No. 2022-SC-0329-TG

In the
Supreme Court of Kentucky

DANIEL CAMERON

Appellant,

v.

EMW WOMEN'S SURGICAL CENTER, P.S.C., ET AL.

Appellees.

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

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2022 I filed, via hand-delivery, the original and nine (9) true and correct copies of this brief by delivering to Kelly Stephens, Clerk of the Supreme Court of Kentucky, State Capitol Room #235, 700 Capitol Ave., Frankfort, KY 40601. I further certify that on that same date I served the same by First-Class U.S. Mail and email on the following:

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INTRODUCTION

This case concerns the constitutionality of two statutes that prohibit almost all abortion in the Commonwealth, which have eliminated access to this critical aspect of reproductive healthcare and stripped Kentuckians of their ability to decide for themselves whether to assume the health risks and responsibilities of pregnancy and parenting. The question before this Court is whether the circuit court abused its discretion in entering a temporary injunction preventing enforcement of the abortion bans while the parties litigate the merits of the case.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to this Court's August 18 Opinion and Order, oral argument is scheduled for November 15, 2022, at 10 a.m. Oral argument will allow this Court to evaluate the weighty issues in this case, including whether Kentuckians are being irreparably harmed by abortion bans that force them to remain pregnant and give birth against their will to the detriment of their health, lives, and futures.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. Statutory Framework

Abortion is a very safe and common form of healthcare that Kentuckians have relied on for decades in order to protect their health, lives, autonomy, and the well-being of themselves and their families. This case concerns two near-total bans on abortion (collectively, "the Bans") that were passed by the General Assembly in 2019, although neither took effect until this summer. During the time that they have been in effect, the Bans have prevented countless Kentuckians from accessing abortion in the Commonwealth, to the detriment of their health and lives.

The first law, KRS 311.772 (the "Trigger Ban"), criminalizes the provision of abortion throughout pregnancy. The Trigger Ban does not specify a point in pregnancy at which the prohibition would become operative or a date on which the law would take effect. Instead, the General Assembly left the scope and timing of the ban up to the U.S. Supreme Court: The Trigger Ban would become "effective immediately upon, and to the extent permitted, by 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)." KRS 311.772(2)(a). Earlier this year—three years after the Trigger Ban was passed—the U.S. Supreme Court overruled the federal constitutional right to abortion recognized in *Roe*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022). Accordingly, the Trigger Ban now criminalizes virtually all abortions in the Commonwealth. The law prohibits anyone from either knowingly "administer[ing] to, prescrib[ing] for, procur[ing] for, or sell[ing] to any pregnant woman any medicine, drug, or other substance" or knowingly "[u]s[ing] or employ[ing] any instrument or procedure upon a pregnant woman"

at any stage of pregnancy, if those actions are done "with the specific intent of causing or abetting the termination of the life of an unborn human being." KRS 311.772(3)(a)(1)–(2). The Trigger Ban's extremely limited medical emergency exception permits abortion only "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 statute contains no exceptions for cases of rape or incest. Any person who knowingly provides an abortion in violation of the Trigger Ban is guilty of a Class D felony, KRS 311.772(3)(b), punishable by imprisonment of one to five years, KRS 532.060(2)(d).

In 2019, the General Assembly also passed a separate, near-total abortion ban, KRS 311.7701–11 (the "Six-Week Ban"). The Six-Week Ban deprives individuals in the Commonwealth of their ability to have an abortion beginning very early in pregnancy by making it a crime to "caus[e] or abet[] the termination of" a pregnancy once embryonic or fetal cardiac activity is detectable. KRS 311.7706(1); KRS 311.7705(1); KRS 311.7704(1). In a typical pregnancy, transvaginal ultrasound can detect this activity beginning around six weeks of pregnancy, as measured from the first day of the patient's last menstrual period ("LMP"), when cells that form the basis for development of the heart later in gestation begin producing pulsations. Ver. Compl. (attached as Pls.' App'x Ex. 2) ¶ 33. Six weeks LMP is before many patients realize they are pregnant, and even for individuals with highly regular, four-week menstrual cycles, it is just two weeks after missing their first period. *Id*. In 2020, the most recent year for which data is available, only 4% of abortions in Kentucky were provided prior to six weeks LMP. *Id.* ¶ 68; Pls.' TI Hearing Ex. 3 (attached as Pls.' App'x Ex. 3) at 7. The Six-Week Ban contains exceptions only for abortions necessary (1)

