IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

EMW WOMEN'S SURGICAL CENTER, P.S.C., *et al.*, Plaintiffs, v. ANDREW G. BESHEAR *et al.*, Defendants.	Case No.:

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

The U.S. Supreme Court has reaffirmed that woman has the right "to choose to have an abortion before viability and to obtain it without undue interference" because "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845 (1992) (plurality opinion). Kentucky House Bill 5 ("the Act") nevertheless criminalizes performing a pre-viability abortion if the person performing the abortion knows that one reason for the woman's decision to terminate her pregnancy is the embryo or fetus's sex, race, color, national origin, or diagnosis or "potential diagnosis" of Down syndrome or any other "disability."[1] The Kentucky legislature passed the Act on March 13 and will send it to Governor Bevin for his signature. Because of its exceptional "emergency" clause, the Act will become effective immediately upon Governor Bevin's signature. Governor Bevin will sign the Act, just as he has signed every abortion restriction

[1] A copy of the Act is attached as Exhibit A.

presented to him. Indeed, last year during a press interview about another abortion restriction, Governor Bevin said that he would "love to see" the time when people are unable to obtain abortion in the Commonwealth.[2] Immediately after Governor Bevin signs the Act, Plaintiffs will be forced to begin turning away some patients seeking abortions.

The Act directly contravenes controlling Supreme Court precedent. Plaintiffs accordingly seek immediate emergency injunctive relief to block Defendants from enforcing an unconstitutional ban that will prevent women from exercising their constitutionally protected right to abortion, and will cause irreparable harm to Kentucky women.[3]

STATUTORY FRAMEWORK

The Act strips a woman of her right to have an abortion if the Commonwealth disapproves of her reason for seeking the care. The Act makes it a crime for any person to "intentionally perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of" the sex, race, color, national origin, or diagnosis or potential diagnosis of Down syndrome or "any other disability." Act §1(2). The Act defines "any other disability" broadly to include "any disease, defect, or disorder, whether or not genetically inherited." Act §1(1)(b). The Act then lists some conditions that are considered "disabilit[ies]," but makes clear that the term "is not limited" to those conditions. *Id.* The only exclusion from the term is for "lethal fetal anomalies," a term that is not defined by the Act. *Id.*

The Act provides a second extremely limited exception "in the case of a medical

[2] Benjamin Fearnow, *Republican Governor Blames Mass Shootings on Zombies, Abortions, Us 'Culture Of Death'—Not Guns* (November 14, 2018) *available at:* https://www.newsweek.com/matt-bevin-zombies-abortion-death-obsessed-mass-shootings-culture-kentucky-1215778

[3] Plaintiffs use "women" in this memorandum as a short-hand for patients seeking abortion care, but note that gender non-conforming patients and men who are transgender may also utilize such services and would thus also suffer irreparable harm as a result of the Act.

emergency." Act § 1(2). A "medical emergency" is defined as "any condition which, on the basis of the physician's good-faith clinical judgment, so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." Act § 1(1)(f); KRS 311.720.

The Act prohibits intentionally performing or attempting to perform an abortion if a person "has knowledge" that a patient "is seeking the abortion in whole or in part" because of the prohibited reasons, but fails to define what constitutes "knowledge" that gives rise to the Act's severe criminal and licensure penalties. A violation of the prohibition constitutes a Class D felony, which is punishable by imprisonment of one to five years. Act § 4(22); KRS 532.060(2)(d). Any physician who violates the prohibition is also subject to mandatory license revocation by the State Board of Medical Licensure. Act § 1(4). Any individual or licensed abortion facility is also subject to mandatory license revocation by the Cabinet for Health and Family Services for violation of the prohibition. Act § 1(5).

In addition to the abortion prohibition, the Act mandates that the physician or the physician's delegate inform a pregnant woman at least twenty-four (24) hours prior to abortion that "[i]t is illegal in Kentucky to intentionally perform an abortion, in whole or in part, because of the sex of the unborn child; the race, color, or national origin of the unborn child; or the diagnosis, or potential diagnosis, of Down syndrome or any other disability." Act § 3(4). Any physician who fails to abide by this provision of the Act is subject to potential medical license denial, probation, suspension, limitation, restriction, or revocation by the State Board of Medical Licensure. KRS 311.725; KRS 311.595.

The Act takes effect immediately upon Governor Bevin's signature. There is no

requirement that Governor Bevin sign bills in public or notify the public immediately upon signing a bill. In fact, Governor Bevin signed the last abortion bill, House Bill 454 (2018), which took effect immediately, in private and without notification to the public or EMW. As a result, it is impossible for Plaintiffs to know precisely when the Act has taken effect.

