

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

EMW WOMEN’S SURGICAL CENTER,
P.S.C., on behalf of itself, its staff, and its
patients; ASHLEE BERGIN, M.D., M.P.H., on
behalf of herself and her patients; and TANYA
FRANKLIN, M.D., M.S.P.H., on behalf of
herself and her patients,

Plaintiffs,

v.

ANDREW G. BESHEAR, in his official
capacity as Attorney General of the
Commonwealth of Kentucky; SCOTT
BRINKMAN, in his official capacity as interim
Secretary of Kentucky’s Cabinet for Health and
Family Services; MICHAEL S. RODMAN, in
his official capacity as Executive Director of the
Kentucky Board of Medical Licensure; and
THOMAS B. WINE, in his official capacity as
Commonwealth’s Attorney for the 30th Judicial
Circuit of Kentucky,

Defendants.

Case No.: 3:18-CV-224-JHM

COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this complaint against the
above-named Defendants, their employees, agents and successors in office, and in support
thereof allege the following:

I. INTRODUCTION

1. This is a constitutional challenge to a profoundly harmful statute that is plainly
unconstitutional under binding Supreme Court and Sixth Circuit authority, and that is inflicting
acute and irreparable harm on Kentuckians each and every hour it remains in effect. On April
10, 2018, the Governor signed into law House Bill 454, 2018 Gen. Assemb., Reg. Sess. (Ky.

2018) (hereinafter “H.B. 454” or “the Act”), attached hereto as Exhibit A, which bans the safest and most commonly used method of abortion starting early in the second trimester, and the only method used in outpatient facilities after the earliest weeks of the second trimester, dilation and evacuation (or “D&E”). Because of the statute’s unusual and extraordinarily disruptive emergency clause (the premise of which is incontrovertibly undermined by the Governor having held the bill for ten days before signing it), it took effect instantaneously. The result is severe: It has extinguished access to abortion in Kentucky for every woman at and after 15 weeks of pregnancy.

2. At this moment, Plaintiffs’ patients are suffering medical, constitutional and irreparable harm as a result of being denied the ability to obtain an abortion at all. The Act has forced Plaintiffs to cancel the appointments of patients seeking time-sensitive and constitutionally protected health care, and will force them to continue turning patients away. That is why Plaintiffs bring this civil rights action, on behalf of themselves and their patients seeking abortions, under the U.S. Constitution and pursuant to 42 U.S.C. § 1983, to challenge the constitutionality of the Act and to seek immediate, emergent relief from this Court to enjoin its enforcement.

II. JURISDICTION AND VENUE

3. The Court has subject matter jurisdiction over Plaintiffs’ federal claims under 28 U.S.C. §§ 1331 and 1343.

4. Plaintiffs’ action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

5. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this district.

III. PLAINTIFFS

6. Plaintiff EMW Women’s Surgical Center, P.S.C. (“EMW”), a Kentucky corporation located in Jefferson County (Louisville), is the sole licensed abortion facility located in Kentucky. EMW has been providing women with reproductive health care including abortion since the 1980s. EMW sues on behalf of itself, its physicians and its patients.

7. Plaintiff Ashlee Bergin, M.D., M.P.H., is an experienced board-certified obstetrician-gynecologist who provides a range of reproductive health services, including abortions at EMW. The abortion services Dr. Bergin provides at EMW include D&E procedures banned by H.B. 454.

8. Plaintiff Tanya Franklin, M.D., M.S.P.H., is an experienced board-certified obstetrician-gynecologist who provides a range of reproductive health services, including abortions at EMW. The abortion services Dr. Franklin provides at EMW include D&E procedures banned by H.B. 454.

