COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2022-CA-___

DANIEL CAMERON, in his official capacity as Attorney General of the Commonwealth of Kentucky, — *Appellant/ Movant*

v. On Appeal from Jefferson Circuit Court, No. 22-CI-3225

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; **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 & 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. — *Appellees/ Respondents*

ATTORNEY GENERAL DANIEL CAMERON'S CR 65.07 MOTION FOR INTERLOCUTORY RELIEF

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

Counsel for the Attorney General

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

> Although it is much cheaper to ask a court to order the social change wanted rather than to go through the time-consuming, expensive and inconvenient process of persuading voters or legislators, the fact remains that the proper forum to accomplish a change such as is involved here is a policy process consigned to the legislature.
>
> *Sasaki v. Commonwealth*, 497 S.W.2d 713, 715 (Ky. 1973)
> (Reed, J., Palmore, C.J., concurring)

When two Justices on Kentucky's high court penned the above, the U.S. Supreme Court had just decided *Roe v. Wade*, 410 U.S. 179 (1973), and thus overturned Kentucky's longstanding prohibition on abortion. The nearly fifty years that followed bore out the wisdom of those two Justices' words. For those decades, the federal courts found themselves engulfed in the politics of abortion. What started as "an exercise of raw judicial power" by the U.S. Supreme Court, *id.* at 222 (White, J., dissenting), turned into federal judges making one policy choice after another on a subject about which "Americans continue to hold passionate and widely divergent views," *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). That result should have been predictable. By inventing a novel constitutional right to an abortion—a right untethered to any text or history—the U.S. Supreme Court "sparked a national controversy that . . . embittered our political culture for a half century." *Id.* at 2241. And it did so by putting the judiciary—the one branch of government that operates independently of the politics of the day—at the center of the firestorm.

The decision below threatens to plunge Kentucky's judiciary into that same abyss. Less than a month after the Supreme Court's decision in *Dobbs*, a single circuit

judge has created the Kentucky version of *Roe v. Wade*. The court below enjoined enforcement of two duly enacted statutes after finding that there is a substantial likelihood that the Kentucky Constitution contains a right to obtain an abortion. Just like *Roe*, that conclusion does not rest on any text in the Constitution. Nor does it rely on any history within the Commonwealth. It is instead "an exercise of raw judicial power," *Roe*, 410 U.S. at 222 (White, J., dissenting), that "substitute[s] [the court's] view of the public interest for that expressed by the General Assembly," *Cameron v. Beshear*, 628 S.W.3d 61, 78 (Ky. 2021).

On this point, the Attorney General will not mince words: The claim that Kentucky's Constitution protects abortion is wholly detached from anything that resembles ordinary legal reasoning or analysis. Since 1879, Kentucky's courts have recognized the General Assembly's constitutional prerogative to prohibit abortion. *Mitchell v. Commonwealth*, 78 Ky. 204, 209–10 (Ky. 1879). No case has come close to saying otherwise. That is because, like the U.S. Constitution, Kentucky's Constitution "is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process." *See Dobbs*, 142 S. Ct. at 2306 (Kavanaugh, J., concurring).

By holding otherwise, the circuit court arrogated to itself the legislative power that rightly belongs to the people. And if the circuit court's decision is upheld, Kentucky's courts will soon face case after case asking how far the right to abortion goes. Does that alleged right prohibit the General Assembly from banning abortions in which an unborn child is ripped apart limb by limb while his or her heart is beating?

KRS 311.787(2). Or does the Kentucky Constitution allow the General Assembly to ban performing abortions that the provider knows are sought because of the race, gender, or disability status of an unborn child? KRS 311.731(2). The plaintiffs here have spent years challenging laws like these in federal court. And with federal courts having now left the field, the plaintiffs brazenly invite Kentucky's judiciary to step in as the new super-legislative body overseeing abortion policy.

There is no overstating how problematic the circuit court's decision is. It is not only rife with legal errors. It threatens to push the Court of Justice into the political fire for decades to come. This is not law. And allowing Kentucky's courts to superintend the Commonwealth's abortion policies by judicial decree will "embitter[] [Kentucky's] political culture for" years to come. *See Dobbs*, 142 S. Ct. at 2241. That legislative power belongs to the General Assembly—as Kentucky's high court held over 140 years ago. All this case requires of the Court is to affirm that settled precedent.

STATEMENT OF THE CASE

On June 24, 2022, the U.S. Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). There, the Court held that its precedents establishing a federal right to abortion—*Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)—"must be overruled," as those decisions were "egregiously wrong from the start." *See Dobbs*, 142 S. Ct. at 2242–43. In so holding, the Court "return[ed] the issue of abortion to the people's elected representatives." *Id.* at 2243.

Not content to make their case to the Kentucky General Assembly, on June 27, EMW Women's Surgical Center, P.S.C., Ernest Marshall, and Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc. ("Facilities") sued in Jefferson Circuit Court to block enforcement of two laws regulating abortion in Kentucky. Compl. ¶ 4 (attached as Exhibit 1). Both laws passed the Kentucky General Assembly with bipartisan votes in 2019.

The first, the Human Life Protection Act, prohibits most abortions in the Commonwealth. KRS 311.772. The second, Kentucky's Heartbeat Law, prohibits abortions after an unborn human life "has a detectable fetal heartbeat." KRS 311.7705(1). Importantly, the Human Life Protection Act allows "a licensed physician to perform a medical procedure necessary in [his or her] reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman." KRS 311.772(4)(a). The Heartbeat Law provides likewise. KRS 311.7705(2), .7706(2).

On June 30, the circuit court issued a restraining order with no legal or factual analysis.[1] Order Granting RO (attached as Exhibit 2). The circuit court then scheduled a hearing on the Facilities' motion for a temporary injunction for July 6. But that hearing looked like what one would expect from a legislative committee hearing in the Capitol Annex, not a judicial proceeding about questions of constitutional law.

[1] The Attorney General promptly took two writs, both of which were denied in one-judge orders that declined to reach the merits of the Facilities' claim that the Kentucky Constitution protects abortion.

The Facilities focused on showing that prohibiting abortion is not sound public policy. Yet even that effort fell short. Their primary witness, Dr. Ashlee Bergin, who performs abortions at EMW, refused to answer basic questions about the biological characteristics of an unborn child. Instead, Dr. Bergin testified that she "do[es]n't really view it in those terms." TR 63:23–64:11, 66:2–24, 68:4–25, 76:5–21, 77:3–14, 78:1–9 (attached as Exhibit 3).[2] When asked whether she views an unborn child as a patient, she responded: "I just don't think of it in those terms." *Id.* at 65:3. When asked whether an unborn child is a human being, she responded again: "I don't think of it in those terms." *Id.* at 66:22. And when asked about the fertilization process that leads to unborn life, Dr. Bergin stated, "I never have really given the matter much -- that much thought." *Id.* at 76:11–12.

The Facilities' other witness, Jason Lindo, an economics professor, fared no better. He confirmed that his testimony "stands for the proposition that Kentucky's laws restricting or banning abortions will lead to fewer abortions in the Commonwealth." *Id.* at 133:22–134:1. He acknowledged that a disproportionate number of minority women receive abortions. *Id.* at 148:21–149:8. He thus agreed that if the laws at issue are enjoined, there would be fewer minority children born in the Commonwealth in the coming years. *Id.* When asked whether that was a good or bad thing—whether it would be good or bad to have fewer minority children in Kentucky—Professor

[2] Because there is not yet a certified record, the Attorney General filed a transcript of the hearing in the record below and has attached a copy of the same for the Court's convenience.

Lindo qualified that "I am not making any value judgments here today." *Id.* at 149:8–10.

The Commonwealth's witnesses crystallized the terms of debate even further. Dr. Monique Chireau Wubbenhorst, an OB-GYN who attended Brown, Harvard, and Yale, *id.* at 176:11–25, explained how a distinct human being forms immediately upon fertilization, and that within four weeks the cells that will eventually make up the cardiovascular system have already formed. *Id.* at 185:12–88:11. By nine to ten weeks, "the fetal heart functions as it will in the adult." *Id.* at 188:13. Soon after, "fingerprints are discernible," *id.* at 188:17–19, and the unborn child will have detectable electrical activity in his or her brain, *id.* at 188:17–19.

The Commonwealth also presented the testimony of a renowned professor of public bioethics, O. Carter Snead. Professor Snead testified that Kentucky's statutory definition of an unborn human being is "a fairly standard definition that represents one perspective in the mainstream of the debate about the moral standing of the unborn human being." *Id.* at 256:8–10. Kentucky's policy judgment, Professor Snead continued, "reflects the view, a capacious view of the human family that includes all human beings, born and unborn." *Id.* at 257:8–10.

The circuit court granted the Facilities' motion for a temporary injunction on July 22. Order at 20 (attached as Exhibit 4). In doing so, the circuit court not only held that the Facilities are likely to succeed on their claim that Kentucky's Constitution protects the right to obtain an abortion, *id.* at 14, it also held that the challenged laws likely violate the equal-protection component of Sections 1, 2, and 3 of the Constitution, *id.*

at 15, as well as the religious-freedom protections in Section 5, *id.* at 15–16. The Facilities, however, never raised the latter two claims. The circuit court also held that the Human Life Protection Act is "arguably an unconstitutional delegation of legislative authority" and suffers from vagueness problems. *Id.* at 11–12.

