NO. 22 CI 03225

JEFFERSON CIRCUIT COURT
DIVISION ________ (__)
JUDGE ________
JEFFERSON CIRCUIT COURT
DIVISION THREE (3)

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

PLAINTIFFS

v.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR RESTRAINING ORDER AND TEMPORARY INJUNCTION

DANIEL CAMERON, *et al.*

DEFENDANTS

FILED IN CLERK'S OFFICE
DAVID L. NICHOLSON, CLERK
JUN 27 2022
BY____________
DEPUTY CLERK

* * * * *

Plaintiff EMW Women's Surgical Center, P.S.C. ("EMW"), Plaintiff Ernest Marshall, M.D. ("Dr. Marshall"), and Plaintiff Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc. ("Planned Parenthood") state the following in support of their Motion for Restraining Order and Temporary Injunction:

INTRODUCTION

Plaintiffs seek a Restraining Order and, subsequently, a Temporary Injunction blocking Defendants from enforcing KRS 311.772 ("Trigger Ban") and KRS 311.7701–11 ("Six-Week Ban) (collectively, "the Bans"), attached to Plaintiffs' Verified Complaint ("Ver. Compl.") as Exhibits A & B. A restraining order and/or temporary injunction from this Court is necessary to prevent the immediate and irreparable harms to both Plaintiffs' patients and the public interest that are occurring by the criminalization of abortion in the Commonwealth while the Court resolves the serious questions this case raises under the Kentucky Constitution.

As demonstrated below, Plaintiffs meet the requirements for an immediate restraining order and, subsequently, a temporary injunction. The Bans have eliminated access to abortion in Kentucky and they are imposing irreparable harm on Plaintiffs and their patients in a variety of ways, including through forcing Kentuckians to remain pregnant, and eventually give birth,

against their will, and inflicting violations of their constitutional rights. Every day that passes increases the health risks to affected Kentuckians. The balance of the equities weighs in favor of an injunction because it would restore the status quo, and serve the public interest in protecting public health and stopping constitutional violations. Furthermore, Plaintiffs have established serious questions going to the merits of the case, warranting a trial on Counts I, II, VII, and VIII, that the Bans violate Plaintiffs' patients' constitutional rights to privacy and self-determination as protected by Sections One and Two of the Kentucky Constitution; on Count III, that the Trigger Ban violates Sections 27, 28, and 29 of the Kentucky Constitution by unlawfully delegating legislative authority to the U.S. Supreme Court; and on Counts V and VI, that the Trigger Ban is vague and unintelligible in violation of Section Two and Sections 27, 28, and 29 of the Kentucky Constitution .

For these reasons, Plaintiffs ask the Court to enter a Restraining Order pursuant to Rule of Civil Procedure 65.03 preventing Defendants and those acting in concert with them from enforcing the Trigger Ban and the Six-Week Ban until a hearing on the temporary injunction may be held. Following an opportunity to present further evidence to this Court, Plaintiffs request the Court enter a Temporary Injunction pursuant to Rule of Civil Procedure 65.04 in order to maintain the long-standing status quo until the serious constitutional questions presented by this case can be resolved.

I. STATUTORY FRAMEWORK

A. Trigger Ban

The Trigger Ban criminalizes virtually all abortions by prohibiting anyone from either knowingly "administer[ing] to, prescrib[ing] for, procur[ing] for, or sell[ing] to any pregnant woman any medicine, drug, or other substance" or knowingly "us[ing] or employ[ing] any

instrument or procedure upon a pregnant woman" if those actions are done "with the specific intent of causing or abetting the termination of the life of an unborn human being." KRS 311.772(3)(a)(1)–(2). Any person who knowingly provides an abortion is guilty of a Class D felony, KRS 311.772(3)(b), punishable by imprisonment of one to five years, KRS 532.060(2)(d).

The statute itself does not specify a point in pregnancy when the prohibition becomes operative. Rather, the General Assembly left the exact scope of the ban up to the U.S. Supreme Court: The law's prohibition is effective "immediately upon, and to the extent permitted" by 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). On June 24, 2022, the U.S. Supreme Court entered judgment on *Dobbs v. Jackson Women's Health Organization*. No. 19–1392 (U.S. June 24, 2022). In that decision, the Court entirely overruled the federal constitutional right to abortion recognized in *Roe*. *Id.* at 69 ("*Roe* and *Casey* must be overruled."). Although the Trigger Ban's vague wording does not make clear whether the issuance of the opinion alone has sprung the Trigger Ban into effect, *see infra*, the threat of enforcement has effectively halted abortion in the Commonwealth throughout pregnancy. KRS 311.772(3)(a)(1)–(2). The Trigger Ban's extremely limited medical emergency exception permits abortion only "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 contains no exceptions for cases of rape or incest.

B. Six-Week Ban

The Six-Week Ban deprives individuals in the Commonwealth of their ability to have an abortion beginning very early in pregnancy. This near-total abortion ban makes it a crime to

"caus[e] or abet[] the termination of" the pregnancy once embryonic or fetal cardiac activity is detectable. KRS 311.7704(1); KRS 311.7706(1). In a typical pregnancy, transvaginal ultrasound can detect this activity beginning around six weeks of pregnancy, as measured from the first day of the patient's last menstrual period ("LMP"), when cells that form the basis for development of the heart later in gestation begin producing pulsations. Six weeks LMP is before many patients realize they are pregnant. Ver. Compl. ¶ 33; *Dobbs v. Jackson Women's Health Org.*, No. 19–1392, 2022 WL 2276808, at *69 (U.S. June 24, 2022) (Roberts, J., concurring in the judgment) (noting that time of average pregnancy detection is approximately six weeks). Even for individuals with highly regular menstrual cycles, this is just two weeks after missing their first period. Ver. Compl. ¶ 33. By banning abortion at this early point in pregnancy, the Six-Week Ban would prohibit the vast majority of abortions currently provided in the Commonwealth.[1]

The Six-Week Ban contains no exceptions for cases of rape or incest, and has only a very limited emergency exception. Abortion is permitted after detection of cardiac activity only if the procedure is necessary to 1) prevent the pregnant patient's death, or 2) to prevent a "substantial and irreversible impairment of a major bodily function." KRS 311.7706(2)(a). A violation of the Six-Week Ban is a Class D felony, which is punishable by imprisonment of one to five years. KRS 311.990(21)–(22); KRS 532.060(2)(d).

The Six-Week Ban has been temporarily enjoined since its passage in 2019 under then-existing U.S. Supreme Court precedent. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019). A motion to dismiss that case without prejudice in light of the Supreme Court's decision in *Jackson Women's Health* is

[1] In 2020, only 4% of abortions in Kentucky occurred prior to six weeks LMP. Ver. Compl. ¶ 71.

currently pending before the federal court, and the Six-Week Ban will immediately go into effect upon the dismissal of that case.

II. STATEMENT OF FACTS

Plaintiffs EMW and Planned Parenthood are the only outpatient abortion providers in Kentucky. Ver. Compl. ¶ 64. In 2020, Plaintiffs provided 99.7% of all abortions in the Commonwealth. *Id.* Plaintiffs and their staff have dedicated their professional lives to providing compassionate healthcare, including abortion, to their patients. Before the threat of enforcement of the Trigger Ban, EMW provided medication abortion up to 10 weeks LMP, as well as procedural abortions through 21 weeks and 6 days LMP, and Planned Parenthood provided medication abortion up to 10 weeks LMP and procedural abortion up to 13 weeks and 6 days LMP. Ver. Compl. ¶¶ 65, 13, 15. Together, Plaintiffs provide care to around 3,000 to 4,000 patients in Kentucky each year. Ver. Compl. ¶ 66.

Abortion is a vital component of reproductive healthcare. Approximately one in four women in the United States will have an abortion by the age of forty-five. Affidavit of Jason Lindo, Ph.D. ("Lindo Aff.") (attached as Exhibit A) ¶ 19; Affidavit of Ashlee Bergin, M.D., M.P.H. ("Bergin Aff.") (attached as Exhibit B) ¶ 29. Three-quarters of these U.S. patients have low incomes, with nearly half living below the federal poverty level. Lindo Aff. ¶ 20. Kentucky's above-average poverty rates suggest that Kentucky abortion patients are even more economically disadvantaged. *Id.* ¶ 22. Nationwide, abortion patients are disproportionately people of color. *Id.* ¶ 19. Likewise, in Kentucky, nearly 35% of abortion patients identified as Black in 2020, despite comprising only around 9% of the Commonwealth's population. *Id.* ¶ 25.