IV. DEFENDANTS

9. Defendant Andrew G. Beshear 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 Beshear may initiate or participate in criminal prosecutions for violations of H.B. 454 at the request of, *inter alia*, the Governor, any court of the Commonwealth, or local officials. K.R.S. §§ 15.190, 15.200. Defendant Beshear is likewise charged with seeking injunctive relief against “abortion facilities” to “prevent violations of the provisions of KRS Chapter 216B regarding abortion facilities or the administrative regulations

promulgated in furtherance thereof.” K.R.S. § 15.241. Those regulations include the requirement that all abortion facilities ensure “compliance with . . . state . . . laws,” including H.B. 454. 902 K.A.R. 20:360, § 5(1)(a). Defendant Beshear is sued in his official capacity.

10. Defendant Scott Brinkman serves as the interim secretary of the Cabinet for Health and Family Services (“the Cabinet”) – an agency of the Commonwealth of Kentucky with its principal place of business in Franklin County, Kentucky. In his capacity as interim secretary of the Cabinet, Defendant Brinkman is charged with, *inter alia*, oversight and licensing of abortion providers and the regulatory enforcement of those facilities. K.R.S. § 216B.0431(1); 902 K.A.R. 20:360, § 5(1)(a). The Cabinet’s regulations include the requirement that all abortion facilities ensure “compliance with . . . state . . . laws,” including H.B. 454. 902 K.A.R. 20:360, § 5(1)(a). Defendant Brinkman is sued in his official capacity.

11. Defendant Michael S. Rodman serves as Executive Director of the Kentucky Board of Medical Licensure (“KBML” or “the Board”), which is located in Jefferson County. Defendant Rodman and the Board possess authority to pursue disciplinary action up to and including license revocation against Kentucky physicians for violating H.B. 454, K.R.S. § 311.565; K.R.S. § 311.606. Defendant Rodman is sued in his official capacity.

12. Defendant Thomas B. Wine serves as Commonwealth’s Attorney for the 30th Judicial Circuit of Kentucky. In this capacity, Defendant Wine has authority to enforce H.B. 454’s criminal penalties in Jefferson County, where Plaintiffs are located. *See* K.R.S. § 15.725(1); K.R.S. § 23A.010(1). Defendant Wine is sued in his official capacity.

V. THE CHALLENGED STATUTE

13. H.B. 454 criminalizes the performance of an abortion that “results in bodily dismemberment, crushing or human vivisection” unless fetal demise has already occurred.

Although these are not medical terms, the definition in the statute makes clear that it prohibits a procedure referred to in the medical profession as dilation and evacuation or D&E. D&E is the safest and most commonly used method of abortion starting early in the second trimester, and the only method used in outpatient facilities after the earliest weeks of the second trimester.

14. The ban applies to all procedures performed after eleven weeks post fertilization. Act, § 1(2)(b). That is equivalent to 13 weeks as physicians measure pregnancy, from the woman's last menstrual period, or 13 weeks LMP.

15. H.B. 454 defines "bodily dismemberment, crushing or human vivisection" as follows:

A procedure in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts portions, pieces, or limbs of the unborn child from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two (2) rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, any portion, piece, or limb of the unborn child's body to cut or separate the portion, piece, or limb from the body. The term includes a procedure that is used to cause the death of an unborn child and in which suction is subsequently used to extract portions, pieces, or limbs of the unborn child after the unborn child's death[.]

Act, § 1(1)(a).

16. The only exception to the ban is "in the case of medical emergency," Act, § 1(2)(b), defined as a condition that "so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function," K.R.S. § 311.720 (9); *see* Act, § 1(1)(b).

17. Violation of the ban is a Class D felony, Act, § 2(18), subjecting a physician to punishment of up to five years' imprisonment, K.R.S. § 532.060(2)(d).

VI. FACTUAL ALLEGATIONS

Abortion in Kentucky and at EMW

18. Legal abortion is one of the safest procedures in contemporary medical practice and is substantially safer for a woman than childbirth.