Large parts of the circuit court's decision read like a policy paper. The court declared—in a judicial opinion—that "abortion is a form of healthcare." *Id.* at 8. Whether to have a child, the court continued, "is a decision that has perhaps the greatest impact on a person's life and as such is best left to the individual to make, free from unnecessary governmental interference." *Id.* at 9. The court also discussed how "[p]regnancy, childbirth, and the resulting raising of a child are incredibly expensive." *Id.*

This CR 65.07 motion for interlocutory relief follows. The Attorney General is simultaneously filing (i) a motion for emergency relief under CR 65.07(6), and (ii) a motion to recommend transfer of this matter to the Supreme Court of Kentucky under CR 74.02(5).

ARGUMENT

CR 65.07 allows a party adversely affected by a temporary injunction to seek immediate relief in this Court. *Boone Creek Props., LLC v. Lexington-Fayette Urb. Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 38 (Ky. 2014). If a trial court makes an error of law in granting a temporary injunction, that serves as a reason to vacate such relief on appeal. *Cameron*, 628 S.W.3d at 72 ("[W]e find that the trial court's issuance of injunctive relief was unsupported by sound legal principles occasioned by an erroneous application of the law.").

To obtain a temporary injunction, the Facilities faced three hurdles. First, the Facilities needed to show "that [their] position presents a 'substantial question' on the underlying merits of the case, *i.e.*, that there is a substantial possibility that [they] will ultimately prevail." *Pollitt v. Pub. Serv. Comm.*, 552 S.W.3d 70, 73 (Ky. 2018) (citation omitted). Second, the Facilities had to show "that [their] remedy will be irreparably impaired absent the extraordinary relief" of a temporary injunction. *Id.* (citation omitted). And third, the Facilities needed to prove "that an injunction will not be inequitable, *i.e.* will not unduly harm other parties or disserve the public." *Id.* (citation omitted).

On all three counts, the Facilities fell woefully short. Most importantly, there is no conceivable basis for finding that the Facilities will prevail on the merits. Their case rests on the Kentucky Constitution protecting a right to abortion, something that no court in Kentucky has ever held (until now). Because there is no support for this novel claim, they cannot show an irreparable injury. And lastly, the equities overwhelmingly weigh against a temporary injunction because the public and the Commonwealth are irreparably harmed whenever a court enjoins enforcement of a duly enacted statute. All the more so given that protecting unborn human life is at stake here.

In considering these three issues, it must be recalled that a temporary injunction is an "extraordinary remedy." *Maupin v. Stansbury*, 575 S.W.2d 695, 697 (Ky. App. 1978). It is so extraordinary that in "doubtful cases" injunctive relief "should await final judgment." *Oscar Ewing, Inc. v. Melton*, 309 S.W.2d 760, 762 (Ky. 1958). On top of that,

Kentucky courts have a "duty to presume that the statutes [they] address are constitutional." *Commonwealth v. Claycomb*, 566 S.W.3d 202, 210 (Ky. 2018) (citation omitted). Close calls about the constitutionality of a statute go to the Commonwealth. *Id.*

At the absolute best, the Facilities' likelihood of success here is "doubtful." *See Oscar Ewing*, 309 S.W.3d at 762. Their case hinges on establishing a constitutional right that runs contrary to nearly a century-and-a-half of Kentucky law. The Facilities of course can litigate their claims to final judgment and take an appeal, but they should do so while following Kentucky's laws.

I. The Facilities have no chance of success on the merits.

The circuit court was egregiously wrong in its evaluation of the merits. Only by ignoring the constitutional text, warping the Commonwealth's history, and expanding Kentucky precedent beyond its breaking point was the court able to divine—for the first time in the Commonwealth's history—a right to abortion in the Kentucky Constitution.

The discussion of the merits below proceeds like this: First, the Attorney General discusses the Facilities' lack of constitutional standing. Second, he discusses the Facilities' argument that the Kentucky Constitution contains an unwritten right to an abortion. And third, he discusses the other legal claims considered by the circuit court.

A. The Facilities lack constitutional standing to press a claim on behalf of pregnant women.

The circuit court should have rejected the Facilities' claim that the Constitution protects abortion based on standing alone. Constitutional standing is a prerequisite to any suit filed in Kentucky's courts. *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 one seeks to strike down a state statute he must show that the alleged unconstitutional feature *injures him*." *Second St. Props., Inc. v. Fiscal Court of Jefferson Cnty.*, 445 S.W.2d 709, 716 (Ky. 1969) (emphasis added) (citation omitted).

Under *Sexton*, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 566 S.W.3d at 196 (citation omitted). To show a "present and substantial interest in the subject matter," a plaintiff must show that his or her injury is "concrete and particularized" as well as "actual or imminent." *Id.* at 194–96 (citation omitted). In other words, "[t]he injury must be . . . distinct and palpable, and not abstract or conjectural or hypothetical." *Id.* at 196 (cleaned up).

1. Even if the Kentucky Constitution protected the right to an abortion (it does not), that right would belong only to pregnant women. The Facilities do not disagree. Yet all the same, the Facilities attempt to pursue the alleged constitutional claims of their "patients[]." Compl. ¶¶ 96, 102, 126, 130. But no patient is a party here.

The Supreme Court of Kentucky has held that "[t]he 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." *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) (citation omitted); *accord Anesthesia Health Consultants, LLC v. Sleep EZ Anesthesia, PLLC*, No. 2020-CA-0284-MR, 2022 WL 627189, at *10 (Ky. App. Mar. 4, 2022) ("[N]othing in *Sexton* . . . forbid[s] our application of principles of prudential standing in appeals—particularly not allowing parties to assert the rights of others not

before the court as parties to the appeal."). This holding forecloses any assertion of third-party standing here. The Facilities are doing exactly what *Associated Industries* prohibits—"rest[ing] upon the legal rights of third persons" to bring suit. As a result, the Facilities lack standing.

2. The circuit court relied entirely on federal abortion case law to conclude otherwise. It is true that before *Dobbs*, federal courts deviated from ordinary third-party standing principles to create a special carve-out in abortion cases. *See, e.g.*, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118–19 (2020) (plurality op.); *Singleton v. Wulff*, 428 U.S. 106, 113–18 (1976) (plurality op.). But *Dobbs* expressly undermined that precedent. *Dobbs* held that these cases "*ignored* the Court's third-party standing doctrine." 142 S. Ct. at 2275 (emphasis added). And *Dobbs* included an illustrative footnote showing how abortion case law has deviated from normal rules for third-party standing. *Id.* at 2275 n.61. *Dobbs* could not have been clearer: abortion-specific rules about third-party standing are no more. *See SisterSong Women of Color Reprod. Justice Collective v. Governor of Georgia*, --- F.4th ---, 2022 WL 2824904, at *5 (11th Cir. July 20, 2022).

The circuit court downplayed this part of *Dobbs* as dicta. Order at 6 n.2. All the same, the circuit court acknowledged that *Dobbs* "expressed displeasure with how abortion related litigation has proceeded with the doctrine of third party standing." *Id.* So by the circuit court's admission, it relied on federal case law about which *Dobbs* "expressed displeasure."

3. Even if third-party standing could exist sometimes, this is not one of those circumstances. The U.S. Supreme Court's decision in *Kowalski v. Tesmer* outlines the

"limited" situations (in federal court) in which one party can assert another's rights: when a plaintiff shows (i) he or she "has a 'close' relationship with the person who possesses the right," and (ii) there is "a 'hindrance' to the possessor's ability to protect his own interests." 543 U.S. at 125, 129–30 (2004) (citation omitted). These stringent requirements reflect a "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed," then courts "might be 'called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.'" *Id.* at 129 (citations omitted).

The circuit court did not engage with the two-part federal test for third-party standing. The circuit court instead devoted only one substantive paragraph to this issue. Order at 6. But that paragraph focuses on first-party standing, which is not at issue. And that paragraph does not discuss the Facilities' patients. It instead mentions how "[t]he Attorney General is attempting to enforce these statutes against the [Facilities]" and how a temporary injunction purportedly would provide the Facilities "with adequate relief." *Id.* Thus, although the circuit court claimed to find third-party standing, it made no attempt to conduct the right analysis.

Had the circuit court done so, it would have found that the Facilities cannot invoke the alleged rights of pregnant women. *Kowalski* provides the roadmap here. There, Michigan changed its procedure for appointing appellate counsel for indigent criminal defendants who plead guilty. 543 U.S. at 127. Two attorneys sued, "seek[ing]

to invoke the rights of hypothetical indigents to challenge the procedure." *Id.* The Court refused to allow the attorneys to represent the interests of hypothetical future clients. *Id.* at 134. It reasoned that "it would be a short step from the . . . grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring in court the claims of future unascertained clients." *Id.* (ellipsis in original) (citation omitted).

The same problem arises here. The Facilities are seeking to represent the interests of future hypothetical pregnant women—akin to what the lawyers tried to do in *Kowalski*. By default then, the Facilities lack any "close" relationship with their patients who allegedly "possess[] the right" to abortion. *See id.* at 130 (citation omitted).

