THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

G. Thomas Cooper, Jr., Presiding Judge

Appellate Case No. 2014-001115

Kristin Joseph P.T., Thomas N. Joseph M.D.,
and William G. McCarthy, M.D,.....Appellants,

v.

South Carolina Department of Labor, Licensing
and Regulation, South Carolina Board of Physical
Therapy,.....Respondent,

and

South Carolina Chapter, American Physical
Therapy Association, Joseph M. McKowen, PT,
Sabrina Queen Bridges, PTA, and Amalia W. Kirby, (PTA),.....Respondents.

PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Respondents the South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy (the "Board") and the South Carolina Chapter of the American Physical Therapy Association ("SCAPTA") petition for rehearing with respect to the Court's decision in *Joseph, et al. v. South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy, et al.*, Opinion No. 27666, filed September 14, 2016. Respondents respectfully suggest that the Court overlooked or misapprehended the following points in reversing the trial court and the Court's own decision in *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 636 S.E.2d 598 (2006):

I. The Legislature—not the Court in *Sloan*, or the Board in any position statement—prohibited physical therapists ("PTs") from working for physicians who refer patients to them.

The majority overruled *Sloan* and reversed the circuit court's decision based on the proposition that the Board overstepped its authority by issuing position statements providing its interpretation of the prohibition in South Carolina Code section 40-45-110(A)(1) without going through the rulemaking process prescribed by the Administrative Procedures Act ("APA"). In so ruling, the Court overlooked or misapprehended the following points:

a. The prohibition on PTs working for referring physicians described in *Sloan* is in the statute—the Board did not create it.

While the general concern about administrative overreach is certainly well stated in Justice Kittredge's learned opinion, it was the Legislature, not the Board, that made PTs subject to discipline if they receive wages from a referring physician. The statutory provision at issue is South Carolina Code section 40-45-110(A)(1), which states:

> (A) In addition to the other grounds provided for in Section 40-1-110, the [Board], after notice and hearing, may restrict or refuse to renew the license of a licensed person, and may suspend, revoke, or otherwise restrict the license of a licensed person who:
>
> > (1) requests, receives, participates or *engages* directly or indirectly *in the dividing*, transferring, assigning, rebating, or refunding *of fees* received for professional services or profits *by means of* a credit or other valuable consideration, including, but not limited to, *wages*, an unearned commission, discount, or gratuity *with a person who referred a patient*, or with a relative or business associate of the referring person; . . .

S.C. Code Ann. § 40-45-110(A)(1) (emphases added).

On its face, the statute makes PTs who share fees, including sharing in the form of "wages," with a referring physician subject to discipline by the Board. *Sloan*, 370 S.C. at 469, 636 S.E.2d at 607. The interpretation of section 40-45-110(A)(1) by the Court in *Sloan* was based on the statute's plain language, not some further pronouncement of the Board. *Id.* The dissent in *Sloan* disagreed with the majority's interpretation of the plain language of the statute. 370 S.C. at 486, 636 S.E. at 616; *see also* Op. 4 ("the dissent would have held that the plain language of Section 40-45(A)(1) does not prohibit all employee-employer relationships between a physician and PT."). Thus, at issue in *Sloan* was whether the *statute itself*—not some Board position statement—prohibits PTs from working for referring physicians. Indeed, in footnote 1 of the Opinion, Acting Justice Toal refers to the failed post-*Sloan* attempts to repeal the "*statutory prohibition* on PTs working for physicians." Op. n.1 (emphasis added).

