COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
Case No. 22-CI-00473

Electronically filed

THE COMMONWEALTH OF KENTUCKY,
ex rel. Attorney General Daniel Cameron

Plaintiff

v.

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

Defendant

MOTION FOR TEMPORARY INJUNCTION

The Commonwealth of Kentucky, ex rel. Attorney General Daniel Cameron, moves for a temporary injunction under CR 65. It asks this Court to "mandatorily direct" the Cabinet for Health and Family Services ("the Cabinet") to fulfill immediately its obligations under House Bill 3 ("HB 3" or "the Act"). CR 65.01. In support of this request, the Commonwealth incorporates the arguments made in its complaint and offers the following:

BACKGROUND

I. The Cabinet's Obligations under HB 3.

The General Assembly passed HB 3 on March 30, 2022. After the Governor vetoed the bill, the General Assembly overrode the veto on April 13, 2022. Due to an

emergency clause, the provisions were immediately effective. The provisions of the Act amend and add to the Commonwealth's abortion laws. Several call for action by the Cabinet.

Under HB 3, the Cabinet must "create and distribute the report forms required in Sections 1, 4, 8, 9, 25, 26, 27, and 29." 2022 HB 3 § 13(1). The Cabinet must also inform all abortion facilities, licensed physicians, and other medical entities of the reporting requirements under the law. *Id.* § 13(6). The Cabinet has said it needs to create new forms for Sections 1, 8, 9, 21, 22, 27, and 29[1], and needs to amend existing forms for Sections 4 and 26. Status Report, (Exhibit 1).

The Act also requires the Cabinet to create the new Kentucky Abortion-Inducing Drug Certification Program. 2022 HB 3 §§ 15–19. Section 15 requires the Cabinet to promulgate regulations "to create a certification program to oversee and regulate the distribution and dispensing of abortion-inducing drugs." *Id.* § 15(1). That includes establishing certification requirements for manufacturers and distributors of abortion-inducing drugs, pharmacies that dispense the drugs, and abortion facilities. *Id.* § 15. Sections 16 and 17 of HB 3 specify several additional requirements on the Cabinet related to the regulations required by Section 15, including what the Cabinet must require for certification and what the Cabinet must require of qualified physicians to be eligible to register as nonsurgical abortion providers. Relatedly, the Cabinet must develop a plan to enforce the program, *id.* § 18(1), and establish a

[1] In its Status Report, the Cabinet said it needed to create a new form for Section 28, but the description of what is required of the Cabinet makes it clear that the Cabinet is referring to Section 29.

complaint portal on its website for individuals to submit information about potential violations of the program, *id.* § 19.

Additionally, the Cabinet must design forms through administrative regulations to document certain information related to fetal remains, and promulgate administrative regulations to aid in private interment of fetal remains. *Id.* §§ 21, 22. And, the Cabinet is required to publish in printed material and on its website the statement specified in Section 12(1) and include information "for assistance in locating a medical professional who can aid in the reversal of a drug-induced abortion." *Id.* § 12(1)–(2). According to the Cabinet, this will require it to amend an existing regulation. Status Report, (Exhibit 1), at PageID.796.

HB 3 specifies that the forms referred to in Section 13 must be created and distributed within sixty days of the effective date of the Act. The effective date of HB 3 is April 13, 2022. Sixty days from April 13 (taking into account that the technical last day falls on a Sunday) is June 13, 2022. *See* KRS 446.030(1)(a). Although the Act does not set an explicit deadline for the promulgation of the administrative regulations, the Cabinet must comply within a reasonable time. *See, e.g.*, *Holliday v. Cornett*, 6 S.W.2d 497, 498 (Ky. 1928) (holding that a statute that did not provide a time limit "necessarily contemplates a reasonable length of time").

II. The Abortion Providers' Challenge to HB 3.

Abortion providers challenged HB 3 by arguing that they could not comply with various provisions until the Cabinet acted by either creating forms or promulgating regulations. *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, and*

Kentucky, Inc. v. Cameron, No. 3:22-cv-00198. A federal district court agreed, and issued first a temporary restraining order of the Act in its entirety, then a more limited temporary restraining order, and finally, a similarly limited preliminary injunction.

At every stage of injunctive relief, the district court made it clear that it was not restraining the Cabinet from taking immediate action to comply with the requirements HB 3 placed on it. *Planned Parenthood*, No. 3:22-cv-00198, 2022 WL 1183560, at *1 (W.D. Ky. April 21, 2022) ("This Order does not prevent the Cabinet from promulgating requisite regulations or creating any of the programs and forms required under HB 3."); *Planned Parenthood*, No. 3:22-cv-00198, 2022 WL 1414485, at *1 (W.D. Ky. May 4, 2022) (same); *Planned Parenthood*, No. 3:22-cv-00198, 2022 WL 1597163, at *1 (W.D. Ky. May 19, 2022) ("This Order does not prevent the Cabinet from taking any steps it considers appropriate to comply with the Kentucky Legislature's mandates."). And the Cabinet did not ask the federal district court to halt or delay its obligations under the Act (nor did any other party).

Yet, the Cabinet has failed to comply with the statutorily-imposed sixty-day deadline, and it has given no indication that it will fulfill its other obligations within a reasonable time. Instead, it has affirmatively asserted that it may not be able to comply in the absence of a specific appropriation and has indicated that any action to enforce the Cabinet's compliance with the requirements of HB 3 would be a violation

of the preliminary injunction—suggesting that the district court's preliminary injunction relieves the Cabinet of its obligation to comply with HB 3.[2] That is wrong.

The Cabinet must comply with HB 3—and it must do so now. Therefore, the Commonwealth moves for a temporary injunction to ensure that compliance.

ARGUMENT

There are three, well-recognized requirements for a temporary injunction. *Cameron v. Beshear*, 628 S.W.3d 61, 71 (Ky. 2021). First, the movant must demonstrate irreparable injury to comply with CR 65.04. *Id.* Second, the court must determine whether the complaint presents a "substantial question" on the merits. *Id.* (quoting *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978)). Third, the court should "weigh the various equities involved," including "possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Id.* The Commonwealth meets all three requirements.

I. The Commonwealth is owed a presumption of irreparable harm.

Generally, showing irreparable injury is a "mandatory prerequisite to the issuance of any injunction." *Id.* But, "[w]here the government is enforcing a statute designed to protect the public interest, it is not required to show irreparable harm to obtain injunctive relief; the statute's enactment constitutes [the legislature's] implied finding that violations will harm the public and ought, if necessary, be restrained."

[2] The Governor first included the idea of not complying in the absence of a specific appropriation in his veto message for HB 3. *See* Exhibit 2. The Cabinet then indicated it may not be able to comply for the same reason in a Status Report submitted to the federal district court, attached as Exhibit 1. In a recent response to the Office of the Attorney General's request for confirmation that the Cabinet would comply with HB 3, the Cabinet indicated any enforcement action would violate the preliminary injunction. This response and the initial letter are attached as Exhibits 3 and 4.

Boone Creek Properties, LLC v. Lexington-Fayette Urb. Cnty. Bd. of Adjustment, 442 S.W.3d 36, 40 (Ky. 2014) (quoting 42 Am.Jur.2d *Injunctions* § 147). The Kentucky Supreme Court has recognized such a presumption because of the "self-evident notion that if a governmental unit enacts a law . . . and the government cannot promptly compel compliance by enjoining an ongoing violation, the power and dignity of that governmental body is diminished." *Id*. The inability of the government to "promptly eliminate ongoing violations of laws enacted by the people's representatives . . . is injurious and harmful to the government and the community it serves." *Id*.

HB 3 is an Act relating to public health and its purpose is several-fold, including, *inter alia*, to "[p]rotect the health and welfare of every woman considering a drug-induced abortion;" "[e]nsure that a physician examines a woman prior to dispensing an abortion-inducing drug;" and "[p]romote the health and safety of women, by adding to the sum of medical and public health knowledge through the compilation of relevant data on drug-induced abortions performed in the state, as well as on all medical complications and maternal deaths resulting from these abortions[.]" 2022 HB 3 Preamble. Based on these and its other like purposes, it is clear that HB 3 is designed to protect the public interest. And any violations of it are necessarily harmful to the government and to the people of the Commonwealth. *See Cameron v. Beshear*, 628 S.W.3d at 78 (explaining that the General Assembly's enactment of a statute constitutes its finding "that the public will be harmed if the statute is not enforced," and that a trial court should not "substitute its view of the

public interest for that expressed by the General Assembly"). Irreparable harm should be presumed here.

Even if irreparable harm is not presumed, it is easily shown. The Commonwealth is irreparably injured when it cannot enforce "statutes enacted by representatives of its people." *See Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (citation omitted). In other words, its inability to enforce HB 3 does not just create a presumption of irreparable harm—it is itself irreparable harm. Furthermore, the inability to enforce HB 3 irretrievably harms the women and unborn children it was enacted to protect. For example, the provision of abortion-inducing drugs is not being fully regulated, and fetal remains are not being disposed of with dignity. Irreparable harm is met—whether presumed or not.

II. The Commonwealth's complaint presents a substantial question as to the merits.

"To satisfy the 'substantial question' prong of the temporary injunction analysis, the trial court must determine there is a 'substantial possibility' that the plaintiff 'will ultimately prevail on the merits.'" *Beshear v. Acree*, 615 S.W.3d 780, 830 (Ky. 2020) (quoting *Norsworthy v. Ky. Bd. of Med. Licensure*, 330 S.W.3d 58, 63 (Ky. 2009)). The substantial question presented in the Commonwealth's complaint is whether the Cabinet must comply with the requirements imposed on it by HB 3 in the absence of an appropriation that is specifically marked for use in complying with HB 3. It is on this question that the Commonwealth must demonstrate that there is a substantial possibility that it will ultimately prevail on the merits—and it can.

Undoubtedly, making laws is the prerogative of the General Assembly. *Acree*, 615 S.W.3d at 809. The executive branch's prerogative, on the other hand, is to "faithfully" enforce those laws. Ky. Const. § 81. Thus, when a law duly passed by the General Assembly places obligations on an executive agency, the agency does not have discretion to decline to act accordingly. Indeed, "[n]o power to suspend laws shall be exercised unless by the General Assembly or its authority." *Id.* § 15. To allow otherwise would be antithetical to the executive's duty under Section 81 of the Kentucky Constitution to faithfully execute the law. *Fletcher v. Commonwealth*, 163 S.W.3d 852, 872 (Ky. 2005).

And nothing in *Fletcher*—the only case the Cabinet has offered in support of its assertion that it may not be able to comply with HB 3 in the absence of a specific appropriation[3]—can reasonably be read to hold otherwise. In *Fletcher*, the question was whether the Governor could implement his own budget when the General Assembly failed to pass one. The Kentucky Supreme Court held that he could not because Section 230 of the Kentucky Constitution places the taxing and spending power solely within the legislative branch. *Id.* at 864–65.

Nothing in that holding suggests that the Governor or an executive agency does not need to attempt to faithfully execute the law. The Governor need not—indeed is not permitted to—pass a budget to fund a law for which the General Assembly has not appropriated funds. *Id.* at 869 ("[T]he existence of a law does not mean that it must be implemented if doing so requires the expenditure of unappropriated funds.").

[3] *See* Status Report, (Exhibit 1) at PageID.795.

That would go beyond his constitutional powers and would be to act contrary to the will of the General Assembly. But nor can he decline to try to faithfully execute the law by asserting the funding that has been appropriated is insufficient. *Id*. at 873 ("If the legislative department fails to appropriate funds deemed sufficient to operate the executive department at a desired level of services, the executive department must serve the citizenry as best it can with what it is given."). Again to do so would be to act contrary to the will of the General Assembly and it would be a failure to fulfill the constitutional duty under Section 81 of the Kentucky Constitution.

Yet, this is what the Cabinet is doing. Here, the Cabinet does not need to expend unappropriated funds to comply with HB 3. Unlike in *Fletcher*, the General Assembly has passed a budget and has already appropriated funds for the Cabinet. 2022 HB 1 § 1, Part 1, G. Presumably, this means that what the Cabinet is actually asserting is that the funds it has been appropriated are not enough to cover the work that is required by HB 3. But that argument fails. The inadequacy of the budget—perceived or real—is not a reason to fail to faithfully execute the law as required by Section 81 of the Kentucky Constitution. *See Fletcher*, 163 S.W.3d at 873 (reiterating the Governor's obligation to faithfully execute the law, even when funding may be scarce).

To allow otherwise would be to improperly allow the executive to exercise a legislative function. It would allow the Cabinet to disregard the express will of the General Assembly and substitute its own, and like when the Governor in *Fletcher* attempted to circumvent the General Assembly's will by passing his own budget, that

is impermissible. The level of funding provided to an executive agency is a policy decision that belongs to the General Assembly, and the Cabinet is obliged to fulfill its duties under HB 3 with the funds appropriated to it.

Moreover, any suggestion that the Cabinet is financially incapable of fulfilling the fairly modest obligations imposed on it by HB 3 is hardly credible given the scale of the Cabinet's budget. For the next fiscal year, the General Assembly has provided the Cabinet with general funds in excess of $10 million for "General Administration and Program Support." 2021 Ky. Acts Ch. 169, Part 1, subpart G. (Exhibit 5). And any costs that might be incurred by complying with the modest demands of HB 3 would be hardly a drop in the bucket when compared to the Cabinet's total General Fund appropriation for the current fiscal year of $2,788,557,200 from a total budget of $17,785,002,800. *Id. See also* 2021 Ky. Acts Ch. 199, Part 1, subpart G. (Exhibit 6).

Finally, to the extent the Cabinet has suggested that it cannot comply with its obligations under HB 3 because of the preliminary injunction, that argument is a *non sequitur*. As discussed above, the federal district court was abundantly clear that it was not enjoining the Cabinet from complying with HB 3. *See, e.g.,* Hearing Transcript (Exhibit 7) at PageID.724 ("And I was pretty specific, I thought, when I said that nothing in my TRO told the Cabinet to stop doing what they're supposed to do and continue on."); *Planned Parenthood*, 2022 WL 1698085, at *12 (W.D. Ky. May 26, 2022) ("The Court did not resolve any issues of state budgeting law in its Preliminary Injunction. It did not direct the Cabinet to do anything or relieve them of any obligations under Kentucky law.").

The Commonwealth has shown a substantial question on the merits.

III. The various equities involved weigh in favor of granting a temporary injunction.

Although not an exclusive list, the court in *Maupin* identified three considerations a court should weigh when determining whether to grant a temporary injunction: "possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." 575 S.W.2d at 699. Each weighs in favor of granting the Commonwealth's request for a temporary injunction. As already discussed, it is in the public interest that the temporary injunction be granted so that the Commonwealth can enforce its duly enacted law. And as to whether there will be harm to the defendant, "[c]onsidering that the General Assembly is the policy-making body for the Commonwealth, not the [Cabinet] or the courts, equitable considerations support enforcing a legislative body's policy choices," which are presumed to be constitutional. *See Cameron v. Beshear*, 628 S.W.3d at 73. And there is no harm to the Cabinet in complying with a valid law.

Finally, the weighing of equities demonstrates the temporary injunction is necessary because the Commonwealth needs more than the preservation of the status quo to have relief. The Cabinet has already missed the sixty-day deadline imposed by HB 3 for creating and distributing forms and has indicated it may not produce the administrative regulations called for in the Act. The current status quo is inaction (or at least delayed action), and the Commonwealth needs prompt action by the Cabinet according to the requirements of the Act. *See Boone Creek*, 442 S.W.3d at 40 (noting

that the government must be able to promptly "correct open violations" of the laws it passes).

And preserving the status quo is not determinative. CR 65.01 is clear that an injunction can issue to "mandatorily direct the doing of an act." And that applies to both permanent and temporary injunctions. The Commonwealth is entitled to a permanent injunction—and will prove that in due course. But until that happens, a temporary injunction is needed. Each day the Cabinet fails to fulfill its duties under HB 3, it simultaneously prevents multiple provisions from being effective. Relief cannot wait for a final adjudication on the merits before the Court directs the Cabinet to comply with its statutory duties. The Commonwealth needs temporary relief so that, at the very least, the Cabinet immediately begins or continues to fulfill its obligations. That is the only way to limit the damage caused by the Cabinet's inaction effectively suspending HB 3.

The equities weigh heavily in favor of granting the temporary injunction.

* * *

The General Assembly made a policy decision that it was in the public interest to pass HB 3 and to require the Cabinet to take actions to implement its provisions. Essential to a representative government's ability to govern and maintain order is the "ability to promptly eliminate ongoing violations of laws enacted by the people's representatives." *Boone Creek*, 442 S.W.3d at 40. Therefore, the Cabinet cannot be allowed to openly flout its obligations under the Act, missing deadlines and failing to promptly act by asserting an untenable argument that it lacks funding to comply.

This situation is one that warrants the "extraordinary remedy" of a temporary injunction to direct the Cabinet to promptly and fully comply with HB 3. *See Maupin*, 575 S.W.2d at 697, 699 ("If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded.").

CONCLUSION

The Court should grant the Commonwealth's motion for a temporary injunction compelling the Cabinet to fulfill its obligations under HB 3. The Commonwealth requests expedited review of this motion and is ready to appear at a hearing, should one be necessary, at the Court's earliest convenience.

Respectfully submitted,

Daniel Cameron
ATTORNEY GENERAL

/s/ Christopher L. Thacker
Victor B. Maddox (KBA No. 43095)
Christopher L. Thacker (KBA No. 91424)
Lindsey R. Keiser (KBA No. 99557)
Daniel J. Grabowski (KBA No. 99536)
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Victor.Maddox@ky.gov
Christopher.Thacker@ky.gov
Lindsey.Keiser@ky.gov
Daniel.Grabowski@ky.gov

Counsel for the Commonwealth of Kentucky

NOTICE

Please take notice that this motion shall be brought for hearing at Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601, at the earliest convenience of the Court.

CERTIFICATE OF SERVICE

I certify that on June 14, 2022, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system, with additional service by email to:

Eric Friedlander, Secretary
Cabinet for Health and Family Services
Office of the Secretary
275 East Main Street 5W-B
Frankfort, KY 40621-0001
eric.friedlander@ky.gov

Wesley W. Duke
Cabinet for Health and Family Services
Office of Legal Services
275 East Main Street 5W-B
Frankfort, KY 40621-0001
wesleyw.duke@ky.gov

Counsel for the Cabinet for Health and Family Services

/s/ Christopher L. Thacker
Counsel for the Commonwealth of Kentucky

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA & KENTUCKY, ET AL. Plaintiffs,

v. Civil Action No. 3:22-cv-00198-RGJ

DANIEL CAMERON, ET AL. Defendant.

STATUS REPORT

Defendant, Eric Friedlander, in his official capacity as Secretary of the Cabinet for Health and Family Services ("CHFS"), provides the following status report pursuant to the Court's Order regarding the requirements that House Bill 3 (R.S. 2022) places on CHFS regarding forms and administrative regulations. The General Assembly did not appropriate any funds to CHFS in House Bill 3, and in the absence of an appropriation these unfunded requirements may not be implemented. *See Fletcher v. Commonwealth*, 163 S.W.3d 852, 865 (Ky. 2005).

Section 1.

Requires CHFS to create a new form.

Section 4.

Requires CHFS to amend an existing reporting form that is required to be submitted to the Vital Statistics Branch within CHFS. Requires the Office of the Inspector General ("OIG") within CHFS to annually audit reporting required to be submitted to the Vital Statistics Branch under Section 4. and Section 29. of House Bill 3 and to function as the health oversight agency of the Commonwealth for this specific purpose, requires the OIG to ensure that none of the information in the required audit report could reasonably lead to the identification of certain individuals, and requires the OIG to submit a written report to the General Assembly and the Attorney General by October 1 of each year that must include certain information specifically described by Section 4.

Section 8.

Requires CHFS to create a new form regarding patient consent to be used by a qualified physician as defined in House Bill 3 and requires the new form to contain certain information specifically identified in Section 8.

Section 9.

Requires CHFS to create a new form regarding certain reporting specifically identified in Section 9. that is to be made to CHFS.

Section 12.

Requires CHFS to create and publish printed material, which will require CHFS to amend 902 KAR 4:110; requires CHFS to publish a statement specifically identified in Section 12. on its website; and requires CHFS to on an annual basis review and update the specific statement and requires the statement to include certain information specifically identified in Section 12.

Section 13.

Requires CHFS to create and distribute the report forms required in Sections 1., 4., 8., 9., 25., 26., 27. and 29. of House Bill 3 within 60 days after the effective date of the bill; requires CHFS to prepare and submit a comprehensive annual statistic report to the General Assembly based on data gathered from reports required in Sections 1., 4., 8., 9., 25., 26., 27. and 29. of House Bill 3, and requires CHFS to make the aggregated data available to the public in an electronic format; requires CHFS to provide reports required by 1., 4., 8., 9., 25., 26., 27. and 29. by the Kentucky Board of Medical Licensure, the Kentucky Board of Pharmacy, state law enforcement offices, and child protective services upon request for use in the performance of their official duties; and requires CHFS to communicate the reporting requirements in 1., 4., 8., 9., 25., 26., 27. and 29. to all medical professional organizations, licensed physicians, hospitals, emergency medical service providers, abortion facilities, ambulatory surgical facilities, pharmacies, and other healthcare facilities operating in Kentucky.

Section 15.

Requires CHFS to promulgate a new administrative regulation to create a certification program to oversee and regulate the distribution and dispensing of certain drugs identified in House Bill 3, and requires the newly-created program to include certain certification requirements specifically identified in Section 15.

Section 16.

Requires CHFS to, at a minimum, impose certain requirements for the certification specifically identified in Section 15.

Section 17.

Requires CHFS to impose certain requirements on qualified physicians as defined in House Bill 3 and requires CHFS to create a new form to comply with certain requirements specifically identified in Section 17.

Section 18.

Requires CHFS to develop a plan to enforce the certification program that House Bill 3 requires it to create, and requires that the plan include certain conditions specifically identified in Section 18.

Section 19.

Requires CHFS to develop a complaint portal on its website for patients, pharmacy, nursing, and medical professionals and the public to submit information about potential violations of the certification program that House Bill 3 requires CHFS to create; requires that certain information specifically identified in Section 19. be listed on the portal; and requires CHFS to review each complaint and determine a disposition, including referral to another state department, within 30 days.

Section 21.

Requires CHFS to create a new form for certain individuals specifically identified in Section 21. to complete to meet certain reporting requirements specifically identified in Section 21.

Section 22.

Requires CHFS to create a new form through administrative regulations that document certain information specifically identified in Section 22., which requires CHFS to promulgate new administrative regulations to design the new form that Section 22. requires CHFS to create.

Section 26.

Requires CHFS to amend an existing form to include certain information specifically identified in Section 26.

Section 27.

Requires CHFS to create a new form that must include, at a minimum, certain information specifically identified in Section 27.

Section 28.

Requires CHFS to create a new form for the reporting to the Vital Statistics Branch within CHFS of certain prescriptions specifically identified in Section 28.; and requires the new form to contain, at a minimum, certain information specifically identified in Section 28.; and requires the Vital Statistics Branch within CHFS to promulgate new administrative regulations to assist in compliances with Section 28.

Respectfully Submitted

/s/*Wesley W. Duke*
Wesley W. Duke (KBA # 88404)
General Counsel
Cabinet for Health and Family Services
Office of Legal Services
275 East Main Street 5W-B
Frankfort, KY 40621-0001
Phone: (502) 564-7042
Fax: (502) 564-7573

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2022, the above document was filed with the CM/ECF filing system, which electronically service a copy to all counsel of record.

/s/ Wesley W. Duke

COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

Andy Beshear
GOVERNOR

Capitol Building, Suite 100
700 Capitol Avenue
Frankfort, KY 40601
(502) 564-2611
Fax: (502) 564-2517

RECEIVED
APR 08 2022
House Clerk's Office

VETO MESSAGE FROM THE GOVERNOR OF THE COMMONWEALTH OF KENTUCKY REGARDING HOUSE BILL 3 OF THE 2022 REGULAR SESSION

I, Andy Beshear, Governor of the Commonwealth of Kentucky, pursuant to the authority granted under section 88 of the Kentucky Constitution, do hereby veto the following:

House Bill 3 of the 2022 Regular Session of the General Assembly in its entirety.

House Bill 3 contains no exceptions or exclusions for pregnancies caused by rape or incest. Under House Bill 3, a 12-year-old child that is raped and impregnated by her father would not have the option of a procedure without both the consent of her mother and without also notifying her rapist – her father – at least 48 hours prior to obtaining a procedure or by petitioning a circuit or district court for a hearing where this violated and hurt child would be judged as to her: credibility and demeanor as a witness; ability to accept responsibility; ability to assess both the current and future life-impacting consequences of, and alternatives to, the procedure; and ability to understand the medical risks of the procedure and to apply that understanding to her decision.

Rape and incest are violent crimes. Victims of these crimes should have options, not be further scarred through a process that exposes them to more harm from their rapists or that treats them like offenders themselves.

Furthermore, House Bill 3 is likely unconstitutional. Similar statutes in Texas and Louisiana have been ruled unconstitutional by the United States Supreme Court. Specifically, House Bill 3 requires physicians performing nonsurgical procedures to maintain hospital admitting privileges in geographical proximity to the location where the procedure is performed. The Supreme Court has ruled such requirements unconstitutional as it makes it impossible for women, including a child who is a victim of rape or incest, to obtain a procedure in certain areas of the state.

To implement House Bill 3 would require the Cabinet for Health and Family Services to, among other things, create three new full-time positions, build an electronic database to store and track a certification and complaint program, and establish additional public reporting requirements at an estimated initial cost of close to $1 million. However, the General Assembly does not appropriate any funds to the Cabinet in House Bill 3, which will result in underfunded essential programs and duties carried out by the Cabinet. The unfunded mandated also comes, meaning it

will go into effect without providing the Cabinet any resources or time to implement these changes and delaying access to legal procedures under the bill. An agency is under no obligation to carry out an unfunded mandate. In the absence of an appropriation, these unfunded statutes may not be implemented. See Fletcher v. Commonwealth, *163 S.W.3d 852, 865 (Ky. 2005).*

For these reasons, I am vetoing House Bill 3.

This, the 8th day of April, 2022.

Andy Beshear
Governor

Commonwealth of Kentucky
Office of the Attorney General

Daniel Cameron
Attorney General

Capitol Building, Suite 118
700 Capital Avenue
Frankfort, Kentucky 40601
(502) 696-5300
Fax: (502) 564-2894

May 27, 2022

Mr. Wesley Duke
General Counsel
Cabinet for Health and Family Services
275 East Main Street
Frankfort, Kentucky 40601

Re: CHFS's Obligations under House Bill 3

Dear Mr. Duke:

On April 13, 2022, the General Assembly overrode the Governor's veto of House Bill 3. Effective that same day, the law makes needed changes to Kentucky's regulation of abortion and tasks the Cabinet for Health and Family Services with implementing several of those changes. It also authorizes the Attorney General to enforce compliance with the law. *See* 2022 HB 3 § 31(1). To that end, I write to detail this Office's understanding of CHFS's obligations under HB 3 and to request confirmation that CHFS will fulfill those obligations on or before the 60-day statutory deadline.

As outlined in the attachment to this letter, HB 3 imposes a variety of obligations on CHFS. But in his veto message of the bill, the Governor claimed that, because HB 3 itself does not appropriate funds, the obligations the bill imposes on CHFS are "unfunded mandate[s]" that CHFS allegedly need not carry out. Without being asked about the issue, CHFS suggested the same in its filing in *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana & Kentucky, Inc. v. Cameron*. *See* Status Report at 1, No. 3:22-CV-198-RGJ (W.D. Ky. May 5, 2022). And the federal district court in that case discussed the proposition. *Planned Parenthood*, 2022 WL 1597163, at *15 (W.D. Ky. May 19, 2022).

But that is not the law. The Governor must "take care that the laws be faithfully executed," Ky. Const. § 81, and only the legislative branch may suspend laws, *id.* § 15. So disregarding HB 3's statutory mandates would be an abdication of the Governor's constitutional duties. It would also effectively suspend HB 3—a clear, impermissible overreach by the executive branch.

And *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005)—the only case the Governor, CHFS, and the federal district court have relied on in this regard—does not prove otherwise. Instead, the Supreme Court of Kentucky in *Fletcher* held that if the General

Assembly fails to pass a budget the Governor may not implement his own, because Section 230 of the Kentucky Constitution places the taxing and spending power solely within the legislative branch. *Id.* at 864–65. That situation does not apply here. And although the Court noted that the "existence of a law does not mean that it must be implemented if doing so requires the expenditure of unappropriated funds," *id.* at 869, this passage cannot be read to suggest that every law must have its own independent appropriation to fund its implementation. The General Assembly may—and regularly does—expect that agencies will use the general funds appropriated to comply with statutory obligations.

That is the case here. The General Assembly appropriated general funds to finance CHFS's operations, including timely implementation of HB 3. 2022 HB 1 § 1, Part 1, G. The level of funding provided was a policy decision left to the General Assembly, and CHFS is obliged to fulfill its duties under HB 3 with the funds appropriated to it. That the Secretary may believe the level of funding is inadequate is no excuse for CHFS to ignore its statutory obligations. Indeed, the Court in *Fletcher* reiterated the Governor's obligation to faithfully execute the law, even when funding may be scarce:

> If the legislative department fails to appropriate funds deemed sufficient to operate the executive department at a desired level of services, the executive department must serve the citizenry as best it can with what it is given. If the citizenry deems those services insufficient, it will exercise its own constitutional power—the ballot.

163 S.W.3d at 873. And here this is not even an issue because funding is not scarce. The recently passed budget allocates significant general funding to CHFS over the next two fiscal years. 2022 HB 1 § 1, Part 1, G. Thus, there is no basis in Kentucky law for CHFS to ignore its obligations under HB 3.

The federal district court's recent order enjoining enforcement of parts of HB 3 does not change that. Importantly, the court granted a preliminary injunction only "to the extent that Defendants are restrained from enforcing specific provisions of HB 3 . . . related to reporting and registration programs not yet created or promulgated by the Cabinet." *Planned Parenthood*, 2022 WL 1597163, at *1. The court explicitly clarified that the injunction "does not prevent the Cabinet from taking any steps it considers appropriate to comply with the Kentucky Legislature's mandates." *Id.* Thus, that injunction does not run to benefit CHFS. The district court even stated as much: "The Court did not resolve any issues of state budgeting law in its Preliminary Injunction. It did not direct the Cabinet to do anything or relieve them of any obligations under Kentucky law." *Planned Parenthood*, No. 3:22-CV-198-RGJ, slip op. at 23 (W.D. Ky. May 26, 2022).

And the court was right to recognize that. Issues of Kentucky budgeting law were never briefed, were not part of any claim before the court, and touch on the rights and duties of non-adverse parties in that litigation—both CHFS and the Attorney General are defendants in that case. Thus, any suggestion by the district court that CHFS need not fulfill its obligations under HB 3 because of funding issues was non-binding dictum. *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 542–43 (6th Cir. 2021) (en banc) (defining "dictum," distinguishing it from a court's holding, and recognizing that only the latter is binding). Any

argument otherwise would easily fail practically each issue-preclusion requirement, for example. *See, e.g.*, *United States v. United Techs. Corp.*, 782 F.3d 718, 725 (6th Cir. 2015); *Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997).

This Office therefore respectfully requests that you closely review the duties imposed by HB 3 and confirm no later than Friday, June 3, 2022, that CHFS will timely comply with its statutory mandates. If CHFS declines to respond, maintains that it may ignore its duties under HB 3, or suggests that it cannot or will not timely fulfill its obligations under the statute, the Attorney General will faithfully carry out his duties under Kentucky law. *See* 2022 HB 3 § 31(1); KRS 15.020(1), (3).

If you have any questions about this Office's position, please let me know.

Sincerely,

/s/ Victor B. Maddox

Victor B. Maddox
Deputy Attorney General

Enclosure

CHFS's Obligations Under House Bill 3

House Bill 3 requires the Cabinet for Health and Family Services to take several steps to implement the law. The Attorney General outlines below his understanding of CHFS's obligations under HB 3, which include, among other things, creating forms and promulgating regulations. He does not, however, purport to identify *every* duty imposed on CHFS by HB 3, and CHFS should independently review the law to ensure it is in full compliance with all the law's provisions.

