. to provide certain management and administrative services in its London office location. However, under its Agreement with Soteria, Physician Services maintains the overall control and legal responsibility for the management of its London office and for all patient care.

² Currently, MRI services are not provided in Physician Services' Pikeville office location. However, it is anticipated that MRI services will be available in Pikeville once Physician Services

Patients come to Physician Services for medical services that may include MRI imaging. These are consensual free market transactions between a willing patient and physician. These services are plainly in demand (otherwise, patients would not need them) and are offered at competitive prices (or else patients would seek them elsewhere). No legitimate concern regarding patient safety exists here. Nor is there any reason for any patient to complain about having greater access to these services by virtue of Physician Services. The existence of Physician Services in the market for medical services will inevitably lower prices for MRIs, even for patients who do come to Physician Services, simply by increasing competition. Because the Commonwealth of Kentucky promotes the reduction of the cost of medical care to its residents, the benefit of lowering medical care prices accrues to everyone from the insured to the uninsured to the indigent. Specifically, the majority of Physician Services' office locations are in medically underserved areas where many patients would otherwise be without access to such services – to their detriment.

Quite clearly, all citizens of the Commonwealth of Kentucky are better off because of the efforts of Physician Services to the exclusion of its competitors (the Affected Parties) who wish to charge higher prices for their MRI services. Such

moves into new office space. These MRI services are offered through Physician Services under the assumed names Open MRI of Lexington, Open MRI of Hazard, Open MRI of London, Open MRI of Pikeville, and Open MRI of Florence. This practice is approved by both the American Medical Association and the Kentucky Medical Association.

competitors have improperly requested that a show cause proceeding be held challenging a patient's right to obtain MRI services from Physician Services in the absence of certificate of need authority.³

Specifically, on December 10, 2003, the Kentucky Diagnostic Center (the "KDC") filed a request with the Cabinet for a show cause hearing concerning the operation of Physician Services' Florence office. This request alleges that Physician Services must obtain certificate of need authority to operate a MRI service from that location. In support of its anti-competitive action, the KDC could only submit the Affidavit of Mr. Saverio Grippa, its Chief Executive Officer. On February 26, 2004, Physician Services filed a response to the Cabinet's request for information in connection with the establishment of the Florence office and the allegations made by the KDC and Mr. Grippa. This response provided ample information to demonstrate that a show cause hearing was simply not warranted, especially given the fact that Physician Services may legally establish a private physician office (either individually or through a corporate entity) without certificate of need authority under the physician's office exemption.

On March 31, 2004, the KDC filed an additional request for show cause hearing concerning all five private physician offices owned and operated by

³ This conduct by the Affected Parties has quite clearly been both disruptive and distracting to Physician Services' physicians. It is, in reality, an anti-competitive tactic calculated to impair the ability of Physician Services to effectively compete against the Affected Parties.

Physician Services. To support this new request, the KDC submitted a second Affidavit of Mr. Grippa along with the Affidavit of Christi Sweet, a Northern Kentucky resident who received a test MRI scan at Physician Services' Florence office location. Again, these Affidavits fail to contain any support for the allegation that Physician Services was operating MRI services within the Commonwealth illegally. Nonetheless, the Cabinet did not provide Physician Services with an opportunity to respond to the new allegations contained in the second hearing request.

On the request of the KDC and the Affidavits of Mr. Grippa and Ms. Sweet, the Cabinet has scheduled a show cause hearing for September 9 – 10, 2004, at which Physician Services must demonstrate why no certificate of need is required for it to offer MRI services. The Kentucky Hospital Association, Pikeville Medical Center, and Marymount Medical Center (other competitors of Physician Services) have since joined the KDC as Affected Parties to this action. Several Motions to Dismiss filed by Physician Services have been denied and discovery has proceeded.

INTRODUCTION

The free market remains, by far, the best mechanism for providing medical services, such as MRI. Physician Services has brought MRI services to the medically underserved areas of Pikeville, Hazard, and London – places that MRI

services were not otherwise being offered. The investment and hard work associated with the establishment of these physician offices are entirely consistent with, and even promote, the public policy in favor of broad access to medical care. Quite the contrary, it would be arbitrary, capricious, and even unconstitutional to interfere with the free market activities of Physician Services, and many patients would needlessly suffer from a rationing of care.

