**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

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| SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, on behalf of itself and its members; FEMINIST WOMEN'S HEALTH CENTER, PLANNED PARENTHOOD SOUTHEAST, INC., ATLANTA COMPREHENSIVE WELLNESS CLINIC, ATLANTA WOMEN'S MEDICAL CENTER, FEMHEALTH USA d/b/a CARAFEM, and SUMMIT MEDICAL ASSOCIATES, P.C., on behalf of themselves, their physicians and other staff, and their patients; CARRIE CWIAK, M.D., M.P.H., LISA HADDAD, M.D., M.S., M.P.H., and EVA LATHROP, M.D., M.P.H., on behalf of themselves and their patients; and MEDICAL STUDENTS FOR CHOICE, on behalf of itself, its members, and their patients,<br><br>Plaintiffs,<br><br>v.<br><br>STATE OF GEORGIA<br><br>Defendant. | Case No. _____ |

**PLAINTIFFS' EMERGENCY MOTION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER**

Plaintiffs are a coalition of Georgia-based obstetrician-gynecologists ("OB-GYNs"), reproductive health centers, and membership groups committed to

reproductive freedom and justice.[1] In accordance with O.C.G.A. §§ 9-11-65 and 9-4-3, Plaintiffs file this emergency motion for an interlocutory injunction and temporary restraining order ("TRO") blocking enforcement of Sections 4, 10, and 11 of Georgia 2019 House Bill 481 ("H.B. 481," "the Act," or "the Six-Week Ban") and O.C.G.A. § 16-12-141(f) ("the Records Access Provision"), which went into effect last week. Relief is urgently needed to maintain the status quo ante and prevent devastating harm to millions of Georgians. For those reasons, Plaintiffs request expedited treatment of this motion under Superior Court Rule 6.7.

H.B. 481 bans virtually all abortions in Georgia at approximately six weeks of pregnancy, as dated from a patient's last menstrual period (LMP)—*i.e.*, just two weeks after a person's first missed period. Since taking effect last week, the Six-Week Ban has caused devastation and turmoil across the state. Plaintiffs' patients and members who need an abortion now must either attempt to travel hundreds or thousands of miles out of state, at great burden and expense, to access care—or else suffer the profound medical risks, pains, and life-altering consequences of pregnancy and childbirth against their will. The Six-Week Ban also sweeps some

[1] Plaintiffs are: SisterSong Women of Color Reproductive Justice Collective, suing on behalf of itself and its members; Feminist Women's Health Center, Planned Parenthood Southeast, Inc., Atlanta Comprehensive Wellness Clinic, Atlanta Women's Medical Center, FemHealth USA d/b/a carafem, and Summit Medical Associates, P.C., suing on behalf of themselves and their physicians, staff, and patients; Carrie Cwiak, M.D., M.P.H., Lisa Haddad, M.D., M.S., and Eva Lathrop, M.D., M.P.H., suing on behalf of themselves and their patients; and Medical Students for Choice suing on behalf of itself, its members, and their patients.

miscarriage care into its definition of "abortion" and denies medically appropriate treatment to people facing inevitable pregnancy loss, elevating their medical risk and extending their agony. The Act's exceedingly narrow exceptions fail to mitigate the harm for even the most vulnerable Georgians.

Plaintiffs are likely to succeed on the merits based on two independent claims: *First*, the Six-Week Ban is void *ab initio* because it was in direct violation of the U.S. Constitution at the time it was enacted in 2019, and Georgia case law is clear that a statute void on arrival "can be made effective only by re-enactment," regardless of a subsequent change in the law. *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 617–18 (1953) (quotation marks omitted).

*Second*, H.B. 481 violates Georgians' fundamental rights to liberty and privacy under the Georgia Constitution, which the Georgia Supreme Court has expansively protected for more than a century and which are far broader than those granted by the U.S. Constitution. *See, e.g.*, *Powell v. State*, 270 Ga. 327, 329 (1998); *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 190 (1905). Those fundamental rights protect Georgians from unwarranted State interference with their "life, . . . body, . . . [and] health," *Paveisch*, 122 Ga. at 190, encompassing, *inter alia*, the right to refuse medical treatment and to engage in private, consensual sexual activity. *See, e.g.*, *Zant v. Prevatte*, 248 Ga. 832, 833 (1982); *Powell*, 270 Ga. at 336. It is beyond question that H.B. 481 infringes these rights.

Indeed, it is difficult to imagine a *greater* infringement on an individual's life, body and health than forcing her to remain pregnant, against her will, for 34 weeks, endure hours or days of labor and delivery, and then (in most cases) parent a child for the rest of her life.

Because the right of privacy is a fundamental right, the State must prove that the challenged law "serve[s] a compelling state interest and [is] narrowly tailored to effectuate only that compelling interest." *Powell*, 270 Ga. at 333. The State cannot meet its heavy burden. There is no compelling state interest in an embryo at six weeks LMP, *four months* before it could survive apart from the pregnant person. Indeed, the Six-Week Ban, which is uniformly opposed by leading state and national medical associations including the Medical Association of Georgia, is premised on the medical fallacy that an embryo has a "heartbeat" at this early point: in fact, the embryo does not yet even have a functioning heart. H.B. 481's ban on miscarriage care also serves no coherent, much less compelling, interest.

Moreover, far from satisfying the least restrictive means prong of strict scrutiny, a categorical ban on abortion from the earliest weeks of pregnancy is virtually the *most* restrictive means of furthering any state interest. The Six-Week Ban's constitutional defects are compounded by the Legislature's decisions to (1) expressly exclude life-threatening psychiatric conditions from the Act's medical emergency exception; (2) further violate the privacy of rape and incest victims by

requiring that they involve law enforcement in their health care decisions; and (3) prohibit appropriate medical care even when pregnancy loss is inevitable. Each of these choices is dispositive of the State's burden on least restrictive means.

Plaintiffs also challenge O.C.G.A. § 16-12-141(f), which, as amended by H.B. 481, provides Georgia prosecutors in both the judicial circuit where an abortion provider is located and the judicial circuit where their patient resides with seemingly unrestricted access to the patient's personal medical records (the "Records Access Provision"). The Records Access provision baldly defies Georgia Supreme Court precedent prohibiting disclosure of a patient's medical records to "anyone, including [a] prosecutor," without due process protections like a subpoena. *King v. State*, 272 Ga. 788, 792 (2000). It cannot survive.

The balance of the equities weighs heavily in favor of an interlocutory injunction. *See SRB Inv. Servs., LLLP v. Branch Banking & Tr. Co.*, 289 Ga. 1, 5 (2011) (describing the discretionary factors courts consider in granting an interlocutory injunction). Every day—every hour—that the Six-Week Ban is in effect, it is causing Plaintiffs and their physicians, staff, members, and patients extraordinary and irreparable harm. The State's interest in protecting an embryo at six weeks LMP does not outweigh Plaintiffs' interests in preserving the health, lives, and fundamental rights of pregnant people in Georgia. And the public interest is clearly served when an injunction would prevent widespread

constitutional harm and vast and irreparable medical, emotional, educational, and financial harm to pregnant Georgians and their families.

For these reasons, and all the reasons in the accompanying memorandum of law, Plaintiffs respectfully request that the Court give this motion expedited treatment and (1) issue a rule nisi today setting a TRO hearing as soon as possible on or after August 2, 2022, and (2) at that proceeding, issue a TRO enjoining enforcement of the Six-Week Ban and Records Access Provision pending a further hearing on Plaintiffs' motion for a preliminary injunction.

Plaintiffs further respectfully request that this Court issue a preliminary injunction prohibiting the State of Georgia; its officers, agents, servants, employees, representatives, and attorneys, including all district attorneys in the State of Georgia; and anyone acting on behalf of, in active participation with, or in concert with the State, from enforcing Sections 4, 10, and 11 of H.B. 481, codified at O.C.G.A. §§ 16-12-141, 31-9B-2, 31-9B-3, as well as O.C.G.A. § 16-12-141(f), during the pendency of this litigation, and from taking any enforcement action premised on a violation of the aforementioned laws that occurred while this order is in effect.

Respectfully submitted, this 26th day of July, 2022.

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**Pro hac vice application forthcoming*

**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

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| SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, on behalf of itself and its members; FEMINIST WOMEN'S HEALTH CENTER, PLANNED PARENTHOOD SOUTHEAST, INC., ATLANTA COMPREHENSIVE WELLNESS CLINIC, ATLANTA WOMEN'S MEDICAL CENTER, FEMHEALTH USA d/b/a CARAFEM, and SUMMIT MEDICAL ASSOCIATES, P.C., on behalf of themselves, their physicians and other staff, and their patients; CARRIE CWIAK, M.D., M.P.H., LISA HADDAD, M.D., M.S., M.P.H., and EVA LATHROP, M.D., M.P.H., on behalf of themselves and their patients; and MEDICAL STUDENTS FOR CHOICE, on behalf of itself, its members, and their patients,<br><br>Plaintiffs,<br><br>v.<br><br>STATE OF GEORGIA,<br><br>Defendant. | Case No. _____ |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER**

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Plaintiffs are a coalition of Georgia-based obstetrician-gynecologists ("OB-GYNs"), reproductive health centers, and membership groups committed to reproductive freedom and justice.[1] In accordance with O.C.G.A. §§ 9-11-65 and 9-4-3, Plaintiffs file this emergency motion for an interlocutory injunction and temporary restraining order ("TRO") blocking enforcement of Sections 4, 10, and 11 of Georgia 2019 House Bill 481 ("H.B. 481," "the Act," or "the Six-Week Ban") and O.C.G.A. § 16-12-141(f). Such relief is urgently needed to maintain the pre-controversy status quo and prevent irreparable harm to millions of Georgians.[2]

## INTRODUCTION AND SUMMARY

H.B. 481 took effect last week, banning abortion in Georgia from the earliest weeks of pregnancy—just two weeks after a missed period, before many people even know they are pregnant.[3] The Six-Week Ban is already having a catastrophic impact

[1] Plaintiffs are: SisterSong Women of Color Reproductive Justice Collective ("SisterSong"), suing on behalf of itself and its members; Feminist Women's Health Center, Planned Parenthood Southeast, Inc., Atlanta Comprehensive Wellness Clinic, Atlanta Women's Medical Center, Femhealth USA d/b/a carafem, and Summit Medical Associates, P.C. ("the Health Center Plaintiffs"), suing on behalf of themselves and their physicians, staff, and patients; Carrie Cwiak, M.D., M.P.H., Lisa Haddad, M.D., M.S., and Eva Lathrop, M.D., M.P.H. ("the OB/GYN Plaintiffs"), suing on behalf of themselves and their patients; and Medical Students for Choice ("MSFC") suing on behalf of itself, its members, and their patients.

[2] H.B. 481 is attached as Ex. A to the Verified Complaint for Declaratory & Injunctive Relief, ECF No. 1 ("Ver. Compl.").

[3] Plaintiffs periodically use "women" herein to refer to people who are pregnant, but note that "not all persons who may become pregnant identify as female," and that transgender and gender non-binary people also need abortion and miscarriage services. *Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021), *reh'g en banc granted, opinion vacated on other grounds*, 22 F.4th 1346 (11th Cir. 2022).

across Georgia, with more harm promised every day it is in effect. It will be devasting for the countless Georgians forced to suffer through up to 34 weeks of pregnancy and labor and delivery against their will. It will be devastating for women who were overjoyed to learn of their pregnancy but now face a medical complication, and cannot get the care they urgently need to preserve their health. And it will be devastating for families across Georgia, because most people seeking abortions already have children at home who will also feel the Act's repercussions. Forcing pregnancy and childbirth will condemn countless Georgia families to poverty. It will mean more women and children suffer violence, because the pregnancy tethers them to an abusive household. And it will mean more women die from pregnancy complications in a state facing one of the worst maternal mortality crises in the nation, especially for Black women.

The Six-Week Ban's exceptions for rape and incest, medical emergencies, and lethal fetal anomalies are drawn so narrowly that they fail to mitigate the Act's harm even for the most vulnerable Georgians. The young girl who has not filed a police report about her father's rapes; the patient whose pregnancy triggers a severe mental health episode and suicide risk; the family who receives a fetal diagnosis that would require extensive medical interventions they cannot afford—all are subject to and will be irreparably harmed by the Six-Week Ban. Nor are people experiencing a miscarriage spared the Act's cruelties: The Six-Week Ban prohibits medically

appropriate care to treat an inevitable pregnancy loss, extending miscarriage patients' agony and elevating their medical risk.

The Six-Week Ban supplants medical judgment with political interference, and its purported justifications are not supported by medical science. For those reasons, and because of the vast medical harm it will impose, the Medical Association of Georgia, Georgia Obstetrical and Gynecological Society, and other leading state and national medical associations uniformly oppose H.B. 481.

The Six-Week Ban is unenforceable for two independent reasons: *First*, when enacted in 2019, it was clearly violative of the U.S. Constitution "under court interpretations of that period," and is therefore void *ab initio*. *Adams v. Adams*, 249 Ga. 477, 478–79 (1982). The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), a seismic change in federal constitutional law, cannot revive the Six-Week Ban: Georgia case law is clear that a statute void on arrival "can be made effective only by reenactment," regardless of a subsequent change in the law. *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 617–18 (1953) (quotation marks omitted).

*Second*, the Six-Week Ban's unparalleled intrusion into the most intimate aspects of a person's bodily autonomy, health, and medical and familial decisions violates Georgians' fundamental right under the Georgia Constitution to be free from unwarranted State interference with their "life, . . . . body, . . . [and] health." *Pavesich*

*v. New Eng. Life Ins.*, 122 Ga. 190, 190 (1905). When the Georgia Supreme Court first recognized the "liberty of privacy" enshrined in the Georgia Constitution in 1905, Georgia established itself as a pioneer in privacy jurisprudence. *See id.* "Since that time, the Georgia courts have developed a rich appellate jurisprudence . . . which recognizes the right of privacy as a fundamental constitutional right" subject to strict scrutiny. *Powell v. State*, 270 Ga. 327, 329 (1998) (citation omitted). The State cannot meet its burden to show that this immense violation of pregnant people's bodies and futures, beginning at the very earliest weeks of pregnancy, serves a compelling interest through the least restrictive means. And *Dobbs* has no bearing on this analysis, because "the 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive tha[n] the right of privacy protected by the U.S. Constitution." *Id.* (citation omitted).

*Finally*, in a further affront to Georgians' privacy, H.B. 481 broadens a statutory provision, O.C.G.A. § 16-12-141(f) ("the Records Access Provision"), which grants district attorneys virtually unfettered access—without the due process protections of probable cause and a subpoena—to the medical files of anyone who seeks an abortion. This provision exposes Georgians' most private decisions, intimate medical conditions, and personal circumstances to state officials in bald defiance of the Georgia Constitution and Georgia Supreme Court precedent.

For all of these reasons, a TRO and interlocutory injunction are warranted.

## REQUEST FOR EMERGENCY TREATMENT

Plaintiffs request expedited treatment of this motion under Superior Court Rule 6.7. The fundamental privacy and liberty interests of millions of Georgians are at stake. Already, the Six-Week Ban is forcing Georgians into pregnancy and childbirth against their will; forcing countless others to attempt to travel across state lines for time-sensitive health care, at great burden and expense; and denying Georgians experiencing a miscarriage or pregnancy-related health complications medically appropriate care to minimize their risk and suffering.

Plaintiffs therefore respectfully request that the Court give this motion expedited treatment and issue a rule nisi today setting a hearing on the request for temporary restraining order as soon as possible on or after August 2, 2022, to prevent this unconstitutional Act from continuing to impose profound and irreparable harm.[4]

## STATEMENT OF FACTS

### I. Pregnancy Is a Profoundly Significant Medical Event.

Pregnancy is a major medical event that affects virtually every aspect of a person's physiology. Aff. of Martina Badell, M.D., Ver. Compl. Ex. B ("Badell Aff."), ¶ 13; *see also id.* ¶¶ 11–12, 14–22, 34, 40. Even in uncomplicated pregnancies, many patients suffer symptoms that cause significant pain and

[4] Georgia Code § 9-10-2 requires that the Attorney General be given "five day's advance written notice" of a hearing when the State is a party defendant.

discomfort and interfere with essential daily tasks. *Id.* ¶ 13. People with co-existing conditions known as "comorbidities," such as diabetes, hypertension, and cardiac disease, face additional risks. *Id.* ¶ 16. Because of income inequality, lack of access to health care, and other facets of structural racism, people of color are more likely to have a preexisting health condition that makes pregnancy riskier. *Id.* ¶¶ 15, 22; Aff. of Whitney Rice, DrPH, M.P.H., Ver. Compl. Ex. D ("Rice Aff."), ¶¶ 19-20. It is not uncommon for someone who had been successfully managing a health condition to see a dramatic deterioration during pregnancy, often with lasting harm even after the pregnancy ends. Badell Aff. ¶ 16. In addition, people can develop conditions for the first time in pregnancy that predispose them to medical conditions, like diabetes and cardiovascular disease, later in life. *Id.* ¶ 19.

The pregnancy and postpartum period (together, the "perinatal" period) are also times of increased vulnerability to mental illness. Aff. of Samantha Meltzer-Brody, M.D., Ver. Compl. Ex. E ("Meltzer-Brody Aff."), ¶ 12. At least one in eight women will experience psychiatric symptoms during the perinatal period, and unplanned pregnancy is a risk factor. *Id.* ¶¶ 13, 18; *see also* Badell Aff. ¶ 16. In a recent study of pregnant and postpartum Black women in south Atlanta, *more than half* reported perinatal anxiety or mood disorder symptoms. Meltzer-Brody Aff. ¶ 17. Perinatal psychiatric episodes can be so severe and debilitating that they are

life-threatening—in addition to causing loss of employment and other life turmoil. *Id.* ¶¶ 12, 23–26, 30, 32–33, 35–36, 39–43.

Labor and delivery carry their own severe risks. Badell Aff. ¶ 17. Vaginal deliveries can cause, *inter alia*, infection, hemorrhage, and pelvic floor damage leading to uterine prolapse and incontinence. *Id*. A caesarean section (C-Section) is major abdominal surgery that carries even greater risks, including blood transfusion, hysterectomy, and death. *Id*. In Georgia, one in three live births is via C-section—the ninth worst rate in the nation. *Id.*

According to the Centers for Disease Control and Prevention ("CDC"), pregnancy is becoming more dangerous. Badell Aff. ¶ 20. In Georgia, the threat is particularly grave. Georgia has a dearth of physicians, particularly in rural areas. Rice Aff. ¶¶ 17–18; Aff. of Carrie Cwiak, M.D., M.P.H., Ver. Compl. Ex. C ("Cwiak Aff."), ¶ 57. Nearly half of Georgia counties lack a single OB-GYN. Rice Aff. ¶ 17. Not coincidentally, Georgia's rate of pregnancy-related deaths is among the top ten worst in the nation, and Georgia's Department of Public Health acknowledges that the overwhelming majority of those deaths are preventable. Rice Aff. ¶ 21; Badell Aff. ¶ 22. Georgia's maternal mortality crisis is particularly severe among Black women, who are 2.3 times as likely to die from pregnancy as white women in Georgia. Rice Aff. ¶ 22; Badell Aff. ¶ 22. Georgia also has one of the highest rates of infant mortality in the nation. Rice Aff. ¶ 23.