For decades, Kentuckians have ordered their lives around having access to this basic healthcare. Kentuckians choose abortion for a variety of medical, familial, economic, psychological, emotional, and personal reasons.

Some of EMW's recent patients have shared their complex reasons for obtaining abortions. Jane Doe 1 is a 36-year-old widow with a preschool-aged son. Affidavit of Patient Jane Doe ("Jane Doe 1 Aff.") (attached as Exhibit C) ¶ 1. She is a teacher, and relies on help from both her parents and her late husband's family in caring for her young son while she works. *Id.* ¶¶ 1–2. She became pregnant approximately a year after her husband's death, and was relieved she could obtain an abortion to avoid complicating the life of her bereaved preschooler, taking resources away from him, and compromising the current childcare arrangements for him that she needs in order to work. *Id.* ¶¶ 3, 5.

Jane Doe 2 is a 36-year-old single mother of two who gets up at four in the morning for her job as a substance abuse counselor. Affidavit of Patient Jane Doe 2 ("Jane Doe 2 Aff.") (attached as Exhibit D) ¶¶ 1–3. She has experienced being the single parent of a newborn, and could not imagine doing it again while caring for her other two children. *Id.* ¶ 5. She also knew that another baby would cost money that currently goes to the care of her other children, and would require her to quit her current job because of the difficulty of finding childcare outside of normal working hours. *Id.* ¶¶ 5–6.

Jane Doe 3 is a 37-year-old single mother of two. Affidavit of Jane Doe 3 ("Jane Doe 3 Aff.") (attached as Exhibit E) ¶¶ 2–3. They have all been living with her parents since her home was destroyed in a tornado in December, and she is currently working multiple jobs totaling more than 60 hours per week to rebuild her and her children's lives after the tornado. *Id.* ¶¶ 1–2, 4, 10. Another pregnancy would derail those plans and compromise their housing, which is

especially challenging because the tornado has made housing difficult to find. *Id.* ¶ 10. In addition, her last pregnancy was difficult, and she is worried about the health effects of another pregnancy at her age, especially since her work schedule would make attending regular prenatal appointments impossible. *Id.* ¶¶ 8–9.

Jane Doe 4 is the 23-year-old mother of a one-year-old, currently working at a coffee shop and planning to begin nursing school in a few months. Affidavit of Patient Jane Doe 4 ("Jane Doe 4 Aff.") (attached as Exhibit F) ¶¶ 1–2. Her previous pregnancy was challenging, and she was unable to take her usual medication for her bipolar disorder. *Id.* ¶ 6. She is having serious problems in her relationship with her fiancé, and most of her current earnings go toward her son's care, groceries and utilities, and student loans. *Id.* ¶¶ 7, 3.

Jane Doe 5 is a single mother of an 11-year-old, working as a server and already struggling to financially support herself and her son. Affidavit of Patient Jane Doe 5 ("Jane Doe 5 Aff.") (attached as Exhibit G) ¶¶ 1–3, 6.

Jane Doe 6 is a stay-at-home mother of two children under age four. Affidavit of Patient A.B. ("Jane Doe 6 Aff.") (attached as Exhibit H) ¶¶ 3, 1. Her previous pregnancy made her so ill that she required a home IV pump, lost thirty pounds and a tooth from vomiting up to ten times daily, and could not eat or even sleep. *Id.* ¶ 5. She knew she could not care well for her two very young children while being that ill again. *Id.* ¶ 7. She experienced similar illness during her most recent pregnancy, as well, and said she knew as soon as she took the first abortion medication and the sickness eased that she had made the right choice. *Id.* ¶¶ 4, 9, 12.

The various reasons that these patients decided that abortion was the best choice for them based on their particular circumstances are representative of the reasons Kentuckians as a whole seek and obtain abortions. Two-thirds of Kentucky abortion patients already have children,

Lindo Aff. ¶ 27, and for many, the ability to care for their existing children is a major factor in their abortion decision. *E.g.*, Jane Doe 1 Aff. ¶¶ 1, 5; Jane Doe 2 Aff. ¶¶ 1–2, 5–6; Jane Doe 3 Aff. ¶¶ 1–2; Jane Doe 4 Aff. ¶¶ 1–2, 6; Jane Doe 5 Aff. ¶¶ 1–3, 6; Jane Doe 6 Aff. ¶¶ 1, 5–6. *See also* Bergin Aff. ¶ 29. The health impacts of pregnancy and delivery are another major concern. *E.g.*, Jane Doe 3 Aff. ¶¶ 8–9; Jane Doe 4 Aff. ¶ 6; Jane Doe 6 Aff. ¶¶ 5, 8. *See also* Bergin Aff. ¶ 29. For many, financial, housing, and childcare concerns are also driving factors. *E.g.*, Jane Doe 2 Aff. ¶¶ 2, 6; Jane Doe 3 Aff. ¶¶ 1–2, 4; Jane Doe 4 Aff. ¶¶ 1–3; Jane Doe 5 Aff. ¶¶ 3, 6; Jane Doe 6 Aff. ¶¶ 1, 3, 5–6. Others may seek abortions because of a change in life circumstances, like the 55% of abortion patients who have experienced a disruptive life event in the last year, Lindo Aff. ¶ 20, or because they do not want to have children. And some decide on abortion because they have become pregnant as a result of rape, Bergin Aff. ¶ 31, or because of an indication or diagnosis of a fetal medical condition or anomaly, *id.* ¶ 30.

For those who decide to terminate a pregnancy, legal abortion is one of the safest procedures in contemporary medical practice in the United States. Bergin Aff. ¶ 7; Ver. Compl. ¶ 54. A Committee of the National Academies of Sciences, Engineering, and Medicine issued a report concluding that abortion in the United States is safe, serious complications are rare, and abortion does not increase the risk of long-term physical or mental health disorders. Ver. Compl. ¶ 54. Indeed, in Kentucky in 2020, over 99% of abortions involved no complications at all, and of the less than 1% that did, nearly all were minor, such as retained tissue treatable by an additional dose of medication. *Id.* ¶ 55; *see also* Lindo Aff. ¶ 54. Notably, abortion entails significantly less medical risk than carrying a pregnancy to term and giving birth. Bergin Aff. ¶¶ 28, 32; Lindo Aff. ¶ 57; *see also* Ver. Compl. ¶ 56.

In contrast, Kentuckians who are delayed in or outright prevented from obtaining wanted abortions will be forced to face increased health risks. Those who are prevented from obtaining abortions face the increasingly dangerous risks that come with continued pregnancy and delivery. Every pregnancy-related complication is more common among people giving birth than among those having abortions. Ver. Compl. ¶ 56. The risk of death associated with childbirth is up to fourteen times higher than that with abortion. Bergin Aff. ¶ 28; Ver. Compl. ¶ 56. Further, according to the Centers for Disease Control and Prevention, pregnancy is becoming more dangerous, with pregnancy-related deaths on the rise across the United States. Ver. Compl. ¶ 50. This unfortunate trend is occurring in Kentucky, with experts identifying a "startling increase" in maternal deaths between 2014 and 2018. *Id.* Kentuckians face one of the highest pregnancy-related death rates in the nation, *id.* ¶ 51, and pregnancy is more than twice as deadly for Black Kentuckians as it is for white Kentuckians, Bergin Aff. ¶ 24, Ver. Compl. ¶ 51. As the Kentucky Department of Public Health has recognized, the Commonwealth could do a great deal to drive down these regrettable statistics and save lives: "78% of [Kentucky's] maternal mortality cases were deemed to be preventable." Ver. Compl. ¶ 51.

Some pregnant individuals encountering life-altering or health-threatening complications during pregnancy will not be eligible for abortions, even under the Bans' medical emergency exceptions. For instance, the Trigger Ban's limited exception appears to exclude situations where a patient could suffer "serious, permanent impairment" of an organ she could technically live without. The Trigger Ban also specifically excludes lifesaving abortions when a complication is related to mental health, even though mental health is a contributing factor to almost 40% of maternal deaths in Kentucky, *Id.* ¶ 42. Even those whose dire situations may technically qualify for one or both of the Bans' varying emergency exceptions may still be refused care out of

hospitals' or providers' fears of being held criminally liable under one or both of the Bans. *See* Bergin Aff. ¶ 27; Ver. Compl. ¶ 85. Other individuals who would have obtained safe and uncomplicated abortions but for the Bans may experience serious, life-altering, or even fatal complications later in pregnancy, at the time of delivery, or postpartum, *see infra*.

