

NO. _____

2201-3225

EMW WOMEN'S SURGICAL CENTER,
P.S.C., on behalf of itself, its staff, and its
patients; ERNEST MARSHALL, M.D., on
behalf of himself and his patients; and
PLANNED PARENTHOOD GREAT
NORTHWEST, HAWAI'I, ALASKA,
INDIANA, AND KENTUCKY, INC., on
behalf of itself, its staff, and its patients

JEFFERSON CIRCUIT COURT
DIVISION _____ ()
JUDGE _____
JEFFERSON CIRCUIT COURT
DIVISION THREE (3)
PLAINTIFFS

v.

**VERIFIED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF**

DANIEL CAMERON, in his official
capacity as Attorney General of the
Commonwealth of Kentucky;

DEFENDANTS

SERVE: Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601
servethecommonwealth@ky.gov

ERIC FRIEDLANDER, in his official
capacity as Secretary of Kentucky's Cabinet
for Health and Family Services;

SERVE: Office of the Secretary
275 E. Main St. 5W-A
Frankfort, KY 40621
WesleyW.Duke@ky.gov

MICHAEL S. RODMAN, in his official
capacity as Executive Director of the
Kentucky Board of Medical Licensure;

SERVE: Board of Medical Licensure
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Louisville, KY 40222
kbml@ky.gov
Leanne.diakov@ky.gov

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

and

THOMAS B. WINE, in his official capacity
as Commonwealth's Attorney for the 30th
Judicial Circuit of Kentucky

SERVE: Office of the Commonwealth's Attorney
30th Judicial Circuit
514 West Liberty Street
Louisville, KY 40202
tbwine@louisvilleprosecutor.com

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PRELIMINARY STATEMENT

1. Abortion is a critical component of reproductive healthcare and crucial to the ability of Kentuckians to control their lives. Pregnancy and childbirth impact an individual's health and well-being, finances, and personal relationships. Whether to take on the health risks and responsibilities of pregnancy and parenting is a personal and consequential decision that must be left to the individual to determine for herself without governmental interference. Pregnant Kentuckians have the right to determine their own futures and make private decisions about their lives and relationships. Access to safe and legal abortion is essential to effectuating those rights.
2. Guided by their individual health, values, and circumstances, Kentuckians seek abortions for a variety of deeply personal reasons, including medical, familial, and financial concerns. Some recent Kentucky patients have shared their reasons for deciding to have an abortion, including to preserve their health, to protect their ability to care and provide for their existing children, because of financial concerns about the ability to work or go to school while pregnant or parenting, or because of complicated family circumstances. Without the ability to decide whether to continue a pregnancy, Kentuckians will lose the right to make critical decisions about their health, bodies, lives, and futures.

3. Plaintiffs are two abortion clinics and a physician who has dedicated his career to providing abortions and OB/GYN care to Kentuckians. Plaintiffs sue on behalf of themselves, their staff, and their patients, seeking declaratory and injunctive relief to prevent Defendants from enforcing the challenged laws which, collectively, eliminate access to abortion in the Commonwealth and are inflicting acute and irreparable harm on Kentuckians.

4. Plaintiffs challenge two separate Kentucky abortion bans (collectively, the “Bans”) under the Kentucky Constitution: KRS 311.772 (the “Trigger Ban”) (attached as Exhibit A) and KRS 311.7701–11 (the “Six-Week Ban”) (attached as Exhibit B). Following the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022), the threat of enforcement of the Trigger Ban is preventing the provision of *any* abortions in Kentucky except in very narrow emergency circumstances. The Six-Week Ban would make it a crime to provide an abortion after embryonic cardiac activity becomes detectable, which generally occurs around six weeks of pregnancy, as measured from the first day of the patient’s last menstrual period (“LMP”). The Six-Week Ban was previously enjoined in federal court under then-existing federal constitutional law, but with the U.S. Supreme Court’s decision in *Jackson Women’s Health*, the law will likely soon take effect.¹ As a result, absent relief from this Court, abortion will be outlawed in the Commonwealth.

5. At this moment, Plaintiffs’ patients are suffering medical, constitutional, and irreparable harm because they are denied the ability to obtain an abortion. The threat of criminal penalties from the Trigger Ban has forced Plaintiffs to cancel the appointments of patients

¹ On June 24, 2022, Plaintiffs filed a motion to dismiss the federal case without prejudice in light of the U.S. Supreme Court’s decision.

seeking this time-sensitive healthcare and, unless this Court grants a restraining order and/or temporary injunction, Plaintiffs will be forced to continue restricting their operations by turning away all patients seeking abortion in Kentucky.

6. The Bans and the irreparable harms they inflict are an affront to the health and dignity of all Kentuckians. The inability to access abortion in the Commonwealth forcibly imposes the health risks and physical burdens of continued pregnancy on all Kentuckians who would otherwise choose to access safe and legal abortion. For many individuals, the Bans will altogether foreclose the ability to access abortion, thus forcing them to carry their pregnancies to term and give birth, which carries a risk of death up to fourteen times higher than that associated with abortion. These individuals will be made to suffer the life-altering physical, emotional, and economic consequences of unexpected pregnancy, childbirth, and parenting. Others, pushed by the Bans to travel out of state for legal care, will bear the burdens both of increased health risks from being pushed later into pregnancy and of the cost and logistical difficulties of long-distance travel. The Bans will also harm those who seek to terminate their unwanted pregnancies outside a clinical setting, which could put them at medical or legal risk. The Bans harm all Kentuckians, but are an attack on Kentuckians with low incomes and Black Kentuckians in particular, as they are among the least able to readily access medical care and the most vulnerable to dying from pregnancy-related causes.

7. The Bans violate Sections One and Two of the Commonwealth's Constitution by infringing on Plaintiffs' patients' rights to privacy and self-determination. Additionally, the Trigger Ban unlawfully (i) delegates legislative power in violation of Sections 27, 28, and 29 of the Constitution, and (ii) takes effect upon the authority of an entity other than the General Assembly in violation of Section 60 of the Constitution. The Trigger Ban is also

unconstitutionally vague in violation of Section Two of the Constitution and unintelligible in violation of Sections 27, 28, and 29 of the Constitution.

8. To protect the constitutional rights of Plaintiffs and their patients, this Court must issue an emergency restraining order followed by a temporary injunction prohibiting Defendants from enforcing the Bans. In addition, this Court should declare the Bans unconstitutional and permanently enjoin their enforcement.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to Sections 109 and 112 of the Kentucky Constitution and KRS 23A.010.

10. Plaintiffs' claims for declaratory and injunctive relief are authorized by KRS 418.040, KRS 418.045, Ky. R. Civ. P. 57, Ky. R. Civ. P. 65.01, and the general legal and equitable powers of this Court.

11. Venue is appropriate in this Court pursuant to KRS 452.005 because this is a civil action that challenges the constitutionality of Kentucky statutes and that seeks declaratory and injunctive relief against individual state officials in their official capacities, and all three Plaintiffs reside in Jefferson County.

12. Pursuant to KRS 418.075(1) and KRS 452.005(3), notice of this action challenging the constitutionality of enactments of the General Assembly is being provided to the Attorney General, who is also a defendant in this action, by serving copies of the Complaint upon him.

