COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2022-OA-_____

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

Petitioner

v.

HON. MITCH PERRY,
Judge, 30th Judicial Circuit, Jefferson Circuit Court,

Respondent

and

EMW WOMEN'S SURGICAL CENTER, P.S.C.,
on behalf of itself, its staff, and its patients;
ERNEST MARSHALL, M.D., on behalf of himself and his patients; and
PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, AND KENTUCKY, INC.,
on behalf of itself, its staff and its patients; **ERIC FRIEDLANDER**, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services; **MICHAEL S. RODMAN**, in his official capacity as Executive Director of the Kentucky Board of Medical Licensure; and **THOMAS B. WINE**, in his official capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky.

Real Parties in Interest

ATTORNEY GENERAL DANIEL CAMERON'S PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION

Pursuant to CR 76.36 and 81, Attorney General Daniel Cameron asks this Court to issue a writ of mandamus and prohibition immediately staying the restraining order issued today by the Jefferson Circuit Court in *EMW Women's Surgical Center v. Cameron*, 22-CI-3225. The restraining order enjoins Attorney General Cameron and the other defendants from enforcing KRS 311.772 and KRS 311.7701–11, two duly enacted laws that prohibit abortions within the Commonwealth, with exceptions when necessary to save the life of the pregnant mother.

A writ is necessary in light of the Supreme Court of Kentucky's recent admonition that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021) (citation omitted). And no harm could be more irreparable than the human lives lost if abortions now prohibited by law resume.

Still worse, there is no conceivable basis for restraining enforcement of these two abortion laws. The plaintiffs—two abortion facilities and their staff—are not constitutionally harmed by laws prohibiting them from performing abortions. To find otherwise would require discovery of a hidden right to an abortion somewhere within the Kentucky Constitution—a right that no court in the history of the Commonwealth has even hinted at recognizing. Stated more directly, the 263 sections of Kentucky's Constitution do not contain even a whiff of a suggestion that abortion is constitutionally protected. Yet the court below seems

to have found such a right. And it did so in the posture of an *emergency restraining order*, without the parties even having a full opportunity to brief the merits of the Facilities' novel and extraordinary claim.

The Facilities are of course entitled to litigate their claims to final judgment. But in the meantime, Kentucky's laws should remain in force, given that the Facilities' only chance of prevailing is convincing the courts to write into the Constitution an entirely new right that has never before existed. The Facilities can press this argument, as is their right, but they should do so while following Kentucky's laws.

If there was ever a time to grant a writ, this is it. Courts are not the moral authority of the Commonwealth with the right to substitute their own views of public policy in place of the legislature's. *Robinson v. Commonwealth*, 212 S.W.3d 100, 106 (Ky. 2006). Whether the right of an unborn child to live outweighs the interests of a pregnant mother is precisely the kind of public-policy judgment that the Kentucky Constitution places in the hands of the General Assembly. All the more so in light of Kentucky's strict separation of powers. By restraining enforcement of Kentucky's abortion laws, the circuit court arrogated to itself the right to decide the moral value of an unborn human life. No authority gives a circuit judge, or even the judiciary, that kind of raw power. This Court should immediately stay the decision below.

Given the stakes, Attorney General Cameron additionally moves for emergency relief from any member of the Court to immediately stay the effectiveness of that restraining order. CR 76.36(4). The Attorney General is filing a separate motion for immediate relief to accompany this writ.

A. Name of Respondent

The Respondent is the Honorable Mitch Perry, Judge, Jefferson Circuit Court.

The names of the real parties in interest are: EMW Women's Surgical Center, P.S.C., Ernest Marshall, M.D., and Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc.; Eric Friedlander, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services; Michael S. Rodman, in his official capacity as Executive Director of the Kentucky Board of Medical Licensure; and Thomas B. Wine, in his official capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky.

B. Style and File Number of Underlying Action

The underlying action is styled *EMW Women's Surgical Center v. Cameron*, 22-CI-3225 (Jefferson Circuit Court).

C. Factual Background

On June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ---, 2022 WL 2276808 (June 24,

2022). This decision "return[s] the issue of abortion to the people's elected representatives." *Id.* at *7.

Not content to make their case to the Kentucky General Assembly, on June 27, 2022, EMW Women's Surgical Center, P.S.C., Ernest Marshall, and Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc. (the "Facilities") sued in Jefferson Circuit Court to block enforcement of two laws regulating abortion in Kentucky. Compl. ¶ 4, Ex. 1. The Human Life Protection Act, KRS 311.772, prohibits most abortions in the Commonwealth, with exceptions when necessary to preserve the life of a pregnant mother. And Kentucky's fetal-heartbeat law prohibits abortions after an unborn human life "has a detectable fetal heartbeat." KRS 311.7705(1). The Heartbeat Law likewise contains exceptions when an abortion is necessary to save the life of a pregnant mother. KRS 311.7705(2). The Facilities claim that these laws violate a never-before-recognized state constitutional right to abortion embedded in Sections 1 and 2 of the Kentucky Constitution. Compl. ¶¶ 91–102, 123–30.[1]