19. Women seek abortions for a variety of psychological, emotional, medical, familial, economic and personal reasons. In the second trimester, women seek abortion for the same complicated personal and medical reasons as in the first trimester, but often with added complexities. These complexities include unforeseen circumstances, such as unexpected drastic changes to their medical or social situations; delay resulting from difficulties the woman experienced raising the necessary funds for the procedure and related expenses, such as travel and childcare; and diagnosis of a fetal or maternal health condition after the first trimester.

20. EMW is the only outpatient abortion facility in the Commonwealth of Kentucky.

21. EMW provides medication abortion through ten weeks LMP and surgical abortion up to twenty-one weeks and six days (21.6 weeks) LMP.

22. EMW performs hundreds of procedures using the D&E method every year.

The Act's D&E Ban and its Impact

23. H.B. 454 bans D&E, the safest and most common abortion method starting in the early second trimester, accounting for more than 95% of such abortions nationally.

24. In the first trimester of pregnancy, there are two available abortion methods. In a medication abortion, which is available only up to ten weeks, the patient ingests two medications to induce early miscarriage. In a suction abortion, which is available up to approximately 15 weeks, the clinician uses a suction device to aspirate (or empty) the patient's uterus.

25. Starting at approximately 15 weeks, Plaintiffs use a combination of suction and forceps or other instruments to remove the fetus, placenta, and uterine lining (in other words, all the products of conception) from the uterus, followed by additional suction to ensure the uterus is completely empty. Because the cervical opening is smaller than the fetus, separation or disarticulation of fetal tissue usually occurs as the physician brings the pregnancy through the cervix. The use of instruments, alone or in conjunction with suction, to empty the uterus in this manner is known as D&E.

26. D&E is safely performed as an outpatient procedure throughout the second trimester of pregnancy. The evacuation phase takes approximately 10 minutes.

27. Other than D&E, the only other medically-proven method available after the earliest weeks of the second trimester is induction abortion, where a physician uses medication to induce labor and delivery of a non-viable fetus. Induction of labor accounts for only about 5% of second-trimester procedures nationally. Induction abortions must be performed in a hospital or similar facility that has the capacity to admit and monitor a patient overnight. Induction abortions can last up to two or three days, are extremely expensive, and entail more pain, discomfort, and recovery time for the patient – similar to that of a woman giving birth – than the D&E procedure.

28. A hospital-based abortion (including an induction procedure) is available in Kentucky only in extremely rare circumstances; it is not a service that is available to most women.

29. Therefore, Kentucky women have essentially no other option but to obtain abortions in an outpatient facility, and starting early in the second trimester, D&E is the only outpatient method of abortion.

30. H.B. 454 would not impose criminal penalties for an abortion in which a physician – through a separate procedure – attempted, and succeeded in causing, fetal demise prior to the use of instruments, such as forceps, to empty the uterus.

31. Beginning at 18.0-20.0 weeks LMP, some physicians outside Kentucky attempt to induce fetal demise prior to starting an abortion procedure, generally in order to demonstrate compliance with a “partial-birth abortion ban.” This usually entails an injection of a medication called digoxin, and it increases the length, complexity and risk of the abortion without any medical benefit to the patient.

32. Published data show that use of digoxin to attempt to induce demise increases risks of nausea, vomiting, infection, and extramural delivery (delivery outside a medical setting), with no medical benefit to the patient. In addition, digoxin injections are not possible for every patient due to anatomical characteristics or medical contraindications.

33. According to the American Congress of Obstetricians and Gynecologists, “[n]o evidence currently supports the use of induced fetal demise to increase the safety of second trimester medical or surgical abortion.” Am. Coll. Obstetricians & Gynecologists Second Trimester Practice Bulletin (No. 135, June 2013).

34. Digoxin can take several hours if not longer to cause demise. As a result, the use of digoxin in the early second trimester would turn a one-day abortion procedure into a two-day procedure. This would unnecessarily prolong the procedure, require an additional, unnecessary trip to the clinic, and burden patients, many of whom are poor or low-income.

35. Even then, digoxin simply fails to cause demise in approximately 5-10% of cases. There are no published studies evaluating the safety, efficacy, or dosage of a second injection of digoxin, if the first attempt is unsuccessful.