In any event, the Facilities have offered no evidence to establish that they have a "close" relationship with pregnant women. *See June Med. Servs.*, 140 S. Ct. at 2168 (Alito, J., dissenting) ("[A] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited."). And the Facilities have offered no evidence to conclude that their patients face a hindrance in protecting their own rights. To the contrary, "a woman who challenges an abortion restriction can sue under a pseudonym, and many have done so." *Id.*

One final point about standing. The U.S. Supreme Court has rejected third-party standing where the interests of the third party and the primary party are "potentially in conflict." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

This limitation ensures that "the most effective advocate of the rights at issue is present to champion them." *Id.* at 15 n.7 (citation omitted). The Facilities have a profit-making motive for pursuing this suit. As Dr. Bergin testified, EMW charges every woman between $750 and $2,000 for an abortion. TR 52:20–53:8. The Court should decline to find third-party standing here given the potential conflict of interests between the Facilities and pregnant women.

B. The Kentucky Constitution does not protect abortion.

The circuit court's discovery of a right to an abortion in Kentucky's Constitution is untethered to the law. It is contrary to the text of the Constitution, unsupported by the Delegates' debates, and inconsistent with Kentucky history and precedent.

1. No constitutional text supports the circuit court's decision.

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 the word "abortion" appears nowhere in any of the 263 provisions that make up Kentucky's charter. The circuit court acknowledged as much. Order at 10. If the Delegates who wrote Kentucky's Constitution wanted to protect abortion, they would have said so. They did not. And if the people wanted to later amend their Constitution to provide such authority, we have had 132 years to do so.

Without a textual hook for a right to abortion, the circuit court resorted to the lofty notion that our Framers "craft[ed] broad sentiments, ideas, and rights that they chose to protect." *Id.* The circuit court cited nothing for this heady proposition. Still

worse, the circuit court then stated that Kentucky's Constitution "must protect more than just the words explicitly enumerated on the page in order for the purpose behind the words to have effect." *Id.* Here again, the circuit court cited nothing. And it is easy to see why. This unbounded notion offends "[t]he basic rule" of constitutional interpretation, which "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." *Claycomb*, 566 S.W.3d at 215 (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).

2. The Debates do not support the circuit court's decision.

Nor do the constitutional debates help the Facilities. To be clear, only if there is ambiguity in the text of a constitutional provision (none exists here) will the judiciary "look to the history of the times and the state of existing things to ascertain the intention of the framers of the Constitution and the people adopting it." *Shamburger v. Duncan*, 253 S.W.2d 388, 390–91 (Ky. 1952) (citation omitted). Yet even if the Court were to invoke this interpretative canon, the Debates show that not one Delegate even suggested that Kentucky's Constitution would protect abortion. The circuit court did not even try to engage with the Debates. Order at 12–14, 18.

The word "abortion" appears only three times in all the Debates. 1890–91 Debates at 1099, 2476, and 4819. First, the Delegates recognized that abortion was a crime

in the Commonwealth. That recognition appears during a discussion of 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. The second reference to abortion notes that it was also a crime in Indiana, *id.* at 2476, and the final reference uses the term in a different context not relevant here, *id.* at 4819.

So if the Debates shed any light on the issue, they recognized that abortion can be a crime. More importantly, the fact that no Delegate stated that the provisions under consideration included the right to abortion is compelling evidence that Kentucky's Constitution does not contain such a right.

3. The Commonwealth's unbroken history of protecting unborn life cuts against the circuit court's decision.

Also weighing against the Facilities is the Commonwealth's century-long, unbroken history of protecting unborn life.

a. As early as 1879, Kentucky's high court recognized the common-law crime of "procuring an abortion." *Mitchell v. Commonwealth*, 78 Ky. 204, 204 (Ky. 1879). At issue in *Mitchell* was whether an indictment that charged an individual with procuring an abortion needed to specify "that the woman was quick with child" (meaning that she had felt the baby move in her womb, *see Dobbs*, 142 S. Ct. at 2249). While some authority supported the claim that abortion was prohibited at all stages at common law,

Mitchell, 78 Ky. at 206–09, it was undisputed that, at a minimum, abortion was prohibited after quickening as a matter of common law. But in *Mitchell*, Kentucky's high court did not limit its discussion to the legality of pre- and post-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 of 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). So just twelve years before the 1891 Constitution was adopted, Kentucky's high court explicitly recognized that the General Assembly could prohibit abortion at all stages. To repeat, Kentucky's high court held that "the law should punish abortions and miscarriages, wilfully produced, at any time during the period of gestation" and that this "ought to be provided against by the law-making department of the government." *Id.*; *accord Dobbs*, 142 S. Ct. at 2253 n.32 (discussing *Mitchell*). And as discussed above, not one delegate at the 1891 Convention disclaimed what *Mitchell* held.[3]

Nor did the views of Kentucky's high court change after the adoption of the 1891 Constitution. No case after our Constitution was adopted walked back—even by

[3] The circuit court briefly discussed *Mitchell*, Order at 13–14, but it altogether failed to discuss the decision's holding that the General Assembly could prohibit abortion "at any time during the period of gestation." *Mitchell*, 78 Ky. at 209. *Mitchell* matters here not because of what it said about the common law, but because of what it held about the General Assembly's policy-making prerogative.

one iota—*Mitchell*'s holding that the General Assembly can prohibit abortion at all stages. *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). In fact, ten years after our current Constitution was adopted, Kentucky's high court discussed whether abortion was a crime at common law only because "[t]here [wa]s no statute in this state changing the common-law rule." *Wilson*, 60 S.W. at 401. This can only be read as an acknowledgment of *Mitchell*'s holding that the General Assembly can in fact prohibit abortion—*i.e.*, "chang[e] the common-law rule."

b. The General Assembly did exactly that a short time later. In 1910, the General Assembly passed a statute prohibiting the performance of an abortion at *any* stage of pregnancy. As Kentucky's high court explained, this 1910 statute changed the "restricted common law rule . . . in this jurisdiction." *Fitch v. Commonwealth*, 165 S.W.2d 558, 560 (Ky. 1942). That statute provided: "It shall be unlawful for any person to prescribe or administer to any pregnant woman, 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*, 142 S. Ct. at 2296 (emphasis altered) (quoting Kentucky's 1910 prohibition against abortion). The statute included an exception for the life of the mother and also provided that a woman's consent to the procedure was "no defense." *Id.* Thus, starting in 1910, Kentucky prohibited all abortions except when necessary to preserve the mother's life. *See id.*

The General Assembly maintained this prohibition throughout the pre-*Roe* era—for more than 60 years. *See* KRS 436.020; Ky. Stat. 1219a (abortion prohibition enacted in 1910). Not once did Kentucky's high court even suggest this prohibition was unconstitutional. And the Court had plenty of opportunities to do so. *See, e.g.*, *Commonwealth v. Davis*, 184 S.W. 1121, 1121–23 (Ky. 1916) (discussing the constitutional rights of a person in an abortion-related criminal prosecution without mentioning a constitutional right to abortion); *Richardson v. Commonwealth*, 312 S.W.2d 470, 471–73 (Ky. 1958) (similar); *Bain v. Commonwealth*, 330 S.W.2d 400, 401 (Ky. 1959) (similar).

Indeed, shortly before *Roe*, Kentucky's high court unanimously rejected a constitutional challenge to Kentucky's statute prohibiting abortions. *See Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972) (*Sasaki I*), *vacated by Sasaki v. Kentucky*, 410 U.S. 951 (1973). The Court determined that "the State has a compelling reason for an interest in the existence of the current abortion statute." *Id.* at 902 (citation omitted). The old Court of Appeals unanimously reasoned that any balancing of interests in deciding whether and when to prohibit abortion "would be a matter for the legislature." *Id.* (citation omitted). It emphasized the Court's "obligation to exercise judicial restraint in nullifying the will and desires expressed by a duly enacted statute of long standing on a matter of deep significance to the way of life, attitude or mind and individual personal faith of the whole people of a sovereign state." *Id.* (citation omitted).

So to sum up, for 60 plus years before *Roe*, Kentucky prohibited all abortions except when necessary to save the pregnant mother's life. Over those decades, no Kentucky court once suggested that this statutory prohibition was unconstitutional. To the

contrary, at least since *Mitchell* was decided in 1879, the General Assembly has had the policy-making prerogative to prohibit abortion at all stages. And from 1910 on, the General Assembly continuously exercised that authority.

Obviously, *Roe* shifted this landscape as a matter of federal law. In the wake of *Roe*, Kentucky's high court begrudgingly acknowledged that it was then "compelled" to find Kentucky's prohibition on abortion unconstitutional as a matter of federal law. *Sasaki v. Commonwealth*, 497 S.W.2d 713, 714 (Ky. 1973) (*Sasaki II*). But three Justices explained their views on the subject. To these Justices, the General Assembly had the power to prohibit abortion, and *Roe* was wrong to conclude otherwise. Justice Osborne believed *Roe* "usurp[ed] the rights of the several states in this Union to determine for themselves what constitutes a crime and to enforce their own criminal laws." *Id.* at 714 (Osborne, J., concurring). Justice Reed, joined by Chief Justice Palmore, said that *Roe* was not based on "any legal principle that the judiciary may properly rely upon." *Id.* at 715 (Reed, J., concurring). 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. They summed up: "Although it is much cheaper and easier to ask a court to order the social change wanted rather than go through the time-consuming, expensive and inconvenient process of persuading voters or legislators, the fact remains that the proper forum to accomplish a change such as is involved here is a policy process to be consigned to the legislature." *Id.* at 715.