Three days after the Facilities sued, the trial court issued a restraining order prohibiting the Attorney General from enforcing either the Human Life Protection Act or the Heartbeat Law against them. Even though the Facilities' claims

[1] The Facilities also claim that the Human Life Protection Act is an impermissible delegation of legislative power and is vague and unintelligible. Compl. ¶¶ 103–11, 112–22. The Facilities do not make such a claim against the Heartbeat Law.

are extraordinarily novel, and even though the Facilities cannot produce any precedent from a Kentucky court that suggests a right to abortion exists, the circuit court restrained enforcement of the two duly enacted laws without so much as a discussion of the merits of the Facilities' claim—or how they might be harmed by laws that purportedly infringe on nonexistent constitutional rights. Nor did the circuit court explain why it could ignore the black letter law in Kentucky that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron*, 628 S.W.3d at 73 (citation omitted).

Although the circuit court has scheduled a hearing on the Facilities' motion for a temporary injunction for Wednesday, July 6, 2022, the court indicated that the hearing may well last several days and that it expects post-hearing briefing from the parties. In other words, we are likely *weeks* away from any appealable ruling from the circuit court—weeks in which Kentucky's duly enacted laws cannot be enforced and weeks in which the lives of unborn children will be lost forever.

D. Relief Requested

The Attorney General requests an immediate writ prohibiting the circuit court from enforcing its restraining order in the underlying action. The Attorney General additionally requests emergency relief from a member of this Court under CR 76.36(4).

E. Memorandum of Authorities

The writ standard is well established. A writ may be granted in two circumstances: (1) "the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court," or (2) "the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Commonwealth v. Shaw*, 600 S.W.3d 233, 237 (Ky. 2020) (citation omitted).

This second class of writs "includes a subclass for 'certain special cases.'" *Mammoth Med., Inc. v. Bunnell*, 265 S.W.3d 205, 209 (Ky. 2008) (citation omitted). In these special cases, Kentucky courts will grant a writ if "the lower court was acting erroneously within its jurisdiction in the absence of a showing of irreparable injury, provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Id.* at 212 (citation omitted).

With one exception discussed below,[2] the second class of writs is at issue here. There can be no doubt that the circuit court's decision suffers from profound legal problems—namely, it prevents two duly enacted laws from being enforced based on contrived claims about a state constitutional right to an abortion that no court in Kentucky has ever recognized. And the circuit court entered that restraining order without regard to clear precedent from the Supreme Court of Kentucky indicating that the "non-enforcement of a duly-enacted statute constitutes irreparable harm." *Cameron*, 628 S.W.3d at 73 (citation omitted).

I. The trial court acted erroneously because there is no such thing as a constitutional right to abortion in Kentucky.

The circuit court's decision to grant a restraining order could not have been more wrong. "A restraining order may be granted . . . only if . . . it clearly appears . . . that the applicant's rights are being or will be violated . . . ." CR 65.03(1). The trial court acted erroneously by issuing a restraining order to protect allegedly unwritten constitutional rights that have never been recognized by a court in Kentucky—not ever. So it is impossible to conclude "that the applicant's rights are being or will be violated," much less that any such harm is clear. CR 65.03(1).

[2] *See infra* at note 5.

On the contrary, the restraining order itself causes a clear, irreparable harm because it prevents the Attorney General from enforcing Kentucky's duly enacted laws. *Cameron*, 628 S.W.3d at 73. The Supreme Court—less than a year ago—made that point unequivocally clear. *Id.* Staying enforcement of the restraining order will rectify the trial court's error here.

The heart of the Facilities' claim turns on their assertion that Kentucky's Constitution protects the right of a woman to obtain an abortion. That issue is central to the restraining order issued below because the Facilities cannot possibly be harmed by enforcing the Human Life Protection Act or the Heartbeat Law unless Kentucky law recognizes a constitutional right to an abortion. Yet nothing in the text of the Constitution, the debates around its ratification, or the history of this Commonwealth supports such a claim.

A. No text in the Kentucky Constitution supports the Facilities' novel claim.

When Kentucky courts interpret provisions in the Kentucky Constitution, they "look first and foremost to the express language of the provision." *Westerfield v. Ward*, 599 S.W.3d 738, 747 (Ky. 2019). But there is no text in the Kentucky Constitution that provides, or even hints at, a state constitutional right to abortion. Indeed, the word abortion nowhere appears in any of the 263 provisions that make up Kentucky's charter. If the delegates who wrote Kentucky's Constitution wanted to protect abortion, they would have said so. Or if the people

wanted to amend their Constitution to provide such protection, they have had 132 years to do so.