## II. Abortion Is Common and Very Safe But Was Already Difficult to Access in Georgia, Especially for Low-Income Patients.

While most pregnancies end in a live birth, the two alternative outcomes—miscarriage and abortion—are both very common. Approximately 15–20% of pregnancies end in miscarriage, and one in four women in the United States has an abortion by age 45. Cwiak Aff. ¶¶ 8, 50; Badell Aff. ¶ 37. In Georgia, in 2019, there were 16.9 abortions per 1,000 women of reproductive age. Cwiak Aff. ¶ 8.

Georgians who seek an abortion do so for a variety of deeply personal reasons. Cwiak Aff. ¶¶ 9-10; *see also* Aff. of Jane Doe 1, Ver. Compl. Ex. F ("Doe 1 Aff."), ¶ 2; Aff. of Jane Doe 2, Ver. Compl. Ex. G ("Doe 2 Aff."), ¶¶ 1–2; Aff. of Jane Doe 3, Ver. Compl. Ex. H ("Doe 3 Aff."), ¶ 3; Aff. of Jane Doe 4, Ver. Compl. Ex. I ("Doe 4 Aff."), ¶ 3; Aff. of Jane Doe 5, Ver. Compl. Ex. J ("Doe 5 Aff."), ¶¶ 2, 4. Deciding whether to continue or end a pregnancy implicates a person's core religious beliefs, values, and family circumstances. Cwiak Aff. ¶ 10. Some people have abortions because they conclude that it is not the right time to have a child or to add to their families. *Id.* ¶ 9. Some want to pursue their education; some lack the economic resources or level of partner support or stability needed to raise children; and some will be unable to care adequately for their existing children or their ill or aging parents if they increase their family size. *Id.* Others end a pregnancy to be able to leave an abusive partner. *Id.* ¶ 10. Some people seek abortion because of the risks that continuing a pregnancy would pose to their health or life; some because they

have become pregnant as a result of rape or incest; and others because they decide not to have children at all. *Id.* Some people decide to have an abortion because of a diagnosed fetal medical condition, concluding that they do not have the societal or personal resources—financial, medical, educational, or emotional—to care for a child with physical or intellectual disabilities, or to do so and simultaneously provide for their existing children. *Id.*

Three out of four abortion patients are either poor or low-income. Rice Aff. ¶ 29. And in Georgia, nearly three out of four abortion patients are people of color: 65% of abortion patients in Georgia in 2019 identified as Black, 21% as white, 9% as Hispanic, and 5% as "other." *Id.* ¶¶ 31, 30 n.71. Eighty-seven percent of Georgia abortion patients are unmarried, and more than 60% already have at least one child. *Id.* ¶¶ 30, 30 n.71. One in five has two children, and nearly one in five abortion patients in Georgia already has at least three children. *Id.*

Abortion is very safe, and far safer than pregnancy. *Id.* ¶ 49; Cwiak Aff. ¶¶ 14, 16. Serious complications occur in fewer than 1% of abortions. Cwiak Aff. ¶ 14. According to CDC data, there were 20.4 maternal deaths per 100,000 live births in 2018–2020; by contrast, in 2013–2018 (the most recent years for which data are available), the national case fatality rate for legal induced abortion was 0.41 deaths per 100,000. Cwiak Aff. ¶ 16; Badell Aff. ¶ 20. Abortion is also safer than many other common medical procedures: colonoscopy, certain dental procedures, and

plastic surgery all have higher mortality rates. Cwiak Aff. ¶ 15. However, while abortion is safe throughout pregnancy, the medical risks increase as pregnancy advances. *Id.* ¶ 37. In other words, delay increases risk.

Georgians have to overcome numerous barriers, including those imposed by state law, which make it difficult to access care early in pregnancy. For instance, a patient must hear a special government-created script and then delay care by at least 24 hours before they are permitted to consent to an abortion, O.C.G.A. § 31-9A-3(2); young people cannot obtain an abortion unless they first notify a parent or obtain a court order, *id.* § 15-11-682; and appointment availability is limited because nurse practitioners and other qualified advanced practice clinicians are prohibited from providing abortions—despite their providing health care of comparable complexity and risk, O.C.G.A. §§ 16-12-141(b), 43-34-110, 43-34-25(l). Additionally, with very narrow exceptions, Georgia bars coverage of abortion through its Medicaid program, Op. Atty. Gen. No. U94-6, March 15, 1994, in health plans offered in the state health-insurance exchange, O.C.G.A. § 33-24-59.17, and in health insurance plans offered to state employees, O.C.G.A. § 45-18-4.

Preexisting Georgia law prohibited abortions at 22 weeks from a patient's last menstrual period (LMP), with very narrow exceptions.[5]

[5] Preexisting Georgia law prohibited abortion at "20 weeks or more," O.C.G.A. § 16-12-141(c)(1) (repealed 2019), "from the time of fertilization," O.C.G.A. § 31-9B-1(5). Because fertilization typically occurs at two weeks LMP, preexisting law banned abortions at 22 weeks LMP.

## III. The Six-Week Ban

### A. Statutory Framework

Section 10 of H.B. 481 requires that, before performing an abortion, a physician must first make "a determination of the presence of a detectable human heartbeat, as such term is defined in Code Section 1-2-1." O.C.G.A. § 31-9B-2(a). As provided by H.B. 481 § 3, "[d]etectable human heartbeat" is defined as "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac." O.C.G.A. § 1-2-1(e)(1).[6] Section 4 of the Act provides that "[n]o abortion is authorized or shall be performed if an" embryo/fetus "has been determined . . . to have a detectable human heartbeat," and "[n]o abortion is authorized or shall be performed in violation of" the code section requiring such a determination. H.B. 481 § 4 (codified at O.C.G.A. § 16-12-141(b), (d)).

The definition on which H.B. 481 is premised is contradicted by medical science. Cwiak Aff. ¶ 21; Badell Aff. ¶ 26. The electrical impulses detectable beginning at approximately six weeks of pregnancy are not a "heartbeat": the cells that produce those early electrical impulses have not yet formed a functional four-chamber heart. Cwiak Aff. ¶ 21; Badell Aff. ¶ 26. Because "heartbeat" is

[6] H.B. 481 also redefines "natural person" throughout the Georgia code to include an "unborn child," defined as a human "at any stage of development who is carried in the womb." H.B. 481 § 3 (codified at O.C.G.A. § 1-2-1(d)-(e)). Plaintiffs have a pending federal court vagueness challenge to H.B. 481 § 3, *SisterSong Women of Color Reproductive Justice Collective v. Kemp*, No. 1:19-cv-02973-SCJ (N.D. Ga.), and do not challenge it here.

scientifically inaccurate, Plaintiffs refer to the prohibition against providing an abortion after the detection of a "human heartbeat" as the "Six-Week Ban."

Under Section 4 of H.B. 481, "abortion" does not include removing an ectopic pregnancy (*i.e.*, a pregnancy located outside the uterus). O.C.G.A. § 16-12-141(a)(1)(B). The Act's definition of abortion also excludes an act "performed with the purpose of removing a dead unborn child caused by spontaneous abortion," *i.e.*, caused by a miscarriage. O.C.G.A. § 16-12-141(a)(1)(A). Under this definition, however, a patient suffering a miscarriage would be able to access medical care to empty her uterus *only if* the process of pregnancy loss has already ended cardiac activity in the embryo or fetus. *See* Cwiak Aff. ¶¶ 51, 53–56; Badell Aff. ¶ 36. As long as cardiac activity persists, H.B. 481 prohibits physicians from providing medically indicated care to complete a patient's miscarriage—regardless of the patient's wishes and the inevitability of the pregnancy loss—unless the patient's health deteriorates to the point that the Act's extremely limited "medical emergency" exception is triggered. *See infra* at 16–17.

Section 11 of the Act imposes new reporting obligations for abortion providers to document that cardiac activity was not detectable before performing an abortion or that one of the Act's three extremely limited exceptions existed, detailed *infra*. H.B. 481 § 11 (codified at O.C.G.A. § 31-9B-3).

A physician who violates Section 4 faces potential imprisonment of one to ten years. O.C.G.A. § 16-12-140(b). Such a violation also exposes a physician to licensing penalties up to and including revocation, because it could constitute both "unprofessional conduct" under O.C.G.A. § 43-34-8(a)(7), *see* H.B. 481 § 10(b) (codified at O.C.G.A § 31-9B-2), and independent grounds for such discipline, *see* O.C.G.A. § 43-34-8(a)(8); *see also* O.C.G.A. § 43-34-8(b)(1)(F) (penalties). A patient may also bring a civil action against the physician for violating Section 4. H.B. 481 § 4(g) (codified at O.C.G.A. § 16-12-141(g)). Section 4 offers affirmative defenses if a clinician "provide[d] medical treatment to a pregnant woman which results in the accidental or unintentional injury or death of an" embryo/fetus, or if "[a] woman sought an abortion because she reasonably believed that an abortion was the only way to prevent a medical emergency." H.B. 481 § 4(h)(1–5) (codified at O.C.G.A. § 16-12-141(h)(1–5)). Once a prosecutor proves the *prima facie* case of a violation of H.B. 481, an accused may try to escape conviction and incarceration by raising an affirmative defense, but they bear the burden of proof.

**B. Embryonic Development at Six Weeks**

In a typically developing pregnancy, ultrasound can generally detect embryonic cardiac activity beginning at approximately six weeks LMP, and thus H.B. 481 prohibits virtually all abortions after that very early point. Cwiak Aff. ¶ 22; Badell Aff. ¶ 26; *accord* H.B. 481 § 8 (codified at O.C.G.A. § 31-9A-4) (instructing

Georgia Department of Public Health to publish information stating that, "[a]s early as six weeks' gestation, an unborn child may have a detectable human heartbeat").

But at six weeks of pregnancy, many people do not even know they are pregnant. Cwiak Aff. ¶ 25. For a person with regular four-week menstrual cycles, six weeks LMP is only two weeks after their first missed period. *Id.* ¶ 26. Many people do not have regular menstrual periods, including due to a health condition, contraceptive usage, or breastfeeding, and some people mistake the vaginal bleeding common in early pregnancy for a period. *Id.* ¶ 25.

At just six weeks, an embryo (not yet a fetus) is wholly dependent on the pregnant woman for sustenance, and, indeed, will be entirely dependent on her body for another *four* months (or more) to follow. Badell Aff. ¶ 23. All nourishment comes to the embryo via the placenta attached to the uterus. *Id*. The embryo is still months away from having the physiological and functional structures necessary for sustained survival outside the womb, even with medical interventions. *Id*.

Beginning at 8–10 weeks, the developing pregnancy is referred to as a fetus. A fetus generally does not reach viability—*i.e.*, the point at which, if born at that time, there is a reasonable likelihood of sustained survival with or without artificial support—until approximately 23–24 weeks LMP, or in rare cases with optimal medical conditions, 22 weeks LMP. Cwiak Aff. ¶ 20; Badell Aff. ¶ 23. A full-term pregnancy is approximately 40 weeks LMP. Cwiak Aff. ¶ 19; Badell Aff. ¶ 26.

### C. Challenges for Patients in Obtaining an Abortion Before Six Weeks

Patients who have made the decision to end a pregnancy generally obtain an abortion as soon as they can, and most abortions in Georgia and nationally occur in the first trimester. Cwiak Aff. ¶¶ 23, 28; *see also* Doe 1 Aff. ¶¶ 2-3, 5; Doe 2 Aff. ¶¶ 3–5; Doe 3 Aff. ¶¶ 2–6; Doe 4 Aff. ¶¶ 2–5. In 2019, more than nine out of ten abortions in Georgia occurred before 14 weeks of pregnancy. Cwiak Aff. ¶ 23.

However, in 2019, the majority of patients in Georgia were not able to access an abortion before six weeks of pregnancy. *Id.* Many people do not even suspect they are pregnant by six weeks LMP for the reasons detailed *supra*, much less confirm the pregnancy, make the decision to obtain an abortion, fulfill Georgia's mandatory 24-hour delay requirement for abortion, O.C.G.A. § 31-9A-3(2), and access an abortion, all within that very early timeframe. Cwiak Aff. ¶¶ 24–25, 27.

Financial and logistical difficulties also prevent many patients from obtaining an abortion before six weeks LMP. Nationwide, 75% of abortion patients are poor or low-income, and Georgia's poverty rate is higher than the national average. Rice Aff. ¶¶ 15, 35. Poverty in Georgia is especially high among Black people, who comprise the majority of Georgia abortion patients. *Id.* ¶¶ 15, 31. People with low incomes are often delayed in accessing abortions as they struggle to raise funds to cover the cost of the abortion—which Georgia law prohibits most insurers from covering, *see supra* at 10—and raise funds for and navigate the logistics of childcare,

transportation to and from the clinic, hotel rooms if traveling long distances to the nearest provider, and lost wages for missed work. Rice Aff. ¶¶ 34–36.

The Six-Week Ban harms even the minority of patients who learn of a pregnancy before six weeks and have, or can quickly gather, sufficient resources to access care in Georgia. The Act's extremely early deadline compels patients to decide quickly how to proceed with their pregnancy—within just hours or days. While many patients know immediately upon learning of a pregnancy that they need an abortion, others take additional time to reflect and/or to consult with loved ones, health care providers, spiritual advisors, or other trusted confidantes. *Compare* Doe 5 Aff. ¶¶ 2, 4, 6; *with, e.g.*, Doe 1 Aff. ¶ 2.

**D. The Six-Week Ban's Narrow Exceptions**

Section 4 of H.B. 481 contains three extremely limited exceptions:

*First*, the Act permits otherwise-banned abortion care when a "medical emergency" exists, strictly defined as "a condition in which an abortion is necessary in order to prevent the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the pregnant woman." H.B. 481 § 4 (b)(1), (a)(3) (codified at O.C.G.A. §16-12-141(b)(1), (a)(3)). It does not permit abortion care necessary to prevent: (1) substantial but reversible physical impairment of a major bodily function, (2) less than "substantial" but irreversible physical impairment of a major bodily function, or (3) substantial and irreversible

physical impairment of a bodily function that is not "major." And where a physician determines an abortion is necessary to reduce *the risk of* death or substantial harm to the pregnant woman, they must weigh their medical judgment that an emergency exists against the threat of criminal liability. Badell Aff. ¶ 29; Cwiak Aff. ¶¶ 47–48.

The Act's medical emergency exception also expressly prohibits a physician from providing an abortion that is necessary to prevent death or substantial impairment if based on "a diagnosis or claim of a mental or emotional condition . . . or that the pregnant woman will purposefully engage in" suicide, self-harm, or dangerous behaviors likely to result in death or self-harm. H.B. 481 §§ 4(a)(3), 4(b)(1). Instead, H.B. 481 would force a patient experiencing a psychiatric crisis due to pregnancy to continue that pregnancy and go through childbirth, no matter how dire or deadly the consequences. Meltzer-Brody Aff. ¶¶ 12, 33, 35–36, 39–43; Badell Aff. ¶ 34. Suicide is a leading cause of maternal death. Meltzer-Brody Aff. ¶ 12.

*Second*, the Act contains an exception for a pregnancy that is at or below 20 weeks post-fertilization (*i.e.*, 22 weeks LMP) that is the result of rape or incest, but only when "an official police report has been filed alleging the offense of rape or incest." H.B. 481 § 4(b)(2) (codified at O.C.G.A. §16-12-141(b)(2)). In other words, if someone pregnant from rape/incest is unable to file such a report, the State of Georgia will force her to carry that pregnancy to term against her will. In the United States, only 25% of rapes are reported to police. Cwiak Aff. ¶ 44. The very low rate

of rape reporting is due to a number of factors, including trauma and fear of retaliatory violence by the abuser. *Id.*

*Third*, the Act permits abortion when the "physician determines, in reasonable medical judgment, that the pregnancy is medically futile," which is limited by definition to "a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth." H.B. 481 § 4(a)(4), (b)(3) (codified at O.C.G.A. §16-12-141(a)(4), (b)(3)). But medicine is not so clear cut, and a physician cannot predict exactly how long a baby will survive, or how much they may suffer before they die. Badell Aff. ¶ 39; Cwiak Aff. ¶ 46. Moreover, a physician cannot be sure that their medical judgment would not later be second-guessed by a prosecutor or judge. Badell Aff. ¶ 39; Cwiak Aff. ¶ 46. Because of this uncertainty, if a pregnant person receives a fetal diagnosis that is not definitively fatal but would be severely life-limiting, or require intervention that may be invasive, painful, and/or unaffordable, physicians may not feel they can take on the potential criminal risk of performing the abortion—and the patient would then be forced to carry the pregnancy to term and give birth regardless of her circumstances and what is best for her and her family. Badell Aff. ¶¶ 38–41.

**E. The Impact of the Six-Week Ban**

The Six-Week Ban has already forced the Heath Center Plaintiffs to cease providing virtually all abortion services after six weeks of pregnancy and turn away

patients in need of such care. Ver. Compl. ¶¶ 74; *see also, e.g.*, Doe 1 Aff. ¶ 5; Doe 2 Aff. ¶ 5. It is already harming the OB/GYN Plaintiffs and MSFC's resident members by undermining their clinical judgment and their relationships with their patients. Cwiak Aff. ¶ 13; Aff. of Pamela Merritt, Ver. Compl. Ex. K ("Merritt Aff."), ¶ 18. And it is already decimating opportunities for physicians, medical students, and residents to provide and receive training in the provision of abortion and miscarriage care, to the detriment of both physicians and patients across Georgia. Cwiak Aff. ¶¶ 58, 61–62; Merritt Aff. ¶¶ 13–19.