While these statements from *Sasaki II* are not strictly binding, they put to rest any suggestion that *Roe* simply codified a federal right that had been part of Kentucky's Constitution all along. To the contrary, both before and after *Roe*, Kentucky's judiciary made clear that our Constitution leaves the issue of abortion to the General Assembly.

One final bookend about Kentucky's long history of protecting unborn life. The year after *Roe* was decided, the General Assembly revised its statutes regulating abortion to comply with *Roe*. *See Wolfe v. Schroering*, 388 F. Supp. 631, 633 (W.D. Ky. 1974), *aff'd in part, rev'd in part*, 541 F.2d 523 (6th Cir. 1976). Although it repealed the prohibition of abortion dating to 1910, 1974 Ky. Acts ch. 255, § 19, the General Assembly made clear that this statutory amendment was driven by *Roe* alone. Part of this 1974 law stated: "If, however, 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). And this provision remains a part of Kentucky law to this day, nearly 50 years later. So from 1910 until now, the unbroken view of the General Assembly has been that all human life must be protected.

* * *

In short, since 1879, Kentucky courts have recognized the General Assembly's legislative prerogative, if it sees fit, to prohibit all abortions. From 1910 until *Roe*, the General Assembly did just that, with an exception to protect the mother's life. And

even after *Roe*, three members of Kentucky's high court reiterated the General Assembly's legislative power in this regard. And since 1974, the General Assembly has continually expressed Kentucky's preference to protect all human life if *Roe* were overturned. The Human Life Protection Act and the Heartbeat Law are simply part of this century-long tradition of protecting unborn human life in the Commonwealth to the fullest extent possible.

Why does this history matter? It matters because it shows just how jarring to our legal system the circuit court's holding really is. This holding contradicts more than a century of Kentucky jurisprudence and history. More to the point, the circuit court's decision flouts "the actual, practical construction that has been given to [the Constitution] by the people." *See Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957). This history went essentially unmentioned in the circuit court's decision. Yet, under the circumstances, this rich history should have been "entitled to controlling weight." *See id.*

4. No case law supports the circuit court's decision.

With the text and history so clearly against it, the circuit court retreated to Kentucky case law to justify a constitutional right to abortion. Order at 12–13. Essentially the only case the circuit court cited was *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). But it extends *Wasson* past its breaking point to derive from it a constitutional right to abortion.

In *Wasson*, the Supreme Court of Kentucky held that a criminal statute punishing consensual sexual intercourse "with another person of the same sex" violated the right to privacy. *Id.* at 488, 492–99. To state the obvious, *Wasson* has nothing to do with

abortion. In fact, abortion is mentioned nowhere in the decision. Nor does *Wasson* say anything that impeaches *Mitchell*'s conclusion, reached more than a century earlier, that "the law should punish abortions and miscarriages, wilfully produced, at any time during the period of gestation." *Mitchell*, 78 Ky. at 209. *Wasson* and *Mitchell* are in no way inconsistent. They operate independently on the topic considered by each court.

The circuit court reached a contrary conclusion by relying on *Wasson*'s discussion of a right to privacy. Order at 13. The circuit court read *Wasson* very broadly, rejecting any assertion that it is "limited to the context of private sexual activity between consenting adults." *Id.* at 13 n.6. *Wasson*, the circuit court reasoned, stands for "a much broader and more fundamental right." *Id.*

But this expansive reading of *Wasson* ignores what the decision said about its own scope. Rather than standing for "a much broader and more fundamental right," *id.*, *Wasson* was careful to emphasize—repeatedly—that the right to privacy does not extend to conduct that affects someone else. For example, in discussing the Delegates' debates, the Court quoted a Delegate who discussed "protect[ing] each individual in the rights of life, liberty, and the pursuit of happiness, *provided that he shall in no wise injure his neighbor in so doing*." 842 S.W.2d at 494 (citation omitted). Later in the decision, *Wasson* expressly recognized this limitation to its reasoning, holding that private conduct "which *does not operate to the detriment of others*, is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." *Id.* at 496 (emphasis added) (internal quotation marks omitted). That is to say, *Wasson* expressly premised its holding on the conduct at issue "not operat[ing] to the detriment of others." *Id.*

In framing its analysis, *Wasson* returned to this point so many times that it cannot be missed. *See id.* at 493 (Sexual intercourse "conducted in private by consenting adults is not beyond the protections of the guarantees of individual liberty . . . ."); *id.* at 494–95 ("It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society." (quoting *Commonwealth v. Campbell*, 117 S.W. 383, 386 (Ky. 1909)));[4] *id.* at 495 ("The Bill of Rights . . . would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public." (quoting *Campbell*, 117 S.W. at 385)); *id.* at 496 ("The power of the state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others." (quoting *Commonwealth v. Smith*, 173 S.W. 340, 343 (Ky. 1915))). This repetition in *Wasson* cannot be written off as unintentional. It was the *Wasson* Court making clear—over and over—that the right recognized there had no applicability when one person's conduct affects another. Even the dissent agreed that this was the point on which *Wasson* turned.[5] *Id.*

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[4] According to *Wasson*, the "leading case" on privacy is *Campbell*. 842 S.W.2d at 494. *Campbell* dealt with a person who possessed "liquor for his own use, and for no other purpose." 117 S.W. at 384. Kentucky's high court held that "[t]he history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort, *provided that in so doing he committed no offense against public decency by being intoxicated* . . . ." *Id.* at 385 (emphasis added). *Campbell* thus recognizes the same limiting principle as *Wasson*.

[5] Even if *Wasson* did not limit its own reach, 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

at 505 (Lambert, J., dissenting) (describing it as the "major premise in the majority opinion").

The circuit court did not dispute any of this. Instead, the court simply failed to mention, or more importantly heed, *Wasson*'s built-in limiting principle. All the circuit court said on the topic was that "[t]he privacy analysis in *Wasson* discusses a much broader and more fundamental right than Defendants acknowledge." Order at 13 n.6. But saying this does not make it so. The circuit court offered no answer for *Wasson*'s statement that it only applies when conduct "does not operate to the detriment of others." *See Wasson*, 842 S.W.2d at 496.

Wasson is thus wholly inapplicable here given that abortion does in fact "operate to the detriment" of someone else—unborn children most obviously.[6] The U.S. Supreme Court has recognized this very distinction. As the Supreme Court put it in *Dobbs*, "decisions involving matters such as intimate sexual relations, contraception, and marriage" (*i.e.*, *Wasson*) 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.'" *See* 142 S. Ct. at

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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* to extend "greater protection[] to the rights in property interests against warrantless search and seizure"); *Yeoman v. Commonwealth, Health Pol'y Bd.*, 983 S.W.2d 459, 473–74 (Ky. 1998) (rejecting a *Wasson* challenge to statute allowing the collection and dissemination of personal healthcare data).

[6] Abortion also undermines the integrity of the medical profession. TR 261:14–20.

2243. More to the point, "[w]hat sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely [like the right to privacy] is something that both of those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'" *Id.* at 2258; *see also id.* at 2261 ("The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a 'potential life,' but an abortion has that effect."). This simple distinction drives a massive wedge between the right discussed in *Wasson* and the alleged right to abortion.[7]

5. There is ample evidence to support the General Assembly's policy judgment.

The Court could end its analysis here and say as a legal matter that the Kentucky Constitution does not protect abortion. But because the circuit court overtly injected policy issues into its analysis, the Attorney General clarifies the factual record to highlight how the evidence overwhelmingly supports the General Assembly's legislative judgment to protect unborn life.

Start with the foundation of the moral dilemma in the abortion debate: Is unborn life worth protecting? The circuit court took it upon itself to decide this profound question after a one-day evidentiary hearing barely a week after the complaint was filed. Yet even if that were part of the judicial enterprise (it most assuredly is not), the circuit

[7] In circuit court, the Facilities relied on three other cases to justify a right to abortion. But the circuit court did not mention those cases. For good reason. They at most suggest that the Commonwealth can protect the lives of those who cannot speak for themselves. *See 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).

court overlooked the overwhelming evidence that supports the General Assembly's conclusion that human life begins at fertilization.[8]

The definition of "unborn human being" in KRS 311.772(1)(c) reflects the opinion of the medical community. TR 183:10–17; *accord id.* at 185:12–186:5. In a survey done among 5,500 biologists, 96 percent agreed that life begins at fertilization.[9] *Id.* at 212:16. In that same vein, the definition of "fetal heartbeat" in KRS 311.7701(4) is "a good lay definition." TR at 190:14–25. As anyone who has seen a pregnancy ultrasound can attest, a fetus's heartbeat can be seen "as a twinkle." *Id.* at 191:13–17. A heartbeat can be detected as early as five weeks, with the heartbeat readily evident at around eight to ten weeks. *Id.* at 192:2–22.