STATEMENT OF FACTS

The Act bans abortion at a pre-viability point in pregnancy based only on a woman's reasons for seeking an abortion. This fact alone dictates the outcome of the instant case. Plaintiffs provide the following to give the Court greater background.

Approximately one in four women in this country will have an abortion by age forty-five. A majority of women having abortions (61%) already have at least one child, while most (66%) also plan to have a child or additional children in the future. Compl. ¶ 24. Women seek abortion for a variety of deeply personal reasons, including familial, medical, and financial. Some women have abortions because they conclude that it is not the right time in their lives to have a child or to add to their families: For example, some decide to end a pregnancy because they want to pursue their education; some because they feel they lack the necessary economic resources or level of partner support or stability; some because they are concerned that adding a children to their family will make them less able to adequately provide and care for their existing children. Some women seek abortions to preserve their life or health; some because they have become pregnant as a result of rape; and others because they choose not to have children at all. Some women decide to have an abortion because of an indication or diagnosis of a fetal medical condition or anomaly. Some families do not feel they have the resources—financial, medical, educational, or emotional—to care for a child with special needs or to simultaneously provide for the children they already have. The decision to terminate a pregnancy for any reason is

motivated by a combination of diverse, complex, and interrelated factors that are intimately related to the individual woman's values and beliefs, culture and religion, health status and reproductive history, familial situation, and resources and economic stability. Compl. ¶ 22.

Plaintiffs are EMW Women's Surgical Center, P.S.C., the sole licensed abortion facility located in Kentucky, and Dr. Ernest W. Marshall, the owner of that facility who is also a board-certified obstetrician-gynecologist. Together, Plaintiffs have been providing reproductive health care, including abortions, since the 1980s. Compl. ¶¶ 9-10. Abortion services are available from Plaintiffs through 21.6 weeks of pregnancy, as measured from the woman's last menstrual period, which is a pre-viability point in pregnancy. Compl. ¶ 25.

Prior to performing an abortion, Plaintiffs provide non-directive patient counseling to each patient, which means they listen to, support, and provide information to the patient, without directing her course of action. That process is designed to ensure that patients are well-informed with respect to all of their options, including terminating the pregnancy; carrying the pregnancy to term and parenting; and carrying to term and placing the baby for adoption. In addition, the process is designed to ensure that the woman's choice is voluntary and not coerced. Compl. ¶ 26. Although some of Plaintiffs' patients disclose some information about the reasons they are seeking an abortion during these discussions, Plaintiffs do not require patients to disclose any or all of their reasons for seeking an abortion. Compl. ¶ 27. Nevertheless, Plaintiffs are aware that some of their patients seek abortions based at least in part on a potential or confirmed prenatal diagnosis of a disability as defined by the Act. Under the Act, these patients would be prohibited from obtaining an abortion. Compl. ¶ 28.

The Act provides only two narrow exceptions. The first is for circumstances where a woman has decided to have an abortion because of diagnosis or potential diagnosis of "lethal

fetal anomaly," but that term is not statutorily defined. Compl. ¶ 34. The second exception for "medical emergencies" is extremely limited, and would not protect a patient who needs an abortion to protect her health but was not yet facing a medical emergency. Compl. ¶ 36.

ARGUMENT

Plaintiffs seek a temporary restraining order and/or preliminary injunction to prevent the Act from inflicting harm on Plaintiffs and their patients. In ruling on such a motion, the Court considers four factors, all of which weigh heavily in Plaintiffs' favor: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015) (internal quotation marks omitted).

As set forth below, Plaintiffs readily satisfy this standard. Plaintiffs have an exceedingly high probability of prevailing on the merits. In contravention of more than four decades of Supreme Court precedent, the Act deprives a woman of making the ultimate decision whether to terminate her pregnancy before the point of viability. Enforcement of the Act will inflict severe and irreparable harm on Plaintiffs' patients depriving them of their right to decide to have a pre-viability abortion. Similarly, the balance of hardships weighs decisively in Plaintiffs' favor and the public interest would be served by blocking the enforcement of this unconstitutional and harmful ban.