The Six-Week Ban is also causing tremendous harm to SisterSong's members, and the Health Center and OB/GYN Plaintiffs' patients, who need reproductive health care in Georgia—with particularly acute consequences for Georgians of color, people with fewer financial resources, young people, and Georgians living in rural areas. Rice Aff. ¶¶ 18–20, 29–31, 33–36, 42–43, 50; Cwiak Aff. ¶¶ 13, 34–40, 55–57; Badell Aff. ¶¶ 11, 12, 15, 18, 22, 28-29, 31-24, 36, 41, 45-46; *see also, e.g.*, Doe 1 Aff. ¶ 2; Doe 2 Aff. ¶ 6. While some Georgians can afford to drive or fly thousands of miles out of state to the nearest abortion provider, pay for overnight lodging, miss multiple days of work without losing their job, and arrange and pay for multi-day childcare (or else bring their children with them on the journey), many cannot. Rice Aff. ¶¶ 15–16, 31, 34–36; Cwiak Aff. ¶¶ 36, 38; *see also* Doe 1 Aff. ¶ 7; Doe 2 Aff. ¶ 6. And while some Georgians are able to safely self-manage an abortion outside of

the formal medical system, others without adequate information or resources are not. Cwiak Aff. ¶ 39; Rice Aff. ¶ 42.

Instead, and by design, the Six-Week Ban will force countless Georgians to undergo pregnancy and childbirth against their will. Already, Plaintiffs have had to send patients home from waiting rooms in tears and cancel hundreds of upcoming appointments. Ver. Compl. ¶ 74; Cwiak Aff. ¶ 13; *see also* Doe 1 Aff. ¶¶ 3, 5; Doe 2 Aff. ¶¶ 4-5. In addition to the immense medical and emotional consequences of forced pregnancy, *see infra* at 52–54, the Six-Week Ban is thwarting the educational and employment goals of innumerable Georgians and condemning them and their families to lasting poverty, Rice Aff. ¶¶ 45–47. The Act will also severely harm survivors of intimate partner violence, denying them the abortion that might have enabled them to sever ties with their abuser and instead tethering them to a violent household through forced pregnancy and childbirth. *Id.* ¶ 53.

In addition, the Six-Week Ban is harming the health of Georgians with wanted pregnancies who experience a pregnancy-related complication or pregnancy loss, by severely restricting the medical care physicians are permitted to provide. Badell Aff. ¶¶ 28–37; Cwiak Aff. ¶¶ 35, 47–56. The Six-Week Ban replaces patient-centered care provided in accordance with a physician's clinical judgment with a legislative mandate enforced with criminal penalties. It is forcing physicians to withhold or delay medically indicated abortion and miscarriage care unless and until either (1)

embryonic/fetal cardiac activity has stopped, or (2) the patient's health has deteriorated to the point of a medical emergency. Cwiak Aff. ¶¶ 35, 47–56; Badell Aff. ¶ 33. The pall that the Six-Week Ban casts on a range of health or life-preserving obstetric care, even beyond abortion, is jeopardizing Georgians' physical, mental, and emotional health every hour the Act is in effect. Cwiak Aff. ¶¶ 35, 47–56; Badell Aff. ¶ 33.

## IV. The Records Access Provision

As Georgia law has long recognized, patient medical records include deeply personal information about, *inter alia*, health status and medical and sexual history. Cwiak Aff. ¶¶ 63-66; *King v. State*, 272 Ga. 788, 790 (2000) ["*King I*"]. Yet O.C.G.A. § 16-12-141(f), as amended by H.B. 481, provides Georgia prosecutors in both the judicial circuits where the abortion provider is located and where the patient resides with seemingly unrestricted access to patient medical records. The law provides that "[h]ealth records shall be available to the district attorney of the judicial circuit in which the act of abortion occurs or the woman upon whom an abortion is performed resides." O.C.G.A. § 16-12-141(f). This provision is an egregious violation of a patient's right to keep her medical records private.

Thus, even for the minority of patients who would still be permitted to obtain an abortion under the Six-Week Ban, Georgia law creates an untenable trade-off, forcing patients to exchange one protected privacy interest for another: in order to

access essential medical care, the State requires Georgians to risk disclosing their health status and medical and sexual history to employees of the district attorney's office *in the judicial circuit where the patient resides* (as well as where the abortion provider is located), without due process of law.

## ARGUMENT AND CITATION TO AUTHORITY

Plaintiffs seek an interlocutory injunction to maintain the status quo ante by preventing state officials from taking any enforcement action under the Six-Week Ban or Records Access Provision based on care provided during the pendency of this lawsuit. This Court has jurisdiction to grant a TRO and interlocutory injunction against the State under the waiver of sovereign immunity enacted by Georgia voters in 2020 for declaratory-judgment actions challenging unconstitutional state action. Ga. Const. art. I, § 2, ¶ V.

Interlocutory relief is warranted (1) because HB 481 was enacted in 2019 in clear defiance of prevailing federal constitutional law, and so was void *ab initio*; and (2) to prevent a violation of Georgians' fundamental right under the due process clause of the Georgia Constitution to be free from unwarranted State interference with their "life, . . . body, . . . [and] health," *Pavesich*, 122 Ga. at 190, and to maintain the privacy of their intimate medical records, *King I*, 272 Ga. at 790. Absent interlocutory relief, more people will suffer the profound and irreparable harm that has swept across Georgia since the Act took effect last week.

## I. Sovereign Immunity is Waived.

In 2020, Georgia voters amended the Constitution to specifically waive sovereign immunity for actions against the State brought under the Georgia Constitution. The Constitution now provides:

> Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, only after awarding declaratory relief, enjoin such acts to enforce its judgment.

Ga. Const. art. I, § 2, ¶ V(b)(1). Because the instant action "seek[s] declaratory relief from [an] act[] of the state . . . in violation of . . . the Constitution of the state," *id.*, this Court plainly has jurisdiction. *See* Ver. Compl. ¶¶ 15, 88–97.

The 2020 sovereign immunity waiver also directly addresses both the kinds of permanent relief available from an unlawful state act and in what sequence such relief can issue. The final sentence provides that, after awarding a final declaratory judgment, the superior court can immediately issue an injunction against the unlawful state action "to enforce its judgment." *Id.* Thus, sovereign immunity does

not bar Plaintiffs' requests for either a declaratory judgment or permanent injunction. Ver. Compl. ¶¶ 16, 98–101.

The best reading of the constitutional text is that it also permits interlocutory relief pursuant to a declaratory judgment action. The amendment waives sovereign immunity "for ***actions*** in the superior court seeking declaratory relief." Ga. Const. art. I, § 2, ¶ V(b)(1) (emphasis added). Black's Law Dictionary defines "action" as "[a] civil or criminal judicial proceeding." ACTION, Black's Law Dictionary (11th ed. 2019). The Georgia Declaratory Judgment Act, O.C.G.A § 9-4-1, *et seq*. ("GDJA"), in turn, governs such civil proceedings seeking declaratory relief—and specifically contemplates and permits preliminary injunctive relief in order to make an eventual determination of rights meaningful. The GDJA provides that: "[t]he court, in order to maintain the status quo pending the adjudication of the questions or to preserve equitable rights, may grant injunction and other interlocutory extraordinary relief in substantially the manner and under the same rules applicable in equity cases." O.C.G.A. § 9-4-3(b). Thus, the 2020 amendment waives sovereign immunity for declaratory-judgment actions in which interlocutory injunctive relief is expressly available to preserve the status quo. Just so here.

This logic has been applied in the context of other waivers of sovereign immunity. For example, the Georgia Constitution waives sovereign immunity for "any action" arising from the breach of a written contract, Ga. Const. art. I, § 2,

¶ IX(c), and Georgia courts have held that the waiver extends to any relief available in such an action, including injunctive relief. *City of Union Point v. Greene Cnty.*, 303 Ga. 449, 455 (2018), *disapproved of on other grounds by City of Coll. Park v. Clayton Cnty.*, 306 Ga. 301 (2019); *Upper Oconee Basin Water Auth. v. Jackson Cnty.*, 305 Ga. App. 409, 412–13 (2010). The Fulton County Superior Court recently confirmed this principle, holding that "the broad waiver [for] breach of contract *actions* means that the State has waived sovereign immunity for the relief Plaintiffs seek, including specific performance, declaratory relief, and injunctive relief." *Federal Defender Program, Inc. v. State*, Case No. 2022CV364429, slip op. at 7 (Fulton Cnty. Super. Ct. May 17, 2022) (emphasis in original), attached as Exhibit A. Here too, the broad sovereign immunity waiver for declaratory relief *actions* must encompass all interlocutory relief that the GDJA makes available in order to maintain the status quo and thus ensure any final judgment is not hollow.

The import of the waiver's final sentence is likewise clear: Claims for permanent injunctive relief under the Injunctions chapter of the Georgia Code, *see* O.C.G.A. § 9-5-1, *et seq.*, are separate and distinct from claims for declaratory relief under the Declaratory Judgment Act—and are not available unless and until a declaration of unlawfulness has been reached. This is consistent with the very purpose of the waiver: to prevent the State or its subsidiaries from acts "outside the scope of lawful authority or in violation of the laws or the Constitution of this state

or the Constitution of the United States," Ga. Const. art. I, § 2, ¶ V(b)(1). Without a determination that the State is acting outside the scope of its authority, an injunction under O.C.G.A. § 9-5-1 is not available. But the purpose of the sovereign immunity waiver would be thwarted if state officials were free to upend the status quo and engage in likely unconstitutional acts with impunity throughout the course of a proceeding until a final determination had been reached.

**II. All Factors for Interlocutory Relief Are Met Here.**

In determining whether to grant an interlocutory injunction, superior courts have "broad discretion." *E.g.*, *SRB Inv. Servs., LLLP v. Branch Banking & Tr. Co.*, 289 Ga. 1, 5 (2011). "The purpose for granting interlocutory injunctions is to preserve the status quo, as well as balance the conveniences of the parties, pending a final adjudication of the case." *Kinard v. Ryman Farm Homeowners' Ass'n, Inc*., 278 Ga. 149, 149 (2004) (internal quotation marks omitted). Injunctions provide relief to litigants who do not have an adequate remedy at law. *Wood v. Wade*, 363 Ga. App. 139, 150 (2022), *reconsideration denied* (Mar. 10, 2022). This remedy is "a stop-gap measure to prevent irreparable injury or harm to those involved in the litigation." *India-Am. Cultural Ass'n, Inc. v. iLink Pros., Inc.*, 296 Ga. 668, 670 (2015). Thus, in deciding whether to issue an interlocutory injunction, the Court should consider whether:

(1) there is a substantial likelihood that Plaintiffs will prevail on the merits of its claims at trial;

(2) there is a substantial threat that Plaintiffs will suffer irreparable injury if the injunction is not granted;

(2) the threatened injury to Plaintiffs outweighs the threatened harm that the injunction may do to the Defendants;

(4) granting the requested interlocutory injunction will not disserve the public interest.

*SRB Inv. Servs.,* 289 Ga. at 5. These factors are a balancing test, and the movant need not prove each factor for the Court to grant an interlocutory injunction. *City of Waycross v. Pierce Cnty. Bd. of Comm'rs*, 300 Ga. 109, 111–12 (2016). Nevertheless, every factor supports interlocutory relief here.

### A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Six-Week Ban is Void *Ab Initio*.

Plaintiffs are likely to succeed in showing that H.B. 481 is void *ab initio* because it plainly violated the U.S. Constitution when it was passed in 2019. Under the Georgia Constitution, "[l]egislative acts in violation of this Constitution or the Constitution of the United States ***are void***, and the judiciary shall so declare them." Ga. Const. art. I, § 2, ¶ V(a) (emphasis added). Because laws in violation of the Constitution are void—as opposed to voidable—"[t]he time with reference to which the constitutionality of an act is to be determined is the date of its passage by the enacting body . . . ; and if it is unconstitutional then, it is forever void." *Frankel v. Cone*, 214 Ga. 733, 737–78 (1959) (internal citations omitted), *disapproved on other grounds by Lott Inv. Corp. v. Gerbing*, 242 Ga. 90 (1978).

Thus, if, when a statute is passed, it is "violative of the Constitution under court interpretations of that period," it is "void from [it]s inception." *Adams v. Adams*, 249 Ga. 477, 478–79 (1982). As the Supreme Court has explained:

> The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.

*Id.* (quoting 11 Am. Jur. 828-28 § 148). It follows then, that "the removal of constitutional objections to an unconstitutional statute does not validate or revive it," because the statute was void on arrival. *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga 613, 614–15 (1953) (quoting 11 Am. Jur. *Constitutional Law* § 151). Instead, "[a] void statute can be made effective only by reenactment." *Id.* (quotation marks omitted).

The question is thus whether the Six-Week Ban violated either the Georgia or U.S. Constitution "under court interpretations of" the time of its enactment. *See Adams*, 249 Ga. at 478. Because it unequivocally violated the U.S. Constitution when it was signed into law on May 7, 2019, the Act is void *ab initio* and cannot be enforced unless and until the Georgia Legislature reenacts it.

Georgia enacted the Six-Week Ban against the backdrop of nearly five decades of unbroken U.S. Supreme Court precedent holding that the Fourteenth Amendment of the U.S. Constitution does not allow a State to "prohibit any woman

from making the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *accord, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016); *Roe v. Wade*, 410 U.S. 113, 153–54, 164–65 (1973). For 50 years, that was the law of the land.

Accordingly, when presented with the question, the lower federal courts uniformly rejected attempts to ban abortions prior to viability. *See, e.g.*, *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 276–77 (5th Cir. 2019) (striking down 15-week ban) ("The Act is a ban on certain pre-viability abortions, which *Casey* does not tolerate . . . ."), *rev'd and remanded*, 142 S. Ct. 2228 (2022); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015) (striking down six-week ban based on detectable cardiac activity); *Edwards v. Beck*, 786 F.3d 1113, 1117–19 (8th Cir. 2015) (striking down 12-week ban); *Isaacson v. Horne*, 716 1213, 1217, 1231 (9th Cir. 2013) (striking down 20-week ban); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (striking down 22-week ban); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down total ban); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368—69, 1371–72 (9th Cir. 1992) (same); *Robinson v. Marshall*, No. 2:19-cv-365-MHT, 2019 WL 5556198, at *3 (M.D. Ala. Oct. 29, 2019) (preliminarily enjoining total ban); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 800–04 (S.D. Ohio 2019)

(preliminarily enjoining six-week ban); *Bryant v. Wooddall*, 363 F. Supp. 3d 611, 630–32 (M.D.N.C. 2019) (striking down 20-week ban).

Likewise, when faced with a constitutional challenge to the Six-Week Ban, the U.S. District Court for the Northern District of Georgia did not hesitate to "declar[e] it unconstitutional." *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1314 (N.D. Ga. 2020), *rev'd and vacated*, No. 20-13024, 2022 WL 2824904 (11th Cir. July 20, 2022); *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 410 F. Supp. 3d 1327, 1350 (N.D. Ga. 2019) (granting preliminary injunction). As the District Court held, the Six-Week Ban "directly conflict[ed] with binding Supreme Court precedent (*i.e.*, the core holdings in *Roe*, *Casey*, and their progeny) and thereby infringe[d] upon a woman's constitutional right to obtain an abortion prior to viability." *SisterSong Women of Color Reprod. Justice Collective*, 472 F. Supp. 3d at 1314.

There is no doubt that when the Six-Week Ban was enacted, it directly violated federal constitutional law as it existed at that time. Because H.B. 481 was unconstitutional as of "the date of its passage by the enacting body," it is "forever void." *Frankel*, 214 Ga. at 737–78 (quoting *Grayson-Robinson Stores*, 209 Ga. at 617). It is of no moment that the U.S. Supreme Court reached a different conclusion three years later in *Dobbs*, upending half a century of federal law: "[T]he removal of constitutional objections to an unconstitutional statute does not validate or revive

it." *Grayson-Robinson Stores, Inc.*, 209 Ga at 617–18 (quoting 11 Am. Jur. *Constitutional Law* § 151). Thus, Plaintiffs are likely to succeed on their claim that the Six-Week Ban is unenforceable because it was void *ab initio.*

### B. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Six-Week Ban Violates Georgia's Due Process Clause.

For more than 100 years, the Georgia Supreme Court has recognized a right to privacy protected by the Georgia Constitution that is independent from, and broader than, that of the U.S. Constitution. *Powell*, 270 Ga. at 329. At the core of Georgia's expansive right of privacy is "a person's right to a 'legal and uninterrupted enjoyment of . . . life, . . . body, [and] health.'" *Pavesich,* 122 Ga. at 195 (quoting 1 William Blackstone, Commentaries *129). It is difficult to imagine a greater infringement on an individual's life, body and health than forcing her to remain pregnant, against her will, for 34 weeks, endure hours or days of labor and delivery, and then (in most cases) parent a child for the rest of her life.

The Six-Week Ban seeks to intrude on this fundamental right and insert the State into a person's most intimate decisions about their body and health. But the Act's only asserted interest rests on a medical fallacy, and its prohibition on medical treatment for inevitable pregnancy loss plainly advances no legitimate interest. Moreover, this extreme law—which protects a six-week embryo four months before viability at direct expense of the pregnant person's health—is virtually the *most* restrictive means of advancing any state interest. H.B. 481's meager exceptions only

compound its constitutional deficiencies. Because the Six-Week Ban cannot withstand strict scrutiny, Plaintiffs are likely to prevail on the merits.

### 1. The Georgia Constitution Provides Broad Privacy Protections.

"The right of privacy has a long and distinguished history in Georgia." *Powell*, 270 Ga. at 329. In a groundbreaking opinion issued more than a century ago, the Georgia Supreme Court became the nation's first court of last resort to recognize privacy as a fundamental right. *Pavesich*, 122 Ga. at 213–14; *see also Powell*, 270 Ga. at 329 (noting Court was "a pioneer in the realm of the right of privacy"). The Court recognized that every Georgian has a "legal right 'to be let alone'" when making personal decisions, *Pavesich*, 122 Ga. at 197, and is "entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty," *id.* at 196.

*Pavesich* placed its confidence, and the task of scrupulously guarding Georgians' right to privacy, with "the wisdom and integrity of the judiciary." *Id.* at 200. For more than a century, Georgia courts have risen to the challenge and remained true to *Pavesich*'s legacy, developing "a rich appellate jurisprudence . . . which recognizes the right of privacy as a fundamental constitutional right, 'having a value so essential to individual liberty in our society that [its] infringement merits careful scrutiny by the courts.'" *Powell*, 270 Ga. at 329 (alteration in original) (quoting *Ambles v. State*, 259 Ga. 406, 408 (1989)).

Indeed, the Georgia Supreme Court has determined that the fundamental right to privacy "is strong enough to withstand a variety of attempts by the State to intrude in the citizen's life." *Id*. at 330. Accordingly, the Court has held that the broad right to privacy spans from the right to refuse medical care, *Zant v. Prevatte*, 248 Ga. 832, 833 (1982); to the right to protect private information contained in public documents despite the strong public policy of open government, *Harris v. Cox Enters., Inc.*, 256 Ga. 299, 301 (1986); to the right to engage in consensual sexual acts between adults, *Powell*, 270 Ga. at 334.