Physician Services' competitors are unhappy, but competition remains the best way to lower the cost of MRIs for consumers while improving access to MRIs. Lowering patient costs simply saves lives. For example, MRIs are superior to mammograms in detecting high-risk breast cancer, according to a study recently published in the *New England Journal of Medicine*, yet cost patients ten to thirty times that of a mammogram. In some areas lacking competition, a hospital can charge as much as \$3,000 for a MRI. With greater competition for MRI services, the charges for these services can drop as low as \$100 to \$150. Additionally, greater competition in MRI services translates directly into reduced fatalities from breast cancer in high-risk cases.

More generally, the dearth of competition in the field of radiology has led to price increases of up to 15% per year. Hospitals routinely enter into exclusive contracts with a small group of radiologists, allowing them to reap exorbitant salaries. In the absence of competition, it is common for hospitals to charge

inflated rates for radiology services because patients have nowhere else to turn. All economists agree: limit competition and prices will increase. Yet, that is exactly what the Affected Parties seek to achieve through this proceeding.

The Kentucky General Assembly has certainly not protected the anti-competitive behavior that the Affected Parties wish to achieve through this proceeding and the Commonwealth of Kentucky does not safeguard the narrow financial interests of the few against the benefits of the many. There is no rational basis for denying the patients of Physician Services the right to MRI services or of depriving Physician Services of the right to provide them.

In 1980, the Kentucky General Assembly determined that the unnecessary proliferation of health facilities and services within the Commonwealth resulted in costly duplication and underutilization of such services, resulting in increased cost to consumers. *See* SENATE BILL 340 (April 3, 1980). The General Assembly also determined that the oversight of health facilities and services was necessary to ensure that the residents of the Commonwealth have safe, adequate, and efficient medical care. *See id.* KRS Chapter 216B was thereby promulgated, creating a certificate of need program. The purpose of this certificate of need program is to improve the quality of health care within the Commonwealth, to increase access to health care facilities, services, and providers, and to create a cost efficient health care delivery system within the Commonwealth. *See* KRS 216B.010.

Presently, under KRS Chapter 216B, no person can establish a health facility without first obtaining certificate of need authority. *See* KRS 216B.061(1)(a). Because MRI is considered a health facility under Kentucky's certificate of need laws, such services generally cannot be offered without certificate of need authority. However, the physician office exemption (codified at KRS 216B.020(2)(a)) provides that the private offices and clinics of physicians are not bound by the certificate of need requirements of KRS Chapter 216B and may provide such services for patients. *See* KRS 216B.020(2)(a). Physician Services has established five private physician offices throughout Kentucky in compliance with the physician office exemption. In addition, it has acquired expensive MRI equipment in reliance on its ability to provide MRI services under the physician office exemption without certificate of need authority.

For the reasons set forth below, the Affected Parties have not presented any credible evidence that Physician Services must have a certificate of need to provide MRI services from any of its five private physician offices. Physician Services may legally offer MRI services as a part of its physician practice without certificate of need authority, and, hence, Physician Services must prevail.

ARGUMENT

I. The Cabinet Is Not Authorized Under Kentucky Law To Regulate The Services That A Physician Can Offer Or Utilize In The Practice Of Medicine From That Physician’s Private Office Or Clinic.

As set forth above, in general, a person must have certificate of need authority to provide MRI services within the Commonwealth. *See generally* KRS 216B.061(1)(a). However, there are several exceptions to this general prohibition, including the physician office exemption, which prohibits the Cabinet from regulating (in any manner) physicians within the confines of their private offices or clinics. *See* KRS 216B.020(2)(a). Rather, regulation of the practice of medicine by physicians within the Commonwealth is delegated to the Kentucky Board of Medicine Licensure. *See generally* KRS 311.565. Specifically, it is the Kentucky Board of Medical Licensure that is charged with “establishing the moral, physical, intellectual, educational, scientific, technical, and professional qualifications” for physicians practicing medicine within the Commonwealth. KRS 311.565(1)(b).