PARTIES

Plaintiffs

13. Plaintiff EMW Women's Surgical Center, P.S.C. ("EMW") is a Kentucky corporation located in Louisville that is licensed under state law to provide abortion care. EMW has been providing reproductive healthcare, including abortion, since the 1980s. Before the U.S. Supreme Court's decision in *Jackson Women's Health*, EMW provided medication abortion up to 10 weeks LMP, and procedural abortion up to 21 weeks and 6 days LMP. EMW sues on behalf of itself, its staff, and its patients.

14. Plaintiff Ernest Marshall, M.D. ("Dr. Marshall"), is a board-certified obstetrician-gynecologist who provides abortions to patients at EMW. Dr. Marshall also owns EMW. Dr. Marshall sues on behalf of himself and his patients.

15. Plaintiff Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc., is a nonprofit organization incorporated under Washington law that operates two health centers in Kentucky, one of which, in Louisville ("Planned Parenthood Louisville"), offers abortion. Planned Parenthood Louisville provides a variety of medical services to its patients, including birth control, pregnancy testing, and sexually transmitted infection testing and treatment, and has been providing abortion in Kentucky since it became a Commonwealth-licensed abortion provider in 2020. Before the U.S. Supreme Court's decision in *Jackson Women's Health*, Planned Parenthood Louisville offered medication abortion up to 10 weeks LMP, and procedural abortion up to 13 weeks and 6 days LMP. Planned Parenthood Louisville sues on behalf of itself, its staff, and its patients.

Defendants

16. Defendant Daniel Cameron is the Attorney General of the Commonwealth of Kentucky and, as such, is the Commonwealth's chief law-enforcement officer. In his capacity as Attorney General, Defendant Cameron "may seek injunctive relief as well as civil and criminal penalties in courts of proper jurisdiction to prevent, penalize, and remedy violations of . . . KRS 311.710 to 311.830," which includes the Bans. KRS 15.241(1)(b). Defendant Cameron is likewise charged with "seek[ing] injunctive relief as well as civil and criminal penalties" against "abortion facilities" to prevent violations of the provisions of KRS Chapter 216B regarding abortion facilities or the administrative regulations promulgated in furtherance thereof. KRS 15.241(1)(a). Those regulations include the requirement that all abortion facilities ensure "compliance with . . . state . . . laws," including the Bans. 902 K.A.R. 20:360 § 5(1)(a). Additionally, Defendant Cameron may initiate or participate in criminal prosecutions for violations of the Bans at the request of, *inter alia*, the Governor, any court of the Commonwealth, or local officials. KRS 15.190; KRS 15.200. Defendant Cameron is sued in his official capacity.

17. Defendant Eric Friedlander is the secretary of the Cabinet for Health and Family Services ("the Cabinet")—an agency of the Commonwealth of Kentucky. In his capacity as secretary of the Cabinet, Defendant Friedlander is charged with, *inter alia*, oversight and licensing of abortion providers and the regulatory enforcement of those facilities. KRS 216B.0431(1); 902 KAR 20:360 § 5(1)(a). The Cabinet's regulations include the requirement that all abortion facilities ensure "compliance with . . . state . . . laws," including the Bans. 902 KAR 20:360, § 5(1)(a). Defendant Friedlander is sued in his official capacity.

18. Defendant Michael S. Rodman serves as Executive Director of the Kentucky Board of Medical Licensure ("the Board"). Defendant Rodman and the Board possess authority to pursue disciplinary action up to and including license revocation against Kentucky physicians for violating the Bans. *See* KRS 311.565; KRS 311.606. Defendant Rodman is sued in his official capacity.

19. Defendant Thomas B. Wine serves as the Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky. In this capacity, Defendant Wine has authority to enforce the Bans' criminal penalties in Jefferson County, where Plaintiffs are located. *See* KRS 15.725(1); KRS 23A.010(1). Defendant Wine is sued in his official capacity.

APPLICABLE CONSTITUTIONAL LAW

20. Section One of the Kentucky Constitution provides, in relevant part: "All men² are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. . . . Third: The right of seeking and pursuing their safety and happiness."

21. Section Two of the Kentucky Constitution provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

22. Section 27 of the Kentucky Constitution provides: "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are

² As used in the Kentucky Bill of Rights, "men" is a generic term encapsulating all people, including women. *Official Report of the Proceedings and Debates in the Convention*, 1890, Ky. Vol. I, 817-18 (discussing proposed amendment to Section 1 to change "men" to "persons" and receiving explanation that "men" is generic and applies to all, including women); *Posey v. Commonwealth*, 185 S.W.3d 170, 200 (Ky. 2006) (Scott, J., concurring in part) ("Nor did the word 'men,' in the first section of the Bill of Rights, limit the enjoyment of those Rights to males, as some might suggest.").

legislative, to one; those which are executive, to another; and those which are judicial, to another.”

23. Section 28 of the Kentucky Constitution provides: “No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”

24. Section 29 of the Kentucky Constitution provides: “The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the ‘General Assembly of the Commonwealth of Kentucky.’”

25. Section 60 of the Kentucky Constitution provides, in relevant part: “No law . . . shall be enacted to take effect upon the approval of any other authority than the General Assembly, unless otherwise expressly provided in this Constitution.”

STATUTORY FRAMEWORK

Trigger Ban

26. The Trigger Ban prohibits anyone from either knowingly “[a]dminister[ing] to, prescrib[ing] for, procur[ing] for, or sell[ing] to any pregnant woman any medicine, drug, or other substance” or knowingly “[u]s[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).

27. The Trigger Ban was enacted to “become effective immediately upon, and to the extent permitted, by 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).

28. It is unclear whether the Trigger Ban is now in effect as a result of the Supreme Court's decision in *Jackson Women's Health*, or whether it will become effective once the U.S. Supreme Court transmits a certified copy of the judgement and opinion, likely on July 19, 2022, which is 25 days from issuance of the opinion, *see* U.S. Sup. Ct. R. 45. However, Defendant Cameron has made public statements indicating that he believes the Trigger Ban is in effect.³

29. Because of the Trigger Ban's serious criminal penalties, the threat of enforcement of the Trigger Ban following the *Jackson Women's Health* decision has stopped the provision of abortion in Kentucky, except in very narrow circumstances. KRS 311.772(3)(a)(1)–(2).

30. 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.

31. Under the Trigger Ban, any person who knowingly provides an abortion to someone who is pregnant would be guilty of a Class D felony, KRS 311.772(3)(b), punishable by imprisonment of one to five years, KRS 532.060(2)(d).

Six-Week Ban

32. The Six-Week Ban requires the doctor who intends to terminate an intrauterine pregnancy to first determine whether there is embryonic or fetal cardiac activity. KRS 311.7704(1); KRS 311.7705(1). If such activity is detected, the Six-Week Ban makes it a felony to "caus[e] or abet[] the termination of" the pregnancy. KRS 311.7706(1).

³ 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>.

33. Detectable cardiac activity generally occurs around six weeks LMP, when the cells that form the basis for development of the heart later in gestation generally begin producing pulsations that are detectable by vaginal ultrasound. Many patients do not yet know they are pregnant at this early stage, and even for patients with highly regular, four-week menstrual cycles, six weeks LMP will be just two weeks after they have missed their first period. 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.