to prevent the pregnant patient's death, or (2) to prevent a "substantial and irreversible impairment of a major bodily function." KRS 311.7706(2)(a). The law contains no exceptions for cases of rape or incest. A violation of the Six-Week Ban is a Class D felony, KRS 311.990(21)–(22), which is punishable by imprisonment of one to five years, KRS 532.060(2)(d). Shortly after it was passed, the Six-Week Ban was temporarily enjoined by a federal court under then-existing federal constitutional law. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019). On June 30, 2022, the federal court injunction was dissolved in light of *Dobbs*. Order, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH (W.D. Ky. June 30, 2022), ECF No. 94.

II. Procedural Background

On June 27, 2022, immediately following the U.S. Supreme Court's decision overturning *Roe v. Wade*, Plaintiffs—the only two abortion clinics in Kentucky, as well as the owner of one of those clinics—filed this case in Jefferson County Circuit Court on behalf of themselves, their staff, and their patients, challenging the Trigger Ban and Six-Week Ban under several provisions of the Kentucky Constitution. Ver. Compl. ¶¶ 91–130. The main constitutional questions presented are whether the Bans violate the rights to privacy and self-determination guaranteed by Sections 1 and 2 of the Kentucky Constitution, and whether the Trigger Ban is an unconstitutional delegation of legislative power. Plaintiffs sued the officials responsible for enforcing the Bans, including Attorney General Daniel Cameron, the Appellant in this case, as well as Eric Friedlander, Secretary of the Cabinet for Health and Family Services; Michael S. Rodman, Executive Director of the Kentucky Board of Medical Licensure; and Thomas B. Wine, the Commonwealth's

Attorney for the 30th Judicial Circuit of Kentucky. On the same day Plaintiffs filed the underlying action, Plaintiffs immediately moved for an emergency restraining order, followed by a temporary injunction, to prevent irreparable harm to Plaintiffs and their patients, including forced continued pregnancy and childbirth, which poses serious risks to patients' health and well-being.

A. Restraining Order

On June 30, 2022, the circuit court entered a restraining order preventing enforcement of the two challenged laws. Order Granting Restraining Order, No. 22-CI-003225 (June 30, 2022). Defendant Attorney General Cameron then filed a petition for writ of mandamus and prohibition, and an emergency motion for intermediate relief, with the Court of Appeals. Two days later, Judge Glenn E. Acree denied the motion. *Cameron v. Perry*, No. 2022-CA-0780-OA, 2022 WL 2443398, at *6 (Ky. App. July 2, 2022). On July 3, the Attorney General filed an almost-identical petition for writ of mandamus and prohibition, and an emergency motion for intermediate relief with this Court, which denied that motion on July 5. Order Den. Pet'r's Emergency Mot. for Intermediate Relief, No. 2022-SC-0266-OA (July 5, 2022). Both actions subsequently became moot when the circuit court entered a temporary injunction and dissolved the restraining order.

