

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

PLANNED PARENTHOOD GREAT
NORTHWEST, HAWAII, ALASKA,
INDIANA and KENTUCKY, INC., on behalf
of itself, its staff, and its patients,

Plaintiff,

v.

DANIEL CAMERON, in his official capacity as
Attorney General of the Commonwealth of
Kentucky, *et al.*,

Defendants.

Case No.: 3:22-cv-198-RGJ

**PLAINTIFF’S MOTION FOR A TEMPORARY RESTRAINING
ORDER/PRELIMINARY INJUNCTION**

Plaintiff hereby moves the Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a temporary restraining order (“TRO”) or, in the alternative, a preliminary injunction (“PI”) blocking Defendants’ enforcement of House Bill 3 (the “Act”),¹ which is tantamount to a ban on abortion because it takes effect immediately but it is impossible to comply with until the Commonwealth promulgates forms and regulations, as required by the Act. Plaintiff has no choice but to cease providing abortions unless the Court enters relief.

Pursuant to Rule 65(b)(1)(B), the undersigned counsel certify that upon electronically filing this motion and Complaint using the Courts CM/ECF system, counsel will electronically mail the filed documents to: David Cameron, Attorney General of the

¹ See Complaint, Exhibit A.

Commonwealth of Kentucky at ServetheCommonwealth@ky.gov; Barry Dunn, Deputy Attorney General at barry.dunn@ky.gov; Victor Maddox, Associate Attorney General, at victor.maddox@ky.gov; Carmine G. Iaccarino, General Counsel to the Attorney General and to the Department of Law at carmine.iaccarino@ky.gov; Wesley W. Duke, Assistant General Counsel for the Kentucky Cabinet for Health and Family Services at WesleyW.Duke@ky.gov; Michael S. Rodman, Executive Director of the Kentucky Board of Medical Licensure at kbml@ky.gov; Leanne Diakov, General Counsel of the Kentucky Board of Medical Licensure at Leanne.diakov@ky.gov; and Thomas Wine, the Commonwealth's Attorney for the 30th Circuit of Kentucky at tbwine@louisvilleprosecutor.com. Formal notice to Defendants and their agents, however, should not be required due to the constitutional rights at issue and the inability to effect formal process as a result of the Act's immediate effective date.

The issuance of emergency relief is warranted here as Plaintiff can readily meet the elements required for such relief. Plaintiff has patients scheduled for abortions and respectfully requests the emergency intervention of this Court to protect it from the immediate and irreparable injury to Plaintiff's and its patients' constitutional rights. Plaintiff respectfully requests that the Court GRANT the Motion.

INTRODUCTION

On April 13, 2022, the Kentucky legislature voted to override Governor Andy Beshear's veto of House Bill 3 (the "Act") thereby allowing an omnibus law affecting more than one million Kentuckians of reproductive age to go into immediate effect. Even though abortion is one of the safest medical procedures, the Act consists of over 70 pages of unnecessary revisions to Kentucky's existing abortion regulations and creates new requirements, including an extensive regulatory regime for the provision of abortion-inducing medication, significantly expanded and

invasive reporting requirements, and new requirements for cremation or interment of fetal remains. The Act directs the Cabinet for Health and Family Services (the “Cabinet”) to promulgate regulations and create required forms, but those forms and regulations have not yet been promulgated because the Act took effect April 13, 2022. And even though it is impossible for Plaintiff to comply with the Act today, the Act imposes the immediate potential for criminal penalties, civil liability (including, in one instance, up to one million dollars), and potential loss of facility and medical licenses if Plaintiff continues to provide abortions.

It is arbitrary and unconstitutional to enforce penalties for noncompliance while failing to provide a means of immediate compliance. Plaintiff, in fairness, must be granted time to work to comply with these sweeping changes to the provision of abortion care. Otherwise, the existence of regulatory requirements uncoupled from the means to comply with them will result in a complete ban on abortion within Kentucky because Plaintiff, which is one of the last two abortion-providing clinics in Kentucky, will be forced to cease providing abortions.² This ban violates Plaintiff’s and its patients’ procedural and substantive due process rights under the Fourteenth Amendment. Plaintiff requests that this Court enjoin the Act in its entirety from immediate enforcement.