34. The Six-Week Ban has only a very limited emergency exception. It permits abortion after detection of cardiac activity only if the abortion 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). The Six-Week Ban contains no exceptions for cases of rape or incest.

35. 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). Additionally, a patient who receives an abortion may bring a civil action for violation of the Six-Week Ban. KRS 311.7709.

36. The Six-Week Ban has been temporarily enjoined since its passage 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 lawsuit without prejudice is pending before the federal court. ECF No. 92. When the court dismisses the case, the Six-Week Ban will immediately go into effect.

FACTUAL ALLEGATIONS

Pregnancy Has Significant Medical, Financial, and Personal Consequences

37. People experience their pregnancies in a range of different ways. While pregnancy can be a celebratory and joyful event for many families, even an uncomplicated pregnancy challenges the pregnant individual's entire physiology. For many, pregnancy can be a period of physical and personal distress.

38. Every pregnancy necessarily involves significant physical change. A typical pregnancy lasts roughly 40 weeks. During that time, 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.

39. As a result of these changes and others, pregnant individuals are more prone to blood clots, nausea, hypertensive disorders, and anemia, among other complications. Many of these complications are mild and resolve without the need for medical intervention. Some, however, require evaluation and occasionally urgent or emergent care to preserve the patient's health or save their life.

40. Pregnancy may aggravate preexisting health conditions such as hypertension and other cardiac disease, diabetes, kidney disease, autoimmune disorders, obesity, asthma, and other pulmonary disease.

41. Other health conditions such as preeclampsia, deep-vein thrombosis, gestational diabetes, and cardiomyopathy may arise for the first time during pregnancy. Patients who develop certain pregnancy-induced medical conditions are at a higher risk of developing the same condition in a subsequent pregnancy.

42. Patients face mental health risks as well. For example, mental health is a contributing factor to almost 40% of maternal deaths in Kentucky.⁴ Additionally, approximately 15% of patients suffer from post-partum depression, which if left untreated can lead to guilt, anxiety, suicidal ideation, and inability to care for oneself and/or for the baby.

43. Pregnancy also increases the risk of intimate partner violence, with the severity sometimes escalating during or after pregnancy. Homicide has been reported as a leading cause of maternal mortality, the majority caused by an intimate partner.⁵

44. Separate from pregnancy, childbirth itself is a significant medical event. 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.

45. People who undergo labor and delivery can experience other unexpected adverse events such as infection or hemorrhage.

46. Vaginal delivery can lead to injury, including pelvic floor injury, such as tearing of the perineum, which is painful and requires time to heal. More extensive tears can lead to problems with a patient's bowel and bladder function

47. A substantial proportion of deliveries now occur by cesarean section (C-Section), abdominal surgery requiring hospitalization for at least a few days. While common, C-sections carry risks of hemorrhage, infection, damage to surrounding organs, and in some cases hysterectomy.

⁴ Ky. Dept. for Pub. Health, Maternal Mortality Review: 2020 Annual Report at 10 (2020), <https://chfs.ky.gov/agencies/dph/dmch/Documents/MMRAnnualReport.pdf>.

⁵ Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 518: Intimate Partner Violence* (Feb. 2012), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2012/02/intimate-partner-violence>.

48. Pregnancy and childbirth are expensive. Pregnancy-related healthcare and childbirth are some of the costliest hospital-based health services, particularly for complicated or higher-risk pregnancies. These expenses are not always covered by insurance, so even insured patients may pay for significant labor and delivery costs out of pocket.

49. 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. 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.

50. 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.⁶ This unfortunate trend is occurring in Kentucky, with experts identifying a “startling increase” in maternal deaths between 2014 and 2018.⁷

51. Kentuckians face one of the highest pregnancy-related death rates in the nation,⁸ and pregnancy is more than twice as deadly for Black Kentuckians as it is for white Kentuckians.⁹ As the Kentucky Department for Public Health has recognized, the Commonwealth could do a great deal to drive down these regrettable statistics and save lives: indeed “78% of [Kentucky’s] maternal mortality cases were deemed to be preventable.”¹⁰

⁶ Ctrs. for Disease Control & Prevention, *Pregnancy Mortality Surveillance System*, <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> (last updated Apr. 13, 2022).

⁷ Ky. Dept. for Pub. Health, *supra* note 4, at 4.

⁸ United Health Found., *America’s Health Rankings: Health of Women and Children Report 34* (2021), <https://assets.americashealthrankings.org/app/uploads/state-summaries-healthofwomenandchildren-2021.pdf> (rate of 37.7 maternal deaths per 100,000 live births in Kentucky as compared to 20.1 nationwide).

⁹ Ky. Dept. for Pub. Health, *supra* note 4, at 5.

¹⁰ *Id.* at 2.

52. 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. Many Kentuckians lack basic legal protections against pregnancy discrimination, or paid or even unpaid leave for pregnancy-related medical reasons, labor and delivery, and recovery. Kentuckians whose primary responsibilities include unpaid work, such as caring for young children or elderly or disabled loved ones, have no safety net at all for pregnancy and childbirth.

53. Given the impact of pregnancy and childbirth on a person's health and well-being, finances, and personal relationships, whether to become or remain pregnant is one of the most personal and consequential decisions a person will make in their lifetime. Certainly, many people decide that adding a child to their family is well worth all of these risks and consequences. But if abortion is unavailable in the Commonwealth, thousands of Kentuckians will be forced to assume those risks involuntarily.

Abortion Is Safe, Common, and Essential Healthcare

54. Legal abortion is one of the safest procedures in contemporary medical practice in the United States. A Committee of the National Academies of Sciences, Engineering, and Medicine previously 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.¹¹

¹¹ Nat'l Acad. Of Scis., Eng'g & Med., *The Safety & Quality of Abortion Care in the United States* 77, 161–62 (2018), <https://nap.nationalacademies.org/catalog/24950/the-safety-and-quality-of-abortion-care-in-the-united-states>.

55. In Kentucky in 2020, over 99% of abortions in the Commonwealth 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.¹²

56. Abortion entails significantly less medical risk than carrying a pregnancy to term and giving birth. Overall, the risk of death from carrying a pregnancy to term is up to fourteen times higher than that from having an abortion, and every pregnancy-related complication is more common among people giving birth than among those having abortions.¹³

57. There are two primary methods of abortion: medication abortion and procedural abortion. Both methods are safe and effective in terminating a pregnancy.

58. Medication abortion involves a combination of two medications, mifepristone and misoprostol, which expel the contents of the uterus in a manner similar to a miscarriage. The passing of the pregnancy takes place after the patient has left the clinic, in a location of their choosing, typically their own home.

59. Procedural abortion involves the use of gentle suction, and in some instances, other instruments, to empty the contents of the patient's uterus. Even though procedural abortions are sometimes referred to as "surgical abortions," it is not what is commonly understood to be "surgery" because it involves no incisions.

60. Abortion is common: Approximately one in four women in this country will have an abortion by age forty-five.

61. Nationwide, a majority of women having abortions (61%) already have at least one child, while most (66%) also plan to have a child or additional children in the future.