Even routine, uncomplicated pregnancy and delivery have major impacts on an individual's life and health for months or years. During the approximately 40 weeks of pregnancy, the body experiences a dramatic increase in blood volume, a faster heart rate, increased production of clotting factors, breathing changes, digestive complications, and a growing uterus. Bergin Aff. ¶¶ 8–10, 12–13. As a result of these changes and others, pregnant individuals are more prone to blood clots, nausea, hypertensive disorders, and anemia, among other complications, and pregnancy can exacerbate a patient's preexisting health conditions. *Id.* ¶¶ 8, 10–17.

In some circumstances, a patient will remain stable and her conditions can be treated, but in other cases, a patient's condition will become more severe. For example, a third of patients with asthma will experience worsening of their condition during pregnancy, sometimes resulting in hospitalization to help with breathing. Bergin Aff. ¶ 10. Some patients will develop gestational diabetes, which can lead to delivery complications. *Id.* ¶ 14. Others develop preeclampsia (high blood pressure during pregnancy), which can lead to stroke, seizure, altered consciousness, impaired liver and kidney function, fluid retention in the lungs, and life-threatening placental abruptions. *Id.* ¶ 16. Patients with renal disease can experience decreased kidney function after delivery, and some may require dialysis. *Id.* ¶ 17. Pregnancy hormones cause nausea and vomiting in many patients, which in some severe cases results in weight loss, electrolyte changes that can cause heart problems, and even brain disorders. *Id.* ¶12. For example, one recent EMW

patient had become so ill from a previous pregnancy that she required a home IV pump and lost thirty pounds and a tooth from vomiting ten times a day during the course of her pregnancy. Jane Doe 6 Aff. ¶ 5. Cardiomyopathy that presents during or after delivery can affect the lungs, liver, and other bodily systems, and some patients will have permanently reduced heart function as a result. Bergin Aff. ¶ 22. Pregnancy may aggravate preexisting health conditions such as hypertension and other cardiac disease, diabetes, kidney disease, autoimmune disorders, obesity, asthma, and other pulmonary disease, *id.* ¶¶ 8, 10–11, 14, 16–17, while other health conditions such as preeclampsia, deep-vein thrombosis, and gestational diabetes, cardiomyopathy, and postpartum depression may arise for the first time during pregnancy or after delivery. *Id.* ¶¶ 13–14, 16, 22–23. Patients who develop a pregnancy-induced medical condition are at a higher risk of developing the same condition in a subsequent pregnancy. *See id.* ¶¶ 16, 22.

Separate from pregnancy, childbirth itself, whether through vaginal or cesarean delivery, is a significant medical event typically involving substantial pain and several weeks or months of recovery time. *Id.* ¶¶ 19–21, 25. Even a normal pregnancy can suddenly become life-threatening during labor and delivery. During labor, increased blood flow to the uterus places the patient at risk of hemorrhage and, in turn, death. *Id.* ¶¶ 20–21. Vaginal delivery also carries risks, including pelvic floor injury, such as tearing of the perinium, which is painful and requires time to heal. *Id.* ¶ 21. More extensive tears can lead to problems with a patient's bowel and bladder function. *Id.* Delivery by cesarean section (C-Section) involves abdominal surgery carrying risks of hemorrhage, infection, damage to surrounding organs such as bowel and bladder, hysterectomy, and risks associated with anesthesia. *Id.* ¶ 20.

Additionally, pregnancy is among the most dangerous times for victims of domestic violence. Pregnancy increases the risk of intimate partner violence, with the severity sometimes

escalating during or after pregnancy. Ver. Compl. ¶ 43. Indeed, homicide has been reported as a leading cause of maternal mortality, the majority caused by an intimate partner. *Id.* For Kentuckians experiencing intimate partner violence, forced pregnancy thus exacerbates the risk of new or increased violence, and further—often permanently—tethers the victim to their abuser. Individuals who sought but were unable to access abortion were more likely to experience ongoing physical violence from the intimate partner, even years later. Lindo Aff. ¶ 75.

Forced pregnancy also compounds the anguish of patients facing certain traumatic or tragic circumstances. Patients who receive fetal diagnoses that are incompatible with sustained life after birth may be forced to carry pregnancies for months, and to suffer the physical and emotional pains of labor and delivery, knowing that their child will not survive. Bergin Aff. ¶ 30. Individuals who become pregnant as a result of rape and are forced to remain pregnant as a result of the Bans may experience their pregnancies as a continued reminder of their rape and experience additional trauma as a result of the constant reminder of the violation committed against them. *Id.* ¶ 31

Beyond the health risks, pregnancy and childbirth are also expensive. Pregnancy-related healthcare and delivery are expensive, and not always covered by insurance. Lindo Aff. ¶ 59. Those giving birth experience catastrophic health expenditures at rates significantly greater than their counterparts. *Id.* The financial burdens of pregnancy and childbirth weigh even more heavily on patients without insurance, who are disproportionately people of color, and on people with unintended pregnancies, who may not have sufficient savings to cover the unexpected pregnancy-related expenses. *Id.* A costly pregnancy, particularly for people already facing an array of economic hardships, could have long-term and severe impacts on a family's financial security. *Id.* The costs of parenting a child resulting from an unexpected pregnancy further

compound these hardships; indeed, studies show that individuals denied an abortion often face years of economic hardship and insecurity, as compared with those who were able to access abortion. *Id.* ¶¶ 60–61. Overall, rigorous data analysis shows a significant increase in financial distress over time among those who are unable to access abortion as compared with comparable individuals who did obtain abortions. *Id.* ¶¶ 62–72.

Regardless of an individual's plans for after birth, the pregnancy, delivery, and recovery will impact and potentially imperil her ability to find or maintain employment, provide for her family, and care for any existing children. Lindo Aff. ¶¶ 59, 61; Bergin Aff. ¶ 29. Not all Kentuckians are legally protected from pregnancy discrimination in the workplace, or entitled to the reasonable accommodations they may need to perform their jobs while pregnant. *See* KRS 344.030(2) (exempting employers with fewer than 15 employees from pregnancy discrimination laws). Kentuckians are not entitled to paid time off for pregnancy, delivery, or recovery.[2] Many Kentuckians are not even entitled to *unpaid* leave, and could lose their jobs just for attending prenatal appointments or labor, delivery, and recovery.[3] For example, Jane Doe 3, who works multiple jobs to support her two children, and works 50 to 60 hours at her primary job alone, would have been unable to take time off from work to attend prenatal appointments. Jane Doe 3 Aff. ¶¶ 2, 4, 9. Kentuckians whose primary responsibilities include unpaid caregiving work, such as caring for their existing children or disabled or elderly family members, may have no recourse at all for finding help to meet these responsibilities while they are medically unable to.

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[2] *See generally* U.S. Dep't of Labor, *National Compensation Survey: Employee Benefits in the United States, March 2021*, Table 33, https://www.bls.gov/ncs/ebs/benefits/2021/employee-benefits-in-the-united-states-march-2021.pdf (nationally, more than 20% of civilian workers have no access to paid sick leave, and 77% have no paid family leave).

[3] *Id.* (More than 10% of civilian workers, and nearly 20% of those in the lowest-paid quarter, have access to even unpaid family leave. These statistics do not include or account for workers who are self-employed or work in private households.).

For example, Jane Doe 6 would have no access to "leave" while she suffered through another pregnancy so debilitating she could neither eat nor sleep, let alone care for her two toddlers. *See* Jane Doe 6 Aff. ¶¶ 1, 5–7. Children in a family affected by abortion denial are likely to experience a decrease in resources, including both increased rates of poverty and less available parental time, which have significant impact on children's lifelong educational and economic outcomes, as well as general well-being and even life expectancy. Lindo Aff. ¶¶ 80–82; *see also generally id.* ¶¶ 58–79.

