COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2022-SC-_____

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

Petitioner

v.

HON. GLENN E. ACREE, Judge, Kentucky Court of Appeals,

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; **THOMAS B. WINE**, in his official capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky; and **HON. MITCH PERRY**, Judge, 30th Judicial Circuit, Jefferson Circuit Court.

Real Parties in Interest

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

Pursuant to CR 76.36, CR 81, and Section 110(2)(a) of the Kentucky Constitution, Attorney General Daniel Cameron respectfully asks this Court to issue a writ directing that the restraining order issued by the Jefferson Circuit Court in *EMW Women's Surgical Center v. Cameron*, 22-CI-3225, be set aside. The restraining order enjoins the Attorney General and the other defendants from enforcing two duly enacted statutes that prohibit most abortions within the Commonwealth, with exceptions to protect the life of the mother. As this Court has explained, "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). A writ is necessary to stop the irreparable harm caused by the lower court's restraining order.

As of right now, a single circuit court judge has blocked the enforcement of two laws that the General Assembly passed with bipartisan majorities. And because of the restraining order, otherwise illegal abortions have resumed in the Commonwealth. The circuit court did not enter the restraining order because Kentucky law compels, or even suggests, that the laws at issue are unconstitutional. Far from it. The plaintiffs' central claim in this case—that the Kentucky Constitution protects the right to an abortion—is not only novel, it lacks any support in Kentucky law. There is no basis for a right to an abortion in the text of the Kentucky Constitution, in the history surrounding its ratification, or in the decisions of this Court interpreting it. The circuit court's restraining order does

not even mention its legal basis for enjoining enforcement of these two laws. In fact, it provides no rationale whatsoever for suspending the policy judgment of the General Assembly.

The decision from the Court of Appeals fares no better. The court declined to stay the restraining order in part based on its determination that the Attorney General's interest in defending Kentucky law and representing the public is not "direct" or "special" enough to merit relief. That conclusion is contrary to decades of precedent from this Court. And it fails to grapple with the central problem that the restraining order irreparably harms the Commonwealth by protecting a purported right that is not part of the Constitution.

So it is important to be clear about what has happened here. Neither the circuit court nor the Court of Appeals has even suggested that the two statutes enjoined by court order are unconstitutional. They have cited no constitutional text or any decisions from this Court that purport to recognize a right to an abortion. Instead, the duly enacted public-policy choices of the General Assembly are being restrained simply because several plaintiffs walked into court with a novel legal theory. That is antithetical to the orderly administration of justice.

All of this has happened against a backdrop with profound moral implications. The challenged laws prohibit what the General Assembly has determined is the unjustified taking of unborn human life. And so every day that these laws are not enforced is a day in which unborn children of the Commonwealth are

lost forever. The non-enforcement of ordinary statutes amounts to irreparable harm. *See Cameron*, 628 S.W.3d at 73. The non-enforcement of these statutes amounts to something far more grave.

If a writ were ever necessary, it is precisely in these circumstances. The plaintiffs, of course, are free to pursue their claims and have the courts resolve them on the merits. But they should do so while following Kentucky's laws. Their novel legal theories about the Kentucky Constitution cannot justify blocking the enforcement of two duly enacted statutes, particularly when doing so will lead to the irreversible loss of unborn life. This Court should grant a writ, order that the restraining order in Jefferson Circuit Court be set aside, prohibit the Jefferson Circuit Court from entering further injunctive relief pending order of this Court, and transfer the underlying case to this Court as soon as review on the merits is possible. *See generally Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020).

A. Name of Respondent

The Respondent is the Honorable Glenn Acree, Judge, Kentucky Court of Appeals.

The names of the real parties in interest are: EMW Women's Surgical Center, P.S.C.; Ernest Marshall, M.D.; 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; Thomas B. Wine, in his official capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky; and the Honorable Mitch Perry, Judge, Jefferson Circuit Court.

B. Style and File Number of Underlying Action

The underlying Kentucky Court of Appeals matter is styled *Cameron v. Perry*, No. 2022-CA-0780-OA (Ky. App.).

The underlying circuit court action is styled *EMW Women's Surgical Center v. Cameron*, No. 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 first law, the Human Life Protection Act, KRS 311.772, prohibits most abortions in the Commonwealth, with exceptions to preserve the life of a pregnant mother. That law

immediately went into effect when the U.S. Supreme Court issued its *Dobbs* decision on June 24, 2022. KRS 311.772(2)(a).