Obligations related to forms

First, HB 3 requires CHFS to create and distribute certain report forms. Section 13 provides that CHFS "shall create and distribute the report forms required in Sections 1, 4, 8, 9, 25, 26, 27, and 29 of this Act." 2022 HB 3 § 13(1). And CHFS must create and distribute those section's forms within sixty days of HB 3's April 13, 2022, effective date. *Id.*

Under Section 1, CHFS must supply a form for an attending physician to specify his or her basis for any medical judgment that warrants not obtaining the consent required by that section. *Id.* § 1(10). So that form must include an explanation of the required consent, *see id.* § 1(2)(a)–(c), and space for the physician to specify the medical reason why it was not obtained.

Under Section 4, CHFS must amend and distribute the form for abortion providers and physicians to report each abortion performed to the Vital Statistics Branch. *See id.* §§ 4(1), 13.[1] The form must include all the information that a physician has to certify under KRS 311.731, 311.7704, 311.7705, 311.7706, 311.7707, 311.774, 311.782, 311.783, as well as Sections 1, 8, and 9 of HB 3. *Id.* § 4(2). And there is certain additional information that must be included, *see id.* § 4(2)(a)–(s), like whether the patient suffered any adverse events and whether she was provided any follow-up treatment as required by Section 26. *See id.* §§ 4(2)(o), 26(3)–(4). CHFS must also create a report form for prescriptions issued for abortion-inducing drugs. *See id.* §§ 4(5), 13.

Under Section 8, CHFS must create a form for a qualified physician to obtain the informed consent of a patient receiving an abortion-inducing drug. *Id.* § 8(2). The form must include at least the information described in Section 8(4).

Under Section 9, CHFS must create and distribute three report forms. *Id.* §§ 9, 13. First, it must create a form for an abortion provider to report each abortion-inducing drug that a physician provides to a patient. *Id.* §§ 9(1), 26(1). Second, CHFS must create a form for a qualified physician to report any adverse events experienced by a woman who used an abortion-inducing drug. *Id.* § 9(2). And third, CHFS must create and distribute a form for a physician or healthcare provider to report the diagnosis or treatment of any complication or adverse event related to a drug-induced abortion. *Id.* § 9(3).

Under Section 25, hospitals, healthcare facilities, and physicians must file a written report with CHFS detailing abortion complications for any patient. *Id.* § 25(1). CHFS must

[1] Section 21 reiterates this requirement. *See id.* § 21(3)–(4).

create that form. *Id.* § 13. And it must include the information required under Section 4 but must not include the patient's name or common identifiers. *Id.* § 25(2)–(3).

Under Section 26, CHFS must provide a form to report prescriptions issued for abortion-inducing drugs. *Id.* § 26(1). It must include the information required by Section 4 in the form. *Id.*

Under Section 27, CHFS must provide a form for a physician to document the information required by Section 4 and an unborn child's probable gestational age, the results of any injuries suffered by the woman, and any medical examinations performed. *Id.* § 27(4).

For Section 29, CHFS must create the form for the reporting of prescriptions dispensed for drugs used in connection with an abortion. *Id.* §§ 13, 29(1). The report must not include patient-identifying information but must contain certain specified information. *Id.* § 29(1)–(2).

CHFS must inform all abortion facilities, licensed physicians, and other medical entities of their reporting requirements under Sections 1, 4, 8, 9, 25, 26, 27, and 29. *Id.* § 13(6). Once abortion providers submit their report forms under those sections, CHFS must "prepare and submit a comprehensive annual statistical report to the General Assembly based upon the data gathered from reports" and make the aggregated data electronically available to the public.[2] *Id.* § 13(2). It must also provide the reports "to the Kentucky Board of Medical Licensure, the Kentucky Board of Pharmacy, state law enforcement offices, and child protective services upon request for use in the performance of their official duties." *Id.* § 13(3).

On top of the forms that CHFS must create under Section 13 and the sections it references, CHFS must also create additional forms. For example, under Section 22, CHFS must "design forms through administrative regulations that document" certain information related to fetal remains. *Id.* § 22(3). That information includes the age of the parents and a designation of how the remains are to be disposed. *Id.* § 22(3)(a), (d). HB 3 does not specify the time within which CHFS must create those forms. But CHFS must do so in a reasonable time. *See, e.g.*, *Holliday v. Cornett*, 6 S.W.2d 497, 498 (Ky. 1928) (holding that a statute that did not provide a time limit "necessarily contemplates a reasonable length of time").

Obligations related to regulations

HB 3 also tasks CHFS with promulgating certain administrative regulations implementing the bill. Sections 15 through 19 relate to a new program, the Kentucky Abortion-Inducing Drug Certification Program, that CHFS must create. Section 15 requires CHFS to promulgate regulations "to create a certification program to oversee and regulate the distribution and dispensing of abortion-inducing drugs." 2022 HB 3 § 15(1). That includes establishing certification requirements for manufacturers and distributors of abortion-inducing drugs, pharmacies that dispense the drugs, and abortion facilities. *Id.* And those

[2] In doing so, CHFS must not compare the data from the reports to other data that could identify a pregnant patient obtaining a drug-induced abortion. *Id.* § 13(4). Nor may it maintain any information that could reveal such a patient's identity. *Id.* § 13(5).

requirements must include recognition of certain limitations on providing abortion-inducing drugs. *Id.* § 15(2).

Section 16 specifies several additional requirements on CHFS related to the regulations required by Section 15. For example, CHFS must require abortion providers, pharmacies, manufacturers, and distributors to compete the certification process as well as audit and ensure that those entities are complying with the program. *Id.* § 16(1)(a), (d).

Likewise, under Section 17, CHFS must impose certain requirements for a qualified physician to register as a nonsurgical abortion provider. *Id.* § 17(1). Those requirements include examining patients prior to providing abortion-inducing drugs and providing for emergency surgical intervention in cases of adverse events. *Id.* § 17(1)(b), (i). CHFS must also require registered physicians to maintain admitting privileges at one or more hospitals in the county or contiguous county where the abortion-inducing drugs will be provided, inform patients of that fact, and enter into a written agreement with a physician in that county or contiguous county. *Id.* § 17(2). That agreement must meet certain conditions, and CHFS must annually submit a copy of it to each hospital in the county or contiguous county. *Id.* § 17(2)(b).

Under Section 22, as mentioned above, CHFS must "design forms through administrative regulations that document" certain information related to fetal remains. *Id.* § 22(3). It must also promulgate administrative regulations to aid in the private interment of fetal remains. *Id.* § 22(4)(d).

Other obligations

HB 3 also imposes several other obligations on CHFS. First, CHFS must "annually audit the required reporting of abortion-related information to the Vital Statistics Branch" in Sections 4 and 29. *Id.* § 4(11). And in doing so, it must function "as a health oversight agency." *Id.*

Second, CHFS must publish in printed material and maintain on its website the statement specified in Section 12(1) and include information "for assistance in locating a medical professional who can aid in the reversal of a drug-induced abortion." *Id.* § 12(1)–(2). Additionally, it must annually review and update that statement if necessary. *Id.* § 12(2).

Third, CHFS must "develop a plan to enforce" the abortion-inducing-drug-certification program, which must include certain conditions. *See id.* § 18(1).

Fourth, CHFS must develop a complaint portal on its website for individuals to submit information about potential violations of the abortion-inducing-drug-certification program. *Id.* § 19(1). The portal must list the names of entities certified or registered under the program and allow for anonymous complaints. *Id.* § 19(3). And CHFS must review and determine a disposition of each complaint within 30 days of submission. *Id.* § 19(4).

* * *

Again, this list of obligations is non-exhaustive, and CHFS should independently review HB 3 to ensure that it is in full compliance with all the law's provisions.

CABINET FOR HEALTH AND FAMILY SERVICES
Office of Legal Services

Andy Beshear
Governor

275 East Main Street, 5W-B
Frankfort, KY 40621
502-564-7905
502-564-7573
www.chfs.ky.gov

Eric C. Friedlander
Secretary

Wesley W. Duke
General Counsel

June 3, 2022

Mr. Victor B. Maddox
Deputy Attorney General
Capitol Building, Suite 118
700 Capital Avenue
Frankfort, Kentucky 40601

Dear Mr. Maddox:

I received your letter dated May 27, 2022, in which you threaten legal action against the Cabinet for Health and Family Services for alleged non-compliance with House Bill 3 (R.S. 2022) ("HB 3"), legislation the United States District Court for the Western District of Kentucky enjoined by Court Order on May 19, 2022. *See Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana & Kentucky, Inc. v. Cameron*, No. 3:22-CV-198-RGJ. First, your assertions that the Cabinet is refusing to comply with or ignoring any requirements imposed on it by HB 3 are not accurate. As you know, the Cabinet has informed the Court otherwise on numerous occasions. The Cabinet will continue to comply with the law, including continuing its work to fulfill its obligations under HB 3 as set forth in the Court's Orders.

Second, your letter appears to ask the Cabinet to ignore the Court's Order or face legal action by your office if it does not. As you are aware, however, the Court's preliminary injunction against HB 3 specifically enjoined relevant provisions that hinge on the Cabinet as long as HB 3 remains unfunded or until such time as the requisite forms, regulations, and programs are implemented by the Cabinet. Any disagreement with the Court's preliminary injunction or Orders should be addressed to the Court, not through the threat of legal action against the Cabinet that would evade the Court's jurisdiction.

Sincerely,

Wesley W. Duke
General Counsel

(1) Computer Services Fund Receipts: The Secretary of the Finance and Administration Cabinet shall provide a listing of fee receipts from the Executive, Judicial, and Legislative Branches of government itemized by appropriation units, cost allocation methodology, and a report detailing the rebate of excess fee receipts to the agencies to the Interim Joint Committee on Appropriations and Revenue by August 1 of each fiscal year.

(2) Service Rates: Notwithstanding KRS 45.253(6), the Commonwealth Office of Technology shall maintain the rate schedule in effect in fiscal year 2019-2020 for services rendered or materials furnished during the 2020-2022 fiscal biennium, unless the services or materials are required by law to be furnished gratuitously. Enterprise assessments and security assessments not directly related to specific rated services shall not exceed fiscal year 2019-2020 levels.

8. REVENUE

	2020-21	2021-22
General Fund (Tobacco)	250,000	250,000
General Fund	100,026,900	104,202,800
Restricted Funds	13,834,000	12,789,300
Federal Funds	233,700	-0-
Road Fund	3,773,800	-0-
TOTAL	118,118,400	117,242,100

(1) Operations of Revenue: Notwithstanding KRS 132.672, 134.552(2), 136.652, and 365.390(2), funds may be expended in support of the operations of the Department of Revenue.

(2) State Enforcement: Notwithstanding KRS 248.654 and 248.703(4), a total of $250,000 of the Tobacco Settlement payments received in each fiscal year is appropriated to the Finance and Administration Cabinet, Department of Revenue for the state's diligent enforcement of noncompliant nonparticipating manufacturers.

9. PROPERTY VALUATION ADMINISTRATORS

	2020-21	2021-22
General Fund	56,446,700	56,593,800
Restricted Funds	3,500,000	3,500,000
TOTAL	59,946,700	60,093,800

(1) Management of Expenditures: Notwithstanding KRS 132.590 and 132.597, the property valuation administrators are authorized to take necessary actions to manage expenditures within the appropriated amounts contained in this Act.

(2) Property Valuation Administrators' Expense Allowance: Notwithstanding KRS 132.597, each property valuation administrator shall receive an expense allowance of $2,400 annually, payable out of the State Treasury at the rate of $200 per month in the 2020-2022 fiscal biennium.

(3) Salary Increment: Notwithstanding KRS 132.590, no increment is provided on the base salary or wages of each eligible property valuation administrator.

TOTAL - FINANCE AND ADMINISTRATION CABINET

	2019-20	2020-21	2021-22
General Fund (Tobacco)	-0-	31,113,200	26,851,200
General Fund	2,800,000	685,172,300	725,979,300
Restricted Funds	-0-	252,935,100	259,265,600
Federal Funds	-0-	19,512,800	150,400
Road Fund	-0-	4,047,400	-0-
TOTAL	2,800,000	992,780,800	1,012,246,500

G. HEALTH AND FAMILY SERVICES CABINET

Budget Units

1. GENERAL ADMINISTRATION AND PROGRAM SUPPORT

	2020-21	2021-22
General Fund	10,323,200	10,350,000
Restricted Funds	53,366,200	53,384,300
Federal Funds	48,932,500	48,859,100
TOTAL	112,621,900	112,593,400

(1) Debt Service: Included in the above General Fund appropriation is $199,000 in fiscal year 2020-2021 and $182,000 in fiscal year 2021-2022 for new debt service to support new bonds as set forth in Part II, Capital Projects Budget, of this Act.

(2) Human Services Transportation Delivery: Notwithstanding KRS 281.010, the Kentucky Works Program shall not participate in the Human Services Transportation Delivery Program or the Coordinated Transportation Advisory Committee.

(3) Federally Funded Positions: Notwithstanding KRS 18A.010(2) and any provisions of this Act to the contrary, direct service units of the Office of Inspector General, Department for Income Support, Office for Children with Special Health Care Needs, Department for Community Based Services, Department for Behavioral Health, Developmental and Intellectual Disabilities, Family Resource Centers and Volunteer Services, Department for Aging and Independent Living, and the Department for Public Health shall be authorized to establish and fill such positions that are 100 percent federally funded for salary and fringe benefits.

(4) Kentucky All Schedule Prescription Electronic Reporting (KASPER) System: In accordance with the appropriation as set forth in Part II, G., 1., 002. of this Act, the Cabinet for Health and Family Services shall issue a Request for Proposals to determine if a vendor can provide a system that is a scalable, cloud-based solution and is capable of best practices, including analytics and administrative dashboards, that also enables critical communications between practitioners, administrators, and doctors, and readily bridges patient transition directly to treatment. The Cabinet may include additional requirements for system functionalities that may improve the implementation of a new KASPER program. A Request for Proposals shall be issued by October 1, 2021. Notwithstanding KRS 45.229, in the event that the Cabinet fails to issue a Request for Proposals by October 1, 2021, an amount of $693,000 of the General Fund appropriation within the General Administration and Program Support budget unit shall lapse to the Budget Reserve Trust Fund Account (KRS 48.705) on October 2, 2021, and shall be used for no other purpose.

(5) Special Olympics: Included in the above General Fund appropriation is $50,000 in each fiscal year to support the operations of Special Olympics Kentucky.

2. OFFICE FOR CHILDREN WITH SPECIAL HEALTH CARE NEEDS

	2020-21	2021-22
General Fund	3,863,100	5,851,900
Restricted Funds	11,439,500	8,982,600
Federal Funds	4,551,800	4,564,800
TOTAL	19,854,400	19,399,300

3. MEDICAID SERVICES

a. Medicaid Administration

	2020-21	2021-22
General Fund	59,304,800	59,310,400
Restricted Funds	12,547,500	12,568,700
Federal Funds	165,853,300	165,864,500
TOTAL	237,705,600	237,743,600

(1) Transfer of Excess Administrative Funds for Medicaid Benefits: If any portion of the above General Fund appropriation in either fiscal year is deemed to be in excess of the necessary expenses for administration of the Department, the amount may be used for Medicaid Benefits in accordance with statutes governing the functions and activities of the Department for Medicaid Services. In no instance shall these excess funds be used without prior written approval of the State Budget Director to:

(a) Establish a new program;

(b) Expand the services of an existing program; or

(c) Increase rates or payment levels in an existing program.

Any transfer authorized under this subsection shall be approved by the Secretary of the Finance and Administration Cabinet upon recommendation of the State Budget Director.

(2) Medicaid Service Category Expenditure Information: No Medicaid managed care contract shall be valid and no payment to a Medicaid managed care vendor by the Finance and Administration Cabinet or the Cabinet for Health and Family Services shall be made, unless the Medicaid managed care contract contains a provision that the contractor shall collect Medicaid expenditure data by the categories of services paid for by the Medicaid Program. Actual statewide Medicaid expenditure data by all categories of Medicaid services, including mandated and optional Medicaid services, special expenditures/offsets, and Disproportionate Share Hospital payments by type of hospital, shall be compiled by the Department for Medicaid Services for all Medicaid providers and forwarded to the Interim Joint Committee on Appropriations and Revenue on a quarterly basis. Projections of Medicaid expenditures by categories of Medicaid services shall be provided to the Interim Joint Committee on Appropriations and Revenue upon request.

b. Medicaid Benefits

	2020-21	2021-22
General Fund	2,018,893,700	1,934,395,200
Restricted Funds	713,921,500	1,510,913,700
Federal Funds	11,745,488,200	11,483,841,700
TOTAL	14,478,303,400	14,929,150,600

(1) Transfer of Medicaid Benefits Funds: Any portion of the General Fund appropriation in either fiscal year that is deemed to be necessary for the administration of the Medicaid Program may be transferred from the Medicaid Benefits budget unit to the Medicaid Administration budget unit in accordance with statutes governing the functions and activities of the Department for Medicaid Services. The Secretary shall recommend any proposed transfer to the State Budget Director for approval prior to transfer. Such action shall be reported by the Cabinet for Health and Family Services to the Interim Joint Committee on Appropriations and Revenue.

(2) Intergovernmental Transfers (IGTs): Any funds received through an Intergovernmental Transfer (IGT) agreement between the Department for Medicaid Services and other governmental entities, in accordance with a federally approved State Plan amendment, shall be used to provide for the health and welfare of the citizens of the Commonwealth through the provision of Medicaid Benefits. Revenues from IGTs are contingent upon agreement by the parties, including but not limited to the Cabinet for Health and Family Services, Department for Medicaid Services, and the appropriate providers. The Secretary of the Cabinet for Health and Family Services shall make the appropriate interim appropriations increase requests pursuant to KRS 48.630.

(3) Medicaid Benefits Budget Deficit: If Medicaid Benefits expenditures are projected to exceed available funds, the Secretary of the Cabinet for Health and Family Services may recommend and implement that reimbursement rates, optional services, eligibles, or programs be reduced or maintained at levels existing at the time of the projected deficit in order to avoid a budget deficit. The projected deficit shall be confirmed and approved by the Office of State Budget Director. No rate, service, eligible, or program reductions shall be implemented by the Cabinet for Health and Family Services without written notice of such action to the Interim Joint Committee on Appropriations and Revenue and the State Budget Director. Such actions taken by the Cabinet for Health and Family Services shall be reported, upon request, at the next meeting of the Interim Joint Committee on Appropriations and Revenue.

(4) Kentucky Access Fund: Notwithstanding KRS 304.17B-021, funds are transferred from this source to Medicaid Benefits in each fiscal year.

(5) Disproportionate Share Hospital (DSH) Program: Hospitals shall report the uncompensated care for which, under federal law, the hospital is eligible to receive disproportionate share payments. Disproportionate share payments shall equal the maximum amounts established under federal law.

(6) Medicaid Pharmacy: Notwithstanding KRS 205.6312(4), a pharmacy provider participating in the Medical Assistance Program or a pharmacy provider serving Kentucky Medicaid recipients through a Medicaid Managed Care Organization shall not be required to serve an eligible recipient if the recipient does not make the required copayment at the time of service. An exception to this provision shall be an encounter when a recipient presents a condition which could result in harm to the recipient if left untreated, in which case the pharmacist shall dispense a 72-hour emergency supply of the required medicine. The recipient may then return to the pharmacy with the necessary copayment to obtain the remainder of the prescription. Only one dispensing fee shall be paid by the Cabinet for the provision of both the emergency supply and the remainder of the prescription. The Medicaid Managed Care Organization shall determine its policies with respect to dispensing fees.

(7) Hospital Indigent Patient Billing: Hospitals shall not bill patients for services if the services have been reported to the Cabinet and the hospital has received disproportionate share payments for the specific services.

(8) Provider Tax Information: Any provider who posts a sign or includes information on customer receipts or any material distributed for public consumption indicating that it has paid provider tax shall also post, in the same size typeset as the provider tax information, the amount of payment received from the Department for Medicaid Services during the same period the provider tax was paid. Providers who fail to meet this requirement shall be excluded from the Disproportionate Share Hospital and Medicaid Programs. The Cabinet for Health and Family Services shall include this provision in facilities' annual licensure inspections.

(9) Medicaid Budget Analysis Reports: The Department for Medicaid Services shall submit a quarterly budget analysis report to the Interim Joint Committee on Appropriations and Revenue no later than 75 days after the quarter's end. The report shall provide monthly detail of actual expenditures, eligibles, and average monthly cost per eligible by eligibility category along with current trailing 12-month averages for each of these figures. The report shall also provide actual figures for all categories of noneligible-specific expenditures such as Supplemental Medical Insurance premiums, Kentucky Patient Access to Care, nonemergency transportation, drug rebates, cost settlements, and Disproportionate Share Hospital payments by type of hospital. The report shall compare the actual expenditure experience with those underlying the enacted or revised enacted budget and explain any significant variances which may occur.

(10) Medicaid Managed Care Organization Reporting: Except as provided by KRS 61.878, all records and correspondence relating to Kentucky Medicaid, revenues derived from Kentucky Medicaid funds, and expenditures utilizing Kentucky Medicaid funds of a Medicaid managed care company operating within the Commonwealth shall be subject to the Kentucky Open Records Act, KRS 61.870 to 61.884. All records and correspondence relating to Medicaid specifically prohibited from disclosure by the federal Health Insurance Portability and Accountability Act privacy rules shall not be provided under this Act.

No later than 60 days after the end of a quarter, each Medicaid managed care company operating within the Commonwealth shall prepare and submit to the Department for Medicaid Services sufficient information to allow the department to meet the following requirements 90 days after the end of the quarter. The Department shall forward to the Legislative Research Commission Budget Review Office a quarterly report detailing monthly actual expenditures by service category, monthly eligibles, and average monthly cost per eligible for Medicaid and the Kentucky Children's Health Insurance Program (KCHIP) along with current trailing 12-month averages for each of these figures. The report shall also provide actual figures for other categories such as pharmacy rebates and reinsurance. Finally, the Department shall include in this report the most recent information or report available regarding the amount withheld to meet Department of Insurance reserve requirements, and any distribution of moneys received or retained in excess of these reserve requirements.

(11) Critical Access Hospitals: Beginning with the effective date of this Act through June 30, 2022, no acute care hospital shall convert to a critical access hospital unless the hospital has either received funding for a feasibility study from the Kentucky State Office of Rural Health or filed a written request by January 1, 2020, with the Kentucky State Office of Rural Health requesting funding for conducting a feasibility study.

(12) Appeals: An appeal from denial of a service or services provided by a Medicaid managed care organization for medical necessity, or denial, limitation, or termination of a health care service in a case involving a medical or surgical specialty or subspecialty, shall, upon request of the recipient, authorized person, or provider, include a review by a board-eligible or board-certified physician in the appropriate specialty or subspecialty area; except in the case of a health care service rendered by a chiropractor or optometrist, for which the denial shall be made respectively by a chiropractor or optometrist duly licensed in Kentucky as specified in KRS 304.17A-

607(1)(b). The physician reviewer shall not have participated in the initial review and denial of service and shall not be the provider of the service or services under consideration in the appeal.

(13) Medicaid Prescription Benefits Reporting: Notwithstanding KRS 205.647, the Department for Medicaid Services shall submit a report to the Interim Joint Committee on Appropriations and Revenue and the Medicaid Oversight and Advisory Committee by December 1 of each fiscal year on the dispensing of prescription medications to persons eligible under KRS 205.560. The report shall include:

(a) The total Medicaid dollars paid to the state pharmacy benefit manager by a managed care organization;

(b) The total amount of Medicaid dollars paid to the state pharmacy benefit manager by a managed care organization which were not subsequently paid to a pharmacy licensed in Kentucky;

(c) The average reimbursement by drug ingredient cost, dispensing fee, and any other fee paid by the state pharmacy benefit manager to licensed pharmacies with which the state pharmacy benefit manager shares common ownership, management, or control; or which are owned, managed, or controlled by any of the state pharmacy benefit manager's management companies, parent companies, subsidiary companies, jointly held companies, or companies otherwise affiliated by a common owner, manager, or holding company; or which share any common members on the board of directors; or which share managers in common;

(d) The average reimbursement by drug ingredient cost, dispensing fee, or any other fee paid by the state pharmacy benefit manager to pharmacies licensed in Kentucky which operate ten locations, ten or fewer locations, or ten or more locations; and

(e) All common ownership, management, common members of a board of directors, shared managers, or control of the state pharmacy benefit manager, or any of the state pharmacy benefit manager's management companies, parent companies, subsidiary companies, jointly held companies, or companies otherwise affiliated by a common owner, manager, or holding company with any managed care organization contracted to administer Kentucky Medicaid benefits, any entity which contracts on behalf of a pharmacy, or any pharmacy services administration organization, or any common ownership management, common members of a board of directors, shared managers, or control of a pharmacy services administration organization that is contracted with the state pharmacy benefit manager, with any drug wholesaler or distributor or any of the pharmacy services administration organizations, management companies, parent companies, subsidiary companies, jointly held companies, or companies otherwise affiliated by a common owner, common members of a board of directors, manager, or holding company.

(14) Kentucky Children's Health Insurance Program (KCHIP): Included in the above appropriation is $46,143,100 in General Fund, $799,500 in Restricted Funds, and $257,910,000 in Federal Funds in fiscal year 2020-2021 and $44,281,500 in General Fund, $605,200 in Restricted Funds, and $232,258,200 in Federal Funds in fiscal year 2021-2022 to support the continuation of KCHIP services.

(15) Supports for Community Living Waiver Program Rates: If the Supports for Community Living Waiver Program experiences a material change in funding based upon a new or amended waiver that is approved by the Centers for Medicare and Medicaid Services, the Department for Medicaid Services may adjust the upper payment limit amount for a Supports for Community Living Waiver Program service as long as the upper payment limit for each service is not less than the upper payment limit in effect on January 1, 2020.

(16) Substance Abuse Treatment for Incarcerated Individuals - Medicaid Demonstration Waiver: Within ninety days after the effective date of this Act, the Department for Medicaid Services shall develop and submit an application for a Section 1115 demonstration waiver under 42 U.S.C. sec. 1315 to provide Medicaid coverage for substance use disorder treatment, including peer support services, to individuals incarcerated for a conviction under KRS Chapter 218A. Upon approval of the waiver, the cost of treatment for a substance use disorder or patient navigation provided by a licensed clinical social worker shall be a covered Medicaid benefit for an incarcerated individual.

(17) Nursing Home Pandemic Relief Reimbursement Increase: Included in the above appropriation is $16,312,500 in General Fund and $58,687,500 in Federal Funds for the period of January 1, 2021, through June 30, 2021, and $16,312,500 in General Fund and $58,687,500 in Federal Funds for the period of July 1, 2021, through December 31, 2021, for an additional reimbursement of $29.00 per resident day for Medicaid eligible nursing home residents. The reimbursement increase shall only be used for personal protective equipment, COVID-19 testing, and staffing for Medicaid eligible nursing home residents. The reimbursement increase shall extend through the last day of the quarter in which the public health emergency for COVID-19 terminates as declared by the Secretary of the U.S. Department of Health and Human Services or December 31, 2021, whichever date occurs earlier. The Department for Medicaid Services shall file an emergency state plan amendment with the Centers for Medicare and

Medicaid Services by March 31, 2021, to effectuate the pandemic reimbursement increase. Notwithstanding KRS 45.229, any funds not expended during the period of January 1, 2021, through June 30, 2021, shall not lapse and shall carry forward for expenditures in fiscal year 2021-2022. Notwithstanding KRS 45.229, any portion of the General Fund moneys not expended for the purpose of providing the pandemic reimbursement increase shall lapse to the Budget Reserve Trust Fund Account (KRS 48.705) at the end of fiscal year 2021-2022.

TOTAL - MEDICAID SERVICES

	2020-21	2021-22
General Fund	2,078,198,500	1,993,705,600
Restricted Funds	726,469,000	1,523,482,400
Federal Funds	11,911,341,500	11,649,706,200
TOTAL	14,716,009,000	15,166,894,200

4. BEHAVIORAL HEALTH, DEVELOPMENTAL AND INTELLECTUAL DISABILITIES

	2020-21	2021-22
General Fund (Tobacco)	1,916,000	1,950,500
General Fund	158,573,900	150,032,000
Restricted Funds	215,396,800	211,176,400
Federal Funds	108,552,900	95,540,400
TOTAL	484,439,600	458,699,300

(1) Disproportionate Share Hospital Funds: Pursuant to KRS 205.640(3)(a)2., mental health disproportionate share funds are budgeted at the maximum amounts permitted by Section 1923(h) of the Social Security Act. Upon publication in the Federal Register of the Annual Institutions for Mental Disease (IMD) Disproportionate Share Hospital (DSH) limit, 92.3 percent of the federal IMD DSH limit goes to the state-operated mental hospitals. If there are remaining funds within the psychiatric pool after all private psychiatric hospitals reach their hospital-specific DSH limit, state mental hospitals may exceed the 92.3 percent limit but may not exceed their hospital-specific DSH limit.

(2) Lease Payments for Eastern State Hospital: Included in the above General Fund appropriation is $11,256,700 in fiscal year 2020-2021 and $11,258,200 in fiscal year 2021-2022 to make lease payments to the Lexington-Fayette Urban County Government to retire its debt for the construction of the new facility.

(3) Tobacco Settlement Funds: Included in the above General Fund (Tobacco) appropriation is $1,416,000 in fiscal year 2020-2021 and $1,450,500 in fiscal year 2021-2022 for substance abuse prevention and treatment for pregnant women with a history of substance abuse problems.

(4) Debt Service: Included in the above General Fund appropriation is $275,000 in fiscal year 2020-2021 for new debt service to support new bonds as set forth in Part II, Capital Projects Budget, of this Act.

(5) Kentucky Rural Mental Health and Suicide Prevention Pilot Program: Included in the above General Fund (Tobacco) appropriation is $500,000 in each fiscal year to support the Kentucky Rural Mental Health and Suicide Prevention pilot program. The Department for Behavioral Health, Developmental and Intellectual Disabilities shall coordinate with the Kentucky Department of Agriculture, the University of Kentucky Southeast Center for Agricultural Health and Injury Prevention, and other entities to enhance awareness of the National Suicide Prevention Lifeline (988) in rural communities in Kentucky and to improve access to information on mental health issues and available treatment services. The Department for Behavioral Health, Developmental and Intellectual Disabilities shall provide cultural competency training to staff to address the unique mental health challenges affecting the state's rural communities. The Department for Behavioral Health, Developmental and Intellectual Disabilities shall also provide outreach, treatment, and other necessary services to improve the mental health outcomes of rural communities in Kentucky. The Department for Behavioral Health, Developmental and Intellectual Disabilities, in conjunction with the Kentucky Department of Agriculture and the University of Kentucky Southeast Center for Agricultural Health and Injury Prevention, shall apply for federal funds as provided by the Agriculture Improvement Act of 2018, 7 U.S.C. sec. 5936, to supplement the General Fund (Tobacco) appropriation provided above. The Cabinet for Health and Family Services shall submit a report on the results of the pilot program, including

but not limited to the number of participants, the mental health issues addressed, and the funding used to the Interim Joint Committee on Appropriations and Revenue and the Interim Joint Committee on Agriculture by June 30, 2021.

(6) The Healing Place: Included in the above General Fund appropriation is $900,000 in each fiscal year to support direct services to clients provided by The Healing Place.

(7) Regional Mental Health/Mental Retardation Boards Retirement Cost: Included in the above General Fund appropriation is $23,274,100 in fiscal year 2020-2021 for Regional Mental Health/Mental Retardation Boards to assist them with employer contributions for the Kentucky Employees Retirement System. In July and January of each year, the Department for Behavioral Health, Developmental and Intellectual Disabilities shall obtain the total creditable compensation reported by each Regional Mental Health/Mental Retardation Board to the Kentucky Retirement System and utilize that number to determine how much of this total appropriation shall be distributed to each Regional Mental Health/Mental Retardation Board. Payments to the Mental Health/Mental Retardation Boards shall be made on September 1 and April 1 of each fiscal year.

