COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 06-CI-00574

ELECTRONICALLY FILED

RALPH BAZE, ET AL. **PLAINTIFFS**

v. **MOTION TO DISSOLVE INJUNCTION AND MEMORANDUM IN SUPPORT**

KENTUCKY DEPARTMENT OF CORRECTIONS AND THE COMMONWEALTH OF KENTUCKY **DEFENDANTS**

Under CR 65.04(2), (4), the Commonwealth of Kentucky respectfully moves the Court to dissolve its decade-long injunction against conducting lawfully imposed executions. All three of the Court's previously identified grounds for the injunction have now been resolved. Thus, there is no longer any basis for the injunction.

Pursuant to Franklin County Rules of Court 3.01 and 4.01, the Commonwealth notices this motion for hearing on Monday, March 18, 2024.

Background

On July 2, 2019, this Court partially granted the plaintiffs' motion for judgment on the pleadings on one of their claims challenging the validity of Kentucky's lethal-injection protocols. Order Granting Plaintiff's Motion for Judgment on the Pleadings ("2019 Injunction Order") at 1. In that order, the Court identified three grounds for an injunction against the enforcement of the protocols:

> 1) because the administrative regulations prohibited the use of a single drug in a manner inconsistent with the lethal injection statute, the administrative regulations were in conflict with their authorizing statute in violation of KRS Chapter 13A; 2) the failure of the administrative regulations to prohibit the execution of insane inmates may illegally conflict with KRS 431.213 *et seq.*; and 3) the failure of the administrative regulations to

> prohibit the execution of intellectually disabled inmates may illegally conflict with KRS 532.135 et seq.

Id. at 3. The Court then recognized that "[t]he first two grounds above have been resolved by DOC's [Kentucky Department of Corrections'] amendments to the execution regulations." *Id.* That left only the third ground to continue supporting the injunction, which was originally entered in 2010. September 10, 2010 Temporary Injunction Under CR 65.04.

With respect to that third ground, the Court found one section of DOC's regulations—specifically, 501 KAR 16:310 Section 1(4)—unconstitutional "to the extent that it fails to provide for an automatic stay of the death penalty when the DOC review has disclosed reasonable grounds to believe the condemned inmate is intellectually disabled." 2019 Injunction Order at 16; *see also id.* at 4, 14–15. By contrast, the Court found the procedures for "independent review and the criteria for intellectual disability given at 501 KAR 16:310 Section 1(1)-(3) are constitutionally sound and admirably designed to prevent the unconstitutional execution of an intellectually disabled person." *Id.* at 15–16. In other words, DOC's procedures for determining whether an inmate might be intellectually disabled were satisfactory. It was the lack of an automatic-suspension provision for inmates determined to be intellectually disabled that drove the Court's constitutional ruling.

On May 23, 2023, DOC filed a notice indicating it had begun a new rule-making process with respect to intellectual-disability regulations. Notice of Filing at 1. As of March 5, 2024, that amendment has now been implemented. The new 501 KAR 16:310 provides in relevant part:

> If the warden is notified by the psychologist described in Section 1(1)(c) of this administrative regulation concerning a diagnosis of an intellectual disability or an IQ test score of seventy-five (75) or less for the condemned

> person after adjustment for the applicable standard error of measurement, the . . . (3) Commissioner *shall suspend the execution* pursuant to KRS 532.140 to allow procedures consistent with KRS 532.135.

501 KAR 16:310 Section 4, 4(3) (emphasis added). The procedures in Section 1(1) of the regulation for determining whether an inmate has an intellectual disability—procedures this Court previously found "constitutionally sound"—remain largely the same, except that an intellectual disability may now be diagnosed by reference to "other similar prevailing medical standards and clinical guidelines" as an *additional* alternative to criteria in the Diagnostic and Statistical Manual or to definitions of the American Association on Intellectual and Developmental Disabilities, the two standards incorporated in the previous version of the regulation. *Compare* KAR 16:310 Section 1(1)(c)(3), *with* 2019 Injunction Order at 11 (quoting the previous version of the regulation). In other words, there is now an additional way to find an inmate intellectually disabled.

With the new version of 501 KAR 16:310, the last of the Court's three grounds for entering the temporary injunction has now been resolved. There is no longer any basis for the injunction, and the Court should lift it.