The second law at issue here is Kentucky's Heartbeat Law, KRS 311.7701–11. This law prohibits abortion after an unborn child "has a detectable fetal heartbeat." KRS 311.7705(1). The Heartbeat Law likewise contains exceptions for when an abortion is necessary to save the life of a pregnant mother. KRS 311.7705(2). Importantly, and contrary to what the Court of Appeals said below, the Heartbeat Law has no triggering provision—the law immediately went into effect upon the Governor's signature of it in 2019.[1] Enforcement of the Heartbeat Law had been enjoined under federal law by a federal district court until June 29, 2022, when that court dissolved its injunction in light of *Dobbs*. *EMW Women's Surgical Ctr., P.S.C. v. Secretary of Kentucky's Cabinet for Health & Fam. Servs.*, No. 3:19-cv-00178 (W.D. Ky. June 29, 2022).

The Facilities claim that both of 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. The Facilities also claim that the triggering provision in the Human Life Protection Act is an impermissible delegation of legislative power and is vague and unintelligible. Compl. ¶¶ 103–11, 112–22. Importantly, the Facilities do not make such a claim against the

[1] The legislative history of the Heartbeat Law can be found at https://apps.legislature.ky.gov/record/19rs/sb9.html.

Heartbeat Law. *See id.* That's because the Heartbeat Law—as explained above and contrary to what the Court of Appeals said—took full effect in 2019.

Three days after the Facilities sued, the trial court issued a restraining order prohibiting the Attorney General from enforcing the Human Life Protection Act and the Heartbeat Law against them. Even though the Facilities' claims are novel, and even though the Facilities cannot identify 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.

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 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.

Recognizing all of this, on June 30, 2022, Attorney General Cameron filed a writ in the Kentucky Court of Appeals, along with a CR 76.36(4) motion for

intermediate relief, asking the Court of Appeals to immediately stay the circuit court's restraining order. *See generally* Cameron Writ Pet.; Cameron Mot. Immediate Relief. The Facilities responded to the emergency motion the next day (July 1, 2022), followed by a same-day reply by the Attorney General. *See generally* Facilities Resp. Cameron Mot. Emergency Relief; AG Reply Facilities Resp. Cameron Mot. Emergency Relief. The Court of Appeals issued its opinion and order denying the Attorney General's motion on Saturday, July 2, 2022. *See generally* Court of Appeals Op. & Order (July 2, 2022).

In denying the Attorney General's motion, the Court of Appeals recognized this Court's rule that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." Op. & Order at 4 (citation omitted). The Court of Appeals also recognized that the Attorney General is entrusted with protecting the rights of the people, as espoused in the General Assembly's statutes. *Id.* at 5–6. But then the Court of Appeals inexplicably held that the Attorney General could not demonstrate a sufficient injury unless an affected individual was a party to this litigation. *Id.* at 7 ("[T]here is no party to this action claiming a direct and special interest that would be injured by a failure to enforce the statutes in question."). Not only that, the Court of Appeals stated that there was insufficient evidence that the Facilities would perform abortions prohibited by the statutes before the temporary-injunction hearing in the

circuit court. *Id.* This even though this case only exists because the Facilities obtained a restraining order so that they could perform abortions that would otherwise violate the two laws. These two bases appear to be the only justification for the Court of Appeals' finding of a lack of irreparable injury.

The Court then proceeded to address some of the merits arguments made by the Attorney General. On its own initiative, the Court found that the Heartbeat Law and the Human Life Protection Act are not yet in effect and will not be in effect for another 17 days. *Id.* at 8–10. That conclusion is inexplicable because the Facilities never made such an argument to the Court of Appeals. And they never made that argument *at all* with respect to the Heartbeat Law—a law that went into effect in March 2019 and had been the subject of a federal injunction until last week. The Court of Appeals, in other words, charted its own path on an issue not briefed by any of the parties and then summarily concluded that the Heartbeat Law might not even be in effect based on statutory language that does not exist.[2]

[2] To clear up some confusion caused by the Court of Appeals' error: the Human Life Protection Act has a triggering provision so that its prohibition on performing abortions took effect whenever the Supreme Court issued a decision overruling *Roe v. Wade*. The Heartbeat Law, on the other hand, has no such triggering provision. And so whether the Human Life Protection Act became operative based on *Dobbs* is irrelevant to the Heartbeat Law.