Without a textual hook, the Facilities try to cobble together some version of Sections 1(1), 1(3), and 2 of the Constitution to support this never-before-recognized right as an extension of a right to privacy. Pls.' TI Mem. 21–30, Ex. 3; Compl. ¶¶ 91–102, 123–30. Even the authority that the Facilities rely on recognizes that the Kentucky Constitution does not textually support their claim. *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) ("No language specifying 'rights of privacy,' as such, appears in . . . the . . . State Constitution." (emphasis omitted)), *overruled on other grounds by Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 568 (Ky. 2020). But "[t]he basic rule . . . is to interpret a constitutional provision according to what was said and not what might have been said; according to what was included and not what might have been included." *Commonwealth v. Claycomb ex rel. Claycomb*, 566 S.W.3d 202, 215 (Ky. 2018) (quoting *Pardue v. Miller*, 206 S.W.2d 75, 78 (Ky. 1947)). This should end the inquiry here. "Neither legislatures nor courts have the right to add to or take from the simple words and meaning of the constitution." *Id.* (citation omitted).

The Supreme Court of Kentucky has made this principle clear beyond doubt in recent years. Consider just a few decisions in which the Court struck down legislation as unconstitutional—each of them based on the plain text of the Constitution. In *Claycomb*, the Supreme Court struck down a statutory delay

on a litigant's right to access the Kentucky Court of Justice to redress an injury by simply holding that the text of Section 14 of the Constitution is clear on this issue. 566 S.W.3d at 215–16 ("Section 14, originally written and adopted in 1792, does not proscribe the creation of 'undue' or 'unreasonable' delay on a Kentuckian's access to due course of law; Section 14 plainly proscribes delay."). In *Westerfield v. Ward*, 599 S.W.3d 738 (Ky. 2019), the Supreme Court emphasized that "[i]t is to be presumed that in framing the constitution great care was exercised in the language used to convey its meaning and as little as possible left to implication." *Id.* at 748. In applying this principle, the Court went so far as to overrule nearly 60 years of precedent because "[n]ow . . . we are unable to square such a statement with the plain text" of the Constitution. *Id.*

Now contrast those decisions with ones in which the Supreme Court has refused to strike down legislation or executive acts as unconstitutional. In *Zuckerman v. Bevin*, 565 S.W.3d 580 (Ky. 2018), the Supreme Court found no textual hook that would allow it to strike down Kentucky's Right to Work Act. *See generally id.* at 594–605. In *Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673 (Ky. 2019), the Supreme Court similarly found no textual basis for striking down the Governor's temporary reorganization of Kentucky's education boards. *See generally id.* at 679–85. In *Calloway Cnty. Sheriff's Dept. v. Woodall*, 607 S.W.3d 557 (Ky. 2020), the Supreme Court yet again found no text to support striking down a provision in Kentucky's Workers' Compensation Act. *See generally id.* at 563–73;

see also Cates v. Kroger, 627 S.W.3d 864, 870–74 (Ky. 2021) (same). And in *Acree*, 615 S.W.3d 780, the Supreme Court of Kentucky once again rejected a constitutional challenge after finding no textual hook to strike down the Governor's COVID-19 executive orders. *See generally id.* at 786–89.

In short, the Supreme Court of Kentucky, especially in recent years, has made clearer than ever that constitutional claims must be based on the text of the document, not the creative thinking of a lawyer or judge. The text of the Kentucky Constitution provides the Facilities with no such textual support here.

B. The constitutional Debates do not support the Facilities' novel claim.

The Debates surrounding the ratification of the Constitution do not help the Facilities.

It is "hornbook law" that the words in the Constitution "should be given the meaning and significance that they possessed at the time they were employed, and the one that the delegates of the convention that framed the instrument, and the people who voted their approval of it, intended to express and impart." *Claycomb*, 566 S.W.3d at 215 (citation omitted). The Debates do not help the Clinics. In fact, they demonstrate that not a single Delegate even suggested that Kentucky's new charter would protect abortions.

There are only three times in all of the Debates that the word "abortion" appears. 1890–91 Debates at 1099, 2476, and 4819. The first reference on page

1099 actually recognizes that abortion is a *crime* in the Commonwealth. That discussion is about the pardon power of the Governor:

> I have been told, since I came to Frankfort, in one of the counties of this Commonwealth, not very long ago, a young man was indicted for the offense of abortion on a young woman; that afterwards they married; they lived together in peace; that it was a happy union, and that that young man, in order to cover up the disgrace upon his wife and relieve himself after he married the woman, went to the Governor and obtained a pardon.

1890–91 Debates at 1099 (Delegate Auxier speaking). The reference to abortion on page 2476 notes that abortion is a crime in Indiana, and the reference on page 4819 uses the word "abortion" in a different context. So to the extent that the 1890–91 Debates even discuss abortion, the Debates recognize that the practice is prohibited. Needless to say, discussing the fact that abortion was a *crime* is inconsistent with any notion that the Framers secretly embedded a right to abortion in the 1891 Constitution. More importantly, the fact that no Delegate stated that the provisions under consideration protected the right to abortion is compelling evidence that Kentucky's Constitution does not contain within it a right to abortion.

C. The Commonwealth's unbroken history of protecting unborn life weighs against the Facilities' novel claim.

The Facilities must also overcome how the Commonwealth has historically treated abortion, including up to the present day.