B. Temporary Injunction Proceedings

On July 6, 2022, the circuit court held an evidentiary hearing on Plaintiffs' request for a temporary injunction. Four witnesses testified at the hearing, and the court accepted thirteen exhibits into evidence. Plaintiffs called Dr. Ashlee Bergin as an expert and fact witness. The court qualified Dr. Bergin as an expert in obstetrics and gynecology (OBGYN) and abortion care. Tr. of July 6 Hearing ("Tr.") (attached as Pls.' App'x Ex. 4)

22:15–19. Dr. Bergin is a board-certified OBGYN who provides full-spectrum OBGYN care at UofL Health and provided abortion care at Plaintiff EMW before the Bans took effect. Tr. 19:5–20:18. She is also Assistant Professor and the Assistant Director of the Ryan Residency Program in the Department of Obstetrics, Gynecology and Women's Health at the University of Louisville School of Medicine. *See id.* She testified that she trains OBGYN residents, including on the provision of abortion care, which is required to be offered to OBGYN residents by the Accreditation Council for Graduate Medical Education (ACGME). Tr. 20:7–20:15. Dr. Bergin testified that it is her moral and ethical duty to provide comprehensive reproductive healthcare for her patients, which includes abortion care. Tr. 23:3–7.

Plaintiffs also called Jason Lindo, Ph.D., as an expert witness. The court qualified Dr. Lindo as an expert in economics and policy evaluation. Tr. 92:25–93:5. Dr. Lindo is an economist and professor of economics at Texas A&M University, where he teaches courses on evaluating causal effects to both undergraduate and Ph.D. students. Tr. 89:12–90:21. He has published numerous peer-reviewed articles focusing on health economics and issues concerning youth. Tr. 91:22–92:5. He is also a specialized co-author who evaluates health economics papers for Economic Inquiry and other publications, and a research associate at the National Bureau of Economic Research. Tr. 91:2–21.[1]

Plaintiffs also submitted, with the motion for a temporary injunction, affidavits from several EMW patients who obtained abortions prior to the filing of the instant action.

[1] Plaintiffs also submitted affidavits with the motion for a temporary injunction, including testimony from Dr. Bergin and Dr. Lindo that mirrored their testimony at the hearing. Aff. of Ashlee Bergin, M.D., M.P.H. (attached as Pls.' App'x Ex. 5); Aff. of Jason Lindo, Ph.D. (attached as Pls.' App'x Ex. 6).

Affs. of Jane Does #1–6 (attached as Pls.' App'x Ex. 7). These patients explained the importance of being able to access abortion care for a host of reasons, including struggling after a spouse died, Jane Doe 1 Aff. 1 ¶¶ 1, 3, 5; being a single parent to two young children while working at a demanding job outside traditional hours, Jane Doe 2 Aff. ¶¶ 1–3, 5–6; facing a housing shortage after her home was lost in a tornado, Jane Doe 3 Aff. ¶¶ 1–2, 10; and deciding to avoid another pregnancy after her prior one made her very ill and because she was the primary caretaker for two children under four years old, Jane Doe 6 Aff. ¶¶ 3, 5–7.

Defendants called two experts to testify, Dr. Monique Chireau Wubbenhorst, an OBGYN, and O. Carter Snead. Dr. Wubbenhorst is not an expert on abortion care: She has never provided an abortion, Tr. 228:17–21, has conducted only one study on abortion, Tr. 229:5–8, and, unlike Dr. Bergin, was not offered or qualified as an expert in abortion care. *Compare* Tr. 182:18–183:4 *with* Tr. 22:15–19. Dr. Wubbenhorst questioned the accuracy of abortion and maternal mortality statistics, but the circuit court found that she failed to provide any evidence to support her criticisms. Op. & Order Granting Temp. Inj. at 4 ("TI Order") (attached as Pls.' App'x Ex. 1). In fact, when asked about Kentucky's statistics on abortion safety and maternal mortality, she admitted she had not reviewed them, and therefore could not form an opinion about them. Tr. 216:14–217:12. Mr. Snead is a law professor and public bioethicist who opposes abortion.