Some, though by no means all, Kentuckians who are prevented from obtaining wanted abortions in the Commonwealth will travel out of state to access abortion elsewhere. *See* Lindo Aff. ¶¶ 35–43. Even for those who are able to find the time and resources to travel, not being able to access this healthcare in Kentucky causes significant harm. *Id.* ¶¶ 43–55. Although abortion is safe throughout pregnancy, the risk of complications increases with gestational age. Bergin Aff. ¶ 32. As such, any delays in accessing a wanted abortion expose the abortion seeker to increased health risks, both as a result of the inherent risks of pregnancy, *see supra*, and by pushing the procedure later in pregnancy, when there is a higher risk of complications, Bergin Aff. ¶ 32. Patients pushed by the Bans to travel outside Kentucky will face delays, including from having to raise funds, make travel arrangements, and the time it takes to travel. Lindo Aff. ¶¶ 53–55; Bergin Aff. ¶ 32. Further, following the U.S. Supreme Court's decision in *Jackson Women's Health*, there are fewer places to access abortion, and the providers in states where abortion remains available likely do not currently have capacity to meet the increased demand for their services. *See* Lindo Aff. ¶¶ 36, 42, 53. As a result, patients will both have to travel longer distances and wait longer for an available appointment. Such delays cause individuals to remain pregnant for longer and be unable to access abortion until later in pregnancy when the

procedure is more complex, more expensive, and, although still safe, higher risk. Bergin Aff. ¶ 32; Lindo Aff. ¶¶ 53–55. These delays may also result in some Kentuckians requiring two-day procedures, which impose additional financial and logistical burdens, particularly if patients must remain out-of-state overnight. *See* Ver. Compl. ¶ 76; Lindo Aff. ¶ 55.

For most individuals, traveling long distances to access time-sensitive abortion care in another state is extremely difficult, and in many cases the burdens of travel will make it impossible to obtain the desired abortion at all. Lindo Aff. ¶¶ 35–43. For example, individuals with limited financial resources may be unable to raise the funds needed to travel out of state or pay for a more expensive abortion later in pregnancy. *Id. See* Jane Doe 4 Aff. ¶ 13; Jane Doe 6 Aff. ¶ 13. Those in the workforce may be unable to afford taking unpaid time off or securing permission to take days off to travel. Those with caretaking responsibilities may be unable to arrange for prolonged or overnight childcare. Those at risk of intimate partner violence may be unable to get away from their partner for enough time without subjecting themselves to serious danger. As a result, the Bans will force the many individuals who are unable to leave Kentucky for care to suffer the life-altering physical, emotional, and economic consequences of unexpected pregnancy, childbirth, and parenting discussed *supra*.

Some Kentuckians who are denied clinical care because of the Bans may attempt to end their pregnancies on their own, outside the medical system. Ver. Compl. ¶ 80. While safe and effective methods to induce abortion outside clinical settings with medication exist, attempts to access and use these abortion-inducing drugs, often from unlicensed sources, can put patients at serious legal risk. *Id.* Others without the resources to access medically safe though legally risky methods of self-managed abortion may resort to dangerous tactics to try to terminate an unwanted pregnancy, such as throwing themselves down the stairs or ingesting poison. *Id.* These

attempts to access healthcare criminalized by Kentucky force individuals to take on added legal and medical risks, and may jeopardize pregnant Kentuckians' lives, safety, health, future, and their families' welfare.

III. ARGUMENT

The requirements for injunctive relief are well-established. Temporary injunctive relief should be granted where a plaintiff shows: (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). If the requesting party has met the standard for temporary injunction, an immediate restraining order is also appropriate without notice to the adverse party if "the applicant will suffer immediate and irreparable injury . . . before the adverse party. . . can be heard in opposition." *See* Ky. R. Civ. P. 65.03(1); *Ky. High Sch. Athletic Ass'n v. Edwards*, 256 S.W.3d 1, 3 (Ky. 2008) (discussing *ex parte* nature of restraining order as primary distinguishing feature between these similar forms of relief).

Because a temporary injunction is typically warranted only after an evidentiary hearing, *see Beshear v. Goodwood Brewing Co.*, 635 S.W.3d 788, 797 (Ky. 2021), and Plaintiffs and their patients are *currently* suffering immediate and irreparable injury, Plaintiffs request that this Court restore the longstanding status quo and prevent Plaintiffs and their patients from suffering further irreparable injury by issuing a restraining order pending further briefing and a hearing. Ky. R. Civ. P. 65.03.

As established below, the requirements for both a restraining order and a temporary injunction are met here. Accordingly, Plaintiffs respectfully request this Court immediately grant

Plaintiffs' Motion for Restraining Order pursuant to Kentucky Rule of Civil Procedure 65.03 to restrain Defendants from enforcing the Trigger Ban, codified at KRS 311.772, and the Six-Week Ban, codified at KRS 311.7701–11, until the parties can submit further briefing and evidence. Subsequently, Plaintiffs request this Court hold a hearing and then grant Plaintiffs' Motion for Temporary Injunction pursuant to Kentucky Rule of Civil Procedure 65.04.

A. Plaintiffs and Their Patients Are Suffering, and Will Continue to Suffer, Immediate and Irreparable Harm Absent Injunctive Relief.

At this moment, Plaintiffs' patients are suffering irreparable harm as a result of being denied the ability to obtain an abortion in Kentucky. The threat of criminal penalties from the Trigger Ban has forced Plaintiffs to restrict their operations by cancelling the appointments of and turning away all patients seeking this time-sensitive healthcare. Ver. Compl. ¶ 82. Unless this Court grants immediate injunctive relief, Plaintiffs will be forced to continue turning away all patients seeking abortion in Kentucky. Plaintiffs and their patients are facing immediate, irreparable injury from forced continued pregnancy and childbirth, and ongoing violations of constitutional rights.

1. Plaintiffs' Patients Are Suffering Immediate and Irreparable Harm of Forced Pregnancy.

"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). There are no measurable damages that could properly compensate an individual for the harm of being forced to continue a pregnancy. Those who seek an abortion but are unable to access that healthcare because of the Bans will be forced to suffer the life-altering physical, emotional, and economic consequences of unexpected pregnancy, childbirth, and parenthood. *See* Statement of Facts,

supra. An individual forced to continue a pregnancy against her will faces risks to her physical, mental, and emotional health, and even her life, as well as to the stability and wellbeing of her family, including her existing children. *See id.* Those denied legal abortions in Kentucky who are pushed by the Bans to seek delayed healthcare in another state or outside the medical system will be exposed to increased medical and other risks that jeopardize their health, lives, and safety. *See id.* Indeed, every day that passes without a Restraining Order increases the risk of complications related to pregnancy or abortion for those Kentuckians who are pushed later into pregnancy by the lack of abortion services in Kentucky. *See id.*

Further, the "clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur prior to trial." *Maupin*, 575 S.W.2d at 698. Access to abortion is a time-sensitive matter and the aforementioned irreparable harms that come from forced continued pregnancy will necessarily occur for the thousands of Kentuckians who are or become pregnant and would seek abortion during the pendency of this case. Waiting for final judgment would render a favorable decision completely meaningless for these individuals and their families.

2. Plaintiffs and Their Patients Are Suffering Immediate and Irreparable Harm from Ongoing Violations of their Constitutional Rights

Plaintiffs and their patients are also currently suffering the irreparable harm that results from violation of their constitutional rights. Kentucky courts have consistently found that constitutional injuries constitute grave and irreparable harm. *E.g.*, *Fletcher v. Graham*, 192 S.W.3d 350, 356 (Ky. 2006) (violations of the Kentucky Constitution constitute "great injustice and irreparable injury" for the purposes of writ of mandamus); *Powell v. Graham*, 185 S.W.3d 624, 629 (Ky. 2006) (violations of Defendant's Fifth Amendment rights constitute "great

injustice and irreparable injury" for mandamus purposes); *see also Am. Civil Liberties Union of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003) ("If it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

As explained in detail below, the Bans violate Plaintiffs' patients' constitutional rights to privacy and self-determination, *see infra* Section III.C.1. The Trigger Ban also violates Plaintiffs' and their patients' constitutional rights by unlawfully delegating legislative authority to an entity other than the General Assembly, *see infra* Section III.C.2, and being unconstitutionally vague and unintelligible, *see infra* Section III.C.3. These constitutional harms alone require a finding of irreparable harm, and thus support issuance of emergency injunctive relief.

B. The Equities Favor Plaintiffs' Requested Injunctive Relief

The equities in this case weigh in favor of a restraining order and temporary injunction. Courts balancing equities "should consider such things as 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. Each of these factors favors the entry of the requested injunctive relief.