36. There are virtually no published studies addressing the safety of digoxin prior to 18.0 weeks LMP. To attempt demise at this stage would impose unknown risks, have uncertain efficacy, and bring no medical benefit to the patient.

37. Even later in the second trimester, such attempts to cause fetal demise are a minority practice. EMW is the only outpatient facility offering D&E services in Kentucky, and physicians providing care there, including Plaintiffs, do not use digoxin at any stage in pregnancy. Indeed, many physicians, including Plaintiffs Dr. Bergin and Dr. Franklin, are not trained to use it.

38. There are no other safe and available methods of attempting to cause fetal demise in the outpatient setting. An injection of KCl (potassium chloride) directly into the fetal heart does effectively cause demise, but requires years of specialized training and hospital-grade equipment. That level of training and equipment are necessary because inadvertent injection of KCl into a patient's blood stream can put the patient into cardiac arrest.

39. Umbilical cord transection, where a clinician attempts to grasp and divide the umbilical cord to cause demise, exposes the patient to increased risk of uterine perforation, cervical injury, and bleeding, and would prolong the D&E, also increasing risks. It can also be impossible to perform because the physician cannot locate the cord. Additionally, because in many cases it is difficult, if not impossible, to grasp the cord without also grasping fetal tissue, attempts at cord transection would violate, rather than circumvent, the D&E ban.

40. Therefore, H.B. 454 imposes a criminal ban on Plaintiffs' second-trimester abortion practice starting at 15 weeks.

VII. IRREPARABLE HARM

41. Under, H.B. 454, which took immediate effect upon signing, Kentuckians in need of abortion services at and after 15 weeks LMP are unable to access care. Those women who can attempt to arrange to travel and access care out of state do so; others remain pregnant against their will.

42. For many women, the increased travel is extremely difficult, and in many cases that added burden makes it impossible to obtain an abortion. It is causing delay, forcing some women to seek abortions later in pregnancy when the procedure is more risky and more expensive, and it is preventing other women from obtaining an abortion at all. Some women who are unable to surmount the travel burdens will resort to unsafe self-abortion methods, thereby jeopardizing their lives, their health, and their family's welfare.

43. Under H.B. 454, Plaintiffs' patients are suffering irreparable harm. H.B. 454 has eliminated access to pre-viability abortion after the earliest weeks of the second trimester, harming women's health and forcing them to remain pregnant against their will.

44. Plaintiffs' patients are also suffering the irreparable harm of the resulting violation of their constitutional rights.

45. Plaintiffs' patients have no adequate remedy at law.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Fourteenth Amendment Right to Privacy)

46. The allegations of paragraphs 1 through 45 are incorporated as though fully set forth herein.

47. By banning the safest and most common method of abortion starting in the early second trimester, the Act violates Plaintiffs' patients' right to liberty and privacy as guaranteed by the due process clause of the Fourteenth Amendment to the U.S. Constitution.

SECOND CLAIM FOR RELIEF

(Fourteenth Amendment Right to Bodily Integrity)

48. The allegations of paragraphs 1 through 45 are incorporated as through fully set forth herein.

49. The Act violates Plaintiffs' patients' right to bodily integrity guaranteed by the due process clause of the Fourteenth Amendment to the U.S. Constitution.

REQUEST FOR RELIEF

Plaintiffs respectfully request the Court:

1. Declare H.B. 454 unconstitutional and unenforceable.
2. Enjoin Defendants, their employees, agents, and successors in office from enforcing H.B. 454.
3. Grant Plaintiffs reasonable attorney's fees, costs, and expenses pursuant to 42 U.S.C. § 1988; and
4. Grant such other and further relief as this Court may deem just, proper, and equitable.

Dated: April 10, 2018

Respectfully submitted,

s/Amy D. Cabbage

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**pro hac vice motions forthcoming*

Counsel for Plaintiffs

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

EMW Women's Surgical Center, P.S.C., et al.

