MILWAUKEE COUNTY BOARD OF SUPERVISORS

DATE: September 22, 2022

AMENDMENT NO. 1 to Item #69

Resolution File No. 22-927

Ordinance File No.

COMMITTEE: Intergovernmental Relations

OFFERED BY SUPERVISOR(S): Clancy

ADD AND/OR DELETE AS FOLLOWS:

Create the WHEREAS clause at or near line 18 as follows:

WHEREAS, in a nearly unprecedented taking of a settled right in the United States, the US Supreme Court issued a ruling on June 24, 2022 in *Dobbs v. Jackson Women's Health Organization* which overturned Roe v. Wade, allowing states to ban abortion; and

WHEREAS, based on Organisation for Economic Co-operation and Development (OECD) data, the United States has the worst maternal mortality rate among advanced economies, and according to the United States Centers for Disease Control and Prevention (CDC), Black maternal mortality is greater than white women by a multiple of three and forced birthing will potentially exacerbate this trend; and

WHEREAS, there is a continued need for surgical intervention via abortion to save the life of persons experiencing ectopic pregnancy, the growth of an embryo or fetus outside of the uterus, or in the case of retained or incomplete miscarriage or placental retention after childbirth, among other situations where it may be deemed necessary by a licensed healthcare provider; and

WHEREAS, Idaho Code § 18-622, Idaho's "total abortion ban," made it a criminal offense for anyone to perform an abortion at any time, except "when necessary to prevent the death of the pregnant woman," however, as the United States federal government argued in *United States v. The State of Idaho*, with the testimony of medical *amicus curiae*, the imprecision of medical treatment with varied possible outcomes make it impossible to determine with absolute certainty that death may be the result: "[W]hile [Idaho's] declarations speak in terms of absolutes, medicine does not work that way in most cases. Death May be a possible or even probably outcome, but different outcomes or conditions may also be probable."; and pondering whether a condition is sufficiently

grave to perform an abortion may also delay necessary care, potentially causing harm and violating the federal Emergency Medical Treatment and Labor Act of 1986 (EMTALA); and

WHEREAS, the EMTALA in 42 USC § 1395dd(a) defines an "emergency medical condition" as:

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
(ii) serious impairment to bodily functions, or
(iii) serious dysfunction of any bodily organ or part; . . .

; and

WHEREAS, the United States District Court for the District of Idaho ruled on August 24, 2022 in *United States v. The State of Idaho*, that Idaho Code § 18-622 violated the Supremacy Clause of the United States Constitution as the Code conflicted with the federal EMTALA and further ruled the Code illegal where it conflicted with the EMTALA; and

WHEREAS, on July 8, 2022, two weeks after the *Dobbs* Decision, President Joe Biden issued his Executive Order 14076 on Protecting Access to Reproductive Healthcare Services which directed the Administration to

- Safeguard access to reproductive healthcare services including abortion and contraception, particularly when abortion may be necessary to save the life of a pregnant woman
- Protect the privacy of patients and their access to accurate information
- Promote the safety and security of patients, providers, and clinics
- Coordinate the implementation of Federal efforts to protect reproductive rights and access to healthcare

; and

WHEREAS, in *State of Texas et al. v. Secretary of Health and Human Services et al.*, the plaintiffs sued the federal Department of Health and Human Services to prevent the Department from enforcing the EMTALA as interpreted by President Biden's Administrative Order, arguing the Order exceeded the EMTALA by:

- "[N]ot considering the welfare of the unborn children when determining how to stabilize a pregnant woman"

- "[Preempting Texas] laws notwithstanding explicit provisions to the contrary" as "Texas civil and criminal laws prohibit abortion unless there is a threat to the life of the pregnant woman" and the Texas Human Life Protection Act (HLPA) "prohibits abortion unless a pregnancy-related 'physical condition' is 'life-threatening' and 'places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function,'" and "HLPA's language indicates that the life-threatening physical condition must be present, rather than likely to be emergent"
- "[I]nterferes with the practice of medicine in violation of the Medicare Act" by threatening civil monetary penalties

; and

WHEREAS, on August 23, 2022, the United States District Court, Northern District of Texas, Lubbock Division, agreed with the plaintiffs in *State of Texas et al. v. Secretary of Health and Human Services et al.* that the President's Executive Order exceeded the EMTALA citing the Act "protects *both* mothers and unborn children, is silent as to abortion, and preempts state law only when the two directly conflict. Since the statute is silent on the question, the Guidance cannot answer how doctors should weigh risks to both a mother and her unborn child. Nor can it, in doing so, create a conflict with state law where one does not exist. The Guidance was thus unauthorized."; and

WHEREAS, it is clear the United States District Court, Northern District of Texas, was spurious in its *Texas v. DHHS Secretary* ruling as it intentionally misread the *prima facia* plain reading of the EMTALA's definition of "emergency medical condition" and the realities of medical care as acknowledged in the United States District Court for the District of Idaho's *US v. Idaho* ruling; and

WHEREAS, Wisconsin has a 173-year-old criminal abortion law still in its statutes, from Wisconsin Chapter 133, §§ 10-11, Laws of 1849, as amended in 1858, which effectively bans all abortions in the state by making it a felony to perform an abortion with no exception for rape or incest; and

Create the WHEREAS clause at or near line 32, Amend the WHEREAS clause at or near line 36, and create the BE IT FURTHER RESOLVED clause at or near line 44 as follows:

WHEREAS, Wisconsin's newer abortion statute, Wis. Stat. § 640.04, does provide an exception for an abortion if the mother's life is at risk, but in this medically sensitive scenario, the statute mandates that medical staff must somehow find two other doctors to review the case and positively affirm that the mother's life is indeed at risk, and that an abortion is medically necessary to save the woman's life; the statute does not provide guidelines for how to affirm or deny the maternal health exemption, creating the potential for delays in decision-making, litigation, and physical harm to the mother; and

WHEREAS, Wis. Stat. § 640.04 is plainly in violation of the federal EMTALA and subsequently the Supremacy Clause of the United States Constitution, and the discourse in the *US v. Idaho* and *Texas v. DHHS Secretary* rulings show what is at stake for pregnant people in Wisconsin who may require abortion to save their own lives in emergency medical care; and

WHEREAS, a Marquette University Law School poll in July 2022 indicated that 64 percent of Wisconsin residents support access to abortion care in all or most cases, while only eight percent of Wisconsinites said abortion should be illegal in all cases; and

WHEREAS, it is clear Wisconsin law is not in line with public sentiment, does not account for proper medical care and contingencies, is in violation of the federal Emergency Medical Treatment and Labor Act of 1986 and the US Constitution's Supremacy Clause, and must change to be in line with the times; now, therefore,

BE IT RESOLVED, the Milwaukee County Board of Supervisors hereby affirms its support and calls upon the State of Wisconsin to protect abortion care as the right to choose and the residents of Milwaukee County and the State of Wisconsin should have access to this healthcare service in their own communities; and

BE IT FURTHER RESOLVED, the Milwaukee County Board of Supervisors hereby calls upon the State of Wisconsin to amend its statutes enabling abortion care for Wisconsinites, or minimally, amend its statutes to bring Wisconsin law in line with the federal Emergency Medical Treatment and Labor Act of 1986; and

BE IT FURTHER RESOLVED, Office of Government Affairs staff is authorized and requested to communicate the contents of this resolution to the Wisconsin Governor and State policymakers, and support legislation that achieves the criteria outlined in this resolution; and

BE IT FURTHER RESOLVED, the Office of Government Affairs staff is authorized and directed to provide this resolution to the Wisconsin Counties Association for consideration in its legislative platform.