¹² Office of Vital Stat., Ky. Dept. for Pub. Health, Kentucky Annual Abortion Report for 2020, at 12.

¹³ Elizabeth G. Raymond & David A. Grimes, The Comparative Safety of Legal Induced Abortion and Childbirth in the United States, 119 *Obstetrics & Gynecology* 215, 216–17 (2012).

Likewise, in Kentucky, approximately 66% of abortion patients in 2020 already had at least one child.¹⁴

62. Three-quarters of U.S. abortion patients have low incomes, with nearly half living below the federal poverty level.

63. In the United States, more than 60% of abortion patients are people of color, including 28% who are Black.¹⁵ In Kentucky, nearly 35% of abortion patients identified as Black in 2020, despite comprising only around 9% of the Commonwealth's population.

64. Plaintiffs EMW and Planned Parenthood Louisville are the only two outpatient healthcare centers in Kentucky that are licensed to provide abortion care. Both are located in Louisville. In 2020, Plaintiffs provided 99.7% of all abortions in the Commonwealth.¹⁶

65. Prior to the threat of enforcement of the Trigger Ban, Plaintiff EMW offered abortion through 21 weeks and 6 days of pregnancy and Plaintiff Planned Parenthood Louisville offered abortion up to 13 weeks and 6 days of pregnancy.

66. For the past several years, Plaintiffs have collectively provided abortions to around 3,000 to 4,000 patients per year.¹⁷

67. Like in the United States as a whole, approximately half of all abortions in Kentucky are medication abortions, and the other half are procedural abortions.

¹⁴ See Office of Vital Stat., *supra* note 12, at 9.

¹⁵ Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, at 5 (May 2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

¹⁶ Office of Vital Stat., *supra* note 12, at 2.

¹⁷ See *id.*; Office of Vital Stat., Ky. Dept. for Pub. Health, Kentucky Annual Abortion Report for 2019, at 2; Office of Vital Stat., Ky. Dept. for Pub. Health, Kentucky Annual Abortion Report for 2018, at 2; Office of Vital Stat., Ky. Dept. for Pub. Health, Kentucky Annual Abortion Report for 2017, at 2.

68. In 2020, only 4% of abortions in Kentucky occurred prior to six weeks of pregnancy, while 28% occurred in the sixth week when cardiac activity typically becomes detectable and the remaining 68% of abortions occurred after six weeks LMP.¹⁸

**Lack of Access to Abortion in the Commonwealth
Harms Pregnant Kentuckians and Their Families**

69. Kentuckians need access to safe and legal abortion in the Commonwealth in order to exercise autonomy over their lives and to engage fully and equally in society. Everyone who can become pregnant has a right to determine their own future and to make decisions about their relationships and life opportunities without government interference that puts their health and well-being at risk.

70. When individuals seek but are unable to access abortion, they are forced to take on the health risks, physical burdens, and other life-altering consequences of continued pregnancy and childbirth, outlined *supra* ¶¶ 37–53.

71. Further, those who are forced to give birth and add a child to their household when they were not prepared to do so face wide-reaching economic and family consequences.

72. The costs related to parenting a child resulting from an unexpected pregnancy could have severe negative impacts on an individual and her family's well-being. For example, those who seek but are denied an abortion often face years of economic hardship and financial insecurity, as compared with those who were able to access abortion.

73. 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,

¹⁸ See Office of Vital Stat., *supra* note 12, at 7.

which may have significant impacts on the children's lifelong educational and economic outcomes.

74. Families affected by abortion denial may also be more prone to experiencing violence at home. For example, individuals who sought but were unable to access abortion have been found to be more likely to experience physical violence from the man involved in the pregnancy, even years after being denied the wanted abortion.

75. Some Kentuckians who seek but are unable to access abortion in the Commonwealth will attempt to travel to access this healthcare in another state. Even for those who are able to find the time and resources to travel, not being able to access abortion in Kentucky causes significant harm.

76. 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 and by pushing the procedure later in pregnancy, when there is a higher risk of complications and when a more complex and expensive procedure may be required.

77. Kentuckians forced to travel will be exposed to these risks and burdens due to delays associated with accessing abortion in another state, including from the need to raise additional funds, make travel arrangements, and the time it takes to travel.

78. Given the U.S. Supreme Court's recent decision finding no federal constitutional right to abortion, 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 from out-of-state patients. As a result, Kentuckians will both have to travel longer distances and wait longer for an available appointment.

79. 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—including travel expenses, finding childcare, and arranging time off work or school— will make it impossible to obtain the desired abortion at all.

80. Some Kentuckians who are denied clinical care because of the Bans may attempt to end their pregnancies on their own, outside the medical system. 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. 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. 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.

The Bans are Causing Irreparable Harm

81. At this moment, Plaintiffs' patients are suffering medical, constitutional, and irreparable harm as a result of being denied the ability to obtain an abortion.

82. Those in need of abortion services are currently unable to access care in the Commonwealth. The threat of criminal penalties from the Trigger Ban has forced Plaintiffs to cancel the appointments of patients seeking this time-sensitive healthcare, and, unless this Court grants relief, will force Plaintiffs to continue turning away all patients seeking abortion.

83. In addition, in the near future when the federal court lifts the injunction currently preventing enforcement of the Six-Week Ban, the threat of additional criminal penalties from

that Ban will similarly force Plaintiffs to turn away patients seeking abortion at or after approximately six weeks, even if the Trigger Ban is enjoined.

84. The inability to access abortion in Kentucky causes irreparable harm to Plaintiffs' patients, including by forcibly imposing the physical burdens and health risks of continued pregnancy and childbirth. 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, economic, and family consequences of unexpected pregnancy and childbirth. These consequences can be particularly acute for patients who are pregnant as a result of rape, experiencing domestic violence, or facing fetal diagnoses incompatible with sustained life after birth.

85. Kentuckians experiencing pregnancy risks or complications that may seriously and permanently impair their health, but in a way that does not meet the Bans' limited emergency exceptions, will be forced to remain pregnant and suffer serious and potentially life-long harms to their health. 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. This is already happening in Texas, where emergency room physicians are afraid to terminate patients' pregnancies because they fear being sued for violating Texas's law banning abortion at roughly six weeks LMP.¹⁹

86. Even those patients who may be able to arrange for out-of-state abortions will suffer the harms associated with the delay, expense, and additional burdens of long-distance

¹⁹ For example, despite the Texas law having an emergency exception, one woman reported that after her membranes ruptured at 19 weeks—putting her at risk of life-threatening infection or hemorrhage—her doctors sent her via plane to Colorado rather than risk the potential legal consequences of terminating her pregnancy in Texas. Sarah McCammon & Lauren Hodges, *Doctors' Worst Fears About the Texas Abortion Law Are Coming True*, NPR News (Feb. 28, 2022), <https://www.wbur.org/npr/1083536401/texas-abortion-law-6-months>.

travel, as well as the increased medical risk that comes with delaying care until later in pregnancy.

87. Still other Kentuckians who are denied clinical care due to the Bans may attempt to end their pregnancies on their own, outside the medical system, which may entail legal and/or medical risks that could jeopardize their lives, health, safety, and welfare.