(b) County of Residence of First Listed Plaintiff Jefferson
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
See attached.

DEFENDANTS

Andrew G. Beshear, in his official capacity as Attorney General, of the Commonwealth of Kentucky, et al.

County of Residence of First Listed Defendant Franklin

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|---------------------------------------|---------------------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input checked="" type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input checked="" type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 U.S.C. §§1983 and 1988

Brief description of cause:

Challenge to constitutionality of Ky. HB 454 (2018)

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

April 10, 2018

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

ADDENDUM TO CIVIL COVER SHEET

I.(c) PLAINTIFFS' COUNSEL

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I. DEFENDANTS

ANDREW G. BESHEAR, in his official capacity as Attorney General of the Commonwealth of Kentucky; SCOTT BRINKMAN, in his official capacity as interim Secretary of Kentucky's Cabinet for Health and Family Services; MICHAEL S. RODMAN, in his official capacity as Executive Director of the Kentucky Board of Medical Licensure; and THOMAS B. WINE, in his official capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky

EXHIBIT A

UNOFFICIAL COPY

18 RS HB 454/SCS 1

1 AN ACT relating to the human rights of unborn children and declaring an
2 emergency.

3 WHEREAS, moral and philosophical concepts of dignity hold that a human being is
4 entitled to receive ethical and humane treatment and is to be respected and valued in all
5 phases of life; and

6 WHEREAS, the Declaration of Independence recognizes the fundamental truth that
7 all people have been endowed by their Creator with certain unalienable rights, that among
8 these are life, liberty, and the pursuit of happiness; and

9 WHEREAS, the Constitution of this Commonwealth guarantees that all human
10 beings have the right of enjoying and defending their lives and liberty as well as seeking
11 and pursuing their safety and happiness; and

12 WHEREAS, the Supreme Court of the United States of America has recognized
13 that states have a legitimate interest in protecting the life of the unborn; and

14 WHEREAS, recognizing the human rights of an unborn child does not contravene
15 prior Supreme Court jurisprudence nor undermine a woman's right to self-determination
16 or bodily autonomy, but instead upholds the state's legitimate interest in protecting the
17 life of the unborn; and

18 WHEREAS, the Supreme Court has further held that the states, with a rational basis
19 to act and without creating an undue burden on women, may bar certain procedures for
20 the purpose of regulating the medical profession so as to promote respect for life,
21 including the life of the unborn. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007); and

22 WHEREAS, giving the life of the unborn equal consideration as that of the mother
23 does not create an undue burden on the mother; and

24 WHEREAS, the Commonwealth of Kentucky statutorily recognizes an unborn child
25 as a human being from conception onward, without regard to age, health, or condition of
26 dependency; and

27 WHEREAS, it is an indisputable scientific fact that by the end of ten weeks the

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18 RS HB 454/SCS 1

1 unborn child can be seen on an ultrasound to have fingers, hands, arms, toes, feet, legs,
 2 eyelids, and ears further confirming the statutory acknowledgment that the unborn child is
 3 a human being; and

4 WHEREAS, certain abortive medical procedures resulting in dismemberment,
 5 crushing, or human vivisection are brutal for unborn children in contravention of their
 6 unalienable rights that replicates past indiscretions of a disregard for the rights of others;
 7 and

8 WHEREAS, Justice Kennedy has recognized the brutality of these procedures by
 9 stating, "The fetus, in many cases, dies just as a human adult or child would: It bleeds to
 10 death as it is torn limb from limb." *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000); and

11 WHEREAS, Justice Stevens, with whom Justice Ginsburg concurred, reflected on
 12 the dichotomy of upholding the ban on partial-birth abortions but not dilation and
 13 extraction procedures by writing, "The notion that either of these two equally gruesome
 14 procedures performed at this late stage of gestation is more akin to infanticide than the
 15 other, or that the State furthers any legitimate interest by banning one but not the other, is
 16 simply irrational." *Stenberg v. Carhart*, 530 U.S. 914, 946-947 (2000); and