By contrast, the Cabinet is charged with improving the quality of health care within the Commonwealth and with creating a cost efficient health care delivery system within the Commonwealth. *See* KRS 216B.010. In other words, the purpose the Cabinet under Kentucky’s certificate of need laws is to regulate the proliferation of health facilities and services that result in costly duplication and underutilization of such services, and to ensure that the residents of this

Commonwealth have access to safe, adequate, and efficient health care. Undoubtedly, Kentucky's certificate of need laws were not designed to restrict a physician's ability to practice medicine, but rather were developed to control the existence of unnecessary health services. Hence, it is simply inappropriate for the Cabinet, through its certificate of need process, to regulate the type and manner of services that a physician can offer or utilize in the diagnosis and treatment of his or her patients.

Furthermore, accepting the position of the Affected Parties would have a severe and negative impact on the manner in which Kentucky academic medical centers, such as the University of Kentucky, the University of Louisville, and the Trover Clinic in Madisonville, provide professional physician services. Presently, each of these three facilities provides physician services through foundations owned by the academic medical center itself. Specifically, the medical center sets up a separate foundation that employs physicians. This wholly-owned foundation then contracts with the facility to provide professional physician services. None of these academic institutions or the foundations that employ their physicians has obtained a certificate of need or licensure prior to the establishment of their physician practices. These foundations have been providing professional physician services for over thirty years, and have afforded needed health care services throughout the Commonwealth.

The Affected Parties contend that to qualify for the physician office exemption, physician services may only be provided by physician-owners of a group practice. Under this logic, the University of Kentucky, the University of Louisville, and the Trover Clinic are not legally providing physician services. Hence, if this proceeding is resolved against Dr. Gilbert, the ramifications of the delivery of professional physician services throughout the Commonwealth would be devastating to the delivery of professional physician services by Kentucky academic medical centers.

II. Physician Services May Provide Professional Services Through Its Sole Physician Shareholder Or Through Physician-Employees Without Destroying Its Reliance On The Physician Office Exemption To The Certificate Of Need Requirements Of KRS Chapter 216B.

In May 1995, Dr. Gilbert incorporated Physician Services as a professional services corporation under KRS Chapter 274, the Kentucky Professional Services Corporations Act. Professional services corporations are business entities organized for the purpose of providing personal services that require a license or legal authorization to perform, such as professional services rendered by certified public accountants, physicians, and attorneys-at-law. *See* KRS 274.005(3). As Physician Services' physician practice has grown and developed over the past nine years, it has established five physician practice locations throughout the Commonwealth and has hired additional physicians to meet its ever-growing patient load. The Affected Parties now contend that Physician Services cannot

offer professional physician services through physician-employees and stay in compliance with the physician office exemption. This assertion is totally indefensible.

Under the physician office exemption, the Cabinet is prohibited from licensing, supervising, regulating, or otherwise controlling the private offices and clinics of physicians. *See* KRS 216B.020(2)(a). This broad exemption is premised on the notion that the State should not interfere with the trained professional judgment of physicians. In other words, physicians should be free to exercise their unfettered medical judgment in assessing, diagnosing, and treating their patients. Additionally, physicians should be free to purchase and utilize the most advanced equipment in assessing, diagnosing, and treating their patients. In providing MRI services, Physician Services has acted in the best interests of its patients, and hence, should be free of administrative interference initiated by competitors.