First, a restraining order and temporary injunction would serve the public interest. This is so because access to abortion protects public health. The interests of public health carry great weight in the "public interest" analysis. *Beshear v. Acree,* 615 S.W.3d 780, 830 (Ky. 2020). Access to abortion serves the public interest in public health by ensuring that Kentuckians can make medical decisions that are best for their individual health and well-being. Denial of access to this vital component of reproductive healthcare puts patients' health and well-being at risk,

including by forcibly exposing those who would otherwise choose abortion to significantly higher risk of death at childbirth. *See* Statement of Facts, *supra*. Even those patients who may be able to later obtain an abortion out of state will face the increased health risks associated with abortion delayed later into pregnancy. *Id.* Additionally, it is always in the public interest "that there be *no* unconstitutional or illegal government conduct." *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 363 (Ky. 2016). As discussed *infra* Sections III.C.1–3, the Bans are unconstitutional, and therefore it is in the public interest that they be enjoined.

Second, Defendants will not suffer any cognizable harm as a result of a restraining order preventing them from enforcing the Bans. While it is true that the government generally has an interest in enforcing its statutes, it is a legal first principle that an unconstitutional statute is "no law at all," *see, e.g.*, *Harrod v. Whaley*, 239 S.W.2d 480, 482 (Ky. 1951). *See also* Ky. Const. § 26 ("[A]ll laws . . . contrary to this Constitution, shall be void."). Even if this were not so, Defendants' only harm would be delay in enforcement of the Bans while the serious constitutional issues raised by this lawsuit are resolved. In contrast, in addition to the inherently irreparable harm of infringement on their constitutional rights, Plaintiffs' patients' face the uniquely irreparable harm of continuing unintended pregnancies. Plaintiffs and their patients thus face far greater irreparable injury as a result of the Bans' enforcement than Defendants would face if they were enjoined.

Third, the requested injunctive relief would restore the decades-long status quo. Abortion has been legal in Kentucky since *Roe v. Wade* was decided, and for the nearly half a century since. Generations of Kentuckians have been able to count on access to safe, legal, and accessible abortion; a restraining order protects that status quo.

Because a restraining order will serve the public health and ensure the constitutionality of laws, not harm Defendants while protecting Plaintiffs' patients from serious and irreparable harm, and preserve the decades-long status quo, the balancing of the equities lies squarely in Plaintiffs' favor.

C. Plaintiffs Have Raised Serious Questions Warranting Trial on the Merits of Counts I, II, III, V, VI, VII, and VIII.

This case presents serious questions about whether the Bans violate rights at the core of the Kentucky Constitution. Because Plaintiffs have demonstrated irreparable injuries and a favorable balance of the equities, an injunction is merited as long as Plaintiffs have raised "a serious question warranting a trial on the merits." *Maupin*, 575 S.W.2d at 699; *accord Com. ex rel. Conway v. Shepherd*, 336 S.W.3d 98, 104 (Ky. 2011) (agreeing that trial court was "duty bound" to issue a temporary injunction where doing so would prevent irreparable injury and serve the public interest, and plaintiff had raised "serious questions" as to the merits); *Rogers v. Lexington-Fayette Urb. Cnty. Gov't*, 175 S.W.3d 569, 571 (Ky. 2005).

1. Plaintiffs have established serious questions warranting a trial on the merits of their claims that the Trigger Ban and Six-Week Ban violate Plaintiffs' patients' constitutional rights to privacy and self-determination as protected by Sections 1 and 2 of the Kentucky Constitution.

i. The Constitution protects the right to abortion.

At the outset, it is important to recognize that this Court has an obligation to review the Kentucky Constitution's protection of rights independent of the federal Constitution. "Kentucky courts are not bound by decisions of the United States Supreme Court when deciding whether a state statute . . . impermissibly infringes upon individual rights guaranteed by the state constitution, as long as the state constitutional protection does not fall below the federal floor." *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 908 S.W.2d 104, 107 (Ky. 1995) (finding statute violates

state constitutional right to civil jury trial regardless of "profoundly different approach[]" to same right under federal constitution); *see also Commonwealth v. Reed*, No. 2020-SC-0116-DG, 2022 Ky. LEXIS 132, at *30 (Ky. June 16, 2022) (Minton, C.J., concurring) ("We are tethered neither to the decisions of the United States Supreme Court nor to the reasoning embodied in those decisions when interpreting the meaning of the Kentucky Constitution."). Instead, "State constitutions may offer greater protections for their citizens than the federal constitution." *Steelvest*, 908 S.W.2d at 107; *see also Crayton v. Commonwealth*, 846 S.W.2d 684, 685 (Ky. 1992) ("While the Supreme Court of the United States is the final arbiter of federal constitutional law . . . this Court and other state courts are at liberty to interpret state constitutions to provide greater protection of individual rights than are mandated by the United States Constitution."); *Florida v. Powell*, 559 U.S. 50, 59 (2010) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.") (citation omitted). "[U]nder our system of dual sovereignty, it is [the Kentucky Courts'] responsibility to interpret and apply [the Kentucky] state constitution independently." *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992), *overruled on equal protection grounds by Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020); *see also Crayton*, 846 S.W.2d at 685 ("American federalism embodies a dual sovereignty whereby state courts must apply their own constitutions and safeguard the rights of their citizens secured thereby"). This Court "would be derelict in [its] constitutional responsibility to suggest that meanings ascribed to [federal constitutional rights] by the United States Supreme Court authoritatively and unalterably dictate our interpretation of the breadth and scope of" similar rights under the state constitution. *Keysor v. Commonwealth*, 486 S.W.3d 273, 280 (Ky. 2016).

As demonstrated below, the Kentucky Constitution protects a fundamental right to abortion. The inherent and inalienable right to liberty guarantees the rights to privacy and self-determination, which both independently and collectively protect the right of Kentuckians to decide whether to continue or terminate their own pregnancy. *See infra* Sections III.C.1.i.a–c.

In recognizing that the Kentucky Constitution provides independent protection for the right to abortion regardless of the United States Supreme Court's interpretation of the federal Constitution, this Court will not stand alone. To date, the highest courts of nearly a dozen states have recognized that their state constitutions independently protect the right to decide whether to continue or terminate a pregnancy. *See Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) (privacy); *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 784 (Cal. 1981) (privacy); *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) (privacy); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (privacy); *Pro-Choice Miss. v. Fordice*, 716 So.2d 645, 653 (Miss. 1998) (privacy); *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999) (privacy); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000) (privacy), *superseded by constitutional amendment*, Tenn. Const. art. I, §36 (2014); *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982) (privacy and health); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019) (personal autonomy and self-determination); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 853 (N.M. 1998) (equal rights amendment). This Court should not hesitate to find that, regardless of the federal Constitution, the Kentucky Constitution protects the right to abortion, as reasoned below.

a. The Constitution protects a fundamental right to privacy, which includes the right to abortion.

The Constitution protects the "inherent and inalienable rights" of all Kentuckians. Ky. Const. § 1. Among such protected rights is the guarantee of individual liberty. *See* Ky. Const.

§§ 1(1), 1(3), 2. The Kentucky Supreme Court has determined that "the guarantees of individual liberty provided in our 1891 Kentucky Constitution offer . . . protection of the right of privacy." *Wasson*, 842 S.W.2d at 491 (looking to text and structure of the Constitution and history and traditions of the Commonwealth to find constitutional right to privacy that offers "greater protection of the right . . . than provided by the Federal Constitution.").

The Kentucky Constitution's privacy right protects individuals "against the intrusive police power of the state." *Id.* at 492. The Supreme Court has recognized that this privacy right puts personal decision-making related to consensual sex, sexuality, and intimate relationships largely beyond the reach of the State. *See Wasson*, 842 S.W.2d at 492–99 (finding Kentucky's constitutional right to privacy protects individuals' ability to privately engage in same-sex sexual conduct). So too does the privacy right recognized in *Wasson* necessarily embrace the right of an individual to decide for herself, free from unwarranted governmental interference, whether to carry a pregnancy to term. This is an intimate and life-defining decision that affects one's personal health and private family life. *See* Statement of Facts *supra*.