In *Sloan*, the Court also correctly determined that the Legislature's intent in enacting the statutory prohibition on PTs working for referring physicians was to avoid "overuse of physical therapy services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to therapists employed by the

physician who will generate additional fees for the physician." *Id.* at 482, 614; *see also id.* at 469, 607; *id.* at 479-80, 612-613. Enacted in 1998, section 40-45-110(A)(1) was not aimed merely at kickbacks or similar unethical referral-for-pay practices. Those were already addressed by the Legislature in the 1993 Self-Referral Act. S.C. Code Ann. § 44-113-10 *et seq.* If the referral restrictions in section 40-45-110(A)(1) simply reiterated already-existing restrictions in the Self-Referral Act (or existing federal Anti-Kickback and Stark laws), there would have been no need or reason for the Legislature to pass section 40-45-110(A)(1) in 1998. *See CFRE, LLC v. Greenville Cnty Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("... the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law."). Rather, as the Court correctly recognized in *Sloan*, the referral restrictions in section 40-45-110(A)(1) *supplement* the Self-Referral, Anti-Kickback, and Stark laws by eliminating the temptation for a physician to overuse physical therapy services when referring patients to PT employees. 370 S.C. at 471-72, 636 S.E.2d at 608.

b. The statutory prohibition on PTs working for referring physicians does not require further regulation to be effective.

The conclusion, based on the word "may" in section 40-45-110(A), that the statute requires the Board to issue further regulations before the statutory prohibition on PTs sharing wages with referring physicians is effective misapprehends the statutory framework of Title 40. The use of the term "may" in section 40-45-110(A) refers to the Board's discretion to act in individual disciplinary proceedings based on the evidence before it, including mitigating evidence. Similar language is used in many of the Chapters of Title 40. *See, e.g.*, S.C. Code Ann. § 40-33-110(A) (State Board of Nursing "may" discipline nurses and nurse practitioners); § 40-36-110 (Board of Occupational

Therapy "may" discipline occupational therapists); § 40-67-110 (Board of Examiners in Speech-Language Pathology and Audiology may discipline speech pathologists). Such individual disciplinary proceedings are themselves each subject to the APA. S.C. Code Ann. § 40-1-90.

The term "may" is, respectfully, not included in section 40-45-110(A) and similar provisions in other chapters of Title 40 in order to require the State's professional boards to issue further regulations before they can discipline licensees. The same language is found in section 40-1-110, applicable to all professions and occupations governed by Title 40:

> In addition to other grounds contained in this article and the respective board's chapter:
> (1) A board *may* cancel, fine, suspend, revoke, or restrict the authorization to practice of an individual who:
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> (a) used a false, fraudulent, or forged statement or document or committed a fraudulent, deceitful, or dishonest act or omitted a material fact in obtaining licensure under this article;
> (b) has had a license to practice a regulated profession or occupation in another state or jurisdiction canceled, revoked, or suspended or who has otherwise been disciplined;
> (c) has intentionally or knowingly, directly or indirectly, violated or has aided or abetted in the violation or conspiracy to violate this article or a regulation promulgated under this article;
> (d) has intentionally used a fraudulent statement in a document connected with the practice of the individual's profession or occupation;
> (e) has obtained fees or assisted in obtaining fees under fraudulent circumstances;
> (f) has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud, or harm the public;
> (g) lacks the professional or ethical competence to practice the profession or occupation;
> (h) has been convicted of or has pled guilty to or nolo contendere to a felony or a crime involving drugs or moral turpitude;
> (i) has practiced the profession or occupation while under the influence of alcohol or drugs or uses alcohol or drugs to such a degree as to render him unfit to practice his profession or occupation;

> (j) has sustained a physical or mental disability which renders further practice dangerous to the public;
> (k) violates a provision of this article or of a regulation promulgated under this article;
> (l) violates the code of professional ethics adopted by the applicable licensing board for the regulated profession or occupation or adopted by the department with the advice of the advisory panel for the professions and occupations it directly regulates.

S.C. Code Ann. § 40-1-110 (emphasis added). Despite the use of "may" in this statute, no South Carolina professional board has to issue regulations interpreting a statute in order to discipline a licensee for violating its terms. For example, while section 40-1-110 itself lists several reasons for which a board "may" discipline a licensee, no South Carolina professional board has to issue further regulations in order to discipline an individual for fraud, pleading guilty to a felony, practicing under the influence of alcohol or drugs, or having a mental disability. Rather, subsection 40-1-110(k) expressly contemplates professional boards disciplining licensees for violations of "provisions of this article," *i.e.* the statutes comprising Title 40, not just violations of "a regulation promulgated under this article." S.C. Code Ann. § 40-1-110(k).