BACKGROUND

I. Abortion In Kentucky

Legal abortion is one of the safest medical procedures available in the United States. *See* Declaration of Rebecca Gibron (“Gibron Decl.”), attached hereto as **Exhibit 1**. There are two methods of abortion, medication abortion and procedural abortion. *Id.* ¶ 3. Both methods safely

² The only other Kentucky abortion provider, EMW Women’s Surgical Center, will also be forced to stop providing abortions due to the Act.

terminate a pregnancy. *Id.* Medication abortion involves a combination of two pills, mifepristone and misoprostol, which expels the contents of the uterus in a manner similar to a miscarriage. *Id.*

¶ 4. Despite sometimes being referred to as “surgical abortion,” a procedural abortion is not “surgery,” as it involves no incisions. *Id.* ¶ 5. Instead, in a procedural abortion, the provider inserts a thin, flexible tube, and in some instances, other instruments, to empty the contents of the patient’s uterus. *Id.* ¶ 6.

Patients seek abortion for a multitude of personal and complex reasons. *Id.* ¶ 8. Some have abortions because they conclude that it is not the right time in their lives to have a child or to add to their families. *Id.* Some decide to end a pregnancy because they want to pursue their education and the demands of that pursuit are incompatible with responsible parenting. *Id.* Some have abortions because they feel they lack the necessary economic resources or level of partner support or stability. *Id.* Many are concerned that adding a child to their family will make them less able to adequately provide and care for their existing children. *Id.* Some seek abortions to preserve their life or health, including their mental health. *Id.* Some do so because they have become pregnant as a result of rape, and others because they decide not to have children at all. *Id.* Some decide to have an abortion because of an indication or diagnosis of a fetal medical condition or anomaly. *Id.* The decision to terminate a pregnancy for any reason is motivated by a combination of diverse, complex, and interrelated factors that are intimately related to the individual patient’s values and beliefs, culture and religion, health status and reproductive history, familial situation, and resources and economic stability. *Id.*

Abortions are only available in Kentucky until 21 weeks and six days as measured from the patient’s last menstrual period (“LMP”). *Id.* ¶ 7. Time is of the essence when a patient decides to have an abortion. *Id.* A delay of weeks or even days presents an urgent threat to a

patient's right to have an abortion, with myriad potentially permanent financial, medical, educational, and emotional consequences. *Id.* ¶¶ 7-8.

II. Plaintiff's Operations in Kentucky

Plaintiff Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana and Kentucky, Inc. ("Planned Parenthood") operates the Louisville Health Center of Louisville, Kentucky. Gibron Decl. ¶ 9. Planned Parenthood provides a variety of medical services to its patients, including birth control, HIV services, pregnancy testing, STD testing, treatment, and vaccines, to name a few. *Id.* ¶ 10. Planned Parenthood's Louisville Health Center is one of the two remaining abortion clinics in Kentucky. *Id.* ¶ 9.

Planned Parenthood provides abortion services once a week. *Id.* ¶ 13. On a service day, Planned Parenthood provides approximately 20 to 30 abortions, which are a combination of procedural and medication abortions. *Id.* Pathological waste, including products of conception,³ is disposed of pursuant to state regulations for infectious waste, and Planned Parenthood currently contracts with third-party vendors to safely dispose of and incinerate this tissue. *Id.* ¶ 16-17. Its vendors are not competent to provide interment or cremation, or licensed to transport products of conception for interment or cremation. *Id.* ¶ 18.

III. The Act

Even though abortion is a safe procedure that is already subject to much more extensive regulation than other outpatient procedures, the Act nevertheless overhauls the existing regulatory structure and makes it more burdensome to providers and less protective of patient

³ Products of conception may include several types of tissue, such as placentas, gestational sacs, uterine tissue, and/or umbilical cords. Gibron Decl. ¶ 16 n.1.

privacy. The Kentucky Legislature passed the Act on March 29, 2022.⁴ Governor Andy Beshear later vetoed the law on April 8, 2022.⁵ In his veto message, Governor Beshear cited, among other reasons such as unconstitutionality and lack of exceptions or exclusions for rape or incest, that he was vetoing the act because

To implement House Bill 3 would require the Cabinet for Health and Family Services to, among other things, create three new full-time positions, build an electronic database to store and track a certification and complaint program, and establish additional public reporting requirements at an estimated initial cost of close to \$1 million. However, the General Assembly does not appropriate any funds to the Cabinet in House Bill 3, which will result in underfunded essential programs and duties carried out by the Cabinet. The [Cabinet requirements] will go into effect without providing the Cabinet any resources or time to implement these changes and delaying access to legal procedures under the bill.