I. PLAINTIFFS WILL LIKELY SUCCEED ON THE MERITS OF THEIR SUBSTANTIVE DUE PROCESS CLAIM

The Act is blatantly unconstitutional. Nearly five decades ago, the Supreme Court struck down as unconstitutional a state criminal abortion statute proscribing all abortions except those

performed to save the life of the pregnant woman. *Roe*, 410 U.S. at 166. Specifically, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects a woman's right to choose abortion, *id.* at 153-54, and, prior to viability, the State has no interest sufficient to justify a ban on abortion, *id.* at 163-65. Rather, the State may "proscribe" abortion only *after* viability—and, even then, may not ban abortion where necessary to preserve the life or health of the woman. *Id*.

The Supreme Court has repeatedly reaffirmed that core holding in the more than four decades since *Roe* was decided. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, decided more than a quarter century ago, the Court reaffirmed the "central principle" of *Roe* that, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion . . . ." 505 U.S. 833, 846 (1992). Although *Casey* jettisoned *Roe*'s strict scrutiny standard in favor of the "undue burden" standard, under which a restriction on pre-viability abortion is permitted as long as the law does not place a "substantial obstacle" in the path of a woman seeking abortion, the Court emphasized:

> Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, *a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability*.

505 U.S. at 879 (emphasis added); *see also id.* at 846 ("*Roe*'s essential holding . . . is a recognition of the right of the woman to choose to have an abortion before viability"); *id.* at 871 (any state interest is "insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions"). These central holdings have been repeatedly reaffirmed by the Court, including as recently as 2016. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2300, 2320 (2016) ("[W]e now use 'viability' as the relevant point at which a State may begin

limiting women's access to abortion for reasons unrelated to maternal health."); *Gonzales v. Carhart,* 550 U.S. 124, 146 (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" (quoting *Casey*, 505 U.S. at 879)); *Stenberg v. Carhart,* 530 U.S. 914, 921 (2000) (declining to "revisit" holding that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)).

Underlying the privacy right first recognized in *Roe* and reaffirmed in *Casey* and *Whole Woman's Health* is the principle that the State may not dictate appropriate reasons for a woman's decision to terminate a pregnancy, nor may it commandeer her deliberative process. *Roe* explicitly held that it was the woman's "decision" that merited Fourteenth Amendment protection, and that she must be permitted to engage in consultation with her physician to make that decision. *Roe*, 410 U.S. at 153. Extending further this understanding of the woman's decisional autonomy, *Casey* explained that protection for the abortion right reflects the fact that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Casey*, 505 U.S. at 851 (1992); *see also Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 987 (7th Cir. 2012) (noting that the abortion right is, in part, "a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion" (quoting *Maher v. Roe*, 432 U.S. 464, 473 (1977) (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 & nn. 24 & 26 (1977))). The State, in other words, may not demand that a woman provide the reasons for her decision for seeking a pre-viability abortion or veto her decision prior to viability.

A ban on abortion at any point prior to viability, whether partial or total, is therefore per se unconstitutional, no matter what interests the state asserts to support it. To hold otherwise would require this Court to overrule the central holdings of *Roe* and *Casey*, which of course it cannot do. Given this unwavering line of Supreme Court precedent, since *Roe*, every federal appellate court to consider the question has ruled that a ban on abortions before viability, with or without exceptions, violates the Fourteenth Amendment.[4]

Indeed, that is the conclusion reached by the two federal courts to recently consider bans very similar to the one at issue here. In words equally applicable here, a federal district court in Ohio recently enjoined a law that prohibited abortion if sought in whole or in part on the basis of a prenatal diagnosis of Down syndrome. As that court explained, "*[t]he interest protected by the Due Process Clause is a woman's right to choose to terminate her pregnancy pre-viability, and that right is categorical.* The State cannot dictate what factors a woman is permitted to consider in making her choice." *Preterm Cleveland v. Hines*, 294 F. Supp. 3d 746, 755 (S.D. Ohio 2018) (emphasis in original) (citing *Casey*, 505 U.S. at 879), *appeal argued* No. 18-3329 (6th Cir. Jan. 30, 2019). The Seventh Circuit similarly held unconstitutional a law prohibiting abortion if the sole reason for the woman's decision is the fetus's race, sex, or diagnosis or potential diagnosis of a disability. The court found that the law was clearly unconstitutional because "[t]he provisions prohibit abortions prior to viability if the abortion is sought for a particular purpose. These provisions are far greater than a substantial obstacle; they are absolute prohibitions on

[4] *See, e.g., MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 776 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1115 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117-18 (10th Cir. 1996), *cert. denied sub nom Leavitt v. Jane L.*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368-69 (9th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992); *Jackson Women's Health Org. v. Currier*, No. 3:18-CV-171-CWR-FKB, 2018 WL 6072127 (S.D. Miss. Nov. 20, 2018), *appeal docketed sub nom. Jackson Women's Health Org. v. Dobbs*, No. 18-60868 (5th Cir. Dec. 17, 2018).

abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State." *Planned Parenthood of Indiana and Kentucky, Inc. v. Comm'r of Indiana State Dep't Health*, 888 F.3d 300, 306 (7th Cir. 2018), *petition for cert. filed sub nom. Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, No. 18-483 (Oct. 12, 2018).