C. Circuit Court's Order Granting a Temporary Injunction

On July 22, 2022, the circuit court issued a temporary injunction, after finding that Plaintiffs have standing and meet the requirements for temporary injunctive relief. In so doing, the court made numerous factual findings. For example, the circuit court credited

the testimony of Dr. Bergin regarding "the complications that can arise from pregnancy, the relative safety of abortions, and the harms that can result from lack of access to abortions." TI Order at 3. The latest records from the Kentucky Department of Public Health Office of Vital Statistics demonstrate that abortion is much safer than childbirth. In 2020, of the 4,104 abortions provided in Kentucky, there were 30 complications, the majority of which were minor, and there were zero deaths. *Id*. In contrast, in 2018, the last year data is available, there were 16.6 per 100,000 pregnancy-related deaths. *Id*. Furthermore, the circuit court found that the narrow medical emergency exceptions in the laws are "insufficient" based on Dr. Bergin's testimony that it is "medically and ethically unacceptable to force a patient [to] deteriorate to the point at which she would become clearly eligible for the exception." *Id*.

In addition to the harm to patients' health, the circuit court found that the Bans would detrimentally affect Kentuckians' lives and families. On this point, the circuit court credited Dr. Lindo's testimony. *Id*. Based on his testimony, the circuit court found that being prohibited from obtaining an abortion means that people will face increased costs, including medical costs, and disruption to one's education and career. *Id.* at 3–4. The circuit court further found that "[n]ot all Kentuckians are legally protected from pregnancy discrimination in the workplace, or entitled to reasonable accommodations needed to perform their jobs while pregnant," and "many Kentuckians are not entitled to paid time off for pregnancy, delivery, or recovery." *Id*. at 4. Furthermore, although "some Kentuckians will be able to travel to other states to access abortions, not all will be able to afford to, and others will be prevented by the similarly restrictive policies of surrounding states." *Id*. The circuit court also found that Plaintiffs were forced, in the few days between

when *Roe* was overturned and when the restraining order was granted, to turn away over two hundred patients seeking abortion who would be subject to the harms of forced pregnancy and childbirth. *Id.* at 7–8. Based on these factual findings, the court held that Plaintiffs and their patients would suffer irreparable harm if relief were not granted.

The court balanced the equities, and found that the "denial of this healthcare procedure is detrimental to the public interest," and recognized that Kentuckians would suffer "economic harms" as a result of the abortion bans, with the burdens falling "hardest on poorer and disadvantaged members of society." *Id*. at 8. The circuit court also noted that the injunctive relief would "merely restore the status quo that has existed in Kentucky for nearly fifty years." *Id*. at 9. As for harm to Defendants, the court found that, "at most," Defendants will suffer "the harm of delayed enforcement," that Defendants' interest in enforcing the Bans is "uncertain," and, as such, "any harm the Defendants may suffer is outweighed by the interest of the Plaintiffs." *Id*.

The circuit court further held that Plaintiffs have "demonstrated at the very least a substantial question as to the merits regarding the constitutionality of both the Trigger Ban and the Six Week Ban," including whether they violate "the rights of privacy, self-determination, equal protection, and religious freedom guaranteed by the Kentucky Constitution." *Id.* at 20. More specifically, the circuit court held that "Sections 1 and 2 of the Kentucky Constitution broadly protect an individual's rights to liberty and self-determination." *Id.* at 12. "Kentucky has a prodigious history of protecting privacy at a greater level than the federal Constitution," which "stands for the proposition that Kentuckians should have control over basic family planning choices, free from governmental interference." *Id.* at 18. The Bans "not only compromise[] a woman's right

to self-determination protected in Section 2 of the Kentucky Constitution by taking away the choice to have an abortion in many instances, but also undercut a woman's choice to have children at all" given the fear that if complications arise during pregnancy "their health and safety will be deemed subordinate to the life of a fetus." *Id.* at 14. As to Plaintiffs' nondelegation claim against the Trigger Ban, the circuit court held that it "impermissibly delegated its legislative authority to a federal body (the United States Supreme Court) in violation of the Kentucky Constitution." *Id.* at 11.