88. In addition to the irreparable harms outlined above, Plaintiffs and Plaintiffs' patients are also suffering the irreparable harm that results from the violation of their constitutional rights.

89. Plaintiffs and Plaintiffs' patients have no adequate remedy at law.

90. Absent an injunction, the Bans provide Plaintiffs no choice but to continue turning away patients in need of abortion in Kentucky, which harms all patients' health and well-being.

CLAIMS FOR RELIEF

Count I:

Violation of Kentucky Constitution §§ 1 & 2 (Right to Privacy) – Trigger Ban

91. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

92. The guarantees of individual liberty provided in Sections One and Two of the Kentucky Constitution, *see* Ky. Const. §§ 1(1), 1(3) & 2, protect the right to privacy.

93. The constitutional right to privacy protects against the intrusive police power of the state, putting personal and private decision-making related to sexual and reproductive matters beyond the reach of the state. The right to privacy thus protects the right of a pregnant individual to access abortion if they decide to terminate their pregnancy.

94. The right to privacy is a fundamental liberty and inalienable right to which strict scrutiny applies. To survive strict scrutiny, the government must prove that the challenged action furthers a compelling governmental interest that is narrowly tailored to that interest.

95. The Trigger Ban does not further any compelling governmental interest. Even if it did, the law is not narrowly tailored.

96. By imposing a total prohibition on abortion, the Trigger Ban infringes Kentuckians' ability to decide to terminate a pregnancy, in violation of Plaintiffs' patients' right to privacy as guaranteed by Sections One and Two of the Kentucky Constitution.

Count II:
Violation of Kentucky Constitution §§ 1 & 2 (Right to Self-Determination) – Trigger Ban

97. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

98. The guarantees of individual liberty provided in Sections One and Two of the Kentucky Constitution, *see* Ky. Const. §§ 1(1), 1(3) & 2, protect the right to self-determination and personal autonomy.

99. The constitutional right to self-determination guards every Kentuckian's ability to possess and control their own person and to determine the best course of action for themselves and their body. An individual who is required by the government to remain pregnant against her will—a significant physiological process affecting one's health for 40 weeks and culminating in childbirth—experiences interference of the highest order with her right to possess and control her own person. The right to self-determination thus protects Kentuckians' power to control whether to continue or terminate their own pregnancy.

100. The right to self-determination as protected by the constitutional right to liberty is a fundamental and inalienable right. Any statute that inhibits such a fundamental right is subject

to strict scrutiny and cannot stand unless the government can prove that the statute furthers a compelling governmental interest that is narrowly tailored to that interest.

101. The Trigger Ban does not further any compelling governmental interest. Even if it did, it is not narrowly tailored.

102. By imposing a total ban on abortion, the Trigger Ban infringes on Kentuckians' ability to decide to terminate a pregnancy, in violation of Plaintiffs' patients' right to self-determination as guaranteed by Sections One and Two of the Kentucky Constitution.

Count III:
Violation of Kentucky Constitution §§ 27, 28, & 29 (Unlawful Delegation) – Trigger Ban

103. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

104. Section 29 of the Kentucky Constitution vests legislative power in the General Assembly. Sections 27 and 28 establish and enforce the separation of powers within the Kentucky government.

105. What conduct will in the future constitute a crime or be subject to severe penalties in Kentucky is a matter for the Kentucky General Assembly to determine in view of the conditions existing when the need for such a statute arises. It is not a matter that may be delegated to the federal government.

106. The Trigger Ban does not specify a point in pregnancy when its ban on abortion becomes operative. Rather, the General Assembly left it to the U.S. Supreme Court to determine the point at which abortion becomes a crime under Kentucky law: The law's prohibition is effective "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)

107. By leaving the future delineation of what conduct constitutes a crime in Kentucky in the hands of the U.S. Supreme Court, the Trigger Ban improperly delegates the nondelegable legislative duty of the General Assembly to define the scope of Kentucky criminal law, in violation of Sections 27, 28, and 29 of the Kentucky Constitution.

Count IV:
Violation of Kentucky Constitution § 60 (Approval of Authority Other Than General Assembly) – Trigger Ban

108. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

109. Section 60 of the Kentucky Constitution provides that “No law . . . shall be enacted to *take effect* upon the approval of any authority other than the General Assembly, unless otherwise expressly provided in this Constitution” (emphasis added). This means that the General Assembly cannot make a law’s life and vitality depend upon the affirmative act of another.

110. The General Assembly did not enact the Trigger Ban to take effect upon its own authority. Instead, it enacted it to “*become* effective immediately upon, and to the extent permitted by . . . [a]ny decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973).” KRS 311.772(2)(a) (emphasis added). The General Assembly plays no role in the determination of when the Trigger Ban takes effect; its effectiveness depends upon the affirmative acts of the U.S. Supreme Court and Kentucky’s Attorney General and other prosecutors, who will take affirmative actions to begin effectuating the Trigger Ban.

111. Because the Trigger Ban takes effect only upon the approval of the authority of the United States Supreme Court and Kentucky's Attorney General, the Trigger Ban violates Section 60 of the Kentucky Constitution.

Count V:
Violation of Kentucky Constitution § 2 (Vagueness) – Trigger Ban

112. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

113. Section Two of the Kentucky Constitution provides due process rights that protect against laws so vague that a reasonable person cannot determine what conduct is prohibited.

114. The General Assembly passed the Trigger Ban in 2019, but the law would only “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).

115. The General Assembly did not specify whether “the occurrence” of a U.S. Supreme Court decision “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” means the issuance of an opinion articulating reversal of *Roe* or the transmission of a certified copy of the judgment in the case reversing *Roe*, which is what would authorize the state from which such a case originated to enforce its abortion prohibition.

116. On June 24, 2022, the U.S. Supreme Court entered judgment in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022). In that decision, the Court explicitly and entirely overruled the federal constitutional right to abortion

recognized in *Roe*. The certified copy of the Supreme Court's judgment in that case is expected to be transmitted on July 19, 2022, which is 25 days after the entry of judgment. *See* Sup. Ct. R. 45.

117. The language of the Trigger Ban leaves it unclear whether it is now in effect, or will go into effect on July 19, 2022, when the mandate issues. Because of the criminal penalties for violating the Trigger Ban, Plaintiffs have been forced to stop providing abortion entirely, even though it is not clear whether the law is actually yet in effect.

118. By imposing serious criminal and licensure penalties while failing to give Plaintiffs fair notice of whether the abortion ban takes effect before or after the Supreme Court's mandate issues, the Trigger Ban violates Plaintiffs' right to due process as guaranteed by Section Two of the Kentucky Constitution.

Count VI:
Violation of Kentucky Constitution §§ 27, 28, & 29 (Unintelligibility) – Trigger Ban

119. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

120. The Kentucky Constitution's separation of powers principles, embodied in Sections 27, 28, and 29, provide an independent constitutional protection against unintelligible laws of all kinds. This is so because courts cannot "conjecture" about the meaning of a facially unintelligible statute without "allocat[ing] to itself legislative functions." *Id.*

121. For the reasons set forth above, *supra* ¶¶ 114–17, the Trigger Ban does not intelligibly define the time at which a decision by the U.S. Supreme Court would "restor[e] to the Commonwealth of Kentucky the authority to prohibit abortion." KRS 311.772(2)(a).