As early as 1879, Kentucky's highest court recognized the common law crime of "procuring an abortion."[3] *Mitchell v. Commonwealth*, 78 Ky. 204, 204 (Ky. 1879). *Mitchell* considered whether an indictment that charged an individual with procuring an abortion needed to specify "that the woman was quick with child" (meaning that the child had passed the point of quickening). *Id.* at 210. While relevant authority supported the claim that abortion was prohibited at all stages at common law, *id.* at 206–09, it was beyond uncontroverted that abortion was prohibited after quickening. Relevant here, though, Kentucky's highest court did not limit its discussion to the legality of pre-quickening abortion. In fact, the Court explained exactly how the General Assembly could regulate abortions:

> In the interest of good morals and for the preservation of society, *the law should punish abortions and miscarriages, wilfully produced, at any time during the period of gestation*. That the child shall be considered in existence from the moment of conception for the protection of its rights and property, and yet not in existence, until four or five months after the inception of its being, to the extent that it is a crime to destroy it, presents an anomaly in the law that ought to be provided against by the law-making department of the government.

Id. at 209–10 (emphasis added). In other words, just twelve years before the 1891 Constitution was adopted, Kentucky's highest court explicitly recognized that

[3] The 1849 Debates contain two references to "abortion," neither of them relevant here. 1849 Kentucky Constitutional Debates at 285, 1020, https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1002&context=ky_cons_conventions. So just like the Debates surrounding Kentucky's current Constitution, the prior history does not support the Facilities' claim either.

the General Assembly could *and should* prohibit abortion at all stages. And as discussed above, not a single delegate at the 1891 Convention disclaimed what *Mitchell* held.[4]

Roughly 20 years later, the General Assembly acted on *Mitchell*'s holding. In 1910, the General Assembly prohibited performing abortions at *any* stage of pregnancy: "It shall be unlawful for any person to prescribe or administer to any pregnant women, or to any woman whom he has reason to believe pregnant, *at any time during the period of gestation*, any drug, medicine or substance, whatsoever, with the intent thereby to procure the miscarriage of such woman." *Dobbs*, 2022 WL 2276808, at *53–54 (outlining Kentucky's 1910 prohibition against abortion) (emphasis added). Importantly, "[t]he consent of the woman to the performance of the operation or administering of the medicines or substances . . . shall be no defense, and she shall be a competent witness in any prosecution under this act, and for that purpose she shall not be considered an accomplice." *Id.*

The General Assembly maintained this prohibition throughout the entirety of the pre-*Roe* era—for more than 60 years. *See, e.g.*, KRS 436.020; Ky. Stat. 1219a (abortion prohibition enacted in 1910). Not once did Kentucky's highest

[4] Nor did the views of Kentucky's high court change after the adoption of the 1891 Constitution either. *See, e.g.*, *Wilson v. Commonwealth*, 60 S.W. 400, 401–02 (Ky. 1901); *Clark v. Commonwealth*, 63 S.W. 740, 744–47 (Ky. 1901); *Goldnamer v. O'Brien*, 33 S.W. 831, 831–32 (Ky. 1896); *see also Calloway Cnty.*, 607 S.W.3d at 572 ("Cases decided contemporaneously or close in time to the constitutional convention would appear to be persuasive of Delegates' intent." (cleaned up)).

court even suggest this prohibition was unconstitutional based on a theory that the Kentucky Constitution protects unwritten abortion rights. And shortly before *Roe*, Kentucky's highest court unanimously rejected a federal constitutional challenge to Kentucky's statute prohibiting abortions. *See Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972), *vacated by Kentucky v. Sasaki*, 410 U.S. 951 (1973). And a three-judge district court likewise rejected a federal constitutional challenge to Kentucky's prohibition of abortion. *Crossen v. Attorney General of Kentucky*, 344 F. Supp. 587 (E.D. Ky. 1972).

Even after *Roe*, Kentucky's highest court maintained views that cannot be squared with a claim that the Kentucky Constitution provides for a right to abortion. In light of *Roe*, the Court begrudgingly acknowledged, with little discussion, that it was compelled to now render KRS 436.020 unconstitutional as a matter of *federal* law only. *Sasaki v. Commonwealth*, 497 S.W.2d 713, 713–14 (Ky. 1973).

But Justices Osborne, Reed, and Palmore wrote separately. All three justices expressed their view that it is within the power of the General Assembly to restrict the practice of abortion in the Commonwealth. *Id.* at 714 (Osborne, J., concurring); *id.* at 714–15 (Reed, J., concurring in an opinion joined by Palmore, C.J.). More specifically, Justice Reed and Chief Justice Palmore recognized "the state's right to *legislate* on the subject" of abortion and extolled the importance of "refer[ring the] issue . . . to the political process even though groups would be angered." *Id.* at 714–15 (Reed, J., concurring in an opinion joined by Palmore,

C.J.) (emphasis added). And they could not have put it in starker terms, explaining that there was "no existing legal principle" to justify inserting the judiciary into the abortion debate. *Id.*

Kentucky's highest court was not the only branch of government that made its views known immediately after *Roe*. Importantly, the year after *Roe* was decided, the General Assembly set forth its policy on abortion: "If . . . the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of *all* human beings regardless of their degree of biological development shall be fully restored." KRS 311.710(5) (emphasis added). In the year after *Roe*, this provision passed our General Assembly by votes of 26-2 and 80-7. And it remains a part of Kentucky law—now nearly 50 years later. In addition, throughout the post-*Roe* but pre-*Dobbs* era, the General Assembly enacted numerous statutes limiting abortion. *See generally* KRS 311.710 through KRS 311.830. The statutes at issue in this litigation—the Life Protection Act and the Heartbeat Law—simply continue Kentucky's longstanding public policy of restricting abortion to the fullest extent possible.