In *Somerset Outpatient Diagnostic Center, PSC v. Commonwealth of Kentucky, Cabinet for Health Services, et. al.*, Civil Action No. 99-CI-00502 (May 2, 2002), the Franklin Circuit Court addressed the scope of the physician office exemption, construing its terms quite broadly. *Somerset Diagnostic* involved an affected party challenge to the establishment of a physician MRI service. In *Somerset Diagnostic*, an affected party challenged the establishment of an MRI service on the theory that the service did not qualify for the physician office

exemption to the certificate of need requirements found in KRS Chapter 216B. The service at issue was established by two physicians: M. H. Radmanesh, M.D. (an anesthesiologist) and Stephen Pomeranz, M.D. (a radiologist). Somerset Diagnostic was open only on Saturdays to provide MRI services on a mobile basis. Dr. Radmanesh was present during the performance of the technical component of the service to administer anesthesia services, when necessary, and Dr. Pomeranz interpreted the scans via teleradiology from Cincinnati.

The Cabinet determined that this MRI service did not constitute a private physician's office. In making this determination, the Cabinet considered the financial benefit of the service to its physician-owners, the fact that the service was only offered on Saturdays, and the fact that one of the service's physician-owners was an anesthesiologist and was not qualified to interpret MRI images. Somerset Diagnostic timely appealed the Administrative Law Judge's decision to Franklin Circuit Court.

The sole issue on appeal was whether the Cabinet exceeded its authority by creating standards for private physicians' offices that are not authorized by statute or regulation, to wit: by considering the financial benefit to physicians, hours of operation, and the specialties of the physician-owners. The Court concluded "that additional criteria or standards for a private physician's office must be established by appropriately promulgated regulations," and found KRS 216B.020(2)(a) (the

codification of the physician office exemption) to be clear and unambiguous as written.⁴ Thus, the Court held that the physician office exemption must be applied without construction or interpretation, based on the ordinary and customary usage of its terms, unless the Cabinet wishes to create additional criteria through the appropriate regulatory processes.

Accordingly, Physician Services qualifies for the physician office exemption. The Affected Parties contend that the MRI services that Physician Services provides within the Commonwealth of Kentucky do not qualify for the physician office exemption because, many times, the professional component of the MRI services are provided by Physician Services' physician-employees and not its sole physician-shareholder. However, the statutory requirements of the physician office exemption do not require that physician services only be performed by physician-owners; it simply requires that physician services be performed in the private offices and clinics of physicians. By the clear and unambiguous meaning of these terms, each Physician Services' location is a private physician office. The inquiry can go no further as the Cabinet is prohibited from regulating, in any manner, the services provided by physicians in their private offices, unless the Cabinet wishes to promulgate additional criteria through a formal rulemaking process.

⁴ See *id.*, citations omitted.

Notably, the Kentucky Hospital Association has made numerous unsuccessful attempts to influence the Cabinet to promulgate an administrative regulation that sets forth additional requirements to qualify for the physician office exemption. Now the Kentucky Hospital Association is making an end run around this process by instituting this show cause proceeding against Physician Services in direct contravention to the *Somerset* decision. One must eventually question: to how many bites at the apple is the Kentucky Hospital Association entitled?

Moreover, the Kentucky Professional Services Act (the “**Act**”) itself allows professional service corporations to provide professional services through employees. In order to qualify as a professional services corporation, all of the corporation’s shareholders must be licensed to render the same professional service. *See* KRS 274.015(1). Additionally, by statute:

no professional services corporation . . . may render professional services except through officers, *employees*, and agents who are duly licensed or otherwise legally authorized to render such professional services within the state.

KRS 274.045 (emphasis added). The terms of the Act are clear: a professional services corporation may provide professional services through properly licensed employees.

Physician Services’ sole shareholder (Dr. Gilbert) is a physician licensed to practice medicine within the Commonwealth, and all its physician employees are likewise duly licensed. **Based on the plain meaning of the terms of KRS**

274.045⁵, a Kentucky professional services corporation may clearly provide professional services through its owners or through its properly licensed professional employees. Hence, by statute, Physician Services may legally provide physician services through either its sole shareholder or through its physician-employees.