122. Because it is unintelligible, the Trigger Ban cannot be enforced without violating Sections 27, 28, and 29 of the Kentucky Constitution.

Count VII:
Violation of Kentucky Constitution §§ 1 & 2 (Right to Privacy) – Six-Week Ban

123. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

124. The Kentucky Constitution protects the fundamental right to privacy, which encompasses the right to abortion. *See supra* ¶¶ 92–96.

125. Statutes impacting fundamental rights can only stand if they survive strict scrutiny. *See supra* ¶ 94. The Six-Week Ban cannot survive strict scrutiny because it does not further any compelling governmental interest and, even if it did, the law is not narrowly tailored.

126. By imposing a ban on abortion upon detection of any embryonic cardiac activity, the Six-Week Ban violates Plaintiffs' patients' right to privacy as guaranteed by Sections One and Two of the Kentucky Constitution.

Count VIII:
Violation of Kentucky Constitution §§ 1 & 2 (Right to Self-Determination) – Six-Week Ban

127. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

128. The Kentucky Constitution protects the fundamental right to self-determination, which encompasses the right to abortion. *See supra* ¶¶ 98–102.

129. Statutes impacting fundamental rights must be reviewed under strict scrutiny. *See supra* ¶ 100. The Six-Week Ban cannot survive strict scrutiny because it does not further any compelling governmental interest and, even if it did, the law is not narrowly tailored.

130. By imposing a ban on abortion upon detection of any embryonic cardiac activity, the Six-Week Ban violates Plaintiffs' patients' right to self-determination as guaranteed by Sections One and Two of the Kentucky Constitution.

Count IX:
Claim for Injunctive Relief Against Defendants (All Claims)

131. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

132. Plaintiffs' claims for injunctive relief are authorized by Kentucky Rule of Civil Procedure 65.

133. As described *supra* in Counts I to VIII, the Trigger Ban and Six-Week Ban are violating the constitutional rights of Plaintiffs and their patients.

134. Plaintiffs and their patients are suffering, and will continue to suffer, immediate and irreparable injury in the absence of injunctive relief preventing Defendants from enforcing the Bans.

135. Plaintiffs have no adequate remedy at law or otherwise to address this injury, save in a court of equity.

136. The balance of the equities weighs in favor of granting injunctive relief because an injunction would restore the status quo, and serve the public interest in protecting public health and stopping constitutional violations.

137. Plaintiffs have presented a substantial question as to the merits of their claims.

138. Plaintiffs are entitled to injunctive relief, both temporary and permanent, restraining and enjoining Defendants and their agents, attorneys, representatives, and any other person in active concert or participation with them, from enforcing the Bans.

139. No court has refused a previous application for a restraining order or injunction in this matter.

Count X:
Claim for Declaratory Judgment (All Claims)

140. The allegations in each of the foregoing paragraphs are incorporated as though fully set forth herein.

141. Plaintiffs' claims for declaratory relief are authorized by Kentucky Rule of Civil Procedure 57 and KRS 418.040–45.

142. This is an actual and justiciable controversy with respect to the constitutionality of the Trigger Ban and Six-Week Ban.

143. The Bans violate the Kentucky Constitution, as described *supra* in Counts I to VIII.

144. Plaintiffs therefore are entitled to a declaratory judgment that the Bans violate the Kentucky Constitution and are void pursuant to Section 26 of the Kentucky Bill of Rights. Ky. Const. § 26 (“[A]ll laws ... contrary to this Constitution, shall be void.”).

145. The court may order a speedy hearing of an action for declaratory judgment. Ky. R. Civ. P. 57.

PRAYER FOR RELIEF

Accordingly, Plaintiffs respectfully request the Court grant the following relief:

- a. Declare the Trigger Ban, KRS 311.772, and the Six-Week Ban, KRS 311.7701–11, unconstitutional and unenforceable.
- b. Enjoin Defendants, their employees, agents, and successors in office from enforcing the Trigger Ban and Six-Week Ban.
- c. Grant Plaintiffs costs herein expended.
- d. Grant such other and further relief as this Court may deem just, proper, and equitable.

DATE: June 27, 2022

Respectfully submitted,


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**pro hac vice motions forthcoming*

VERIFICATION

I, Ernest Marshall, as an abortion provider at and owner of EMW Women's Surgical Center, P.S.C., verify that the foregoing facts are true and accurate to the best of my knowledge, information, and belief.

Ernest Marshall, M.D.
Ernest Marshall, M.D.

COMMONWEALTH OF KENTUCKY)

COUNTY OF JEFFERSON)

Subscribed, sworn, and acknowledged before me by Ernest Marshall on this
21st day of June, 2022.

Tracy Martin Wray
NOTARY PUBLIC

My commission expires:

Oct 6, 2025

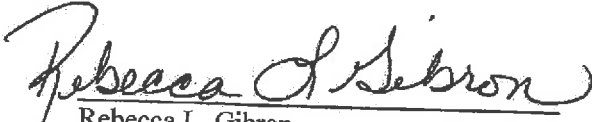
Commission number:

KYNP35554



VERIFICATION

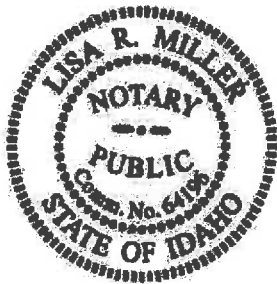
I, Rebecca L. Gibron, as Acting CEO of Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc., verify that the foregoing facts related to Plaintiff Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana and Kentucky, Inc., are true and accurate to the best of my knowledge, information, and belief.


Rebecca L. Gibron

State of Idaho)

County of Ada)

Subscribed, sworn, and acknowledged before me by Rebecca L. Gibron on this 27th
day of June, 2022.




NOTARY PUBLIC

My commission expires: 9/3/26

Commission number: 64196

Exhibit A

311.772 Prohibition against intentional termination of life of an unborn human being -- Definitions -- When section takes effect -- Penalties not to apply to pregnant woman -- Contraception -- Appropriation of Medicaid funds.

- (1) As used in this section:
 - (a) "Fertilization" means that point in time when a male human sperm penetrates the zona pellucida of a female human ovum;
 - (b) "Pregnant" means the human female reproductive condition of having a living unborn human being within her body throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth; and
 - (c) "Unborn human being" means an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth.
- (2) The provisions of this section shall become effective immediately upon, and to the extent permitted, by the occurrence of any of the following circumstances:
 - (a) Any 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; or
 - (b) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the Commonwealth of Kentucky the authority to prohibit abortion.
- (3)
 - (a) No person may knowingly:
 1. Administer to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being; or
 2. Use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.
 - (b) Any person who violates paragraph (a) of this subsection shall be guilty of a Class D felony.
- (4) The following shall not be a violation of subsection (3) of this section:
 - (a) For a licensed physician to perform a medical procedure necessary in reasonable medical judgment 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. However, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of the unborn human being in a manner consistent with reasonable medical practice; or
 - (b) Medical treatment provided to the mother by a licensed physician which results in the accidental or unintentional injury or death to the unborn human being.
- (5) Nothing in this section may be construed to subject the pregnant mother upon

whom any abortion is performed or attempted to any criminal conviction and penalty.