This history matters because of the novelty of the Facilities' interpretation of the Kentucky Constitution. The Facilities advance an unprecedented theory of the Constitution that is inconsistent with "the actual, practical construction that has been given" to [the Constitution] by the people" since its inception. *See*

Grantz v. Grauman, 302 S.W.2d 364, 367 (Ky. 1957). In such a circumstance—particularly in this emergency posture—the history should be "entitled to controlling weight." *Id.*; *accord Gayle v. Owen Cnty. Court*, 83 Ky. 61, 69 (Ky. 1885) (explaining that challenged power of the "Legislature has been too long conceded to be now [be] regarded as an open question.").

D. No authority cited by the Facilities supports their novel claim.

The Facilities' efforts to overcome the text and history of Kentucky's Constitution come up well short of the burden they must meet to show they are entitled to a restraining order.

The Facilities below made only two attempts to justify their unprecedented claim that the Kentucky Constitution guarantees a right to abortion. First, they point to *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)—a case about the right to privacy that expressly limits its holding in a way that means it could not possibly recognize a right to abortion. Pls.' TI Mem. 22–24. Second, the Facilities point to three cases recognizing the responsibility of the Commonwealth to protect the lives of those who cannot speak for themselves. *DeGrella ex rel. Parrent v. Elston*, 858 S.W.2d 698, 709–10 (Ky. 1993); *Woods v. Commonwealth*, 142 S.W.3d 24, 31–32, 43–45, 50 (Ky. 2004); *Tabor v. Scobee*, 254 S.W.2d 474, 475 (Ky.

1951)); Pls.' TI Mem. 25–26. Those cases, of course, provide nothing but support for laws that protect the lives of the unborn children.

a. *Wasson* is limited to private conduct that has no impact on third parties.

The Supreme Court of Kentucky held in *Wasson* that a criminal statute punishing consensual sexual intercourse "with another person of the same sex" violated Kentucky's limited right to privacy. *Id.* at 488, 492–99. Despite calling it a "right to privacy," the Facilities' claimed right to perform abortions does not fit within the narrow right recognized in *Wasson*. In fact, *Wasson* expressly limited its holding so as not to cover conduct like abortion that affects third parties. As the Supreme Court explained, the "immorality in private which *does not operate to the detriment of others,* is beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." *Id.* at 496 (internal quotation marks omitted) (emphasis added). That is to say, *Wasson* expressly premised its holding on the conduct at issue "not operat[ing] to the detriment of others." *See id.*

That makes *Wasson* wholly inapplicable here given that abortion does in fact "operate to the detriment" of the unborn. "[D]ecisions involving matters such as intimate sexual relations, contraception, and marriage" are "fundamentally different [from abortion], as both *Roe* and *Casey* acknowledged, because [abortion] destroys what those decisions called 'fetal life' and what the law now before us describes as an 'unborn human being.'" *Dobbs*, 2022 WL 2276808, at

*7; *see also id.* at *19–20 (analyzing and rejecting the idea that the right to an abortion is entrenched in the right to privacy). The fact that abortion—unlike private sexual conduct—"operate[s] to the detriment of [unborn children]" means that *Wasson*'s limited right to privacy simply cannot support the Facilities' novel claim. *Wasson*, 842 S.W.2d at 496 (citation omitted).

Even if *Wasson* did not limit its reach on its own, the Supreme Court of Kentucky has cabined *Wasson* in the decades since. *See, e.g.*, *Blue Movies, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 317 S.W.3d 23, 29 (Ky. 2010) ("While state courts are free to expand individual rights beyond the federal floor, *see* [*Wasson*], we adjudge that on the issue of regulating sexually oriented businesses, the Kentucky Constitution does not grant broader protections than the federal Constitution, except for the blanket ban on touching as discussed below."); *Colbert v. Commonwealth*, 43 S.W.3d 777, 780 (Ky. 2001) (declining to read *Wasson*'s right to privacy to extend a "greater protection[] to the rights in property interests against warrantless search and seizure"; *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 473–74 (Ky. 1998) (rejecting a *Wasson* right-to-privacy challenge against a statute allowing the collection and dissemination of personal healthcare data).

b. The other cases the Facilities cited below only cut against their position.