5. PUBLIC HEALTH

	2019-20	2020-21	2021-22
General Fund (Tobacco)	-0-	11,873,100	11,943,200
General Fund	300,000	66,670,100	52,433,100
Restricted Funds	-0-	84,625,500	87,483,100
Federal Funds	-0-	499,477,100	263,241,400
TOTAL	300,000	662,645,800	415,100,800

(1) Tobacco Settlement Funds: Included in the above General Fund (Tobacco) appropriation is $7,000,000 in each fiscal year for the Health Access Nurturing Development Services (HANDS) Program, $942,000 in fiscal year 2020-2021 and $965,000 in fiscal year 2021-2022 for Healthy Start initiatives, $942,000 in fiscal year 2020-2021 and $965,000 in fiscal year 2021-2022 for Early Childhood Mental Health, $989,100 in fiscal year 2020-2021 and $1,013,200 in 2021-2022 for Early Childhood Oral Health, and $2,000,000 in each fiscal year for Smoking Cessation.

(2) Local and District Health Department Retirement Cost: Included in the above General Fund appropriation is $25,394,600 in fiscal year 2020-2021 for Local and District Health Departments to assist them with employer contributions for the Kentucky Employees Retirement System. In July and January of each year, the Department for Public Health shall obtain the total creditable compensation reported by each Local and District Health Department Board to the Kentucky Retirement System and utilize that number to determine how much of this total appropriation shall be distributed to each department. Payments to the Local and District Health Departments shall be made on September 1 and April 1 of each fiscal year.

(3) Local and District Health Department Fees: Notwithstanding KRS 211.170 and 211.180, local and district health departments shall retain 90 percent of the fees collected for delivering foundational public health program services to fund the costs of operations, services, and the employer contributions for the Kentucky Employees Retirement System.

(4) Kentucky Poison Control Center and COVID-19 Hotline: Included in the above General Fund appropriation is $300,000 in fiscal year 2019-2020, and $1,850,000 in fiscal year 2020-2021 for the Kentucky Poison Control Center and COVID-19 Hotline. Included in the above General Fund appropriation is $750,000 in fiscal year 2021-2022 for the Kentucky Poison Control Center. If federal emergency relief funds become available for COVID-19-related poison control expenditures, those Federal Funds shall be used first to support the Kentucky Poison Control Center and COVID-19 Hotline, and any unexpended General Fund balance from the appropriations set forth in this subsection shall lapse to the General Fund.

(5) Kentucky Colon Cancer Screening Program: Included in the above General Fund appropriation is $500,000 in each fiscal year to support the Kentucky Colon Cancer Screening Program.

(6) Kentucky Pediatric Cancer Research Trust Fund: Included in the above General Fund appropriation is $2,500,000 in each fiscal year to the Kentucky Pediatric Cancer Research Trust Fund for general pediatric cancer research and support of expansion of clinical trials at the University of Kentucky and the University of Louisville.

(7) Folic Acid Program: General Fund (Tobacco) continuing appropriation reserves allotted to the Folic Acid Program shall be utilized by the Department for Public Health during the 2020-2022 fiscal biennium to continue the Folic Acid Program.

6. FAMILY RESOURCE CENTERS AND VOLUNTEER SERVICES

	2020-21	2021-22
General Fund	11,348,900	12,451,200
Federal Funds	7,053,300	7,053,300
TOTAL	18,402,200	19,504,500

(1) Family Resource and Youth Services Centers Funds: No more than three percent of the total funds transferred from the Department of Education to the Family Resource and Youth Services Centers, as consistent with KRS 156.496, shall be used for administrative purposes in each fiscal year.

If 70 percent or more of the funding level provided by the state is utilized to support the salary of the director of a Family Resource and Youth Services Center, that center shall provide a report to the Cabinet for Health and Family Services and the State Budget Director identifying the salary of the director. The Cabinet for Health and Family Services shall transmit any reports received from Family Resource and Youth Services Centers pursuant to this paragraph to the Legislative Research Commission.

(2) Additional Centers: Included in the above General Fund appropriation is $1,100,000 in fiscal year 2021-2022 to support the operations of an additional 24 Family Resource and Youth Services Centers.

7. INCOME SUPPORT

	2020-21	2021-22
General Fund	13,616,600	13,616,600
Restricted Funds	13,053,500	12,930,900
Federal Funds	90,521,000	91,020,200
TOTAL	117,191,100	117,567,700

8. COMMUNITY BASED SERVICES

	2020-21	2021-22
General Fund (Tobacco)	12,250,000	12,311,000
General Fund	505,418,400	504,340,900
Restricted Funds	202,178,300	202,239,400
Federal Funds	710,631,100	650,370,100
TOTAL	1,430,477,800	1,369,261,400

(1) Tobacco Settlement Funds: Included in the above General Fund (Tobacco) appropriation is $9,750,000 in each fiscal year for the Early Childhood Development Program. Included in the above General Fund (Tobacco) appropriation is $2,500,000 in fiscal year 2020-2021 and $2,561,000 in fiscal year 2021-2022 for the Early Childhood Adoption and Foster Care Supports Program.

(2) Contracted Entities Retirement Cost: Included in the above General Fund appropriation is $1,498,900 in fiscal year 2020-2021 for domestic violence shelters, rape crisis centers, and child advocacy centers to assist them with employer contribution rates for the Kentucky Employees Retirement System. In the interim, the contracted entities shall evaluate the feasibility of continued participation in the Kentucky Employees Retirement System as provided in KRS 61.522.

(3) Fostering Success: Included in the above General Fund appropriation is $500,000 in each fiscal year for the Fostering Success Program. The Cabinet for Health and Family Services shall submit a report containing the results of the program, including but not limited to the number of participants, number and type of job placements, job training provided, and any available information pertaining to individual outcomes to the Interim Joint Committee on Appropriations and Revenue by July 1 of each fiscal year.

(4) Relative Placement Support Benefit: Included in the above General Fund appropriation is $1,000,000 in each fiscal year for start-up costs associated with placing children with non-parental relatives.

(5) Domestic Violence Shelters: Included in the above General Fund appropriation is $500,000 in each fiscal year for operational costs.

(6) Rape Crisis Centers: Included in the above General Fund appropriation is $500,000 in each fiscal year for operational costs.

(7) Dually Licensed Pediatric Facilities: Included in the above General Fund appropriation is $550,000 in each fiscal year to provide supplemental payments to dually licensed pediatric facilities for emergency shelter services for children.

(8) Child Care Assistance Program: Included in the above General Fund appropriation is $10,600,000 in each fiscal year to provide services to families at or below 160 percent of the federal poverty level as determined annually by the U.S. Department of Health and Human Services.

(9) Family Counseling and Trauma Remediation: Included in the above General Fund appropriation is $50,000 in each fiscal year to provide forensic interviews, family counseling, and trauma remediation services primarily in Jefferson County and surrounding Kentucky counties.

(10) Child Advocacy Centers: Included in the above General Fund appropriation is $500,000 in each fiscal year to support the operations of the child advocacy centers.

(11) Family Scholar House: Included in the above General Fund appropriation is $1,000,000 in each fiscal year to support the operations of the Family Scholar House.

(12) Personal Care Homes: Included in the above General Fund appropriation is $2,200,000 in each fiscal year to support an increase in the reimbursements provided to personal care homes.

(13) Transition Aged Foster Youth: Notwithstanding KRS 610.110(6), 620.140(1)(e), and 625.025, through September 30, 2021, youth in extended foster care may remain committed in the custody of the Cabinet for Health and Family Services or receive transitional living support past twenty-one years of age. Any youth over the age of eighteen who ended their commitment with the Cabinet during the COVID-19 public health emergency shall be permitted to voluntarily re-enter foster care and extend commitment. Extended commitment shall not be terminated solely due to age or noncompliance with education or work requirements because of COVID-19.

(14) Children's Services Contractors: Notwithstanding KRS Chapter 45A, no contracts awarded for the use and benefit of the Department for Community Based Services shall interfere with the contractor's freedom of religion as set forth in KRS 446.350. Any such contracts shall contain a provision allowing a contractor to allow a substitute contractor who is also licensed or approved by the Cabinet to deliver the contracted services if the contractor cannot perform a contracted service because of religiously held beliefs as outlined in KRS 446.350.

9. AGING AND INDEPENDENT LIVING

	2020-21	2021-22
General Fund	45,269,700	45,293,900
Restricted Funds	2,816,700	2,787,400
Federal Funds	45,754,300	24,829,300
TOTAL	93,840,700	72,910,600

(1) Local Match Requirements: Notwithstanding KRS 205.460, entities contracting with the Cabinet for Health and Family Services to provide essential services under KRS 205.455 and 205.460 shall provide local match equal to or greater than the amount in effect during fiscal year 2019-2020. Local match may include any combination of materials, commodities, transportation, office space, personal services, or other types of facility services or funds. The Secretary of the Cabinet for Health and Family Services shall prescribe the procedures to certify the local match compliance.

10. HEALTH DATA AND ANALYTICS

	2020-21	2021-22
General Fund	481,400	482,000
Restricted Funds	16,318,900	23,301,900
Federal Funds	25,095,200	9,287,700
TOTAL	41,895,500	33,071,600

(1) Kentucky Access Fund: Notwithstanding KRS 304.17B-021, funds from this source are transferred to the Health Benefit Exchange in each fiscal year.

TOTAL - HEALTH AND FAMILY SERVICES CABINET

	2019-20	2020-21	2021-22
General Fund (Tobacco)	-0-	26,039,100	26,204,700
General Fund	300,000	2,893,763,800	2,788,557,200
Restricted Funds	-0-	1,325,664,400	2,125,768,400
Federal Funds	-0-	13,451,910,700	12,844,472,500
TOTAL	300,000	17,697,378,000	17,785,002,800

H. JUSTICE AND PUBLIC SAFETY CABINET

Budget Units

1. JUSTICE ADMINISTRATION

	2020-21	2021-22
General Fund (Tobacco)	3,516,600	3,593,800
General Fund	34,937,200	35,817,200
Restricted Funds	8,025,500	6,733,900
Federal Funds	45,119,800	45,125,000
TOTAL	91,599,100	91,269,900

(1) Operation UNITE: (a) Notwithstanding KRS 48.005(4), included in the above Restricted Funds appropriation is $1,500,000 in each fiscal year for the Operation UNITE Program from settlement funds resulting from the suit against Purdue Pharma, et al.. Included in the above General Fund appropriation is $500,000 in each fiscal year for the Operation UNITE Program.

(b) For the period ending June 30, 2020, the Secretary of the Justice and Public Safety Cabinet, in coordination with the Chief Executive Officer of Operation UNITE, shall prepare a report detailing for what purpose and function the funds were utilized. This report shall be submitted to the Interim Joint Committee on Appropriations and Revenue by September 1 of fiscal year 2020-2021.

(2) Office of Drug Control Policy: Included in the above General Fund (Tobacco) appropriation is $3,166,600 in fiscal year 2020-2021 and $3,243,800 in fiscal year 2021-2022 for the Office of Drug Control Policy.

(3) Access to Justice: Included in the above General Fund appropriation is $500,000 in each fiscal year to support the Access to Justice Program.

(4) Court Appointed Special Advocate Funding: (a) Included in the above General Fund appropriation is $1,500,000 in each fiscal year for grants to support Court Appointed Special Advocate (CASA) funding programs.

(b) No administrative costs shall be paid from the appropriation provided in paragraph (a) of this subsection.

(5) Restorative Justice: Included in the above General Fund (Tobacco) appropriation is $350,000 in each fiscal year to support the Restorative Justice Program administered by the Volunteers of America.

(6) State Medical Examiner Offices: (a) Included in the above General Fund appropriation is $50,000 in fiscal year 2020-2021 and $325,000 in fiscal year 2021-2022 for the realignment of staffing to address caseloads.

(b) Included in the above Restricted Funds appropriation is $900,000 in fiscal year 2021-2022 to support toxicology needs.

(c) Included in the above General Fund appropriation is $593,700 in fiscal year 2021-2022 to reestablish the Northern Kentucky Regional Medical Examiner's Office.

(d) The Secretary of the Justice and Public Safety Cabinet shall prepare a report detailing the realignment of existing Medical Examiner offices in order to best meet the needs of the program. This report shall be submitted to the Interim Joint Committee on Appropriations and Revenue by July 1, 2022.

2. CRIMINAL JUSTICE TRAINING

Restricted Funds	315,900	13,133,500	13,132,600
TOTAL	6,266,200	130,514,300	134,686,900

(1) Operations of Revenue: Notwithstanding KRS 132.672, 134.552(2), 136.652, and 365.390(2), funds may be expended in support of the operations of the Department of Revenue.

(2) State Enforcement: Notwithstanding KRS 248.654 and 248.703(4), a total of $250,000 of the Tobacco Settlement payments received in each fiscal year is appropriated to the Finance and Administration Cabinet, Department of Revenue for the state's diligent enforcement of noncompliant nonparticipating manufacturers.

(3) Office of Property Valuation Technical Equipment: Included in the above General Fund appropriation is $3,188,000 in fiscal year 2023-2024 to purchase computers, tablets, scanners, and other technical equipment needed to modernize the county property valuation offices. The Office of Property Valuation shall work with the Commonwealth Office of Technology to ensure the technical equipment is compatible with the digital mapping base that is being developed.

8. PROPERTY VALUATION ADMINISTRATORS

	2021-22	**2022-23**	**2023-24**
General Fund	2,767,500	63,823,200	64,518,800
Restricted Funds	286,300	4,786,300	4,786,300
TOTAL	3,053,800	68,609,500	69,305,100

(1) Management of Expenditures: Notwithstanding KRS 132.590 and 132.597, the property valuation administrators are authorized to take necessary actions to manage expenditures within the appropriated amounts contained in this Act.

(2) Mandatory Services: Included in the above General Fund appropriation is $1,635,900 in fiscal year 2022-2023 and $1,664,700 in fiscal year 2023-2024 to support the continuation of mandatory services in the property valuation administrators' offices.

(3) Salary Increment: Notwithstanding KRS 132.590, the increment provided on the base salary or wages of each eligible property valuation administrator shall be the same as that provided for eligible state employees in Part IV of this Act.

TOTAL - FINANCE AND ADMINISTRATION CABINET

	2021-22	**2022-23**	**2023-24**
General Fund (Tobacco)	-0-	25,518,800	23,916,200
General Fund	12,281,000	636,848,600	661,360,200
Restricted Funds	3,348,100	272,057,000	272,581,300
Federal Funds	132,302,100	60,894,400	57,734,800
TOTAL	147,931,200	995,318,800	1,015,592,500

G. HEALTH AND FAMILY SERVICES CABINET

Budget Units

1. GENERAL ADMINISTRATION AND PROGRAM SUPPORT

	2021-22	**2022-23**	**2023-24**
General Fund	178,200	10,640,300	10,640,200
Restricted Funds	1,876,400	57,039,700	57,428,200
Federal Funds	798,200	50,499,000	50,668,200
TOTAL	2,852,800	118,179,000	118,736,600

(1) Human Services Transportation Delivery: Notwithstanding KRS 281.010(27), the Kentucky Works Program shall not participate in the Human Services Transportation Delivery Program or the Coordinated Transportation Advisory Committee.

(2) Federally Funded Positions: Notwithstanding KRS 18A.010(2) and any provisions of this Act to the contrary, direct service units of the Office of Inspector General, Department for Income Support, Office for Children with Special Health Care Needs, Department for Community Based Services, Department for Behavioral Health, Developmental and Intellectual Disabilities, Family Resource Centers and Volunteer Services, Department for Aging and Independent Living, and the Department for Public Health shall be authorized to establish and fill such positions that are 100 percent federally funded for salary and fringe benefits.

(3) Special Olympics: Included in the above General Fund appropriation is $150,000 in each fiscal year to support the operations of Special Olympics Kentucky.

(4) Electronic Health Records System Implementation: The Cabinet for Health and Family Services shall implement a single, comprehensive, and integrated electronic health records system within the Cabinet which shall be utilized by all Cabinet departments.

2. OFFICE FOR CHILDREN WITH SPECIAL HEALTH CARE NEEDS

	2021-22	2022-23	2023-24
General Fund	286,600	7,568,200	7,379,200
Restricted Funds	91,800	9,385,700	9,322,000
Federal Funds	117,200	4,753,900	4,754,300
TOTAL	495,600	21,707,800	21,455,500

(1) Office for Children with Special Health Care Needs Operating Expenses: Included in the above appropriation is $863,000 in General Fund and $100,000 in Restricted Funds in fiscal year 2022-2023 and $798,500 in General Fund and $35,600 in Restricted Funds in fiscal year 2023-2024 to support increased operating expenses.

(2) Kids Center for Pediatric Therapies: Included in the above General Fund appropriation is $250,000 in fiscal year 2022-2023 to support program operations.

(3) Electronic Health Records System Implementation: Any funds expended for the implementation of an electronic health records system within the Office for Children with Special Health Care Needs shall be coordinated as specified in Part I, G., 1., (4) of this Act.

3. MEDICAID SERVICES

a. Medicaid Administration

	2021-22	2022-23	2023-24
General Fund	5,700	69,695,000	70,437,500
Restricted Funds	411,500	57,157,600	52,020,600
Federal Funds	196,000	289,555,900	302,093,100
TOTAL	613,200	416,408,500	424,551,200

(1) Transfer of Excess Administrative Funds for Medicaid Benefits: If any portion of the above General Fund appropriation in either fiscal year is deemed to be in excess of the necessary expenses for administration of the Department, the amount may be used for Medicaid Benefits in accordance with statutes governing the functions and activities of the Department for Medicaid Services. In no instance shall these excess funds be used without prior written approval of the State Budget Director to:

(a) Establish a new program;

(b) Expand the services of an existing program; or

(c) Increase rates or payment levels in an existing program.

Any transfer authorized under this subsection shall be approved by the Secretary of the Finance and Administration Cabinet upon recommendation of the State Budget Director.

(2) Medicaid Service Category Expenditure Information: No Medicaid managed care contract shall be valid and no payment to a Medicaid managed care vendor by the Finance and Administration Cabinet or the Cabinet for Health and Family Services shall be made, unless the Medicaid managed care contract contains a provision that the contractor shall collect Medicaid expenditure data by the categories of services paid for by the Medicaid Program. Actual statewide Medicaid expenditure data by all categories of Medicaid services, including mandated and optional Medicaid services, special expenditures/offsets, and Disproportionate Share Hospital payments by type of hospital, shall be compiled by the Department for Medicaid Services for all Medicaid providers and forwarded to the Interim Joint Committee on Appropriations and Revenue on a quarterly basis. Projections of Medicaid expenditures by categories of Medicaid services shall be provided to the Interim Joint Committee on Appropriations and Revenue upon request.

(3) Medicaid Information Technology Development: Included in the above appropriation is $2,660,100 in General Fund, $4,713,300 in Restricted Funds, and $60,856,200 in Federal Funds in fiscal year 2022-2023 and $5,837,300 in General Fund, $3,635,800 in Restricted Funds, and $74,898,200 in Federal Funds in fiscal year 2023-2024 to support information technology projects for Medicaid claims administration, electronic visit verification, utilization management, and data analytics.

(4) Electronic Health Record System: Included in the above appropriation is $607,300 in Restricted Funds and $5,465,400 in Federal Funds in fiscal year 2022-2023 and $2,095,600 in Restricted Funds and $18,860,100 in Federal Funds in fiscal year 2023-2024 to support enhancements to the electronic health record system.

(5) Home and Community Based Services (HCBS) Enhanced FMAP Reinvestment: Included in the above appropriation is $37,810,800 in Restricted Funds and $52,502,500 in Federal Funds in fiscal year 2022-2023 and $32,264,200 in Restricted Funds and $40,022,600 in Federal Funds in fiscal year 2023-2024 to support activities to enhance, expand, and strengthen HCBS waiver services as provided in Section 9817 of the American Rescue Plan Act of 2021. Any additional nonclinical and clinical staff hired to perform duties funded through the above appropriation shall be federally funded time limited positions which shall expire as of March 31, 2024, notwithstanding federally provided extensions of funding timelines.

(6) Medicaid Eligibility Determination Services: Included in the above General Fund appropriation is $4,000,000 in each fiscal year to support services performed by the Department for Community Based Services to determine eligibility for Medicaid benefits.

(7) Program of All-Inclusive Care for the Elderly (PACE): Included in the above appropriation is $1,000,000 in Restricted Funds and $1,000,000 in Federal Funds in each fiscal year to support the coordination of PACE services for eligible recipients.

(8) Basic Health Program Information Technology System: Included in the above appropriation is $3,500,000 in General Fund and $3,500,000 in Federal Funds in fiscal year 2022-2023 and $1,000,000 in General Fund and $1,000,000 in Federal Funds in fiscal year 2023-2024 to support enhancements to the Medicaid Management Information System (MMIS) for implementation of a Basic Health Program to provide a bridge health insurance plan for eligible recipients.

(9) Electronic Health Records System Implementation: Any funds expended for the implementation of an electronic health records system within the Department for Medicaid Services shall be coordinated as specified in Part I, G., 1., (4) of this Act.

b. Medicaid Benefits

	2021-22	2022-23	2023-24
General Fund	-0-	1,962,892,300	2,402,688,700
Restricted Funds	4,550,000	1,586,012,300	1,383,080,900
Federal Funds	721,214,300	11,723,695,600	12,061,242,200
TOTAL	725,764,300	15,272,600,200	15,847,011,800

(1) Transfer of Medicaid Benefits Funds: Any portion of the General Fund appropriation in either fiscal year that is deemed to be necessary for the administration of the Medicaid Program may be transferred from the Medicaid Benefits budget unit to the Medicaid Administration budget unit in accordance with statutes governing the functions and activities of the Department for Medicaid Services. The Secretary shall recommend any proposed

transfer to the State Budget Director for approval prior to transfer. Such action shall be reported by the Cabinet for Health and Family Services to the Interim Joint Committee on Appropriations and Revenue.

(2) Intergovernmental Transfers (IGTs): Any funds received through an Intergovernmental Transfer (IGT) agreement between the Department for Medicaid Services and other governmental entities, in accordance with a federally approved State Plan amendment, shall be used to provide for the health and welfare of the citizens of the Commonwealth through the provision of Medicaid Benefits. Revenues from IGTs are contingent upon agreement by the parties, including but not limited to the Cabinet for Health and Family Services, Department for Medicaid Services, and the appropriate providers. The Secretary of the Cabinet for Health and Family Services shall make the appropriate interim appropriations increase requests pursuant to KRS 48.630.

(3) Medicaid Benefits Budget Deficit: If Medicaid Benefits expenditures are projected to exceed available funds, the Secretary of the Cabinet for Health and Family Services may recommend and implement that reimbursement rates, optional services, eligibles, or programs be reduced or maintained at levels existing at the time of the projected deficit in order to avoid a budget deficit. The projected deficit shall be confirmed and approved by the Office of State Budget Director. No rate, service, eligible, or program reductions shall be implemented by the Cabinet for Health and Family Services without written notice of such action to the Interim Joint Committee on Appropriations and Revenue and the State Budget Director. Such actions taken by the Cabinet for Health and Family Services shall be reported, upon request, at the next meeting of the Interim Joint Committee on Appropriations and Revenue.

(4) Kentucky Access Fund: Notwithstanding KRS 304.17B-021, funds are transferred from this source to Medicaid Benefits in each fiscal year.

(5) Disproportionate Share Hospital (DSH) Program: Hospitals shall report the uncompensated care for which, under federal law, the hospital is eligible to receive disproportionate share payments. Disproportionate share payments shall equal the maximum amounts established under federal law.

(6) Hospital Indigent Patient Billing: Hospitals shall not bill patients for services if the services have been reported to the Cabinet and the hospital has received disproportionate share payments for the specific services.

(7) Provider Tax Information: Any provider who posts a sign or includes information on customer receipts or any material distributed for public consumption indicating that it has paid provider tax shall also post, in the same size typeset as the provider tax information, the amount of payment received from the Department for Medicaid Services during the same period the provider tax was paid. Providers who fail to meet this requirement shall be excluded from the Disproportionate Share Hospital and Medicaid Programs. The Cabinet for Health and Family Services shall include this provision in facilities' annual licensure inspections.

(8) Medicaid Budget Analysis Reports: The Department for Medicaid Services shall submit a quarterly budget analysis report to the Interim Joint Committee on Appropriations and Revenue no later than 75 days after the quarter's end. The report shall provide monthly detail of actual expenditures, eligibles, and average monthly cost per eligible by eligibility category along with current trailing 12-month averages for each of these figures. The report shall also provide actual figures for all categories of noneligible-specific expenditures such as Supplemental Medical Insurance premiums, Kentucky Patient Access to Care, nonemergency transportation, drug rebates, cost settlements, and Disproportionate Share Hospital payments by type of hospital. The report shall compare the actual expenditure experience with those underlying the enacted or revised enacted budget and explain any significant variances which may occur.

(9) Medicaid Managed Care Organization Reporting: Except as provided by KRS 61.878, all records and correspondence relating to Kentucky Medicaid, revenues derived from Kentucky Medicaid funds, and expenditures utilizing Kentucky Medicaid funds of a Medicaid managed care company operating within the Commonwealth shall be subject to the Kentucky Open Records Act, KRS 61.870 to 61.884. All records and correspondence relating to Medicaid specifically prohibited from disclosure by the federal Health Insurance Portability and Accountability Act privacy rules shall not be provided under this Act.

No later than 60 days after the end of a quarter, each Medicaid managed care company operating within the Commonwealth shall prepare and submit to the Department for Medicaid Services sufficient information to allow the department to meet the following requirements 90 days after the end of the quarter. The Department shall forward to the Legislative Research Commission Budget Review Office a quarterly report detailing monthly actual expenditures by service category, monthly eligibles, and average monthly cost per eligible for Medicaid and the Kentucky Children's Health Insurance Program (KCHIP) along with current trailing 12-month averages for each of these figures. The report shall also provide actual figures for other categories such as pharmacy rebates and reinsurance. Finally, the Department shall include in this report the most recent information or report available regarding the

amount withheld to meet Department of Insurance reserve requirements, and any distribution of moneys received or retained in excess of these reserve requirements.

(10) Critical Access Hospitals: Beginning with the effective date of this Act through June 30, 2024, no acute care hospital shall convert to a critical access hospital unless the hospital has either received funding for a feasibility study from the Kentucky State Office of Rural Health or filed a written request by January 1, 2022, with the Kentucky State Office of Rural Health requesting funding for conducting a feasibility study.

(11) Appeals: An appeal from denial of a service or services provided by a Medicaid managed care organization for medical necessity, or denial, limitation, or termination of a health care service in a case involving a medical or surgical specialty or subspecialty, shall, upon request of the recipient, authorized person, or provider, include a review by a board-eligible or board-certified physician in the appropriate specialty or subspecialty area; except in the case of a health care service rendered by a chiropractor or optometrist, for which the denial shall be made respectively by a chiropractor or optometrist duly licensed in Kentucky as specified in KRS 304.17A-607(1)(b). The physician reviewer shall not have participated in the initial review and denial of service and shall not be the provider of the service or services under consideration in the appeal.

(12) Medicaid Prescription Benefits Reporting: Notwithstanding KRS 205.647, the Department for Medicaid Services shall submit a report to the Interim Joint Committee on Appropriations and Revenue and the Medicaid Oversight and Advisory Committee by December 1 of each fiscal year on the dispensing of prescription medications to persons eligible under KRS 205.560. The report shall include:

(a) The total Medicaid dollars paid to the state pharmacy benefit manager by a managed care organization;

(b) The total amount of Medicaid dollars paid to the state pharmacy benefit manager by a managed care organization which were not subsequently paid to a pharmacy licensed in Kentucky;

(c) The average reimbursement by drug ingredient cost, dispensing fee, and any other fee paid by the state pharmacy benefit manager to licensed pharmacies with which the state pharmacy benefit manager shares common ownership, management, or control; or which are owned, managed, or controlled by any of the state pharmacy benefit manager's management companies, parent companies, subsidiary companies, jointly held companies, or companies otherwise affiliated by a common owner, manager, or holding company; or which share any common members on the board of directors; or which share managers in common;

(d) The average reimbursement by drug ingredient cost, dispensing fee, or any other fee paid by the state pharmacy benefit manager to pharmacies licensed in Kentucky which operate ten locations, ten or fewer locations, or ten or more locations; and

(e) All common ownership, management, common members of a board of directors, shared managers, or control of the state pharmacy benefit manager, or any of the state pharmacy benefit manager's management companies, parent companies, subsidiary companies, jointly held companies, or companies otherwise affiliated by a common owner, manager, or holding company with any managed care organization contracted to administer Kentucky Medicaid benefits, any entity which contracts on behalf of a pharmacy, or any pharmacy services administration organization, or any common ownership management, common members of a board of directors, shared managers, or control of a pharmacy services administration organization that is contracted with the state pharmacy benefit manager, with any drug wholesaler or distributor or any of the pharmacy services administration organizations, management companies, parent companies, subsidiary companies, jointly held companies, or companies otherwise affiliated by a common owner, common members of a board of directors, manager, or holding company.

(13) Kentucky Children's Health Insurance Program (KCHIP): Included in the above appropriation is $86,492,800 in General Fund, $400,000 in Restricted Funds, and $362,367,900 in Federal Funds in fiscal year 2022-2023 and $91,336,100 in General Fund, $400,000 in Restricted Funds, and $380,029,200 in Federal Funds in fiscal year 2023-2024 to support the continuation of KCHIP services.

(14) Supports for Community Living Waiver Program Rates: If the Supports for Community Living Waiver Program experiences a material change in funding based upon a new or amended waiver that is approved by the Centers for Medicare and Medicaid Services, the Department for Medicaid Services may adjust the upper payment limit amount for a Supports for Community Living Waiver Program service as long as the upper payment limit for each service is not less than the upper payment limit in effect on January 1, 2020.

(15) Substance Abuse Treatment for Incarcerated Individuals - Medicaid Demonstration Waiver: Upon approval of the Section 1115 demonstration waiver to provide substance use disorder treatment services to

individuals incarcerated for conviction under KRS Chapter 218A, the cost of treatment for a substance use disorder or patient navigation provided by a licensed clinical social worker shall be a covered Medicaid benefit for an incarcerated individual.

(16) Nursing Home Pandemic Relief Reimbursement Increase: Included in the above appropriation is $41,527,500 in General Fund and $108,472,500 in Federal Funds in fiscal year 2022-2023 and $41,745,000 in General Fund and $108,255,000 in Federal Funds in fiscal year 2023-2024 to support an additional reimbursement of $29.00 per resident day for Medicaid eligible nursing home residents.

(17) Medicaid Benefits Program Support: Included in the above appropriation is $709,067,100 in Federal Funds in fiscal year 2021-2022, $116,100,000 in Restricted Funds and $31,489,200 in Federal Funds in fiscal year 2022-2023, and $438,009,300 in General Fund, $232,200,000 in Restricted Funds, and $354,170,400 in Federal Funds in fiscal year 2023-2024 to support estimated program needs.

(18) Michelle P. Waiver Slots: Included in the above appropriation is $464,700 in General Fund and $1,194,900 in Federal Funds in fiscal year 2022-2023 to support 50 additional slots and $929,400 in General Fund and $2,389,800 in Federal Funds in fiscal year 2023-2024 to support 50 additional slots for a total of 100 slots over the 2022-2024 fiscal biennium.

(19) Supports for Community Living Waiver Slots: Included in the above appropriation is $1,104,900 in General Fund and $2,841,200 in Federal Funds in fiscal year 2022-2023 to support 50 additional slots and $2,209,800 in General Fund and $5,682,400 in Federal Funds in fiscal year 2023-2024 to support 50 additional slots for a total of 100 slots over the 2022-2024 fiscal biennium.

(20) Home and Community Based Waiver Services Funding Initiatives: (a) Pending approval from the Centers for Medicare and Medicaid Services, included in the above Federal Funds appropriation is $48,311,000 in fiscal year 2022-2023 and $71,505,000 in fiscal year 2023-2024 from the enhanced FMAP funds for Home and Community Based Services authorized by Section 9817 of the American Rescue Plan Act of 2021. The Cabinet for Health and Family Services shall use these funds to strengthen and improve Kentucky's Acquired Brain Injury (ABI), Acquired Brain Injury Long Term Care (ABI-LTC), Home and Community Based (HCB), Model II Waiver (MIIW), Supports for Community Living (SCL), and Michelle P. waiver programs through the following initiatives:

1. In fiscal year 2022-2023, the reimbursement rate for SCL Level I and ABI residential services shall be increased by 50 percent over the rate in effect on December 31, 2019. This reimbursement increase shall remain in effect in fiscal year 2023-2024. The Cabinet for Health and Family Services shall not implement exclusions to this reimbursement rate increase for day service attendance.