17 WHEREAS, past failures to uphold and respect the unalienable rights and dignity of
 18 other human beings protected by the laws of the Commonwealth and this great nation
 19 resulted in unfair and detrimental practices that still affect the lives of so many
 20 Kentuckians and Americans today;

21 NOW, THEREFORE,

22 ***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

23 ➔SECTION 1. A NEW SECTION OF KRS 311.710 TO 311.820 IS CREATED
 24 TO READ AS FOLLOWS:

25 **(1) As used in this section:**

26 **(a) "Bodily dismemberment, crushing, or human vivisection" means a**
 27 **procedure in which a person, with the purpose of causing the death of an**

UNOFFICIAL COPY

18 RS HB 454/SCS 1

1 unborn child, dismembers the living unborn child and extracts portions,
2 pieces, or limbs of the unborn child from the uterus through the use of
3 clamps, grasping forceps, tongs, scissors, or a similar instrument that,
4 through the convergence of two (2) rigid levers, slices, crushes, or grasps, or
5 performs any combination of those actions on, any portion, piece, or limb of
6 the unborn child's body to cut or separate the portion, piece, or limb from
7 the body. The term includes a procedure that is used to cause the death of
8 an unborn child and in which suction is subsequently used to extract
9 portions, pieces, or limbs of the unborn child after the unborn child's death;
10 (b) "Medical emergency" has the same meaning as in KRS 311.720;
11 (c) "Probable post-fertilization age" has the same meaning as in KRS 311.781;
12 and
13 (d) "Unborn child" has the same meaning as in KRS 311.781.
14 (2) No person shall intentionally perform or induce or attempt to perform or induce
15 an abortion on a pregnant woman:
16 (a) That will result in the bodily dismemberment, crushing, or human
17 vivisection of the unborn child; and
18 (b) When the probable post-fertilization age of the unborn child is eleven (11)
19 weeks or greater;
20 except in the case of a medical emergency.
21 (3) A pregnant woman on whom an abortion is performed or induced or attempted to
22 be performed or induced in violation of subsection (2) of this section is not guilty
23 of violating subsection (2) of this section or of attempting to commit, conspiring
24 to commit, or complicity in committing a violation of subsection (2) of this
25 section.

26 ➔Section 2. KRS 311.990 is amended to read as follows:

27 (1) Any person who violates KRS 311.250 shall be guilty of a violation.

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- 1 (2) Any college or professor thereof violating the provisions of KRS 311.300 to
2 311.350 shall be civilly liable on his bond for a sum not less than one hundred
3 dollars (\$100) nor more than one thousand dollars (\$1,000) for each violation,
4 which may be recovered by an action in the name of the Commonwealth.
- 5 (3) Any person who presents to the county clerk for the purpose of registration any
6 license which has been fraudulently obtained, or obtains any license under KRS
7 311.380 to 311.510 by false or fraudulent statement or representation, or practices
8 podiatry under a false or assumed name or falsely impersonates another practitioner
9 or former practitioner of a like or different name, or aids and abets any person in the
10 practice of podiatry within the state without conforming to the requirements of KRS
11 311.380 to 311.510, or otherwise violates or neglects to comply with any of the
12 provisions of KRS 311.380 to 311.510, shall be guilty of a Class A misdemeanor.
13 Each case of practicing podiatry in violation of the provisions of KRS 311.380 to
14 311.510 shall be considered a separate offense.
- 15 (4) Each violation of KRS 311.560 shall constitute a Class D felony.
- 16 (5) Each violation of KRS 311.590 shall constitute a Class D felony. Conviction under
17 this subsection of a holder of a license or permit shall result automatically in
18 permanent revocation of such license or permit.
- 19 (6) Conviction of willfully resisting, preventing, impeding, obstructing, threatening, or
20 interfering with the board or any of its members, or of any officer, agent, inspector,
21 or investigator of the board or the Cabinet for Health and Family Services, in the
22 administration of any of the provisions of KRS 311.550 to 311.620 shall be a Class
23 A misdemeanor.
- 24 (7) Each violation of subsection (1) of KRS 311.375 shall, for the first offense, be a
25 Class B misdemeanor, and, for each subsequent offense shall be a Class A
26 misdemeanor.
- 27 (8) Each violation of subsection (2) of KRS 311.375 shall, for the first offense, be a