Apart from being the wrong conclusion, such a conclusion begs the question: If neither of these laws is in effect, why did the circuit court grant a restraining order to enjoin immediate enforcement of them instead of fleshing out all issues through temporary-injunction briefing? And why would the Court of Appeals keep in place a restraining order against enforcing laws that are not yet enforceable?

The Court of Appeals next turned its attention to constitutional standing, and it correctly recited this Court's standard. *Id.* at 11–12. But the court failed to grasp the standing problem here. The court concluded that the Facilities likely have constitutional standing because they could be subject to criminal penalties for violating the statutes. But that is all the court said. It ignored the fact that the Facilities' claim is based on a purported right to abortion that—if it exists—belongs to pregnant women, not the Facilities.

This writ petition follows.

D. Relief Requested

The Attorney General requests a writ ordering that the Jefferson Circuit Court's restraining order be set aside and that no further injunctive relief be issued pending further order of this Court. The Attorney General is not requesting for a halt to the proceedings in Jefferson Circuit Court. The Facilities, like any other litigant, are entitled to bring their novel claims and have them resolved on

the merits. But a restraining order blocking the enforcement of duly enacted statutes based on novel claims that no court has ever recognized is not the proper way to administer justice. The Court should thus order that the restraining order be stayed and transfer the matter below to this Court as soon as a ruling on the merits is ripe for review.

The Attorney General additionally requests emergency relief under CR 76.36(4) and has filed a motion to that effect.

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,[3] 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 that the "non-enforcement of a duly-enacted statute constitutes irreparable harm." *Cameron*, 628 S.W.3d at 73.

The Court of Appeals then exacerbated these errors by failing to immediately rectify them. In doing so, it created new rules regarding irreparable harm that are contrary to this Court's precedent. It disregarded this Court's decisions affirming the propriety of seeking intermediate relief on a writ petition to stay a restraining order. And it did all of that at the cost of the people of Kentucky being allowed to implement their will through the policy choices of the General Assembly.

[3] *See infra* at note 8.

The Attorney General's analysis below proceeds as follows: First, he discusses the lack of authority for the Facilities' claim that the Kentucky Constitution protects the right to abortion. This merits analysis matters even at this stage because a restraining order can only issue if a plaintiff's rights are being violated or will soon be violated. So whether there is a right to abortion in the Kentucky Constitution matters even at this early juncture. Second, the Attorney General discusses the Facilities' lack of third-party standing to represent pregnant women. Third, the Attorney General discusses the errors made by the Court of Appeals in denying relief. And fourth, the Attorney General discusses the other aspects of a writ.

I. The Court of Appeals 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) (emphasis added). So a restraining order requires a trial court to consider what "rights" a plaintiff has. The Jefferson Circuit Court acted erroneously here by issuing a restraining order to protect allegedly unwritten constitutional rights that have never been recognized by a court in Kentucky— not ever. And because no court has ever recognized such a right, 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).

The Court of Appeals only perpetuated the circuit court's errors when it denied emergency relief. The primary question under CR 76.36(4) is whether irreparable harm is likely. And the answer to that question here is easy because of this Court's recent holding in *Cameron*. Yet even after recognizing that the non-enforcement of these laws constitutes irreparable harm, the Court of Appeals sidestepped the issue by finding that the Attorney General's interest in enforcing the laws here is not "special" or "direct" enough to justify relief. But no case has ever held that the Attorney General does not have a "special" or "direct" interest in defending the enforceability of state law on behalf of the public. In fact, this Court has repeatedly affirmed the Attorney General's unique status under Kentucky law to vindicate the public's interest. *See, e.g.*, *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 361–66 (Ky. 2016). And so the Court of Appeals' decision to overlook the irreparable harm in this case and invent a new rule that prevents the Attorney General from vindicating the very real interest of the public flouted numerous decisions from this Court.

But at their core, the decisions from the circuit court and the Court of Appeals suffer from the same flaw. There is a restraining order now preventing enforcement of two duly enacted statutes. Yet neither the trial court nor the Court of Appeals has articulated *any basis* under current Kentucky law to believe

these statutes are unconstitutional. That is because the Facilities' claim that the Kentucky Constitution protects the right to an abortion is both novel and extraordinary. Nothing in the text of the Constitution, the debates around its ratification, or the history of this Commonwealth supports such a claim. And so what legal basis could there be for issuing a restraining order to protect alleged rights that no court has ever recognized? Novel claims about constitutional law should not prevent duly enacted statutes from taking effect while litigation proceeds.

