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.: 3:19-cv-00178-DJH

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiffs seek emergency relief to block the enforcement of Senate Bill 9 and House Bill 5 that were passed Wednesday and Thursday. Senate Bill 9 will prohibit 90% of the abortions in the Commonwealth by banning abortion after a fetal heartbeat is detected, which is usually around 6 weeks in pregnancy (hereinafter "6-week Ban"). House Bill 5 will prohibit abortion if a woman's decision is influenced by either a diagnosis or the potential for a diagnosis of a disability, or the sex, race, color, or national origin of the embryo or fetus (hereinafter "Reason Ban"). Both Bans will take effect immediately upon Governor Bevin's signature. These are blatantly unconstitutional bans on abortion, and given the immediate irreparable harm that they will cause, Plaintiffs respectfully request that the Court act on an expedited basis and immediately grant a TRO enjoining Defendants from enforcing them.

Governor Bevin will sign the Bans, just has he has signed every abortion restriction presented to him. He has explicitly said he will sign the 6-week Ban.[1] Moreover, during a press interview about another abortion restriction, Governor Bevin said that he would "love to see" the

[1] https://www.facebook.com/GovMattBevin/videos/398571394240662.

time when people are unable to obtain abortion in the Commonwealth.[2] As soon as he signs the Bans, Plaintiffs must turn away almost all patients seeking abortion.

As detailed more fully in the accompanying Memorandum of Law, the issuance of a temporary restraining order is warranted here. Plaintiffs have met all of the elements required for such relief. Plaintiffs will prevail on their claim that the Bans are unconstitutional under 46 years of Supreme Court precedent, beginning with *Roe v. Wade*, 410 U.S. 113 (1973), which unequivocally holds that the State may not ban abortion before the point of fetal viability, regardless of the woman's reason for her decision. The Bans will cause immediate irreparable harm to Plaintiffs and most of their patients by criminalizing abortion. Moreover, the balance of equities weighs firmly in Plaintiffs' favor, and blocking the enforcement of this unconstitutional abortion ban will further the public interest.

Further, pursuant to FRCP 65(b)(1)(B), the undersigned counsel certify that upon electronically filing this motion and Complaint using the Courts CM/ECF system, counsel will electronically mail the filed documents to: Andrew G. Beshear, Kentucky Attorney General at andrew.beshear@ky.gov; M. Steve Pitt, General Counsel to Governor Bevin at steve.pitt@ky.gov; S. Chad Meredith, Deputy General Counsel to Governor Bevin at chad.meredith@ky.gov; Hans Herklotz, General Counsel for the Kentucky Cabinet for Health and Family Services at hans.herklotz@ky.gov; Travis S. Mayo, Assistant Attorney General at travis.mayo@ky.gov; Michael S. Rodman, Executive Director Kentucky Board of Medical Licensure at kbml@ky.gov; and Thomas Wine, the Commonwealth's Attorney for the 30th Circuit of Kentucky at tbwine@louisvilleprosecutor.com. Formal notice to Defendants and their

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

agents, however, should not be required due to the constitutional rights at issue and the inability to effect formal process as a result of House Bill 5's and Senate Bill 9's immediate effective dates.

For the foregoing reasons, and as set forth in the accompanying Memorandum and Declarations, Plaintiffs respectfully request that the court GRANT the Motion for a Temporary Restraining Order and/or Preliminary Injunction.

Dated: March 15, 2019

Respectfully submitted,

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Case No.: 3:19-cv-00178-DJH

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

The Kentucky legislature passed two bans on abortion. The first one makes it a felony for a doctor to provide an abortion starting at approximately six weeks in pregnancy, a point at which many women do not even know they are pregnant and long before fetal viability. Indeed, Senate Bill 9 ("the 6-week Ban") criminalizes approximately 90% of the abortions performed in the Commonwealth. The second ban 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." H.B. 5 ("Reason Ban").