Id. The Kentucky Legislature overrode Governor Beshear’s veto on April 13, 2022.

Among many other unnecessary and burdensome changes, the Act creates an extensive regulatory scheme for medication abortions; requires cremation or interment of fetal remains for the first time; and adds significant new reporting requirements that entail disclosure of identifying and sensitive patient information. The Act provides for criminal and civil penalties for its violation including potential Class D felonies or fines up to \$1,000,000. Certain violations of the Act could also lead to the revocation of physician and facility licenses.

These wholesale changes are effective immediately. In Kentucky, a law generally takes effect “ninety days after the adjournment of the session at which it was passed” unless the legislature declares an “emergency” where a law may become effective right away. Ky. Const. § 55. The Act declares such an emergency, providing that it “take[s] effect upon its passage and

⁴ *House Bill 3*, Kentucky General Assembly, <https://apps.legislature.ky.gov/record/22rs/hb3.html> (last visited April 12, 2022).

⁵ *Id.* See also *id.* at “Governor’s Veto Message” <https://apps.legislature.ky.gov/record/22rs/hb3/veto.pdf> (last visited April 12, 2022).

approval by the Governor or its otherwise becoming a law.” Act § 39. As of the legislature’s override of the Governor’s veto, the Act is thus effective. However, a plain reading of the Act confirms that it was not designed to be effective immediately, including provisions that otherwise provide for months to prepare for the new and elaborate requirements. Without the lead time to implement new forms and promulgate new regulations—which the Act itself requires—compliance is impossible.

A. Requirement that Cabinet create multiple new forms, processes, and regulations.

Throughout the Act, there are myriad new reporting requirements to be completed on Cabinet-created forms that either do not exist or have not been updated to allow the newly required information to be reported. Under Section 13(1), the Act mandates that the Cabinet create the following new forms within 60 days:

- Section 1 requires a new form for providers to document provision of emergency medical abortion services to minors without consent;
- Section 4 requires a new form through which abortion providers report *every* abortion they perform within the Commonwealth;
- Section 8 requires a new form through which abortion providers obtain the informed consent of a patient before providing medication abortion;
- Section 9 requires a new form through which abortion providers report each provision of medication abortion and any complications or adverse events, as well as any resulting treatment, related to medication abortion;
- Section 25 requires a new form through which abortion providers report any complications or adverse events related to abortion;
- Section 26 requires a new form through which abortion providers report each abortion medication prescription issued, each abortion performed, and all adverse events;
- Section 27 requires abortion providers to report the results of inquiries of the patient as to gestational age and any medical exams or tests performed; and
- Section 29 requires a report of each prescription dispensed by a pharmacy for abortion medication.

The Act also requires that the Cabinet create the following forms without any related deadline for completion:

- Section 17 requires qualified physicians to sign an annual “Dispensing Agreement Form” to be developed and provided by the Cabinet prior to providing medication abortions; and
- Section 22(3) requires the Cabinet to “design forms through administrative regulations” to document among other information the age of the “parent or parents,” information pertaining to any abortion patient who is an unemancipated minor, and a designation of how the fetal remains shall be disposed of and who shall be responsible for final disposition.

Ultimately, the Act imposes *at least* ten different requirements that necessitate new or amended forms that do not yet exist for providers to comply with its tenets.

B. Creation of New Medication Abortion “Program”

The Act creates a new “Abortion-Inducing Drug Certification Program” to govern access to medication abortions. Despite the Act’s recognition that this certification program will require implementing regulations and further administrative action, the Act’s mandate for compliance with the program—like the rest of the Act—took immediate effect. As a result, Plaintiff, its staff, and other regulated parties cannot meet the program’s new certification requirements.