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.

Without a textual hook, the Facilities try to cobble together 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 on which the Facilities rely 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) (citation omitted). This should end the inquiry here because "[n]either legislatures nor courts have the right to add to or take from the simple words and meaning of the constitution." *See id.* (citation omitted).

This Court has made this principle clear beyond doubt in recent years. Consider just a few recent decisions in which this Court struck down legislation as unconstitutional based on the text of the Constitution. In *Claycomb*, the Court struck down a statutory delay on a litigant's right to access the Court of Justice by simply holding that the text of the Constitution is clear on the issue. *Id.* 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 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.*

In short, this Court, 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 support.

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 are of no help to the Facilities. In fact, they show that not a single Delegate even suggested that Kentucky's new charter would protect abortion.

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 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, they recognize that the practice was prohibited. Needless to say, discussing the fact that abortion was a crime is inconsistent with any notion that the Framers embedded an unwritten right to abortion in the 1891 Constitution. More importantly, the fact that no Delegate stated that the provisions under consideration protect 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."[4] *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 uncontroverted that abortion was prohibited after quickening. Relevant here, 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 abortion:

> 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 the General Assembly could *and should* prohibit abortion at all stages. And as

[4] 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.

discussed above, not a single delegate at the 1891 Convention disclaimed what *Mitchell* held.[5]

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). 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 statutory 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 court ever suggest that this prohibition was unconstitutional based on a

[5] Nor did the views of Kentucky's high court change after the adoption of the 1891 Constitution. *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)).

theory that the Kentucky Constitution protects 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 abortions. *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*, this Court's predecessor 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 the General Assembly by lopsided votes of 26–2 and 80–7. And this provision 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 regulating abortion. *See generally* KRS 311.710 through KRS 311.830. The statutes at issue in this litigation—the Human Life Protection Act and the Heartbeat Law—simply continue Kentucky's longstanding public policy of protecting unborn life.

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 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 their burden 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 pointed 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 such that a right to abortion is not protected. Pls.' TI Mem. 22–24. Second, the Facilities pointed 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 unborn children.

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

This Court 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. 842 S.W.2d at 488, 492–99. Despite the Facilities basing their claim on a right to privacy, abortion does not fit within the narrow right discussed in *Wasson*. In fact, *Wasson* expressly limited its holding in a way that excludes conduct—like abortion—that affects third parties. As the Court explained, the conduct at issue there "*does not operate to the detriment of others*" and is thus "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 within 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. *See Wasson*, 842 S.W.2d at 496 (citation omitted).

Even if *Wasson* did not limit its own reach, this Court 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).

2. The other cases that the Facilities cited below do not help them.

The Facilities below also relied on a trio of decisions about making life-altering decisions that they claim support a 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.

a. 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 stop life-sustaining care. *Id.* at 701. This Court held that:

> 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 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 end a person's life 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 the termination of unborn life—life that cannot speak for itself.

b. Consider *Woods* next. *Woods* also involved an individual in a vegetative state with no hope of regaining 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 the child's best interest.

Indeed, in speaking about a Kentuckian's Section 1 rights, *Woods* discussed 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 end another person's life, that was at issue in *Woods*. Yet even in that situation, *Woods* was careful to note 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 expressly 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 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.

c. 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 a state constitutional right to abortion. In any event, *Tabor* confronted only a question about performing medical procedures without the consent of the patient. 254 S.W.2d at 475. 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 an unborn child without that child's consent. *See id.*

d. One other point is worth emphasizing. Assume for a moment that Kentucky's Constitution in fact protected abortion. If that were so, Kentucky's courts would then need to discern what that right does and does not protect. Does it protect the ability to have an abortion at any point in pregnancy—even up until birth? If not, when does the abortion right exist? Until 10 weeks of pregnancy? 15 weeks? 20 weeks? And what in the Kentucky Constitution tells a court when that cut-off should be? Of course, nothing in the Constitution empowers a court to make such a judgment or 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 courts find a right to abortion in the state constitution, they will soon be asked to answer all these questions as well.