The Facilities below also relied on a trio of decisions about making life-altering decisions that they claim support their right to abortion. But when properly read, those cases all cut against the Facilities because they demonstrate the Commonwealth's profound interest in protecting the rights of persons—like unborn children—who cannot speak for themselves.

i. Take *DeGrella*. Martha Sue DeGrella was beaten to the point where she "languishe[d], slowly wasting away, in a persistent vegetative state" at a nursing home "with no significant possibility of improvement in her condition." 858 S.W.2d at 700–01. The issue in *DeGrella* was whether her guardian-ad-litem could discontinue care keeping her alive. *Id.* at 701. The Supreme Court of Kentucky's holding is illuminating:

> We conclude the right to withdrawal of further medical treatment for a person in a persistent vegetative state exists within the framework of the individual's common law rights of self-determination and informed consent in obtaining medical treatment. In this Opinion we have recognized these rights can be exercised by an incompetent person through the process of surrogate decision-making so long as the wishes of the patient are known.

Id. at 709. In other words, "[t]he subject matter of [*DeGrella*] is not judicial power to terminate treatment, but Sue DeGrella's right to terminate treatment, a choice she made before she was reduced to her present state, and retained when this

tragedy befell her." *Id.* at 710. It was DeGrella's choice, not that of her guardian-ad-litem, that the Supreme Court evaluated.

DeGrella is about the choice of an individual who stands to die. The case is not about the right of the state or anyone else to kill that person without knowing that she would choose to end her own life if she could speak. In the context of abortion, the life that cannot speak for itself is *the unborn child*. If *DeGrella* has any relevance here, it supports laws like the Human Life Protection Act and Heartbeat Law that prohibit physicians from terminating unborn life—life that cannot speak for itself.

ii. Consider *Woods* next. *Woods* also involved an individual in a vegetative state with no hope of gaining consciousness. 142 S.W.3d at 28–30. The *Woods* Court held that "the withdrawal of artificial life support from a patient is prohibited absent clear and convincing evidence that the patient is permanently unconscious or in a persistent vegetative state and that withdrawing life support is in the patient's best interest." *Id.* at 31. Like *DeGrella*, if *Woods* is relevant here, it supports the assertion that—at a *minimum*—the life of an unborn child cannot be ended absent a determination that the child will never gain consciousness and that ending the life is in that child's best interest.

Indeed, in speaking about a Kentuckian's Section 1 rights, *Woods* noted that what comes from Section 1 is the "right of a *competent* person to forego medical treatment by either refusal or withdrawal." *Id.* at 31–32 (emphasis added). It

is the right of a person to refuse medical care, not the right to eliminate another person's life, that was at issue in *Woods*. Yet even in that situation, the *Woods* Court carefully recognized that "this right is not absolute. The individual's liberty interest must be balanced against relevant state interests," two of which include "preserving life" and "protecting innocent third parties." *Id.* at 32. And in the exercise of that right, the Court explicitly noted that "[i]t is also universally accepted that the state may not deprive citizens of their constitutional rights solely because they do not possess the decisional capacity to personally exercise them." *Id.* Not only that, but medical treatment rights "extend[] not only to the competent but also to the incompetent, 'because the value of human dignity extends to both.'" *Id.* (citation omitted). Ultimately, *Woods* found that to end the life of an individual who cannot speak for him or herself requires clear and convincing evidence that it is in the best interest of the individual to do so. *Id.* at 43–45, 50. And the Court made sure to explicitly note that public-policy decisions of that sort belong with the General Assembly. *Id.* at 45–46.

Just like with *DeGrella*, it is difficult to see how *Woods* supports the Facilities' position. *Woods* is about the Kentucky Constitution's protection of life that cannot speak for itself. In this context, that life is the unborn child who—if the Facilities prevail—has no choice in deciding whether he or she will live.

iii. Finally, consider *Tabor*. That case dealt with the tort liability of a physician who removed a patient's Fallopian tubes when she only consented to the

removal of her appendix. *Tabor*, 254 S.W.2d at 475. *Tabor* was decided pre-*Roe* when abortion was banned in the Commonwealth. KRS 436.020; Ky. Stat. 1219a. So it is difficult to see how anything in *Tabor* could be viewed as a pronouncement about the state constitutional right to abortion. In any event, *Tabor* confronted only a question about performing medical procedures without the consent of the patient. *Id.* That is irrelevant here, where the only consent that could be at issue is the lack of consent from an unborn child. Like the other cases, *Tabor* also supports the notion that a doctor cannot end the life of a child inside of the womb without that child's consent. *See* 254 S.W.2d at 475.

iv. The right to an abortion claimed by the Facilities could not be more different from the rights recognized in this trio of cases. In each case, the Supreme Court grounded the ability to make medical decisions in the right of the voiceless to decide what to do with their lives. But abortion destroys that right, as the U.S. Supreme Court explained in *Dobbs*—a point that differentiates abortion from the general right to make medical decisions about one's own body. *Dobbs*, 2022 WL 2276808, at *20 (noting that "the abortion right" is different from "the right not to be sterilized without consent and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures" because "[a]bortion destroys . . . 'potential life' and what the law at issue in [*Dobbs*] regards as the life of an 'unborn human being.'" (citations omitted)); *Wasson*, 842 S.W.2d at 496 ("[I]mmorality in

private which *does not operate to the detriment of others,* is beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." (internal quotation marks omitted) (emphasis added)).