It is remarkable how soon after fertilization the hallmarks of human life begin developing. The cardiovascular system starts to develop as soon as the zygote moves toward being an embryo. *Id.* at 187:11–188:3. By about four weeks, the cells that will eventually make up the cardiovascular system start to separate from the placenta and fetal-membrane connections and begin to organize themselves. *Id.* Around four and five weeks, they form a tube, which then over the next few weeks begins to fold and differentiate. *Id.* By seven weeks, the tube starts forming four heart vessels, with the

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[8] The circuit court discounted Dr. Wubbenhorst's and Professor Snead's testimony because they work at the University of Notre Dame, a Catholic institution. Order at 4, 19 n.14. The circuit court, notably, did not find any problem with the testimony of Dr. Bergin, who is paid to perform abortions at EMW. TR 45:20–21 ("EMW does provide some salary support for me.").

[9] This survey is discussed further here: Br. of Biologists as Amici Curiae in Support of Neither Party at 24–28, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), https://perma.cc/C6DL-4G7Y.

cardiac valves beginning to form around eight weeks. *Id.* And by nine to ten weeks, the fetal heart functions as it will in the adult. *Id.*

Other bodily organs and functions form during this time, as well. The nervous system begins to differentiate at around five weeks. *Id.* at 188:8–22. By seven weeks, the first synapses are observable in the spine. *Id.* And by about eight to nine weeks, electrical activity is detectable in the brain. *Id.* The hands begin to develop around four weeks, and then continues to extend around six weeks. *Id.* By about ten weeks, finger-prints are discernible. *Id.* The blood in the unborn child's body is distinct from and does not mix with the mother's. *Id.* at 189:4–13. The heartbeat of the unborn child is also distinct from its mother's. *Id.* at 63:3–15. So too is fetal-brain-wave activity. *Id.* at 190:6–13.

All of this evidence about the development of unborn children is unrefuted on this record. And Dr. Bergin admitted the truth of at least some of it. She acknowledged that "a live fetus that's developing towards full term has a heartbeat by the eighth week or so" and that this heartbeat is distinct from the pregnant mother's. *Id.* at 63:9–15. When queried about whether abortion after that point in pregnancy stops a beating heart, Dr. Bergin admitted that "the end of the pregnancy stops that beating heart of the baby in every case." *Id.* at 64:6–11. Yet when asked whether human life begins at fertilization, Dr. Bergin countered not with scientific evidence but with the statement that "I never have really given the matter much -- that much thought." *Id.* at 76:10–12.

Rather than dispute the Attorney General's scientific evidence about unborn life, the Facilities' strategy, which the circuit court accepted, was to focus on the health

effects that pregnancy can have on an expectant mother. But health risks associated with pregnancy are not strictly relevant to the legal question of whether the Kentucky Constitution protects a right to abortion. At best, the focus on alleged health risks could perhaps be relevant to an as-applied challenge to a law that prohibits all abortions without an exception for preserving the life of the mother. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). Both laws challenged here, however, contain just such an exception. KRS 311.772(4)(a); KRS 311.7705(2), .7706(2). Yet the circuit court entered a broad temporary injunction against all applications of the Human Life Protection Act and the Heartbeat Law—even for purely elective abortions that have nothing to do with the health risks associated with pregnancy. That was obvious error.

Even putting all that aside, the health risks that the Facilities rely on are overstated and do not account for the health risks associated with abortion. Of course, every abortion ends unborn human life. And Dr. Bergin admitted that abortion carries the risk of death and other serious complications for the mother. TR 36:16–23, 38:24–39:14, 57:23–61. It cannot be the province of the judiciary to figure out how to balance whatever competing risks exist under the guise of constitutional interpretation.

To be sure, had the circuit court engaged in such a balancing act, it would have had to weigh the evidence the Attorney General presented on the risks of abortion. Abortion-related mortality is underreported and abortion reporting statistics are inherently very limited. *See id.* at 196:11–201:11. Dr. Wubbenhorst, for example, challenged the suggestion that abortion is safer than childbirth. *Id.* Of course, pregnancy has risks.

But Dr. Wubbenhorst put numbers on some of the problems that women may suffer during a pregnancy:

> [B]lood clots in pregnancy . . . . occur in .05% to .3% of pregnancies. Gestational diabetes occurs in about 7% of pregnancy. Hypertension pregnancy, about .3% to 3% of pregnancies. Abruption, postpartum cardiomyopathy is somewhere in the range of . . . . 4 per 10,000. . . . Since earlier in the 20th century, there's been a 99% reduction in maternal mortality. . . . [T]hese are still relatively rare outcomes. And many of these other issues in pregnancy are not only relatively uncommon, but they're often treatable.

Id. at 195:16–96:10. There is no legal reason why such rare and mostly treatable health risks associated with pregnancy would have any bearing on whether the Kentucky Constitution protects a right to abortion.

In finding a constitutional right to an abortion, the circuit court also emphasized that "[p]regnancy, childbirth, and the resulting raising of a child are incredibly expensive." Order at 9. But is that really a legal principle on which to rest a constitutional right? After all, children cost money all the way until the age of 18 (and often well beyond). If the cost of caring for a child is enough to justify a constitutional right to abortion, what meaningful moral or ethical distinction stops that decision at 15 weeks, 20 weeks, 40 weeks? There is none.

The circuit court's conclusion on this point serves only to highlight the policy-driven aspects of its decision. The circuit court would no doubt agree that the cost of raising a child does not justify infanticide. And so it is not really the economics of childrearing that drove the analysis here. Indeed, economics cannot justify the circuit court's decision given Kentucky's safe-haven law. KRS 216B.190(3); KRS 405.075(2). Rather, baked into the court's decision is its policy preference that the life of an unborn

child is of no moral value. But no constitutional provision gives the circuit court the power to decide such a profoundly moral question.

6. The two laws pass constitutional scrutiny.

Because the Kentucky Constitution does not protect the right to abortion, rational basis review applies. *Beshear v. Acree*, 615 S.W.3d 750, 826 (Ky. 2020); *accord Moore v. N. Ky. Indep. Food Dealers Ass'n*, 149 S.W.2d 755, 756–57 (Ky. 1941). Legitimate state interests that justify the Human Life Protection Act and Heartbeat Law include, among others, preserving unborn life, protecting maternal health and safety, the mitigation of fetal pain, and protecting the integrity of the medical profession. *See Dobbs*, 142 S. Ct. at 2284; TR 261:14–20; *accord SisterSong Women of Color*, 2022 WL 2824904, at *3–4 (upholding Georgia's heartbeat law under rational basis review).

But even if this Court were to apply some form of heightened scrutiny, the Human Life Protection Act and the Heartbeat Law survive review. Under strict scrutiny review, for example, a challenged statute is constitutional "if it is suitably tailored to serve a 'compelling state interest.'" *C.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003) (citation omitted). Here, the Commonwealth "has a compelling reason for an interest in the existence of the current abortion statute." *See Sasaki*, 483 S.W.2d at 902. The Human Life Protection Act and the Heartbeat Law protect the lives of unborn children while providing the flexibility that physicians need to protect the health and safety of the mother. KRS 311.772(4); KRS 311.7706(2).

In concluding otherwise, the circuit court came up with a series of hypotheticals that, in its view, would follow if the challenged laws were applied. There is no support

for the circuit court's suggestion that the laws would "potentially obligate the state to investigate the circumstances and conditions of every miscarriage that occurs in Kentucky." Order at 14. Neither law has any application when a pregnant mother suffers a miscarriage. *See* KRS 311.772(3)(a) (applying only when person "knowingly" performs medical or surgical abortion), .772(5) (stating the law does not apply to pregnant mother); KRS 311.7705(1) (applying only when person "intentionally" performs abortion), .7705(4) (stating the law does not apply to pregnant mother). The same goes for the circuit court's suggestion that there is now "uncertainty" about the "future legality and logistics of In Vitro Fertilization." Order at 14. Neither law in any way affects IVF procedures. *E.g.*, KRS 311.772(1)(b) (defining "[p]regnant" to mean "having a living unborn human being within her body through the entire embryonic and fetal stages"). Nor are there, as the circuit court suggested, tax, estate, confinement, driving, and even child-labor issues associated with the two laws here. Order at 17. The Human Life Protection Act and Heartbeat Law simply prohibit abortions in specified circumstances.

C. The circuit court improperly enjoined the challenged laws based on claims the Facilities never raised.

Not only did the circuit court invent a new constitutional right, it also injected into this suit two new claims that the Facilities never brought. The circuit court held that the Human Life Protection Act and Heartbeat Law violate both equal-protection and religious-liberty principles. But the Facilities never asserted such claims. Presumably, they know that precedent forecloses them.

Yet the circuit court forged ahead. Order at 1, 15–16, 18–19. It justified doing so by citing cases in which the parties made minor errors, like "fail[ing] to cite" the applicable regulation, *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002), or failing to discuss a separate applicable definition, *Comm. Fin. Servs. Bank v. Stamper*, 586 S.W.3d 737, 740 (Ky. 2019). But it ignored the long-held rule that courts "do not, or should not, sally forth each day looking for wrongs to right." *Martin v. Wallace*, --- S.W.3d ---, 2022 WL 1284030, at *3 (Ky. Apr. 28, 2022) (citation omitted) (not final). Instead, courts "wait for cases to come to [them], and when they do [courts] normally decide only questions presented by the parties." *Id.* (citation omitted); *accord Delahanty v. Commonwealth*, 558 S.W.3d 489, 503 n.16 (Ky. App. 2018) ("The premise of our adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." (citation omitted)).