The fact that Physician Services provides professional physician services through employed physicians, as well as through its sole physician shareholder, does not destroy its reliance on the physician office exemption to exempt it from the certificate of need requirements of KRS Chapter 216B. Physicians nationwide routinely offer physician services through physician-employees or as physician-employees, and in Kentucky, such arrangements regularly bring necessary medical services (like specialty neurosciences services) to numerous medically underserved areas of the Commonwealth. To outlaw such arrangements only serves to deny necessary medical services to many deserving rural communities. A finding that Physician Services' reliance on the physician office exemption is destroyed by the provision of physician services through physician-employees simply runs afoul of the realities of the modern practice of medicine and would have a detrimental impact on the delivery of healthcare, especially in rural areas of the country (like much of Kentucky).

⁵ By statute, all statutory terms and phrases are to be construed according to their common and approved usage of language. *See* KRS 446.080(4).

It is clear that, under Kentucky law, Physician Services may provide MRI services through physician-owners and physician-employees without destroying its reliance on the physician office exemption to exempt it from the certificate of need requirements of KRS Chapter 216B.

III. Physician Services Establishes A Physician-Patient Relationship With All Its MRI Patients.

It is a fundamental principle that physicians must be free to exercise their professional judgment in the evaluation, diagnosis, and treatment of their patients without overly obtrusive government interference. The Affected Parties argue that Physician Services' physicians should be restrained in this right because some of their MRI patients are outside referrals. This argument is also baseless.

In today's world of modern health care delivery, physicians routinely rely on advanced diagnostic technology (such as MRI, CT, ultrasound, and diagnostic cardiac catheterization) to accurately diagnose a patient's medical condition and to create appropriate treatment plans. Neurosurgeons frequently utilize MRI images to assist in the quick and accurate diagnosis of soft-tissue injuries. MRI is also the preferred diagnostic tool for detecting most diseases of the brain and central nervous system. This is especially true for a neurosciences practice, such as Physician Services, because MRI is a fundamental diagnostic tool, and is the standard means utilized, in identifying neurological abnormalities. Hence, MRI is an indispensable diagnostic device for Physician Services' physicians.

Importantly, Physician Services only performs MRI services upon a request for consultation. Specifically, a treating physician (either a Physician Services' doctor or an outside physician) must request an MRI scan on behalf of a patient. Thereafter, Physician Services obtains a detailed history on each patient and determines whether the potential patient is an appropriate candidate for MRI studies. After that determination is made, Physician Services explains the benefits and risks of the proposed procedure to the patient and obtains proper informed consent for the procedure. It is necessary for Physician Services to obtain informed consent because the performance of MRI services gives rise to a duty to provide an appropriate standard of care and exposes Physician Services to liability for negligence and malpractice claims, as a result of the risks involved in undergoing such a procedure, especially where contrast is utilized to obtain more detailed images.

The scan is then performed and interpreted by either Dr. Gilbert (a board certified neurosurgeon trained in neuro-imaging and Physician Services' sole shareholder) or Dr. Goldstein (a board certified neuro-radiologist employed by Physician Services). Based on the results of the initial scan, Physician Services may then request that additional images or other diagnostic tests be performed to confirm or rule out a suspected diagnosis, if problematic pathology is noted. Thereafter, Physician Services is responsible for generating and maintaining proper

patient records on its MRI patients, as well as protecting the confidentiality of such records. Physician Services is also responsible for servicing and maintaining its MRI equipment.

The fact that Physician Services may not have a relationship with a patient **prior** to the performance of MRI services is irrelevant for purposes of compliance with the physician office exemption. **It is at such time that a physician accepts a patient or undertakes to provide treatment for him or her, and the patient accepts the services of the doctor that the physician-patient relationship is established.** *See* PROOF OF FACTS § 3, 46 Am. Jur. 2d 373 (Aug. 2003) (citations omitted). **Once established, the physician has a legal obligation to treat the patient in accord with the standard of care and skill of the medical community in which the physician practices. In other words, once the physician-patient relationship is formed, the physician will be held to a professional standard.** *See id.* at § 4.

Based on these standards, a physician-patient relationship is formed at such time as a physician agrees to provide professional medical services and a patient agrees to accept such services. In fact, at least one court has found that a physician-patient relationship can arise when a radiologist gives advice to a patient, even if the advice is communicated through another health care professional. *See e.g. Raptis-Smith v. St. Joseph's Medical Center et al.*, N.Y., 755

N.Y.S.2d 384, 386 (2003). Once the physician-patient relationship is formed, the physician has a duty to uphold the applicable standard of care.