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1 violation, and, for each subsequent offense, be a Class B misdemeanor.

2 (9) Each day of violation of either subsection of KRS 311.375 shall constitute a
3 separate offense.

4 (10) (a) Any person who intentionally or knowingly performs an abortion contrary to
5 the requirements of KRS 311.723(1) shall be guilty of a Class D felony; and

6 (b) Any person who intentionally, knowingly, or recklessly violates the
7 requirements of KRS 311.723(2) shall be guilty of a Class A misdemeanor.

8 (11) (a) 1. Any physician who performs a partial-birth abortion in violation of KRS
9 311.765 shall be guilty of a Class D felony. However, a physician shall
10 not be guilty of the criminal offense if the partial-birth abortion was
11 necessary to save the life of the mother whose life was endangered by a
12 physical disorder, illness, or injury.

13 2. A physician may seek a hearing before the State Board of Medical
14 Licensure on whether the physician's conduct was necessary to save the
15 life of the mother whose life was endangered by a physical disorder,
16 illness, or injury. The board's findings, decided by majority vote of a
17 quorum, shall be admissible at the trial of the physician. The board shall
18 promulgate administrative regulations to carry out the provisions of this
19 subparagraph.

20 3. Upon a motion of the physician, the court shall delay the beginning of
21 the trial for not more than thirty (30) days to permit the hearing, referred
22 to in subparagraph 2. of this paragraph, to occur.

23 (b) Any person other than a physician who performs a partial-birth abortion shall
24 not be prosecuted under this subsection but shall be prosecuted under
25 provisions of law which prohibit any person other than a physician from
26 performing any abortion.

27 (c) No penalty shall be assessed against the woman upon whom the partial-birth

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1 abortion is performed or attempted to be performed.

2 (12) Any person who intentionally performs an abortion with knowledge that, or with
3 reckless disregard as to whether, the person upon whom the abortion is to be
4 performed is an unemancipated minor, and who intentionally or knowingly fails to
5 conform to any requirement of KRS 311.732 is guilty of a Class A misdemeanor.

6 (13) Any person who negligently releases information or documents which are
7 confidential under KRS 311.732 is guilty of a Class B misdemeanor.

8 (14) Any person who performs an abortion upon a married woman either with
9 knowledge or in reckless disregard of whether KRS 311.735 applies to her and who
10 intentionally, knowingly, or recklessly fails to conform to the requirements of KRS
11 311.735 shall be guilty of a Class D felony.

12 (15) Any person convicted of violating KRS 311.750 shall be guilty of a Class B felony.

13 (16) Any person who violates KRS 311.760(2) shall be guilty of a Class D felony.

14 (17) Any person who violates KRS 311.770~~[or 311.780]~~ shall be guilty of a Class D
15 felony.

16 (18) **Except as provided in subsection (3) of Section 1 of this Act, any person who**
17 **intentionally violates Section 1 of this Act shall be guilty of a Class D felony.**

18 **(19)** A person convicted of violating KRS 311.780 shall be guilty of a Class C felony.

19 **(20)**~~[(19)]~~ Except as provided in KRS 311.782(6), any person who intentionally violates
20 KRS 311.782 shall be guilty of a Class D felony.

21 **(21)**~~[(20)]~~ Any person who violates KRS 311.783(1) shall be guilty of a Class B
22 misdemeanor.