**2. The Privacy Right Protected by the Georgia Constitution Is Independent From, and Broader Than, the Federal Right to Privacy.**

The Georgia Constitution has "long granted more protection to its citizens than has the United States" Constitution. *Creamer v. State*, 229 Ga. 511, 515 (1972); *Powell*, 270 Ga. at 331 n.3 (collecting cases); *see also State v. Miller*, 260 Ga. 669, 671 (1990) (right to free speech); *Green v. State*, 260 Ga. 625, 626 (1990) (right to be free from self-incrimination); *Fleming v. Zant*, 259 Ga. 687, 690 (1981) (right to be free from cruel and unusual punishment), *superseded by statute as stated in Turpin v. Hill*, 269 Ga. 302 (1998); *Hayes v. Howell*, 251 Ga. 580, 584 (1983) (right against retroactive laws); *Crim v. McWhorter*, 242 Ga. 863, 864 (1979) (right to free education).

The privacy right guaranteed by the Georgia Constitution is similarly "far more extensive tha[n] the right of privacy protected by the U.S. Constitution[.]" *Powell*, 270 Ga. at 330. Thus, the U.S. Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which overruled nearly fifty years of *federal* constitutional precedent, is of no moment to this case.

The decision in *Powell* exemplifies Georgia's independent solicitude for the right of privacy. In that case, the Georgia Supreme Court struck down the state's sodomy ban, holding that the criminalization of private, consensual sexual acts between adults "manifestly infringe[d]" on the state privacy right. *Powell*, 270 Ga. at 336 (quoting *Miller v. State*, 266 Ga. 850, 852 (1996)). Notably, the *Powell* decision came after the U.S. Supreme Court rejected a challenge to the *very same* Georgia statute, describing a privacy claim under the federal Constitution as "at best, facetious." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

The *Powell* Court recognized that, as here, the "[p]rivacy rights protected by the U.S. Constitution are not at issue in this case." 270 Ga. at 329 n.1. The Court considered the U.S. Supreme Court's decision in *Bowers* "not applicable" to its discussion, despite the fact that the two courts were considering privacy challenges to the same statute. *Id.* Instead, the Supreme Court traced Georgia's long history of "pioneer[ing]" an expansive right of privacy, *id.* at 329, and concluded: "We cannot think of any other activity that reasonable persons would rank as more private and

more deserving of protection from governmental interference than unforced, private, adult sexual activity. We conclude that such activity is at the heart of the Georgia Constitution's protection of the right of privacy." *Id.* at 332 (citations omitted).[7]

### 3. The Fundamental Right to Privacy Includes the Right to Abortion.

The decision to have an abortion is at the crux of the privacy right guaranteed under the Georgia Constitution. For well over a century, the Georgia Supreme Court has recognized that the right of privacy embraces "a person's right to a legal and uninterrupted enjoyment of . . . life, . . . body, . . . [and] health," *Pavesich*, 122 Ga. at 195 (internal quotation marks and citation omitted). Applying that framework, the Court has held that personal decisions related to medical treatments, sexuality, and intimate relationships "fall[] within the area protected by the right of privacy." *Powell*, 270 Ga. at 332; *see also, e.g.*, *State v. McAfee*, 259 Ga. 579, 580 & n.1 (1989) (citing *Zant*, 248 Ga. 832); *Doreika v. Blotner*, 292 Ga. App. 850, 851–52 (2008), *rev'd on other grounds*, 285 Ga. 481 (2009), *and vacated*, 298 Ga. App. 875 (2009).

The deeply personal decision whether to carry a pregnancy to term—which arises from the kind of intimate conduct protected in *Powell*, and carries irreversible consequences for one's body, health, and life—likewise falls squarely within that

[7] Five years later, the U.S. Supreme Court followed Georgia's lead and held that the federal constitutional privacy right extends to consensual, private, sexual intimacy. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers*).

sphere of constitutionally protected activity. *See, e.g.*, *Women of the State of Minn. v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (holding state privacy right encompasses a right to abortion and explaining: "We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion"); *accord, e.g.*, *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) ("We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment.").

Georgia's strong prohibition against state interference with personal medical decisions reinforces this conclusion. For example, "by virtue of his right of privacy," an individual "can refuse to allow intrusions on his person, even though calculated to preserve his life." *Zant*, 248 Ga. at 832–33 (holding State could not forcibly feed a prisoner on hunger strike); *see also McAfee*, 259 Ga. at 580 ("The state concedes that its interest in preserving life does not outweigh Mr. McAfee's right to refuse medical treatment."). A Constitution so protective of the right to make personal medical decisions surely does not look away when the State forces Georgia residents to undergo 34 weeks of pregnancy and labor and delivery against their will.[8]

[8] The Georgia Supreme Court has held that, unlike rights under the U.S. Constitution, Georgia's broad privacy right is not limited to "matters 'deeply rooted in this Nation's history and tradition[.]'" *See Powell*, 270 Ga. at 330–31 (quoting *Bowers*, 478 U.S. at 191–92). But even if that framework were applicable, it would also support a finding that the privacy and liberty interests protected by Georgia's due process clause encompass a right to end a pregnancy.

Numerous other States have recognized that state constitutional protections encompass a right to abortion, at least up to the point of fetal viability. *See, e.g.*, *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997); *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 798–99 (Cal. 1981); *In re T.W.*, 551 So. 2d at 1193; *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 483 (Kan. 2019); *Gomez*, 542 N.W.2d at 27, 32; *Armstrong v. State*, 989 P.2d 364, 377 (Mont. 1999); *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 853 (N.M. 1998); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000), *superseded by constitutional amendment*, Tenn. Const. art. I, § 36 (2014); *Doe v. Maher*, 515 A.2d 134, 150, 157 (Conn. Super. Ct. 1986); *see also Planned Parenthood of Mich. v. Att'y Gen. of Mich.*, No. 22-000044-MM, 2022 WL 2103141 (Mich. Ct. Cl. May 17, 2022) (in granting preliminary injunction, recognizing state right to bodily integrity encompasses abortion), *application for leave to appeal docketed*, No.

Georgia's current due process clause was enacted in 1865 and has remained unchanged since that time. *See* Ga. Const. art. I, § 1, ¶ I; *see also* Robert N. Katz, *The History of the Georgia Bill of Rights*, 3 Ga. State U. L. Rev. 83, 107 (1986). In 1865, when Georgia's due process clause was enacted, many states had criminal abortion bans, *see, e.g.*, La. Rev. Stat. § 24 (1856); 1854 Tex. Gen. Laws p. 58; 1841 Ala. Acts p. 143—but Georgia did not, *see, e.g.*, *Brinkley v. State*, 253 Ga. 541, 542–43 (1984). In other words, at the time Georgia's constitutional convention enacted the Constitution's due process clause, abortion was permissible in Georgia. It wasn't until 11 years later, in 1876, that the Georgia legislature first introduced a criminal abortion ban. *See id*.

362078 (Mich. Ct. App. July 6, 2022). Georgia's historically strong liberty interests cannot abide a different result.[9]

Finally, the Six-Week Ban also intrudes on Georgians' privacy rights by necessitating, for many, the unwilling disclosure of their pregnancy and abortion decision. Rice Aff. ¶ 39; *see also* Doe 1 Aff. ¶ 7. The Six-Week Ban will indisputably cause some Georgians to attempt to seek medical care across state lines, which—due to the significant time, costs, and logistics involved in such travel—will frequently require explaining their private medical information to employers, abusive partners, and others to whom they would not otherwise disclose it. Rice Aff. ¶ 39; *see also* Doe 1 Aff. ¶ 7. This, too, infringes Georgia's constitutional right to privacy under well-established Supreme Court precedent. *King I*, 272 Ga. at 790, 792 (privacy right protects against disclosure of personal medical information).

[9] To be sure, the right of privacy is not without limitations. However, Georgia courts have typically constrained privacy rights only when necessary "to yield 'in some particulars . . . to the right of speech and of the press,'" *Powell*, 270 Ga. at 331 (alteration in original) (quoting *Pavesich*, 122 Ga. at 204) (collecting cases). In addition, *Pavesich* surmised that there may be situations where privacy rights must be constrained to avoid "invad[ing] the rights of [one's] neighbor," 122 Ga. at 195; *accord id.* at 197. But these exceptions are inapplicable here. As explained *supra* at 14, an embryo is not the "neighbor" or "other individual[]" envisioned in *Pavesich*, but rather is part of, cannot exist outside of, and is wholly dependent on the pregnant person carrying it. In any event, whether the State can justify its intrusion on Georgians' fundamental privacy right comes only after the threshold determination that Georgia's due process clause encompasses the decision whether to end a pregnancy—which it plainly must.

### 4. H.B. 481 Fails Strict Scrutiny

Because Georgians' right of privacy is a fundamental right, any state intrusion may be upheld only if it "is shown to serve a compelling state interest and to be narrowly tailored to effectuate only that compelling interest." *See, e.g.*, *Powell*, 270 Ga. at 333. The State bears the burden of establishing that strict scrutiny is satisfied. *See Zant*, 248 Ga. at 833.

H.B. 481 asserts a solitary state interest: Protecting embryos and fetuses beginning at approximately six weeks LMP. *See* H.B. 481 §§ 2, 4 (codified at O.C.G.A. § 16-12-141). The Georgia Supreme Court has already held that the State's interest in protecting life is not boundless, *Zant*, 248 Ga. at 832–33; *see also McAfee*, 259 Ga. at 580, and here, the Act's countervailing harm to pregnant people is dispositive. The State's interest in protecting an embryo at six weeks, months before it could survive outside the womb, cannot be advanced through the infliction of profound harm to the health and lives of pregnant people.

Moreover, the Six-Week Ban does not utilize the least restrictive means. The Act, *inter alia*, expressly prohibits life-saving abortion care for people experiencing a psychiatric emergency; bars doctors from providing medically appropriate treatment even where pregnancy loss is inevitable; and structures its rape/incest exception to be maximally intrusive on privacy interests, demanding that a patient

first publicize her assault to the police in order to qualify for an abortion. The Six-Week Ban cannot survive strict scrutiny.

#### *a. HB 481's Solitary State Interest Cannot Be Considered Compelling When Premised on a Medical Inaccuracy and Advanced by Prohibiting Miscarriage Care.*

The State cannot meet its heavy burden to show that prohibiting abortion and miscarriage care from the earliest weeks of pregnancy advances a compelling interest. The Six-Week Ban's legislative findings assert a single state interest: protecting embryos and fetuses. The Act provides that "[m]odern medical science . . . demonstrates that unborn children are a class of living, distinct persons" and that "the full body of modern medical science[] recognizes the benefits of providing full legal recognition to an unborn child[.]" H.B. 481 §§ 2(3), (4). It therefore prohibits abortions upon detection of a "human heartbeat," defined as "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac." *See* H.B. 481 § 3(e)(1) (codified at O.C.G.A § 1-2-1(e)).

These legislative findings cannot be squared with medical science. Embryonic electrical impulses at six weeks of pregnancy are not a heartbeat: the embryonic cells have not yet formed a four-chamber heart, much less the full cardiovascular system and other physiological and functional structures necessary for life. Badell Aff. ¶ 23; Cwiak Aff. ¶ 21. And far from being a "living, distinct person," H.B. 481 § 2(3), there is overwhelming medical consensus that, at six weeks LMP, an embryo—

approximately 1/10 of an inch in size at that point—is entirely dependent on remaining inside the body of the pregnant person to survive; will remain so for at least *four more months*; and even at that distant point in the future could survive only with substantial artificial interventions. Badell Aff. ¶¶ 26–27; Cwiak Aff. ¶ 20; *see also MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 911 (D.N.D. 2013) ("To suggest [an embryo] can live outside the mother's womb at six weeks, even with the help of innovative neonatal advancements, is simply unproven."). As such, other state courts have recognized that the State's interest in embryonic or fetal life "becomes compelling [only] upon viability" because until that point, the fetus "is entirely dependent upon the mother for sustenance" and "[t]he mother and fetus are so inextricably intertwined that their interests can be said to coincide." *In re T.W.*, 551 So. 2d at 1193–94; *see also, e.g.*, *Planned Parenthood of Middle Tenn.*, 38 S.W.3d at 17 (holding that under the Tennessee Constitution at the time and state laws relevant to potential human life, "the State's interest in potential life becomes compelling at viability").[10]

[10] The only Georgia Supreme Court case to consider a state interest in a viable fetus, albeit outside of the abortion and right to privacy context, is in accord. *See Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 247 Ga. 86, 88 (1981). *Jefferson* involved a woman in her final (39th) week of pregnancy who, because of her medical condition, faced extraordinarily high risks from delivering vaginally: she herself would have had less than a fifty percent chance of surviving, and her viable fetus would have had almost no chance at all. *Id.* Delivery by C-section, however, would result in an almost 100 percent chance of survival for *both*. *Id.* Given those exceptional facts, the Court held that the State's interest in preserving life outweighed the woman's religious interests in refusing the surgery. *Id.* As Justice Hill noted, *Jefferson* presented unique circumstances; it has not been

Moreover, the Six-Week Ban prohibits appropriate medical care for Georgians facing an inevitable pregnancy loss. When miscarriage is inevitable, it serves no coherent—much less compelling—interest in embryonic or fetal life to force clinicians to stand aside until cardiac activity has flickered out, denying their patient the care she needs to minimize bleeding, risk of infection, risk of passing the embryo or fetus at home, and all of the accompanying physical and emotional pain. Cwiak Aff. ¶¶ 54–55.

***b. A Ban on Abortion and Miscarriage Care from the Earliest Weeks of Pregnancy Is Far from the Least Restrictive Means, and the Act's Exceptions Only Compound Its Constitutional Deficiencies.***

Even if the State's asserted interest were compelling, which it is not, H.B. 481 fails strict scrutiny because an outright ban on abortion beginning at six weeks LMP is not the least restrictive means of advancing any legitimate interest. To the contrary, there is virtually no law the State could have enacted that would have been *more* intrusive on the liberty and privacy rights of pregnant Georgians.

It is the State's burden under strict scrutiny to show why its interests were not served by Georgia's preexisting ban on abortion at 22 weeks LMP, *i.e.*, in the weeks

extended beyond its facts. *See id.* at 89–90 (Hill, Presiding J., concurring). It certainly has no application to pre-viability abortions in general or to abortions necessary to preserve a woman's health.

approaching viability,[11] but rather can *only* be met by a law that bans abortion *four months earlier*—before most abortions in Georgia occur. *See supra* at 40–42. And, even if the State can establish that it has a compelling interest in protecting embryos starting at six weeks LMP rather than any other point in pregnancy, that interest must be considered alongside the State's countervailing interest in the health and life of the countless Georgians upon whom the Act will force pregnancy and childbirth. The Six-Week Ban is "not merely proposing to protect a fetus from general harm, but rather is asserting an interest in protecting a fetus vis-a-vis the woman of whom the fetus is an integral part." *Comm. to Def. Reprod. Rts.*, 625 P.2d at 795. Unless and until a pregnant woman's condition deteriorates to a medical emergency (defined exceedingly narrowly, *see infra*), the Act wholly disregards that person's real and imminent needs to preserve her health, in service of an abstract interest in the potential life inside of her.

As explained *supra* at 18–21, the Six-Week Ban will have a devastating effect on the health and lives of Georgians. Even for otherwise healthy patients with uncomplicated pregnancies, carrying a pregnancy to term and giving birth poses serious medical risks. Badell Aff. ¶¶ 13–22. For people with preexisting conditions, the medical risks are even more likely and dire—and yet the Six-Week Ban's

[11] Viability is generally understood to occur at approximately 23 to 24 weeks LMP, though in rare cases, with optimal conditions and the highest level of medical care, survival may be possible at 22 weeks LMP. Cwiak Aff. ¶ 20; Badell Aff. ¶ 23.

medical emergency exception excludes most complications. *See supra* at 20–21. One in three Georgians forced into pregnancy will have to undergo major abdominal surgery (C-section)—a direct result of the Six-Week Ban—while all others who carry to term will suffer the pain and risks of vaginal delivery. Badell Aff. ¶ 17. Pregnancy will cause or exacerbate mental illness for a substantial number of Georgians, including one in eight Georgians who will experience postpartum depression—yet the Six-Week Ban forces pregnancy on people even when it prompts a psychiatric emergency. Meltzer-Brody ¶¶ 12–13, 16–19, 21–26, 32, 35–43. In Georgia, which has a maternal mortality rate far exceeding the national average—particularly for Black women—forcing countless women into pregnancy and childbirth will be deadly. Badell Aff. ¶ 22.

The Six-Week Ban is also denying critical training opportunities in abortion and miscarriage care for physicians at Georgia's medical schools and hospitals, further exacerbating Georgia's physician shortage and jeopardizing the health and safety of Georgians. Cwiak Aff. ¶¶ 58, 61–62; Merritt Aff. ¶¶ 13–19. Because of the devastating toll it will have on physicians' ability to exercise their clinical judgment and on access to quality healthcare in Georgia, H.B. 481 is *uniformly opposed* by leading state and national medical associations. Cwiak Aff. ¶ 11.

Any interest advanced at such steep cost to the health and lives of Georgians cannot satisfy strict scrutiny. Indeed, the Georgia Supreme Court has already held

that the State's interest in preserving human life is not compelling in all circumstances and may be cabined when in conflict with individual liberties. *See Zant*, 248 Ga. at 833 (holding that the plaintiff's privacy right of bodily autonomy, including the right to starve himself to death, outweighed any state interest in preserving life).[12] For example, Donate Life Georgia asserts that "one organ and tissue donor has the potential to save 75 lives."[13] Yet despite this possibility of one organ donor being able to save the lives of up to 75 other people, the State has not overridden individual bodily autonomy and privacy to mandate that all Georgia residents serve as organ donors, nor could it. Even after death, Georgians' bodily autonomy and spiritual and/or medical decision to not be an organ donor overrides the State's interest in protecting human life. *See* O.C.G.A. § 44-5-145.

At bottom, even if the State had a compelling interest in protecting embryos, a categorical ban on abortion from the earliest weeks of pregnancy—which puts second the life, health, safety, and autonomy of women and other pregnant people in Georgia—is the opposite of least restrictive means.[14]

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[12] The Court in *Zant* also noted that "[t]he State has argued in this proceeding that there is a compelling state interest in preserving any human life. The Court notes that Prevatte was at one time under a death sentence. To take the State's argument to its logical conclusion, were Prevatte still under a death sentence the State would ask the Court to allow it to keep him alive against his will[,] so it could later kill him." *Zant*, 248 Ga. at 833.