Under the Act, medication abortions can now only be provided by “qualified physicians” and “certified” abortion facilities, pharmacies, manufacturers, and distributors. Act §§ 15, 16. The Act expressly tasks the Cabinet with promulgating administrative regulations that will create “a certification program to oversee and regulate the distribution and dispensing of abortion inducing drugs.” Act § 15. The program will establish certification requirements applicable to licensed abortion facilities, including Plaintiff, in addition to pharmacies, manufacturers, and distributors of abortion-inducing medication. *See id.*

To provide medication abortion, “qualified physicians” must now be “registered as

nonsurgical abortion providers.” Act § 15(2). Other than mandating such registration, the law does not otherwise specify how physicians are to register, and no such existing registration process exists. Moreover, to be “qualified,” prior to providing any abortion medication, physicians must sign an annual “Dispensing Agreement Form” to be developed and provided by the Cabinet; again, the form does not yet exist. Act § 17. The Act also requires additional information from providers regarding medication abortions, but the existing medication abortion forms propagated by the Cabinet do not allow providers to include this newly required information. The Act imposes new and more extensive adverse-event reporting obligations, which also must be fulfilled through use of a form that does not yet exist, and these reports are statutorily required to include a large amount of individually identifiable health information.⁶ Act § 9. The Act further details the procedures a physician must follow in order to be deemed qualified and to register under the Act, including but not limited to securing admitting privileges at a local hospital or entering into a written associated physician agreement. Act §§ 7, 8, 17. These requirements take time and effort to comply with.

Notably, providers who make medication abortions available without complying with the form and/or registration requirements of the Act potentially face Class D felonies punishable by at least one year in jail.

C. Imposition of new requirements for “fetal remains”

The Act establishes a new requirement that the tissue resulting from an abortion may not

⁶ These provisions require at a minimum highly sensitive and personal information, including, among other data: patients’ city, county, state, and zip code; patients’ age, race, and ethnicity; the age of the “father” of the fetus; whether the patient was tested for sexually transmitted diseases and the outcome of those tests; and the total number and dates of the patient’s previous pregnancies, live births, and abortions.

be disposed of as medical waste, as has consistently been permitted under Kentucky law. 902 K.A.R. § 20:106; 902 K.A.R. § 20:360, Section 9(2)(c). Accordingly, products of conception now must be disposed of via a Kentucky-licensed crematory or funeral home, or by private interment. That requirement will necessarily obligate Plaintiff to enter into one or more new contracts with a third-party vendor, without which Plaintiff cannot provide procedural abortion. Moreover, the patient's choice of disposition must be documented in forms that are to be created by the Cabinet through administrative regulations. Because those forms do not exist, it is impossible for Plaintiff to comply with the new consent requirements relating to final disposition of tissue.

Section 22(3) additionally requires providers to report details related to the cremation or interment of the products of conception.

IV. Impact Of The Act

A. Multiple provisions of the Act work in concert to effectively ban abortion in Kentucky.

Parsing the various interlocking provisions of the Act—an urgent exercise in light of its immediate effectiveness—leads to the inescapable conclusion that the Act effectively bans abortion in the Commonwealth. For ease of reference, the following chart summarizes the provisions that operate to bar abortion in Kentucky due to their immediate effect:⁷

⁷ Plaintiff's contemporaneously filed Complaint seeks relief related to other problematic parts of the Act, including portions of the Act for which preliminary injunctive relief might later be needed. However, to streamline the Court's review at this time, this TRO/PI motion addresses only the most immediate concerns for Plaintiff and its patients.

Act Section	Short Description	Impact Upon Passage
Section 1	Requires providers to submit form regarding provision of emergency abortion procedures to minors without consent and notarization of consent forms	Compliance impossible as form does not yet exist; immediate compliance with requirement to notarize consent forms impossible without privacy concerns.
Sections 4, 27	Require providers to submit forms reporting every abortion to the Bureau of Vital Statistics	Compliance impossible as forms do not yet exist; all abortions effectively prohibited.
Sections 5-11, 14-19	Create “program” for provision of medication abortions in Kentucky	Compliance impossible as program, forms, requirements, and regulations do not yet exist and failure to comply may result in Class D felony charges; medication abortions effectively prohibited.
Section 22	Establishes tissue disposal process for tissue resulting from a procedural abortion	Compliance impossible as forms and regulations for cremation process do not yet exist and providers need to time comply; procedural abortions effectively prohibited.
Section 25	Requires providers to report detailed information about any patient who reports certain complications	Compliance impossible as forms do not exist; abortions effectively prohibited.
Section 26	Requires providers to submit form after every medication abortion	Compliance impossible as form does not exist; medication abortions effectively prohibited.
Section 29	Requires a report of each prescription dispensed by a pharmacy for abortion medication.	Compliance impossible as forms do not exist; medication abortions effectively prohibited.