Interpreting "may" in provisions like sections 40-45-110(A) and 40-1-110 to require professional boards to point to a particular regulation every time they discipline a licensee threatens to upset the entire statutory framework and daily operation of professional boards in the State. For the same reason, the use of "may" in section 40-45-110(A) does not support the assumption in Justice Kittredge's opinion that the General Assembly envisioned that the Board would first issue regulations before enforcing the statutory prohibition on PTs working for referring physicians, particularly given the

General Assembly's subsequent rejection of bills seeking to repeal section 40-45-110(A) after *Sloan*.

c. If the Legislature thought the Court's interpretation of the statute in *Sloan* was wrong, it could have repealed the statute.

In *Sloan* the Court agreed with the Attorney General and the Board in interpreting section 40-45-110(A)(1) to reach employment arrangements. If the Legislature thought the Court's interpretation of section 40-45-110(A)(1) in *Sloan* was wrong—or the product of administrative overreach—it could easily have changed the statute. *McLeod v. Starnes*, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012) ("The Legislature is presumed to be aware of the Court's interpretations of its statutes."); *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) ("Because we are adhering to our earlier interpretation of a statute, the General Assembly is free to correct any misinterpretation on our part.").

Despite the introduction of bills to overturn the statutory prohibition on PTs working for physicians,[1] supported by extensive lobbying from Appellants[2] and other physicians and physicians groups, the Legislature has declined to do so. The General Assembly's "inaction is evidence the Legislature agrees with this Court's interpretation." *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003); *see also* 354 S.C. at 118, 580 S.E.2d at 109 ("Because the Legislature's intent is clear from the statute's language and the decision by the Legislature not to statutorily overturn *Singleton*, we affirm the [*Singleton*] rule . . . .").

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[1] *See* Op. n.1, citing S.B. 1031, H.B. 4329, 118th Gen. Assemb., Reg. Session (S.C. 2010); *see also* S.B. 881, Amd. 3, 116th Gen. Assemb., Reg. Session (S.C. 2006).

[2] Two of the Appellants, Dr. McCarthy and Mrs. Joseph, testified in a legislative hearing on a proposed bill to amend the statute. *See* Board's Mem. in Supp. of Mot. for Summ. J. at 4, citing McCarthy Dep. 23-25, K. Joseph Dep. 52-54 (R. p. 185).

The Opinion thus not only overrules the Court's own decision in *Sloan*,[3] but also the post-*Sloan* decisions of the General Assembly rejecting bills to amend section 40-45-110(A)(1). It is well established in the Court's jurisprudence that such second-guessing of the Legislature is improper. *See, e.g., Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) ("We do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.").

d. In its position statements, the Board merely interpreted the statute, it did not create new restrictions or requirements for physical therapists.

The Court in *Sloan* explained the Board's position statements well:

> The Board's pronouncement did not implement or prescribe the law or practice requirements for physical therapists in more detail than set forth by statute; the pronouncement simply adopted an interpretation of the statute which the Board intended to begin enforcing. To hold otherwise would lead to the absurd result that, before an agency may enforce a statute, it would have to enact a regulation explaining its interpretation and application of the statute in detail and its intention of enforcing it. The agency would be required to return to the Legislature seeking approval of a regulation which interpreted the legislative pronouncement and permission to enforce it. Neither the APA's rule-making provisions for regulations nor our precedent requires such a step.

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[3] The Court also overlooked the fact that Appellants failed to preserve their challenge to *Sloan* for appeal. The circuit issued two summary judgment orders adverse to Appellants: the December 4, 2012 order that dismissed the Seventh through Ninth Causes of Action directly challenging *Sloan*; and the April 22, 2014 order dismissing the First through Sixth Causes of Action addressing the 2011 Position Statement. Appellants' notice of appeal references the 2014 order, but it *neither mentions nor attaches the 2012 order*. *See* Notice of Appeal (R. pp. 298-300). The Court need not insist on strict compliance with Rule 203 if the notice of appeal at least mentions or attaches the challenged order. *See Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (S.C. Ct. App. 2000) (the notice of appeal "referred to the order denying the motion for reconsideration rather than to the original order," but the original order was attached to the notice); *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 458 S.E.2d 431, 318 S.C. 471 (S.C. Ct. App. 1996). But here, Appellants' notice of appeal does not mention or attach the December 4, 2012 order, and Appellants' challenge to *Sloan* in their Seventh though Ninth Causes of Action was not properly preserved for appeal. By assuming jurisdiction over the Appellants' challenge to *Sloan*, the Court has overlooked Rule 203(d)(1)(B)(ii) and the 30-day deadline in Rule 203(b)(1).