2. In fiscal year 2022-2023, the reimbursement rate for all services in the ABI, ABI-LTC, HCB, SCL, and Michelle P. waiver programs shall be increased by 10 percent, excluding the services described in subparagraph 1. of this paragraph.

3. In fiscal year 2023-2024, the reimbursement rate increase as provided in subparagraph 2. of this paragraph shall remain in effect, and the reimbursement rate for all services in the ABI, ABI-LTC, HCB, SCL, and Michelle P. waiver programs shall be increased by an additional 10 percent, excluding the services described in subparagraph 1. of this paragraph.

(b) It is the intent of the 2022 General Assembly that General Fund dollars will be appropriated to maintain the funding initiatives outlined in paragraph (a) of this subsection after the funds from the enhanced FMAP for Home and Community Based Services authorized by Section 9817 of the American Rescue Plan Act of 2021 are no longer available.

(21) Medicaid Managed Care Chronic Disease Management Pilot Program: The Department for Medicaid Services shall implement a pilot program to manage and reduce the adverse outcomes of chronic diseases such as diabetes experienced by individuals enrolled in the Medicaid program. The pilot program shall include strategies to effectuate behavioral change such as real-time monitoring via cellphones and additional evidence-based measures. The Department for Medicaid services shall require each Medicaid managed care organization participating in the Kentucky Medicaid program to provide the chronic disease management services as implemented through the pilot program as part of the contracted services.

(22) Basic Health Program: Notwithstanding any provision of law to the contrary, the Cabinet for Health and Family Services shall not exercise the state's option to develop a basic health program as permitted under 42 U.S.C. sec. 18051 without first obtaining specific authorization from the General Assembly to do so.

TOTAL - MEDICAID SERVICES

	2021-22	2022-23	2023-24
General Fund	5,700	2,032,587,300	2,473,126,200
Restricted Funds	4,961,500	1,643,169,900	1,435,101,500
Federal Funds	721,410,300	12,013,251,500	12,363,335,300
TOTAL	726,377,500	15,689,008,700	16,271,563,000

4. BEHAVIORAL HEALTH, DEVELOPMENTAL AND INTELLECTUAL DISABILITIES

	2021-22	2022-23	2023-24
General Fund (Tobacco)	-0-	1,400,000	1,400,000
General Fund	1,215,500	177,840,100	186,810,300
Restricted Funds	249,300	217,643,800	219,142,900
Federal Funds	161,400	117,259,600	107,459,000
TOTAL	1,626,200	514,143,500	514,812,200

(1) Disproportionate Share Hospital Funds: Pursuant to KRS 205.640(3)(a)2., mental health disproportionate share funds are budgeted at the maximum amounts permitted by Section 1923(h) of the Social Security Act. Upon publication in the Federal Register of the Annual Institutions for Mental Disease (IMD) Disproportionate Share Hospital (DSH) limit, 92.3 percent of the federal IMD DSH limit goes to the state-operated mental hospitals. If there are remaining funds within the psychiatric pool after all private psychiatric hospitals reach their hospital-specific DSH limit, state mental hospitals may exceed the 92.3 percent limit but may not exceed their hospital-specific DSH limit

(2) Lease Payments for Eastern State Hospital: Included in the above General Fund appropriation is $9,811,200 in fiscal year 2022-2023 and $9,810,000 in fiscal year 2023-2024 to make lease payments to the Lexington-Fayette Urban County Government to retire its debt for the construction of the new facility.

(3) Tobacco Settlement Funds: Included in the above General Fund (Tobacco) appropriation is $1,400,000 in each fiscal year for substance abuse prevention and treatment for pregnant women with a history of substance abuse problems.

(4) Debt Service: Included in the above General Fund appropriation is $590,000 in fiscal year 2022-2023 and $1,180,000 in fiscal year 2023-2024 for new debt service to support new bonds as set forth in Part II, Capital Projects Budget, of this Act.

(5) The Healing Place: Included in the above General Fund appropriation is $900,000 in each fiscal year to support direct services to clients provided by The Healing Place.

(6) Tim's Law Pilot Program Expansion: Included in the above General Fund appropriation is $500,000 in fiscal year 2022-2023 and $1,000,000 in fiscal year 2023-2024 to support expansion of a pilot program for individuals with severe mental illness to additional locations to ensure statewide access to services offered through the pilot program.

(7) Mobile Crisis Services Expansion and 988 Suicide Hotline Support: Included in the above General Fund appropriation is $6,170,700 in fiscal year 2022-2023 and $13,437,000 in fiscal year 2023-2024 to support the establishment of additional mobile crisis units and implementation of the 988 federally designated suicide hotline.

(8) Lee Specialty Clinic: Included in the above General Fund appropriation is an additional $1,495,000 in each fiscal year to support specialty medical services for individuals with moderate developmental and intellectual disabilities living in residential and community settings.

(9) Appalachian Regional Hospital: Included in the above General Fund appropriation is $14,600,000 in each fiscal year to support contracted inpatient psychiatric services provided within Hospital District IV under KRS 210.300. The Secretary of the Cabinet for Health and Family Services shall provide a report on total expenditures by fund source and program area for fiscal year 2022-2023 and estimated funding required for a continuation of services in fiscal year 2023-2024 to the Interim Joint Committees on Health and Family Services and Appropriations and Revenue by September 1, 2023.

(10) Substance Abuse Funding Report: The Department for Behavioral Health, Developmental and Intellectual Disabilities shall compile for each fiscal year a report on the funding received by the Cabinet for Health and Family Services to provide substance abuse prevention, treatment, and recovery services in the Commonwealth. The report shall include the amount, source, and duration of the funding, the purpose of the funding, the number of individuals served, and any available information on outcomes demonstrated as a result of the funding provided for substance abuse prevention, treatment, and recovery services. The report shall be submitted to the Legislative Research Commission, Office of Budget Review, by September 1 of each fiscal year.

(11) Electronic Health Records System Implementation: Any funds expended for the implementation of an electronic health records system within the Department for Behavioral Health, Developmental and Intellectual Disabilities shall be coordinated as specified in Part I, G., 1., (4) of this Act.

(12) Harbor House: Included in the above Federal Funds appropriation is $5,000,000 in fiscal year 2022-2023 from the State Fiscal Recovery Fund of the American Rescue Plan Act of 2021 to support the operations of the Harbor House.

(13) Mental Health Workforce Development: The Cabinet for Health and Family Services shall develop a pilot project to provide training for primary care providers relating to the diagnosis and treatment of common psychiatric disorders in order to strengthen the mental health workforce in rural and underserved areas and to expand the access to psychiatric services. The Cabinet shall develop the pilot project in coordination with the Train New Trainers Primary Care program at the University of California, Irvine.

5. PUBLIC HEALTH

	2021-22	2022-23	2023-24
General Fund (Tobacco)	-0-	12,200,000	12,200,000
General Fund	690,400	76,890,300	100,158,400
Restricted Funds	351,000	94,200,700	102,193,300
Federal Funds	700,100	439,878,200	307,606,700
TOTAL	1,741,500	623,169,200	522,158,400

(1) Tobacco Settlement Funds: Included in the above General Fund (Tobacco) appropriation is $7,000,000 in each fiscal year for the Health Access Nurturing Development Services (HANDS) Program, $900,000 in each fiscal year for the Healthy Start initiatives, $900,000 in each fiscal year for Early Childhood Mental Health, $900,000 in each fiscal year for Early Childhood Oral Health, $500,000 in each fiscal year for the Lung Cancer Screening Program, and $2,000,000 in each fiscal year for Smoking Cessation.

(2) Local and District Health Department Fees: Notwithstanding KRS 211.170 and 211.186, local and district health departments shall retain 90 percent of the fees collected for delivering foundational public health program services to fund the costs of operations, services, and the employer contributions for the Kentucky Employees Retirement System.

(3) Kentucky Poison Control Center: Included in the above General Fund appropriation is $750,000 in each fiscal year for the Kentucky Poison Control Center. If federal emergency relief funds become available for COVID-19 related poison control expenditures, those Federal Funds shall be used to support the Kentucky Poison Control Center, and any unexpended General Fund balance from the appropriations set forth in this subsection shall lapse to the General Fund.

(4) Kentucky Colon Cancer Screening Program: Included in the above General Fund appropriation is $500,000 in each fiscal year to support the Kentucky Colon Cancer Screening Program.

(5) Kentucky Pediatric Cancer Research Trust Fund: Included in the above General Fund appropriation is $2,500,000 in each fiscal year to the Kentucky Pediatric Cancer Research Trust Fund for general pediatric cancer research and support of expansion of clinical trials at the University of Kentucky and the University of Louisville. Included in the above General Fund appropriation is an additional one-time allocation of $3,750,000 in each fiscal year to the Kentucky Pediatric Cancer Research Trust Fund.

(6) Folic Acid Program: General Fund (Tobacco) continuing appropriation reserves allotted to the Folic Acid Program shall be utilized by the Department for Public Health during the 2022-2024 fiscal biennium to continue the Folic Acid Program.

(7) Public Health Transformation: Included in the above General Fund appropriation is $17,688,000 in fiscal year 2022-2023 and $19,068,000 in fiscal year 2023-2024 to support the costs of workforce and operations for the local health departments.

(8) Health Access Nurturing Development Services: Included in the above Restricted Funds appropriation is $6,068,900 in fiscal year 2022-2023 and $13,972,900 in fiscal year 2023-2024 to support direct services for eligible clients of the Health Access Nurturing Development Services Program for the Department for Public Health.

(9) Area Health Education Centers: Included in the above Federal Funds appropriation is $2,500,000 in each fiscal year from the State Fiscal Recovery Fund of the American Rescue Plan Act of 2021 to support the operations of the eight regional Area Health Education Centers in the Commonwealth.

(10) Electronic Health Record System: Included in the above General Fund appropriation is $1,207,900 in fiscal year 2022-2023 and $22,950,100 in fiscal year 2023-2024 to support the purchase and implementation cost of an Electronic Health Record system for the Department for Public Health.

(11) Lung Cancer Screening MCO: Each Medicaid Managed Care Organization that has a participating contract with the Commonwealth for the next contract renewal cycle shall provide services for lung cancer screenings.

(12) Electronic Health Records System Implementation: Any funds expended for the implementation of an electronic health records system within the Department for Public Health shall be coordinated as specified in Part I, G., 1., (4) of this Act.

6. FAMILY RESOURCE CENTERS AND VOLUNTEER SERVICES

	2021-22	2022-23	2023-24
General Fund	54,900	22,557,300	22,566,200
Federal Funds	19,200	9,114,300	9,118,900
TOTAL	74,100	31,671,600	31,685,100

(1) Family Resource and Youth Services Centers Funds: No more than three percent of the total funds transferred from the Department of Education to the Family Resource and Youth Services Centers, as consistent with KRS 156.496, shall be used for administrative purposes in each fiscal year.

(2) Per Eligible Student Amount: Included in the above General Fund appropriation is $9,400,000 in each fiscal year to support an increase in the per eligible student amount from $183.86 to $210.00 for the Family Resource and Youth Service Centers.

(3) AmeriCorps Match: Included in the above General Fund appropriation is $500,000 in each fiscal year to support the matching requirements of Federal Funds for the Division of Serve Kentucky.

7. INCOME SUPPORT

	2021-22	2022-23	2023-24
General Fund	-0-	14,293,100	14,969,600
Restricted Funds	164,100	16,633,600	16,663,500
Federal Funds	1,424,400	100,206,100	100,567,100
TOTAL	1,588,500	131,132,800	132,200,200

(1) Contractual Services: Included in the above appropriation is $2,725,200 in Restricted Funds and $5,290,300 in Federal Funds in each fiscal year to support the cost of contractual services for the Division of Child Support Enforcement.

(2) Staffing Vacancies: Included in the above appropriation is $429,600 in Restricted Funds and $1,002,300 in Federal Funds in each fiscal year to support hiring an additional 12 full-time staff positions, which include seven full-time positions for the creation of a Division of Fiscal Management and five Child Support Specialist positions for the Division of Child Support Enforcement.

(3) Debt Service: Included in the above General Fund appropriation is $676,500 in fiscal year 2022-2023 and $1,353,000 in fiscal year 2023-2024 for new debt service to support new bonds as set forth in Part II, Capital Projects Budget, of this Act.

8. COMMUNITY BASED SERVICES

	2021-22	2022-23	2023-24
General Fund (Tobacco)	-0-	12,400,000	12,400,000
General Fund	13,859,100	631,088,600	652,595,200
Restricted Funds	771,900	209,841,100	210,454,900
Federal Funds	3,064,100	1,035,567,300	773,871,800
TOTAL	17,695,100	1,888,897,000	1,649,321,900

(1) Tobacco Settlement Funds: Included in the above General Fund (Tobacco) appropriation is $9,900,000 in each fiscal year for the Early Childhood Development Program. Included in the above General Fund (Tobacco) appropriation is $2,500,000 in each fiscal year for the Early Childhood Adoption and Foster Care Supports Program.

(2) CCAP Reimbursement Rate Increase: Included in the above Federal Funds appropriation is $12,000,000 in each fiscal year from the State Fiscal Recovery Fund of the American Rescue Plan Act of 2021 to continue the $2 per child increase in the Child Care Assistance Program provider reimbursement rate.

(3) Fostering Success: Included in the above General Fund appropriation is $500,000 in each fiscal year for the Fostering Success Program. The Cabinet for Health and Family Services shall submit a report containing the results of the program, including but not limited to the number of participants, number and type of job placements, job training provided, and any available information pertaining to individual outcomes to the Interim Joint Committee on Appropriations and Revenue by July 1 of each fiscal year.

(4) Relative Placement Support Benefit: Included in the above General Fund appropriation is $1,000,000 in each fiscal year for start-up costs associated with placing children with non-parental relatives.

(5) Domestic Violence Shelters: Included in the above General Fund appropriation is $500,000 in each fiscal year for operational costs.

(6) Rape Crisis Centers: Included in the above General Fund appropriation is $500,000 in each fiscal year for operational costs.

(7) Dually Licensed Pediatric Facilities: Included in the above General Fund appropriation is $550,000 in each fiscal year to provide supplemental payments to dually licensed pediatric facilities for emergency shelter services for children.

(8) Child Care Assistance Program: Included in the above General Fund appropriation is $10,600,000 in each fiscal year to provide services to families at or below 160 percent of the federal poverty level as determined annually by the U.S. Department of Health and Human Services.

(9) Family Counseling and Trauma Remediation: Included in the above General Fund appropriation is $50,000 in each fiscal year to provide forensic interviews, family counseling, and trauma remediation services primarily in Jefferson County and surrounding Kentucky counties.

(10) Child Advocacy Centers: Included in the above General Fund appropriation is $500,000 in each fiscal year to support the operations of the child advocacy centers.

(11) Family Scholar House: Included in the above General Fund appropriation is $1,000,000 in each fiscal year to support the operations of the Family Scholar House.

(12) Personal Care Homes: Included in the above General Fund appropriation is $12,000,000 in each fiscal year to support reimbursements provided to personal care homes.

(13) Children's Services Contractors: Notwithstanding KRS Chapter 45A, no contracts awarded for the use and benefit of the Department for Community Based Services shall interfere with the contractor’s freedom of religion as set forth in KRS 446.350. Any such contracts shall contain a provision allowing a contractor to allow a substitute contractor who is also licensed or approved by the Cabinet to deliver the contracted services if the contractor cannot perform a contracted service because of religiously held beliefs as outlined in KRS 446.350.

(14) Additional Social Service Workers: Included in the above appropriation is $7,450,200 in General Fund, $335,300 in Restricted Funds, and $703,800 in Federal Funds in fiscal year 2022-2023 to support an additional 100 Social Service Worker **~~[I]~~** positions and $14,900,400 in General Fund, $670,600 in Restricted Funds, and $1,407,600 in Federal Funds in fiscal year 2023-2024 to support an additional 100 Social Service Worker **~~[I]~~** positions for a total of 200 Social Service Worker **~~[I]~~** positions over the 2022-2024 fiscal biennium. The Cabinet for Health and Family Services shall submit a quarterly report containing the number of Social Service Worker, Social Service Clinician, Social Service Specialist, and Family Services Office Supervisor filled positions to the Interim Joint Committee on Appropriations and Revenue, with the first report due July 1, 2022.

(15) Social Service Worker Recruitment: Included in the above General Fund appropriation is $1,500,000 in fiscal year 2022-2023 and $2,400,000 in fiscal year 2023-2024 to support the recruitment initiative. Notwithstanding any statute to the contrary, by July 1, 2022, the Secretary of the Personnel Cabinet shall increase the entry rate salary of the Social Service Worker I, Social Service Worker II, Social Service Clinician I, Social Service Clinician II, Social Service Specialist, and Family Services Office Supervisor classified positions in the Department for Community Based Services within the Cabinet for Health and Family Services by ten percent. Notwithstanding any statute to the contrary, to effectuate the salary increases as specified, the Secretary of the Personnel Cabinet shall establish a special entry rate for the classifications above in the Department for Community Based Services, raise the grade levels of the above classifications, or establish a new classification reserved for use by the Department for Community Based Services.

(16) Prevention Services Expansion: Included in the above appropriation is $10,000,000 in General Fund and $9,600,000 in Federal Funds in each fiscal year of the 2022-2024 biennium to support the development of programs included in Kentucky's Title IV-E Prevention Plan as approved by the U.S. Department of Health and Human Services and to expand Kentucky Strengthening Ties and Empowering Parents (K-STEP) to additional regions in the Commonwealth.

(17) Residential and Therapeutic Foster Care Rates: Included in the above appropriation is $25,000,000 in General Fund, $5,000,000 in Restricted Funds, and $6,000,000 in Federal Funds in each fiscal year to support an increase in the reimbursement rates for private residential and therapeutic providers to meet the requirements of the Family First Prevention Services Act of 2018 in the Department for Community Based Services.

(18) Victims Advocacy Programs: Included in the above General Fund appropriation is an additional $5,000,000 for the Children's Advocacy Centers, an additional $3,500,000 for the Domestic Violence Shelters, and an additional $1,500,000 for the Rape Crisis Centers in each fiscal year. These appropriations shall support direct service costs only, and no administrative overhead costs shall be paid with these appropriations. The Cabinet for Health and Family Services shall submit a report containing the number of participants served and the details of items expended from these funds to the Interim Joint Committee on Appropriations and Revenue by August 1 of each fiscal year.

(19) Debt Service: Included in the above General Fund appropriation is $572,500 in fiscal year 2022-2023 and $1,145,000 in fiscal year 2023-2024 for new debt service to support new bonds as set forth in Part II, Capital Projects Budget, of this Act.

(20) Social Worker Alternative Work Program: The General Assembly recognizes the vital role, responsibilities, and the resulting stress experienced by social workers in meeting the needs of their clients and the citizens of the Commonwealth. To address the retention of social workers, the Department for Community Based Services shall examine the feasibility of establishing an alternative work program for Social Service Worker classifications within the Department for Community Based Services. The alternative work program is intended to provide Social Service Worker classification personnel who have completed a minimum of four years of service, a period of respite from their regular duties while remaining employees of the Commonwealth. These activities may include service as a classroom substitute teacher, volunteerism, or other approved activities. The Department for Community Based Services shall provide recommendations to the Interim Joint Committee on Appropriations and Revenue by December 1, 2022, on the eligibility criteria for participating in the program, allowable activities, duration of the respite period, process for resumption of regular duties within the Department for Community Based Services, and other factors as deemed pertinent.

(21) Family Recovery Court: Included in the above General Fund appropriation is $375,000 in each fiscal year to support the operations of the Jefferson County Family Recovery Court to assist families involved with the child welfare system.

(22) Maryhurst: Included in the above General Fund appropriation is $1,350,000 in each fiscal year to provide a reimbursement rate increase for children in the 5 Specialized Program.

(23) Buckhorn Children and Family Services: Included in the above Federal Funds appropriation is $1,000,000 in fiscal year 2022-2023 from the State Fiscal Recovery Fund of the American Rescue Plan Act of 2021 to support COVID-19 staffing issues.

(24) Norton Children's Pediatric Protection Specialists: Included in the above General Fund appropriation is $6,000,000 in fiscal year 2022-2023 to support a team of doctors and specially trained staff to accept cases for children suspected to be victims of child abuse or neglect and at risk of harm. The funds shall be used to create a Center of Excellence in the Commonwealth.

(25) Kentucky Alliance of Boys and Girls Clubs: Included in the above Federal Funds appropriation from the Child Care Development Block Grant of the American Rescue Plan Act of 2021 is $10,000,000 in fiscal year 2022-2023 for non-licensed providers caring for children ages six to 18 years of age to be used for one-time capital projects specific to each local club's needs.

(26) Bellwood Presbyterian Home for Children: Included in the above General Fund appropriation is a one-time allocation of $325,000 in fiscal year 2023-2024 to the Bellwood Presbyterian Home for Children to support operations.

(27) Children's Alliance: Included in the above General Fund appropriation is a one-time allocation of $1,000,000 in each fiscal year to the Children's Alliance to support operations.

(28) Hospice Centers Support: Included in the above General Fund appropriation is a one-time allocation of $1,000,000 in each fiscal year which shall be distributed equally to all hospice centers across the Commonwealth to support operations.

(29) Foster Care Independent Living: Included in the above General Fund appropriation is $2,000,000 in each fiscal year for independent living supports to children aging out of the foster care system.

(30) Employee Child-Care Assistance Partnership: Included in the above General Fund appropriation is $15,000,000 in fiscal year 2023-2024 to the Employee Child-Care Assistance Partnership for matching contributions. There shall be a seven percent cap on administrative costs for the oversight of this program.

9. AGING AND INDEPENDENT LIVING

	2021-22	2022-23	2023-24
General Fund	694,700	47,783,800	47,903,500
Restricted Funds	19,900	2,883,400	3,013,600
Federal Funds	7,276,600	67,667,300	67,668,500
TOTAL	7,991,200	118,334,500	118,585,600

(1) Local Match Requirements: Notwithstanding KRS 205.460, entities contracting with the Cabinet for Health and Family Services to provide essential services under KRS 205.455 and 205.460 shall provide local match equal to or greater than the amount in effect during fiscal year 2021-2022. Local match may include any combination of materials, commodities, transportation, office space, personal services, or other types of facility services or funds. The Secretary of the Cabinet for Health and Family Services shall prescribe the procedures to certify the local match compliance.

(2) Expansion of Senior Meals: Included in the above Federal Funds appropriation is $7,240,000 in fiscal year 2021-2022 and $14,480,000 in each fiscal year of the 2022-2024 fiscal biennium from the State Fiscal Recovery Fund of the American Rescue Plan Act of 2021 for the expansion of meals to senior citizens in the community.

(3) Electronic Health Records System Implementation: Any funds expended for the implementation of an electronic health records system within the Department for Public Health shall be coordinated as specified in Part I, G., 1., (4) of this Act.

10. HEALTH DATA AND ANALYTICS

	2021-22	2022-23	2023-24
General Fund	8,300	497,400	500,200
Restricted Funds	83,700	23,461,800	23,472,400
Federal Funds	7,500	18,106,000	18,110,500
TOTAL	99,500	42,065,200	42,083,100

(1) Kentucky Access Fund: Notwithstanding KRS 304.17B-021, funds from this source are transferred to the Health Benefit Exchange in each fiscal year.

TOTAL - HEALTH AND FAMILY SERVICES CABINET

	2021-22	2022-23	2023-24
General Fund (Tobacco)	-0-	26,000,000	26,000,000
General Fund	16,993,400	3,021,746,400	3,516,649,000
Restricted Funds	8,569,600	2,274,259,700	2,076,792,300
Federal Funds	734,979,000	13,856,303,200	13,803,160,300
TOTAL	760,542,000	19,178,309,300	19,422,601,600

H. JUSTICE AND PUBLIC SAFETY CABINET

Budget Units

1. JUSTICE ADMINISTRATION

	2021-22	2022-23	2023-24
General Fund (Tobacco)	-0-	3,250,000	3,250,000
General Fund	636,600	49,307,800	48,296,700
Restricted Funds	-0-	5,265,800	5,595,000
Federal Funds	49,800	55,230,600	55,239,800
TOTAL	686,400	113,054,200	112,381,500

(1) Operation UNITE: (a) Notwithstanding KRS 48.005(4), included in the above Restricted Funds appropriation is $1,500,000 in each fiscal year for the Operation UNITE Program from settlement funds resulting from the suit against Purdue Pharma, et al.. Included in the above General Fund appropriation is $500,000 in each fiscal year for the Operation UNITE Program.

(b) For the periods ending June 30, 2022, and June 30, 2023, the Secretary of the Justice and Public Safety Cabinet, in coordination with the Chief Executive Officer of Operation UNITE, shall prepare reports detailing for what purpose and function the funds were utilized. The reports shall be submitted to the Interim Joint Committee on Appropriations and Revenue by September 1 of each fiscal year.

(2) Office of Drug Control Policy: Included in the above General Fund (Tobacco) appropriation is $3,000,000 in each fiscal year for the Office of Drug Control Policy.

(3) Access to Justice: Included in the above General Fund appropriation is $500,000 in each fiscal year to support the Access to Justice Program.

(4) Court Appointed Special Advocate Funding: (a) Included in the above General Fund appropriation is $3,000,000 in each fiscal year for grants to support Court Appointed Special Advocate (CASA) funding programs.

(b) No administrative costs shall be paid from the appropriation provided in paragraph (a) of this subsection.

(5) Restorative Justice: Included in the above General Fund (Tobacco) appropriation is $250,000 in each fiscal year to support the Restorative Justice Program administered by the Volunteers of America.

(6) Medical Examiner Personnel: Included in the above General Fund appropriation is $3,774,800 in each fiscal year to support additional positions within the Office of the Kentucky State Medical Examiner and provide salary increases for forensic autopsy technicians, medical examiners, and the Chief Medical Examiner.

(7) Office of the Kentucky State Medical Examiner: (a) Included in the above General Fund appropriation is $6,349,700 in each fiscal year to support the operations of the Office of the Kentucky State Medical Examiner.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, AND KENTUCKY, et al. Plaintiffs,	)	Case No. 3:22-CV-198
VS.	)	
CAMERON, et al., Defendants.	)	May 2, 2022 Louisville, KY

* * * * *

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE HONORABLE REBECCA GRADY JENNINGS
UNITED STATES DISTRICT JUDGE

* * * * *

APPEARANCES:

For Plaintiff Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Inc.,:

Miranda H. Turner
Crowell & Moring LLP - DC
1001 Pennsylvania Ave., NW
Washington, DC 20004
And
Julie A. Murray
Planned Parenthood Federation of America - DC
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005

April Dowell, RMR, CRR
Official Court Reporter
232 U.S. Courthouse
Louisville, KY 40202
(502) 625-3778

Proceedings recorded by mechanical stenography, transcript produced by computer.

APPEARANCES (Continued)

For Plaintiff Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Inc.,:

Casey Hinkle
Michael P. Abate
Kaplan Johnson Abate & Bird LLP
710 West Main Street, Suite 400
Louisville, KY 40202
And
Jennifer Salzman Romano
Crowell & Moring LLP - Los Angeles
515 South Flower Street, 40th Floor
Los Angeles, CA 90071

For Plaintiff EMW Women's Surgical Center, P.S.C.:

Brigitte Amiri
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
And
Heather L. Gatnarek
ACLU of Kentucky
325 W. Main Street, Suite 2210
Louisville, KY 40202

For Defendant Daniel Cameron:

Christopher L. Thacker
Lindsey Keiser
Daniel Grabeowski
Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, KY 40601

For Defendant Eric Friedlander:

Wesley W. Duke
Cabinet for Health & Family Services
275 W. Main Street, 5W-B
Frankfort, KY 40621

For Defendant Michael S. Rodman:

Leanne K. Diakov
Kentucky Board of Medical Licensure
310 Whittington Parkway, Suite 1B
Louisville, KY 40222

For Defendant Thomas B. Wine:

Jason B. Moore
Jefferson County Commonwealth Attorney
514 W. Liberty Street
Louisville, KY 40202

(Begin proceedings in open court 10:17 a.m.)

THE COURT: We are going on the record this morning in 3:22-CV-198. Can I have appearances for the record?

MS. TURNER: Your Honor, Miranda Turner on behalf of Planned Parenthood.

THE COURT: All right.

MS. MURRAY: Your Honor, Julie Murray on behalf of Planned Parenthood.

MS. AMIRI: Brigitte Amiri on behalf of EMW.

MS. ROMANO: Good morning, Your Honor. Jennifer Romano on behalf of Planned Parenthood.

THE COURT: Okay.

MS. GATNAREK: Good morning, Your Honor. Heather Gatnarek on behalf of EMW Women's Surgical Center.

THE COURT: Okay.

MR. ABATE: Michael Abate on behalf of Planned Parenthood.

THE COURT: Okay.

MS. HINKLE: Good morning. Casey Hinkle on behalf of plaintiff.

THE COURT: Okay. And, yes, over to the other side.

MR. THACKER: Your Honor, Christopher Thacker for defendant, Attorney General Daniel Cameron. With me at the table I have Assistant Attorney General Lindsey Keiser. Your Honor, I also have Assistant Solicitor General Daniel

Grabeowski. I'd note for the court Mr. Grabeowski is admitted in Kentucky but his application to practice before this court is pending. I'd ask that he nonetheless be allowed to participate in today's hearing and join me at the table.

THE COURT: Okay. That's no problem. Thank you. All right. Yes?

MR. DUKE: Thank you, Your Honor. Wesley Duke for the Cabinet for Health and Family Services and Secretary Friedlander.

THE COURT: All right.

MS. DIAKOV: Good morning, Leanne Diakov for Defendant Michael Rodman.

MR. MOORE: Your Honor, Jason Moore on behalf of Defendant Thomas Wine, Commonwealth Attorney.

THE COURT: All right. Wonderful. Okay. So we are here today for a preliminary injunction hearing. There was a lot of feverish writing over the weekend and even into this morning, clearly. So I have received all of the briefing. I have gotten through the great majority of it. Certainly the stuff filed early this morning, we've gotten through a good bit of it, but -- but I appreciate you filing that.

I'm going to say at the start that I will have you do any findings of fact and conclusions of law and do another submission before the PI, so it wasn't your last chance to be heard on paper, certainly. I know over the weekend everybody

seemed to work very diligently, but we'll get one more set of briefing before we do the PI part of this.

As an initial matter, certainly I understand that the underlying topic of this House Bill is -- emotes a lot of emotion certainly from both sides. And, you know, there are people who have very personal feelings about it as individuals, very personal religious and moral emotions as well, and certainly it's a political issue as well.

But we're here today in a courtroom and so the only arguments that are going to be entertained by the court today are those that are strictly of a legal nature having to do with compliance with the House Bill as well as the constitutionality of the House Bill.

And I say that at the start 'cause I know emotions run high on these issues and I want to make it clear the court's not entertaining emotional or political arguments today. This is purely on the legal nature of this particular house bill, so we'll want to make sure we confine our arguments to those. As to how we're going to proceed today, are there witnesses on behalf of Planned Parenthood?

MS. TURNER: Your Honor, the parties conferred ahead of time and we think that everything that should be discussed today is of a legal nature so we're not anticipating calling a witness. There is a declaration already in the record before you with respect to any facts that you may find. Of course,

we're always happy to supplement.

THE COURT: Okay. Okay. Anything on behalf of EMW? So that's on behalf of all of you? You've all agreed there'll be no witnesses today; is that correct?

MR. THACKER: Your Honor, again, Christopher Thacker for the Attorney General. That is true for today. As we say in our response to the motion that was filed on Friday, we believe that the house -- the 15-week ban issue potentially raises factual questions. And we submitted a declaration late last evening. We would reserve the opportunity -- or would seek the opportunity to perhaps further supplement the factual record.