- (6) Nothing in this section may be construed to prohibit the sale, use, prescription, or administration of a contraceptive measure, drug, or chemical, if it is administered prior to the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure is sold, used, prescribed, or administered in accordance with manufacturer instructions.
- (7) The provisions of this section shall be effective relative to the appropriation of Medicaid funds, to the extent consistent with any executive order by the President of the United States, federal statute, appropriation rider, or federal regulation that sets forth the limited circumstances in which states must fund abortion to remain eligible to receive federal Medicaid funds pursuant to 42 U.S.C. secs. 1396 et seq.

Effective: June 27, 2019

History: Created 2019 Ky. Acts ch. 152, sec. 1, effective June 27, 2019.

Legislative Research Commission Note (6/27/2019). 2019 Ky. Acts ch. 152, sec. 2 provides that 2019 Ky. Acts ch. 152 may be cited as the "Human Life Protection Act." This statute was created in Section 1 of that Act.

Exhibit B

311.7701 Definitions for KRS 311.7701 to 311.7711.

As used in KRS 311.7701 to 311.7711:

- (1) "Conception" means fertilization;
- (2) "Contraceptive" means a drug, device, or chemical that prevents conception;
- (3) "Fertilization" has the same meaning as in KRS 311.781;
- (4) "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac;
- (5) "Fetus" means the human offspring developing during pregnancy from the moment of conception and includes the embryonic stage of development;
- (6) "Frivolous conduct" has the same meaning as in KRS 311.784;
- (7) "Gestational age" means the age of an unborn human individual as calculated from the first day of the last menstrual period of a pregnant woman;
- (8) "Gestational sac" means the structure that comprises the extraembryonic membranes that envelop the fetus and that is typically visible by ultrasound after the fourth week of pregnancy;
- (9) "Intrauterine pregnancy" means a pregnancy in which the fetus is attached to the placenta within the uterus of the pregnant woman;
- (10) "Medical emergency" has the same meaning as in KRS 311.781;
- (11) "Physician" has the same meaning as in KRS 311.720;
- (12) "Pregnancy" means the human female reproductive condition that begins with fertilization, when the woman is carrying the developing human offspring, and that is calculated from the first day of the last menstrual period of the woman;
- (13) "Serious risk of the substantial and irreversible impairment of a major bodily function" has the same meaning as in KRS 311.781;
- (14) "Spontaneous miscarriage" means the natural or accidental termination of a pregnancy and the expulsion of the fetus, typically caused by genetic defects in the fetus or physical abnormalities in the pregnant woman;
- (15) "Standard medical practice" means the degree of skill, care, and diligence that a physician of the same medical specialty would employ in like circumstances. As applied to the method used to determine the presence of a fetal heartbeat for purposes of KRS 311.7704, "standard medical practice" includes employing the appropriate means of detection depending on the estimated gestational age of the fetus and the condition of the woman and her pregnancy; and
- (16) "Unborn child" and "unborn human individual" have the same meaning as "unborn child" has in KRS 311.781.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 1, effective March 15, 2019.

311.7702 Findings and declarations.

The General Assembly finds and declares, according to contemporary medical research, all of the following:

- (1) As many as thirty percent (30%) of natural pregnancies end in spontaneous miscarriage;
- (2) Less than five percent (5%) of all natural pregnancies end in spontaneous miscarriage after detection of fetal cardiac activity;
- (3) Over ninety percent (90%) of intrauterine pregnancies survive the first trimester if cardiac activity is detected in the gestational sac;
- (4) Nearly ninety percent (90%) of in vitro pregnancies do not survive the first trimester where cardiac activity is not detected in the gestational sac;
- (5) Fetal heartbeat, therefore, has become a key medical predictor that an unborn human individual will reach live birth;
- (6) Cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;
- (7) The Commonwealth of Kentucky has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of an unborn human individual who may be born; and
- (8) In order to make an informed choice about whether to continue her pregnancy, the pregnant woman has a legitimate interest in knowing the likelihood of the fetus surviving to full-term birth based upon the presence of cardiac activity.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 2, effective March 15, 2019.

311.7703 Application of KRS 311.7704, 311.7705, and 311.7706.

KRS 311.7704, 311.7705, and 311.7706 apply only to intrauterine pregnancies.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 3, effective March 15, 2019.

311.7704 Determination of fetal heartbeat -- Medical records -- Option to view or hear heartbeat -- Administrative regulations -- Persons not in violation.

- (1)
 - (a) A person who intends to perform or induce an abortion on a pregnant woman shall determine whether there is a detectable fetal heartbeat of the unborn human individual the pregnant woman is carrying. The method of determining the presence of a fetal heartbeat shall be consistent with the person's good-faith understanding of standard medical practice, provided that if administrative regulations have been promulgated under subsection (2) of this section, the method chosen shall be one that is consistent with the regulations.
 - (b) The person who determines the presence or absence of a fetal heartbeat shall record in the pregnant woman's medical record the estimated gestational age of the unborn human individual, the method used to test for a fetal heartbeat, the date and time of the test, and the results of the test.
 - (c) The person who performs the examination for the presence of a fetal heartbeat shall give the pregnant woman the option to view or hear the fetal heartbeat.
- (2) The secretary of the Cabinet for Health and Family Services may promulgate administrative regulations specifying the appropriate methods of performing an examination for the purpose of determining the presence of a fetal heartbeat of an unborn human individual based on standard medical practice. The regulations shall require only that an examination shall be performed externally.
- (3) A person is not in violation of subsection (1) or (2) of this section if:
 - (a) The person has performed an examination for the purpose of determining the presence of a fetal heartbeat of an unborn human individual utilizing standard medical practice;
 - (b) The examination does not reveal a fetal heartbeat or the person has been informed by a physician who has performed the examination for a fetal heartbeat that the examination did not reveal a fetal heartbeat; and
 - (c) The person notes in the pregnant woman's medical records the procedure utilized to detect the presence of a fetal heartbeat.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 4, effective March 15, 2019.

311.7705 Prohibition against performing or inducing abortion before determining whether fetal heartbeat exists -- Exceptions -- Written notation -- Persons not in violation.

- (1) Except as provided in subsection (2) of this section, no person shall intentionally perform or induce an abortion on a pregnant woman before determining in accordance with KRS 311.7704(1) whether the unborn human individual the pregnant woman is carrying has a detectable fetal heartbeat.
- (2)
 - (a) Subsection (1) of this section shall not apply to a physician who performs or induces the abortion if the physician believes that a medical emergency exists that prevents compliance with subsection (1) of this section.
 - (b) A physician who performs or induces an abortion on a pregnant woman based on the exception in paragraph (a) of this subsection shall make written notations in the pregnant woman's medical records of both of the following:
 1. The physician's belief that a medical emergency necessitating the abortion existed; and
 2. The medical condition of the pregnant woman that prevented compliance with subsection (1) of this section.The physician shall maintain a copy of the notations in the physician's own records for at least seven (7) years from the date the notations were made.
- (3) A person is not in violation of subsection (1) of this section if the person acts in accordance with KRS 311.7704(1) and the method used to determine the presence of a fetal heartbeat does not reveal a fetal heartbeat.
- (4) A pregnant woman on whom an abortion is intentionally performed or induced in violation of subsection (1) of this section is not guilty of violating subsection (1) of this section or of attempting to commit, conspiring to commit, or complicity in committing a violation of subsection (1) of this section. In addition, the pregnant woman is not subject to a civil penalty based on the abortion being performed or induced in violation of subsection (1) of this section.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 5, effective March 15, 2019.