370 S.C. at 474-75, 636 S.E.2d at 610. The Board's 2004 and 2011 statements merely interpret the PT Act, and give PTs subject to Board discipline notice of those interpretations. Again, it is the plain language of section 40-45-110(A) that prohibits PTs from sharing fees by accepting wages from referring physicians, not some Board pronouncement. As *Sloan* correctly concluded, the Board's statements are, in essence, saying: "'This interpretation is what we believe the law means and we direct our staff to enforce it accordingly...'" 370 S.C. at 474, 636 S.E.2d at 610.[4]

Importantly, as Justice Beatty's dissenting opinion describes, Appellants invoked the circuit court's jurisdiction to challenge the Board's 2011 Position Statement, and the Board's interpretation of section 40-45-110(A)(1) in that statement does not threaten Appellants in any way.

II. Appellants face no discipline by the Board and thus lack standing.

The determination that Appellants have standing overlooks or misapprehends the following points:

As Justice Beatty addressed, the 2011 Position Statement does not threaten the Appellants with any injury. In fact, Appellants do not object to PTs practicing in groups or covering for one another—acts that do not violate section 40-45-110(A)(1) as it is interpreted by the Board in the 2011 Position Statement. Furthermore, none of the

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[4] The 2011 Position Statement provided the Board's interpretation that the "referrals" targeted by section 40-45-110(A)(1) were not the ordinary hand-offs of patients among caregivers occurring within a physical therapy practice. Rather, section 40-45-110(A)(1) deals with the referrals of gatekeeping physicians referenced in section 40-45-110(A)(4) of the same statute. To interpret the statute otherwise would have created an absurd result—PTs would be prevented from practicing together and supervising physical therapy assistants ("PTAs"), thus effectively eliminating the group practice of physical therapy and the licensed occupation of PTA in this State. Such construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons. *Emerson Elec. Co. v. Wasson*, 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986).

Appellants is facing discipline for a violation of the statutory prohibition on PTs working for referring physicians in section 40-45-110(A)(1)—the prohibition addressed by the Board in the 2004 Position Statement and the Court in *Sloan*. There is no Board disciplinary proceeding against PT Joseph for any violation of section 40-45-110(A)(1), and no indication that she has shared fees by accepting wages from a referring physician. Drs. Joseph and McCarthy are physicians and thus not subject to discipline by the Board.

Acting Justice Toal's opinion finds standing based on the assertion that "no party could *ever* achieve the requisite standing to challenge *Sloan* unless a party consciously disregarded the opinion and willfully violated the law" and that the "only viable avenue to seek redress and access to our courts cannot be solely through disregarding our laws." But parties are often required to risk sanction for non-compliance with the law or court order in order to bring a challenge in court. For instance, to have standing to appeal a discovery order, a party is required to refuse to comply with the order and be held in contempt of court, because unless the party is held in contempt, no legal injury is sustained. *See e.g., Metts v. Mims,* 384 S.C. 491, 499, 682 S.E.2d 813, 818 (2009) (discussing a party's choice to be held in contempt in order to immediately appeal a discovery order); *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) (holding that a non-party may appeal a discovery order only if he refuses to comply with the order and is held in contempt for failure to comply and has thus suffered a legal injury).