D. Post-Temporary Injunction Proceedings

On July 28, 2022, Defendant Attorney General Cameron brought a CR 65.07 motion for interlocutory relief and a CR 65.07(6) emergency motion for intermediate relief from the temporary injunction in the Court of Appeals, and requested that the Court of Appeals recommend transfer to this Court pursuant to CR 74.02(5). Att'y Gen. Daniel Cameron's CR 65.07 Mot. Interlocutory Relief, No. 2022-CA-0906-I (July 28, 2022); Att'y Gen. Daniel Cameron's Emergency Mot. Intermediate Relief, No. 2022-CA-0906-I (July 28, 2022); Emergency Mot. Ct. App. Recommend Transfer of Case, No. 2022-CA-0906-I (July 28, 2022). That same day, Defendant Cameron moved this Court to transfer the CR 65.07 appeal and consolidate it with Defendant's still-pending original action seeking relief from the restraining order in this Court. Att'y Gen. Daniel Cameron's Mot. Transfer & Consolidate, No. 2022-SC-0266-OA (July 28, 2022). Plaintiffs joined the motions to transfer and consolidate, albeit for different reasons. Pls.-Appellees' Resp. Appellant Daniel Cameron's Emergency Mot. Ct. App. Recommend Transfer of Case, No. 2022-CA-0906-I (Aug. 1, 2022); Pl. Real Parties in Interest's Resp. Ptr.'s Mot. Transfer & Consolidate, No. 2022-SC-0266-OA (Aug. 1, 2022).

On August 1, 2022, Court of Appeals Judge Thompson granted Defendant Cameron's CR 65.07(6) emergency motion for intermediate relief and stayed the circuit court's order temporarily enjoining Defendants from enforcing the challenged laws, Order Granting Mot. Emergency Relief, No. 2022-CA-0906-I (Aug. 1, 2022), immediately halting abortion services in the Commonwealth. On August 2, 2022, Plaintiffs appealed that order to this Court. Pls.-Appellants' Mot. Emergency Interlocutory Relief Pursuant CR 65.09, No. 2022-SC-0326-I (Aug. 2, 2022). On August 4, 2022, the Court of Appeals recommended transfer of this case to the Kentucky Supreme Court. Aug. 4 Order, No. 2022-CA-0906-I (Aug. 4, 2022). On August 18, 2022, this Court denied Plaintiffs' motion for emergency interlocutory relief and accepted transfer of Defendant's CR 65.07 motion for interlocutory relief from the circuit court's entry of temporary injunction. Aug. 18 Op. & Order.

ARGUMENT

I. Standard of Review

The standard for granting a temporary injunction is clear. Relief should be granted where a plaintiff shows: (1) irreparable injury is probable if injunctive relief is not granted; (2) the equities—including the public interest, harm to the defendant, and preservation of the status quo—weigh in favor of the injunction; and (3) there is a "serious question warranting a trial on the merits." *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978). "Unless a trial court has abused [its] discretion, this Court has no power to set aside the order" of a temporary injunction. *Id.* at 698. This is because whether to grant a temporary injunction is "addressed to the sound judicial discretion of the trial judge." *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162 (Ky. 2009) (citation

omitted), *as corrected* (Jan. 4, 2010). A temporary injunction therefore should not be disturbed unless a circuit court's decision was "a clear abuse of discretion," which means that its decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citations omitted). Moreover, a trial court's findings of fact are "entitled to deference and will not be disturbed absent clear error." *Univ. of Louisville v. Eckerle*, 580 S.W.3d 546, 551 (Ky. 2019) (citation omitted). A trial court's determination of legal questions, such as whether a plaintiff has standing, are reviewed *de novo*. *See Phillips v. Rosquist*, 628 S.W.3d 41, 45–46 (Ky. 2021).