The ability to make reproductive healthcare decisions, including whether to have an abortion, is thus at the core of the right to privacy guaranteed by Sections One and Two of the Constitution. Just as the Kentucky Supreme Court recognized that the Commonwealth's constitutional right to privacy protects private same-sex sexual conduct even at a time when the U.S. Supreme Court had found that the federal right to privacy did not, *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), Kentucky's expansive right to privacy protects Kentuckians' freedom to terminate a pregnancy regardless of the U.S. Supreme Court's decision in *Jackson Women's Health*.

b. The Constitution protects a fundamental right to self-determination, which includes the right to have an abortion.

The "inherent and inalienable right[]" to liberty, *see* Ky. Const. §§ 1(1), 1(3) & 2, also guarantees the right to self-determination and personal autonomy. *See Woods v. Commonwealth*, 142 S.W.3d 24, 31–32 (Ky. 2004) ("[T]he right of a competent person to forego medical treatment by either refusal or withdrawal… derives from the common law rights of self-determination . . . and in the liberty interest protected by the Fourteenth Amendment to the United States . . . and, perhaps even more so, by Section 1 of the Constitution of Kentucky."). *See also DeGrella By & Through Parrent v. Elston*, 858 S.W.2d 698, 708 (Ky. 1993) (avoiding constitutional question of whether statute "impair[s] rights of self-determination or personal autonomy which the constitution protects" because statute could be interpreted as allowing respect for incompetent patient's previously expressed healthcare wishes).

Woods and *DeGrella* both dealt with patients' right to refuse medical treatment, which courts have recognized is "inextricably correlate[d] with a general liberty interest in seeking medical treatment. The right to bodily integrity inherent in a decision to reject a physician's advice logically embraces the right to make a medical decision to obtain treatment." *Planned Parenthood of Mich. v. Att'y Gen. of the State of Mich.*, No. 22-000044-MM (Mich. Ct. of Claims May 17, 2022). The constitutional right to self-determination thus guards every Kentuckian's ability to possess and control their own person and to determine the best course of action for themselves, their health, and their body without unwarranted governmental interference. *See DeGrella*, 858 S.W.2d at 703 ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of other, unless by clear and

unquestionable authority of law.") (citing *Union Pac. Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *see also Tabor v. Scobee*, 254 S.W.2d 474, 475 (Ky. 1951) (holding in tort context that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" and that a woman's Fallopian tubes therefore could not be removed in a non-emergent scenario without her express consent). Such a right to self-determination would be hollow if it did not embrace an individual's ability to determine for herself, free from governmental intrusion, whether to carry a pregnancy to term and undergo childbirth.

Every full-term pregnancy is a major medical event that affects one's health for 40 weeks, culminates in childbirth, and requires weeks or months of recovery—with potential ramifications on every aspect of an individual's medical, psychological, familial, and economic well-being. *See* Statement of Facts, *supra*. A portion of term pregnancies also result in major, potentially life-altering complications, and even death. *See id.* If the right to self-determination means anything, it must include the ability to decide for oneself, without governmental interference, whether to take on these health risks. An individual who is required by the government to remain pregnant against her will and endure childbirth experiences interference of the highest order with her right to possess and control her own person. The ability to decide whether to continue a pregnancy is thus an integral part of the right to self-determination guaranteed by Sections One and Two of the Constitution.

c. The Constitution protects the fundamental rights to privacy and self-determination, which combined create a penumbra of rights that guarantees the right to abortion.

As discussed *supra*, the fundamental right to privacy and the fundamental right to self-determination each independently protect the right to abortion. In addition, at a minimum,

collectively, these fundamental rights recognized by the Kentucky Supreme Court work together to protect the right to abortion.

Recognized constitutional rights form theoretical, sometimes overlapping, umbrellas that function to protect other, often more specific, rights. *See Singleton v. Commonwealth*, 740 S.W.2d 159, 161 n.4 (Ky. Ct. App. 1986) (acknowledging right "ancillary to both free speech and right of privacy" that "clearly … fall[s] within the penumbra of guarantees afforded in the [Commonwealth's] Bill of Rights."). Such penumbral rights, as they are often called, help give "life and substance" to the explicitly recognized right. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Even if the fundamental right to privacy, standing alone, did not protect the right to abortion—which it does, *see supra*—it certainly embraces such a right when paired alongside the recognized right to self-determination. Only when an individual has the autonomy to make the intimate and life-defining decision for herself whether to continue a pregnancy can the guarantees of the rights to privacy and self-determination, as discussed *supra*, be fulfilled. The right to abortion thus gives "life and substance" to these recognized constitutional rights. For this additional reason, the Kentucky Constitution protects the right to abortion.

Further, the recognition of a constitutional right to abortion—whether derived from the right to privacy, self-determination, or both—is in accord with the history and traditions of this Commonwealth, including when the Kentucky Constitution was ratified in 1891. At that time, Kentucky had not codified any statutory limits on the right to abortion. Instead, as recognized by Kentucky courts, abortion was permissible at least until quickening, when the pregnant woman first feels fetal movement. *See Mitchell v. Commonwealth*, 78 Ky. 204, 210 (1879) ("[I]t never was a punishable offense at common law to produce, with the consent of the mother, an abortion

prior to the time when the mother became quick with child."). Ten years after ratification of the Constitution, a Kentucky court again affirmed that "there 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 the time when she became quick with child." *Wilson v. Commonwealth*, 60 S.W. 400, 401 (Ky. Ct. App. 1901).[4] "Until that stage of development," which is well into the second trimester[5] and long past the point in pregnancy at which the Bans take effect, "the law took no notice of the agency by which a miscarriage was procured, if done with the woman's consent." *Fitch v. Commonwealth*, 165 S.W.2d 558, 560 (Ky. 1942). *See also* Janet Farrell Brodie, Contraception and Abortion in 19th Century America 33 (1994) ("There was little outcry about abortion's being immoral or unethical ... Nor were abortions illegal so long as quickening (fetal movement) had not yet occurred, generally in the second trimester."). Preventing the police power of the state from intruding on an individual's private decision to access abortion thus aligns with the history and traditions of Kentucky.

ii. The Bans violate Kentuckians' constitutional rights.

The constitutional right to abortion is fundamental, and as a result, the highest level of scrutiny applies. Indeed, "[s]trict scrutiny applies to a statute that . . . impacts a fundamental right or liberty explicitly or implicitly protected by the Constitution." *Beshear v. Acree*, 615 S.W.3d 780, 815–16 (Ky. 2020). The rights to privacy and self-determination, which both independently and collectively protect the right to abortion, *see supra* Sections III.C.1.i.a–c, are fundamental

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[4] The pre-*Roe* Kentucky law cited in *Dobbs v. Jackson Women's Health* was not passed until 1910, well after the ratification of the 1891 Constitution. *Jackson Women's Health*, slip op. at 99.

[5] 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) ("At the opening of the nineteenth century, abortion was governed by common law, and was not a criminal offense if performed before quickening – the point at which a pregnant woman perceived fetal movement, typically late in the fourth month or early in the fifth month of gestation.").

liberties and inalienable rights protected by Sections One and Two of the Kentucky Constitution. *See Wasson*, 842 S.W.2d at 496 ("The fundamental rights of personal security and personal liberty, include the right of privacy"); *id.* (calling the right to privacy an "inalienable right legally protected in this state"); *see also Woods*, 142 S.W.3d at 32 (noting "right of a competent person to forego medical treatment by either refusal or withdrawal" is derived from Section One's "inherent and inalienable … right of [Kentuckians to] enjoy[] and defend[] their lives and liberties."). The Trigger Ban and Six-Week Ban violate these fundamental and inalienable rights by stripping individuals of the ability to decide whether to continue their pregnancies—a direct state interference in the private realm of family life and reproductive decision making, and an unwarranted governmental intrusion on the ability of an individual to possess and control her own body. An exacting strict scrutiny review thus applies to the constitutional challenges to these Bans.