[13] *Donate Life Georgia, Get The Facts*, at https://www.donatelifegeorgia.org/get-the-facts/ (last checked July 6, 2022).

[14] Notably, the State has failed to adopt numerous policy measures that would be protective of

Moreover, the Legislature's decisions to (1) expressly exclude life-threatening psychiatric conditions from the Act's medical emergency exception; (2) further violate the privacy of rape and incest victims by requiring that they involve law enforcement in their health care decisions, and (3) prohibit appropriate medical care even when pregnancy loss is inevitable, are *each* dispositive of the State's burden on least restrictive means:

**(1) <u>Exclusion of Life-Threatening Psychiatric Conditions</u>**: As discussed *supra*, many serious pregnancy complications that require abortion will not meet the high threshold for the "medical emergency" exception. Badell Aff. ¶¶ 28–37; Cwiak Aff. ¶¶ 47–48, 51, 55. Doctors will be forced to delay clinically indicated medical care until the patient's condition has deteriorated to the point that her life is in danger, resulting in even more preventable deaths. Badell Aff. ¶¶ 28, 33; Cwiak Aff. ¶¶ 47–48, 54. But the Ban even more callously disregards the health and life of the pregnant person by arbitrarily distinguishing between physical and mental health

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embryonic and fetal life, and that would lead to earlier abortions, without trampling the fundamental rights of pregnant women. For instance, the State could reduce legal barriers that push people seeking abortions later into pregnancy, like Georgia's bans on insurance coverage for abortion. *See* Cwiak Aff. ¶ 27; Op. Atty. Gen. No. U94-6, March 15, 1994) (Medicaid); O.C.G.A. §§ 33-24-59.17 (health plans offered in the state insurance exchange; O.C.G.A. § 45-18-4 (health insurance plans offered to state employees). Georgia could also facilitate healthy pregnancies and mitigate its maternal and infant mortality crises by requiring reasonable accommodations for pregnant employees, as North Carolina and South Carolina do, and permitting additional benefits to families who have additional children while on government assistance, like Alabama—but it has not. *See* Rice Aff. ¶¶ 25-27 (Georgia has the 5th lowest number of policies supportive of women and children in the nation).

emergencies: If a patient's serious health risks stem from mental illness, this exception completely ignores the risk to the patient's life, however severe, and does not apply at all. *See* H.B. 481 § 4(b)(1), (a)(3) (codified at O.C.G.A. § 16-12-141(b)(1), (a)(3)); Meltzer-Brody Aff. ¶¶ 36–42. Such a distinction is not only clinically indefensible, *see* Meltzer-Brody Aff. ¶¶ 43–44, Badell Aff. ¶ 33—it also contradicts the state interest advanced in a recent Georgia law establishing parity between mental and physical illness in insurance coverage. Georgia Mental Health Parity Act 2022 House Bill 1013 (codified at O.C.G.A. § 33-1-27). A law that condemns to death pregnant Georgians suffering a mental health crisis is plainly not the least restrictive means to further any legitimate interest.

**(2) <u>Rape/Incest</u>**: Georgia law has long recognized that survivors of rape/incest need access to abortion without needless and harmful hurdles. Thus, Georgia's 1968 criminal abortion statute included an exception where "[t]he pregnancy resulted from forcible or statutory rape." *Doe v. Bolton*, 410 U.S. 179, 183 (1973), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). But the Six-Week Ban dramatically narrows this longstanding exception, mandating that rape/incest survivors either broadcast their trauma to the police or else carry a pregnancy resulting from violence against their will. O.C.G.A. § 16-12-141(b)(2). Because only a fraction of rapes are reported to police—including because of fears of retaliatory violence—only a small subset of patients seeking an

abortion because of violence will be able to utilize this exception. Cwiak Aff. ¶ 44. A 12-year-old rape survivor in Georgia will face greater barriers to accessing an abortion in 2022 than she would have in 1968, five years *before Roe v. Wade*.

Moreover, the existence of the rape/incest exception cannot possibly satisfy the "narrow tailoring" prong of strict scrutiny because the requirement that a rape survivor file an official police report in order to qualify for this exception itself violates the longstanding protection under the Georgia Constitution against involuntary public disclosure of private information. *See, e.g.*, *King I*, 272 Ga. at 790 ("Since [the defendant's] medical records are protected by the constitutional right of privacy, they cannot be disclosed without her consent unless their prohibition is required by the law of Georgia."). By mandating "disclosure of an intensely personal and traumatic experience when such a disclosure may very well be impossible due to physical or psychological injury," *Fischer v. Com., Dep't of Pub. Welfare*, 482 A.2d 1148, 1160 (Pa. Commw. Ct. 1984), *decree aff'd*, 502 A.2d 114 (Pa. 1985), the reporting requirement in H.B. 481 is an affront to the fundamental right of Georgians to "withdraw from the public gaze at such times as a person may see fit," *Pavesich*, 122 Ga. at 196.

**(3) <u>Miscarriage Care</u>**: Finally, the Act's definition of abortion permits a clinician to provide medically appropriate care for a "spontaneous abortion" (*i.e.*, miscarriage) only to the extent that the clinician is removing an already "dead"

embryo or fetus: if there is lingering cardiac activity, the prohibition applies. H.B. 481 § 4(a)(1)(A) (codified at O.C.G.A. § 16-12-141(a)(1)(A)). Barring clinicians from providing medically appropriate care for an in-progress miscarriage serves no state interest, as detailed *supra* at 42. The Six-Week Ban's broad net, ensnaring even those patients for whom pregnancy loss is inevitable, is the precise opposite of least restrictive means.

For all of these reasons, the Six-Week Ban fails strict scrutiny.

### C. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Records Access Provision Violates Georgia's Right to Privacy.

Plaintiffs are also likely to succeed in proving that O.C.G.A. § 16-12-141(f), which mandates that "[h]ealth records shall be available to the district attorney of the judicial circuit in which the act of abortion occurs or the woman upon whom an abortion is performed resides," blatantly violates Georgians' constitutional rights. As the Georgia Supreme Court has held, "the personal medical records of this state's citizens . . . are protected by [the right to privacy] as guaranteed by our constitution." *King I*, 272 Ga. at 790; *see also id.* ("[A] patient's medical information, as reflected in the records maintained by his or her medical providers, is certainly a matter which a reasonable person would consider to be private."); *King v. State*, 276 Ga. 126 (2003) [hereinafter *King II*] (affirming *King I*). This right protects against the unauthorized disclosure of a patient's medical records to "anyone, *including [a] prosecutor*." *King I*, 272 Ga. at 792 (emphasis added). Thus, any law that allows the

State to access patients' medical records without their permission must serve a compelling state interest and be narrowly tailored to effectuate "*only* that compelling interest." *Powell*, 270 Ga. at 333 (emphasis added). There is no question that the Records Access Provision fails this stringent constitutional review.

*King I* directly controls the outcome here. In that case, the State subpoenaed a criminal defendant's hospital records to support a charge of driving under the influence.[15] Addressing the defendant's motion to exclude the records obtained by the subpoena, the Supreme Court held that the State was "not entitled to exercise indiscriminate subpoena power as an investigative substitute for procedural devices otherwise available to it in the criminal context, such as a search warrant." *King I*, 272 Ga. at 791.[16] The Court acknowledged that while "such unlimited use of the subpoena power in a criminal case might well serve the State interest of law enforcement, it cannot be said to do so in a 'reasonable' manner if it violates the

[15] The state relied on O.C.G.A. § 24-9-40, which stated that "[n]o physician . . . and no hospital or health care facility . . . shall be required to release any medical information concerning a patient except . . . on appropriate court order or subpoena." *King I*, 272 Ga. at 790. Notwithstanding that it harbored "some doubt" as to whether the statute could "even be construed as affirmative authority for a litigant to subpoena the medical reports of an opposing party who has not waived the privilege otherwise attaching to those records," *id.* at 791, the Supreme Court ruled on the underlying constitutional question.

[16] The *King II* court reaffirmed that "statutory authority for the subpoena [in *King I*] had no defined limits and, therefore, was not narrowly drawn to effectuate the State's compelling interest in enforcing criminal laws." *King II*, 276 Ga. at 128. By contrast, the search warrant at issue in *King II* was held an appropriate means of accessing private medical records because the limitations on the State's ability to obtain a search warrant are narrowly tailored to the compelling interests in law enforcement and public safety. *Id.*

accused's constitutional right of privacy." *Id.* at 792. "Not only must the State's interference with [the right to privacy] be reasonably necessary for law enforcement purposes, such an interference must also avoid subjecting Georgia citizens to undue oppressiveness." *Id.* (citing *Powell*, 270 Ga. at 334). Because "[p]ermitting the State unlimited access to medical records for the purposes of prosecuting the patient would have the highly oppressive effect of chilling the decision of any and all Georgians to seek medical treatment," the Court held such access violated the state constitutional right to privacy. *Id.*

The Records Access Provision directly defies the Georgia Constitution under the standard articulated in 2005 in *King I*, and thus was void *ab initio*. *See supra* at 27–31. Moreover, the privacy claim here—on behalf of patients who have not been charged with or even suspected of any crime[17]—is even more compelling than in *King I*. O.C.G.A. § 16-12-141(f) grants district attorneys virtually limitless access to patient medical records, without any due process. While the State may have a legitimate interest in seeing that its laws are enforced, neither this interest, nor the Georgia Constitution, permits prosecutors to access the most intimate details of its

[17] Even if a pregnant woman were to have an abortion in Georgia prohibited by H.B. 481, she could not be prosecuted under the State's criminal abortion ban. As the Georgia Court of Appeal has explained, because Georgia's criminal abortion statute criminalizes actions "to any woman" and "upon any woman," "[b]y its plain meaning, OCGA § 16–12–140 does not criminalize a pregnant woman's actions in securing an abortion, regardless of the means utilized." *Hillman v. State*, 232 Ga. App. 741, 741 (1998).

citizens' lives in an unconstrained search for unlawful activity. Hence, O.C.G.A. § 16-12-141(f) violates the Georgia Constitution, and must be enjoined.

### D. Plaintiffs and Their Physicians, Staff, Members, and Patients Are Suffering Irreparable Injury Every Day without Interlocutory Relief.

In considering a request for interlocutory relief, the Georgia Supreme Court has held that irreparable harm is "the most important [factor], given that the main purpose of an interlocutory injunction is to preserve the status quo temporarily to allow the parties and the court time to try the case in an orderly manner." *W. Sky Fin., LLC v. State ex rel. Olens*, 300 Ga. 340, 354 (2016) (internal quotation marks omitted). As an initial matter, violations of rights guaranteed by the Georgia Constitution "unquestionably constitute[ ] irreparable injury." *Great Am. Dream, Inc. v. DeKalb Cnty.*, 290 Ga. 749, 752 (2012); *accord, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Six-Week Ban and Records Access Provision are causing constitutional harm to Plaintiffs' patients and members, *see supra* at 31–49, and for that reason alone must be enjoined.[18]

The harms that enforcement of the challenged laws is imposing on Plaintiffs, their physicians, staff, patients, and members are also profound and irreparable,

[18] Similarly, it is well established that "[w]here it is manifest that a [criminal] prosecution and arrest is threatened . . . [to] prevent[] the exercise of civil rights . . . , [an] injunction is the proper remedy to prevent the injury." *Ga. R. & Banking Co. v. City of Atlanta*, 118 Ga. 486, 486 (1903); *Carmichael v. Allen*, 267 F. Supp. 985, 995 (N.D. Ga. 1966) (holding that an injunction is available against enforcement of criminal statutes that implicate a party's constitutional rights).

necessitating interlocutory relief. The Health Center Plaintiffs have been forced to cease providing nearly all abortion services after six weeks and cancel hundreds of appointments, in some cases with patients already at the clinic. *See supra* at 20; *see, e.g.*, *Davis v. VCP S., LLC*, 297 Ga. 616, 622 (2015) (deactivating Facebook page, which would reduce the number of new patients, constitutes irreparable harm); *Variable Annuity Life Ins. Co. v. Joiner*, 454 F. Supp. 2d 1297, 1304 (S.D. Ga. 2006) (finding harm from lost customer goodwill to be irreparable because "it is neither easily calculable, nor easily compensable[,] and is, therefore, an appropriate basis for injunctive relief"). The OB/GYN Plaintiffs and MSFC's members are not permitted to exercise their professional judgment to provide appropriate medical care to their patients, and are being deprived of essential training opportunities. Merritt Aff. ¶¶ 13–19; Cwiak Aff. ¶¶ 34–62; *see, e.g.*, *Wood v. Wade*, 363 Ga. App. 139, 149 (2022) (inability to engage in chosen profession is irreparable injury).

Most critically, the Six-Week Ban is causing severe medical harm to Plaintiffs' members and patients seeking abortion and miscarriage care in Georgia, especially Georgians of color, people with fewer financial resources, young people, and Georgians living in rural areas. *See supra* at 7; *Thomas v. Mayor of Savannah*, 209 Ga. 866, 867 (1953) (injunction proper when there is grave danger of impending injury to person). If the Act is permitted to remain in effect for even one day more and force Georgians into pregnancy and childbirth against their will, the

immeasurable harm that will result can never be undone.

### E. The Irreparable Injury to Plaintiffs and Their Physicians, Staff, Members, and Patients Outweighs Any Hypothetical Harm to Defendants, and an Injunction Favors the Public Interest.

The injunction that Plaintiffs seek will protect and maintain the status quo ante by returning the parties to their positions before the enactment and enforcement of H.B. 481—*i.e.*, to the "last, peaceable, noncontested status of the parties." *Inkaholiks Luxury Tattoos Ga., LLC v. Parton*, 324 Ga. App. 769, 774 (2013). Here, the status quo for the last half-century was the state of Georgia law prior to the enactment of H.B. 481 and before the violation of Plaintiffs' constitutional rights. Therefore, an injunction that enjoins Defendants from enforcing the Six-Week Ban maintains the status quo. *See Byelick v. Michel Herbelin USA, Inc*., 275 Ga. 505, 506 (2002) (explaining that an interlocutory injunction is designed to protect the status quo before one party violates the other's rights); *see also, e.g.*, *Grossi Consulting, LLC v. Sterling Currency Grp., LLC*, 290 Ga. 386, 388 (2012) (interlocutory injunction proper to prevent party "from hurting the other whilst their respective rights are under adjudication" (citing *Price v. Empire Land Co.*, 218 Ga. 80, 85 (1962))). This is true even now that H.B. 481 is in effect. *See State v. Cafe Erotica, Inc.*, 270 Ga. 97, 97 (1998) (trial court entered TRO enjoining further enforcement of law challenged as unconstitutional to maintain the status quo); *Rutledge v. Gaylord's, Inc.*, 233 Ga. 694, 694 (1975) (temporary injunction enjoining defendants from

enforcing alleged unconstitutional provisions of law, after law had taken effect).

The Court may issue an interlocutory injunction if, "by balancing the equities of the parties, it would appear that the equities favor the party seeking the injunction. Thus, a demonstration of irreparable injury is not an absolute prerequisite to interlocutory injunctive relief." *Parker v. Clary Lakes Recreation Ass'n*, 272 Ga. 44, 45 (2000) (internal citation omitted). In balancing the equities between the parties, the Court may consider the plaintiffs' likelihood of success on the merits, but the likelihood of ultimate success is not dispositive. *Garden Hills Civic Ass'n, Inc. v. Metro. Atlanta Rapid Transit Auth*., 273 Ga. 280, 281 (2000).

Here, the balance of equities clearly tips in Plaintiffs' favor. If allowed to remain in effect, H.B. 481 will continue its devastating impact: irreparably harming constitutional rights, undermining physicians' ability to provide medically appropriate—indeed, life-saving—care, and subjecting Georgians to the severe risks and pains of pregnancy and childbirth against their will. For the same reasons that Defendants cannot meet their heavy burden under strict scrutiny, neither the State's asserted interest in embryonic and fetal life nor any other hypothetical interest can outweigh Plaintiffs' weighty interest in avoiding the myriad harms they will suffer without an interlocutory injunction. *See supra* at 39–51.

Finally, the public interest weighs strongly in favor of granting an interlocutory injunction to prevent widespread constitutional harm and vast,

irreparable medical, emotional, educational, and financial harm to pregnant Georgians and their families. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019) ("[T]he public interest is served when constitutional rights are protected."); *EMW Women's Surgical Center v. Cameron*, No. 22-CI3225, Op. & Order Granting Temporary Injunction, Slip Op. at 8. attached hereto as Ex. B ("[T]he denial of this healthcare procedure is detrimental to the public health" and will also cause significant "economic harms," noting that "the burden of abortion bans fall hardest on poorer and disadvantaged members of society."); *Planned Parenthood of Mich.*, 2022 WL 2103141, at *13 ("[A] preliminary injunction furthers the public interest, allowing the Court to make a full ruling . . . without subjecting plaintiffs and their patients to the impact of a total ban on abortion services in this State. . . . Moreover, 'it is always in the public interest to prevent the violation of a party's constitutional rights.'" (internal citation omitted)); *Gainesville Woman Care, LLC v. State*, 210 So.3d 1243, 1264 (Fla. 2017) ("[P]reventing women from enduring the additional and unnecessary burdens [the abortion restriction] would impose upon them in violation of the Florida Constitution, would serve the public interest."), *vacated on remand on motion for summary judgment*, No. 2015 CA 1323 (Fla. Cir. Ct. Apr. 8, 2022); *Hodes & Nauser, MDs, P.A. v. Schmidt*, No. 2015cv000490, 2015 WL 13065200, *5 (Kan. Dist. Ct. June 30, 2015) ("The public's interest in not suffering a potential constitutional

limitation is served more by maintaining the *status quo* than by permitting a law which may be unconstitutional to go into effect."), *aff'd*, 440 P.3d 461 (Kan. 2019).

## CONCLUSION & PRAYER FOR RELIEF

To prevent this unconstitutional Act from continuing to impose profound and irreparable harm, Plaintiffs respectfully request that the Court give this motion expedited treatment and (1) issue a rule nisi today setting a TRO hearing as soon as possible on or after August 2, 2022, and (2) at that proceeding, issue a TRO enjoining enforcement of the Six-Week Ban and Records Access Provision pending a further hearing on Plaintiffs' motion for a preliminary injunction.