B. Impact on Plaintiff and Plaintiff’s Patients

Given the significant criminal and civil penalties at stake, Planned Parenthood cannot risk continuing to perform abortions if the Act is given effect before the Cabinet creates the forms and other infrastructure that the Act mandates and before it is able to comply with the new tissue disposal requirements. Gibron Decl. ¶¶ 21-22. Accordingly, the Act is a de facto ban on all abortions in Kentucky. *Id.* ¶¶ 24-29. Planned Parenthood currently has patients who have

scheduled abortions as early as April 22, 2022 and will have to deny those patients care in Kentucky in the absence of injunctive relief. *Id.* ¶¶ 25-26.

Cancelling existing patients’ appointments and ceasing to provide abortion services will irreparably harm Planned Parenthood and its patients. *Id.* ¶ 27. The resulting delay may push some patients beyond the period in which medication abortion is available to them, and others beyond the period in which abortion is available at all. *Id.* ¶ 29. While some women may elect to travel to other states for abortions, not all women are able to do so. *Id.* ¶ 28.

Moreover, the Act is causing irreparable harm now given that patients must plan in advance to receive care. *Id.* The only facilities providing abortion care in Kentucky are located in Louisville. *Id.* ¶ 9. Yet, Plaintiff’s patients reside throughout the Commonwealth, and frequently must sacrifice in order to afford to travel to Louisville in addition to other sacrifices such as potential lost income from not working, potentially jeopardizing their employment and the confidentiality of their pregnancy and abortion decision by forcing disclosure to an employer or an intimate partner. *Id.* ¶ 28. Accordingly, Plaintiff seeks immediate injunctive relief.

ARGUMENT

In granting this motion, the Court must consider “(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.” *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015) (internal quotation marks omitted); *see also Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (the standard for whether to issue a temporary restraining order is the same as the preliminary injunction standard). As set forth below and in the accompanying declaration, Plaintiff readily

satisfies this standard. Plaintiff is likely to prevail on the merits because the Act is plainly unconstitutional under decades of binding and directly applicable Supreme Court and Sixth Circuit precedent; enforcement of the Act will inflict severe and irreparable harm on Plaintiff and Plaintiff's patients and will continue to do so until it is enjoined; the balance of hardships weighs decisively in Plaintiff's favor; and the public interest would be served by blocking the enforcement of this unconstitutional and harmful statute. Plaintiff accordingly seeks a temporary restraining order and/or a preliminary injunction.

I. Plaintiff Is Substantially Likely To Succeed On The Merits Of Its Claims

Plaintiff requests immediate relief because it cannot comply with the Act until the state provides the means for compliance, *i.e.*, the forms, regulations, and certification processes required under the Act, and until it has time to comply with the new tissue disposal requirements. However, the Act is immediately effective due to the emergency clause, even though there is no way for Plaintiff to comply with it, imposing an immediate and total ban on abortion throughout the Commonwealth. If Plaintiff does not stop providing constitutionally protected abortion in Kentucky, Plaintiff and its staff members risk serious penalties for noncompliance with the Act including possible felony prosecutions, jail time, fines up to a million dollars, and loss of facility and professional licenses. Plaintiff will likely succeed on the merits of its claims for violations of substantive and procedural due process, and therefore is entitled to a temporary restraining order and/or preliminary injunction to preserve the status quo—legal abortion in Kentucky—while Plaintiff's claims are adjudicated.

- A. Plaintiff is likely to succeed on the claim that the Act imposes a ban on previability abortion and is unconstitutional.

Due process protects “all fundamental rights comprised within the term liberty.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)). As set out in *Casey*, the Fourteenth Amendment protects a patient’s right to pre-viability abortion, and for this reason, regardless of any state interest asserted, a state may not constitutionally impose a pre-viability abortion ban. *Id.* at 846; *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2135, 207 L. Ed. 2d 566 (2020) (Roberts, J., concurring) (internal citations and quotations omitted) (“*Casey* reaffirmed the most central principle of *Roe v. Wade*, a woman’s right to terminate her pregnancy before viability.”). An operative ban on all abortion is a clear violation of these fundamental rights.