An individual becomes a patient of Physician Services once Physician Services agrees to provide physician services and the patient accepts these physician services. Clearly, Physician Services has established a physician-patient relationship with each of its MRI patients. Once Physician Services accepts a referral for MRI services from a patient's treating physician and the individual elects to obtain such MRI services, Physician Services is serving the individual's medical needs. Physician Services also provides professional physician services through the interpretation of MRI images obtained by its technologists, by Dr. Gilbert or Dr. Goldstein. Hence, the individual has become a patient of a private physician practice, under the standards outlined in the preceding paragraphs, especially in light of the fact that Dr. Gilbert and Dr. Goldstein provide professional MRI interpretive services.

Moreover, once the physician-patient relationship is formed, Physician Services has a duty to competently perform the requested scans and to interpret the images obtained in compliance with the applicable standard of care for MRI services. Physician Services' physicians must utilize professional judgment in screening out inappropriate candidates, in interpreting the obtained images, in deciding whether additional scans or other diagnostic procedures are necessary to

properly evaluate a patient's medical condition, and in maintaining patient medical records and protecting the confidentiality of those records. All of these tasks unquestionably involve medical services and the use of medical skills and judgment.

The mechanism through which an individual receives MRI services from Physician Services does not change the nature of the relationship between the parties. Regardless of whether a patient is referred for MRI services from a Physician Services' physician or an outside referral, a physician-patient relationship is clearly formed once the MRI services are provided. To find otherwise ignores the basic tenet that a physician-patient relationship is formed once a physician serves a patient's medical needs, even at the request of a treating physician and would serve only to gut the doctrine of the physician-patient relationship. More importantly, such arrangements provide physicians and patients in rural areas with access to cutting-edge technology that would otherwise not be available. The ability of local physicians who do not have MRI diagnostic capability to provide better medical services to their patients and to choose which other physicians will care for their patients is thus, wrongfully, impeded. Without such additional services being available, patients in rural areas often have to travel great distances to receive necessary medical services. In the modern age of

increased health care costs, such services are simply vital to more rustic areas of the country.

The result of limiting a physician's ability to utilize MRI to properly diagnose patients within the confines of his or her private physician office also amounts to an illegal and unethical limitation on patient choice and convenience. Physician Services is providing its patients with a choice of where to receive MRI services. The Affected Parties are, in essence, advocating the elimination of this free market choice, in preference to a monopoly in favor of hospital-owned MRI services, by denying patients the option of receiving MRI services from a physician as opposed to a hospital or diagnostic center. Such a position cannot prevail in the interest of patient care.

Plainly, there is no question that a physician-patient relationship is formed. As a result, whether or not an individual was a Physician Services patient prior to obtaining MRI services from Physician Services has no material bearing on the issue of whether Physician Services' MRI service is a private physicians' office or clinic and, therefore, exempt from certificate of need.

IV. Allowing The Affected Parties To Prevent Physician Services From Offering MRI Services To Its Patients Is Unconstitutional.

The Affected Parties also contravene public policy in seeking to shut down the MRI services offered by Physician Services, thereby inhibiting competition in the provision of such services. The Affected Parties are, in essence, demanding an

arbitrary, capricious, and unconstitutional application of the certificate of need requirements of KRS Chapter 216B to the detriment of Physician Services and its patients. Prohibiting Physician Services from offering MRI is simply irrational from both an economic and constitutional perspective. Physician Services' patients are undeniably better off because Physician Services offers this vital service in-house. Additionally, the Fourteenth Amendment to the United States Constitution prohibits irrational state action, which (in this case) would benefit only a narrow group of providers like the Affected Parties to the detriment of the public-at-large.