311.7706 Prohibition against performing or inducing abortion if fetal heartbeat detected -- Exceptions -- Written declaration -- Persons not in violation.

- (1) Except as provided in subsection (2) of this section, no person shall intentionally perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has been detected in accordance with KRS 311.7704(1).
- (2)
 - (a) Subsection (1) of this section shall not apply to a physician who performs a medical procedure that, in the physician's reasonable medical judgment, is designed or intended to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.
 - (b) A physician who performs a medical procedure as described in paragraph (a) of this subsection shall, in writing:
 1. Declare that the medical procedure is necessary, to the best of the physician's reasonable medical judgment, to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman; and
 2. Specify the pregnant woman's medical condition that the medical procedure is asserted to address and the medical rationale for the physician's conclusion that the medical procedure is necessary to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.
 - (c) The physician shall place the written document required by paragraph (b) of this subsection in the pregnant woman's medical records. The physician shall maintain a copy of the document in the physician's own records for at least seven (7) years from the date the document is created.
- (3) A person is not in violation of subsection (1) of this section if the person acts in accordance with KRS 311.7704(1) and the method used to determine the presence of a fetal heartbeat does not reveal a fetal heartbeat.
- (4) A pregnant woman on whom an abortion is intentionally performed or induced in violation of subsection (1) of this section is not guilty of violating subsection (1) of this section or of attempting to commit, conspiring to commit, or complicity in committing a violation of subsection (1) of this section. In addition, the pregnant woman is not subject to a civil penalty based on the abortion being performed or induced in violation of subsection (1) of this section.
- (5) Subsection (1) of this section shall not repeal or limit any other provision of the Kentucky Revised Statutes that restricts or regulates the performance or inducement of an abortion by a particular method or during a particular stage of a pregnancy.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 6, effective March 15, 2019.

311.7707 Written document regarding purpose of abortion -- Retention of records.

- (1) The provisions of this section are independent of the requirements of KRS 311.7704, 311.7705, and 311.7706.
- (2) A person who performs or induces an abortion on a pregnant woman shall:
 - (a) If the reason for the abortion purported is to preserve the health of the pregnant woman, specify in a written document the medical condition that the abortion is asserted to address and the medical rationale for the person's conclusion that the abortion is necessary to address that condition; or
 - (b) If the reason for the abortion is other than to preserve the health of the pregnant woman, specify in a written document that maternal health is not the purpose of the abortion.
- (3) The person who specifies the information in the document described in subsection (2) of this section shall place the document in the pregnant woman's medical records. The person who specifies the information shall maintain a copy of the document in the person's own records for at least seven (7) years from the date the document is created.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 7, effective March 15, 2019.

311.7708 Drugs, devices, and chemicals designed for contraceptive purposes.

Nothing in KRS 311.7701 to 311.7711 prohibits the sale, use, prescription, or administration of a drug, device, or chemical that is designed for contraceptive purposes.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 8, effective March 15, 2019.

311.7709 Civil action for wrongful death of unborn child -- Damages, costs, fees -- Defense.

- (1) A woman on whom an abortion was performed or induced in violation of KRS 311.7705(1) or 311.7706(1) may file a civil action for the wrongful death of her unborn child.
- (2) A woman who prevails in an action filed under subsection (1) of this section shall receive from the person who performed or induced the abortion:
 - (a) Damages in an amount equal to ten thousand dollars (\$10,000) or an amount determined by the trier of fact after consideration of the evidence at the mother's election at any time prior to final judgment subject to the same defenses and requirements of proof, except any requirement of live birth, as would apply to a suit for the wrongful death of a child who had been born alive; and
 - (b) Court costs and reasonable attorney's fees.
- (3) A determination that KRS 311.7705(1) or 311.7706(1) is unconstitutional shall be a defense to an action filed under subsection (1) of this section alleging that the defendant violated the subsection that was determined to be unconstitutional.
- (4) If the defendant in an action filed under subsection (1) of this section prevails and:
 - (a) The court finds that the commencement of the action constitutes frivolous conduct;
 - (b) The court's finding in paragraph (a) of this subsection is not based on that court or another court determining that KRS 311.7705(1) or 311.7706(1) is unconstitutional; and
 - (c) The court finds that the defendant was adversely affected by the frivolous conduct;the court shall award reasonable attorney's fees to the defendant.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 9, effective March 15, 2019.

311.7710 Inspection of facilities to determine compliance with reporting requirements.

The Cabinet for Health and Family Services shall inspect the medical records from any facility that performs abortions to ensure that the physicians or other persons who perform abortions at that facility are in compliance with the reporting requirements under KRS 213.101. The facility shall make the medical records available for inspection to the Cabinet for Health and Family Services but shall not release any personal medical information in the medical records that is prohibited by law.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 10, effective March 15, 2019.

311.7711 Effect of court order suspending enforcement -- Application to court concerning constitutionality or injunction -- Severability.

- (1) It is the intent of the General Assembly that a court judgment or order suspending enforcement of any provision of KRS 311.7701 to 311.7711 is not to be regarded as tantamount to repeal of that provision.
- (2)
 - (a) After the issuance of a decision by the Supreme Court of the United States overruling *Roe v. Wade*, 410 U.S. 113 (1973), the issuance of any other court order or judgment restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, or the effective date of an amendment to the Constitution of the United States restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, the Attorney General may apply to the pertinent state or federal court for either or both of the following:
 1. A declaration that any one (1) or more sections specified in subsection (1) of this section are constitutional; or
 2. A judgment or order lifting an injunction against the enforcement of any one (1) or more sections specified in subsection (1) of this section.
 - (b) If the Attorney General fails to apply for the relief described in paragraph (a) of this subsection within thirty (30) days of an event described in paragraph (a) of this subsection, any Commonwealth or county attorney may apply to the appropriate state or federal court for such relief.
- (3) If any provision of KRS 311.7701 to 311.7711 is held invalid, or if the application of such provision to any person or circumstance is held invalid, the invalidity of that provision does not affect any other provisions or applications of KRS 311.7701 to 311.7711 that can be given effect without the invalid provision or application, and to this end the provisions of KRS 311.7701 to 311.7711 are severable as provided in KRS 446.090. In particular, it is the intent of the General Assembly that:
 - (a) Any invalidity or potential invalidity of a provision of KRS 311.7701 to 311.7711 is not to impair the immediate and continuing enforceability of the remaining provisions; and
 - (b) The provisions of KRS 311.7701 to 311.7711 are not to have the effect of repealing or limiting any other laws of this state, except as specified by KRS 311.7701 to 311.7711.

Effective: March 15, 2019

History: Created 2019 Ky. Acts ch. 20, sec. 11, effective March 15, 2019.