The trial court here, aided by the benefit of live witness testimony, carefully considered each of the three factors for injunctive relief, and found that all were present and a temporary injunction is therefore warranted. The circuit court made factual findings—which are entitled to deference by this Court—that accurately detail how forced pregnancy and childbirth impose health risks and life-altering consequences on Kentuckians, including consequences for their education, their employment, and their ability to care for their children. Based on these findings, the trial court determined that Plaintiffs and their patients would suffer irreparable injury absent an injunction and that the balance of equities favors an injunction. TI Order at 7–9. On the merits, the circuit court did not abuse its discretion by finding, based on this Court's long-established precedent, that there are serious questions warranting a trial on the merits of Plaintiffs' claims that the challenged laws violate the Kentucky Constitution. The trial court also correctly held that Plaintiffs have constitutional standing and can raise the rights of their patients. Accordingly, this Court should affirm the circuit court's temporary injunction and vacate the Court of Appeals' stay of the temporary injunction.

II. The Circuit Court Correctly Held That Plaintiffs Have Standing.

A. Plaintiffs Meet Constitutional Standing Requirements.

Kentucky courts apply the federal framework to evaluate a plaintiff's standing. *Commonwealth Cabinet for Health & Fam. Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 196 (Ky. 2018) ("[W]e formally adopt the *Lujan* test as the constitutional standing doctrine in Kentucky as a predicate for bringing suit in Kentucky's courts." (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992))).

To have constitutional standing in Kentucky, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id*. (cleaned up). Here, Plaintiffs are prohibited from providing abortion care to their patients due to the Bans' threats of criminal and licensure penalties, Ver. Compl. ¶¶ 3–5, 13–19, 26–36, 64–65, 82–83, 90, an injury that would be redressed if Defendants were enjoined from enforcing the laws. As the circuit court properly held:

> The challenged statutes directly prohibit the Plaintiffs from lawfully engaging in both medication and procedural abortions. The Attorney General is attempting to enforce these statutes against the Plaintiffs. An order of this Court preventing enforcement of these statutes would provide the Plaintiffs with adequate relief. Therefore, the Plaintiffs have satisfactorily established all the required elements of standing and can proceed with this suit.

TI Order at 6. *See also Cameron*, 2022 WL 2443398, at *5 ("The challenged statutes directly prohibit Plaintiffs from lawfully engaging in both medication abortions and procedural abortions."). Therefore, Plaintiffs have constitutional standing.

B. Plaintiffs Have Third-Party Standing to Assert the Rights of Their Patients.

The federal standing framework adopted by Kentucky courts has a prudential—not jurisdictional—standing rule that "a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court," *Sexton*, 566 S.W.3d at 193, but nevertheless allows litigants to bring claims on behalf of third parties if (1) those litigants have suffered an injury, (2) the litigants have a "close relation" to the third-party, and (3) there is "some hindrance to the third party's ability" to assert her own rights. *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991); *see also Singleton v. Wulff*, 428 U.S. 106, 114 (1976) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party. Like any general rule, however, this one should not be applied where its underlying justifications are absent." (citations omitted)).

Under this framework, federal courts "have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (citations omitted), *abrogated on other grounds by Dobbs*, 142 S. Ct. 2228. *See also id.* at 2119 (holding that abortion providers have third-party standing because, among other reasons, the challenged law "regulate[d] their conduct," including by threat of sanctions for noncompliance, and "plaintiffs ha[d] every incentive to 'resist efforts at restricting their operations'" and were "far better positioned than their patients" to challenge the restrictions (quoting *Craig v. Boren*, 429 U.S. 190, 195 (1976))); *Singleton*, 428 U.S at 114–18 (concluding "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision" because "enjoyment of the right [to abortion] is inextricably bound up with the activity the

[provider] litigant wishes to pursue" and "there are several obstacles" to abortion patients asserting their own right, including "a desire to protect the very privacy of her decision" and "the imminent mootness . . . of any individual woman's claim"). The personal injury, close relation, and hindrance factors are present in every case where abortion providers challenge laws that regulate or ban the provision of abortion care, which is why the framework "generally . . . allow[s]" abortion providers to assert their patients' right to abortion. *Singleton*, 428 U.S. at 118. And the U.S. Supreme Court's decision overruling the federal constitutional right to abortion, *Dobbs*, 142 S. Ct. 2228, did not overrule the federal third-party standing doctrine generally, or as it applies to abortion providers. TI Order at 6 n.2 (finding that the *Dobbs* majority's criticism of third-party standing for abortion providers is "dicta").