The Sixth Circuit has held that a law regulating abortion is valid only if it satisfies two requirements. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 524-25 (6th Cir. 2021). First, the law must be reasonably related to a legitimate state interest. Second, the law must not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. *Id.* at 524-25 (internal citations and quotations omitted). The Sixth Circuit held that “[u]nder the law of our circuit, a woman faces a substantial obstacle when she is deterred from procuring an abortion as surely as if the government has outlawed an abortion in all cases.” *Id.* at 525. Here, regardless of whether the Act serves a valid state interest, which Plaintiff does not concede,⁸ the Act, which effectively bans abortion, undeniably imposes a substantial obstacle in

⁸ Plaintiff likewise does not concede that the addition of unnecessary restrictions and regulations on top of an already burdensome regime serves any valid state interest.

the path of patients seeking access to abortion.

Therefore, Plaintiff is likely to succeed on its claim that the Act violates the liberty rights of Plaintiff's patients under the Fourteenth Amendment.

B. Plaintiff is likely to succeed on its claims that the Act violates its due process rights.

Not only does the Act violate Plaintiff's patients' due process rights, but Plaintiff is also likely to succeed on the claim that the Act violates Plaintiff's due process rights as well. The Fourteenth Amendment prohibits any state from depriving "any person of life, liberty, or property without due process of law," and protects "the individual against arbitrary action of government." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 459-60 (1989); *Meachum v. Fano*, 427 U.S. 215, 223 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). As one court explained, "any law that requires you to do something by a certain date must give you adequate time to do it; otherwise, the law would be irrational and arbitrary for compliance with it would be impossible." *Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1343 (M.D. Ala. 2002) (finding due process violation where defendants changed deadline for independent candidate registration without leaving plaintiff sufficient time to meet the deadline); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013) ("The impossibility of compliance with the statute" by abortion providers "is a compelling reason for the preliminary injunction"); *United States v. Dumas*, 94 F.3d 286, 291 n.3 (7th Cir. 1996) ("[T]he validity of a law with which it is impossible to comply may be questioned."); *Planned Parenthood of*

Tennessee & N. Mississippi v. Slatery, No. 3:20-cv-00740, [2020 WL 5797984](#), at *5 (M.D. Tenn. Sept. 29, 2020) (temporarily enjoining abortion restriction where state had up to 90 days after law’s effective date to make required materials available and had not done so when law took effect). Here, due to the inclusion of the emergency clause, the Act arbitrarily and unfairly precludes compliance, as multiple forms, processes, and programs required by the Act do not yet exist. Accordingly, Plaintiff will likely prevail on its claim that the Act violates its rights under the due process clause of the Fourteenth Amendment.

Plaintiff will likely also succeed on its claim that the Act violates its right to procedural due process. “Procedural due process protects those life, liberty, or property interests that fall within the Due Process Clause of the Fourteenth Amendment,” including “an interest in the continued operation of an existing business.” *Women’s Med. Pro. Corp. v. Baird*, [438 F.3d 595, 611](#) (6th Cir. 2006). In particular, as recognized by the Sixth Circuit in *Baird*, owners and operators of abortion clinics have a “protected property interest in the continued operation of [their] clinic[s].” *Id.* at 612. In *Baird*, an abortion clinic was ordered to cease providing abortion services due to an alleged licensing problem. The Sixth Circuit recognized the clinic operator’s interest in the continued operation of his business, and held that a cease and desist order requiring an immediate shut down without a hearing did not provide adequate procedural protections. *Baird*, [438 F.3d at 613](#).

Here, as in *Baird*, Plaintiff has a constitutionally protected property interest in the continued operation of its clinic in Kentucky, and Plaintiff may not be deprived of that interest without due process of law. Immediately upon enactment, the Act forces Plaintiff to choose between ceasing to operate its business or violating the law, under risk of felony criminal penalties. This Hobson’s choice is the result of the emergency clause that immediately obligates

Plaintiff to use obligatory forms and comply with registration requirements that simply do not exist. There is no option to “apply for a waiver or variance of the requirement[s],” like the legislation at issue in *Baird*. *Id.* at 599. Because the Act leaves Plaintiff with only one real choice—to stop providing abortions—it violates Plaintiff’s due process rights under the Fourteenth Amendment.

Plaintiff is therefore likely to succeed on the merits of its claims for due process, and this Court should temporarily enjoin the entire Act.

