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. ERIC FRIEDLANDER, et al., Defendants.	Case No.: 3:19-cv-00178-DJH-RSE

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

Yesterday a sweeping omnibus abortion law, House Bill 3 ("the Act") took effect, which prohibits doctors from providing an abortion at 15 weeks in pregnancy and imposes numerous unnecessary abortion restrictions—including an extensive regulatory regime for the provision of abortion-inducing medication, significantly expanded and invasive reporting requirements, and new requirements for cremation or interment of fetal remains—that require Plaintiffs to use forms created by the Cabinet for Health and Family Services or follow regulations promulgated by the Cabinet. But those forms and regulations are not yet ready, and therefore it is impossible for Plaintiffs to comply with the law. Plaintiffs are now forced to turn away all patients seeking abortions. The Act violates the Fourteenth Amendment rights of Plaintiffs and their patients and is causing them immediate and irreparable harm. Plaintiffs therefore respectfully request that the Court immediately grant Plaintiffs' request for a temporary restraining order and/or preliminary injunction.

STATUTORY FRAMEWORK

Plaintiffs incorporate by reference the description of House Bill 3 in the simultaneously filed Memorandum in Support of their Motion for a Temporary Restraining Order/Preliminary Injunction in *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, and Kentucky v. Cameron*. In addition to the various restrictions imposed by the Act that are outlined in Planned Parenthood's brief, the Act bans abortion at 15 weeks in pregnancy as measured from a patient's last menstrual period ("lmp"). Act §§ 27, 32–35. The Board of Medical Licensure shall revoke the medical license if a physician violates the law. KRS 311.782(4). In addition, the Attorney General has the authority to bring an action in law or in equity to enforce the 15-week ban. Act § 35. There is a very limited exception to the 15-week ban, namely that the abortion is necessary to prevent the death of the pregnant woman or to avoid serious risk of the substantial and irreversible impairment of a major bodily function of the woman, KRS 311.783, and there are other limited affirmative defenses, KRS 311.782(2)(b).

STATEMENT OF FACTS

Plaintiff EMW Women's Surgical Center is one of two outpatient abortion facilities in Kentucky and both are located in Louisville. First Suppl. Verified Compl. ("Suppl. Compl.") ¶ 16 . Both abortion facilities provide medication abortion up to 10 weeks LMP. *Id.* Planned Parenthood also provides procedural abortions up to 13 weeks and 6 days as measured from the patient's last menstrual period (LMP). Plaintiff EMW provides procedural abortions up to 21 weeks and 6 days LMP. *Id*. The Act bans abortion at 15-weeks in pregnancy, and its other provisions are impossible to comply with, as discussed above. Given the significant criminal and civil penalties at stake, Plaintiffs cannot risk continuing to perform abortions absent an injunction from this Court. *Id.* ¶ 30. Plaintiffs are forced to turn patients away today, which is causing Plaintiffs and their patients irreparable harm. If the Act is not quickly enjoined, it will force patients to remain pregnant against

their will. If a woman is forced to continue a pregnancy against her will, it can pose a risk to her physician, mental, and emotional health, and even her life, as well as to the stability and wellbeing of her family, including her existing children. Verified Am. Compl. ¶ 51, Doc. 5, PageID.82.

ARGUMENT

Plaintiffs seek a temporary restraining order and/or preliminary injunction to prevent the Act from inflicting constitutional, medical, emotional, and other 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 are likely to prevail on the merits because the Act directly contravenes decades of binding Supreme Court precedent holding that a State may not ban abortion before the point of viability. Plaintiffs are also likely to succeed on the claim that the Act violates Plaintiffs' due process rights because compliance is impossible. Enforcement of the Act will inflict severe and irreparable harm on Plaintiffs' patients, and the balance of hardships weighs decisively in Plaintiffs' favor. Finally, the public interest would be served by blocking the enforcement of this unconstitutional and harmful statute.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Act Violates Plaintiffs' Patients' Substantive Due Process Rights.

The Supreme Court has repeatedly and unequivocally held that the government may not ban abortion prior to viability. 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 v. Wade*, 410 U.S. 113 (1973). 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 and 2020. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), and *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).[1] Recently, in *Preterm-*

[1] Defendants will undoubtedly point to *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, in which the Court is considering whether Mississippi's 15-week ban is constitutional. Regardless of the outcome in that case, the parties and this Court are required to apply the law as

Cleveland v. McCloud, 994 F.3d 512, 520 (6th Cir. 2021) (en banc), the Sixth Circuit held that a law expressly characterized as a ban is subject to the undue burden test. Under that test, a law restricting abortion must satisfy two requirements. First, the law must be reasonably related to a legitimate state interest. Second, the law must not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. *Id*. at 524–25 (internal citations and quotations omitted).