The circuit court's unprompted decision to insert new claims into this case is itself grounds for vacating this part of the temporary injunction. But this aspect of the circuit court's decision fails on the merits anyway.

1. The laws do not violate equal-protection principles.

As the circuit court recognized, Sections 1, 2, and 3 of the Kentucky Constitution function "much the same way" as the Fourteenth Amendment's Equal Protection Clause: they ensure that "similarly situated persons are treated alike." Order at 15 (citations omitted). Indeed, the Supreme Court of Kentucky has long recognized

that a "single standard" can be applied for both federal and state equal-protection challenges. *Commonwealth v. Howard*, 969 S.W.2d 700, 704 (Ky. 1998).

The overlap between the federal and state standards for equal protection ends the matter. In *Dobbs*, the Supreme Court expressly rejected any equal-protection argument about the abortion law at issue. Such a claim, *Dobbs* held, "is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." 142 S. Ct. at 2245. As *Dobbs* put it, "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretext designed to effect an invidious discrimination against members of one sex or the other.'" *Id.* at 2245–46 (citation omitted) (cleaned up).

Because there is no evidence of pretext here (and the circuit court did not say there was), an equal-protection challenge to the Human Life Protection Act and Heartbeat Law is subject only to rational basis review. *See id.* at 2246. And there is no suggestion that these laws do not satisfy such deferential review, given that "respect for and preservation of prenatal life at all stages of development" provides a legitimate basis to uphold the laws. *See id.* at 2284.

Even if the Court looks beyond *Dobbs*, these laws survive scrutiny under Kentucky's equal-protection case law. A prerequisite to an equal-protection violation is that the law treats similarly situated persons differently. *See Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465 (Ky. 2011). The circuit court's reasoning in this regard

both ignores prior case law and expands the notion of similarly situated persons so far as to question any pregnancy-related statute.

Start with prior case law. In *Sasaki*, Kentucky's high court decided pre-*Roe* that Kentucky's prohibition on abortion did not violate equal protection. 485 S.W.2d at 903. In that case, the party challenging the law argued that the law disproportionately affected poor women. *Id.* The Court rejected that this violated the Constitution's guarantee of equal protection. While acknowledging that "a rich woman has greater economic freedom than a poor woman," the Court reasoned that this difference "is not in and of itself a fact which would vitiate the statute on constitutional grounds." *Id.* Rather, because the statute treated all women the same, any disparity "caused by" economic status "was not caused by the wording of the statute." *Id.* (citation omitted).

Although the circuit court did not cite *Sasaski*'s equal-protection discussion, it framed the issue slightly differently. Rather than focus on economic distinctions among women, as the *Sasaki* challenger did, the circuit court found differential treatment not between women, but between men and women. It reasoned: "As similarly situated parties to the creation of life, the woman and the man must be treated equal under the law." Order at 15. But men and women are not similarly situated in this regard. After all, only women can become pregnant. So a law that only affects those who are pregnant does not treat similarly situated persons differently. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1984) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . .").

A contrary rule may well strip Kentucky women of many pregnancy-related benefits. For example, KRS 218A.274 gives pregnant women "priority" in accessing substance-abuse treatment. And KRS 214.160(1) requires a physician to test a pregnant woman for syphilis as soon as the physician "is engaged to attend the woman and has reasonable grounds for suspecting that pregnancy exists." The same goes for testing for hepatitis C. KRS 214.160(9)(a). Under the circuit court's reasoning, laws like these presumably violate equal protection because they treat men differently from pregnant women. And these are not the only laws that could be suspect under the circuit court's boundless theory. *See, e.g.*, KRS 205.617 (expanding Medicaid coverage for screening and treatment of cervical cancer); KRS 211.755(1) (stating that "a mother may breast-feed her baby or express breast milk in any location, public or private, where the mother is otherwise authorized to be"); KRS 217.105(2) (banning false advertising claiming to cure "prostate gland disorders").

2. Neither law implicates protections for religious liberty.

The circuit court also erred in holding that the Human Life Protection Act and Heartbeat Law are unconstitutional under Section 5 of the Kentucky Constitution. Order at 15–16, 19. Without the benefit of briefing, the circuit court decided that these laws codify a Christian theology. This, the circuit court decided, "infringes . . . upon the prohibition on the establishment of religion" because the General Assembly "established . . . that life begins at the very moment of fertilization" even though non-

Christian faiths[10] "hold a wide variety of views on when life begins." *Id.* at 15. But this claim is self-refuting at least as to the Heartbeat Law, which does not prohibit abortions after fertilization. As its shorthand name conveys, the Heartbeat Law prohibits abortions only after a fetal heartbeat has been detected. KRS 311.7704(1)(a). The Heartbeat Law thus does not rely on the view that "life begins at the very moment of fertilization." Order at 19.

Even still, believing that life begins at fertilization is a secular view, not solely a religious one. The view that life begins at fertilization is "the leading biological view on when a human's life begins." Br. of Biologists as Amici Curiae Supporting Neither Party at 3, 18, 24, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), https://perma.cc/SES3-PC26. So even if the challenged laws require adopting the view that life begins at fertilization, this view is the one supported by biology. That some religious views align with the predominant view of biologists does not turn the policy judgment of the General Assembly into a forbidden establishment of religion. "This is not a particularly close call." Order at 19.

Kentucky's high court has already rejected the circuit court's conclusion. In *Sasaki*, the Court held that "[t]he State is certainly competent to recognize that the embryo or fetus is potential human life" without violating the establishment of religion. 485

[10] Confusingly, the very source the circuit court cited for its conclusion that the laws impose a Christian belief reports that Christian churches take different positions on abortion. *See* Order at 16 n.10 (citing David Masci, *Where Major Religious Groups Stand on Abortion*, Pew Research Center, June 21, 2016, at https://perma.cc/B47F-4U9M (reporting that "[m]any of the nation's largest mainline Protestant [Christian] denominations" support abortion access)).

S.W.2d at 903. Rather than grapple with *Sasaki*, the circuit court relied on an out-of-context quote for its belief that Section 5 requires "a much stricter interpretation than the Federal counterpart found in the First Amendment's 'Establishment of Religion clause.'" *Neal v. Fiscal Court, Jefferson Cnty.*, 986 S.W.2d 907, 909–10 (Ky. 1999) (citation omitted). But the Supreme Court of Kentucky has since held that "the Kentucky Constitution provides no greater protection to religious practice than the federal Constitution does." *Gingerich v. Commonwealth*, 382 S.W.3d 835, 844 (Ky. 2012). As many courts have recognized, Kentucky's "anti-establishment provisions" are only more restrictive in "the context of state funding for religious schools."[11] *See, e.g.*, *Ark Encounter, LLC v. Parkinson*, 152 F. Supp. 3d 880, 922 (E.D. Ky. 2016) (collecting cases). Otherwise, Section 5 "is linked to the Supreme Court's interpretation of the First Amendment." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 617 n.78 (Ky. 2014). And the U.S. Supreme Court has explained that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (citations omitted). Here, Kentucky's unbroken history of protecting unborn life (discussed above) is reason enough to reject a Section 5 challenge to Kentucky's abortion statutes.

It is worth dwelling on how absurd the results would be if the Court adopts the circuit court's reasoning. According to the decision below, "[t]he General Assembly is not permitted to single out and endorse the doctrine of a favored faith for preferred

[11] This could be because the Kentucky Constitution has an additional provision discussing aid to religiously affiliated schools. Ky. Const. § 189. *But see Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022).

treatment." Order at 16. The court even called the statutes at issue "theocratic[-]based policymaking." *Id.* But the fact that some legislators have moral beliefs rooted in religion does not make their policy judgments unconstitutional. Were it otherwise, religious individuals would be excluded from public life. But the "American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less fanciful to their oaths of civil office than their unordained counterparts." *McDaniel v. Paty*, 435 U.S. 618, 629 (1978).

As Kentucky's highest court observed nearly 70 years ago, "there are 256 separate and substantial religious bodies" in the United States, and trying to "eliminate everything that is objectionable to any of these warring sects, or that which is inconsistent with their doctrines" would leave the law "in shreds." *Rawlings v. Butler*, 290 S.W.2d 801, 805 (Ky. 1956) (citation omitted).

Take theft, for example. The Ten Commandments state, "You shall not steal." *Exodus* 20:15. And Kentucky law is filled with prohibitions on theft. *See, e.g.*, KRS 514.030, .040. Yet some religions say that a person who steals food when hungry should be "pardoned from punishment." Arvind Khetia, *In different religions, is stealing ever OK?*, The Kansas City Star, July 23, 2016, https://perma.cc/TN8B-EC9U. And Kentucky law has no exception for thefts done out of hunger. *See* KRS 514.020 (listing defenses to theft). Does this mean that the General Assembly has, to quote the circuit court, "encase[ed] the doctrines of a preferred faith, while eschewing the competing views of other faiths"? Order at 19. It would be absurd to say that Section 5 prevents the General

Assembly from criminalizing theft. Yet this is exactly what the circuit court sees as "the imposition of a particular faith by the government." *Id.*

For another example, consider child marriage. In 2018, the General Assembly passed Senate Bill 48, which established a new minimum age for marriage. *See* 2018 SB 48, https://apps.legislature.ky.gov/record/18rs/sb48.html (last visited July 28, 2022). Before this reform, the Commonwealth had "some of the laxest laws in the country, including . . . no bottom-line age floor for marriage." Press Release, Tahirih Justice Center, *Kentucky Governor Signs Landmark Child Marriage Reform Bill Into Law* (Mar. 29, 2018), https://perma.cc/7X3D-EUSU. But this issue too implicates religious beliefs. A recent national survey identified child marriages in various faiths. Fraidy Reiss, *America's Child-Marriage Problem*, N.Y. Times, Oct. 13, 2015, at A25 https://perma.cc/SSE9-8EAS. Do religious beliefs about child marriage mean that the General Assembly cannot forbid child marriages without creating an establishment problem? Of course not.