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."[6] *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, and the trial court erred in issuing a restraining order to purportedly protect the Facilities' nonexistent rights. The Court of Appeals exacerbated this error by denying the Attorney General's request for relief.

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

The circuit court was wrong to enter a restraining order for one more reason: the Facilities lack constitutional standing to bring their claims. Contrary

[6] In the wake of *Dobbs*, two state high courts have already rejected attempts to use emergency relief to block enforcement of state abortion laws based on novel theories about state constitutional law. *See In re Paxton*, No. 22-0527 (Tex. July 1, 2022) (staying a restraining order entered by a trial court); *State ex rel. Preterm-Cleveland v. Yost*, No. 2022-0803 (Ohio July 1, 2022) (denying an emergency motion to block enforcement of Ohio's abortion law).

to the Court of Appeals' cursory analysis otherwise, that threshold issue prevents the circuit court from taking any action in this case, much less granting extraordinary relief like a restraining order.[7]

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).

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,

[7] The Court of Appeals faulted the Attorney General for not yet filing a motion to dismiss for lack of standing or devoting enough pages to this argument in his writ, which he filed the same day as the restraining order issued. Op. & Order at 11 n.8. Of course, the underlying case was filed less than a week ago, and so it is unclear why the Court of Appeals expected the Attorney General to have focused his efforts last week on a CR 12 motion instead of responding to the request for a restraining order. Regardless, it is unclear why that matters anyway. Constitutional standing is a threshold issue for the court no matter when a party raises it or whether it takes only a "few pages" to address it. *See Ky. Unemployment Ins. Comm'n v. Nichols*, 635 S.W.3d 46, 50 (Ky. 2021).

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).

Even if the Facilities were right that the Kentucky Constitution contains an unwritten right to obtain an abortion, that right would belong only to pregnant women. 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 no patient is a party here. So the Facilities' claim rests on them having third-party standing to pursue a purported right to an abortion enjoyed by their patients. That kind of claim is not justiciable because any possible injury to the Facilities' patients is not a personal injury to the Facilities themselves. *See Sexton*, 566 S.W. at 196.

The Facilities are likely to rely on federal abortion case law to say otherwise. It's true that prior to *Dobbs*, some federal courts deviated from otherwise well-established standing principles to create carve-outs for cases dealing with abortion. In fact, when the U.S. Supreme Court discarded *Roe*, 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. And *Dobbs* indicated those decisions are no longer good law. *See id.* (stating that the decisions "ignored the Court's third-party standing doctrine").

Kentucky has never made such a carve-out, *Assoc. Indus. of Ky.*, 912 S.W.2d at 951, and given this Court'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.") (Ky. Apr. 28, 2022) (not final).

Nor does it matter, as the Court of Appeals claimed, that the Attorney General "seeks to enforce the statutes against" the Facilities. Op. & Order at 12. What matters is that the Facilities' claim has nothing to do with their "own legal rights." *Assoc. Indus. of Ky.*, 912 S.W.2d at 951. The purported right to an abortion would belong to the patients, not the Facilities. And so enforcing the statutes against the Facilities does not violate any of their constitutional rights. Thus, they have no constitutional standing to bring their claims.[8]

[8] Because of this lack of standing, the court below should 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 describes 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 also justified here.

F. The Court of Appeals erroneously interpreted the effective dates of the two laws at issue here.

The Court of Appeals—without any briefing on the issue—found that the Heartbeat Law and Human Life Protection Act were not enforceable because the mandate in *Dobbs* has not issued yet. Order 10. That is flatly wrong on both laws.

Start with the Heartbeat Law. This law is not a "trigger law" in any sense. It was effective the moment the Governor signed it into law in 2019. The General Assembly did not make the law contingent on the Supreme Court overruling *Roe*. *See, e.g.*, KRS 311.7705. Nothing in its text suggests that—and the Facilities have never argued otherwise. Instead, the Court of Appeals ventured outside the issues presented to make a palpably erroneous legal conclusion to justify not issuing a stay.

What the Court of Appeals mistook for a triggering provision is in fact a section of the law conferring authority on the Attorney General to ask state and federal courts to dissolve existing injunctions in the event that *Roe* were overturned. Op. & Order at 8 n.6; KRS 311.7711. That provision says that any court judgment suspending the enforcement of another provision does not repeal the law. KRS 311.7711(1). And it provides that after a decision of the Supreme Court reversing *Roe*, the Attorney General may apply to the appropriate court both for

a declaration that the provision is constitutional and a judgment lifting any injunction preventing its enforcement. KRS 311.7711(2).