The Court need not reach the question of whether the Act is reasonably related to a legitimate state interest because the Act unquestionably fails the second part of the undue burden test. Indeed, the 15-week ban prohibits abortion for all patients seeking abortion between 15 weeks and 21 weeks and 6 days in pregnancy, a period when the fetus is not viable. The Sixth Circuit held that "[u]nder the law of our circuit, a woman faces a substantial obstacle when she is deterred from procuring an abortion as surely as if the government has outlawed an abortion in all cases." *Id*. at 525. Therefore, the 15-week ban creates a substantial obstacle in the path of people seeking abortion of a nonviable fetus. Furthermore, for the reasons discussed in Planned Parenthood's brief, because Kentucky's two abortion facilities cannot comply with the other restrictions in the Act until the Cabinet promulgates forms and regulations, they must stop providing abortion, and therefore the Act imposes a substantial obstacle in the path of all people seeking abortion in the Commonwealth. Plaintiffs have therefore established that they are likely to succeed on the merits of their claim that the ban violates the substantive due process rights of their patients.

B. Plaintiffs are Likely to Succeed on the Merits of Their Claim that the Act

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it exists today because "vertical *stare decisis* is absolute." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (the Supreme Court alone has "the prerogative of overruling its own decisions").

Violates Their Due Process Rights.

Plaintiffs are likely to succeed their claim that the Act violates Plaintiffs' due process rights. As discussed further in Planned Parenthood's brief, due to the inclusion of the emergency clause, the Act arbitrarily and unfairly precludes compliance, as multiple forms, processes, and programs required by the Act do not yet exist. *See, e.g.*, *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 459–60 (1989); *Meachum v. Fano*, 427 U.S. 215, 223 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

Plaintiffs will likely also succeed on their claim that the Act violates their right to procedural due process, also discussed further in Planned Parenthood's brief. Plaintiffs have a constitutionally protected property interest in the continued operation of their abortion facility, and Plaintiffs may not be deprived of that interest without due process of law. Immediately upon enactment, the Act forced Plaintiffs to choose between ceasing to operate their business or violating the law, under risk of felony criminal penalties in violation of their procedural due process rights. *Women's Med. Pro. Corp. v. Baird*, 438 F.3d 595, 611–13 (6th Cir. 2006).

II. PLAINTIFFS AND THEIR PATIENTS ARE SUFFERING IRREPARABLE HARM.

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, 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."). The Act impairs a patient's constitutional right to make "the ultimate decision to terminate her pregnancy before viability," and therefore this Court must find irreparable harm. *Casey*, 505 U.S. at 879.

Because of the Act, Plaintiffs have been forced to turn away patients in need of abortion and suspend the provision of those services indefinitely. If relief is not granted urgently to restore abortion access in Kentucky, the consequences will be dire: patients will be forced to attempt to travel out of state for care, if they are able to scrape together the resources, or they will be forced to remain pregnant against their will. Furthermore, 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), 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).

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

It is beyond dispute that Plaintiffs and their patients face far greater irreparable injury as a result of the Act's enforcement than Defendants would face if the Act's enforcement were enjoined and the preexisting status quo restored. Impairing a constitutional right alone is irreparable injury, but the consequences that result from a woman being forced to maintain a pregnancy against her will are likewise irremediable, and include potential emotional, financial, and physical harm.

On the other hand, the Commonwealth "does not have an interest in enforcing a law that is likely constitutionally infirm," *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742,

771 (10th Cir. 2010), which the Act manifestly is, *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 337 (6th Cir. 2007). Defendants will suffer no harm from being ordered temporarily not to enforce a statute that is unconstitutional under decades of Supreme Court and Sixth Circuit precedent as abortion is a safe procedure that is already heavily regulated in Kentucky.

That the Act has profoundly disturbed the longstanding status quo further confirms that the balance of hardships weighs decisively in Plaintiffs' favor. *See, e.g., Mich. State*, 833 F.3d at 669; *see also Planned Parenthood of Kansas v. Drummond*, No. 07-4164-CV-C-0DS, 2007 WL 2669089, at *2 (W.D. Mo. Sept. 6, 2007) (granting TRO where there was question of ability to comply with new regulations and holding that "a desire to insure compliance with the regulations justifies issuing a TRO to maintain the status quo").

In short, the balance of hardships weighs overwhelmingly in Plaintiffs' favor, further demonstrating that immediate injunctive relief is necessary and appropriate here.

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

Finally, the interests of Plaintiffs and the public are aligned in favor of granting preliminary injunctive relief in this case. 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. (SMART)*, 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).

Moreover, it is unquestionably in the public interest for the processes contemplated by this 72-page law—with significant rights at stake and threats to patient privacy—to occur in a considered way. In contrast to the emergency clause, multiple provisions of the Act recognize the need for such consideration, allowing the Cabinet months to create the processes and forms required. The only way to ensure that Plaintiffs' and Plaintiffs' patients' constitutional rights are not denied is by enjoining 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.

CONCLUSION

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

Dated: April 14, 2022 Respectfully submitted,

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**pro hac vice motions granted*

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed with the Court using the CM/ECF system on April 14, 2022, which will generate an electronic notice of filing to all counsel

registered with that service.

s/Brigitte Amiri
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