Perhaps that can be done in connection with whatever filing the court wants after today's hearing in terms of findings of fact and conclusions of law but certainly no witnesses today. And I think the determination of whether a separate hearing will be needed on the facts can be made after all filings are closed and the court looks at any declaration or proffers of evidence that are made.

THE COURT: Okay. And on behalf of EMW?

MS. AMIRI: No, Your Honor. We don't have any witnesses to offer today.

THE COURT: Okay. So I'd like to break the hearing up really into two sections. I'd like to start with the compliance issue and walk through the compliance issue first,

and then second we'll handle the constitutionality issue which I see those as two separate things although obviously compliance comes into play in that, but I'd like to take up the compliance issues first and then we'll take up the constitutionality issues.

I think on the charts that I have seen produced by both parties -- and I appreciate you-all using the same chart. That was very helpful. I think there are some -- I mean, I understand that the Attorney General's office has put forward the argument that compliance with the bill as a whole is possible; however, I think that argument is somewhat disingenuous based on some of the other comments that are made in the briefings, so there does seem to be some agreement on which provisions cannot be complied with and so I want to focus on the ones that are truly in dispute.

Obviously ones that are not applicable, being that there's no change in the law, I don't think we need to address those. And I understand -- you know, the chart I'm looking at, the one that came from Planned Parenthood, certainly EMW might also want to address some of those -- and I think the Attorney General mentioned this -- might not apply exactly the same way to you and you might have other additional arguments to make and you're welcome to make those today and certainly submit as well.

So if there's anything you think I'm skipping over

that seems to have agreement amongst the parties, feel free to jump in and note that, but we'll skip over the ones that appear to either not be applicable, being no change in the prior law, or that the parties seem to agree upon the fact that compliance is not possible.

So I'm going to let Planned Parenthood start. And what I would suggest is we just do one section at a time, hear arguments from each party on those divisions, and then we can address any rebuttal to that, okay?

MS. TURNER: Your Honor, would you like me at the podium or --

THE COURT: It's whatever -- I think you'll probably be more comfortable at the podium and you're welcome to use the larger podium if that helps too. That moves up and down, so you're welcome to use that. Do you need to display anything?

MS. TURNER: Your Honor, I don't have anything to display.

THE COURT: Okay.

MS. TURNER: So thank you for that guidance. In terms of where to start with compliance, you know, we could go numerically through the chart if that's Your Honor's preference. And let me begin then, if so, by saying Section 1 is -- certainly has a lot to discuss, but Section 1 is one of the eight provisions that Section 13 states the Cabinet shall

create these required forms.

And so I think that because of Section 13 which says the Cabinet shall create and distribute the report forms required for Sections 1, 4 and the rest, you know, we think that for all of these, the Cabinet is the entity that has to create and provide the forms so that we know what we are obligated to provide and so that we can comply with that.

The Attorney General has put in a suggestion that it's Section 10 -- (10) of Section 1. I don't know that that's clear from the way the Bill is structured that that is in fact the form that is going to need to be submitted, and if it is, whether it is the form that already exists or whether it is some new version of that form that has yet to be created.

So from our perspective, Section 1 is currently impossible to comply with because there is a form that is required for Section 1 according to Section 13 and we don't know what it is or whether it exists right now and therefore can't fill it out.

The other thing I want to note just as a preface to all of these sort of sections that dovetail off of Section 13, a lot of them call for information that -- excuse me. A lot of them call for information that is new and that is potentially revelatory of patient identity.

I will say that's not the case necessarily for

Section 1, although we don't know, but for some of the others like Section 4, some of the new pieces of information include patient's county and zip code which is going to be new. And the concern there is that putting that information in could potentially -- combined with other demographic information that's already collected -- reveal patient identity, so that's another concern we have with sort of all of these that stem from Section 13 and are requiring forms.

We want the guidance from the State so that we understand how we put in information that complies with the law but also information that doesn't reveal patient privacy.

THE COURT: Okay. So as to your suggestion there about a zip code or county, so those are items not currently listed on the form?

MS. TURNER: That's right. There's an existing form that all abortion --

THE COURT: This is the one for 1(10)?

MS. TURNER: No, Your Honor. And I'm sorry if I confused issues. For 1(10) that is something that exists and that may be what Section 13 says is required. It may not be. I don't know the answer to that. The Attorney General has suggested that is the case. I think it's unclear.

THE COURT: So the form for 1(10) -- 1(10) was part of the prior law already existing --

MS. TURNER: Yes.

THE COURT: -- so at the time this house bill was written, there was a form that had existed in compliance with Section 1(10), correct?

MS. TURNER: That's my understanding.

THE COURT: Okay. And that form, does it cover all of the reporting requirements now added into Section 1?

MS. TURNER: I expect that the answer is no to that. I believe the form in 1(10) is intended to cover a medical emergency situation. And the Bill in other areas of Section 1 creates new requirements for an emergency situation if such a situation exists, and so to the extent that form would need to encompass the new stuff, it probably doesn't.

THE COURT: Okay. All right. And so --

MS. TURNER: It does not.

THE COURT: Okay. Go ahead.

MS. AMIRI: Your Honor, we think the form does not exist currently for 1(10), so we're not aware of it being in existence right now even pre-HB 3.

THE COURT: Okay. So the form for 1(10) -- nobody's provided me the 1(10) form, like, specified "This is the form that was created for the purpose of complying with 1(10)" previous to this house bill being written, correct?

MS. TURNER: That's correct. The language has not changed in 110 in the bill.

THE COURT: But there is no form for it?

MS. TURNER: We believe that there may not be a form, yeah. I'm sorry. I misspoke earlier.

THE COURT: Okay. So -- and this was some of my confusion because the Attorney General's office suggested in their original briefing that there wasn't a form for 1(10) yet, and so if I were to enjoin something, 1(10) would have been on that list which made me question -- because that was pre-existing to House Bill 3's changes, so I want to make sure I understand what forms actually exists 'cause that makes a difference for what we can and cannot comply with and what information is being specifically requested for each compliance for each section.

So there is no form for 1(10) even though that was something that theoretically -- and I'm suggesting that maybe Section 13 was intended to request the Cabinet to actually create that and that was not in the original language of that law; is that correct?

MS. TURNER: I think that that's a possibility, yes.

THE COURT: Okay. All right. All right. So other than 1(10), you also speak to additional information that's going to be requested to be reported as part of these emergency situations. You mentioned, I think, county and zip code.

MS. TURNER: So let me just step back and say for -- if we're only focused on Section 1, I think the question is

what is the form that's required to be created --

THE COURT: Okay.

MS. TURNER: -- and there are other new requirements within Section 1 including the requirement that certain information now be notarized, but the biggest issue for Section 1 is Section 13 directs that the Cabinet create and distribute a report form required in Section 1. To our knowledge, that doesn't exist.

THE COURT: Okay. And so the sections that that would be applicable to are Sections 2, 9 -- I'm sorry -- subsections (2), (9), (10), (11) of Section 1, correct?

MS. TURNER: Your Honor, like I said, I think it is unclear what Section 13 is asking for. It is asking for a form. The Attorney General has suggested that it's subsection (10), but as you point out, there's been some inconsistent briefing on that and I don't -- from our perspective, if there is a requirement to report and we don't know what it is, it's impossible to comply with.

THE COURT: Okay. However, for instance, subsection (1), those are definitions. They remain unchanged. There's no compliance issue with that.

MS. TURNER: That's right.

THE COURT: Also I think subsections (3) and (4), they don't impose obligations on the defendants -- or I'm sorry -- on the plaintiffs in this case, and so there's --

there's really nothing there that would prevent compliance with those sections for the folks in this room?

MS. TURNER: That's right.

THE COURT: Okay. Subsection (5), there's no change from the prior law. And then no obligations on plaintiffs for 6 and 8, no change from the prior law on 7, and no additional obligations on plaintiffs regarding Section 12. So those sections, for instance, are not really part of our compliance argument here today.

MS. TURNER: That's right.

THE COURT: All right. Okay. Let's then hear from the Attorney General on Section 1. And you can choose whether or not you want to stand, sit, or use that podium. It's completely up to you.

MR. THACKER: Thank you, Your Honor. We'll see what works best. Your Honor, I want to begin by making it very clear that it is the burden of the plaintiffs here to show that they cannot conform, and it's their burden to show, you know, if -- again, I actually find it remarkable that we're talking about a preexisting section that's been around -- actually, I'm not sure -- but at least for over a year.

You know, it wasn't created by this most recent General Assembly and they don't know if there was a form to submit or not. I think that's their job to show.

THE COURT: Well, I think you-all suggested that to

start, though. In the first set of briefings that was a suggestion from the Attorney General's office that there wasn't a form.

MR. THACKER: Again, Your Honor, our assumption is -- and as far as I know, nobody's put any evidence in the record one way or the other, but our assumption is if there was a portion of the statute that's not new, that a form that was required over a year ago or more presumably does exist. Either that or plaintiffs are conceding they've been operating in violation of the preexisting statute for at least the last year.

THE COURT: And that may be the case. Probably the difference is the penalties imposed in the new house bill make a difference for that so maybe up the ante a little bit, so the question is -- and we do have the Cabinet here, correct?

MR. DUKE: Yes, Your Honor.

THE COURT: Can I ask a very basic question?

MR. DUKE: Please.

THE COURT: Is there a form for Section 1(10)?

MR. DUKE: It's the position of the Cabinet that we don't have a form for that section that would fit this. And one would have to be created as with several others as well.

THE COURT: Okay. All right. And that's -- and has there been a form available, say, for the last year for Section 1(10)? Doesn't sound like there is; is that right?

MR. DUKE: I think there might be a general form that could be available, but we don't think it fits as far as the reporting requirements go, so it's not a -- it doesn't fit this section. I would have to confirm that.

THE COURT: Okay. It doesn't fit the section generally or it doesn't fit Section 1(10) which was pre-existing?

MR. DUKE: 1(10) pre-existing.

THE COURT: Okay. Which would mean probably it doesn't fit Section 1 now as it stands?

MR. DUKE: Correct.

THE COURT: Okay. Thank you. So we have a fact on the record. That -- as opposed to arguing about whether a form exists, I just want to know if a form exists.

MR. THACKER: Your Honor, I think leaving aside whether the form's out there or whether the current form needs to be revised or not, I want to be very clear about what the statute says. And I think that -- that is the burden of the plaintiffs and the court here before enjoining the statute that you look at what is actually being required.

The only requirement of a form at all in Section 1 is, again, at Page 13, line 15, a report indicating the basis of any medical judgment that warrants failure to obtain consent pursuant to this section shall be filed on a form provided by the Cabinet.

That's just a reporting requirement. At most that's all that cannot be complied with. The rest of Section 1 is -- are substantive provisions that have nothing to do with that form. There's nothing that prevents plaintiffs from, you know, giving the notice required to parents. There's nothing that prevents them from collecting the information regarding the minor and their parents that are required to be collected.

There's nothing to keep them from -- and it even gives you the language in subsection (2)(b) at the top of Page 9 the language. The language that has to be used for the consent is quoted there at that first paragraph. Quote, I -- insert name of parent or legal guardian -- and the -- select parent or legal guardian of -- insert name of minor -- to perform an abortion on her under penalty of perjury, etcetera, etcetera.

You don't need a form to comply with that. The statute could not be clearer as to what you're being required to do. You have to keep a copy of that in your file. You don't need a form to keep a copy of a piece of paper with that exact language. You already told -- the statute tells you the language that's signed. What else is in this? So there is nothing else --

THE COURT: So you're talking about subsection (2)?

MR. THACKER: I'm -- yeah, that's subsection (2). So those substantive parental consent requirements are

separate from the reporting requirement which talks about the form. So there's nothing -- a form doesn't keep you from getting that consent and a form isn't required to give that consent. The exact language of the consent is in the statute. Plaintiff can comply with that today with nothing else from the Cabinet. It's in the statute.

The rest of Section 1 then talks about the judicial bypass and prevents -- provides substantive requirements for a court being asked to provide judicial bypass. Doesn't apply to plaintiffs. Nothing to prevent those provisions looking at subsection (3) --

THE COURT: Yeah. I think we've agreed on (3) and (4) as well as (5), (6), (7), (8), so I think really the next for you to address would be (9).

MR. THACKER: Again, (9) -- there's no reference to a form anywhere in (9). The new sections, (b) and (c), just define when a abortion may be performed without the consent, what a medical emergency is, and then if you've done it, then you have to still provide the parents' information on that within 24 hours.

No reference to a form anywhere in Section 9. Has nothing to do with a form that is referenced in Section 10, which, again, just requires you to later report the basis of the medical judgment. Nine just requires you to make the medical judgment and gives you some of the substantive

standards for it. Nothing requiring a form there.

THE COURT: Is there anything different in there than what a doctor would typically document in their records?

MR. THACKER: I'm not a physician. I -- I don't know, but there's no -- again, there's no new form required there.

THE COURT: Okay. I understand the form part, but the substance of this and what they're being asked to keep in their records, is there an argument that that's any different than what, say, the AMA or anybody else requires of doctors to maintain in their records? Are we asking for something more or above what is already there?

MR. THACKER: I don't know if we are, but if we are, it would be the burden of plaintiff to show, one, that's the case and it imposes some undue burden. Again, if you look at the -- you know, just having to document what the medical emergency is that requires you to proceed without consent and then inform the parents 24 hours later does not strike me as an undue burden.

Certainly parental consent in general has not been found to be an undue burden, so if that's the case, you know, having to find a medical emergency and then to inform the parents 24 hours later. I don't see any colorable argument that that is a constitutionally undue burden.

THE COURT: And is there any argument that they're

then going to need to produce something to the Cabinet in regards to this information?

MR. THACKER: Well, that is subsection (10). And, again, if the court finds that they're, you know -- that the form doesn't exist -- and appears that at least for now that -- I don't know that we know that but at least the Cabinet seems to stipulate that, then, again, at most you have subsection (10) that might be an appropriate subject of injunction but nothing else in Section 1.

THE COURT: So arguably if the doctors here are keeping the records that they would normally keep, which you would assume includes what you're doing and why you're doing it and the reasoning for that, then I think the question is later enforcement in regards to if you're not asking them to keep additional information which then is reported on Form 1(10) when it's created, then they've already kept the information. They have it.

I think the issue is whether or not they are keeping a sufficient amount of information and being caught in a catch-22 later if the new form asks for things that they don't normally keep in the ordinary course or that would go beyond what this language might suggest.

MR. THACKER: Your Honor, so long as they comply with what's required to be kept by the statute, then they can't be violating the statute. If by regulation along with

the promulgation of the form or through the promulgation of the form the Cabinet later requires additional information, that would arise later. That's not in the statute. So today there could not be any violation for -- you know, for failing to do something you've not been told you have to do.

THE COURT: So arguably if they're keeping what they would normally keep in the ordinary course of their practice, that would be compliant --

MR. THACKER: I would think so, Your Honor, yes.

THE COURT: -- with Section 9, obviously not subsection (10).

MR. THACKER: Correct.

THE COURT: Okay. All right. Why don't you then address subsection (11)? And I'll let you-all respond, I will.

MR. THACKER: Subsection (11) of -- of 1?

THE COURT: Yes, sir.

MR. THACKER: I believe that's pre-existing. And there was no change to subsection -- oh, I'm sorry. No, there's no change to subsection (11), was there? Am I missing something, Your Honor?

THE COURT: Well, they have indicated in their filings that they cannot comply with this section because of the need for reporting forms. And it imposes penalties for violating subsection (1), which if you can't send in the form,

the question would then be would you be able to impose the penalty?

MR. THACKER: I'm sorry, Your Honor. I don't see a reference to a form in subsection (11).

THE COURT: Okay. All right.

MR. THACKER: So earlier in the beginning of Section 1, you have, again, substantive -- I think I referred to the language, the consent you got to get, and this simply says failure to get that consent -- and, again, this is existing.

There's already a consent law. It's just being modified. I don't see any reference to any new form here or any form at all. Again, if you get the form consistent with the earlier provision that, again, quotes what the consent has to say, it would seem to me that you're clearly in compliance with subsection (11).

THE COURT: Okay. And so the argument would be there's nothing else other than the specific language in the statute -- that you would need to comply with that?

MR. THACKER: Correct.

THE COURT: Okay. And I think that is the last section here. We've addressed --

MR. THACKER: Of Section 1, yes.

THE COURT: -- 1(10). All right. Do you want to respond? And particularly I'd like to hear responses in regards to subsection (2) and the specific written consent

that's required and then also in regards to the other section I asked several questions about; what is ordinarily kept in the course of business for a physician and how that might play into this particular provision of the house bill.

MS. TURNER: Right. Thank you. Yeah, I was going to start with (2) and some of these things. We already do some of these things. We get informed consent. It's just that now there is this language. You know, there is already some of these things in place. A new thing is government-issued IDs for minors.

So there are new things, there's some existing things that are already kept in records already collected, things of that nature. The concern with respect to (2) which is why it's highlighted in orange in our chart and some of the others is we still do not think it is clear what Section 13 is directing the Cabinet to provide a form with respect to.

It may be (10), but it may be some of these other things. Understanding they don't say "forms." There is something else in the Bill under, I believe, Section 7 or 8 that calls for informed consent to be provided on a form.

So there is that possibility that there is a different place that is going to be pointed to at some point in the future as Your Honor was pointing out and could wind up being some sort of catch-22.

And the reason that we have highlighted these

changes, because they do require new and specific language, they do require government-issued IDs of minors, they require a notary. You know, all of those things are new.

To the extent a form is going to require collection of that information and -- and it winds up being something down the line that we haven't been complying with or, you know, we did not know that we needed to comply with, that's the sort of situation that is created with this ambiguity around what Section 13 is telling Section 1 to be reported on.

And the reason we highlighted 11 which is the presumption of -- the presumption of -- sorry. It's in one of my papers somewhere. Section 1 and also Section 2(12) is because those create penalties that are associated with failure to comply with Section 1 -- with violating Section 1, so --

THE COURT: Well, and I think part of that is also what you said earlier; failure to obtain consent pursuant to the requirements of this section if part of Section 7 requires that it be kept on some sort of form, then certainly that would be the problem with the pre-existing section.

In and of itself it's pre-existing language, but the terminology of requirements of this section are now expanded to include probably a wider scope than maybe what was -- what was there before. Is that part of the issue?

MS. TURNER: I think that's part of the issue. And

both 1(10) and 1(11) is existing language, but as Your Honor pointed out, Section 13 could have been telling the Cabinet, Okay. Go ahead and create something that addresses (10) or addresses (11). We don't know.

THE COURT: Because it doesn't address subsections. Section 13 is just general to the section, does not identify the subsections which is really the drafting issue is if it identified specific subsections, then we could do this maybe a little more efficiently. Okay. So as far as, though, what your client collects, I mean, it is collecting already, as I understand it, informed consent?

MS. TURNER: Yes.

THE COURT: It is already collecting, you know, most of the information requested here, so your issue is the government-issued IDs, you would be making photocopies of those. Do you already do that or is that something your client does not collect at this time?

MS. TURNER: We do not collect that. Currently it's not required that a minor show --

THE COURT: I'm not sure how many minors have government-issued IDs, but --

MS. MURRAY: Your Honor, we do ask for some identification of a minor's parents, and so that would be kept in the minor's medical records but it would not be submitted to the State. And at this time there is no requirement to and

we do not ask for minor's government ID for the very reason that Your Honor alluded to; in many cases that simply won't be possible or would be very difficult to produce.

THE COURT: Okay. All right. Anything else with that section that would be -- that's not already kept? I mean, obviously there's stuff not produced to the Cabinet. There's nothing here about how you would actually produce that information to the Cabinet either.

I mean, I don't think you just send in a pile of papers and say "Here's my compliance." But anything else in that section, though, that you think would be difficult to comply with or not already kept? And I guess the same question for subsection (9). Presumably some of this information is already kept. It's just not currently submitted in any form.

MS. TURNER: Right. And Section 9 addresses medical emergencies which are happily rare, but certainly, you know, these are the procedures that are followed. It's just a question of whether information needs to follow certain language, whether it needs to be kept, whether it needs to be submitted.

And I think that because of the directive to the Cabinet that there is a form required here, the question is what would we, if anything, need to be reporting now because of some of these new requirements layered with the new form

directive from Section 13.

THE COURT: So sounds to me like subsection (9) the information is already kept and obtained in some format. The question is reporting of it later on.

MS. TURNER: Sure. Right. If a medical emergency exists, yes, details of the emergency. It would be assessed by a physician and, you know --

THE COURT: In the record -- the medical records that are kept?

MS. TURNER: In the medical records, yes.

THE COURT: Okay. All right. Anything else from you-all on subsection -- or Section 1?

MS. TURNER: Not on Section 1, Your Honor, except to say that as we tried to indicate in the chart, other sections including 3(12) is what creates the penalty here --

THE COURT: Yes.

MS. TURNER: -- so it sort of would rise and fall together. To the extent there is a new requirement that can't be complied with, the penalty sort of goes along with it.

THE COURT: Okay. Understood. And from the AG's office, anything in response to those comments?

MR. THACKER: Again, Your Honor, the only report required in Section 1 is the subpart (10) which only requires reporting of the medical judgment. Again, if later the Cabinet produces a new nonexistent form, new regs under 13,

you know, that -- we'd have to address that then. It's not in the statute.

THE COURT: Okay. So let's then move to Section 2. Actually, let me go back to your comment for one second. So the position of the Attorney General's office would then be that if they are already keeping this information as part of their medical records, if they are keeping all of this -- I mean, obviously I do think the government-issued IDs to a minor is certainly a bit of a stumbling block on that particular issue, but other than that, it sounds to me like most of this information is already kept in their records.

So you're not really asking for anything additional other than the possibility based on another section here that you would have to report this information in certain detail.

MR. THACKER: Well, again, there is no reporting requirement for the information that's required to be collected, again, other than, again, in (10) which is simply the reason for a medical judgment that warrants bypassing parental consent. That's the only report that has to be provided under Section 1.

Again, there are -- the wording and the specific requirements consent is clarified. And, again, have the exact language there, so you don't need a form for it. There are other substantive requirements, I think, that may add to what's already being done, but none that have to be reported

to the Cabinet under subsection (1).

THE COURT: Okay. Under any other subsection or any other section?

MR. THACKER: Not that I see. Again, Section 13 is a broad instruction to the Cabinet to review the statute and determine what forms need to be created or revised. I don't -- it does not impose obligations -- that requirement doesn't impose obligations on the plaintiffs. And, again, they can't be obliged to comply with a form or regulation that hasn't been promulgated.

And I think, you know, for that reason, again, the Attorney General's position is that to the extent a form doesn't exist for reporting the medical judgment because subsection (10) says that it has to be reported on a form supplied by the Cabinet, that subsection doesn't come into effect until the Cabinet produces the form.

Now, it still makes sense to have this be an emergency statute because that tells the Cabinet start working on this form now. If you didn't have the emergency provision, then arguably the Cabinet wouldn't have to start working on the form until 60 days later, so that's why we say you don't really need to enjoin a provision that doesn't apply yet, but if the court thinks that's unclear, then yes.

To the extent that it says the report has to be done on a form provided by the Cabinet and that form doesn't yet

exist, you don't have to comply whether, you know, the court agrees -- but the statute doesn't require you to -- or feels there needs to be an injunction, but, again, that's the only thing that you're dealing with a required form or something from the Cabinet is that one subsection. And, again, it's only reporting the medical judgment that warrants the failure to obtain consent.

THE COURT: Okay. So let's just take a hypothetical on the enforcement side because I think it's the enforcement that's sort of a bit at issue here. So for subsection (2), the Attorney General's office position would be that they could still enforce subsection (2) along with whatever penalties would come with it. In what manner would that enforcement be ascertained? How would you know whether they complied? How would that compliance be ascertained?

MR. THACKER: Your Honor, first of all, it would be the Commonwealth's burden to ascertain and prove it. And to the extent that -- I believe, that there is now -- I believe it's now would be a Class D felony. You'd have the burden of proof beyond a premise of doubt.

I mean, I would -- hypothetically I would imagine enforcement would arise if there was an audit of the office and the things required to be copied and put in the file weren't there, I would assume -- or I suppose you could have a parent come and provide evidence that, hey, you know, this

kind of consent was not obtained. And, again, you'd have to develop the facts and figure out is that the case or not.

But, again, for plaintiffs the important thing is is there any ambiguity as to what they're required to do here and can they do it. And I think the answer to that is there is no ambiguity and they can do it. They're doing something pretty close to it already today.

THE COURT: Okay. And that's what I was trying to ascertain. Okay. Subsection (2) -- or I'm sorry -- Section 2, do you want to take that one up? Obviously we're not going to deal with subsections (1) through (26). I think we're only dealing with subsection (27).

MS. TURNER: And, Your Honor, subsection (27) is a penalty provision that just adds on a suspension of license based on now included failure to comply with the requirements of Section 1. And so our position is it rises and falls together.

If Section 1 -- if there is ambiguity, which we think that there is with respect to how we comply with Section 1, now this is a significant penalty associated with it. There's also one in Section 3 that would create the potential for felony liability --

THE COURT: I'm going to take -- I think (2) and (3) we can take together because they're much, much the same if you want to address both.

MS. TURNER: That's right, I agree. Right. And so, you know, our position is it needs to be clear what we are being asked to do with respect to Section 1 because otherwise there are now significant penalties associated with it. And so, you know, to the extent that these penalties can become immediately effective, I suppose as long as there is an injunction with respect to what's required under Section 1, that that works, but they really go hand-in-hand.

I think there are these new requirements. We don't know what they are. And, again, it may be collection of information in 1(10). It may be something else. That's where we need the Cabinet to sort of set the path for compliance.

There are plenty of things we already do. We do collect informed consent. We do not collect that precise language. We can start doing that, but if that is what the Cabinet wants reported, that -- we need to be told so that we can understand and comply.

THE COURT: So obviously with the informed consent you would simply change whatever your form of written consent is to use the language that's in the statute. So that sounds like something that you're already essentially doing but can change the language to comply.

MS. TURNER: That's right.

THE COURT: The issue would be -- well, I think part of the issue would be whether or not there are

government-issued IDs of minors, and if the minor does not have that, how the Cabinet would foresee you keeping that information or developing that information.

I mean, I don't know that whether or not they have an ID -- this is sort of making almost like an ID requirement if you're required to keep that information. I mean, I'm sure you could keep information regarding whether or not they had one, right?

MS. TURNER: Yes.

THE COURT: And that's probably information that you could easily collect.

MS. TURNER: Yes.

THE COURT: Okay. And then for -- so essentially it's just the clarity of how to keep the information and the specifics of it.

MS. TURNER: And how to report it.

THE COURT: And how to report it? Okay. All right. Do you want to comment then from the Attorney General's office on --

MR. THACKER: Your Honor, as to Sections 2 and 3, the -- sort of the penalty provisions, we don't believe there's any need to do anything with them. Obviously if the court enjoins any provision -- substantive provision of the statute, then there will be no penalty for violating that substantive provision while the injunction's in place, so it

sort of would be redundant and rather -- so we think, you know, the penalty is what it is, but, again, the penalty can only apply if the substantive requirement is in force.

THE COURT: Okay. All right. So let's move then to Section 4 and I think we can address subsections (1) through (5) to start with. So Section 4 subsections (1) through (5).

MS. TURNER: Subsection (1) and -- (1) through (5) we've sort of addressed all at once, but the issue here is not with -- necessarily with respect to timing per se which is (1). So I think, you know, the move from 15 days to 3 days is something that -- you know, it will require a change operationally but is not necessarily impossible at this point.

The problem is that we need to understand and have a form on which to provide all the information that's now called for in Section 4. And, again, we put in Exhibits B -- Exhibit B, I think, yesterday was the existing form and it does call for some of this information.

The concern is that some of the information called for is new and combined with the existing info that's collected could reveal patient privacy. So it's things like county and zip code some of which have, you know, very small numbers of people in them and then you combine with demographic information that's submitted such as race and information about number of prior pregnancies and then personal information about medical issues.

Combining those things in a small population, it's possible that that could reveal patient identity, so that is one reason all by itself that we would need the Cabinet to tell us, you know, "How are you going to do this?"

The other thing is, I think, you know, the legislator must have anticipated this concern to some extent because in Section 4 there is this provision that any report submitted shall not contain information that would make it possible to ascertain a patient's identity.

And so if on the one hand you have to submit all of this information, on the other hand you can't submit information that would make it possible to ascertain patient identity, we need to understand what information the State wants us to put on a form and turn in so that we are not having this problem where we're potentially in violation of the law itself and then of course the patient privacy issues because Section 13 also says that the reports -- that the reports are going to be submitted. They will be deemed public records.

And so there is a lot of personally identifying -- there is a lot of personal medical information encompassed in these reporting including prior pregnancies, sexually transmitted diseases, and other information that if a patient's identity were ascertainable, that that presents a real threat to the privacy of health information.

THE COURT: Okay. So as to subsection (1) about the timing, sounds like the timing is not an issue. You're currently reporting this information on a form -- or how are you currently reporting the information in regards to subsection (1)?

MS. TURNER: The information is reported on a form. It is as a mechanical matter. It's in a computer. And then at the end of the month, it's printed off, as I understand it, and sent in. So doing that within three days as opposed to within 15 days, I think, is doable. It would require, you know, a change to internal operations, but that is something that is doable; however, the form that we report on currently doesn't have all of the information that Section 4 now calls for.

THE COURT: Okay. And so subsection (2) -- and this is just so I understand because the AG's office -- and I'll let you respond to this as well -- says that, yes, you can comply with it. There's no requirement that Section 4 be reported on a form be required by the Cabinet, but functionally the way this works currently, it is an online form that you print off and send in. For what has been reported in the past, it is on a form. You don't just call them up and say --

MS. TURNER: Yes.

THE COURT: -- "Here's my numbers"?

MS. TURNER: That's right.

THE COURT: Okay. So there's currently a form that exists that you report this information. You now do it within 15 days. They're asking you to do it within 3 which sounds possible. I'm not totally sure -- I'm not sure what the change is intended to do, but there's additional information now being required by Section 4 that would need to be on that form. So to some extent you are now currently reporting a portion of the information called for in Section 4 on the form required?

MS. TURNER: Yes.

THE COURT: And there's just the additional information -- you don't know how to report that or the specificity of it at this point in time?

MS. TURNER: That's right.

THE COURT: Okay.

MS. TURNER: And, Your Honor, I'll add, it is not a matter of just writing it down and sending it in, right? All of the regulations that -- currently there are many in Kentucky with respect to abortion. You know, things are reported on forms. It's not ad hoc. You know, it's not -- that's not done, so yes --

THE COURT: I don't know of many areas of reporting to the government that are just done on Post-it notes or pieces of paper or emails. I mean, there's something you

provide that's requested.

MS. TURNER: Precisely.

THE COURT: Okay. I understand that. And you're currently continuing to report, yes, what was in the old law?

MS. TURNER: Yes. Yeah.

THE COURT: Okay. All right. Anything -- well, I guess we didn't address -- I guess we didn't really address (8), but it really dovetails in with the others as far as there's no substantive change to the provision. It just -- it still requires, what, a late fee?

MS. TURNER: Right. No substantive change, but sort of rises and falls all together with the requirement that we submit the new information on a report provided -- created and distributed by the Cabinet.

THE COURT: Okay. All right. We'll let the Attorney General's office address --

MR. THACKER: Your Honor, since you've already noted our honorable points in our written brief, so I won't belabor it, but this is significantly different than Section 1 and subsection (10) where statute -- statutory language says "report on a form from the Cabinet." Here it simply says "report."

Now, it may be -- and, again, I think our expectation would be as soon as possible the Cabinet would update their form and make it really easy to do this through

the computer --

THE COURT: In the meantime --

MR. THACKER: -- but that's not what the statute requires. For now compliance may be had by simply doing what you do on the computer and stuff that's not in there now dropping out, drop it in the mail, send an email. Again, to the extent the statute doesn't tell you how to do it so long as you report this information to the Cabinet. Until the Cabinet gets you the form, you're complying, so compliance is possible.

And this is -- there's no mystery here. Again, look at the language of the statute on Page 23. The full name and address of the physician. That's probably amongst stuff that's already in the existing report, I would guess, one way or another, but it's not hard to figure out, "Hey, I can type that on a blank piece of paper and send that in;" the address where the abortion's performed, the drug codes used, etcetera, etcetera. So there is no ambiguity about how to conform.