But that does not mean the effectiveness of the Heartbeat Law is contingent on anything. All the provision does is provide a statutory mechanism to lift an injunction. It does not make the Heartbeat Law's effective date contingent on *Roe*'s reversal. Indeed, a federal court has already dissolved its injunction against the law, and it did so just days after *Dobbs* issued. *EMW Women's Surgical Ctr., P.S.C. v. Secretary of Kentucky's Cabinet for Health & Fam. Servs.*, No. 3:19-cv-00178 (W.D. Ky. June 29, 2022). In reaching out to resolve an issue no one raised, the Court of Appeals badly missed the mark.

Now consider the Human Life Protection Act. Here too, the Court of Appeals suggested that it has not yet taken effect because the statutory triggering event "is the reversal or overruling of *Roe*." Op. & Order at 8. But the statute states that its prohibition on abortion is "effective immediately upon" a "*decision* of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973)[.]" KRS 311.772(2) (emphasis added). And that word "decision" matters a lot here because—as the Court of Appeals noted—the "date of the decision in *Dobbs*" was June 24. Op. & Order at 9. So a careful reading of the actual words of the statute makes clear that the effective date of the abortion prohibition in the Human Life Protection Act was June 24.

The Court of Appeals misunderstood this issue by claiming that the triggering event was "the reversal or overruling of *Roe*," which the court construed to mean the date on which the Supreme Court's mandate or judgment issues. But the statute talks about the date of the "decision," not the date of the judgment, mandate, or anything else. And it is black-letter law that every statutory term "must be given equal effect so that no part of the statute will become meaningless or ineffectual." *Travelers Indem. Co. v. Armstrong*, 565 S.W.3d 550, 563 (Ky. 2018) (citation omitted). The Court of Appeals disregarded that black-letter law—apparently because it thought that the Supreme Court's decision did not overrule *Roe* under the Supreme Court's procedural rules.

Although this issue was not raised by the Facilities in the Court of Appeals, it is worth pointing out how wrong it is. No doubt, mandates or judgments in the Supreme Court do not take effect until "at least 25 days after they are announced, when the Court issues a certified copy of its opinion and judgment in lieu of a formal mandate." *Texas v. United States*, 798 F.3d 1108, 1118 (D.C. Cir. 2015); *see also* Sup. Ct. R. 45. But a mandate is just an "order from an appellate court directing a lower court to take a specified action." *Mandate*, *Black's Law Dictionary* (11th ed. 2019). It is when the appellate court relinquishes jurisdiction and directs a lower court to act as to the parties in the case. *See Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951 (6th Cir. 1999); *N. Cal. Power Agency v. Nuclear Regul. Comm'n*, 393 F.3d 223, 224 (D.C. 2004).

In other words, when the Court issues a decision, the parties to the case are not usually directed to do anything immediately. They are given time to petition for rehearing before the mandate issues. *See* Sup. Ct. R. 44. But that does not mean that a decision is not legally binding or precedential from the moment it issues. Nonparties and lower courts do not have free reign to ignore a U.S. Supreme Court decision until its mandate issues. That would make no sense. And it is not how the Supreme Court or lower courts treat its opinions. *See, e.g.*, *United States v. AMC Ent., Inc.*, 549 F.3d 760, 771 (9th Cir. 2008) ("Our federal judicial system requires that when the Supreme Court issues an opinion, its pronouncements become law of the land.").

Dobbs itself makes that clear. The Court stated: "We *now* overrule [*Roe* and *Casey*] and return that authority to the people and their elected representatives." 2022 WL 2276808, at *43 (emphasis added). It did not state that *Roe* and *Casey* will be overruled in 25 days once the mandate issues. And in fact, the Supreme Court has already vacated a lower-court judgment and remanded it "for consideration in light of *Dobbs*." *See* June 30, 2022 Order List, https://www.supremecourt.gov/orders/courtorders/063022zor_5he6.pdf. If *Dobbs* is not yet binding, why would the Supreme Court take such action?