Applicable Law

CR 65.01 allows a party to "obtain injunctive relief in the circuit court by . . . temporary injunction[.]" CR 65.04(1) sets out the standard for obtaining a temporary injunction:

> A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.

Kentucky courts use a three-part test to determine "whether to issue a temporary injunction" under CR 65.04(1). *Sturgeon Min. Co., Inc. v. Whymore Coal Co., Inc.*, 892 S.W.2d 591, 592 (Ky. 1995).

First, the moving party must show "irreparable injury." *Cameron v. Beshear*, 628 S.W.3d 61, 71 (Ky. 2021) (quoting *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978)). "This is a mandatory prerequisite to the issuance of any injunction." *Maupin*, 575 S.W.2d at 699. An injunction should not be granted "when the remedy at law is sufficient to furnish the injured party full relief to which he is entitled in the circumstances." *Cyprus Mountain Coal Corp. v. Brewer*, 828 S.W.2d 642, 645 (Ky. 1992). And "the availability of a further administrative remedy negates . . . a claim of irreparable injury." *Sturgeon*, 892 S.W.2d at 592. "[D]oubtful cases should await trial of the merits." *Maupin*, 575 S.W.2d at 698.

Second, "the trial court should weigh the various equities involved." *Cameron*, 628 S.W.3d at 71 (quoting *Maupin*, 575 S.W.2d at 699). This inquiry requires "that an injunction will not be inequitable, *i.e.*[,] will not unduly harm other parties or disserve the public." *Price v. Paintsville Tourism Comm'n*, 261 S.W.3d 482, 484 (Ky. 2008). "Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Cameron*, 628 S.W.3d at 71 (quoting *Maupin*, 575 S.W.2d at 699).

Third, the complaint must present "a substantial question." *Id.* (quoting *Maupin*, 575 S.W.2d at 699). The substantial question concerns "the underlying merits of the case, *i.e.*[,] that there is a substantial possibility that the movant will ultimately prevail[.]" *Price*, 261 S.W.3d at 484.

"The purpose of [CR 65.04's] requirements is to insure that the injunction issues only where absolutely necessary to preserve a party's rights pending the trial of the merits." *Maupin*, 575 S.W.2d at 698. Once a court issues a temporary injunction, it remains in effect "until modified or dissolved on motions or until a permanent injunction is granted or denied." CR 65.04(4). But if a party fails any part of the test, the injunction should be dissolved. *See Sturgeon*, 892 S.W.2d at 592.

Argument

In this case, the three *Maupin* factors no longer favor the temporary injunction. Therefore, the Court should dissolve it.

First, the plaintiffs' request for injunction no longer presents a "substantial question" on the merits. This follows from what the Court has already held. As the Court recognized nearly four years ago, two of three original grounds for the injunction have been resolved. And with DOC's implementation of its new regulation on March 5, the sole remaining ground for the injunction is gone. The plaintiffs can no longer show a substantial likelihood that they will prevail on their underlying challenge to the regulations, *see Price*, 261 S.W.3d at 484; yet the injunction remains in place despite a lack of legal rationale. This Court should lift it.

Second, any threat of irreparable injury the plaintiffs faced at the time this Court entered the injunction is no longer. "Whether the [plaintiffs have] shown an irreparable injury is tied to [their] constitutional claims and the likelihood of success." *Cameron*, 628 S.W.3d at 73. Here, because there is no longer a "substantial question" on the merits of the constitutional challenge underlying this Court's injunction—because the alleged wrong the

plaintiffs were facing has been resolved—any assertion that the plaintiffs will be irreparably injured by enforcement of the protocols is diminished.

On the other side of the coin, "equitable considerations support enforcing a legislative body's policy choices." *Id.* "In fact, non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Id.* Thus, while there is no longer a threat of irreparable injury to the plaintiffs absent an injunction, the continued non-enforcement of Kentucky's law allowing the imposition of the death penalty and DOC's implementing regulation irreparably harms the public's interest in enforcement of the laws. And the plaintiffs' remaining challenges to the protocols can and should be litigated through the "ordinary processes of law," which are in most circumstances preferable to "the extraordinary remedy by injunction." *Brewer*, 828 S.W.2d at 645; *see Cameron*, 628 S.W.3d at 72 (noting that a temporary injunction "should issue only where it is clearly shown that one's rights will suffer immediate and irreparable injury pending trial" (citation omitted)).