Thus, the requirement that a party would have to "consciously disregard the [*Sloan*] opinion" and face potential discipline for a violation of section 40-45-110(A)(1) in order to challenge the statute (as interpreted in *Sloan*) is neither novel nor

fundamentally unfair. Rather, it is entirely consistent with the requirement that Appellants suffer an "actual or imminent" injury in order to establish standing. *See Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. Carolina Dep't of Nat. Res.*, 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001); *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000); *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 302, 634 S.E.2d 664, 667 (Ct. App. 2006) (a "prospective concern of future harm" is not sufficient to establish standing). Merely disagreeing with the statutory construction and constitutional analysis in one of the Court's opinions is not sufficient for a party to have standing.

III. The statutory prohibition on PTs working for referring physicians is constitutional, because the law necessarily treats different healthcare professions differently.

Two of the Justices in the majority also opined that, contrary to the decision in *Sloan*, the Legislature's prohibition on PTs working for physicians who refer patients to them is unconstitutional. This determination overlooks or misapprehends the following points:

Under the rational basis test, the Court must determine: 1) whether the law treats similarly situated entities differently; 2) if so, whether the legislative body has a rational basis for the disparate treatment; and 3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 293-94, 737 S.E.2d 601, 608 (2013). Here, different types of healthcare providers are not similarly situated, and the Legislature has a rational basis and legitimate purposes for treating them differently, including specifically with respect to physician referrals.

a. South Carolina law appropriately treats different healthcare professions differently.

The broad array of "healthcare professionals such as occupational therapists, speech pathologists, and nurse practitioners" referenced in Acting Justice Toal's opinion cannot possibly be considered "similarly situated" for purposes of equal protection analysis. There is no requirement that states regulate all professions in the same way. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *see also Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Revenue*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003) ("A class may be constitutionally confined to a particular trade."); *Seabolt v. Tex. Bd. of Chiropractic Exam'rs*, 30 F. Supp. 2d 965, 969 (S.D. Tex. 1998) (holding that chiropractors are not similarly situated to medical doctors or osteopaths); *N.H. Podiatric Med. Ass'n v. N.H. Hosp. Ass'n*, 735 F. Supp. 448, 452 (D.N.H 1990) (holding that podiatrists are not similarly situated to physicians). This is for obvious reasons: PTs don't provide occupational or speech therapy, just as speech pathologists don't perform surgery, and podiatrists don't pull teeth.

The different classifications of healthcare providers provide different services, they have different qualifications and training, and they relate to patients, other providers, and payors in different ways. They are thus separately and differently licensed and governed under the South Carolina Code. Each of these professions has its own separate chapter in Title 40 (Occupations and Professions). *See, e.g.*, S.C. Code Ann. § 40-35-5 *et seq.* (separate licensing statutes, requirements, prohibitions and disciplinary board for occupational therapists); § 40-67-5 *et seq.* (speech pathologists and audiologists); § 40-33-5 *et seq.* (nurses and nurse practitioners); § 40-45-5 *et seq.* (physical therapists); § 40-

47-5 *et seq.* (physicians). This is entirely appropriate and consistent with equal protection.[5]

There is no constitutional commandment that every chapter of Title 40 has to have identical provisions. Nor do the differing provisions in each of these chapters somehow suggest that any profession is being unconstitutionally "singled-out and provided disparate treatment." If that were the case, every provision not also found in every other chapter of Title 40 could be deemed unconstitutional if the Court merely disagreed with the Legislature's policy decision underlying that particular provision. Equal protection law provides no basis for such judicial usurpation of legislative prerogative.

b. Other healthcare professionals do not need a physician referral to treat their patients.

Moreover, the reason for the restriction in section 40-45-110(A)(1) is precisely because the Code treats PTs differently from other healthcare providers; PTs need physician referrals in order to treat their patients. S.C. Code § 40-45-110(A)(4) (PTs subject to discipline if they treat a patient beyond an initial 30-day window without a physician referral); § 40-45-110(A)(5) (PTs subject to discipline if they modify "specific patient care instructions or protocols" established by the referring physician without the