The Court may issue a TRO if "it appears from affidavits or verified complaint that immediate and irreparable injury, loss or damage will result before the adverse party can be heard in opposition." *United Food & Com. Workers Union v. Amberjack Ltd.*, 253 Ga. 438, 438 (1984); O.C.G.A. § 9-11-65(b). For the reasons described above, Plaintiffs will suffer immediate and irreparable injury if Defendants are not prohibited from enforcing H.B. 481.

Plaintiffs further respectfully request that this Court issue a preliminary injunction prohibiting the State of Georgia; its officers, agents, servants, employees, representatives, and attorneys, including all district attorneys in the State of Georgia; and anyone acting on behalf of, in active participation with, or in concert with the State, from enforcing Sections 4, 10, and 11 of H.B. 481, codified at O.C.G.A. §§ 16-

12-141, 31-9B-2, 31-9B-3, as well as O.C.G.A. § 16-12-141(f), during the pendency of this litigation, and from taking any enforcement action premised on a violation of the aforementioned laws that occurred while this order is in effect.

Respectfully submitted, this 26th day of July, 2022.


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**Pro hac vice application forthcoming*

# Exhibit A

**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

| | |
|---|---|
| FEDERAL DEFENDER PROGRAM, INC.<br><br>Plaintiff,<br><br>and<br><br>VIRGIL DELANO PRESNELL, JR.<br><br>Plaintiff-Intervener,<br><br>v.<br><br>THE STATE OF GEORGIA and CHRISTOPHER M. CARR, *in his official capacity as Attorney General of the State of Georgia*,<br><br>Defendants. | CIVIL ACTION<br>FILE NO.: 2022CV364429 |

**ORDER DENYING DEFENDANTS' AMENDED OR SUBSTITUTE MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER**

This matter came before the Court on Plaintiff's Emergency Motion for Interlocutory Injunction and Temporary Restraining Order. Defendants filed a response seeking to dismiss the underlying petition and Plaintiff's Emergency Motion on the basis of sovereign immunity. Both parties presented arguments to the Court on May 16, 2022. Plaintiff, the Federal Defender Program, Inc., brought a civil action for breach of contract against Defendants, the State of Georgia and Christopher M. Carr, in his official capacity as Attorney General for the State of Georgia.

Since the Defendants in this case are the State of Georgia and the Attorney General in his official capacity, the Court begins with the threshold issue of sovereign immunity. Plaintiff has the burden of proving that sovereign immunity has been waived. *Ga. Dept. Comm. Health v. Data*

*Inquiry*, LLC, 313 Ga. App. 683, 685 (2012). Plaintiff briefly alleges that the Defendants have waived sovereign immunity based on a written contract. Plaintiff's Verified Complaint, ¶ 5; *See e.g.* O.C.G.A. § 50-21-1(a). Defendants assert that this Court lacks jurisdiction over this matter because Defendants are protected by the sovereign immunity of the State of Georgia, and sovereign immunity has not been waived for Plaintiff's implied contractual theories.

The subject of this action is an email dated April 14, 2021 (hereinafter "Agreement") from Beth Burton, Deputy Attorney General. Plaintiff contends that the email formed a contract between Plaintiff and Defendants. Defendants contend that the email formed a contract between the Georgia Appellate Practice and Resource Center, its stakeholders (to include Plaintiffs) and Defendants. Defendants argue that the Agreement was not a contract. The Court rejects both arguments.

Defendants contend that the Agreement was not with this Plaintiff. Arceneaux accepted the terms in Burton's email. The Court rejects this argument as it is directly counter to the evidence in the record. The evidence presented is crystal clear that Anna Arceneaux, Executive Director for the Georgia Resource Center, was negotiating the agreement on behalf of the Georgia Resource Center, Federal Defender Program, and other stakeholders – as noted by the emails entered into evidence and various affidavits (including Ms. Arceneaux's affidavit).

Defendants further contend that there was no contract established by the Agreement. After months of negotiating terms of the Agreement, Ms. Burton sent the Agreement to Ms. Arceneaux who then responded accepting the terms in Burton's email. It was signed with her electronic signature and spelled out the terms of the agreement. Ms. Arceneaux accepted said terms, and replied with the same. Thus, a contract was formed. On the same day, Ms. Graham (also with the Attorney General's Office), send an email in the same thread re-iterating the agreement, and further evidencing the intention of the parties to be bound by the Agreement. The next day, the parties

then announced that they had reached an agreement, and the terms thereof to the Supreme Court's COVID Task Force – further evidencing their intention to be bound by the Agreement.

The Court finds that said single e-mail is an express, signed, written contract sufficient to waive the State's and the Attorney General's sovereign immunity. *Ga. Dep't of Labor v. RTT Associates, Inc.,* 299 Ga. 78, 83-84 (2016); *Ga. Dep't of Cmty. Health v. Data Inquiry*, *LLC*, 313 Ga. App. 683, 686-87 (2012) *citing Board of Regents v. Tyson*, 261 Ga. 368, 369 (1991) (a contract requires "signed contemporaneous writings"); *Baker v. Jellibeans, Inc.*, 252 Ga. 458, 460 (1984) (signed contemporaneous writings are required to satisfy the statute of frauds and create a contract); *Bd. of Regents of Univ. Sys. of Ga. v. Ruff*, 315 Ga. App. 452, 456-57 (2012) (documents signed by only one party do not waive sovereign immunity).

Based on the evidence presented, the Court finds that Defendants waived sovereign immunity for this action. Under Georgia law, "the defense of sovereign immunity is waived as to any action *ex contractu* for the breach of any written contract." O.C.G.A. § 50-21-1(a); *see also* Ga. Const. art. I, § 2, ¶ 9 (waiving "[t]he state's defense of sovereign immunity … as to any action ex contractu for the breach of any written contract"). The State contends that the Agreement is not a written contract subject to sovereign immunity because it is a single, unsigned email. The Court rejects this argument. It is very clear that the parties intended to be bound by the Agreement. Moreover, the "email" (Agreement) was the result of months of negotiations between the Attorney General's Office and the parties by way of Anna Arceneaux. In a recent case with facts remarkably similar to this one, the Northern District of Georgia held that an email exchange between an attorney from the Attorney General's office and a plaintiff's attorney agreeing to the terms of a settlement was a written contract that waived sovereign immunity. *Hammond v. Ga. Dept. of Juvenile Justice*, 2021 WL 6751922, at *1 (N.D. Ga. Sept. 16, 2021) (Thrash, J.). The emails were

exchanged between "[a]gents with authority to bind the parties" who "signed the written emails" by including their names at the bottom of the email, thereby forming a contract. *Id.* The Court made clear that **"[t]he waiver of immunity includes any written contract and the waiver is not limited to formal, traditional signed contracts."** *Id.* (emphasis added) (citing *Bd. of Regents of the Univ. Sys. of Georgia v. Doe*, 278 Ga. App. 878, 881 (2006)). In *Hammond*, the emails were approximately 6 days apart. Here, the emails were all executed on the same day. The initial email was initiated by Deputy Attorney General Beth Burton, a senior administrator at the Attorney General's Office who had been involved in the negotiations for months between the parties and stakeholders. Specifically, the April 14, 2021 email states, **"Anna, instead of a formal MOU, we will agree, and this email serves as the agreement that…"** (emphasis added) See Pl.'s Ex 7, Affidavit of Anna Arceneaux and Pl.'s Ex 7C. The evidence presented also shows that between February and April, before Ms. Burton's email, the parties engaged in negotiations on the underlying disputed issue. As a result of said negotiations, the April 14, 2021 email was sent by Ms. Burton to Ms. Arceneaux spelling out an Agreement. Said email was ratified by Sabrina Graham, a Senior Assistant Attorney General. Both the email from Ms. Burton and Ms. Graham had their "signature" at the bottom of the emails.

Other courts and the Georgia's Uniform Electronic Transactions Act confirm that email signatures are sufficient to satisfy any requirement that a writing be signed. *Johnson v. DeKalb Cnty.*, 314 Ga. App. 790, 795 (2012); *see also Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 296 (7th Cir. 2002) (Posner, J.); O.C.G.A. § 10-12-7(a). Here, both Deputy Attorney General Beth Burton and Senior Assistant Attorney General Sabrina Graham signed their respective emails within the Agreement, thereby signing the Agreement. Pl.'s Ex. 7C.

Defendants argue that an actual signature, not an electronic signature is needed to create a contract. The Court is not convinced that a "wet" signature is required for a written contract to waive sovereign immunity. Georgia courts have found that contracts without formalities, including a signature, waive sovereign immunity. *Bd. of Regents of the Univ. Sys. of Georgia v. Doe*, 278 Ga. App. 878, 881 (2006); *Georgia Lottery Corp. v. Vasaya*, 836 S.E.2d 107, 111 (Ga. Ct. App. 2019) (physical precedent only); *Georgia Lottery Corp. v. Patel*, 349 Ga. App. 529, 533–34 (2019) (physical precedent only); *Cobb Cnty. Sch. Dist. v. Learning Ctr. Found. of Cent. Cobb, Inc.*, 348 Ga. App. 66, 69 (2018) (physical precedent only). These cases instead focus on whether the parties' writings confirm the parties assented to the agreement and that all necessary terms are in writing. Here, it is clear that the parties intended to enter into an agreement and confirmed that in writing. Deputy Attorney General Burton wrote "[I]nstead of a formal MOU, we will agree, and **this email serves as the agreement** . . ." Pl.'s Ex. 7C (emphasis added). After other parties to the Agreement sought clarification on several terms, Senior Assistant Graham responds "Yes, we confirm that's the agreement." *Id.* Moreover, the Agreement contains all of the necessary terms, clearly and specifically laying out the conditions for the resumption of executions and identifying the category of death-eligible prisoners to whom the Agreement applies, as well as time frame and expiration. *Id.* Contrary to Defendants' argument, Plaintiffs do not seek to enforce any "implied terms" of the Agreement. The Complaint seeks only to enforce the written terms set forth in the Agreement. Therefore, the Court finds that the Agreement is a written contract, signed by Defendants' agent, sufficient to waive sovereign immunity.

The Court also rejects Defendants' argument that Deputy Attorney General Beth Burton had no authority to contract on behalf of the State. Ms. Burton is a Deputy Attorney General. She was spearheading and involved with the negotiations. On behalf of the Attorney General's Office,

Ms. Graham is a Senior Assistant Attorney General, and was also spearheading and involved with the negotiations on behalf of the Attorney General. The Agreement itself represents that Ms. Burton has the authority to enter into the Agreement for the Attorney General using the terms "we agree." Plaintiffs presented evidence that the Attorney General himself was being briefed on the negotiations and terms of the Agreement as referenced in various emails from Sabrina Graham. No other person from the Attorney General's office, including Defendant Carr participated.

Defendants identified no statutory restriction on Ms. Graham's or Ms. Burton's ability to negotiate on behalf of and contract the Attorney General's Office. Defendants present no evidence or case law suggesting that Ms. Graham nor Ms. Burton were not acting as agents/designees of Mr. Carr and the Attorney General's Office. *City of Atlanta v. Black 265 Ga. 425, 429 (1995)* ("There is no evidence that plaintiffs either orally inquired or took any reasonable steps to ascertain the necessary authorization had been obtained, and it uncontroverted that the city attorneys made no representations which included they had obtained requisite authorization or which otherwise excused plaintiff's failure to fulfill their duty of determining that the city attorneys had complied with § 4-2007."). Defendants presented no evidence to refute Plaintiff's contention that Graham and Burton had authority to negotiate and bind. In fact, Counsel for the Attorney General's Office stated that she did not contend that Graham or Burton went "rogue" and did not know if they were operating outside of Attorney General Carr's knowledge. Before the Agreement, on March 11, 2021 at 3:10:17 PM EST, Ms. Graham emailed Ms. Arceneaux specifically saying, "I'm still working on the DAs and hopefully will have input from the Attorney General by tomorrow. So far the DAs have agreed to the timeline proposal." Thus, Defendants assertion that Defendant Car was unaware of the negotiations (and/or the Agreement) is directly contradicted by the evidence.

Particularly since, it is after Ms. Graham's March 11, 2021 email that Ms. Burton sends the Agreement to Ms. Arceneaux.

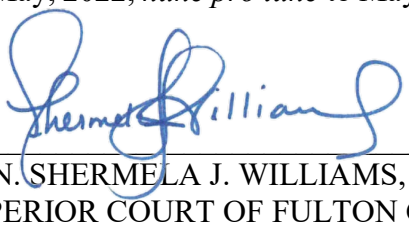
The Court also finds that the broad waiver for breach of contract *actions* means that the State has waived sovereign immunity for the relief Plaintiffs seek, including specific performance, declaratory relief, and injunctive relief. *Upper Oconee Basin Water Auth. v. Jackson County,* 305 Ga. App. 409, 412–13 (2010); *see also City of Union Point v. Greene County, 303 Ga. 449, 455 (2018), disapproved on other grounds by City of College Park v. Clayton County*, 306 Ga. 301, 313 n.7 (2019).

Finally, the Agreement is a waiver by Defendants as to Mr. Presnell's claims as well. As described above, Mr. Presnell is a third-party beneficiary of the Agreement. A breach-of-contract claim by a third-party beneficiary clearly arises from a written contract, as required to waive sovereign immunity, meaning Defendants also waived their sovereign immunity as to Mr. Presnell's claim. *See Youngblood v. Gwinnett Rockdale Newton Cmty. Serv. Bd.*, 273 Ga. 715, 718 (2001) ("To the extent such agreements may constitute written contracts with the GRNCSB conferring a benefit upon Youngblood as an intended beneficiary, the GRNCSB's sovereign immunity is waived."); *State Dep't of Corr. v. Developers Sur. & Indemn. Co.*, 295 Ga. 741, 744–46 (2014) (holding that the State had waived sovereign for claims asserted by a surety standing in the party's shoes).

The Court also notes that Defendants presented no evidence (by way of affidavits or witness testimony) to support their argument that (1) it was not the intent of the parties to enter into a contract, or (2) that neither Ms. Burton nor Ms. Graham were not designees of and/or operating under the authority of Defendants.

For the above stated reasons, Defendants' Motion to Dismiss is **DENIED.**

SO ORDERED THIS 17th day of May, 2022, *nunc pro tunc* to May 16, 2022 at 10:27 p.m.



HON. SHERMELA J. WILLIAMS, JUDGE
SUPERIOR COURT OF FULTON COUNTY

# Exhibit B

NO. 22-CI-3225

JEFFERSON CIRCUIT COURT
DIVISION THREE
JUDGE MITCH PERRY

EMW WOMENS
SURGICAL CENTER, et al. PLAINTIFFS

v.

DANIEL CAMERON, et al. DEFENDANTS

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OPINION & ORDER GRANTING TEMPORARY INJUNCTION

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## Introduction

This matter comes before the Court on Plaintiffs' Motion for a Temporary Injunction. The Court held a Hearing on July 6, 2022 where the parties presented expert witness testimony. Both parties have filed proposed Findings of Fact and Conclusions of Law. After careful consideration of the record and the memoranda of the parties, as well as the applicable law, the Court determines that the Temporary Injunction should be granted.

The Plaintiffs have sustained their burden of demonstrating substantial questions on the merits regarding the constitutionality of the challenged laws. As discussed further below, the Court finds that there is a substantial likelihood that these laws violate the rights to privacy and self-determination as protected by Sections 1 and 2 of the Kentucky Constitution, the right to equal protection in Sections 1, 2, and 3, the right to religious freedom in Section 5, and that additionally KRS 311.772 is both an unconstitutional delegation of legislative authority and unconstitutionally vague. For all of these reasons, the Plaintiffs are entitled to injunctive relief pending full resolution of this matter on the merits.

## Findings of Fact

### I. Procedural Background

On June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). The Supreme Court in *Dobbs* entirely overruled *Roe v. Wade*, 410 U.S. 113 (1973), and returned the issue of abortion to the states. The Attorney General contended that KRS 311.772 ("Trigger Ban") was thereby triggered and became effective on June 24, 2022. On June 27, 2022, the Plaintiffs, two clinics that provide abortions, among other medical services, and the doctor-owner of one of the clinics, filed this lawsuit challenging the constitutionality of the Trigger Ban and KRS 311.7701-7711 ("Six Week Ban"), and seeking a Temporary Restraining Order ("TRO") pending a hearing and ruling on a Temporary Injunction.

The Court held a hearing on June 29, 2022 to consider the TRO. After hearing arguments of all parties, the Court reviewed the filings and subsequently granted the TRO. The Court then held a full evidentiary hearing for the Temporary Injunction on July 6, 2022. Each side presented two expert witnesses. Dr. Ashlee Bergin and Dr. Jason Lindo testified for the Plaintiffs, while Dr. Monique Wubbenhorst and Professor O. Carter Snead testified for the Defendants. After the hearing was concluded, the Court requested the parties file proposed Findings of Fact & Conclusions of Law.

### II. Factual Findings

The Plaintiffs are healthcare providers who also provide abortions in Kentucky. Prior to *Dobbs*, EMW Women's Surgical Center ("EMW") provided medication abortion up to 10 weeks from the last menstrual period ("LMP"), and procedural abortion through 21 weeks and 6 days from the LMP. Since entry of the TRO, EMW provides medication abortion up to 10 weeks from the LMP and procedural abortion up to 15 weeks.

The second Plaintiff, Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky ("Planned Parenthood"), provides a variety of medical services to patients, and has also been providing abortion services in Louisville, Kentucky since 2020. Before *Dobbs*, Planned Parenthood provided medication abortion up to 10 weeks from LMP, and procedural abortion up to 13 weeks and 6 days from the LMP. After entry of the TRO, Planned Parenthood resumed abortion services as before *Dobbs*.

The final Plaintiff is Dr. Ernest Marshall, a board-certified obstetrician-gynecologist ("OBGYN") who performs abortions at EMW, and is also the owner of EMW.

Defendant Daniel Cameron is the Attorney General of Kentucky. In this role, he has the statutory authority, and duty to ensure proper enforcement and compliance with the laws of the Commonwealth. Defendant Eric Friedlander is the Secretary of the Cabinet for Health and Family Services ("the Cabinet"). In that role, he is responsible for the oversight and licensing of facilities that provide abortions to ensure they comply with applicable state laws. Defendant Michael Rodman is the Executive Director of the Kentucky Board of Medical Licensure ("the Board"). The Board possesses the authority to pursue disciplinary actions against Kentucky physicians for violations of state law. Finally, Defendant Thomas Wine is the Commonwealth's Attorney for the 30th Judicial Circuit. In this capacity, he has authority to pursue criminal prosecutions for crimes committed in Jefferson County.