Both Bans are unquestionably unconstitutional under 46 years of Supreme Court precedent, beginning with *Roe v. Wade*, 410 U.S. 113 (1973), that unequivocally holds that the State may not ban abortion before the point of fetal viability. The Kentucky legislature passed the 6-week Ban on March 14, 2019 and the Reason Ban on March 13, 2019, and will send them to Governor Bevin for his signature. Because of their exceptional "emergency" clauses, both Bans will become effective immediately upon Governor Bevin's signature. Governor Bevin will sign

the Bans. Indeed, he said, about the 6-week Ban, that "I hope to be on my desk here soon so I can sign this into law."[1] Furthermore, 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 Bans, Plaintiffs will be forced to begin turning away almost all women seeking abortions, including women with appointments for that very day. Enforcement of the Bans will violate the constitutional rights of Kentucky women, and will cause them immediate and irreparable harm. Plaintiffs seek emergency injunctive relief to block the enforcement of these unconstitutional abortion Bans, and given the immediate irreparable harm that the Bans will cause, Plaintiffs respectfully request that the Court act on an expedited basis.

STATUTORY FRAMEWORK

6-Week Ban

The 6-week Ban effectuates its near total abortion ban in the following manner: If a woman's[3] pregnancy is in the uterus, the 6-week Ban requires the doctor who intends to perform an abortion to determine whether there is a fetal heartbeat, and if there is a heartbeat, it is a crime to "caus[e] or abet[] the termination of" the pregnancy. S.B. 9 § 4(1), 6(1). In a typical pregnancy, the heartbeat can be detected at around six weeks in pregnancy.

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[1] https://www.facebook.com/GovMattBevin/videos/398571394240662.

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

[3] Plaintiffs use "woman" in this memorandum as a short-hand for a patient 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 Bans.

The 6-week Ban has only two very limited exceptions. The 6-week Ban permits abortion after a heartbeat is detected only if the abortion is necessary to 1) prevent the woman's death, or 2) to prevent a "substantial and irreversible impairment of a major bodily function." S.B. 9 § 6(2)(a). "Substantial and irreversible impairment of a major bodily function" means "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function. A medically diagnosed condition that constitutes a 'serious risk of the substantial and irreversible impairment of a major bodily function' includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, but does not include a condition related to the woman's mental health." KRS 311.781(8).

A violation of the 6-week Ban is a Class D felony, which is punishable by imprisonment of one to five years. KRS 311.990(22)(23); KRS 532.060(2)(d). A woman also may bring a civil action for violation of the 6-week Ban. S.B. 9 § 9.

Reason Ban

The Reason Ban 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." H.B. 5 §1(2). The Reason Ban defines "any other disability" broadly to include "any disease, defect, or disorder, whether or not genetically inherited." H.B. 5 §1(1)(b). The Reason Ban 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 Reason Ban. *Id.*

The Reason Ban provides a second extremely limited exception "in the case of a medical emergency." H.B. 5 § 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." H.B. 5 § 1(1)(f); KRS 311.720.

The Reason Ban 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 Reason Ban'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. H.B. 5 § 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. H.B. 5 § 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. H.B. 5 § 1(5).

In addition to the abortion prohibition, the Reason Ban 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." H.B. 5 § 3(4). Any physician who fails to abide by this provision of the Reason Ban 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 Reason Ban, like the 6-week

Ban, takes effect immediately upon Governor Bevin's signature.

STATEMENT OF FACTS

There is one fact that resolves this case: both Bans prohibit abortion before viability. Compl. ¶¶ 18, 35-37. That fact alone dictates the outcome here. Plaintiffs provide the following information to give the Court greater background.

In a normally developing embryo, cells that form the basis for development of the heart later in gestation produce cardiac activity that can be detected with ultrasound. Compl. ¶ 29. In early pregnancy, Plaintiffs typically perform a vaginal ultrasound to date the pregnancy. Compl. ¶ 30. Using vaginal ultrasound, cardiac activity is generally detectible beginning at approximately six weeks lmp. Compl. ¶ 31.

At six weeks lmp many women are unaware that they are pregnant. Compl. ¶ 32. A woman's menstrual cycle is usually approximately four weeks long, although this can vary significantly from woman to woman. Compl. ¶ 28. Fertilization of an egg typically occurs around two weeks after the woman's last menstrual period. *Id.* The medical profession considers pregnancy to actually begin when a fertilized egg implants in the uterus, typically around three weeks lmp, approximately a week before a woman with a typical and regular menstrual cycle will expect to get her period. *Id.* (And even at that point, for a variety of reasons—including that they have irregular periods, they have certain medical conditions, they have been using contraceptives, or they are breastfeeding—many women may not realize that they have missed a period.) Compl. ¶ 32. Even for women with highly regular periods, a ban on abortion at six weeks lmp will be just two weeks after they have missed their period. Compl. ¶ 33.