Make no mistake, the Facilities' position here would require finding that "the [Kentucky] Constitution *requires* the State[] to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed." *Dobbs*, 2022 WL 2276808, at *23. The judiciary, however, does not make policy decisions of that sort. *See Cameron*, 628 S.W.3d at 73 (explaining that "the General Assembly is the policy-making body for the Commonwealth, not the Governor or the courts"). The right to determine when life begins is best left to the people. Indeed, "[o]ur Legislature has a broad discretion to determine for itself what is harmful to health and morals or what is inimical to public welfare. *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968). "Indeed, the legislature's power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government." *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006).

v. One other point is worth emphasizing. Assume for a moment that Kentucky's Constitution in fact protects abortion. If that is so, Kentucky's courts must then discern what that right does and does not protect. Does it protect the ability to have an abortion at all stages in pregnancy—even up until birth? If not, when does the abortion right exist? Until 10 weeks of pregnancy? 15? 20? And

what in the Kentucky Constitution tells a court when that cut-off should be? Of course, nothing in the Constitution empowers the courts to draw such a line.

But that is not all. If the right to abortion is not absolute, does the General Assembly have the right to prohibit abortions in which a fully formed unborn child is ripped apart limb from limb? *See* KRS 311.787. Or what about prohibiting discriminatory abortions based on race, gender, or disability? *See* KRS 311.731. How about merely requiring a doctor to show a pregnant woman seeking an abortion an ultrasound image of her unborn child? *See* KRS 311.727. All these Kentucky laws, and many more, have been challenged under *Roe*'s now-overruled regime. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785 (6th Cir. 2020); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178, 2019 WL 1233575 (W.D. Ky. Mar. 25, 2019); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019). If Kentucky's courts find a right to abortion in the state constitution, they will soon be asked to answer all these questions.

But Kentucky's Constitution, much like the federal Constitution, is "neither pro-life nor pro-choice." *Dobbs*, 2022 WL 2276808, at 61 (Kavanaugh, J., concurring). It "leaves the issue for the people and their elected representatives to resolve through the democratic process." *Id.*

* * *

The Facilities have no textual, historical, or case-law support for their argument that there is an unwritten right to abortion within the Kentucky Constitution. They simply cannot succeed on the merits in this case, and the trial court erred in issuing a restraining order to purportedly protect the Facilities' nonexistent rights.

E. Even if Kentucky's Constitution contained an unwritten right to abortion, the Facilities lack constitutional standing to bring claims for pregnant mothers.

The circuit court was wrong to enter a restraining order for one more reason: the Facilities lack constitutional standing to bring their claims. That threshold issue prevents the circuit court from taking *any* action in a case, much less granting extraordinary relief like a restraining order.

Constitutional standing is a prerequisite to any suit filed in Kentucky's courts. *See Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 192, 196–99 (Ky. 2018). Before a trial court can even exercise jurisdiction over a case, it must ensure that it has the constitutional authority to do so. And that authority extends only to "justiciable" cases—cases in which the plaintiff alleges a concrete injury caused by the defendant that a court can redress. *Overstreet v. Mayberry*, 603 S.W.3d 244, 260 (Ky. 2020) (citing *Sexton*, 566 S.W.3d at 196–99).

Relevant here, "[a] plaintiff must allege *personal* injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Sexton*, 566 S.W.3d at 196 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (emphasis added). "The assertion of one's own legal rights and interests must be demonstrated and the claim to relief will not rest upon the legal rights of third persons." *Assoc. Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) (emphasis added). Federal standing principles are in accord. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Even if the Facilities are right that the Kentucky Constitution contains an unwritten right to obtain an abortion, that right would belong only to the pregnant mothers. Nor do the Facilities disagree. They allege that the right to abortion belongs to their "patients[]," not themselves. *See* Compl. ¶¶ 96, 102, 126, 130. But that kind of claim is not justiciable because the injury to the Facilities' patients is not a personal injury to the Facilities. *Sexton*, 566 S.W. at 196.

The Facilities are likely to rely on federal abortion law to say otherwise. It's true that prior to *Dobbs*, federal courts deviated from the otherwise well-established standing principles to create exceptions and carve-outs for cases dealing with abortion. In fact, when the U.S. Supreme Court discarded *Roe* as untethered from the federal Constitution, it pointed to special standing rules that courts had adopted for abortion cases as one example of how harmful *Roe* has been to the integrity of the judiciary. *Dobbs*, 2022 WL 2276808, at *35. Kentucky has

never made such a carve out, and given the Supreme Court of Kentucky's recent commitment to enforcing the constitutional limits of the judiciary's power, there is no basis to do so now. *See, e.g.*, *Ward v. Westerfield*, --- S.W.3d ---, 2022 WL 1284024, at *4 ("[A]ll litigants . . . must allege a concrete and particularized injury-in-fact to invoke the jurisdiction of Kentucky courts.") (Apr. 28, 2022) (not final).