Now, will compliance be easier when the Cabinet updates its computer and -- the computer forms? Probably. But, again, the burden on plaintiffs is to show that to comply with the statute as written today is an undue burden. They have not made that showing. Haven't even attempted to make it.

I will also note, Your Honor, that nowhere in the

motion for temporary injunction or restraining order did we see this -- to my knowledge -- see this argument about patient privacy. Again, the argument's simply unable to comply until there are forms.

Patient privacy, again, it would be the burden of the plaintiffs to show that there's something here that would create -- you know, would compromise patient privacy and create an undue burden. Page 25, Section -- subsection (3) makes it clear that the General Assembly has said reports shall not contain the name of the pregnant patient, common identifiers such as Social Security number, motor vehicle operator's license, and other information to make it possible to find patient identity.

And then there's separate provisions on Page 27 where the Inspector General, when they review and audit these things, is supposed to make sure there aren't patient identifiers. So, again, that argument's not been advanced. If it is, I think it would require arguments that haven't been put before this court.

Similarly -- I'm going to jump back real quickly. The same is true of this idea about the ID requirement in Section 1. Again, there's not been advanced to the court any argument that it would impose an undue burden for a minor to obtain a state ID before obtaining an abortion.

Minors may not routinely get them before they get

driver's license but they are available. And it would be the plaintiffs' burden to show that requirement is an undue obstacle to -- undue burden and potential obstacle to abortion. We require driver's license for exercising federal rights all the time such as voting, so -- sorry to jump back there.

THE COURT: How long does it take to ascertain a state ID for a minor?

MR. THACKER: I do not know that, Your Honor. It's not in the record as far as I know.

THE COURT: Okay. Okay. And on the privacy issue, so -- and I'm trying to work this through in my head how it works practically. You seem to indicate that somebody was reviewing the information to ensure that it would not violate privacy laws, but who's burden is it to comply with HIPAA, is it the physician who produces the information to the State or is it the State's burden before you publish?

MR. THACKER: Your Honor, I am not aware of any argument made that's been advanced that reporting this information actually required by Section 3 would violate HIPAA. I have no reason to believe it would. And, again, the intention of the General Assembly as expressed in subsection (3) is clearly not to have, you know, patient identifiable information in this report.

And, again, I have no reason to think that any of --

that complying with the information that doesn't include names, Social Security number, license number, things like that, would violate HIPAA or anything else or be contrary to the clear intention to provide, you know, robust but non-patient identifying information.

THE COURT: And I -- I think my question is how do you know whether or not the information put together in the report would create an identifiable situation. And then if that's the case -- I mean, I think plaintiffs gave an example of a small county in Kentucky. We have a lot of counties here. But you're taking a small county and then you're requiring a zip code on top of that which presumably would shrink your pool even more of possible individuals.

I think my question to you is if they're required to comply with HIPAA in the information they produce to you, is there anything in place which would allow them to figure out whether or not all the information put in your report that's made to the public, right, because if they're not reporting on a form and they're just mailing you information, how do they know the format in which that's going to be produced such that they would know whether or not they were producing something that would be identifiable under subsection (3)?

MR. THACKER: Again, Your Honor, it would -- in order to get an injunction, it would be the burden of plaintiffs to show that that is the case. It's not the burden

of the Commonwealth to show that it's not the case. It's also not the burden of the Commonwealth to ensure that physicians comply with independent federal statutory duties. That's their burden. They clearly have plenty of lawyers to help them with it.

And so, again, for purposes of today, there is nothing in the record to suggest -- in the written filings I don't think there's ever been an argument that complying with these provisions would require violation of any other federal or statutory obligation. And, again, it's their burden to show that. I have no reason to believe it would.

THE COURT: I understand whose burden everything is. I'm testing these items out in real life 'cause the issue is compliance, right? So compliance is how does this play out when it comes down to it. They are only going to be able to show what they're producing to you. Their argument, as I understood it at the very beginning, was just they don't know what's going to be personally identifiable.

My question to you is: How would they know that if they don't know how you are reporting this information -- making a public documentation. I'm just asking how would they know and what could they do to comply with their HIPAA requirements if they don't know how you're producing it?

MR. THACKER: And, again, right now --

THE COURT: There doesn't seem to be anything in

here that says how -- how it's being produced as a public document.

MR. THACKER: Well, right now it will be -- you know, to the extent that documents are subject to open records, they're -- they are available in the form they exist. So until there's a form by the Cabinet, it would be in the format they sent it, so I think the burden would be on them to identify one of these items -- one or more of these items of information that they believe would -- provision of which would somehow violate HIPAA. You know, I think -- the information is what it is. It's clearly defined by the statute.

You know, again, I've not seen any evidence that any item of information required here, any new item of information, or all of it combined together -- there's been no evidence that that would actually identify someone or -- and, again, I'm not sure -- you know, I think that may or may not be a separate issue for HIPAA. Again, no argument's been made that compliance would require a violation of HIPAA.

And, again, it would be the burden of the plaintiffs to show exactly how that is and which items of information that applies to. You can't just say all of this is problematic. If the zip code's a problem, the zip code's a problem and that's what gets enjoined. I don't know the zip code's a problem. If the zip code with the county is the

problem, then they can -- again, I've not seen any evidence or any -- you know, anything for this court to conclude, yeah, by reporting what's required here, you would violate some other duty either patient privacy or otherwise.

THE COURT: Okay. I understand your position and I think I understand theirs as well because they don't know how you're making it public, so they don't know when you amass that information publicly -- however that ends up happening -- I don't know what the intent is, but whether or not that information can be put together to create something that would be identifiable. So I think that's the argument.

Let me let them respond 'cause you've made a number of points, so let's let them respond and then I'll give you another opportunity, okay?

MS. TURNER: Thank you, Your Honor. So I do think our argument is -- there are -- there is the potential for privacy to be revealed through the reporting because of things like zip code and county in combination with the other information that's already collected. And what Section 13 says is reports required in Section 4 shall be deemed public records.

So the existing form is patient specific. If suddenly there is, you know, zip code and county on that, is that existing form going to be the public record? Is it going to be aggregated somehow? We don't know without the guidance

from the State.

But the other thing in addition to this sort of more macro is this a HIPAA violation issue, would we be violating our patient privacy. Section 4 itself says don't reveal information that could cause patient identity to be ascertainable.

So it's a bit internally inconsistent with respect to "Give us zip code information," "Give us everything else and also don't reveal patient identity." "Don't give us names," "Don't give us Social Security numbers," but also "Don't give us any other information that would make identity ascertainable."

So that tension within the statute itself is something that really -- the -- if the state provides the way forward -- you asked how do you know about what the State's going to do with this information, what information the State wants. The answer is to provide the form, I think.

THE COURT: Okay. And so it would be plaintiff's position that maybe if the county were small, your producing those two pieces of information in addition to what's already there could make it identifiable, but you're being told on one hand to produce it but you're being told on the other hand don't produce it if you think it would be personally identifiable.

MS. TURNER: Right. Don't give any other

information, right.

THE COURT: Okay.

MS. TURNER: And --

THE COURT: Well, is it any other information in addition to that which would require you to produce it? And let me go back to the -- I think it's Page 25 line 13.

MS. TURNER: That's right.

THE COURT: So you -- (Reading) The report shall not contain the name of the pregnant patient, common identifiers such as Social Security number, motor vehicle operation license number.

But you are keeping -- okay. But you are going to be required to keep IDs but you're not going to be required to produce those. You just have to keep them in your record?

MS. TURNER: Your Honor, I think the ID requirement under Section 1 does not require us to keep the ID of an adult.

THE COURT: Well, for informed consent you're getting the ID of the consenting adult, right?

MS. MURRAY: Yeah. So under current practice, the consenting adult ID would become part of the medical record for a minor. The minor's identification is not currently requested or collected. As I understand Section 1, it would require us to keep that material --

THE COURT: Not produce?

MS. MURRAY: -- to keep it, but Section 13 also says that there is a form yet to be identified in scope with respect to Section 1. So it doesn't expressly say we would have to produce those, but it is also possible that the Cabinet could come to a different conclusion when developing that form.

THE COURT: Well, but theoretically (3)(b) tells them they can't include that information. And then the last one is any other information or identifiers that would make it possible to ascertain the patient's identity.

So the "other" there modifies what the report should not contain as opposed to the information previously requested or otherwise requested. Okay. I think I understand the argument on that.

MS. TURNER: And just to note on -- to respond with respect to enjoining certain provisions. The -- Mr. Thacker referenced zip code, county. But I just want to respond that currently there is a reporting regimen already in place on an existing form. So, you know, to the extent the suggestion was to go piecemeal through the statute and enjoin some and not enjoin others, that does not make as much sense when what we have here is already an existing reporting requirement that is being complied with that everyone agrees is on this form that is regularly submitted. I just wanted to make that note.

THE COURT: Understood. And then for subsection

(5), so this has a substituting reference to abortion-inducing drug in Section 5 for a list of drugs. Is there any concern about that or the change in reporting from 15 to 3? I mean, it doesn't sound like the timing is of particular concern. Is there any concern in regards to the definition?

MS. TURNER: So, Your Honor, there is -- the answer is no I think with respect to the definition of abortion-inducing drug except to the extent, you know, that whole rubric within Section 5 and some of the other ones applicable to medication abortions is a topic for another hour, probably.

But there is already a form on which medication abortions is reported in existence. There are other things within this bill that call for new reporting requirements for prescriptions for medication abortions. I don't believe that this one in particular, Section 4, sub(5), is a problem.

THE COURT: Okay. Understood. All right. Do you want to make any response on behalf of the Attorney General's office?

MR. THACKER: I will just note, Your Honor, I cannot remember where it was earlier, but on -- in subsection (11) in the portion of the section that talks about the auditor or the office of Inspector General auditing reports, not only is the auditor -- Inspector General to ensure that any information that could lead to identification of a pregnant woman is not

included and if there is such information 11(c) makes it clear that that information would not be subject to open records.

So, again, the General Assembly's clear intention is that the data only be released in -- I think, in statistical form. And, again, the statute goes to lengths to try to make sure that there is not individual identifiable information. And, again, if there is, the burden's on the plaintiff to show exactly what information causes that.

THE COURT: All right. So I think the next couple of sections dovetail into what you indicated was the next issue of abortion-inducing drugs, definitions of terms, and registration which I think is sort of the largest topic under this -- under these couple of sections here.

It would seem that if there's no method to register, there is no registration currently, no one could actually perform an abortion and comply with this particular house bill. So I'm going to let Planned Parenthood, again, address this.

And I don't mean to be ignoring the other parties in the room. You're welcome to jump in if you have an issue, but I just perceived this to be you-all can hop in where you feel it's appropriate, so let's go ahead and address these next couple of sections. I believe it's -- well, 5 is like terms/definitions. 6, 7, 8, 9. I think that's where it goes. Yeah. So let's do 6 through 9.

MS. TURNER: So I will just note, there are several references within the bill to Sections 5 through 11 sort of going together. Five through 9 is fine for right now.

THE COURT: Yeah.

MS. TURNER: Ten is different.

THE COURT: Slightly.

MS. TURNER: Eleven is slightly different, so I can understand --

THE COURT: You're welcome to address them all together. If it's in the interest of time, I'm fine with that.

MS. TURNER: So I think the point, though, is that our position is they sort of all rise and fall together. This new registration and certification program, it really is 5 through 11 and 14 through 19, actually -- because to your point about the ability to register being determinative here, it's Section 17 which says, (Reading) In order to register as a non-surgical -- non-surgical abortion provider, one has to create this form that the Cabinet will supply.

The Attorney General has conceded this form doesn't exist, so it is not possible to register -- so even if there were a registration track, there is no form that you would fill out and submit as part of your registration packet, so there's no form, there is no structure as far as we know for registering; therefore, one cannot be a non-surgical abortion

provider under any of these sections.

And Section 6(1) -- 6 sub(1) states, (Reading) Abortion-inducing drugs shall only be provided to a pregnant person by a qualified physician who is registered with the Cabinet as a non-surgical abortion provider by following the procedures established.

So the procedures deal in part with how one is a qualified physician, but the key is in order to provide medication for a medication abortion one has to be a qualified physician who is registered. There is no path for registration right now and the Attorney General has said so effectively by conceding that this form required to register doesn't exist.

THE COURT: What about the qualified part?

MS. TURNER: So the qualified part is pages of detail about what one does to become qualified and a lot of that is already going on. Again, it's things like giving your patient certain advice. It's things like seeing -- you know, actually examining your patient, making sure a patient is pregnant, things of that nature.

There are things already being done. There are new things that are new requirements. Becoming a qualified physician is -- is something that is more -- it sits more with the physician -- with the provider, so those are things that are either already happening or in progress and, you know, not

all of them are technically -- not all of them are going to require -- other than changes to procedures and training.

THE COURT: So presumably that piece -- like -- and I hate to parse words but we are parsing words here. We're parsing "qualified" versus "registered." The "qualified" piece of it can be complied with. Obviously it's going to take changes, certainly, but it can be complied with in terms of the issue as far as what can be -- what training is needed, what procedures. Those types of things, as you said, sit with the physician. And I'm assuming when you say "sit with the physician," they don't sit with the Cabinet?

MS. TURNER: So to be a qualified physician, for the most part, sits with the physician, but I will flag that there are some requirements that a qualified physician is to do that requires a form created by the Cabinet. And here I'm looking at Section 8.

THE COURT: Sub -- Section 8.

MS. TURNER: Section 8, not sub.

THE COURT: Sorry.

MS. TURNER: No, no.

THE COURT: Numbers and letters would have been helpful, but we'll go with numbers and sub numbers. Okay. So Section 8. What subsection are you referring to?

MS. TURNER: I'm about to exceed the capacity of this podium.

THE COURT: Yeah. That one's not particularly large.

MS. TURNER: So Section 8(2).

THE COURT: Which is on page 32 line 25.

MS. TURNER: And I believe that this is also one that the Attorney General has conceded does not exist --

THE COURT: Yeah.

MS. TURNER: -- and, you know, is required to be on a Cabinet-created form.

THE COURT: Okay. Okay. Understood. Anything else as far as the qualified piece?

MS. TURNER: So the answer generally speaking is no, but I will note some of these things, like I said, require changes to procedures. And so to the extent that they were going into place, with respect to, for example, differences in how consent is obtained and documented may run into some issues with the 24-hour waiting period for particular patients who may have already been consented under the old and would need to potentially come in again, have a 24-hour waiting period, and then potentially reschedule an abortion.

This would be something that would be pretty granular and patient specific, but of course since timing is so important sometimes with respect to these requirements, those -- that's the only flag I want to say today. It would be something that we would put in some detail in our

submission to make that very clear if that was an issue.

THE COURT: Okay. Understood. All right. So the registration piece is really the one that's out there.

MS. TURNER: Yes.

THE COURT: Okay. Anything else in regards to those sections? You can have a moment.

MS. TURNER: So other things with respect to registration. There are also these requirements that a qualified physician in order to register has to submit written protocols with respect to -- with respect to how follow-up visits and complications will be handled.

And the -- in order to be eligible to register, a qualified physician also has to maintain hospital-admitting privileges or have an associated physician's agreement in place. And that agreement -- if that's the way to go -- is apparently going to be submitted to or collected by the Cabinet and placed with the hospital.

So it's not -- I bring that up only to say it's not something where internally we can say, "Oh, okay. We're good. We checked off that we're qualified." "We've gone through the steps." There needs to be a written agreement that would need to be submitted to the Cabinet. The Cabinet would have to -- with the hospital.

And with respect to our own operations, the written associated physicians agreement is not something that we have

in place right now and that may be time consuming to obtain.

And on behalf of Planned Parenthood, our providers do not presently have admitting privileges to any hospitals, so that is mostly the registration piece, but it's another thing I wanted to say is something that is currently difficult to -- impossible to comply with as of today.

THE COURT: But it's something that with time could be complied with? That's a timing issue as opposed to a Cabinet form issue? I mean, obviously there's no form to submit it. You're just going to submit the -- the agreement, but you're saying it more from the standpoint of being able to comply immediately with the rule?

MS. TURNER: Yes, for the written agreement. I will say, for submitting written protocols describing these certain follow-up visits and the complications it says "submit written protocols," so that is on us to submit, but presumably the submission would come with some sort of -- it could come with some sort of response from the Cabinet or not.

THE COURT: Okay. So as far as those items, those are things that you're seeking to -- you are actively beginning to comply with as far as getting the things in place that you would need to comply with this?

MS. TURNER: Yes. We're taking steps to figure out how we will be able to comply with the things that are on our side of the house to do.

THE COURT: Okay. Understood. All right. Let's let the Attorney General respond in regards to this registration program.

MR. THACKER: So, Your Honor, I do think that we have something in the agreement that, again, registration's not going to be required with the Cabinet until the Cabinet sets up a registration program, but as the court noted, that doesn't affect a number of other provisions of these sections.

Looking at Section 6(2) is utterly unaffected. It simply prevents the distribution of abortion-inducing drugs via courier, delivery, or mail services. Full stop. Doesn't matter if you're registered, not registered, whatever. So that provision stands and falls independently of this registration issue.

And, again, we've not seen any showing that that provision as is is unconstitutional or -- again, I don't know that it's been challenged apart from this forum discussion we've had.

THE COURT: Let me interrupt you for a second. Do any of the plaintiffs do that?

MS. TURNER: No.

THE COURT: On behalf of EMW?

MS. AMIRI: Oh, no. No, Your Honor. There's a current law that prohibits telehealth abortions in Kentucky.

THE COURT: So it's my understanding this is sort of

almost redundant of other laws that's already out there. That's my understanding. I just wanted to make sure everybody agreed it was somewhat redundant of what's out there already. Okay. Sorry to interrupt you.

MR. THACKER: Not at all, Your Honor. On Section 7, I think as the court has already indicated, the Attorney General's position is you can't register, but to the extent that the statute tells you in black and white what the qualified physician needs to do before prescribing abortion-inducing drugs, you can do it.

You can -- you know, subsection (1)(a) be credentialed and competent to handle complication management including emergency transfer and (b) have a signed contract with an associated physician.

You know, on these, again, it is -- to the extent there is a separate argument, again, now not the form registration argument but the "we need to time to comply argument," again, the burden is on the plaintiff to show, one, that's true; they can't do it.

And now this law has been a law for, what is it, a week and a half now and -- I guess two weeks now -- and I think they at minimum have the obligation to show what good faith efforts they've made to comply if they're going to ask this court to enjoin it for additional time because they haven't complied yet and no showing of that kind has been made

here, Your Honor, and nothing in the motion has even attempted to. So, again, I think there's no reason why Section 1 -- 7(1), you know, should not be effective and binding on plaintiffs immediately.

THE COURT: Okay. Let's talk about that. Let's talk about the word "immediately" and the timing issue. So I think the question becomes if something like an associated physician agreement takes a couple of weeks to be put into place or a couple of days, I mean, they've -- the argument I think we just heard them make was that that took some time to get in place and they indicated that they had started to make plans to comply with these things.

My question is on the timing of this. The purpose of the injunction seems to me to be in part -- or the requested injunction -- seems to me to be in part to allow them to come up to speed with these provisions. Obviously I understand why there was -- I think I understand why there was an emergency provision put in this. It was for the purpose of getting the Cabinet to do what they needed to do to bring this to fruition and that makes sense.

The part of it that I think is causing the dispute here is that there was nothing placed in here to allow providers to come up to speed with any of the other provisions or obviously to give the Cabinet time to put these things in place beforehand. There's nothing that prevents enforcement

on your behalf before they've had time to get up to speed or even the Cabinet's had time to get up to speed.

And so my question is for purposes of saying they can comply, is it the expectation of the Attorney General that there would be no abortions performed -- and this goes to the likelihood of success issue -- no abortions performed until all of these provisions were met?

So in this period where they're getting up to speed, changing their protocols, or the Cabinet is preparing the forms, is the argument that it's still -- you're requiring that the abortions cease until those things are done?

MR. THACKER: Your Honor, our position -- and it's not our position. The law is -- so you have a statute that is Kentucky law today.

THE COURT: Right.

MR. THACKER: If they believe that operation of that Kentucky law either permanently or for some period of time would violate some constitutional provision such that it should be stayed, it is the plaintiff's burden to come in and not just argue but to offer facts showing that "We" -- "We cannot comply with X." And, again, it has to be provision specific.

You know, this -- we don't enjoin, you know, independent provisions -- I mean, I think the law requires the court to look at each provision -- each law. And here, again,

it's their burden to show that -- why they can't or why they haven't been able to in the past couple of weeks have their physicians credentialed and competent to handle complications if they aren't already. Maybe they are. And similarly with the contract signed with an associated physician.

Again, if they believe that being required to comply with that is effectively impossible for X amount of time and therefore that translates to an undue burden on the constitutional right to an abortion, it is their burden to come in and not just make that argument, to show the facts, because this is a factual question.

I don't know, Your Honor, and there's nothing in this record to tell the court what a reasonable amount of time to enter into this kind of contract is or -- and moreover, I think if -- as part of showing that it's -- if they want to take a position -- if the plaintiffs want to take the position that it can't be done for one week, two weeks, three weeks, whatever they say, then they've got to offer evidence to show that.

And I think they also -- in order to be entitled to an injunction -- extraordinary relief from this court suspending the statute -- they've got to show what good faith efforts they've made to try to comply. And none of that -- none of those facts are in the record, and so for that reason an injunction is not appropriate at this time.

Now, again, they may come back and renew their motion and bring in witnesses, offer a declaration saying, you know, "Here's why we can't comply" and "Here's why that means," you know, "constitutional rights interfered with." That's their burden. You know, I think, you know, right now before the court, all there is is the statute and it's not ambiguous and it's not something that on its face is impossible to comply with.

THE COURT: Okay.

MR. THACKER: Moving on to subsection -- Section 7(2). Again, these are requirements for what the provision actually does. For instance, independently verifying that a pregnancy exists. I would hope that's something that's already done before prescribing abortion-inducing drugs, but if not, that certainly is something that can be complied with today.

And similar to that, the requirements are there in subsection (2) about determining blood type and if any steps need to be taken regarding Rh factors, etcetera. We would agree that on subsection (8), to the extent that it requires a form created by the Cabinet -- and, again, the statute actually uses the phrase "created by the Cabinet" there -- that -- our position is you're simply not required to comply with that as a statutory matter until the form exists. If the court believes statutory interpretation is wrong and you need

an injunction until the form's there, then I think that is unnecessary but also harmless; however, subsection -- 8(4) just tells the Cabinet, I think, to create the form.

And finally, Section 9. Again (1) and (3) -- let me catch up with myself, here, Your Honor. (1) and (3) do have reporting provisions that require a form required by the Cabinet. So, again, our position is there is no obligation until -- on the plaintiffs -- until the form exists; however, subsection 9(2) doesn't require a specific form, but --

THE COURT: It requires a written report.

MR. THACKER: It does require a report, but it doesn't have to be on a form provided, so, again, I think --

THE COURT: Where does it need to be reported to?

MR. THACKER: The same place the form would go; to the Cabinet.

THE COURT: Okay. And so is it a collective report or an individual patient report? Would a collective report supplied by Planned Parenthood comply with that or would it need to be an individual patient report?

MR. THACKER: Subpart (2) is --

THE COURT: It's page 36 line 4.

MR. THACKER: I believe this is for the purpose of reporting an adverse event, so that would be patient specific, but it does not require disclosing patient identity. Simply requires, again, reporting where the adverse event was. And I

believe the MedWatch reporting system is something that exists, but I'll defer to the Cabinet on that.

Again, if the court can choose to require reporting on a particular medium or form that doesn't exist, then we would concede it's not yet in force, but I think -- and I have no reason on the face of subpart (2) to believe that it's not enforceable.

THE COURT: So -- but you believe that the MedWatch reporting system permits this type of report?

MR. THACKER: I believe that's the case.

THE COURT: Is that a Cabinet question?

MR. DUKE: Your Honor, that is a Cabinet question and unfortunately I don't have an answer on that today, but it's something I can confirm, but I can't answer one way or another here today.

THE COURT: Okay. So is this -- this is at -- this is adding a requirement to report the adverse impact. It's giving it three days -- you have three days in order to make the report.

MR. THACKER: I think it's 15, Your Honor, on this one, I believe. Line 8, 36. I believe it's 15.

THE COURT: (Reading) During or within 15 days after the use of the abortion-inducing drug --

MR. THACKER: Sorry. You're right, Your Honor. Three days to report within 15 days after.

THE COURT: Right. So that is for events that take place within the first 15 days after the abortion. So the 15 days applies to when it takes place but then the reporting piece is the three days.

MR. THACKER: Right.

THE COURT: Okay. So -- all right.

MR. THACKER: And that's, again, a report to the FDA. And I believe MedWatch is -- my understanding is that it's, again, maintained by the FDA for reports of adverse effects of drugs generally is my understanding. Again --

THE COURT: Is this required already? It's just you're adding that it has to be done within three days?

MR. THACKER: I don't know if it's already, but from the text of it, Your Honor, I don't see no reason to believe that plaintiffs can't comply with it.

THE COURT: Okay.

MR. THACKER: And I think that -- I think that gets us through the end of Section 9 which I believe is where the court wanted us to go.

THE COURT: You can go through -- I think we really got all the way through 11, didn't we?

MR. THACKER: Oh. So 10 -- 10(1) through (2) don't impose any obligations on plaintiffs. Sub -- 10 3), again, I think their -- again, doesn't -- it doesn't impose obligations on plaintiffs, per se. It's a general prohibition on

providing abortion-inducing drugs in any school facility or on state grounds. In Kentucky, again, I think that -- there's no basis that plaintiffs have given us to believe that that needs to be enjoined or particularly burdens them.

THE COURT: They've said already in their response it's not applicable --

MR. THACKER: So nothing in 10. Section 11, I believe it was -- Section 11, to the extent it creates a private cause of action or basis for discipline, again, obviously those remedies would not apply to the extent some substantive provision that's being referred to in Sections 5 through 11 is enjoined, but as I said earlier, with the -- the licensure and the criminal statute, we see no reason to enjoin penalty or cause of action itself. It obviously wouldn't apply if some subpart of Sections 5 through 11 was not enforceable.

THE COURT: Understood.

MR. THACKER: So, again, I see nothing in Section 11 that would require any basis to enjoin as such.

THE COURT: Okay. All right. Do you have anything further to comment on this section or are you moving to the next one?

MS. TURNER: Briefly. I just wanted to point out with respect to Section 9(2), there's currently reporting on the form that exists for adverse events. Section 2 is

obviously going to require a broader -- it has a broader definition of what would need to be reported. Also --

THE COURT: Is that something that can be reported on the current forms?

MS. TURNER: I think it depends on the definition of "adverse event" that's in 5. Currently the form has some checkboxes with respect to outcomes. "Adverse event" is a more general and generic broader description, so I think that's a potential issue that we can get into more detail in our submission.

It also says that the report has to be within three days of the adverse event, but of course if one finds out about it later, that's going to present a timing issue. What it says I believe is if the physician finds out within 15 days after use of the pharmaceutical, they have to provide a written report within three days of the event, so that's -- that's a potential ambiguity there.

THE COURT: As opposed to three days of discovery?

MS. TURNER: Right. And then I just wanted to quickly note, the discussion on admitting privileges and written associated physicians agreement, those two alternative requirements are under the registration portion of the law, so -- it's not with respect to qualified physician. It's with respect to can you register as a nonsurgical abortion provider. And the answer to that is right now you can't

because there is no dispensing agreement form, which the Attorney General has conceded, but there is no ability to register at all.

So the -- the compliance on admitting privileges at present, it wouldn't allow you to register as a nonsurgical abortion provider at this point in time anyway because there is no registration process, and that process, once it exists, requires a form that doesn't exist.

THE COURT: And I think part of the issue, though, that the Attorney General's office was bringing up was good faith compliance -- attempted good faith compliance, which is why I asked what -- what have you done in order to attempt to comply.

And those portions of this law obviously that have a -- have a timing issue 'cause it's -- it's a little different where you have an emergency clause that doesn't have any time for people to get up to that point. There may be some people who are already in compliance, I don't know, other than the registration piece.

Certainly the registration piece is a barricade to that, but the other things, I think, to the Attorney General's office point is there are things that Planned Parenthood and EMW can be doing in order to become compliant with these. And from the timing perspective, you know, making sure that those actions are being taken because there is to some extent a --

yes, it may cause a barrier for women being able to get an abortion if you-all have to do certain things that take time to comply.

The Attorney General's office is saying what are those things and how long do they take. And then subsequent to that is have you taken the appropriate steps in this interim period where you know the law is there, you know you're going to need to comply with it, coming up to speed with those compliance, and have you taken the good faith effort in order to do that so that when there is a form you're prepared to comply.

MS. TURNER: Yes. And --

THE COURT: Okay.

MS. TURNER: -- for example, Section 7 requires an associated physician. We have that. It requires a written contract. We can put that into place. The admitting privileges issue and the written agreement with respect to that is under the registration header. So qualified physician, registration. I just want to make some clear.

THE COURT: Gotcha. Understood. It's more about which you can actually comply with, not necessarily that you're coming up to speed on it. Understood.

MS. TURNER: That's right.

THE COURT: Okay. All right. I might just stay there for a second. Why don't you address 13? I mean, I

think you can address the next few, possibly.

MS. TURNER: I think that's right. Thirteen we already talked about in the context of Section 4, really. Thirteen is the one that says the Cabinet shall create and distribute the report forms required in 1, 4, 8, 9, 25, 26, 27, and 29. And I think really the dispute here is whether the particular provision, i.e., 25, 26, 27, states it has to be a Cabinet created form in addition to this directive in Section 13.

Our position is Section 13 is very clear. It says the report forms required in these other sections have to be created and distributed by the Cabinet, not just any forms, these forms that are required in these particular sections.

And so the Cabinet would have to do that even if there's no specific statement in a different place that says the form has to be Cabinet-created. Section 13 says that because it says these are the report forms required and they have to be created by the Cabinet.

THE COURT: And so as I understand it, the Attorney General's office position is that those -- those specific subsections which indicate that they must have a Cabinet created form in those sections, excluding Section 13, are the ones that can't possibly be complied with, but that ones that do not specify that in the actual section or subsection could be complied with via a, I guess, email or typed-up document

from these two providers to the Cabinet.

Your position is that that is not quite true because 13 says all of the things they have to do and among those is create them for the subsections. And this goes back to the earlier drafting issue which is not specifying subsections but just specifying sections is broad. I mean, that's for the Cabinet to interpret.

But from the plaintiffs in this case position, Section 13 is not -- you're not requesting an injunction of 13 because it's not really what you're being asked to do. I mean, that's the Cabinet. And I was pretty specific, I thought, when I said that nothing in my TRO told the Cabinet to stop doing what they're supposed to do and continue on. It's just stopping enforcement of the entirety of it.

Now, there's a difference between enforcement of all of this versus them going ahead and, you know, doing what they need to do under 13. Thirteen is what makes everything else difficult to comply with, but the injunction really isn't about Section 13. Thirteen is just what causes everything else to be problematic in terms of the forms being created and the specificity about what exactly the forms are that are created because theoretically everything reported to the Cabinet comes on some form. They're not just taking in emails and letters and things of that nature. They're taking in forms.

MS. TURNER: Right. We agree. Exactly right. Thirteen we want the forms to be developed at some point. So on the chart, there's not a "no" up top, but there's also not a -- doesn't impose obligations because it is this odd provision where things need to move forward so that everything else eventually will fall into place.

The other thing I want to note with respect to -- I think, Your Honor, described the position of the parties correct from our perspective. That's my understanding.

Some of the other sections that are listed in 13, i.e., 25, 26, 27, 29 -- some of those point to Section 4. And so then there's the potential for the same issues with respect to the internal inconsistency or tension within Section 4 about "Give us a bunch of new information." "Don't give us anything that would identify a patient."

So from our perspective, you know, regardless of what Section 25, 26, 27 says about Cabinet-created forms, the fact that some of these point to Section 4 and this directive in Section 13 says that the Cabinet really needs to provide a path here again so that we understand, if we have to loop in all this information from Section 4, how do we do it.

THE COURT: 'Cause subsection (5) is prohibiting the Cabinet from maintaining the information. The other subsection is prohibiting you from providing the information that might allow for an identity to be discerned from the

information.