Under the binding precedent of *Casey* and *Roe*, the Act's ban on pre-viability abortions is inarguably unconstitutional, irrespective of any interest the State may assert to support it. *See Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 164-65. Plaintiffs have therefore established that they have a strong likelihood of success on the merits of their claim that the ban violates the substantive due process rights of their patients and that a preliminary injunction is warranted.

II. PLAINTIFFS AND THEIR PATIENTS SUFFER IRREPARABLE HARM IF THE ACT TAKES EFFECT

The Act will inflict substantial, irreparable, and ongoing harm on Plaintiffs' patients, each of whom is blocked from "making the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992). As the Sixth Circuit has long made clear, "if it is found that a constitutional right is being threatened or impaired, *a finding of irreparable injury is mandated*." *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003) (emphasis added) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *accord Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("[W]hen constitutional rights are threatened or impaired, irreparable injury is presumed.") (internal quotation marks omitted); *Obama for Am. v. Husted*, 697 F.3d 423, at 436 (6th Cir. 2012) (same); *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) ("[T]he loss of constitutional rights for even a minimal amount of time constitutes irreparable harm."). This rule alone requires a finding of irreparable harm here, and thus issuance of emergency injunctive relief.

That is all the more true because "the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." *Bellotti v. Baird*, 443 U.S. 622, 643 (1979). In other words, the presumption of irreparable harm applies with particular force where the threatened or impaired right is a woman's fundamental right to abortion, *see, e.g.*, *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795–96 (7th Cir. 2013). As *Roe* recognized, the loss of access to abortion can impose serious harm:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153.

In short, it is beyond dispute that the Act will cause Plaintiffs' patients irreparable, tangible injuries. Being forced to continue a pregnancy against her will can pose a risk to a woman's physical, mental, and emotional health, and even her life, as well as to the stability and wellbeing of her family, including her existing children.

III. THE BALANCE OF HARM TIPS DECIDEDLY IN PLAINTIFFS' FAVOR

Plaintiffs and Plaintiffs' patients unquestionably face far greater irreparable harm while the Act is in effect than Defendants would face if the Act's enforcement were enjoined and the status quo of availability of abortion was maintained. As discussed above, the Act will prohibit some of Plaintiffs' patients from obtaining an abortion, causing them profound and irreparable harm.

By contrast, the Commonwealth will suffer no harm if it is ordered to preserve the status quo and not to enforce a ban that is plainly unconstitutional under decades of Supreme Court precedent. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (defendant "does not have an interest in enforcing a law that is likely constitutionally infirm"). The balance of harm thus weighs decisively in Plaintiffs' favor, further demonstrating that preliminary injunctive relief is necessary and appropriate.

IV. A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST

Finally, enjoining the Act is in the public interest. As the Sixth Circuit has made clear, "[w]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights." *Am. Civil Liberties Union Fund of Mich.*, 796 F.3d at 649 (alteration in original) (internal quotation marks omitted); *accord Mich. State*, 833 F.3d at 669 (same); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.,* 698 F.3d 885, 896 (6th Cir. 2012) ("the public interest is promoted by the robust enforcement of constitutional rights"); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (same). The only way to prevent the public harm resulting from this far-reaching, ongoing constitutional violation is to enjoin enforcement of the Act.

V. A BOND IS NOT NECESSARY IN THIS CASE

Finally, this Court should waive the Federal Rule of Civil Procedure 65(c) bond requirement. The Sixth Circuit has long held "that the district court possesses discretion over whether to require the posting of security." *Appalachian Reg'l Healthcare, Inc. v. Coventry Health and Life Ins. Co.*, 714 F.3d 424, 431 (6th Cir. 2013) (emphasis omitted) (internal quotation marks omitted); *see also Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (affirming district court decision to require no bond "because of the strength of [the plaintiff's] case and the strong public interest involved"). This Court should use its discretion to waive the bond requirement here, where the relief sought will result in no monetary loss for Defendants. In the alternative, if the Court feels that a bond is appropriate, Plaintiffs ask that the Court set it at $1.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

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Respectfully submitted,

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