Thankfully, all these absurd results are already foreclosed by precedent. A statute does not "violate[] the Establishment Clause just because it 'happens to coincide or harmonize with tenets of some or all religions.'" *Harris v. McRae*, 448 U.S. 297, 319–20 (1980) (citation omitted) (upholding federal ban on financing abortions with tax dollars against Establishment Clause challenge even though that restriction "may coincide with the religious tenets of the Roman Catholic Church"). Just as the Establishment Clause does not prohibit "laws prohibiting larceny" even though "the Judeo-Christian religions oppose stealing," *id.* at 319, the Establishment Clause likewise

does not invalidate the Heartbeat Law and Human Life Protection Act simply because some religions oppose abortion.

D. The claims about the effective date of the Human Life Protection Act lack merit.

The circuit court also erred in accepting the Facilities' arguments that they have raised a serious question about whether the scope and effective date of the Human Life Protection Act is unconstitutional. Order at 11–12. This claim comes in two parts: first, that the General Assembly unconstitutionally delegated its lawmaking authority to the U.S. Supreme Court. And second, that the effective date of the law is unconstitutionally vague. Both claims are wrong.[12]

1. The General Assembly did not delegate any legislative authority to the U.S. Supreme Court in defining the effective date or scope of Kentucky's prohibition on abortion in KRS 311.772(2). The Human Life Protection Act provides that "the provisions of this section shall become effective immediately upon . . . the occurrence of . . . [a]ny decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973), thereby restoring to the Commonwealth of Kentucky the authority to prohibit abortion." *Id.* (citation italics added). The U.S. Supreme Court neither passed the Human Life Protection Act nor signed it into law. The General Assembly and the then-Governor did that. The General Assembly simply provided a triggering event for when the Human Life Protection Act took effect: when the U.S. Supreme Court overrules *Roe*.

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[12] None of these alleged delegation and vagueness issues apply to the Heartbeat Law. Order at 12 (acknowledging as much).

The U.S. Supreme Court just did that. It overruled *Roe* and *Casey* in *Dobbs*. 142 S. Ct. at 2284. In doing so, the Supreme Court exercised its own judicial power, not Kentucky's legislative power. This exercise of judicial power, planned for by the General Assembly through the exercise of its legislative power, was specified in statute as the event on which Kentucky's law would go into effect. KRS 311.772(2). "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Bloemer v. Turner*, 137 S.W.2d 387, 391 (Ky. 1939). That is what happened here.

Nor does the law impermissibly delegate the scope of its prohibition. Under the statute, the law "shall become effective . . . to the extent permitted[] by . . . any decision of the United States Supreme Court" reversing *Roe*. KRS 311.772(2). This provision is clear, and it does not require, invite, or allow any exercise of legislative power by the U.S. Supreme Court. Instead, it provides that if the Supreme Court overrules *Roe*, Kentucky's abortion prohibition would take effect to the greatest extent possible. This does not delegate any legislative authority to the Supreme Court; it simply provides a savings clause in case the law conflicts in some respect with the Supreme Court's decision overruling *Roe*.

The Facilities' reliance on the words "to the extent permitted by" is irrelevant. The Supreme Court in *Dobbs* overruled *Roe* in its entirety. *Dobbs*, 142 S. Ct. at 2284 ("We now overrule [*Roe* and *Casey*] and return that authority to the people and their

elected representatives."). Any discussion of which abortions would not be prohibited if the Supreme Court had written a different opinion is academic.

And the circuit court's reliance on a case from more than 60 years ago is unpersuasive. Order at 11 (citing *Dawson v. Hamilton*, 314 S.W.2d 532, 536 (Ky. 1958)). For starters, *Dawson* is inapplicable because here the General Assembly fixed the extent to which Kentucky law prohibits abortions. *See* KRS 311.772(3). The problem with the statute in *Dawson* was that it wed the standard time in the Commonwealth to whatever Congress or the Interstate Commerce Commission ("ICC") decided. *Dawson*, 314 S.W.2d at 535. Whenever an act of Congress or an order from the ICC changed standard time, the statute at issue provided that standard time in the Commonwealth would change too. *Id.* The predecessor to Kentucky's highest court held that this provision "constitutes an unconstitutional delegation of legislative power." *Id.* In contrast, KRS 311.772(2) provides a definite rule: the Supreme Court overruled *Roe*, so KRS 311.772(3) is in full effect.

The key principle the *Dawson* court relied on shows how its reasoning does not apply here. That principle is that "the adoption by or under authority of a state statute of prospective [f]ederal legislation, or [f]ederal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power." *Id.* (citation omitted). This principle, however, specifically mentions only federal legislation and federal administrative rules. Notably absent is any discussion of relying on federal court holdings describing constitutional rights. And there is a good reason for that omission: many States' long-arm statutes authorize jurisdiction up to the limits of the federal

Constitution. *See Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 56–57 (Ky. 2011).

2. Kentucky precedent interpreting Section 60 of the Kentucky Constitution confirms that a law tied to a triggering event is constitutional. That section states that "[n]o law . . . shall be enacted to take effect upon the approval of any other authority than the General Assembly . . . ." Ky. Const. § 60. At its core, the Facilities' delegation argument is really a Section 60 argument dressed up differently. And an examination of Kentucky precedent on the issue shows that there is a "well settled rule that a legislature may make a law to become operative on the happening of a certain contingency or future event." *Walton v. Carter*, 337 S.W.2d 674, 678 (Ky. 1960) (citation omitted).

An early invocation of this rule arose in a case involving a statute that assessed taxes, deposits, and securities against out-of-state insurance companies equal to the tax, deposit, or security required by that company's state of incorporation. *Clay v. Dixie Fire Ins. Co.*, 181 S.W. 1123, 1123 (Ky. 1916). In discussing Section 60, Kentucky's high court noted that Kentucky statutes "contain a great many laws that become effective only when the conditions described in the statute exist, but of course this does not mean that they 'take effect upon the approval of any other authority than the General Assembly.'" *Id.* at 1124 (citation omitted). Instead, the court recognized that "the Legislature itself says that, when certain conditions exist, the law shall be so and so." *Id.* at 1125. When the triggering event occurs, the law "becomes effective, not by virtue of

the voice of the foreign [state], but by virtue alone of the legislative will of this commonwealth." *Id.* Such a trigger, the court noted, "is no surrender of the legislative function." *Id.*

3. The circuit court also incorrectly found that the effective date of the Human Life Protection Act is unconstitutionally vague and unintelligible. Order at 11–12. Importantly, this issue is now moot. That is because the Facilities' vagueness argument is that they lacked clear notice only about *when* the act prohibits abortion—either on the date of the decision in *Dobbs* or when the mandate in *Dobbs* issued. Order at 11–12. Either way, the Facilities necessarily agree that the law is now effective,[13] and so resolution of this issue has no practical effect going forward. *See Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 797–99 (Ky. 2021).

Even still, the statute's effective date is not unconstitutionally vague. The provisions of the Human Life Protection Act "become 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), thereby restoring to the Commonwealth of Kentucky the authority to prohibit abortion." KRS 311.772(2) (emphasis added). A person of ordinary intelligence would have no difficulty understanding that the provisions are effective as soon as the Supreme Court issues a decision that overrules *Roe*. And *Dobbs* does just that. It expressly reverses *Roe* and "return[s] the issue of abortion to the people's elected representatives." *Dobbs*, 142 S. Ct. at 2243. So from the moment the Supreme

[13] The Supreme Court's docket in *Dobbs* reflects that the judgment issued on July 26, 2022.

Court issued its "decision," the act's prohibitions took effect. There is nothing vague, unclear, or unintelligible about it.

The Facilities argue that "decision" could refer to issuance of the Supreme Court's opinion, which occurred on June 24, or issuance of the Court's mandate, which did not occur until at least 25 days later. *See* Sup. Ct. R. 45; Compl. ¶¶ 112–22. That is wrong. A decision is simply a court's determination of a case. *See*, *e.g.*, *Decision*, *Black's Law Dictionary* (11th ed. 2019). And an opinion is a "court's written statement explaining its decision in a given case." *Id.* at *Opinion*. So the court rendered its decision when it issued its opinion. And that is the moment when *Roe* was overruled and the authority to prohibit abortion returned to the Commonwealth. *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.").

A mandate, on the other hand, is a separate "order from an appellate court directing a lower court to take a specified action." *See Mandate*, *Black's Law Dictionary* (11th ed. 2019). It is a directive to the lower court to act and a relinquishment of appellate jurisdiction. *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). There is no mistaking the Human Life Protection Act's reference to "decision" as the issuance of the mandate. The mandate is not what reverses *Roe*. It is not what returns the authority to prohibit abortion to the Commonwealth. *Dobbs* itself stated: "We *now* overrule [*Roe* and *Casey*] and return that authority to the people and their elected representatives." 142 S. Ct. at 2284 (emphasis added).