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[5] The equal protection clause does not require that things that are different in fact be treated in the law as though they are the same. *Winter v. Pratt*, 258 S.C. 397, 408, 189 S.E.2d 7, 11 (1972); *Griffin v. Warden, C.C.I.*, 277 S.C. 288, 290, 286 S.E.2d 145, 146 (1982), *cert. denied*, 459 U.S. 942 (1982). The Legislature's decision to create different classes of licensed health care professionals subject to separate regulations tailored to each class is entitled to great deference. *See Sloan*, 370 S.C. at 480, 636 S.E.2d at 613 (stating that courts must give great deference to a legislative body's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue); *see also State ex rel. Medlock v. S.C. Family Farm Dev't Auth.*, 279 S.C. 316, 321, 306 S.E.2d 605, 609 (1983) (stating that the determination of whether a classification is reasonable is initially one for the legislature); *Gary Concrete Prods., Inc. v. Riley*, 285 S.C. 498, 504, 331 S.E.2d 335, 338-39 (1985).

physician's approval). Having given physicians the keys to physical therapy care in sections 40-45-110(A)(4) and (5), the Legislature enacted section 40-45-110(A)(1) to prevent physicians from making money off their referrals to PTs. There are no similar provisions in Chapters 35 and 67 requiring occupational therapists or speech pathologists to have a physician referral in order to treat their patients. And the supervisory requirements and prohibitions for nurse practitioners in Chapter 33 do not involve the same kind of physician "referrals" required for PTs to practice under Chapter 45.

So the Code already treats different healthcare professionals differently, including specifically with respect to physician referrals. If the concern of the Court is economic favoritism, it is the referral requirement in section 40-45-110(A)(4) giving physicians control over the work of PTs that poses the "protectionist" problem,[6] not the prohibition on PTs working for referring physicians in section 40-45-110(A)(1). But just as the Legislature can make the policy decision, consistent with equal protection, that PTs need physician referrals in order to treat patients, the Legislature can also enact, consistent with equal protection, a prohibition on PTs working for referring physicians in order to prevent those referring physicians from making money off their referrals.

c. There is a rational basis for the prohibition on PTs working for referring physicians.

Sloan held that the prohibition on PTs sharing fees with referring physicians, including sharing fees through an employee-employer relationship, is reasonably related

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[6] To be clear, the Court is certainly not expanding economic opportunity for PTs by allowing them to work for physicians. Because physicians can control the patients and the work of PTs through their statutorily required referrals, PTs in states without a restriction like that in section 40-45-110(A)(1) often end up essentially captive to their physician referral sources, with no viable alternative employment or ability to start their own independent practices. Similarly, the Court should have no illusion; the South Carolina Orthopaedic Association funded the Appellants' litigation of this case because physicians want to make money by owning physical therapy practices.

to the legislative purpose of reducing the "overuse of physical therapy services by physicians who, for their own financial gain, rather than their patients' medical needs, refer patients to therapists employed by the physician who will generate additional fees for the physician." *Sloan*, 370 S.C. at 482, 636 S.E.2d at 614. Acting Justice Toal's opinion disagrees, stating that the restriction in section 40-45-110(A)(1) has "no rational relationship to the legislative purpose of the statute—to protect consumers and government-sponsored health care programs from conflicts of interest and potential misuse of medical services." The basis of this conclusion appears to be disagreement with the Legislature's policy decision that the ability of physicians to profit from PT referrals poses a potential problem—"[w]e choose to make no such assumption concerning our brothers and sisters in the medical profession."

But it is not the Court's place to second-guess the Legislature's rational policy decision that there is the potential for physicians to overuse physical therapy services when they make money off those services, and that PTs should thus not work for referring physicians. This was the Legislature's purpose in enacting the prohibition in section 40-45-110(A)(1), as evidenced by the fact that, despite the efforts of physician groups in the years after *Sloan*, the Legislature has declined to repeal section 40-45-110(A)(1).