Third, the equities decidedly favor lifting the injunction. "The fact that a statute is enacted constitutes the legislature's implied finding that the public will be harmed if the statute is not enforced." *Cameron*, 628 S.W.3d at 78. Especially now that the three bases for the injunction have disappeared, this Court would err if it "substituted its view of the public interest for that expressed by the General Assembly." *Id.* Because of this Court's decade-old temporary injunction, Kentucky's law regarding the death penalty has not been enforced. During that time, the agencies involved have undertaken substantial administrative efforts consistent with the Court's injunction, issuing regulations regarding the use of a single drug, insane inmates, and now intellectually disabled inmates. Now

before the Court are a "duly-enacted statute" and valid regulations implementing it. *See id.* at 73. Again, "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Id.* There is no longer a threat of irreparable harm to the plaintiffs; therefore, the threat of irreparable harm to the people from non-enforcement of the law outweighs any asserted harms by the plaintiffs.

One other point about the equities that cannot be overlooked. Because of this Court's long-running injunction, the families of the victims of the horrific crimes committed by the plaintiffs have been in what has seemed like an interminable holding pattern. As one of those family members recently stated, "We're fed up with the delays. Fed up. Totally fed up." She continued: "It's like the state of Kentucky has forgotten how heinously my brother and brother-in-law were murdered." R.G. Dunlop, *Review of KY death row system shows delays, disparities, costs many say must be addressed*, Louisville Public Media (Jan. 29, 2024), https://perma.cc/73FK-VCFG. These sentiments weigh heavily in any discussion of the equities here. As the U.S. Supreme Court has recognized, "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

* * *

Nearly 15 years have passed since the Supreme Court of Kentucky held that Kentucky's lethal-injection protocol must "be promulgated as a regulation to the extent it affects private rights." *Bowling v. Ky. Dep't of Corr.*, 301 S.W.3d 478, 492 (Ky. 2009). Since then, DOC has promulgated regulations in compliance with *Bowling*. The three bases for this Court's injunction against enforcement of the protocols have been resolved. Indeed,

the Court's 2019 order all but admits as much. The rule of law requires this Court to lift its 2010 injunction.

To be sure, the death penalty is a topic on which Kentuckians disagree. But what is not up for debate is that the Kentucky General Assembly has authorized imposition of the death penalty. Nor is it debatable that "the judiciary bears no license to end a debate reserved for the people and their representatives." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019). As Justice Alito stated in a case involving one of the plaintiffs here: "The Court should not produce a *de facto* ban on capital punishment by adopting method-of-execution rules that lead to litigation gridlock." *Baze v. Rees*, 553 U.S. 35, 70–71 (2008) (Alito, J., concurring). If this Court declines to lift the injunction, Justice Alito's concerns will continue to be realized. Allowing the injunction to continue will continue to re-traumatize the victims of the some of the worst crimes in Kentucky and thwart the legislative will of our citizenry. The Court should take the opportunity to remedy this inequitable state of affairs.

Conclusion

All grounds for this Court's temporary injunction against enforcement of Kentucky's lethal-injection protocols have been resolved. Therefore, the Court should lift the injunction.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the above motion was filed with the clerk of this Court on this 7th day of March 2024 and sent via email to:

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COMMONWEALTH OF KENTUCKY
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RALPH BAZE, ET AL. **PLAINTIFFS**

v. **[PROPOSED] ORDER DISSOLVING TEMPORARY INJUNCTION UNDER CR 65.04**

KENTUCKY DEPARTMENT OF CORRECTIONS AND THE COMMONWEALTH OF KENTUCKY **DEFENDANTS**

This matter comes before the Court on defendant Commonwealth of Kentucky's motion to dissolve the temporary injunction entered September 10, 2010. Having considered the motion, any response, and arguments of counsel, and being otherwise sufficiently advised, the Court hereby ORDERS that the temporary injunction of September 10, 2010, is DISSOLVED.

SO ORDERED this the ___ day of _____, 2024, at ____ (EST).

_____
PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I