In fact, most state courts that have found a right to abortion under their state's constitution have applied strict scrutiny.[6] This is so not only because abortion is a fundamental

[6] *See, e.g., Valley Hosp. Ass'n*, 948 P.2d at 969, 971 (finding no "compelling state interest" where policy generally prohibiting elective abortions was solely a matter of conscience); *Comm. to Def. Reprod. Rts.*, 625 P.2d at 784, 793, 797 (finding state's interest in protecting a fetus is not compelling enough to justify impairment of "fundamental constitutional right to choose whether or not to bear a child"); *In re T.W.*, 551 So. 2d at 1192–94 (finding no compelling interest to justify statute that interferes with woman's ability to decide whether to continue a pregnancy); *Women of Minn.*, 542 N.W.2d at 31–32 (finding state's asserted interest in preservation of human life and encouragement of childbirth not compelling enough to outweigh woman's decision about whether to terminate a pregnancy without state interference); *Armstrong*, 989 P.2d at 380, 384 (finding legislature has "no interest, much less a compelling [interest]," in interfering with an individual's fundamental right to obtain a pre-viability abortion); *Planned Parenthood of Middle Tenn.*, 38 S.W.3d at 18 (finding state has a compelling interest in maternal health from the beginning of pregnancy, but a prohibition on all second trimester abortions not performed in a hospital was not narrowly tailored to promote this interest); *Byrne*, 450 A.2d at 934, 937 (finding fundamental right to choose whether to have an abortion outweighs state's interest in protecting potential life); *Hodes*, 440 P.3d at 496 (holding "the strict scrutiny test best protects those natural rights that we today hold to be fundamental" and finding ban on common method of second trimester abortion fails that test); *N.M. Right to Choose*, 975 P.2d at 854 (holding a restriction on funding medically necessary abortions unconstitutional where the state failed to offer a compelling justification for treating men and women differently with respect to medical needs). *See also Hope Clinic for Women v. Flores*, 991 N.E.2d 745, 760, 765–67 (Ill. 2013) (finding state due process clause protects abortion in a

right, but also because "imposing a lower standard than strict scrutiny … when the factual circumstances implicate these rights because a woman decides to end her pregnancy—risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making. It cheapens the rights at stake. The strict scrutiny test better protects these rights." *Hodes*, 440 P.3d at 497–98 (finding right of personal autonomy protects right to abortion under Kansas Constitution); *see also Armstrong*, 989 P.2d at 377 (finding state constitutional right to abortion and finding no compelling governmental interest because, "if the State has the power to infringe the right of procreative autonomy in favor of birth, then, necessarily, it also has the power to *require* abortion under some circumstances").

"To survive strict scrutiny, the government must prove that the challenged [statute] furthers a compelling governmental interest that is narrowly tailored to that interest." *Acree*, 615 S.W.3d at 815–16. The Bans cannot survive strict scrutiny. The State cannot have a compelling interest in preventing individuals from exercising the fundamental right to end a pregnancy beginning at the earliest stages of pregnancy, as the Trigger Ban and Six-Week Ban do. No state interest could justify such absolute bans on abortion, and any law that does so unquestionably violates the strict scrutiny standard.

At minimum, whether the Bans violate the Kentucky Constitution's established rights to privacy and self-determination is a serious question warranting resolution on the merits.

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manner "equivalent" to the federal constitution but applying strict scrutiny instead of federal undue burden standard); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981) (holding Massachusetts Declaration of Rights affords privacy rights with "no less protection" than the Federal Constitution and finding strict scrutiny applicable).

2. Plaintiffs have established a serious question warranting a trial on the merits of Count III, that the Trigger Ban violates Sections 27, 28, and 29 of the Kentucky Constitution by unlawfully delegating legislative authority to the U.S. Supreme Court.

Plaintiffs are entitled to injunctive relief because there is a serious question as to whether the Trigger Ban violates the foundational principles of the Kentucky Constitution, by impermissibly delegating to the U.S. Supreme Court the fundamentally legislative responsibility of the General Assembly to determine the scope of criminal law in the Commonwealth, in violation of Sections 27, 28, and 29 of the Constitution.

"Perhaps no state . . . has a Constitution whose language more effectively separates and perpetuates the American tripod of government" than the Commonwealth of Kentucky. *Bd. of Trustees of the Jud. Form Retirement Sys. v. Att'y Gen. of Ky.*, 132 S.W.3d 770, 782 (Ky. 2003) (quoting *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922)). Kentucky's Constitution separates governmental power into three branches, Ky. Const. §§ 27, 28, and vests legislative power solely in the General Assembly, *id.* § 29. This "separation of powers doctrine is fundamental to Kentucky's tripartite system of Government and must be strictly construed." *Leg. Research Comm'n v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984).

It is well-established that because "Kentucky is a strict adherent to the separation of powers doctrine . . . 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) (emphasis added); *see also, e.g.*, *City of Louisa v. Newland*, 705 S.W.2d 916 (Ky. 1986). The legislature can, of course, delegate certain *administrative* functions, when those delegations are accompanied by appropriate safeguards. *See, e.g.*, *Diemer*, 786 S.W.2d at 864. But inherently legislative functions are "nondelegable." *Id.*

The responsibility for defining what conduct is criminal under Kentucky law is squarely in the zone of inherently legislative, nondelegable functions. "The authority to enact laws depriving citizens of their liberty by incarceration" is "the *sole charge* of the General Assembly." *Johnson v. Commonwealth*, 449 S.W.3d 350, 354–55 (Ky. 2014) (Cunningham, J., concurring) (holding that criminal lawmaking could not be delegated to localities). "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).

In passing the Trigger Ban, the General Assembly wrote a blank check for the federal government to define the scope of a criminal law in Kentucky, at some indeterminate point in the future. The Trigger Ban did not take effect when the General Assembly passed it. Instead, it left both the timing and the scope of a felony abortion ban up to the "decision of the United States Supreme Court." KRS 311.772(2)(a).

Kentucky's highest court has held that the General Assembly could not pass a law criminalizing failure to adhere to the time zone standards to be set in the future by the United States Congress and the Interstate Commerce Commission. *Dawson*, 314 S.W.2d at 536. While it was permissible for Kentucky law to rely on *then-existing* timekeeping standards set by the federal government, to the extent the statute *prospectively* adopted "standards *to be fixed in the future* by the [federal government] [it] is unconstitutional." *Id.* (emphasis in original). What the General Assembly has done with the Trigger Ban is codify exactly the kind of *prospective* reliance on then-unknown federal law that the *Dawson* court prohibited. The General Assembly may have anticipated the kind of decision the U.S. Supreme Court might make (*i.e.*, full or

partial reversal of *Roe v. Wade*), just as the law at issue in *Dawson* anticipated future laws or regulations setting time zone and timekeeping regulations. But the General Assembly may not simply choose a subject area, establish felony penalties, and then leave the definition of what actual conduct is subject to those penalties up to the discretion of future federal government bodies. To do so would violate Kentuckians' right to a tripartite government in which essential lawmaking functions are performed only by the General Assembly members elected to do so.

At minimum, Plaintiffs have raised a serious question about the Trigger Ban's violation of the nondelegation principles established by the Kentucky Constitution.

3. Plaintiffs have established a serious question warranting a trial on the merits of Counts V and VI, that the Trigger Ban is unconstitutionally vague and unintelligible.

i. The Trigger Ban is vague in violation of Kentuckians' due process rights, as protected by Section 2 of the Kentucky Constitution.

It is well-settled that Kentucky's Constitution protects Kentuckians from vague laws that deprive "a person disposed to obey the law" of the ability 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) (citing *Commonwealth v. Foley*, 798 S.W.2d 947 (Ky. 1990), *overruled on other ground by Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2004)). The protection against vague laws contains two separate elements: First, a statute is impermissibly vague if it does not place someone to whom it applies on actual notice as to what conduct is prohibited; and second, a statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory enforcement. *Id.* (citing *Musselman v. Commonwealth*, 705 S.W.2d 476, 478 (Ky. 1986)); *see also Ky. Milk Mktg. & Antimonopoly*

Comm'n v. Kroger Co., 691 S.W.2d 893, 899 (Ky. 1985) (noting that Section Two "embrace[s] the traditional concept[] of . . . due process").

First, the Trigger Ban's ambiguous effectiveness provision deprives Plaintiffs (or any others "targeted by the statute") of "fair notice" because its unclear effective date lacks "sufficient definiteness so that ordinary people can understand what conduct is prohibited," *Tobar v. Commonwealth*, 284 S.W.3d 133, 135 (Ky. 2009).

The General Assembly enacted the Trigger Ban to "*become* effective 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), thereby restoring to the Commonwealth of Kentucky the authority to prohibit abortion." KRS 311.772(2)(a) (emphasis added). But the General Assembly did not specify in the text of the Trigger Ban whether "the occurrence" of such a decision means the issuance of an *opinion* articulating reversal of Roe or the issuance of a *mandate* by the U.S. Supreme Court rendering its opinion operative.