At the July 6th Hearing, the Plaintiffs first called Dr. Ashlee Bergin. Dr. Bergin is a board-certified OBGYN who provides care at EMW, as well as teaching at the University of Louisville Medical School. Dr. Bergin testified at length regarding the complications that can arise from pregnancy, the relative safety of abortions, and the harms that can result from lack of access to abortions. Video Record ("VR") 10:12:21-10:13:04; 10:13:35-10:13:55; 10:15:50-10:16:15; 10:17:04-10:17:16. The latest records from the Kentucky Department of Public Health Office of Vital Statistics show that of the 4,104 abortions provided in Kentucky in 2020, there were only 30 complications, the majority of which were minor. Pls.' Ex. 3 at 12. Further, there were zero recorded deaths from abortion complications in Kentucky in 2020, whereas there were 16.6 per 100,000 pregnancy-related deaths in 2018, the last year data is available. Pls.' Ex. 3 at 12; Pls.' Ex. 10 at 10. Dr. Bergin testified that at the date of the hearing, EMW had turned away approximately 200 patients, before the TRO was entered. VR 10:20:25-10:20:41. Dr. Bergin also testified that the narrow medical emergency exceptions in the laws at issue are insufficient because it is medically and ethically unacceptable to force a patient deteriorate to the point at which she would become clearly eligible for the exception. VR 10:18:10-10:18-38.

The Plaintiffs next called Dr. Jason Lindo, an economist and causal effects expert. Dr. Lindo testified about the impacts abortion bans have on people, and the likely impact if these abortion bans take effect. Dr. Lindo testified that prenatal care and childbirth are very costly, even to those with medical insurance. VR 12:05:34-12:06:23. Further, these costs are not limited

to purely monetary ones. Pregnancy can lead to significant disruptions to a woman's education and career[1]. VR 12:07:31-12:08:04. Not all Kentuckians are legally protected from pregnancy discrimination in the workplace, or entitled to the reasonable accommodations needed to perform their jobs while pregnant. KRS 344.030(2) (exempting employers with fewer than 15 employees from pregnancy discrimination laws). Additionally, many Kentuckians are not entitled to paid time off for pregnancy, delivery, or recovery. U.S. Dep't of Labor, National Compensation Survey: Employee Benefits in the United States, March 2021, Table 33.

Dr. Lindo further testified that while some Kentuckians will be able to travel to other states to access abortions, not all will be able to afford to, and others will be prevented by the similarly restrictive policies of surrounding states. VR 12:16:19-12:16:41; 12:23:16-12:27:40.

The Defendants first called Dr. Monique Wubbenhorst, an OBGYN and research fellow at the University of Notre Dame de Nicola Center for Ethics and Culture. Dr. Wubbenhorst testified that she questioned the accuracy of abortion statistics in general, but was unable to provide any evidence to support her criticism. VR 2:18:46-2:20:14; 3:01:17-3:01:46. She further challenged the accuracy of maternal mortality statistics, but again was unable to provide any evidence to support her criticisms. VR 2:16:12-2:18-45.

The Defendants also called O. Carter Snead, a professor at the University of Notre Dame Law School and the Director of the de Nicola Center for Ethics and Culture at Notre Dame. Professor Snead has contributed significantly to the field of public bioethics. Professor Snead testified about the ethical concerns of the data indicating that many women who receive abortions are poorer, minorities, or experiencing some sort of life disruption. VR 3:59:15-4:01:29. He expressed concern that these women lacked a real choice, and were likely coerced into obtaining abortions by outside factors. *Id.*

Both Defense witnesses generally expressed views that mirrored the positions of their institutional employer, namely that abortion should have no place in the practice of medicine and should not be provided even in the cases of fatal fetal anomalies, rape, or incest. VR 2:44:37-2:46:09. In a recent statement, the de Nicola Center reaffirmed that position: "The University of Notre Dame is institutionally committed to 'to the defense of human life in all its stages,' recognizing and upholding the sanctity of human life from conception to natural death (cf.,

[1] The Court recognizes that these laws will also impact members of the LGBTQ community. Accordingly, "woman" is used in this Order to refer to all people affected by these laws.

https://news.nd.edu/news/notre-dame-adopts-new-statement-and-principles-in-support-of-life/). For our part, the de Nicola Center is proud to advance that commitment through our own efforts and programming." de Nicola Center Director's Statement on Dobbs v. Jackson Women's Health Organization, June 24, 2022, https://ethicscenter.nd.edu/news/dcec-directors-statement-on-dobbs-v-jackson-womens-health-organization/.

## Conclusions of Law

### I. Statutory Review

KRS 311.772 ("Trigger Ban") and KRS 311.7701-7711 ("Six Week Ban") were both passed by the General Assembly in 2019. The Trigger Ban prohibits all abortions except in extremely limited medical situations "to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman." KRS 311.772(4)(a). The Trigger Ban makes it a Class D felony for anyone to knowingly provide an abortion. KRS 311.772(3)(b). KRS 311.772 is referred to as a trigger law because it would only become effective by the issuance of a U.S. Supreme Court decision "which reverses, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973)." KRS 311.772(2)(a).

The Six Week Ban criminalizes abortion once embryonic or fetal cardiac activity is detectable. KRS 311.7704(1); KRS 311.7706(1). This is activity usually detectable around the six week mark of pregnancy, as measured from the first day of the patient's last menstrual period. Like the Trigger Ban, the Six Week Ban provides only very limited medical exceptions, preventing the woman's death or substantial and irreversible impairment of major bodily function. KRS 311.7706(2)(a). A violation of the Six Week Ban is also a Class D felony. KRS 311.990(21)-(22); KRS 532.060(2)(d). Neither the Trigger Ban nor the Six Week Ban contain exceptions for cases of rape or incest.

### II. Standing

Kentucky courts have "the constitutional duty to ascertain the issue of constitutional standing … to ensure that only justiciable causes proceed in court." *Commonwealth, Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 192 (Ky. 2018) (emphasis omitted). In *Sexton*, the Kentucky Supreme Court adopted the federal standard for standing as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), holding that "for a party to sue in Kentucky, the initiating party

must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, (3) redressability. In order words, [a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Sexton*, 566 S.W.3d at 196.

Here, the Attorney General claims the Plaintiffs lack the standing to bring this suit because the facilities do not have third party standing to represent the rights of their patients. However, the Court finds that the Plaintiffs do have standing to proceed with this suit. While not binding, since Kentucky adopted the federal standing guidelines, federal cases provide persuasive authority. Federal courts have long allowed for third party standing in situations where "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth v. Seldin*, 422 U.S. 490, 510 (1975). Third party standing should be allowed when: "(1) the interests of the litigant and the third party are aligned, and (2) there is an obstacle to the third party asserting her own rights." *Singleton v. Wulff*, 428 U.S. 106, 114-18 (1976).

Recently, the Supreme Court reaffirmed the practicality of third party standing for abortion providers in *June Medical Services LLC v. Russo*, 140 S.Ct. 2103, 2118 (2020). The Supreme Court concluded that abortion providers had third party standing to assert claims on behalf of their patients because the challenged laws regulated their conduct, including by threat of sanctions, the providers had every incentive to resist efforts at restricting their operations, and the providers were far better positioned than their patients to challenge the restrictions. *Id.* at 2119[2].

Turning then to the standing analysis. The challenged statutes directly prohibit the Plaintiffs from lawfully engaging in both medication and procedural abortions. The Attorney General is attempting to enforce these statutes against the Plaintiffs. An order of this Court preventing enforcement of these statutes would provide the Plaintiffs with adequate relief. Therefore, the Plaintiffs have satisfactorily established all the required elements of standing and can proceed with this suit.

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[2] The Defendants contend that the United States Supreme Court undermined third party standing in *Dobbs* to the point it can no longer be relied upon. While the United States Supreme Court expressed displeasure with how abortion related litigation had proceeded with the doctrine of third party standing, this comment came in dicta, and is therefore not binding upon this Court. *Dobbs*, 142 S.Ct. at 2276.

Relatedly, the other Defendants, the Kentucky Board of Medical Licensure, The Cabinet for Health and Family Services, and the Commonwealth's Attorney, have taken the position that relief should not be granted against them because the Plaintiffs' claims are purely speculative as they have not yet taken any enforcement actions against the Plaintiffs. For the same reasons, this argument is unpersuasive. The Plaintiffs have been forced to modify their medical services and practices in order to avoid the harm and sanctions envisioned by these statutes. The Commonwealth's Attorney could bring criminal prosecutions against the facilities and their practitioners. The Board of Medical Licensure and the Cabinet would then be empowered to bring administrative actions against the facilities and practitioners to prevent them from operating or even practicing medicine again in the state. The relief Plaintiffs seek would merely maintain the long-standing status quo while this litigation proceeds. With that context in mind, the Court concludes that all Defendants are properly before the Court and subject to the relief sought by the Plaintiffs.

## III. Injunction Analysis

The standard for a temporary injunction is well established in Kentucky. The party moving for injunctive relief must show: (1) irreparable injury is probable if injunctive relief is not granted; (2) the equities – including the public interest, harm to the defendant, and preservation of the status quo – weigh in favor of the injunction; and (3) there is a "serious question warranting a trial on the merits." *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. Ct. App. 1978). The Court will examine each of these factors.

### A. Irreparable Harm

A party must first show that it will suffer irreparable harm if injunctive relief is not granted. An injury is irreparable if "there exists no certain pecuniary standard for the measurement of the damages." *Cyprus Mountain Coal Corp. v. Brewer*, 828 S.W.2d 642, 645 (Ky. 1992) (quoting *United Carbon Co. v. Ramsey*, 350 S.W.2d 454 (Ky. 1961). The Plaintiffs have demonstrated that they will indeed suffer irreparable harm without injunctive relief.

At the July 6th hearing, Dr. Bergin testified about the harms the Plaintiffs will suffer if injunctive relief is not provided. From the time when the Supreme Court's decision in *Dobbs* was handed down on June 24th to June 30th when the TRO was granted, EMW turned away almost 200 patients. These patients were denied previously scheduled medical care because of the legal uncertainty that resulted from the Trigger Ban and the Six Week Ban. Some of these women may

be able to reschedule their procedures, but others may not. Dr. Bergin testified that EMW has stopped providing abortions after 15 weeks.

Dr. Bergin also testified extensively to the harms and risks that can result from, and be exacerbated by, pregnancy. She testified that the risks presented by abortions are much lower, but do increase the later in the pregnancy the procedure is performed. Thus any delays in scheduling and performing an abortion comes with more serious risks.

Finally, waiting until final judgment on the issues presented here, without injunctive relief, would be effectively meaningless to many people because they would either be past gestational age restrictions or would have been forced to carry their pregnancy to term. Therefore, the Plaintiffs have demonstrated that they would suffer irreparable harm if injunctive relief is not provided.

**B. Balance of Equities**

Next the Court must consider whether the balance of equities weighs in favor of injunctive relief. This factor includes several components for courts to analyze. Courts balancing the equities of injunctive relief should consider "possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Maupin*, 575 S.W.2d at 699. The Court will examine each of the factors in order.

Public health concerns carry great weight in the public interest analysis. *Beshear v. Acree*, 615 S.W.3d 780, 830 (Ky. 2020). Plaintiffs assert, and this Court agrees, that abortion is a form of healthcare. It is provided by licensed medical professionals in licensed medical facilities, just like many other medical procedures. As such, the denial of this healthcare procedure is detrimental to the public interest.

Additionally, Dr. Lindo testified at length about the economic harms that Kentuckians would suffer under the laws at issue. Dr. Lindo noted that the burden of abortion bans falls hardest on poorer and disadvantaged members of society. By contrast the Defendants presented a baseless claim that the Plaintiffs are essentially advocating for eugenics and fewer minorities in Kentucky. This is a tired and repeatedly discredited claim[3]. It has no legal basis, and the Court disregards it as such.

[3] See further Melissa Murphy, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (April 12, 2021).

Dr. Lindo also testified that these abortion bans will impose not just serious financial costs, but also educational and professional harms on Kentuckians. Pregnancy, childbirth, and the resulting raising of a child are incredibly expensive. Adding another child can put exponential strain on an already struggling family and lead to detrimental outcomes for all involved. An unplanned pregnancy can also derail a woman's career or educational trajectory. Across the United States, approximately 72% of women obtaining abortions are under the age of 30. Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 101 AM.J.PUB.HEALTH 1904, 1907 (2017). This is the stage of life where people are completing their education and establishing a career. All of this is not to say, as the Defendants' witness Professor Snead contends, that all young women who get abortions are financially coerced to do so. Indeed, quite the contrary. This is a decision that has perhaps the greatest impact on a person's life and as such is best left to the individual to make, free from unnecessary governmental interference. In the Court's view, denial of this healthcare option will have a detrimental impact on the public interest, satisfying the first prong of the injunctive relief analysis.

The Court must next consider if the Defendants will suffer any harm by the requested injunctive relief. The Court finds any harm the Defendants may suffer is outweighed by the interests of the Plaintiffs. At the outset, the Court notes the Supreme Court's opinion in *Dobbs* does not become final until 25 days after it was issued on June 24, 2022. Sup. Ct. R 45. Judge Glenn Acree noted in the related appellate court proceedings, 2022-CA-0780, the Defendants will at most suffer the harm of delayed enforcement, as the earliest this law became enforceable was July 19, 2022. This harm, when balanced against the harms of the Plaintiffs, is not sufficient to preclude injunctive relief.

Further, as long recognized, the state has no interest in enforcing an unconstitutional law. *See Harrod v. Whaley*, 239 S.W.2d 480, 482 (Ky. 1951). As the Court will explain further below, the Plaintiffs have established significant doubt as to the constitutionality of the laws at issue. Accordingly, the state's interest in enforcing these laws is uncertain at this stage.

Finally, the requested injunctive relief will merely restore the status quo that has existed in Kentucky for nearly fifty years. This factor weighs strongly in favor of granting the injunctive relief. Based on all of these considerations, the Court finds the balance of equities weighs in favor of granting injunctive relief.

### C. Serious Questions Raised

The final factor courts must examine when considering injunctive relief is whether there are serious questions presented that warrant trial on the merits. For the reasons stated below in Section IV, the Court concludes that the Plaintiffs have identified, and sufficiently supported, serious questions such that injunctive relief is warranted.

## IV. Constitutional Analysis

At the outset, the Court notes that, despite what some suggest, the inquiry does not end simply because the word "abortion" is not found in the Kentucky Constitution. The Constitution must protect more than just the words explicitly enumerated on the page in order for the purpose behind the words to have effect. To hold otherwise ignores the realities of how constitutions, and laws more generally, are written. It is impossible for any legislative or constitutional body to enumerate every possible future scenario and application. Instead, bodies craft broad sentiments, ideas, and rights they value and choose to protect. It is then the role of the judiciary to interpret the enumerated words and give effect to the meaning behind them. Indeed, "to declare the meaning of constitutional provisions is a primary function of the judicial branch in the scheme of checks and balances that has protected freedom and liberty in this country and in this Commonwealth for more than two centuries. The power of judicial review is an integral and indispensable piece of the separation of powers doctrine. To desist from declaring the meaning of constitutional language would be an abdication of our constitutional duty." *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 83 (Ky. 2018).

The Court further recognizes that while the parties did not raise every argument analyzed below, it is the duty of courts to consider all legal aspects when evaluating cases. *Community Financial Services Bank v. Stamper*, S.W.3d 737, 740-41 (Ky. 2019). This is so because "applicable legal authority is not evidence and can be resorted to at any stage of the proceedings whether cited by the litigants or simply applied, *sua sponte*, by the adjudicator(s). Nor is legal research a matter of judicial notice, for the issue is one of law, not evidence." *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 930 (Ky. 2002); *see also Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991) ("When the facts reveal a fundamental basis for decision not presented by the parties, it is our duty to address the issue to avoid a misleading application of the law."). That is what this Court will endeavor to do below.

**A. Trigger Ban**

The Trigger Ban is an arguably unconstitutional delegation of legislative authority, not just to a different branch of government, but to a different jurisdictional body entirely. Since the law was drafted to take effect at a later time if the United States Supreme Court made a certain decision, it violates Sections 27, 28, and 29 of the Kentucky Constitution.

Kentucky is a strict adherent to the separation of powers. "The General Assembly cannot delegate any portion of the legislative function to another authority." *Diemer v. Commonwealth*, 786 S.W.2d 861, 864 (Ky. 1990). The Trigger Ban would create criminal penalties for abortions. Criminal laws fall directly under the umbrella of legislative and nondelegable functions. "What conduct shall in the future constitute a crime in Kentucky or be subject to severe penalties is a matter for the Kentucky legislature to determine in view of the *then existing conditions when the need for such a statute arises*. It is not a matter that may be delegated." *Dawson v. Hamilton*, 314 S.W.2d 532, 536 (Ky. 1958) (emphasis added). The Kentucky Supreme Court held that adopting prospective federal legislation or rules into state statute constituted an impermissible delegation of legislative authority. *Id.* at 535. This is precisely the action the General Assembly took with the Trigger Ban. It impermissibly delegated its legislative authority to a federal body (the United States Supreme Court) in violation of the Kentucky Constitution.

The Plaintiffs also contend the Trigger Ban is unconstitutionally vague. Kentucky laws must be sufficiently clear that a person ordinarily disposed to obey the law is able to "determine whether the contemplated conduct would amount to a violation." *State Bd. for Elementary & Secondary Educ. v. Howard*, 834 S.W.2d 657, 662 (Ky. 1992). The test to determine whether a statute is unconstitutionally vague contains two separate elements: first, does the statute place someone to whom it applies on actual notice as to what conduct is prohibited; and second, is it written in a manner that encourages arbitrary and discriminatory enforcement. *Id.* (citing *Musselman v. Commonwealth*, 705 S.W.2d 476, 478 (Ky. 1986)).

The Trigger Ban does not adequately give actual notice because the date upon which it becomes effective is at best unclear. The General Assembly stated that the Trigger Ban was to take effect "immediately upon ... the occurrence of ... [a]ny decision of the United States Supreme Court which reverses, in whole or in part *Roe v. Wade*, 410 U.S. 113 (1973)." KRS 311.772(2)(a). On its face this might seem clear enough, but upon closer examination problems arise. Unless specifically stated otherwise in the opinion, United States Supreme Court opinions

do not become final until twenty-five days after the opinion is announced. Sup. Ct. R. 45. Since the opinion in *Dobbs* was announced on June 24, 2022, the opinion did not become final until July 19, 2022. Defendant Cameron however, contends the Trigger Ban became effective immediately on June 24th. Attorneys general in other states with trigger laws have failed to reach a consensus on this matter as well[4]. This uncertainty is sufficient to satisfy the first prong of the analysis.