The United States Supreme Court has emphasized that parochial regulations are disfavored to the extent they interfere with free market flow. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984) (reiterating “our free-trade policy” under the Commerce Clause); *Welton v. Missouri*, 91 U.S. 275, 282 (1876) (agreeing that “inter-State commerce shall be free and untrammelled”). Most tellingly, the Supreme Court has repeatedly invoked the principles of free enterprise to interpret even the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (holding that the First Amendment must be construed to protect commercial information in our “predominantly free enterprise economy”); *Bates v. State Bar*, 433 U.S. 350, 364 (1977) (“[C]ommercial speech . . . performs an indispensable

role in the allocation of resources in a free enterprise system”) (citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring)).

Because Physician Services has made an enormous investment in MRI equipment in reasonable reliance on the physician office exemption and its related advisory opinions (issued by the Cabinet)⁶, prohibiting Physician Services now from using this equipment simply violates its’ right to due process. Physician Services has a reasonable investment-based expectation protected by the Fifth Amendment from taking without due compensation. *See e.g. Brown v. Legal Found.*, 538 U.S. 216, 233-34 (2003). If Physician Services is precluded from utilizing this expensive equipment, “complex factual assessments of the purposes and economic effects of government actions” will be necessary. *Id.* at 234. Such a taking is clearly beyond the scope of this proceeding and should not be promoted here.

Moreover, restricting a physician from providing professional services through physician employees (or as a physician employee) may actually operate as an illegal restraint of trade. Interestingly, each of the Affected Parties is a competitor of Physician Services and all but one of the Affected Parties (KDC) is a hospital. In essence, the Affected Parties wish to eliminate physicians as

⁶ Additionally, the hospital members who are part of the Affected Parties have known for years that Physician Services provided MRI services at its Hazard and London offices, but until the KDA initiated these proceedings, never uttered one word of protest. Indeed, both Pikeville Methodist Hospital (now the Pikeville Medical Center) and Marymount Hospital encouraged Physician Services to bring neurology services to their communities.

competitors for MRI services. Under Kentucky law, physicians have the right to exercise their professional medical judgment in the diagnosis and treatment of their patients in the context of their private offices and clinics without regulation by the Cabinet, as such regulation is left to the Kentucky Board of Medical Licensure. *See* KRS 216B.020(2)(a); *see also* KRS 311.565(1)(b). Limiting a physician's ability to utilize MRI to properly diagnose his or her patients within the confines of his or her private office (whether such diagnosis is made by a physician-owner or physician-employee) runs afoul of this right and simply operates as an undue restriction on competition, as well as a unjustified obstruction of the due course of trade in violation of the Sherman Antitrust Act (*see generally*, 15 U.S.C. § 1 et. seq.) and the Supremacy Clause of the United States Constitution.

Without a doubt, this proceeding must be resolved in favor of Physician Services in order to avoid these constitutional difficulties. "It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, this Court will first ascertain whether a construction to the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *see also* *Crowell v. Benson*, 285 U.S. 22, 62 (1932), *U.S. v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *compare* *Alemendarez-Torres v. U.S.*, 523 U.S. 224, 238 (1998) (construing a statute to avoid its invalidation and thereby honor legislative will). The same

principles of statutory construction apply to Kentucky statutes. See KRS 446.080(4); see also 1979 Ky. AG LEXIS 104 (citing *Bloemer v. Turner*, 281 Ky. 832, 137 S.W. 387 (1939)). The Administrative Law Judge is bound by Federal and State law to construe KRS Chapter 216B in favor of Physician Services and consistent with controlling Kentucky precedent, such as the *Somerset* decision, supra.

CONCLUSION

Physician Services has legally established five MRI services throughout the Commonwealth of Kentucky without a certificate of need, in reliance on the physician office exception to the certificate of need requirements found at KRS Chapter 216B. For the reasons set forth above, neither the fact that Physician Services provides professional physician services through physician-employees nor the fact that Physician Services accepts outside referrals for MRI services destroys its reliance on the physician office exemption. Hence, Physician Services and Dr. Gilbert must prevail in this show cause proceeding.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served upon the following parties by U.S. Mail, postage prepaid, first class, on this the 2nd day of September 2004:

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