Because the Facilities do not have standing to press their claims, the circuit court erred in asserting the jurisdiction necessary to enter a restraining order. A stay of that decision would remedy that defect.[5]

II. The other requirements for a second-class writ are met.

The Supreme Court of Kentucky has recognized that "there is no right to appeal or to seek interlocutory relief from a restraining order." *Ky. High Sch. Athletic Ass'n v. Edwards*, 256 S.W.3d 1, 3 (Ky. 2008). The Court has thus affirmed that a writ is the only way to rectify a restraining order that causes irreparable harm. *See Appalachian Racing, LLC v. Commonwealth*, 504 S.W.3d 1, 2–3 (Ky. 2016)

[5] The Court would, in fact, be within its power to order that the circuit court dismiss the underlying case for lack of jurisdiction. The lack of constitutional standing justifies issuing a writ of the first class. As discussed above, a first-class writ may be granted where a circuit court acts outside its jurisdiction—*i.e.*, where the circuit has no "authority to hear the case at all." *Lawson v. Woeste*, 603 S.W.3d 266, 272 (Ky. 2020) (citation omitted). The Supreme Court's recent landmark decision about constitutional standing described it as something without which "the circuit court *cannot* hear the case." *Sexton*, 566 S.W.3d at 196 (emphasis in original). In light of this jurisdictional defect, a first-class writ ordering dismissal is justified here.

(affirming the Kentucky Court of Appeals' grant of "a writ of prohibition barring the [trial court] from enforcing [a] restraining order"); *accord Beshear v. Acree*, No. 2020-SC-0313 (Ky. June 17, 2020) (granting writ, which had the effect of staying a restraining order).

Because the Attorney General cannot appeal the circuit court's restraining order, he must simply wait to see whether the court enters a temporary injunction. Although the trial court has set a hearing for next week, the court has noted that the hearing may last several days and will be followed by briefing. So at best the parties are likely *several weeks away* from the trial court entering an appealable order. In the meantime, abortions will resume in the Commonwealth despite its duly enacted laws. One of the Clinics' attorneys has stated publicly that EMW has cancelled over 200 abortion appointments since *Dobbs* was decided.[6] Accepting that math for the sake of argument, the circuit court's restraining order will allow *many hundreds* of abortions to be performed before the Attorney General can even file a notice of appeal.

This is the definition of when an eventual appeal will be inadequate. Absent a writ, hundreds of unborn lives will be lost forever. An appeal of a temporary injunction will not bring them back. In short, if a writ is not proper in these circumstances, the Commonwealth's chief law officer has no option but to sit on

[6] Erin Kelly, *Kentucky Clinic: Nearly 200 denied abortions since Roe Reversal*, Spectrum News 1 (June 30, 2022), https://perma.cc/M37Q-B9XF.

his hands—for weeks—while laws designed to protect unborn life go unenforced.

The lack of an adequate remedy by appeal here is made starker by the "great injustice and irreparable injury" caused by the circuit court's restraining order. *See Appalachian Racing*, 504 S.W.3d at 4; *Allstate Prop. & Cas. Ins. Co. v. Kleinfeld*, 568 S.W.3d 327, 332 (Ky. 2019). The Supreme Court of Kentucky made clear less than one year ago that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron*, 628 S.W.3d at 73. In other words, every second that Attorney General Cameron is barred from enforcing the will of the people through their duly elected representatives constitutes de facto irreparable harm to the Commonwealth and its citizens. Only a writ of mandamus and prohibition staying the operation of the trial court's restraining order would give anything close to an adequate remedy for that irreparable injury.

The General Assembly has spoken here, declaring it the policy of the Commonwealth to protect the lives of unborn children. The General Assembly has codified that protection according to the principles set out in KRS 311.772, .7704, .7705, and .7706. "Considering that the General Assembly is the policy-making body for the Commonwealth, not the Governor or the courts, equitable considerations support enforcing a legislative body's policy choices. Every time the General Assembly passes a law, it makes an 'implied finding' that the public

will be harmed if the statute is not enforced." *Cameron*, 628 S.W.3d at 78 (quoting *Boone Creek Props., LLC. v. Lexington-Fayette Urban Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014)). The Supreme Court of Kentucky has made clear that the General Assembly is the body that speaks for the public's interest and that a Kentucky court should not "substitute its view of the public interest for that expressed by the General Assembly." *Id.* And as the Supreme Court has also made clear, the public's interest "strongly favors adherence" to duly enacted legislation. *Id.* Every day that the restraining order is in effect necessarily results in irreparable harm to the Commonwealth, Attorney General Cameron, and the public by preventing Attorney General Cameron from following his duty to carry out the will of the people expressed through their elected officials.

* * *

By issuing a restraining order enjoining enforcement of the Human Life Protection Act and the Heartbeat Law, the trial court failed to recognize that the Facilities' success in the underlying action is doubtful, and such "cases should await trial of the merits." *Bingo Palace v. Lackey*, 310 S.W.3d 215, 216 (Ky. 2009) (citation omitted). It simply cannot be said that any injuries suffered by the Facilities outweigh or are in any way comparable to the irreparable injuries suffered by the unborn children on whose behalf Attorney General Cameron speaks here.

CONCLUSION

The Court should immediately grant the Attorney General's request for a writ of prohibition and enjoin the enforcement of the trial court's restraining order.

Respectfully submitted,

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I certify that on June 30, 2022, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system on counsel of record and additionally by email as indicated below:

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