MS. TURNER: Right.

THE COURT: Okay. Understood. Anything else with regards to those chunk of --

MS. TURNER: Your Honor, I don't think so right now.

THE COURT: Okay. Let's let the Attorney General respond. Have I accurately stated your position on those? I want to make sure I understand it.

MR. THACKER: I think so, Your Honor. Again, not to belabor it, but on 13 -- 13 clearly doesn't impose any obligation on plaintiffs. The obligation's on the Cabinet. I do take issue with the plaintiffs', I guess, assumption that 13 should be read to imply that there will be a required form for every reporting or form referenced in those sections.

I think the Cabinet has some discretion there. I expect they will want a form to make it easier to process, but again the question today is can plaintiffs comply. And, again, if -- again, I won't go back to Section 4 or whatever. But if the provision says report X and gives you a list, if there's not a form, you have complied if you just send in a piece of paper.

Now, the Cabinet may later do regs and say "Use our form." When it does, you got to use the form. But, again, the question is, you know, for today this is what the statute says, not what the Cabinet might do about it in the future.

Now, again, there are a couple places where it says you've got to report it on a Cabinet form. We've conceded you can't comply with that today. We don't believe not doing so is a violation.

So -- and I don't know -- so that's 13. Your Honor, I don't know if we've -- I mean, 14 is just definitional and I think doesn't impose any obligations. I don't know how far we've gone.

MS. TURNER: Jumping around a little bit.

MR. THACKER: Where did you stop?

MS. TURNER: Well, so I did 13, but 14 is back on the medication abortion, so --

MR. THACKER: Okay.

MS. TURNER: The number's referenced in 13.

MR. THACKER: Right.

THE COURT: Yeah. There -- seems a little out of order, but -- I might have put it in a different location in the bill, but -- all right. As far as -- let's move on to, like, 16. This really deals with pharmacies, manufacturers, distributors, particularly eligibility requirements, a program that needs to be put in place. And I'm sorry. What is the position of the parties on this?

MS. TURNER: So similar to how 5 through 11 are referred to all at once within the bill, 14 through 19 are as well, and I think that they together create this Kentucky

Abortion-Inducing Drug Certification Program that applies to providers, it applies to licensed abortion facilities, which plaintiffs are, it also applies to pharmacies, manufacturers, and distributors.

Obviously, you know, we don't stand here on behalf of those entities right now, but the entire program does -- you know, it basically prohibits the provision of medication abortion outside of this program and the concept that we went over before; a qualified physician who is registered.

THE COURT: If they were a qualified physician -- let's take registration out of it for a second. But if there's a qualified physician, would that qualified physician be able to get the drugs if the pharmacy -- I mean, if the pharmacy distributor manufacturer is not part of the program, would you be able to ascertain the drugs?

MS. TURNER: So I think the answer is no, Your Honor, because it is both the -- the pharmaceuticals have to be provided by a qualified physician who is registered, but --

THE COURT: But where do they get them from? Do they have to be a registered -- or a pharmacy to be certified including submitting proof of certification by an abortion-inducing drug manufacturer for the distribution of abortion-inducing drugs and only filling prescriptions that are accompanied by patient consent form?

Like, would you be able to -- even if you were

qualified and registered, would you be able to get the drugs legally without whatever the program is that is established?

MS. TURNER: The answer is no because the drugs also have to be provided within the context of this certification process which I think is why Your Honor jumped to Section 16 where it says, (Reading) The Cabinet shall at a minimum require completion of the process for pharmacies and for facilities which includes plaintiffs. And it -- you know, it has a number of things here that need to be put into place.

THE COURT: Some of those are, like, in what 18, I think, which is the Kentucky Abortion-Inducing Drug Certification Program. This program I'm a little less clear on exactly what the purpose of that program is and what it's going to -- even if -- I don't understand the arguments as to whether or not I could enjoin one or not the other or whether they have to be enjoined together because if you can't register as a physician, obviously, you can't then perform the abortion, but my question is: Even if you were registered and qualified or whatnot, can you even get the drugs to begin with under this program, and so I need a little more clarification on that piece of it.

MR. THACKER: Your Honor, if I might?

THE COURT: Sure. Sure.

MR. THACKER: Our understanding of this, if you look at Section 30 on Page 63 --

THE COURT: Yep.

MR. THACKER: -- and frankly I think this is a pharmacy sort of protection provision. It says, (Reading) Any prescription or medical order for a drug that is known to possibly cause an abortion shall be presumed by a pharmacy to be for indications other than termination of pregnancy.

And they are not required to certify. So I think the answer to the court's question is: One, we concede or agree that until the registration programs there, you don't have to register. So that doesn't apply to them until the Cabinet creates the registration program. So under this statute just like today, they can still write the prescription and under Section 30 a pharmacy's still going to fill it, so I think the --

THE COURT: But theoretically, in the future when a program exists, those pharmacies, distributors, manufacturers, are going to have to do what before they can fill it?

MR. THACKER: Well, the -- I'm not -- frankly, Your Honor, I'd have to go back and look to see what the obligations placed on distributors are. I've been focusing on the obligation of these plaintiffs. And as far as I can tell, Your Honor, under Section 17 the only thing that -- the only obligation that plaintiffs can't do is there's a requirement to sign an annual dispensing form agreement which, again, has to be an agreement on -- apparently on a form that the

Cabinet's going to develop, so they can't do that, and that's in 17(1).

So, again, I think the only compliance issue is to sub(1)(c). Obviously, if it says you got to use a form from the Cabinet, the form doesn't exist, you don't have to use it yet, but --

THE COURT: Well -- okay. So as I understand it, CHFS has to promulgate regulations to create a certification program -- the Kentucky Abortion-Inducing Drug Certification Program -- to oversee and regulate the distribution and dispensing of these drugs and it says that the program shall establish certification requirements.

So presumably the question becomes if there is no -- if there's no program in which to certify, say, pharmacies or distributors or anyone else and they write a prescription and there's no one to fill it, are they still not being prevented from providing the service?

And I think I understand your position to be, well, if no program yet exists, then no one can comply with it; therefore that piece of the law doesn't become applicable -- I mean, my question is are you arguing that none of it becomes -- none of this certification registration piece of it becomes applicable until it exists? And if that's the case, injunction or no injunction, right?

MR. THACKER: I think that's right, Your Honor.

THE COURT: Okay.

MR. THACKER: As for today. And I think they can do what they already do. And under Section 30, a pharmacy's going to go ahead and fill the prescription until there's some additional regulations under the program that the Cabinet's to create but doesn't exist now.

THE COURT: But that would be a question for whether or not -- there's no certified pharmacies. So whether or not they choose to not comply with the law as written is a pharmacy issue, correct?

MR. THACKER: Again, Your Honor -- and, again, this gets into factual record that, again, I believe is on the burden of the -- the plaintiff's burden to develop and isn't in the record, hasn't been made, but my understanding is that most if not all of these drugs, you know, have additional uses. But Section 30 says if a pharmacy gets a prescription for one of these drugs, it presumes it's -- it fills it presuming it's not for abortion.

Now, once the program's developed, then there may be a mechanism where they now have to -- are made aware of what it's for and additional things, but until that program's there, again, I don't see anything in this section that changes what they are doing today.

THE COURT: Okay.

MS. TURNER: Your Honor, may I respond?

THE COURT: Yes.

MS. TURNER: So on the -- on that point, there is a provision in here that requires an indication of the purpose of the prescription that a provider has to put in, so --

THE COURT: Where? On what?

MS. TURNER: One second.

THE COURT: I think we can all see why I'm going to ask you to submit additional briefing.

MS. MURRAY: It's Section 8, Your Honor.

MS. TURNER: Thank you.

THE COURT: Okay.

MS. TURNER: But it indicates that a physician prescribing medication abortion has to write on -- I mean, my colleague can talk about why this actually doesn't come up that often, but to the extent that there is a prescription written for dispensing outside of the health center, that prescription under Section 8 must bear an indication that it's for the purpose of inducing an abortion.

So the presumption that our colleague on the other side is pointing to with respect to that it's not for an abortion would be if you were to comply with Section 8 plainly rebutted by the face of the prescription itself.

THE COURT: Gotcha. So they would be presuming something contrary to what the prescription says?

MS. TURNER: Sort of undermines the presumption at

that point, I think.

MS. AMIRI: And, Your Honor, that's 8(4)(m); is that right? No.

THE COURT: Page 33.

MS. AMIRI: It's Page 35 at the very end. But, Your Honor, if I may just jump in very quickly. Generally speaking there are two manufacturers of medication abortion in this country and the clinics have the medication abortion in-clinic and dispense it within the clinic.

So really the issue for the most part is about the certification program that has to be regulating the manufacturers and distributors of the drug, and without that certification -- for example, in 15(1) and then also in 16(2), to be eligible for certification the manufacturers and distributors have to do certain things. Without that, you're right, there would be no medication abortion to stock within the clinics.

THE COURT: So that would be -- okay. But for your purposes, you-all are not writing the prescription and having it filled outside of your clinic. You're acquiring it yourselves and then fulfilling it directly from the clinic?

MS. AMIRI: Generally speaking, yes. It's stocked within the clinic and we dispense it within the clinic.

THE COURT: So the question's whether you can get the prescriptions, not -- so some of this discussion about on

the face of the prescriptions doesn't really apply here to you-all, correct?

MS. AMIRI: Generally speaking, that's the case. The -- there probably are some exceptions to that, but generally speaking the dispensing happens within the clinic. And so the clinics get the medication abortion from the manufacturer and have it within their clinic and then provide it to the patient in-clinic.

THE COURT: Okay. Understood. All right. That gets us up to what section? I've lost count.

MS. TURNER: I think we can move to 20.

THE COURT: Okay. And let me ask this question. We have a few more sections here and then we have a constitutional issue to address. Does anybody want to take a recess for a little bit before we continue on? I sometimes forget that everybody maybe had a different amount to drink in the morning or may need to take a brief break, so I'm happy to do that. Counsel, whatever you-all want. Would you like to take a brief recess? We're past noon already, so we've been going over two hours.

MS. TURNER: A short break would be appreciated.

THE COURT: Okay. How about we take -- how about we take about 30 minutes? I think that's probably reasonable. Grab a granola bar, those types of things. So we'll just take a recess for about 30 minutes and then we'll come back. We'll

start with Section 20 which is I think where we are and then finish up with the compliance and move to the constitutional issues, okay? All right. We'll be in recess.

(Recess at 12:19 p.m. until 12:59 p.m.)

THE COURT: All right. We can pick up where we left off, if you want to start with Section 20.

MS. TURNER: Thank you, Your Honor. Section 20 is related to the couple that follow; 21, 22, 23. So Section 20, the changes here pertain to fetal death remains now requiring the same permit as was previously called for here. The reason that we flagged this one, Your Honor, is because the existing permit would identify the patient here.

The other thing that I will point out is fetal death as defined in existing law is actually defined to exclude abortion; however, the same concern with respect to requiring a permit that would disclose patient name for something of this nature like a miscarriage, for example, is something that we think is problematic and therefore, along with Section 22, additional forms or permitting or something to sort of have the Cabinet put out a reporting requirement that wouldn't identify patients or wouldn't compromise the sort of sensitive information is something that should be provided by the Cabinet.

THE COURT: Walk through with me how this -- how you understand this provision to work and how compliance -- how --

what you're currently complying with and how that differs from what this is asking you to comply with so we can figure out exactly what it is that makes it challenging to comply.

MS. TURNER: Okay. So Planned Parenthood does do some miscarriage management and that -- you know, often miscarriages are at home but sometimes they require an in-clinic and some treatment just depending on the circumstances.

Previously the law was that fetal death remains which is defined to -- defined to be demise in utero explicitly excluding abortion but would include miscarriage. That was exempt from the permit requirement for authorizing cremation. Now it requires the same permit and the permit itself is something that would have patient name on it. So in order to protect patient identity in a sensitive area, it's something that a new or different approach to a form or a permit should be provided.

THE COURT: Okay. Okay. And so this would comply -- because there are a couple of different -- there are a couple of different definitions in here. And I'm looking at -- let's see. So pathological waste versus -- there now just seems to be multiple definitions because fetal remains would be different than the disposal of pathological waste. Would that apply to miscarriages as well -- I mean, that applies to both?

MS. TURNER: The definition -- so fetal death -- "fetal death remains" is a term used in Section 20. "Fetal death" is a definition in existing law that does include miscarriage, does not include abortion.

THE COURT: Okay.

MS. TURNER: In Section 22 there is a new definition of fetal remains --

THE COURT: Right.

MS. TURNER: -- which appears to wrap in abortion and miscarriage.

THE COURT: Okay. And are fetal remains still considered pathological waste under the KRS -- or I'm sorry -- under the KAR?

MS. TURNER: Under the changes here, fetal remains would be -- it would be prohibited to dispose of fetal remains as medical waste. That's in 22(4). And there is also a carve-out from pathological waste to exclude fetal remains, so fetal remains are no longer medical waste under 22(4) or pathological waste under 23(15).

THE COURT: And that includes miscarriages or anything like that?

MS. TURNER: That includes miscarriages and abortion under the definition of "fetal remains."

THE COURT: Okay. Okay.

MS. TURNER: That implicates how the remains of an

abortion or miscarriage can be treated if they cannot be disposed of as medical waste. There are different carve-outs here with respect to miscarriage versus the result of a medication abortion versus the result of a procedural abortion.

Fundamentally, the big issue is 22(3) requiring the Cabinet to design forms through administrative regulations in order to document effectively what will happen with the fetal remains now that they cannot be disposed of as medical waste or pathological waste anymore and --

THE COURT: There has to be an election?

MS. TURNER: So there has to be an election and there has to be a designation recorded and there has to be some information collected to meet the requirements of these -- of the existing birth, death, provisional death, or death certificate for purposes of transport or cremation.

So 22(3) is saying the Cabinet needs to design forms through regulations in order to document the status of the remains that meet certain requirements, the designation of the disposition, and any other information required by the Cabinet.

THE COURT: Okay. So that's sub(3). Back up to sub(2). And so subsection (2) requires orally in writing to disclose certain things. Is -- does that apply to -- does the disclosure require physicians for, what, like medical

abortions -- I'm sorry -- medicine abortions as well as procedural abortions? I mean, it's a little vague what all that's going to apply to 'cause I assume in many situations that actually is not completely the case, correct?

MS. TURNER: I think -- I think (2) -- (2)(a) requires -- applies to all abortions and miscarriage.

THE COURT: Okay.

MS. TURNER: I think if what you're asking is not all medication abortions result in a person being seen in the clinic and having remains, I think that's true. Some of those things finish at home.

Sub(b) specifically refers to medication-induced abortions and carves-out this transport requirement. It exempts a patient from the requirements of permitting for purposes of transporting the remains.

THE COURT: So are you able to procure individuals who would be compliant with this?

MS. TURNER: I'm not sure I understand the --

THE COURT: Are you able to find people to transport?

MS. TURNER: So if that's the question -- it is a question of transport and it's a question of receiving the remains for purposes of cremation. And so on the one -- first of all, I want to say we are taking steps to explore and contact crematoria and facilities to make sure we would be in

a position to comply, so we have done that.

There is -- in addition to the new forms and administrative regs that are required, there's another big change to the law which is simultaneous cremation is now permitted for the first time and so that is a change for the crematoria.

So when we were contacting them, at least one response has been, "Oh, we're not allowed to do that." "We need to have our own sort of internal operations updated to be able to accommodate that." So when we contact people, you know, it is a question of whether they're going to be able to accommodate simultaneous cremation, whether they can accommodate this type of remains, whether they will accept them.

So as of right now, we cannot comply because none of those things are in place. We are working towards it, but I think that from our side of the house, so to speak, plaintiffs are making efforts to do that --

THE COURT: But you don't have anybody who's able to do this yet on their end?

MS. TURNER: We don't have anybody who has said they are able to do this as of now. And I think part of that may be it is a change to the way it's done both, you know, for purposes of filling out the requisite forms because there are forms that already exist but they disclose patient identity

and also the simultaneous cremation.

So when I -- Section 22(3) calling for forms promulgated through regs, you know, this is sort of more of an infrastructure question and some relatively big changes that are going to impact our ability through the forms, but also folks that we are going to be working with need to understand how they are -- what they are now able to do and they need to update their operations as well and I think guidance from the Cabinet is something that's important to being able to do that.

THE COURT: Okay. However, you are already documenting or you can easily document choices for disposal in the medical records?

MS. TURNER: Yes.

THE COURT: Okay. And the notification, I assume to the extent it's correct, so it would just be whether or not you could find somebody who has the ability to dispose of the remains in the manner called for in here?

MS. TURNER: And the requisite forms.

THE COURT: And the requisite forms for them to do it on.

MS. TURNER: And to the extent we can give 24 hours disclosure of something, you know, that sort of depend s on what we would be able to do. So, you know, 22(2)(a) says disclose certain things to the patient, but at this point we

would be disclosing -- you have the right to determine final disposition, but we can't -- we can't -- if you bring it back -- if you bring the remains back to us, we don't have currently the means to provide for cremation.

THE COURT: Okay. All right. That probably takes care of -- that gets you up to where, Section --

MS. TURNER: I think 22(3) is the forms and the administrative regs that needs to provide the infrastructure. 22(4) --

THE COURT: Is what's prohibited.

MS. TURNER: -- is what's prohibited. (A) is sort of the key part of this; disposition as medical or infectious waste is now prohibited. (B) and (c) we have absolutely no problem with. That's obviously already what is happening. And (d) the transport issue is another issue because currently medical waste is transported out of the clinic and disposed of as medical waste, so a prohibition on transport of fetal remains is also -- that would be a prohibition on the ability to dispose of fetal remains as medical waste.

THE COURT: Okay. And you can't comply with that -- the argument is you cannot comply with that currently because there are no providers willing to provide that to you?

MS. TURNER: Currently we dispose of remains as medical waste. This would prohibit doing that and we'd have to find another way to dispose of them. And correct, right

now, we do not --

THE COURT: Which would either be cremation --

MS. TURNER: Or interment.

THE COURT: -- or interment?

MS. TURNER: And we do not have the ability to do that right now both because of the need to make arrangements and also because of the lack of forms and administrative regs.

THE COURT: Got it. Okay. And those are forms you fill out or forms the crematorium or interment fills out -- they have?

MS. TURNER: I don't think it's clear. It says the Cabinet shall design forms that document certain things. Those things would need to be documented as some point.

THE COURT: Some of them you may not be able to document?

MS. TURNER: Well, the last subsection calls for any other information required by the Cabinet, so I don't know what it would be -- what the Cabinet would require.

THE COURT: Okay. Understood. All right. And from the Attorney General's office, do you want to address this issue?

MR. THACKER: Your Honor, I think as just pointed out, the only provision of Section 22 that requires a form -- in particularly a form for the Cabinet -- is that subsection (3) which is reporting requirement after the fact.

Obviously, you know, again, as we've said before, you know, the few times where there actually is a requirement for a form provided by the Cabinet, that particular reporting requirement doesn't kick in until the Cabinet provides the form. That is --

THE COURT: But -- okay. And you've said this a couple of times today. But you've also said in your briefs that they can still comply with it --

MR. THACKER: Yeah. They can comply with the rest of the provision.

THE COURT: -- because they can --

MR. THACKER: So they can -- well, even the reporting thing on 3, they can make a note in their file of the specific things they're going to -- that they know are going to be reported: The age, the parent, if they're under 18, emancipated or not, status of the fetal remains and how they're disposed of, so they can make notes of that.

But I think more importantly, outside of Section 3 there are substantive requirements regarding options to be provided to the -- the parent to determine if they want to take responsibility for the fetal remains, and if not, how they're going to be treated. And then substantive --

THE COURT: I don't think there's any argument -- correct, there's no argument that you-all can comply with that offering the options, correct? I'm trying to narrow down

what's an issue. I didn't think that was an issue. You can provide those options. You just don't have anybody currently willing --

MS. TURNER: Your Honor, it's the lack of a willing counterparty to accept, but it's also this part in 2(c)(1) that gives the election to relinquish guardianship of the remains and responsibility for disposition and then says, (Reading) The clinic shall dispose of those remains as they would any other human remains.

MR. THACKER: And, Your Honor, I think getting to that, that's, I think, very closely related to a point we made earlier. Again, this is, you know, a new obligation on the clinic to obtain some contract with someone to transport -- transport the fetal remains and then to either bury or cremate them.

I don't dispute it may take some time to get these contracts, but it's the burden of the plaintiffs to show that additional time is needed and to define what that is before it's -- to show that it's impossible. On the face of it, people have miscarriages every day.

Many mothers' families choose to have the remains of their unborn children interred. Cemeteries across the Commonwealth do that every day. Certainly cremations are done every day. The statutes actually liberalize it somewhat so as far as now they're able to do it simultaneously, so I think

the burden is on them to come with facts, not just sort of statements of counsel that this is hard for us. These are things that are done by other people every day and now it's part of their business to have to do it.

And if they are going to tell the court that "We cannot facilitate" or that it would be an undue burden on a woman's constitutional right to require us to do it now, they need to tell us -- give us facts to show that's true and I think also show us what steps they've tried to comply and give the court an idea of how long 'cause clearly it's not impossible.

Again, there are basically two requirements. You know, appropriate transport of the fetal remains like you would any other human remains -- the dignity of the infant being obviously sought to be protected here -- and a dignified burial or cremation. Both things happen every day in the Commonwealth. Businesses do these things. That -- I would dare say that's something the court could take judicial notice of.

What they have to prove is that for some reason they can't do it yet. And also I think for asking for an injunction of limited duration, they need to tell us when they can do it. They've not done either. So our position is having not done that, on the face of it there is nothing other than the reporting provision of Section 3, which says you have

to do a form later, that they can't comply with and therefore the statute has no basis -- they've not made any -- offered the court any basis to enjoin the statute.

THE COURT: All right. Why don't you-all address that?

MS. AMIRI: So, Your Honor, a couple of points. First of all, this may be happening today with respect to cremation for miscarriages. This fundamentally changes that. So, for example, in Section 19 -- sorry -- 22(2) -- Section 20(2). It specifically strikes out the current law before HB 3 which was the provisions of this section shall not apply to the cremation of fetal death remains and adds now that a permit is going to be required. So, for example, Ms. Turner was explaining how that would apply to miscarriages where there was fetal demise in utero.

THE COURT: So what is the permit?

MS. AMIRI: The permit that would be required is referenced in (1) of Section 20. So right now, for example, for human remains there is an infrastructure of forms; death certificates, cremation authorizations, that is required --

THE COURT: Right.

MS. AMIRI: -- for human remains. Exhibit D is one of the forms that is required for authorization for cremation, but there's also death certificates that are required as well. So the permit is the --

THE COURT: So you need a death certificate?

MS. AMIRI: For human remains you need a death certificate to cremate and you need the authorization form which is in Section (d).

THE COURT: How do you get a death certificate in the case of a miscarriage?

MS. AMIRI: Well, you previously did not necessarily need it, although -- unless the fetal death was 20 weeks or more which is in Section 21 --

THE COURT: Right.

MS. AMIRI: -- so --

THE COURT: So 15 weeks or less you're still having to get a death certificate for the transport and cremation, is that what I'm understanding?

MS. AMIRI: So for -- now for any gestational age under HB 3, if there was a miscarriage where there was fetal demise in utero, then you would need a permit under Section 20(2).

THE COURT: And that infrastructure for the permit already exists, correct?

MS. AMIRI: Well, that permit exists; however, it -- certainly, if you look at the authorization form that exists now, it's not applicable to situations where there's a miscarriage and it specifically says on there that simultaneous cremation is prohibited.

So it must be to avoid that absurd result that Section 22(3)(c) in particular contemplates that the Cabinet shall design forms through administrative regulations to address this.

And I think specifically with respect to abortion, the reference there that the fetal remains resulting from an abortion for the purpose of cremation that shall meet any requirement for birth, death, and provisional death or death certificates for transport for cremation.

That piece of it acknowledges that there is an existing infrastructure for human remains that is not appropriate for fetal remains and that therefore the Cabinet needs to design those forms through administrative regulations.

THE COURT: Okay.

MS. AMIRI: So that there were crematoria willing to provide services to people who miscarry pre-HB 3. HB 3 changes that. And so that is the fundamental issue that we have both with respect to abortion provision and for miscarriage management.

THE COURT: Okay. So that's going to put additional reporting burdens both on you and potentially on the crematorium or other provider of the service --

MS. AMIRI: Yes, Your Honor. And also, I mean, we --

THE COURT: -- without a form to do it on?

MS. AMIRI: Correct. And that's what 23(c) contemplates with respect to the administrative regulations which you can imagine will provide an opportunity for public comment not just from plaintiffs but also other providers of ob-gyn services, the crematoria themselves, and the public. That is why you would have an administrative regulatory process to invite public comment as to what that process should look like.

THE COURT: Okay. Understood. All right. The Attorney General want to address that issue?

MR. THACKER: Your Honor, I tried to follow, but I'm still not sure, other than for reporting after the fact, what would be necessary to be able to comply now. Again, obviously outside of getting the contracts; you got to find someone to transport the fetal remains and contract with either crematorium or -- again, significant issue here is that I think they focused on the -- the permit required for cremation which is what they've attached to Exhibit D.

I'm not sure why that form couldn't work now to the extent that in its instructions it says something contrary to -- you know, in terms of -- says you can't have simultaneous cremation. Obviously that's superseded by the law. I think you can still use the form and of course you have the option of interment. So, again, other than --

THE COURT: I don't understand your argument about "superseded by the law."

MR. THACKER: So I think what they're saying is somewhere in the instructions on the form it cites prior Kentucky law that did not require -- did not permit simultaneous cremation. To the extent that that's somewhere in the instructions -- I think it is -- that's not that case.

I mean, it doesn't affect -- the form itself they've actually attached. I think -- and the law says use the same form. You know, maybe the instructions be revised at some point, but there's nothing to keep you -- again, you know, the substantive requirements -- leaving aside the reporting requirements after the fact that need a new form per the expressed terms, there's things that other people do with fetal remains every day, so they can do them. It may take some efforts to do them, but it can be done.

MS. TURNER: Your Honor, the form that we attached as Exhibit D is -- has information regarding rights and responsibilities concerning cremation. Number one states that all cremations are performed individually and it's unlawful to carry them out simultaneously.

THE COURT: Which is no longer --

MS. TURNER: Which is no longer -- it's in the law but not in the form. Another issue is this authorizing agent. It's required -- if you go through the list -- the checklist

of who it could possibly be, it's going --

THE COURT: It doesn't include you.

MS. TURNER: It can only be the patient. It doesn't include --

THE COURT: Well, your client. Doesn't include your client.

MS. TURNER: Yeah. So, you know, as Ms. Amiri was saying, the form that insists now -- the infrastructure that exists now is not appropriate to carry out this sort of structure that is all very new and so currently it is impossible to comply with. It will take some time. And as of right now the law, you know, prohibits the existing situation which is fetal remains can be disposed of as medical waste, and so without the ability to dispose of them otherwise, that is what's creating the impossibility right now.

THE COURT: So there's only two choices? So the woman would select, what, she's going to select cremation or interment?

MS. TURNER: Yes. I think those are the --

THE COURT: Those are her only choices or she can -- presumably it's not going to apply to some people and -- in that there would really not be fetal remains that were recovered, correct?

MS. TURNER: Correct. For patients who are at home, I think this would give the right -- the right to relinquish

control to the clinic. For patients who are seen in the clinic, those remains will be at the clinic, and so arrangements would have to be made if the patient wanted to handle them under current law -- under the current situation, arrangements would have to be made to go through a funeral home or crematorium or something. The remains do not just get released to the patient.

THE COURT: Okay. Okay. So she has to choose one of those two options. And as of right now, would she be able to garner that individual to transport the fetal remains if she wanted to?

MS. TURNER: In what context?

THE COURT: Well --

MS. TURNER: From home to the clinic I think is --

THE COURT: Well, from the clinic to a crematorium.

MS. TURNER: That would have to be coordinated, I think -- oh. The answer is no.

THE COURT: She can choose a crematorium of her choice or an interment of her choice? Is that -- my understanding of the law accurate?

MS. AMIRI: Yes, Your Honor. Under HB 3, you mean?

THE COURT: Yes.

MS. AMIRI: Yes. Under HB 3, it's interment, cremation, for law enforcement purposes, for an investigation to ensure chain of custody or for pathological -- pathology

laboratory. So some patients choose to have a laboratory examine the products of conception for genetic testing, for example. So those are the only options. And so that is in 22 --

THE COURT: So she has that choice?

MS. AMIRI: Under HB 3.

THE COURT: If she is in Planned Parenthood's facility, she can make those choices herself and choose a place of her own or do you-all have to coordinate that? And the reason I'm asking is because while it might be impossible for you to comply, meaning for you to get somebody to do it on your behalf, I would assume -- the Attorney General says it happens all the time -- could a woman contact somebody and have it done on their behalf or once it's in your facility, then you have to comply with this law and therefore you can't give that option to the woman?

MS. AMIRI: Well, Your Honor, I think what the Attorney General is saying is pre-HB 3 it happened, but HB 3 changes all of this, so I think that that is just a fundamentally, you know, kind of misstatement in terms of what's going to happen under HB 3 if it were to take effect.

But in terms of -- what's going to happen in terms of the -- the crematoria still needs those permits and whatever the forms that the Cabinet is going to create because -- to allow for cremation.

So for right now, the existing infrastructure for disposition of human remains involves a death certificate and a cremation authorization and those things apply to the crematoria. It does not mean -- and so therefore it means that until those forms are prepared by the Cabinet through administrative regulations for the status of fetal remains, the crematoria cannot process those fetal remains.

THE COURT: And so they're not going to accept your request for a contract?

MS. AMIRI: Correct. So regardless if it's coming from the clinics or I think from the patient herself.

THE COURT: Okay. And I was asking it to say can you take yourselves out of it. Like, is there a way to, you know, exclude yourselves from it and give all of those decisions to the woman and allow her to engage in it. And I was just feeding off of what the Attorney General's counsel was saying that, you know, you're -- if it could have been done any other day.

But now you're just saying they're not going to do it because the forms aren't in place for them to comply with the law, so you're not able to get the contracts. So the question then becomes -- to the Attorney General's counsel's point -- how long do you-all think that requires and is that something that maybe you can or cannot determine until the forms are prepared?

I think probably the issue is in order to know what you're complying with, the forms would have to be there to know what the crematorium would have to do -- and from the Cabinet's perspective, is that the type of information that is on those forms? Is a crematorium going to need your form before they can determine what they're going to have to do to comply?

MR. DUKE: To the first part of the question, yes, that is the type of information that is -- that we contemplate being -- that is currently on forms and we contemplate being on the ones that have to be created due to HB 3. I don't want to speak for crematorium, but I would think they would feel much more comfortable having form in hand before they perform any services.

THE COURT: Okay. Understood. All right. From the Attorney General's office?

MR. THACKER: Yes, Your Honor. Just very briefly. Again, to the court's point, on Page 50, Section 2(c), the options that must be presented to the parent are either, one, relinquish guardianship of the fetal remains and responsibility to the clinic or to retain it.

I think it's significant that the statute speaks in terms of guardianship. I think if -- so the problem for plaintiffs only arises if the patient chooses option one; relinquish guardianship to the plaintiffs. Say, "You take

care of the fetal remains."

THE COURT: And I assume that's all we're really talking about.

MR. THACKER: And if they do that, I think the term "guardianship" there is significant because I think at that point there's no difference between plaintiffs filling out any of the forms now as the guardian of the deceased versus, again, any parent of a miscarried child doing it today. So, again, I don't believe -- certainly not from anything I've seen in the record that plaintiffs have shown they can't comply under the current forms.

THE COURT: Guardianship -- I mean, that's a -- that is a legal term that has legal requirements.

MR. THACKER: Whatever it means for a fetus. The statute says that it's relinquished to them if that's the choice of the patient. So, again, I think that would stand in the same place as parents of a miscarried child who today or, you know, a month ago would go to seek cremation or interment of their unborn child.

So, again, I think they can sign the form as guardian because the statute says if the -- again, if the patient has relinquished guardianship of the remains. So that's just to say again I think the current forms work and, again, I've certainly not seen anything that shows they wouldn't work, but, you know, again, at most --

THE COURT: Does Planned Parenthood have their own internal forms to seek guardianship?