The circuit court pointed out that other state attorneys general have stated that it is the issuance of the Supreme Court's judgment or mandate that triggers their respective state laws. Order at 12 & n.4. But the reason for that is simple: those laws have different language than Kentucky's. Texas's law takes effect 30 days after "the issuance of United States Supreme Court *judgment* in a decision" overruling *Roe*. 2021 Tex. Sess. Law Serv. Ch. 800 (H.B. 1280) § 3 (emphasis added). And Idaho's law says basically the same: it takes effect 30 days after "the issuance of the *judgment* in any decision" restoring authority to the States. Idaho Code Ann. § 18-622(1) (2020) (emphasis added). Both expressly refer to the "judgment," while KRS 311.772 does not.[14]

II. The Facilities did not prove irreparable harm.

To obtain a temporary injunction, the Facilities had to show that they will suffer an irreparable injury absent relief. *See Cameron*, 628 S.W.3d at 71. "This is a mandatory prerequisite to the issuance of any injunction." *Id.* But the circuit court confused the inquiry here. Rather than identify any irreparable harm to the Facilities, the circuit court focused on harms that third parties might suffer. Order at 7–8. But even those alleged harms are not enough to warrant a temporary injunction. That is because, at bottom, the Facilities' allegations of irreparable harm are tied up in the merits of this action. So if the Court finds for the Attorney General on the merits, any alleged harm suffered as

[14] Because it is not vague or unintelligible, the act does not invite arbitrary enforcement. *See Tobar v. Commonwealth*, 284 S.W.3d 133, 135 (Ky. 2009). Indeed, the Attorney General has made clear that—apart from the circuit court's injunction—the law is currently in effect and so can be enforced. Human Life Protection Act Advisory, Attorney General (June 24, 2022), https://perma.cc/JD4H-UM5E.

a result of the challenged laws does not justify a temporary injunction. *See Cameron*, 628 S.W.3d at 73.

The Facilities cannot explain how they are irreparably harmed if they cannot perform abortions. The circuit court's identification of the Facilities having to turn away patients suggests concern that stopping abortions will affect the Facilities' bottom lines. Order at 7–8. After all, the Facilities are in the abortion business. But such an injury is not irreparable. If it were, any time a regulated entity loses clients or business because of a new law, the business could automatically claim irreparable harm. Such monetary loses, which are the cost of doing business in a regulated field, do not rise to the level of irreparable harm—*i.e.*, "incalculable" damages or "something of a ruinous nature." *See Barnes v. Goodman Christian*, 626 S.W.3d 631, 638 (Ky. 2021) (citations omitted).

The circuit court implicitly recognized this problem by focusing on harms that might befall pregnant women. As noted above, *Dobbs* did away with any ability by the Facilities' to litigate on behalf of women seeking an abortion. Even so, the circuit court focused its analysis on "the harms and risks that can result from, and be exacerbated by, pregnancy"—essentially holding that unnamed expectant mothers will suffer an irreparable injury absent a temporary injunction. Order at 8. To be sure, there are instances in which timing matters for an expectant mother who desires an abortion—

certainly if her life is in danger or there is a serious risk of permanent impairment. But, as noted above, both laws have a health-related exception.

In the end, the question of irreparable harm turns on whether the circuit court was correct that the Kentucky Constitution protects the right to an abortion. As the Court put it in *Cameron*, whether irreparable injury exists in a constitutional challenge to state law "is tied to [the] constitutional claims and the likelihood of success." 628 S.W.3d at 73; *accord Ward v. Westerfield*, --- S.W.3d ---, 2022 WL 1284024, at *5 (Ky. Apr. 28, 2022) (not final). So as long as the Kentucky Constitution does not protect the right to an abortion, it cannot be said that the Human Life Protection Act and the Heartbeat Law cause irreparable harm.

III. The equities overwhelmingly favor vacating the injunction.

Before granting a temporary injunction, "the trial court must find 'that an injunction will not be inequitable, *i.e.* will not unduly harm other parties or disserve the public.'" *Beshear*, 635 S.W.3d at 795 (citation omitted). The circuit court noted that "[c]ourts balancing the equities of injunctive relief should consider 'possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo.'" Order at 8 (citation omitted). But in balancing these factors the circuit court went badly off the rails.

The circuit court found that stopping abortions "is detrimental to the public interest" because "[p]ublic health concerns carry great weight in the public interest analysis" and "abortion is a form of healthcare." *Id.* Not stopping there, the circuit court even voiced concern that "[p]regnancy, childbirth, and the resulting raising of a

child are incredibly expensive." *Id.* at 9. But these assertions are just policy preferences. Worse, this discussion contradicts what the Supreme Court of Kentucky held just last year. The General Assembly, not the courts, decides what the public's interest is. And "[t]he 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 (cleaned up). The circuit court's mistake here was the same error that the Supreme Court identified in *Cameron*—the "trial court substituted its view of the public interest for that expressed by the General Assembly." *Id.* In other words, what the circuit court considers to be "healthcare" is irrelevant. The same goes for the circuit court's concern about the expenses of childcare. The General Assembly is the policymaking branch of Kentucky government, and it has spoken.

In fact, the Supreme Court went even further in *Cameron*. It held that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Id.* at 73. So not only was the circuit court wrong to conclude that the public interest would be harmed by enforcement of the statutes, but the irreparable harm runs in the opposite direction: it is the public that is irreparably harmed by the circuit court's temporary injunction. *Id.* As *Cameron* held, "the public interest strongly favors adherence" to the laws enacted by the General Assembly. *See id.* at 78.

The most important part of the circuit court's public-interest discussion, however, is what the court did not say. The circuit court never mentioned the loss of unborn life that has resulted from its restraining order and now its temporary injunction. As the circuit court noted, because of its restraining order, the Facilities have essentially

returned to pre-*Dobbs* business as usual (with one exception).[15] Order at 2. To give an idea of how many abortions are now occurring, 4,104 abortions were performed in Kentucky in 2020. *Id.* at 3. As of the filing of this motion, the Human Life Protection Act and Heartbeat Law have been enjoined for roughly one month—meaning that about 350 illegal abortions have occurred. For every day that the circuit court's temporary injunction remains in place, roughly a dozen more unborn lives will be lost to abortion. This simple fact should have predominated the circuit court's public-interest analysis. Yet it was not even mentioned.

The circuit court's other bases for finding that the balance of equities tips toward the Facilities also fall flat.[16] Although the Commonwealth has no interest in enforcing unconstitutional laws, the laws at issue are constitutional, as discussed above. And the circuit court's suggestion that its temporary injunction "restore[s] the status quo" that has existed for 50 years, Order at 9, ignores that the status quo in Kentucky has never been the recognition of a state constitutional right to an abortion. The status

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[15] That exception is EMW is no longer performing abortions after 15 weeks. *See Planned Parenthood Great N.W. v. Cameron*, No. 3:22-cv-198-RGJ, 2022 WL 2763712, at *1 (W.D. Ky. July 14, 2022).

[16] The circuit court also mentioned testimony from Professor Lindo to the effect that "the burden of abortion bans falls hardest on poorer and disadvantaged members of society." Order at 8. But there is an obvious counterpoint: As Professor Lindo admitted, if the challenged laws are enforced, more minority children in Kentucky will be born. TR 148:21–149:10. In discussing the equities, the circuit court also chided Professor Snead for expressing concern with supporters of abortion "talking about the harms of too many unwanted minority and poor children as causing economic harms." *Id.* at 269:21–24; *see* Order at 8. No less than a U.S. Supreme Court Justice shares Professor Snead's concerns. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783–91 (2019) (Thomas, J., concurring).

quo since *Mitchell* has been that, as a state constitutional matter, the General Assembly can prohibit abortion if it so chooses. The General Assembly did so from 1910 until *Roe*. And in the wake of *Roe*, the General Assembly reaffirmed its intention to protect unborn life to the fullest extent possible. KRS 311.710(5). *This* is the status quo that the circuit court disrupted.

CONCLUSION

The Court should vacate the circuit court's temporary injunction.

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 Gray Kilgore
Alexander Y. Magera
Michael R. Wajda
Assistant Solicitors General

Counsel for the Attorney General

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

CERTIFICATE OF SERVICE

I certify that on July 28, 2022, a copy of the above was filed with the Court and served via U.S. mail and electronic mail (where indicated below):

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

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

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

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

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, New York 10038
(212) 261-4593
Hana.bajramovic@ppfa.org

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

Leanne Diakov
Kentucky Board of Medical Licensure
310 Whittington Pkwy, Suite 1B
Louisville, Kentucky 40222
Leanne.Diakov@ky.gov

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

Hon. Mitch Perry
Circuit Judge
Jefferson Circuit Court
700 West Jefferson Street
Louisville, Kentucky 40202

Counsel for the Attorney General

APPENDIX

Exhibit	Description
1	Verified Complaint for Injunctive & Declaratory Relief, filed June 27, 2022
2	Restraining Order, entered June 30, 2022
3	Transcript of Temporary-Injunctive Hearing, held July 6, 2022
4	Opinion & Order Granting Temporary Injunction, entered July 22, 2022