Secondly, the lack of clarity regarding the date of enforceability creates the risk of arbitrary and discriminatory enforcement because prosecutors across the Commonwealth could reach different conclusions as to when they may begin enforcing the Trigger Ban. Indeed, Defendant Cameron insisted that he has the authority to begin enforcing the law immediately. Defendant Wine has not given any indication when, or if, his office intends to enforce the law. A situation where the Attorney General and Commonwealth's Attorney could be at odds over the enforceability of a criminal law is undesirable for all involved. Accordingly, this second factor of the analysis is met as well. The Plaintiffs have presented serious questions as to the constitutionality of the Trigger Ban.

**B. Six Week Ban**

Unlike the Trigger Ban, the Six Week Ban does not rely on a decision of the U.S. Supreme Court to become effective. As such, the Six Week Ban and its constitutionality must be examined separately. For the reasons stated below, the Court concludes that the Six Week Ban implicates Sections 1, 2 and 5 of the Kentucky Constitution. The Court will separately examine the Plaintiffs' likelihood of success in Section C.

**1. Right to Privacy**

Sections 1 and 2 of the Kentucky Constitution broadly protect an individual's rights to liberty and self-determination. The liberty right protected in Sections 1 and 2 have been interpreted to include a similar right to privacy as recognized in the federal Constitution.

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[4] See Advisory from Tex. Att'y Gen. Ken Paxton on Texas Law upon Reversal of *Roe v. Wade* (June 24, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf, *and* Kelcie Moseley-Morris, *Idaho Attorney General Says Abortion Ban Likely to Take Effect in Late August After SCOTUS Decision*, Idaho Capitol Sun (June 24, 2022) https://idahocapitalsun.com/2022/06/24/idahos-trigger-law-will-abolish-abortions-30-days-after-scotus-ruling-overturning-roe-v-wade/

*Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)[5]. Indeed, the Kentucky Constitution has been held to "offer greater protection for the right of privacy than provided by the Federal Constitution as interpreted by the United States Supreme Court." *Id.* at 491. The right of privacy has been consistently recognized as an integral part of the guarantee of liberty in the 1891 Kentucky Constitution since its inception. *Id.* at 495. The Kentucky Supreme Court has held that the 1891 Constitution prohibits state action "thus intruding upon the inalienable rights possessed by the citizens" of Kentucky. *Commonwealth v. Campbell*, 117 S.W. 383, 385 (Ky. 1909).

The constitutional privacy right protects individuals "against the intrusive police power of the state." *Wasson*, 842 S.W.2d at 492[6]. The Kentucky Supreme Court has recognized that "Kentucky has a rich and compelling tradition of recognizing and protecting individual rights from state intrusion." *Id.* The Defendants here placed great emphasis on the importance of the history and precedent of laws outlawing abortion in the mid to late nineteenth century. However, conduct is "not beyond the protections of the guarantees of individual liberty in our Kentucky Constitution simply because 'proscriptions against that conduct have ancient roots.' Kentucky constitutional guarantees against government intrusion address substantive rights." *Id.* at 493 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)).

Additionally, the history the Defendants rely on is less clear than they contend, and actually tends to potentially weaken their case. At common law, abortion with the consent of the woman was not a crime before quickening[7]. *Mitchell v. Commonwealth*, 78 Ky. 204, 210 (1879). Ten years after the ratification of the current Kentucky Constitution, the Kentucky Supreme Court again held that "[t]here is no statute in this state changing the common-law rule" that "it was not ... a punishable offense to produce with the consent of the mother an abortion prior to

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[5] The Court recognizes that *Wasson* was revisited by the Kentucky Supreme Court in *Calloway Cnty. Sheriff's Dept. v. Woodall*, 607 S.W.3d 557 (Ky. 2020). However, *Calloway County* merely modified the analysis courts use for evaluating special legislation. The privacy analysis of *Wasson* was untouched and remains the law of Kentucky.

[6] The Court acknowledges the Defendants' contention that *Wasson* is limited to the context of private sexual activity between consenting adults. The Court is unpersuaded however that *Wasson* is, or should be, limited to that narrow context. The privacy analysis in *Wasson* discusses a much broader and more fundamental right than Defendants acknowledge. As such, the reasoning of the Kentucky Supreme Court in *Wasson* is directly applicable to this context as well.

[7] Quickening is recognized as the moment when a woman first feels fetal movement. This is generally understood not to occur until late in the fourth month or early in the fifth month of gestation. Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STANFORD L. REV. 261, 281-82 (1992).

the time when she became quick with child." *Wilson v. Commonwealth*, 60 S.W. 400, 401 (Ky. 1901). The Six Week Ban intercedes well before the point of quickening. Contrary to the Defendants' contention, history demonstrates that pre-quickening abortions were permissible. Defendants' reliance on the history and traditions of Kentucky law are therefore misplaced.

Furthermore, the laws that the Defendants seek to enforce would at the very least potentially obligate the state to investigate the circumstances and conditions of every miscarriage that occurs in Kentucky. This would lead to an unprecedented level of intrusion and invasiveness, rarely seen before in this state. Kentucky has a long and proud history of limiting governmental intrusion and overreach. The Six Week Ban flies directly in the face of that tradition.

The Six Week Ban will have wide ranging effects on family planning decisions that are traditionally protected from governmental imposition. It not only compromises a woman's right to self-determination protected in Section 2 of the Kentucky Constitution by taking away the choice to have an abortion in many instances, but also undercut a woman's choice to have children at all. Many people are justifiably concerned about having children now due to a very real fear around many of the complications that may arise during the pregnancy, as outlined by Dr. Bergin in her testimony. Women have legitimate concerns about their ability to receive adequate care, and the possibility their health and safety will be deemed subordinate to the life of a fetus. Already, laws similar to the ones at issue here, are creating confusion and concern in healthcare settings as doctors, in order to avoid incurring civil and criminal liability, are forced to wait until women are in dire medical conditions before interceding[8]. There is further uncertainty regarding the future legality and logistics of In Vitro Fertilization. The implications of constitutional protections beginning from the very moment of fertilization raises a whole host of concerns for the continued legal feasibility of IVF.

These laws intrude into the traditionally protected familial sphere, and as such require exceedingly compelling justifications in order to pass constitutional muster.

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[8] Arey, et al., *A Preview of the Dangerous Future of Abortion Bans – Texas Senate Bill 8*, NEW ENGLAND JOURNAL OF MEDICINE, June 22, 2022, (last visited July 12, 2022), https://www.nejm.org/doi/full/10.1056/NEJMp2207423

### 2. Equal Protection

Furthermore, Sections 1, 2, and 3 of the Kentucky Constitution function much the same way as the Equal Protection Clause of the 14th Amendment of the Federal Constitution. *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003). The goal of Equal Protection is to ensure that similarly situated persons are treated alike. *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465 (Ky. 2011). The challenged statutes may run afoul of this protection by imposing obligations, restrictions, and penalties on the woman, and possibly physicians, but not on the man. As defined by statute, the man is at least 50% responsible for the creation of the fetus, yet contrary to the woman, he bears no legal consequences for his contribution. As similarly situated parties to the creation of life, the woman and the man must be treated equal under the law.

Additionally, there is no other context in which the law dictates that a person's body must be used against her will, even to aid or save the life of another. Section 2 of the Kentucky Constitution grants a right to self-determination that protects people from "absolute and arbitrary power over [their] lives, liberty, and property." Ky. Const. § 2. People cannot be legally coerced into giving blood or donating organs. Bone marrow transplants are not compulsory. When a person dies, their organs can be utilized only if they consent to being an organ donor. These laws grant less bodily autonomy to pregnant women than in any of these other instances, or at any other time in the woman's life. Only in the context of pregnancy is a woman's bodily autonomy taken away from her. This is a burden that falls directly, and only, on females. It is inescapable, therefore, that these laws discriminate on the basis of sex.

### 3. Religious Freedom

Section 5 of the Kentucky Constitution protects both the free exercise of religion and prohibits the establishment of a state religion. The Six Week Ban infringes upon those rights as well, but primarily upon the prohibition on the establishment of religion. Defendants' witnesses at the July 6th hearing advocated for, and agreed with what the General Assembly essentially established in these laws, independent fetal personhood[9]. They argue that life begins at the very moment of fertilization and as such is entitled to full constitutional protection at that point. However, this is a distinctly Christian and Catholic belief. Other faiths hold a wide variety of views on when life begins and at what point a fetus should be recognized as an independent

[9] The General Assembly uses the term "unborn human beings" to refer to fetal personhood.

human being[10]. While numerous faith traditions embrace the concept of "ensoulment," or the acquisition of personhood, there are myriad views on when and how this transformation occurs[11]. The laws at issue here, adopt the view embraced by some, but not all, religious traditions, that life begins at the moment of conception.

The General Assembly is not permitted to single out and endorse the doctrine of a favored faith for preferred treatment. By taking this approach, the bans fail to account for the diverse religious views of many Kentuckians whose faith leads them to take very different views of when life begins. There is nothing in our laws or history that allows for such theocratic based policymaking. Both the Trigger Ban and the Six Week Ban implicate the Establishment and Free Exercise Clauses by impermissibly establishing a distinctly Christian doctrine of the beginning of life, and by unduly interfering with the free exercise of other religions that do not share that same belief.

All of these considerations together stand for the proposition that governmental intrusion into the fundamentally private sphere of self-determination as contemplated by these laws is to be prohibited. Having recognized that the Six Week Ban necessarily involves several fundamental rights, the Court will next analyze whether the law withstands constitutional scrutiny.

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[10] David Masci, *Where Major Religious Groups Stand on Abortion*, PEW RESEARCH CENTER, June 21, 2016, (last visited Jul 11, 2022), https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/

[11] See Vatican Sacred Congregation for the Doctrine of the Faith, Declaration on Procured Abortion, at n.19 (Nov. 18, 1974), available at https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declarationabortion_en.html; Presbyterian Church (U.S.A.), Abortion/ Reproductive Choice Issues ("We may not know exactly when human life begins[.]"), available at https://www.presbyterianmission.org/what-we-believe/socialissues/abortion-issues/; United Church of Christ, Statement on Reproductive Health and Justice (noting the "many religious and theological perspectives on when life and personhood begin"), available at https://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/le gacy_url/455/reproductive-health-and-justice.pdf?1418423872; Evangelical Lutheran Church in America, Social Statement on Abortion at 1, 3 n.2 (1991) (explaining that embryology provides insight into the "complex mystery of God's creative activity" but that individual interpretation of the scientific information leads to various understandings of when life begins), available at http://download.elca.org/ELCA%20Resource%20Repository/Abo rtionSS.pdf; National Council of Jewish Women, Abortion and Jewish Values Toolkit at 16 (2020), available at https://www.ncjw.org/wpcontent/uploads/2020/05/NCJW_ReproductiveGuide_Final.pdf.

### C. Constitutional Scrutiny Analysis

As established in Section B above, the Six Week Ban implicates numerous fundamental rights protected by the Kentucky Constitution. Strict scrutiny is the highest level of scrutiny courts apply. It applies to analysis of statutes that "impact a fundamental right or liberty explicitly or implicitly protected by the Constitution." *Beshear v. Acree*, 615 S.W.3d 780, 816 (Ky. 2020). To survive strict scrutiny, "the government must prove that the challenged action furthers a compelling governmental interest and is narrowly tailored to that interest." *Id.* The seldom used intermediate scrutiny is generally used when evaluating discrimination based on gender. *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003). Intermediate scrutiny requires the government to "prove its action is substantially related to a legitimate state interest." *Id.* (citing *Steven Lee Enters v. Varney*, 36 S.W.3d 391, 394). Under either standard, the Plaintiffs have demonstrated serious questions regarding the validity of the Six Week Ban.

It is well established in statutory interpretation that courts must always presume the legislature did not intend for a statute to produce absurd results. *Beshear v. Acree*, 615 S.W.3d 780, 804 (Ky. 2021), citing *Layne v. Newberg*, 841 S.W.2d 181, 183 (Ky. 1992). However, followed to its logical conclusions, the theory of "independent fetal personhood" that is created by both the Trigger Ban and the Six Week Ban would have far-ranging implications and could lead to unintended consequences and absurd results. For instance, do child support obligations now begin from the moment of fertilization? Does a fetus gain a legal claim as an heir to the father's estate at the moment of fertilization? Would a pregnant woman be able to claim her fetus as a dependent on her tax returns? Would a company that schedules a pregnant woman to work be in violation of child labor laws? Or, if a pregnant woman commits a crime and is sentenced to serve time in prison, would the rights of the fetus be violated by sharing the same confinement as the woman? The answer to all of these is surely "no."[12] With these considerations in mind, the Court will now evaluate the previously identified constitutional provisions.

[12] A further example of the unintended chaos these laws will bring comes from a pregnant woman in Texas who recently received a ticket for driving in a High-Occupancy Vehicle (HOV) lane. She is currently challenging the ticket in court arguing that since Texas has recognized independent fetal personhood, the two-person minimum occupancy to use the HOV Lane was satisfied. https://www.cnn.com/2022/07/11/us/pregnant-woman-hov-lane/index.html

### 1. Right to Privacy

The Defendants argue that the state has a compelling interest in protecting what it calls "unborn human beings." As established at the July 6th Hearing, a fetus cannot survive on its own outside of the womb until it has reached a gestational age between twenty and twenty-five weeks. The Six Week Ban intercedes well before the point of viability, indeed at a point before many women even know they are pregnant. The state's interest in protecting potential fetal life before the point of viability has traditionally been viewed as insufficient to justify total or near total bans on abortion in courts across the country[13]. While the decisions of other states are not binding upon this Court, the reasoning behind those decisions is both informative and persuasive. This Court agrees with many other courts that the state's purported interest in protecting potential fetal life pre-viability is not a compelling enough state interest to justify such an unparalleled level of intrusion and invasiveness into the fundamental area of choosing whether or not to bear a child. The fundamental right for a woman to control her own body free from governmental interference outweighs a state interest in potential fetal life before viability. As the Court has previously recounted, Kentucky has a prodigious history of protecting privacy at a greater level than the federal Constitution. See *Wasson*, 842 S.W.2d at 491. Surely, if this heightened privacy right stands for anything, it stands for the proposition that Kentuckians should have control over basic family planning choices, free from governmental interference.

### 2. Equal Protection

Next, the Court turns to the Equal Protection analysis. There are two equally necessary parties to the creation of human life, a male and a female. As established above in Section IV(B), these laws impose unilateral obligations and responsibilities on only the female, and none on the male. Laws that discriminate on the basis of sex are not unconstitutional per se, but must pass intermediate scrutiny in order to be constitutional. *Codell*, 127 S.W.3d at 575. This requires the government to show that its action is substantially related to a legitimate state interest. *Id.* The Defendants again argue that the state has a legitimate interest in protecting fetal life, and that by

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[13] *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 971 (Alaska 1997); *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 793-797 (Cal. 1981); *In re T.W.*, 551 So.2d 1186, 1192-94 (Fla. 1989); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31-32 (Minn. 1995); *Armstrong v. State*, 989 P.2d 364, 380-384 (Mont. 1999); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 18 (Tenn. 2000); *Right to Choose v. Byrne*, 450 A.2d 925, 934-37 (N.J. 1982); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 496 (Kan. 2019).

nearly banning all abortions these laws will achieve that goal. However, the Defendants have again failed to meet their burden. The Defendants have proffered no legitimate reason why the woman must bear all the burdens of these laws while the man carries none. As similarly situated parties, they must be treated equally under the law. These laws fail to do that, and therefore the Plaintiffs have established a substantial question as to the merits.

**3. Religious Freedom**

Turning finally to the analysis of Section 5 of the Kentucky Constitution, Kentucky courts have consistently held that the purpose of Section 5 is to guarantee religious freedom. *Lawson v. Commonwealth*, 164 S.W.2d 972, 975-76 (Ky. 1942). The Kentucky Constitution states that "no preference shall ever be given by law to any religious sect, society or denomination." Ky. Const. § 5. This provision mandates "a much stricter interpretation than the Federal counterpart found in the First Amendment's 'Establishment of Religion clause.'" *Neal v. Fiscal Court, Jefferson County.*, 986 S.W.2d 907, 909-10 (Ky. 1999), citing *Fiscal Court of Jefferson County. v. Brady*, 885 S.W.2d 681 (Ky. 1994).

This is not a particularly close call. As discussed above, by ordaining that life begins at the very moment of fertilization, the General Assembly has adopted the religious tenets of specific sects or denominations. The General Assembly ignored the contending positions of other faiths regarding the origins and beginnings of life. It is true that the General Assembly has sweeping authority to legislate for the public good, but expressly encasing the doctrines of a preferred faith, while eschewing the competing views of other faiths, is an arguable violation of Section 5's prohibition on the establishment of religion[14]. Section 5 protects Kentuckians in their choice to worship, how they worship, and to be free from the imposition of a particular faith by the government. As Kentucky courts have long held, "under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men." *Campbell*, 117 S.W. at 387. For all of these reasons, the Plaintiffs have again at the very least established a substantial question as to the merits of this law.

[14] It is further notable that the two witnesses the Defendants called to testify at the July 6th Hearing were both affiliated with a religious institution that expressly promotes and advocates the view adopted by the General Assembly, further deepening the implicit connection between the state and a favored faith.

## Conclusion

The Court here is tasked not with finding whether the Kentucky Constitution explicitly contains the right to an abortion, but rather with discerning whether the laws at issue constituting near total bans on abortion violate the rights of privacy, self-determination, equal protection, and religious freedom guaranteed by the Kentucky Constitution. The Plaintiffs have demonstrated at the very least a substantial question as to the merits regarding the constitutionality of both the Trigger Ban and the Six Week Ban. As such, they are entitled to injunctive relief until the matter can be fully resolved on the merits. Therefore, with the Court being sufficiently advised;

**IT IS ORDERED THAT** Plaintiffs' Motion for a Temporary Injunction is **GRANTED**. The Defendants are enjoined from enforcing KRS 311.772 and KRS 311.7701-7711, pending full resolution of this matter on the merits, until further order of this Court. The previously filed bond is continued. Accordingly, the Temporary Restraining Order issued on June 30, 2022 is hereby dissolved pursuant to CR 65.03(5).

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
JUL 22 2022
BY _____ DEPUTY CLERK

HON. MITCH PERRY, JUDGE

Date: July 22, 2022

Time: 10:00 am

CC:
Hon. Michele Henry
*Counsel for Plaintiffs*

Hon. Heather Gatnarek
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Hon. Carrie Flaxman
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Hon. Wesley Duke
*Counsel for Office of the Secretary of Kentucky's Cabinet for Health and Family Services*

Hon. Jason Moore
*Counsel for the Office of the Commonwealth's Attorney, 30th Judicial Circuit*