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

This Court 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) (affirming the Kentucky Court of Appeals' grant of "a writ of prohibition barring the [trial court] from enforcing [a] restraining order");[9] *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 Wednesday, the court has noted that the hearing may last several days and will be followed by additional briefing. So at best the parties are likely several weeks away from the trial court entering an appealable order. In the meantime, abortions have resumed in the Commonwealth based on the Jefferson Circuit Court's restraining order.[10]

The Court of Appeals suggested otherwise by stating that "[t]he inference may be strong, but the evidence is non-existent that any Real Party in Interest

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[9] The Court of Appeals distinguished *Appalachian Racing* because it dealt with a special-cases writ. Op. & Order at 13. But *Appalachian Racing* matters not because of the type of writ it considered, but because it establishes that a writ can be pursued to rectify a restraining order.

[10] Deborah Yetter, *Kentucky appeals court rules on AG Daniel Cameron's push to again stop abortions*, Louisville Courier Journal (July 2, 2022), https://perma.cc/8FQM-ETZC ("EMW and Planned Parenthood were able to resume abortion services Friday under Perry's order.").

will violate the statutes in question before the Jefferson Circuit Court's hearing to decide whether to convert the temporary restraining to a temporary injunction." Op. & Order at 7. But this assertion makes no sense. Why would the Facilities work so hard to secure and defend a restraining order if the Facilities did not intend to violate the statutes subject to the restraining order? The Facilities' litigation conduct is all the evidence needed to demonstrate that they intend to violate the statutes before any temporary injunction issues.

The scale of irreparable harm while the restraining order remains in place cannot be overstated. One of the Facilities' attorneys has stated publicly that EMW cancelled over 200 abortion appointments since *Dobbs* was decided.[11] Accepting that math for the sake of argument, the circuit court's restraining order will allow the lives of *many hundreds* of unborn children to be lost through abortion before the Attorney General can even file a notice of appeal or CR 65.07 motion to protect them. This is the definition of when an eventual appeal will be inadequate. Absent a writ, hundreds of unborn lives will be lost forever. An eventual 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 his hands—likely for weeks—while laws designed to protect unborn life go unenforced.

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

Indeed, all the Attorney General has done here is follow the process this Court laid out for litigants seeking emergency relief from a restraining order that causes irreparable harm. Consider first *Russell County, Kentucky Hospital District Health Facilities Corp. v. Ephraim McDowell Health, Inc.*, 152 S.W.3d 230 (Ky. 2004). In *Russell County*, the plaintiff obtained a restraining order against the defendant. *Id.* at 232. In the Court of Appeals, the defendant filed a writ of prohibition, an emergency motion for a stay of the restraining order, and a CR 65.07 motion. *Id.* The Court of Appeals found the CR 65.07 motion to be procedurally improper, but granted the emergency motion for a stay during the time it considered the writ of prohibition. *Id.* The plaintiff then sought relief in this Court, filing a writ, an emergency motion for relief from the Court of Appeals' stay, and a CR 65.09 motion. *Id.*

In concluding that it could entertain the writ against the Court of Appeals, this Court found that "although the orders entered by the Court of Appeals did not state the authority for the temporary stay, such authority is *expressly given* in the 'intermediate relief' provision of CR 76.36(4) and, as such, the Court of Appeals has jurisdiction to enter a temporary stay." *Id.* at 236–37 (emphasis added). And although this Court did not ultimately grant a writ in *Russell County*, the Court extensively outlined exactly why the procedure for taking the writ there was

proper. *Id.* at 234–36. The Attorney General here does nothing more or nothing less than what was done in *Russell County*.

It is much of the same story in this Court's recent intermediate order in *Beshear v. Acree*, No. 2020-SC-0313-OA (Ky. July 17, 2020). In that case, the trial court granted a restraining order against the Governor. *Florence Speedway, Inc. v. N. Ky. Indep. Dist. Health Dep't*, No. 20-CI-00678 (Boone Cir. Ct. July 2, 2020). The Governor filed a writ and a motion for emergency relief in the Court of Appeals. *Beshear v. Brueggemann*, No. 2020-CA-0834 (Ky. App. July 6, 2020). The Court of Appeals denied emergency relief. *Id.* at July 13, 2020. So the Governor then filed a writ and motion for emergency relief in this Court. *Beshear v. Acree*, No. 2020-SC-0313 (Ky. July 14, 2020 & July 16, 2020). The Court granted the motion for emergency relief. *Id.* at July 17, 2020. And by eventually granting the Governor's writ petition, the Court blessed the taking of a writ to block a restraining order. *Beshear v. Acree*, 615 S.W.3d 780, 830 (Ky. 2020). In filing for emergency intermediate relief here, the Attorney General is simply following the same procedure as in *Beshear*.