23 **(22)**~~[(21)]~~ Any person who violates KRS 311.810 shall be guilty of a Class A
24 misdemeanor.

25 **(23)**~~[(22)]~~ Any professional medical association or society, licensed physician, or
26 hospital or hospital medical staff who shall have violated the provisions of KRS
27 311.606 shall be guilty of a Class B misdemeanor.

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1 ~~(24)~~~~(23)~~ Any administrator, officer, or employee of a publicly owned hospital or
 2 publicly owned health care facility who performs or permits the performance of
 3 abortions in violation of KRS 311.800(1) shall be guilty of a Class A misdemeanor.

4 ~~(25)~~~~(24)~~ Any person who violates KRS 311.905(3) shall be guilty of a violation.

5 ~~(26)~~~~(25)~~ Any person who violates the provisions of KRS 311.820 shall be guilty of a
 6 Class A misdemeanor.

7 ~~(27)~~~~(26)~~ (a) Any person who fails to test organs, skin, or other human tissue which is
 8 to be transplanted, or violates the confidentiality provisions required by KRS
 9 311.281, shall be guilty of a Class A misdemeanor.

10 (b) Any person who has human immunodeficiency virus infection, who knows he
 11 is infected with human immunodeficiency virus, and who has been informed
 12 that he may communicate the infection by donating organs, skin, or other
 13 human tissue who donates organs, skin, or other human tissue shall be guilty
 14 of a Class D felony.

15 ~~(28)~~~~(27)~~ Any person who sells or makes a charge for any transplantable organ shall be
 16 guilty of a Class D felony.

17 ~~(29)~~~~(28)~~ Any person who offers remuneration for any transplantable organ for use in
 18 transplantation into himself shall be fined not less than five thousand dollars
 19 (\$5,000) nor more than fifty thousand dollars (\$50,000).

20 ~~(30)~~~~(29)~~ Any person brokering the sale or transfer of any transplantable organ shall be
 21 guilty of a Class C felony.

22 ~~(31)~~~~(30)~~ Any person charging a fee associated with the transplantation of a
 23 transplantable organ in excess of the direct and indirect costs of procuring,
 24 distributing, or transplanting the transplantable organ shall be fined not less than
 25 fifty thousand dollars (\$50,000) nor more than five hundred thousand dollars
 26 (\$500,000).

27 ~~(32)~~~~(31)~~ Any hospital performing transplantable organ transplants which knowingly

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1 fails to report the possible sale, purchase, or brokering of a transplantable organ
2 shall be fined not less than ten thousand dollars (\$10,000) or more than fifty
3 thousand dollars (\$50,000).

4 ~~(33)~~~~[(32)]~~ (a) Any physician or qualified technician who violates KRS 311.727 shall
5 be fined not more than one hundred thousand dollars (\$100,000) for a first
6 offense and not more than two hundred fifty thousand dollars (\$250,000) for
7 each subsequent offense.

8 (b) In addition to the fine, the court shall report the violation of any physician, in
9 writing, to the Kentucky Board of Medical Licensure for such action and
10 discipline as the board deems appropriate.

11 ~~(34)~~~~[(33)]~~ Any person who violates KRS 311.691 shall be guilty of a Class B
12 misdemeanor for the first offense, and a Class A misdemeanor for a second or
13 subsequent offense. In addition to any other penalty imposed for that violation, the
14 board may, through the Attorney General, petition a Circuit Court to enjoin the
15 person who is violating KRS 311.691 from practicing genetic counseling in
16 violation of the requirements of KRS 311.690 to 311.700.

17 ➔Section 3. Whereas the fundamental rights of Kentuckians deserve immediate
18 protection, an emergency is declared to exist, and this Act takes effect upon its passage
19 and approval by the Governor or upon its otherwise becoming a law.

General Information

Court	United States District Court for the Western District of Kentucky; United States District Court for the Western District of Kentucky
Federal Nature of Suit	Constitutionality of State Statutes[950]
Docket Number	3:18-cv-00224