The U.S. Supreme Court published an opinion reversing *Roe v. Wade* on June 24, 2022. But the certified copy of the judgment ("the mandate") will not, under ordinary procedure, issue to the Court of Appeals for the Fifth Circuit, from which the case came on appeal, until 25 days after the opinion. Sup. Ct. R. 45. This 25-day delay allows for a party to petition for rehearing, which would stay the mandate until disposition of the case. Sup. Ct. R. 44, 45. This means that until the mandate issues, the Supreme Court's decision is subject to petition for rehearing and not final, and Mississippi—the state from which *Jackson Women's Health* originated—cannot begin to enforce the 15-week ban at issue in that case. In other words, the *Jackson Women's Health* decision will not "restore" to Mississippi the "authority to prohibit abortion" until the mandate issues, likely on July 19. 2022, but possibly earlier, later, or even not at all if the Supreme Court

or the parties to that case stipulate otherwise, or the mandate is stayed pending a petition for rehearing, Sup. Ct. R. 44, 45.

It is already evident that attorneys general with Trigger Bans similar to Kentucky's cannot come to a consensus about whether it is the opinion or the subsequent issuance of the mandate that constitutes the triggering event. *Compare* Advisory from Ky. Att'y Gen. Daniel Cameron on The Effect and Scope of the Human Life Protection Act in Light of *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), https://ag.ky.gov/Press%20Release%20Attachments/Human%20Life%20Protection%20Act%20Advisory.pdf. (stating that the publication of the *Jackson Women's Health* opinion makes Kentucky's Trigger Ban effective as of June 24, 2022) *with* 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%20(updated%20draft%2006.21.2022)%20(1).pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term (announcing that it will be the later transmission of the "judgment" that will trigger Texas's similar law.); *and* Kelcie Moseley-Morris, *Idaho Attorney General Says Abortion Ban Likely to Take Effect in Late August After SCOTUS Decision*, Idaho Capital 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/ (Idaho Attorney General's office reported that the transmission of certified "judgment" is the occurrence triggering effectiveness of Idaho's similar law). A triggering provision so convoluted and reliant on the intricacies of U.S. Supreme Court practice that even attorneys general are not in consensus about when it occurs cannot possibly

give "ordinary people" a reasonable opportunity to know what is prohibited with any level of "definiteness," *Tobar*, 284 S.W.3d at 135.

Second, the Trigger Ban's unclear effective date vests prosecutors with the power to arbitrarily decide when to begin enforcing it. The risk of arbitrary and discriminatory enforcement is acute where there is a risk of serious criminal penalties at stake.

Even though Plaintiffs reasonably believe that by its own terms, the Trigger Ban cannot be effective until the issuance of a mandate in *Jackson Women's Health* renders the Supreme Court's opinion final and operative, Dr. Marshall and the other staff at EMW and Planned Parenthood are at risk of serious criminal penalties if prosecutors decide to interpret the publication of the opinion as an "occurrence" rendering the Trigger Ban operative.

This leaves Plaintiffs in an impossible position: they can continue to provide Kentuckians with abortions, as they believe they may lawfully do, unless and until a mandate from the U.S. Supreme Court renders the *Jackson Women's Health* opinion final and operative. But if they do so, they risk felony charges, carrying penalties of up to five years imprisonment, if Kentucky prosecutors arbitrarily, or animated by hostility toward abortion providers, decide to begin enforcing the Trigger Ban before that time.

ii. The Trigger Ban is unintelligible in violation of the separation of powers principles established by Sections 27, 28, and 29 of the Kentucky Constitution.

The Trigger Ban additionally violates the separate protections against unintelligible laws inherent in the Kentucky Constitution's separation of powers.

Although criminal laws like the Trigger Ban are subject to the "most rigorous" review under the void-for-vagueness analysis, *see supra*, the Kentucky Constitution's "bedrock principle of separation of powers," embodied in Sections 27, 28, and 29, provides an additional,

independent constitutional protection against unintelligible laws of all kinds. *Util. Mgmt. Grp. LLC v. Pike Cnty. Fiscal Court*, 531 S.W.3d 3, 12 (Ky. 2017). Because the power to legislate is vested solely in the General Assembly, neither the executive branch nor the courts have the power to adopt a particular interpretation of a facially ambiguous statute without violating these "bedrock principles." *Id.*

As a criminal statute that is void for vagueness, *see supra*, the Trigger Ban is also void for "unintelligibility" under the less "rigorous," but constitutionally distinct separation-of-powers protections of the Kentucky Constitution. *Bd. of Trustees*, 132 S.W.3d at 781; *Util. Mgmt. Grp. LLC*, 531 S.W.3d at 12–13.

Kentucky's separation-of-powers principles prevent any branch of government except the General Assembly from exercising legislative power. The executive branch may not implement a statute that is unintelligible on its face; to do so, it would have to "guess at the intent of the legislature and [be] thereby transformed from implementer of the law into maker of the law." *Bd. of Trustees*, 132 S.W.3d at 781. For this reason, Defendant Cameron's statement that the Trigger Ban is now in effect demonstrates, rather than cures, the separation of powers violation. Nor may a court "interpret" an unintelligible statute without engaging in "effectively unauthorized judicial legislation." *Util. Mgmt. Grp.*, 531 S.W.3d at 13.

These separation of powers principles mean that the facial ambiguity of the Trigger Ban cannot be cured by prosecutors' interpretation of the Trigger Ban's effective date, nor by a judicial decision choosing a definition of a triggering "occurrence." *See id.* Where, as here, an intelligible interpretation is not evident on a statute's face, the only "proper course is to declare the challenged statute unconstitutional and give the General Assembly the opportunity to pass a new, intelligible statute." *Id.*

IV. THE EMERGENCY INJUNCTIVE RELIEF SHOULD ISSUE WITH A LOW BOND

This Court should find that the proper bond in this case is a low sum. Rule of Civil Procedure 65.05(1) requires "the giving of a bond by the applicant" for a restraining order or temporary injunction "in such sum as the court . . . deems proper, for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined." Here, where Defendants will not suffer any monetary harm from the issuance of the requested emergency injunctive relief, this Court should find that the proper sum be no more than a nominal amount, such as ten dollars. *See Metropolitan Housing Coalition v. Public Serv. Comm'n of Ky.*, No. 18-CI-01115 (Franklin Cir. Ct. Nov. 21, 2018) (setting bond at $10 because defendants "cannot be anticipated to suffer any pecuniary harm from the issuance of the Temporary Injunction"). Moreover, Plaintiffs are healthcare providers dedicated to serving low-income patients and underserved communities, *see* Ver. Compl. ¶¶ 13–15, 62–64, Bergin Aff. ¶ 32, and a high bond would strain their already-limited resources. Federal courts have routinely waived the federal security requirement in Plaintiffs' previous cases seeking injunctive relief against enforcement of Kentucky abortion restrictions. *See, e.g., Planned Parenthood Great Nw., Haw., Alaska, Ind., & Ky., Inc. v. Cameron*, No. 3:22-CV-198-RGJ, 2022 WL 1597163, at *19 (W.D. Ky. May 19, 2022) (waiving security requirement because "requiring [Planned Parenthood and EMW] to secure a bond would strain [their] limited financial resources"); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 9047174, at *3 (W.D. Ky. Mar. 20, 2019) (waiving security requirement because requiring EMW to post security in a challenge to an abortion law was "not appropriate"); *EMW Women's Surgical Ctr., P.S.C. v. Glisson*, No. 3:17-CV-00189-GNS, 2017 WL 11485685, at *2 (W.D. Ky. Mar. 31, 2017) (same).

CONCLUSION

For the foregoing reasons, the requirements for emergency injunctive relief are met in this case. Accordingly, Plaintiffs respectfully request this Court immediately grant Plaintiffs' application and enter a restraining order pursuant to Kentucky Rule of Civil Procedure 65.03 to restrain Defendants from enforcing the Trigger Ban and the Six-Week Ban until a hearing on a temporary injunction may be held. Thereafter, following a hearing and for the reasons stated above, this Court should enter a temporary injunction pursuant to Kentucky Rule of Civil Procedure 65.04.

DATE: June 27, 2022

Respectfully submitted,

/s/ Michele Henry

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**pro hac vice motions forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2022, true and accurate copies of the foregoing Motion for Restraining Order and Temporary Injunction, the Memorandum of Law in Support, the Proposed Order, and the Proposed Restraining Order Bond were served by email and by operation of the Court's electronic filing system on the following:

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