If that were not enough, 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 4–6 (finding no abuse of discretion on the part of the Court of Appeals in granting a writ blocking enforcement of a restraining order); *Allstate Prop. & Cas. Ins. Co. v. Kleinfeld*,

568 S.W.3d 327, 332 (Ky. 2019). This Court 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 the Attorney General is barred from enforcing the will of the people constitutes de facto irreparable harm to the Commonwealth and its citizens, born and unborn. Only a writ 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, declaring it the policy of the Commonwealth to protect the lives of unborn children. "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)). And it is the General Assembly that speaks for the public's interest, not the judiciary, and so no Kentucky court should "substitute its view of the public interest for that expressed by the General Assembly." *Id.*

* * *

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 public, especially the unborn children for whom the Attorney General speaks. This Court should immediately grant relief so that the Attorney General can again enforce Kentucky's laws against the Facilities.

CONCLUSION

The Court should grant the Attorney General's request for a writ of mandamus and prohibition.

Respectfully submitted,

Daniel Cameron
ATTORNEY GENERAL

Matthew F. Kuhn
Solicitor General
Brett R. Nolan
Principal Deputy Solicitor General
Courtney E. Albini
Daniel J. Grabowski
Harrison G. Kilgore
Alexander Y. Magera
Michael R. Wajda
Assistant Solicitors General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300

Counsel for Attorney General Daniel Cameron

CERTIFICATE OF SERVICE

I certify that on July 3, 2022, a copy of the above was filed by electronic mail to the Clerk of the Supreme Court of Kentucky and served on the below by electronic mail. Service by U.S. mail will be accomplished on the below on July 5, 2022. Hard copies of the above will also be provided to the Clerk of the Supreme Court on that date.

Michele Henry
Craig Henry PLC
401 West Main Street, Suite 1900
Louisville, Kentucky 40202
(502) 614-5962
mhenry@craighenrylaw.com

Counsel for Plaintiffs

Brigitte Amiri
Chelsea Tejada
Faren Tang
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2633
bamiri@aclu.org
ctejada@aclu.org
rfp_ft@aclu.org

Counsel for Plaintiffs EMW Women's Surgical Center, P.S.C., and Ernest Marshall

Heather L. Gatnarek
ACLU of Kentucky
325 Main Street, Suite 2210
Louisville, Kentucky 40202
(502) 581-9746
heather@aclu-ky.org

Counsel for Plaintiffs EMW Women's Surgical Center, P.S.C., and Ernest Marshall

Carrie Y. Flaxman
Planned Parenthood Federation of America
1110 Vermont Avenue, NW, Suite 300
Washington, D.C. 20005
(202) 973-4830
Carrie.flaxman@ppfa.org

Hana Bajramovic
Planned Parenthood Federation of America
123 William Street, Floor 9
New York, NY 10038
(212) 261-4593
Hana.bajramovic@ppfa.org

Counsel for Plaintiff Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana and Kentucky, Inc.

Leah Godesky
Kendall Turner
O'Melveny & Myers LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 246-8501
lgodesky@omm.com
kendallturner@omm.com

Counsel for Plaintiffs

Eric Friedlander
Office of the Secretary of Kentucky's Cabinet for Health and Family Services
275 E. Main St. 5W-A
Frankfort, KY 40621
Wesleyw.duke@ky.gov

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

Hon. Glenn E. Acree
Judge
Kentucky Court of Appeals
Tate Building
125 Lisle Industrial Ave. Suite 140
Lexington, KY 40511-2058
Kate.Morgan@kycourts.net
Michelle.Hurley@kycourts.net

Michael S. Rodman
Kentucky Board of Medical Licensure
310 Whittington Pkwy, Suite 1B
Louisville, KY 40222
kbml@ky.gov
leanne.diakov@ky.gov

Hon. Mitch Perry
Circuit Judge
Jefferson Circuit Court
700 West Jefferson Street
Louisville, KY 40202
williamnixon@kycourts.net
kalowe@kycourts.net

Counsel for the Attorney General