MS. MURRAY: Your Honor, I'm not aware of that. There is a current policy with respect to disposition of pregnancy tissue. It is not anything like what is contemplated here. Certainly under the current system, you know, the presumption is that any pregnancy tissue obtained from an abortion in the clinic is kept and disposed of by the health center, but the patient could under the previous regime, which as Ms. Amiri noted, is fundamentally changed here.

Under the previous regime, a patient could have selected to get either the tissue cremated or interred. Under the current policy, though, there is not sort of a -- we do not have a consent form that identifies relinquishment of pregnancy tissue for purposes of guardianship, no. That would need to be created and staff would need to be trained on that to the extent there is an infrastructure to which it would apply.

THE COURT: And I'm just -- I don't know the answer to this question, but I don't think I've come upon the issue of guardianship of -- I mean, it's not quite guardianship of a deceased individual. You're not giving guardianship of a human remain to somebody. It's different. So I understand the word "guardianship." I think that's a question of law;

whether that could be complied with using the word "guardian" 'cause "guardianship" has, you know, legal definitions as opposed to, you know, being an agent and receiving something or, you know, the other forms that a crematorium or -- you know, what you sign when, you know, a place of interment receives human remains. It's a little bit -- I don't think it's guardianship, per se.

Okay. So the word "guardianship" is from the Attorney General's perspective essentially making the facility be able to sign as a parent?

MR. THACKER: Well, I think what it does is it allows them -- with respect to the final disposition of these particular remains -- allows them to step into legal shoes of the patient, whatever that was.

THE COURT: Okay. All right. I think I understand the arguments on that. Anything else with regards to those sections? All right. Where are we as far as the next section Planned Parenthood would like to address?

MS. TURNER: Your Honor, nothing to discuss with respect to 24.

THE COURT: Understood.

MS. TURNER: And then I will -- I will take your guidance if you need me to address 25, 26, 27 only with respect to forms. This is going to be the same argument that comes out of the directive in Section 13.

THE COURT: Understood.

MS. TURNER: And I will point out that the -- the Attorney General concedes that for Section 27, it requires the use of a form provided by the Cabinet, but its position with respect to 25, 26 is any report will do and our position is that it has to be a Cabinet-created form because that is the directive in Section 13. Cabinet has to create and distribute the form. And also Section 25 invokes Section 4 as does Section 26.

So all of the information that Section 4 calls for including zip code and county has to be incorporated within Sections 25 and 26, so we think it presents the same issues with respect to the problem from our perspective of complying with the "Give us all this information, but don't identify any patients."

THE COURT: Okay. And what about the argument with 26(1) that the form already exists because it was part of pre-existing statute?

MS. TURNER: So, Your Honor, I think it's very similar to the issues with Section 1. The Attorney General's --

THE COURT: Is there a form, let's start with that question.

MS. TURNER: Well, the Attorney General says a form should exist.

THE COURT: Let me ask the Cabinet. Let's just get to the fact. Is there a form for 26.1?

MR. DUKE: It is the Cabinet's position that the current prescription reporting form is currently incorporated by reference in 901 KAR 5:120, so it does exist.

THE COURT: Okay. And would it allow for compliance with the requested information for HB 3?

MR. DUKE: We believe it would, but we are still kind of trying to get our hands around that, but at this time we -- we think it would.

MS. TURNER: Okay. So, Your Honor, just to respond to that. I believe we put in what the Cabinet just referred to as Exhibit C on Sunday.

THE COURT: Yes.

MS. TURNER: And we too are still parsing through all of the requirements, but the list of items in Section 4 includes things that do not appear to be called for on the existing form.

THE COURT: I'm sorry. Give me a line number, please, the items you just --

MS. TURNER: Working on it. Sorry.

MS. AMIRI: Page 56, line 23.

MS. TURNER: But I think we have to go to Section 4, right? So, sorry, Your Honor. In Section 4 it would be Page 23 line 11(b) and (c): Names, serial number, national drug

code, lot numbers, expiration dates of the specific drugs provided. And I don't believe Exhibit C incorporates that level of detail right now, so that's one example. And of course --

THE COURT: What's the Cabinet's position on that?

MR. DUKE: Your Honor, I still think -- like I said, I mean, I do believe that the current form could possibly work, but at the same time we are just still trying to get a handle on all this as well and I don't have a concrete answer.

If anything, this is a form that falls in that category that the existing form can be quickly modified to accommodate any new information --

THE COURT: Okay.

MR. DUKE: -- so we don't have to start from scratch on this one.

THE COURT: What about the -- what about the part of -- I guess it's at the top of Page 56; (Reading) The form shall be signed by the qualified physician.

So are we back to "qualified" and is that qualified but not registered or qualified and registered 'cause I was a little confused. The law appears to use both the word "qualified" sometimes, the word "registered" sometimes, and then both together at other times. So as far as who's allowed to sign the form.

MS. TURNER: And I think, Your Honor, I agree it is

confusing, but the pharmaceuticals can only be provided under HB 3 by a qualified physician who is registered, so even if it refers just to qualified physician, that qualified physician isn't supplying any drugs until he or she is registered.

THE COURT: Cabinet agree with that?

MR. DUKE: Yes, Your Honor.

THE COURT: Okay. Okay. All right. Anything else in this particular section?

MS. TURNER: I think we're just on 25, 26, 27. I will leave 27 substantively; the 15-week ban to the side. That's for EMW.

THE COURT: Yeah, absolutely. Let's do that for now. Let's leave that to the side. All right. The Attorney General's office want to respond?

MR. THACKER: Just briefly because, again, I think this is an issue that we've already discussed at length in Section 4. Again, I would say here, when the statute says "qualified," if you've done the couple of things required to be qualified, registration's not also required if it's not said there until a registration program exists and that doesn't exist now, so as we said before, you don't have to comply with it until it exists.

But if you're dispensing abortion-inducing drugs, I think you should be qualified and I think there's no reason to delay the application of that. And, again, that was an

earlier provision.

As to the particular requirement here, again, it's -- it is a reporting one. And, again, I will point the court to Exhibit C. In plaintiffs, I believe, response filed yesterday, you know, again, that form certainly does identify the drugs at issue, has a lot of blank space, a place for "other." I think, again, to the extent there's not specific requirements. To the extent there's letter by letter regulation, I think you can write in the additional information in "other" and in the blank form.

You know, again, it would be helpful once the Cabinet promulgates a new form, but to the extent there's an existing form that facilitates the information -- the key information and has room for the rest, I don't know why an injunction's necessary and can -- can comply.

THE COURT: All right. You want to move on to the next section at issue?

MS. TURNER: I think the next one is Section 28 --

THE COURT: Yes.

MS. TURNER: -- which is penalties. Our position is it goes hand-in-hand. Sections 14 through 19 are the certification program that needs to be designed and promulgated through administrative regulations. This -- 28 would make it a felony to violate Sections 14 through 19. So plaintiffs think that to the extent that it's impossible to

comply with, it's not appropriate to have a penalty, particularly one of this significance attached to a certification program that doesn't exist.

THE COURT: Okay. And I believe the response from the Attorney General's office in their slot was, yes, Planned Parenthood is not a pharmacy. So do you want to address that argument?

MS. TURNER: Planned Parenthood is not a pharmacy. We do as was mentioned earlier sometimes dispense certain medications through the clinic facility, but Sections 14 through 19 create this certification program that applies to pharmacies, yes, but also to licensed abortion facilities, and so --

THE COURT: So you would be included in that?

MS. TURNER: So we are included in that. And we cannot, you know, legally under HB 3 as it is written, the pharmaceuticals cannot be provided outside of the certification program.

THE COURT: Okay. All right. Let's let the Attorney General address that one.

MR. THACKER: So, again, this is just a penalty provision. To the extent that the court either enjoins or finds that compliance is not possible with the substantive underlying provision, you don't need to separately enjoin the penalty provision.

We would agree that to the extent that the plaintiffs would be subject to the registration provisions and program, until that program's in place, they can't be penalized for not being part of it.

THE COURT: Okay. But as to this comment in here, Planned Parenthood's not a pharmacy, you're not disagreeing that they would come under the purview of 14 through 19?

MR. THACKER: I think as we read -- and, again, without a factual -- without a complete factual record and without knowing more than I frankly know today about their practice, I'm not sure they come under it, but if they do come under the provisions that we were reading as to only apply to pharmacies that require registration, again, they can't be penalized until the registration program exists.

I don't know if they do or not, Your Honor, but, again, to the extent that what you have is a penalty for not participating in registration and the program to register isn't there, you can't be penalized. We agree with that.

THE COURT: But is the Attorney General's office reading this as only applying to pharmacies?

MR. THACKER: That's -- I think that's how we initially read it. Yeah. So Section 28 itself is an amendment of KRS 315.990 which my understanding is a statutory provision that is governing pharmacies and pharmaceutical practice. If I've -- you know, from --

THE COURT: But if they're dispensing, right -- if they're dispensing the drugs from their clinic, that would be a pharmacy service which I believe would fall under that, correct?

MR. THACKER: I don't know the answer to that, Your Honor. I don't know if a physician directly dispensing drugs to the patient during a visit. That may be and appears to me to be at least facially distinct from filling a prescription written by another physician which is what a pharmacist does.

So, again, I -- I do not believe that the pharmacy provisions do apply to plaintiffs. If they do, I think we're agreeing that they don't have to comply with any registration until a registration program is set up by the Cabinet.

THE COURT: All right. And your argument is I wouldn't need to enjoin a penalty provision because I would have already enjoined the other, but you also said it's harmless if one were to enjoin the penalties --

MR. THACKER: So long as the injunction is clear it's only as to these plaintiffs and only as to the substantive provisions being enjoined.

THE COURT: Okay. You want to address whether you comply -- or apply?

MS. TURNER: Section 15(2) directs the Cabinet to -- I'm sorry -- sub(1) directs the Cabinet to establish certification requirements for manufacturers, distributors,

pharmacies and abortion facilities licensed under KRS 216B. So just to address that issue as to who the certification program applies to. And our position would be --

THE COURT: You're licensed under 216B?

MS. TURNER: And the penalty should not go into force if -- program exists, program doesn't. There's no need for the penalties if compliance is impossible because it doesn't exist.

THE COURT: Okay.

MS. TURNER: It's the other side of the same coin, I think.

THE COURT: All right. Understood. That brings us to 29.

MS. TURNER: 29, Your Honor. It requires prescriptions dispensed to be reported on a form to be created by the Cabinet. So I think our position here would be the same as for Section 13 as directing the Cabinet to create these forms. One does not exist. I don't think that there's a dispute about that.

And while this is a requirement to be carried out by a pharmacy, as we discussed earlier, to the extent a medication abortion cannot be obtained because no pharmacy would be able to comply with the regulation and dispense that pharmacy, that's operative in the same way as the other ones. Yeah.

THE COURT: Okay. And why don't you just go ahead and address 30. I don't really need you-all to address 31. I think I -- I think I can figure that one out.

MS. TURNER: And I think 30, Your Honor, is one that we have highlighted as white -- or not highlighted, rather, as not applicable.

THE COURT: Yep. I'm sorry. Did I say 30? I meant 31.

MS. TURNER: Oh, I'm sorry. 31 is -- our position is it's another penalty, another --

THE COURT: Okay.

MS. TURNER: -- provision that authorizes enforcement of something that can't be complied with. And so to the extent it's impossible to comply, it's not appropriate to authorize enforcement nor do I understand why enforcement would be needed for something that cannot be complied with, so it's not -- you know, the two really go together.

THE COURT: Okay. All right. Then after that I think we're going to get into stuff that maybe more applies to EMW, correct?

MS. TURNER: I believe that's correct.

THE COURT: All right. Does the Attorney General want to comment on those last two?

MR. THACKER: On Section 29.

THE COURT: 29 and 31.

MR. THACKER: First of all, Page 61, line 14, the statute by its expressed language says (Reading) Each prescription dispensed by a pharmacy -- which I don't think plaintiffs will argue they're a pharmacy, though, maybe they have.

But I'm reviewing the statute and from my notes I don't see that it requires -- this is another one where there is ultimately a report requirement, but I don't see that it requires the report to be on a form provided by the Cabinet, so, again, I think our position would be that until and unless a form is promulgated, you can just provide the information to the Cabinet.

But, again, I'm not even sure the extent to which 29 would apply. I think -- I think we've covered 31. That, again, obviously if you enjoin a substantive provision, the penalty won't apply. If the court enjoins a substantive provision, the Attorney General's office will not be able to enforce it.

The generic penalties and the generic -- certainly the generic power to enforce need not be enjoined and certainly shouldn't be enjoined as to -- except to the extent that it applies to substantive provisions that are enjoined, so --

THE COURT: All right. So I think this brings us now to the sections that would apply to EMW and the

constitutional argument, so I'll let you kind of address the remaining portions here.

I don't think there is anything else as far as compliance goes just, you know, to bring it full circle. I don't think there are any other sections compliancewise that we need to talk about from any other standpoint other than the constitutional nature of the 15-week ban, is that correct, from Planned Parenthood's point of view?

MS. TURNER: That's right, Your Honor. Nothing else on compliance.

THE COURT: Okay. All right.

MS. AMIRI: Thank you, Your Honor. With respect to the ban on abortion starting at 15 weeks in pregnancy, the law is very clear that a ban on abortion previability is unconstitutional under established Supreme Court precedence and the precedence of the Sixth Circuit.

It's a straightforward question of law. This court does not need to reach any factual issues other than 15 weeks is a point in pregnancy previability, which the Attorney General does not dispute.

I do want to clarify, which is in our reply this morning, that the Attorney General articulates the wrong standard for evaluating abortion restrictions. The Sixth Circuit recently made clear en banc that the -- they are adopting Chief Justice Roberts concurrence in June Medical

Services versus Russo in that the undue burden test involves two parts.

First, the law must be reasonably related to a legitimate state interest and, second, the law must not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

A law restricting abortion must pass both of these tests. This court does not need to reach the question of whether the law is reasonably related to a legitimate state interest. We are not conceding it does.

But certainly for the purposes of a preliminary injunction, the urgent matter before the court, it only needs to reach the question of whether there's a substantial obstacle path -- placed in the path of patient seeking abortions -- abortion and a 15-week abortion ban does just that. A ban on abortion is by definition a substantial obstacle in the path of patients seeking abortion.

So, Your Honor, we think that this is a straightforward question that the court can address now and preliminary enjoin the 15-week abortion ban. I'm happy to answer any questions.

THE COURT: All right. Let's hear from the Attorney General's office first.

MR. THACKER: Thank you, Your Honor. As a preliminary matter, I will note our objection to considering

the two motions together. Obviously the EMW's motion on the 15-week ban was only filed on Friday. We have responded and I think that -- and our objection may be addressed with the ability to maybe supplement anything in the record you might want with the post-hearing filings the court has mentioned but we can discuss that then.

To the extent the court does want to hear arguments on that motion today, we would -- first of all, we would agree that there are -- there are two factors and we believe both factors have a factual element that needs to be developed.

And, again, first there is the question of whether there is a legitimate state interest, which I'll talk about more in a minute, but plaintiffs have not -- EMW in particular has not contested that. And then there's the question of whether the regulation presents an undue burden that is a substantial obstacle to a woman obtaining an abortion.

EMW obviously reads the controlling case law including Sixth Circuit law to take it as a given that anything labeled a ban before viability satisfies that -- the undue burden element. We don't believe that's clear from the case law at all and it's certainly not from Sixth Circuit case law, which, again, talks about -- well, Preterm and in EMW Friedlander.

The Sixth Circuit made clear that a preterm -- a previability ban is not per se an undue burden. You can't

just assume that; that there has to be, you know, some -- still some evidence of undue burden and I don't -- plaintiffs haven't even attempted that here, Your Honor. There's no evidence at all that a woman who -- in Kentucky who wishes to obtain an abortion cannot do so before the expiration of 15 weeks without experiencing substantial hurdles.

Moreover, again, the argument of EMW assumes that the holding in Casey applies squarely here. It does not. Casey applied the undue burden test on the facts before it. And as a number of courts made clear -- and I think we cite to the concurrences of Judges Sutton and Bush in Preterm Cleveland, their concurring opinions by the majority there, that to the effect that every -- every case including a Supreme Court case has to, you know, be held to its holdings, not its dicta, and holdings are determined by facts.

And the facts at issue in Casey are different than those here in several regards. And in particular, as to the nature of the government's interest, Casey looked at only two; the protection of the unborn life and the health of the mother. And in light of those state interests found that the previability -- previability ban would be undue.

Here the General Assembly have articulated and we put at least -- we put a declaration in the record to support additional and we believe significant state interests. In particular, the General Assembly noted that a large number, if

not most, abortions post 15 weeks include the dilation and evacuation procedures which the General Assembly found to be, quote, barbaric practices, dangerous for the maternal patient, and demeaning to the medical profession, end quote.

That element there, demeaning to the medical profession, is something that was not at issue in Casey, is a substantial -- or -- yes, is a substantial state interest as found in Preterm. This is something -- and, again, makes this case -- this law -- different than the one before the court in Casey.

And, additionally, here the General Assembly identifies a, quote, pain-capable unborn child as one with a probable gestational age of 15 weeks. That question of whether or not the procedure is inflicting pain on an existential being was not before the court in Casey, was not one of the government issues -- or government interests that Casey said could not justify a previability ban.

Together these interests as finding of fact by the General Assembly which, again, I think we have to be accepted certainly unless rebutted, which they've not been here, they -- they show that they're interests that are significantly different than those raised in the Supreme Court in Casey and we believe that they're interest that combined with the two in Casey do satisfy the undue burden test, particularly in light of the fact that there is no evidence,

again, that there is a substantial obstacle preventing any woman in Kentucky who wishes to obtain one -- abortion before 15 weeks, so we, again, disagree, therefore that the -- there's a substantial likelihood of ultimate success on the merits by plaintiff and believe the court should not restrain the 15-week ban.

THE COURT: Can you explain to me your argument about the medical professional? What is -- what is the interest you're asserting?

MR. THACKER: So -- and, again, this Preterm Cleveland opinion out of the Sixth Circuit does discuss this extensively. So the General Assembly has found that the particularly brutal and cruel nature, frankly, of dismemberment abortions is demeaning to the medical profession in the same way that the General Assembly has found in Tennessee and Ohio found that it's demeaning to the medical profession to perform abortions on the basis of a child's disability because of things like Down syndrome or in the case of Kentucky and Tennessee to perform -- knowingly perform abortion because of race, sex, and gender, so these eugenic reasons for abortion.

THE COURT: What's the State interest in the medical profession -- in demeaning the medical profession?

MR. THACKER: Protecting the medical profession from being demeaned is the interest. So the General Assembly has

concluded that by participating in these particularly gruesome abortions and abortions that science now shows likely -- almost certainly cause pain to the unborn child -- the infant, the fetus -- that causing pain intentionally, ripping apart by the limbs, that these are antithetical to the dignity of a profession that should be a profession of healers, a profession that avoids unnecessary pain.

And, again, it's the same kind of dignity of the profession that has led the Sixth Circuit to say you can say that abortionists may not -- physicians may not participate in abortions when they know the reason is because the disability of the child.

Why? Because eugenics and the potential association of that kind of abortion with discrimination is beneath the dignity of the medical profession which is, I think, obviously a State interest. We license -- we have here a representative of the Kentucky Board of Medical Licensure. We do hold our physicians to a high standard. And the General Assembly has found that abortions post 15 week demeans the dignity of the profession.

THE COURT: Want to respond?

MS. AMIRI: Yes, Your Honor.

THE COURT: Actually, I'm sorry. Let me ask one more question before I have you sit down. So the factual scenario set forth in Casey, you've indicated that there are

other State interests at play in this law.

Does that mean the test is different or does that just mean the perspective is different in terms of weighing the State interests? I think the test and whether it applies to the circumstance overall is different than whether or not the balancing is the same.

MR. THACKER: And, again, it's not even necessarily a straight balancing. I don't think that's what we're -- that is not what we're suggesting. What we are suggesting is that the test is still is it an undue burden, but given the additional and fundamentally different state interests here -- and we have the first CC here as well: Life of a child, health of the mother. But you have these additional interests as well that says that Casey is not controlling. It's not -- so KC's -- so you have to do --

THE COURT: But -- the test and the outcome, so the question is do you agree on the test?

MR. THACKER: I agree that the test is the undue burden test, but I think the application may be different here. And -- and here I believe --

THE COURT: The application or the weighing of the State interests?

MR. THACKER: Well, I think the difference is that under Sixth Circuit precedence reflected in Preterm and in EMW versus Friedlander, that even previability there's not a per

se undue burden; that you still have to look at the actual -- the court still must find that there is a substantial obstacle to a woman in Kentucky obtaining abortion within the 15 weeks.

THE COURT: Okay. Understood. Want to respond?

MS. AMIRI: Yes, Your Honor. Thank you. I think we do disagree about the tests. There is no weighing test under Sixth Circuit precedent. The court en banc was very clear in Preterm that they were shoeing the balancing test that the plurality put forth in June Medical Services versus Russo picked up from Whole Woman's Health and said instead they were adopting Chief Justice Roberts' test and his concurrence in June Medical; that it was really a two-part test. There's no weighing of the state interest and the substantial obstacle.

So there's no circumstance in which the state interest can be so great that they outweigh the substantial obstacle placed in the path of a person seeking an abortion previability. That is just simply not the test in the Sixth Circuit as it has been developed in Preterm and EMW versus Friedlander.

So regardless of the State interests that the State put forward, there can be no overcoming of the obstacle that's created. And it cannot be disputed that an abortion ban at 15 weeks in pregnancy prohibits previability abortions and patients will not be able to obtain an abortion in violation of their constitutional rights.

And in fact, the defendant, Attorney General, admits on Page 13 of its opposition to the temporary restraining order filed initially -- it's Document 21, Page ID 205, that HB 3 prohibits some previability abortions and the reference is to the 15-week ban, so admission that there is a prohibition on previability abortions.

With respect to the State interest, the Attorney General seems to be trying to relitigate the ban on D&E abortions which is permanently enjoined. There was already a trial in front of a different judge in this court about the State's interest under the test that applied at the time which was the weighing test. And there was a trial on the merits very specifically about these State interests including whether fetuses can feel pain.

And there was an overwhelming evidence as the district court find that fetuses cannot feel pain before 24 weeks and that those findings were created on appeal in the Sixth Circuit on a panel decision and that law remains permanently enjoined.

So the attempt to try to relitigate that case is not only improper but is also -- those State interests are now irrelevant for the large part because the law here fails under the substantial obstacle test which is now the test -- those two-part tests from Preterm.

So this court should preliminary enjoin the 15-week

ban under decades of Supreme Court precedent and the current Sixth Circuit precedent as well.

THE COURT: All right. You want to respond to anything?

MR. THACKER: Two things very briefly. Again, there is a difference of law. We'll rely on our briefs. I will say that to the extent there may have been findings of fact as to pain capable of fetuses in a prior case, science changes and so therefore the factual record on that issue may change.

And I think we reiterate that regardless of the law, we believe there must be some evidence presented by plaintiffs of the substantial obstacle and there is no factual record at all as to there being a substantial obstacle to obtaining an abortion based upon this statute. Again, there is ample time -- up to 15 weeks -- to obtain one.

THE COURT: Okay. Anything further?

MS. AMIRI: Your Honor, this idea that it's not a substantial obstacle before 15 weeks is not the question. It's whether it's a substantial obstacle after 15 weeks. And as the verified complaint demonstrates, when HB 3 was in effect, EMW had to turn away 23 patients at 15 weeks or beyond. They provided abortions to 21.6. You look at the period when abortion is banned, not the period prior to the ban.

THE COURT: All right. Understood. So I wanted to

capture anything from the other defendants. Any other comments today that you want to put forward either -- on either issue, although, I think the Cabinet would probably be commenting more on the -- the compliance issues. Anything further from the other defendants? I don't want to leave anybody out?

MR. DUKE: Your Honor, I'll go first. The Cabinet has nothing further to add at this time.

THE COURT: All right. Thank you. It's true of the rest of you as well?

MS. DIAKOV: The Board of Medical Licensure has nothing to add.

MR. MOORE: Nor does Mr. Wine.

THE COURT: Okay. All right. Thank you. Okay. So I am going to -- as it seems we already did -- hear the argument on the 15-week ban. And I understand the Attorney General's arguments; however, EMW's motion for preliminary injunction is similar if not identical in many respects to that which was filed as a supplement in Judge Hale's case, and so -- so it's been out there and in your purview. You've had notice of what the arguments are for some time now.

So I do think it's appropriate to hear them, consider them on the preliminary injunction; however, as I said and I think as our arguments sort of bore out today, we need more information that's not before the court.

When we're talking about going line by line through a 70-some page law and determining specifically what can and cannot be complied with, that takes more than just reading the law because you have to know how it works practically on the ground and what forms are available or are not available and what those forms specifically require or don't require, whether those forms are submitted electronically, whether those forms are emailed in.

I know it is the position of the Attorney General that you could mail in the reporting requirements, although, I question who would I mail them to and whose -- you know, whose attention do I put that to? You have very sensitive medical information just going out. I think that's part of the reason why forms do exist and there's very specific reporting requirements about where those forms go and to whom they go within the Cabinet and how that reporting is done, so we do need some additional information.

I also think the burden being on the plaintiffs has to give information as far as where compliance goes from here, how long compliance may take. Obviously, there's a couple of different things here. There's a 60-day requirement in here for the Cabinet to create programs, promulgate rules, and create forms.

Sixty days is not very long as they already -- the clock is already ticking on that, so certainly there's the

issue of timing from the perspective of how long it takes that process to be completed on the Cabinet's part. Not that I don't believe that 60 days means 60 days, but sometimes 60 days may not get to the end of the process.

There's, I'm sure, certain promulgation rules that will need to be taken into account when we actually score that out in terms of how many weeks things take. So there's that issue on one side.

Then there's also the issue of compliance from the standpoint that I do believe that there are pieces of this legislation that can be complied with right now. I think there are some pieces of legislation which while there may not be a form required for it, it may be difficult to obtain compliance because there aren't rules or programs promulgated which is different than just a form.

It's one thing to report something on a form. It's another thing to know what you're responsibilities are under the law. And I think we talked about that a little more in his terms of the creation -- cremation piece or the transportation piece and whether or not there would be providers of drugs or the other issues with disposal of fetal remains.

So all of those things being said, there needs to be more detail in the record to carry the burden as far as specifically for each of these items, what is the time frame

for compliance for those that are still outstanding? How many of them -- you know, we very broadly said in these charts, "Oh, they are" -- "because we don't have a form, we don't know." That's a very broad issue. Some of them, yes, there's no form, so you don't know. But for some of them, there's certainly maybe other issues at play as far as the promulgation of regulations, how long it might take providers to become qualified, things like that, that we need more specifics on if we are going to delineate which pieces of this legislation can and cannot be complied with at this very moment.

As I said in the initial temporary restraining order, it was my intention to restrain enforcement of all of it because we really didn't have an understanding of what could and could not be complied with, for instance, whether or not the form existed for Section 1(10), so that was disconcerting. My intent is -- that the 14 days on the TRO runs on Wednesday.

It would be my intent to -- I think for good cause shown under the rule, I'm permitted to extend the TRO. My intention is not to extend it in its current state, but to specifically exclude those portions that, quite frankly, I think most of you agree that you can comply with -- some of them it's pretty clear. There's no change to the law. There's nothing really to enjoin.

So there are some in here that I certainly think the TRO can be lifted on certain sections and subsections. So it's my intent because I think we need more facts in the record. Both sides have been unable to answer some questions necessarily because we're thinking through how the law actually works in real life, and so I would like answers to those questions that I've posed today that we've been unsure of.

I think it's appropriate then to extend the TRO for another 14 days, but it will be in a slightly more limited nature based upon what I believe everybody said can be complied with and that there don't really appear to be remaining arguments from my perspective.

So I will reissue on Wednesday something that clarifies what pieces can and cannot be complied with at this time. And then the remaining issues, my hope would be that you-all can file findings of fact, conclusions of law, and additional materials based upon the questions I've asked today, based upon the issues that have come up during today's pretty detailed discussion.

If we're asking for a TRO of some and not all of this law, we have to be pretty specific 'cause they are -- many of the provisions are intertwined. So the question becomes when you would feel comfortable providing briefing on that. Understanding that I can only extend the TRO until May

18th by my calculation if I reissue it on the 4th with slightly different modifications.

Now, it will be a slightly different TRO, so there are arguments to be made many ways on that, but I think for purposes of expediency, my question for the parties is how long would you like for briefing?

MR. THACKER: Your Honor, are you envisioning simultaneous briefing or -- I might suggest it might make sense for plaintiffs to tender their supplemental memorandum in support of findings of fact, conclusions of law and us respond because I don't want to argue about provisions that they're not -- may not be arguing for anymore.

THE COURT: Right. We want to narrow it down as much as possible which is why I'm saying I'm reissuing it on Wednesday. That will give me time to exclude some things that you-all don't need to argue about anymore.

And then I think the burden being on the plaintiffs, they should go first to produce what facts they believe are necessary, I assume, in the form of affidavits. Now, if we get to a point where you-all tell me that you need witnesses -- I was kind of hoping that if we needed that, we would hear from that today, but if we need that, we can always entertain that, but I would like to receive something in the next week or so if that is something we can do.

MS. TURNER: Your Honor, is next Monday acceptable?

THE COURT: I think we can do next Monday. Here's what I'm trying to balance. I'm trying to get them a response. And if you want a reply, you would have to do it even sooner.

MS. TURNER: Let's do it by Friday.

THE COURT: Okay. So Friday?

MS. AMIRI: Yeah. And, Your Honor, I hope to maybe buy one more day too. Since your TRO was effective as of April 21st at 3:00 p.m. which would be Thursday --

THE COURT: How many days -- I'm not really great at math, but I will assure you that I will do a calculation and look at a calendar. I have to go through it in my head.

MS. AMIRI: So by my calculation, it would expire on 3:00 p.m. on May 5th, so then a 14-day extension would be the 19th -- Thursday 19th at 3:00 p.m.

THE COURT: Okay.

MS. AMIRI: So just wanted to clarify that to hope to buy us one more day.

THE COURT: Okay. So if your briefing is in by Friday, when would the government like?

MR. THACKER: I think they were going to have it by Friday which is the 6th. Is the following Friday -- well, when are we -- give me -- what's the end date now, again, of the TRO?

THE COURT: Well, if we all agree it's the 19th,

I'll take your word on it.

MR. THACKER: We can work with that then. Is the following Friday workable for everyone?

MS. TURNER: Your Honor, if we are going to put in by this Friday, I think -- if possible we appreciate a reply also leaving Your Honor some time to read our submissions.

THE COURT: Yeah.

MR. THACKER: Then we can do the 12th if Thursday's better than Friday. I don't know how much time the court will want before --

THE COURT: Well, the court's in trial, so -- all right. If you-all do by this Friday, you-all do by the following Thursday, can you do it by Monday?

MR. THACKER: Reply?

THE COURT: The reply by Monday. Will that work? While you-all were very busy over the course of this weekend, so -- okay. So let's -- let's plan on that and then I'll obviously get whatever ruling out four days later.

So we'll issue an order from today's proceeding setting forth the deadlines that we've established. And then on Wednesday I will -- after I have a chance to just look back through everything. I'll issue a new TRO modified to exclude those things, so you'll really know when your briefing -- what it is that's still remaining, okay? And then that should be hopefully a format that we can work with moving forward.

Anything else that we need to address today? And obviously other defendants are welcome to brief should you so choose. I'm not leaving anyone out. Anybody can throw in their brief as well.

And obviously the Cabinet to the extent that there are factual issues that are incorrect or that you believe need clarification, I would expect the Cabinet to chime in and indicate whether or not a form exists, doesn't exist, the format of it, those types of things, because certainly those are factual issues that the court would like at its disposal.

MR. DUKE: Yes, Your Honor.

THE COURT: Okay. Anything else that we need to discuss today? Silence. Okay. All right. Thank you-all.

(Proceedings concluded at 2:24 p.m.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

s/April R. Dowell — 5/4/22

Official Court Reporter, RMR, CRR — Date