II. The Act Is Currently Inflicting Irreparable Harm On Plaintiff And Plaintiff’s Patients

As the Sixth Circuit has long made clear, “if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is *mandated*.” *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003) (emphasis added) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *accord Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) (internal quotation marks omitted) (“[W]hen constitutional rights are threatened or impaired, irreparable injury is presumed.”); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (same); *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (“[T]he loss of constitutional rights for even a minimal amount of time constitutes irreparable harm.”). The Act impairs a patient’s constitutional right to make “the ultimate decision to terminate her pregnancy before viability,” and therefore this Court must find irreparable harm. *Casey*, 505 U.S. at 879.

Because of the Act, Plaintiff will be forced to cancel existing appointments of all patients in need of an abortion and suspend the provision of those services on an ongoing basis. If relief is not granted urgently to restore abortion access in Kentucky, the consequences will be dire:

patients will be forced to attempt to travel out of state for care, if they are able to scrape together the resources needed, or to remain pregnant against their will, at great physical, emotional, and financial cost to them and their existing families. Compl. ¶ 60; *see also* Gibron Decl. ¶ 28 (detailing the physical, emotional, and financial harms to patients from the denial of an abortion). Because “the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences,” *Bellotti v. Baird*, 443 U.S. 622, 643 (1979), the presumption of irreparable harm applies with particular force where the threatened or impaired right is a person’s fundamental right to abortion, *see, e.g., Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014); *Van Hollen*, 738 F.3d at 795-96.

In short, from the moment it took effect, the Act has denied—and continues to deny—Kentuckians the ability to obtain an abortion at all, in violation of their constitutional rights. There can be no question that this constitutes severe and irreparable harm as a matter of law.

III. The Balance of Equities Weighs Heavily In Plaintiff’s Favor

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

On the other hand, the Commonwealth “does not have an interest in enforcing a law that is likely constitutionally infirm,” *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010), which the Act manifestly is, *Northland Fam. Plan. Clinic, Inc. v. Cox*, 487 F.3d 323, 337 (6th Cir. 2007). The Defendants will suffer no harm from being ordered

temporarily not to enforce a statute that is unconstitutional under decades of Supreme Court and Sixth Circuit precedent as abortion is a safe procedure that is already heavily regulated in Kentucky.

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

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

IV. A Temporary Restraining Order Or Injunction Is In The Public Interest

Finally, the interests of Plaintiff and the public are aligned in favor of granting immediate injunctive relief in this case. As the Sixth Circuit has made clear, “[w]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights.” *Am. Civil Liberties Union Fund of Mich.*, 796 F.3d at 649 (alteration in original) (internal quotation marks omitted); *accord Mich. State*, 833 F.3d at 669 (same); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp. (SMART)*, 698 F.3d 885, 896 (6th Cir. 2012) (“the public interest is promoted by the robust enforcement of constitutional rights”); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (same). Moreover, it is unquestionably in the public interest for the processes contemplated by this 72-page law—with significant rights at stake and threats to patient privacy—to occur in a considered way. In

contrast to the emergency clause, multiple provisions of the Act recognize the need for such consideration, allowing the Cabinet months to create the processes and forms required. The only way to ensure that Plaintiff's and Plaintiff's patients' constitutional rights are not denied is by enjoining enforcement of the Act.

V. A Bond Is Not Necessary In This Case

The court “possesses discretion over whether to require the posting of security.” *Appalachian Reg'l Healthcare, Inc. v. Coventry Health and Life Ins. Co.*, 714 F.3d 424, 431 (6th Cir. 2013) (emphasis omitted) (internal quotation marks omitted); *see also Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (affirming district court decision to require no bond “because of the strength of [the plaintiff's] case and the strong public interest involved”). This Court should use its discretion to waive the bond requirement here, where the relief sought will result in no monetary loss for Defendants. Moreover, Plaintiff is a health care provider dedicated to serving patients in low-income and underserved communities, and a bond would strain its already-limited resources. Gibron Decl. ¶ 11.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion for a temporary restraining order and/or preliminary injunction.

SIGNATURE ON FOLLOWING PAGE

Dated: April 14, 2022

s/ Michael P. Abate

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, I filed the foregoing with the Court through the Court's CM/ECF system. I further served a copy of this Motion on counsel for Defendants by email at the following addresses:

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