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. ¶¶ 8-9. 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. ¶ 35. Approximately 90% of abortions at EMW take place after six weeks lmp and the 6-week Ban will prohibit virtually all of these abortions. Compl. ¶¶ 36-37. 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. ¶ 26.

Women seek abortions 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. ¶ 25. The Bans would prevent all of these women from obtaining a pre-viable abortion in the Commonwealth. Compl. ¶ 37.

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. ¶ 38. 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. ¶ 39. 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 Reason Ban. Under the Reason Ban, these patients would be prohibited from obtaining an abortion. Compl. ¶ 40.

ARGUMENT

Plaintiffs seek a temporary restraining order and/or preliminary injunction to prevent the Bans 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 will prevail on the merits because the Bans directly contravene decades of binding Supreme Court holding that a State may not ban abortion before the point of viability; enforcement of the Bans will inflict severe and irreparable harm on Plaintiffs' patients; 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 statute.

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

Both Bans are blatantly unconstitutional. 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*, 410 U.S. at 166. Specifically, the Supreme Court held that 1) 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, 2) 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 previability 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. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2300 (2016).

Unsurprisingly, attempts to ban abortion prior to viability have been uniformly rejected by the courts. *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).

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.

Accordingly, two federal courts recently held unconstitutional bans very similar to the Reason Ban 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 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*, both Bans on pre-viability abortions are 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 are likely to succeed on the merits of their claim that the Bans violate the substantive due process rights of their patients and that a preliminary injunction is warranted.

II. PLAINTIFFS AND THEIR PATIENTS WILL SUFFER IRREPARABLE HARM IF THE BANS TAKE EFFECT

Because of their extreme "emergency clause" provisions, the challenged Bans on abortion will take effect immediately upon Governor Bevin's signature. As a result, Plaintiffs' patients seeking abortion services will be prohibited from obtaining the constitutionally protected health care they require. That denial of their constitutional rights constitutes per se irreparable harm. Additionally, the Bans will irreparably harm Plaintiffs' patients by prohibiting them from obtaining

a desired abortion.

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."). Because it is clear that the Bans impair Plaintiffs' patients' rights guaranteed by the Fourteenth Amendment to the United States Constitution, it *per se* effects irreparable injury and should be enjoined.

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). In addition, 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. Moreover, abortion access is critical to women's equality. As the Supreme Court observed in *Casey*, access to abortion has improved women's lives: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856. In sum, the Bans will cause irreparable injury to Plaintiffs and their patients, and this injury warrants immediate relief.

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

Plaintiffs and their patients unquestionably face far greater irreparable harm while the Bans are in effect than Defendants would face if their enforcement were enjoined and the status quo of availability of abortion was maintained. As discussed above, the Bans will cause Kentucky women profound and irreparable harm.

By contrast, the Commonwealth will suffer no harm if it is ordered not to enforce bans that are plainly unconstitutional under decades of Supreme Court. *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 Bans serves 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 Bans.

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 this Court determines that a bond is required, Plaintiffs request that it be set at $1.

CONCLUSION

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

Dated: March 15, 2019

Respectfully submitted,

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**pro hac vice motions forthcoming*

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EMW WOMEN'S SURGICAL CENTER, P.S.C., *et al.*,

Plaintiffs,

v.

ANDREW G. BESHEAR *et al.*,

Defendants.

Case No.: 3:19-cv-00178-DJH

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

This matter having come before the Court upon Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction; for good cause shown, it is hereby ORDERED that Plaintiffs' Motion for a Temporary Restraining Order is GRANTED.

Plaintiffs have established a likelihood of success on the merits of their Fourteenth Amendment substantive due process claim. Absent an injunction from this Court, Plaintiffs' and their patients' rights would be irreparably harmed.

The balance of hardships favors Plaintiffs because a temporary restraining order would preserve the status quo. Finally, the entry of a temporary restraining order is in the public interest.

The Court further finds that no security is required under Fed. R. Civ. P. 65(c).

IT IS THEREFORE ORDERED that Plaintiffs' Motion for a Temporary Restraining Order is GRANTED and, effective immediately, Defendants, as well as their agents, employees, and successors in office, are HEREBY immediately RESTRAINED and ENJOINED, from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with

Senate Bill 9 and Kentucky House Bill 5.

IT IS FURTHER ORDERED that the bond requirement of Fed. R. Civ. P. 65(c) is waived and that this injunctive relief is effective upon service.

Done this _____ day of _____, 2019.

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UNITED STATES DISTRICT JUDGE