Furthermore, there is ample evidence to support the legislative policy decision to prohibit referring physicians from employing PTs. When the Legislature enacted section 40-45-110(A)(1) in 1998, it could have looked to research by Dr. Jean Mitchell and Dr. Elton Scott published in the Journal of the American Medical Association, concluding that "utilization, charges per patient, and profits are higher when physical therapy and

rehabilitation facilities are owned by referring physicians." Jean M. Mitchell & Elton Scott, *Physician Ownership of Physical Therapy Services: Effects on Charges, Utilization, Profits and Service Characteristics*, 268 JAMA 2055-59 (1992) (R. pp. 754-58); *see also* Alex Swedlow et al., *Increased Costs and Rates of Use in the California Workers' Compensation System as a Result of Self-Referral by Physicians*, 327 New Eng. J. Med. 1502-06 (1992) (R. pp. 759-63) (finding that physical therapy was initiated 2.3 times more often when a physician engaged in "self-referral"—*i.e.*, where the physician referred patients for physical therapy services to an entity owned by the referring physician). More recently, Professor Mitchell and others published a study showing that self-referring physicians were more than 2.5 times as likely to prescribe physical therapy to patients, and on average, the fees of self-referring PT providers were $144 per episode of care compared with an average of $73 for non-self-referring PT providers. Jean M. Mitchell et al., *Physician Self-Referral of Physical Therapy Services for Patients with Low Back Pain: Implications for Use, Types of Treatments Received and Expenditures*, Forum for Health Economics & Policy (2015).

In sum, there is certainly a rational basis for concern about overuse and expense of physical therapy services prescribed by self-referring physicians, and "the statutory prohibition on employment relationships between physicians and physical therapists bears a reasonable relation to that purpose." *Sloan*, 370 S.C. at 482, 636 S.E.2d at 614.

d. The government has a legitimate interest in preventing overuse of physical therapy by self-referring physicians.

Although an individual has a right to practice her chosen profession, the exercise of that right is subject to the Legislature's police power to enact statutes and regulations aimed at enhancing the public welfare. *See Dantzler v. Callison*, 230 S.C. 75, 92-96, 94

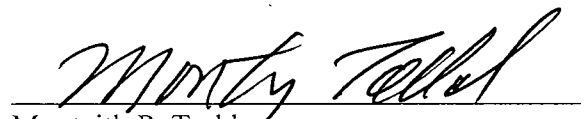
S.E.2d 177, 186-88 (1956). "In reviewing substantive due process challenges," courts must consider whether the legislation "bears a reasonable relationship to any legitimate interest of government." *Dunes West*, 401 S.C. at 296, 737 S.E.2d at 609.

As this Court properly recognized in *Sloan*, "[t]he statute prohibiting employment relationships between physicians and physical therapists bears a reasonable relationship to a legitimate interest of government," namely to prevent "overuse of medical services." 370 S.C. at 479-80, 484, 636 S.E.2d at 612-13, 615. The Legislature was thus "within its power to regulate the practices of medicine and physical therapy" and "has not engaged in an arbitrary or wrongful act in enacting the statute." *Id.* Again, Justices may disagree with the wisdom of the prohibition on PTs working for referring physicians in section 40-45-110(A)(1), but that is not a basis for finding the prohibition unconstitutional. Just as the Legislature has the authority to require PTs to have a physician referral in order to treat patients, so too does it have the authority to prohibit physicians from making money off those statutorily required referrals.

CONCLUSION

For all the foregoing reasons, the Court should grant this Petition, withdraw its prior opinion, and issue a new opinion affirming the trial court's decision.

Respectfully submitted,



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Columbia, South Carolina
October 13, 2016

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

G. Thomas Cooper, Jr., Presiding Judge

Appellate Case No. 2014-001115

Kristin Joseph P.T., Thomas N. Joseph M.D.,
and William G. McCarthy, M.D,.....Appellants,

v.

South Carolina Department of Labor, Licensing
and Regulation, South Carolina Board of Physical
Therapy,.....Respondent,

and

South Carolina Chapter, American Physical
Therapy Association, Joseph M. McKowen, PT,
Sabrina Queen Bridges, PTA, and Amalia W. Kirby, (PTA),.....Respondents.

PROOF OF SERVICE

I certify that I have served Respondents' Petition for Rehearing by depositing a copy of same in the United States Mail, postage prepaid, and by electronic mail on October 14, 2016, addressed to attorneys of record as follows:

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Columbia, South Carolina
October 13, 2016