This case is no different. The abortion-provider litigants are personally injured by statutes threatening criminal or licensure penalties if they provide abortions. And the "close relation" and "hindrance" factors likewise support third-party standing here. A "close relation" refers to the alignment of interests between the litigant and the third party in order to ensure the named plaintiff will be an effective proponent of the third party's rights. *See, e.g.*, *Powers*, 499 U.S. at 413–14 (finding close relation between criminal defendant and excluded jurors because they "have a common interest in eliminating racial discrimination from the courtroom . . . [a]nd, there can be no doubt that [defendant] will be a motivated, effective advocate for the excluded venirepersons' rights"). Such an alignment of interests is clearly present here, where patients' ability to access abortion is "inextricably bound," *Singleton*, 428 U.S. at 114, with Plaintiffs' ability to engage in the conduct prohibited by the Bans. *See* Ver. Compl. ¶¶ 1–5, 82–83, 90. Here, Plaintiffs' patients also face hindrances

to asserting their own rights, including because of understandable fears about stigmatization from their families, communities, and even other medical providers if information about their abortion decision did not remain private. *See* Jane Doe 1 Aff. ¶ 14; Jane Doe 3 Aff. ¶ 12; Jane Doe 4 Aff. ¶ 14; Jane Doe 5 Aff. ¶ 17.

The circuit court therefore correctly found that Plaintiffs both satisfy Kentucky's constitutional standing requirements and have third-party standing to assert their patients' rights.

III. The Circuit Court Properly Found That a Temporary Injunction Is Warranted.

A. The Circuit Court Properly Found That Plaintiffs and Their Patients Would Suffer Irreparable Harm Absent an Injunction.

Plaintiffs and their patients are and will continue to be irreparably harmed by enforcement of the Bans because, as the circuit court found, "waiting until final judgment . . . would be effectively meaningless" to Kentuckians who are forced to carry pregnancies to term and give birth against their will. TI Order at 7–8. For decades, and until August of this year, Kentuckians relied on the ability to decide for themselves whether to undertake the significant medical risks and life-altering health, psychological, family, and economic consequences of carrying a pregnancy to term and giving birth. The Bans irreparably harm pregnant Kentuckians by denying them the ability to make that decision for themselves, and forcibly subjecting them to all the risks and uniquely irreparable consequences of pregnancy and childbirth in violation of their constitutional rights.

1. The Bans Cause Irreparable Harm to Patients' Health.

Abortion is an extremely safe and common form of medical care that one in four women in the U.S. will likely obtain in her lifetime. Tr. 98:14–24; Lindo Aff. ¶¶ 19, 57;

Bergin Aff. ¶¶ 7, 28–29. In fact, abortion is one of the safest procedures in contemporary medical practice in the United States. Tr. 36:19–37:8; Bergin. Aff. ¶ 7; *see* TI Order at 3. As the circuit court found, in Kentucky in 2020, over 99% of abortions involved no complications at all, and of the less than 1% that did, nearly all were minor, and there were zero deaths. TI Order at 3.

In contrast, pregnancy and childbirth carry much more significant risks, including a risk of death that is up to fourteen times higher than that associated with abortion. Bergin Aff. ¶ 28; *see also* TI Order at 3. According to the Centers for Disease Control and Prevention, pregnancy is becoming more dangerous, with pregnancy-related deaths on the rise across the United States. Ver. Compl. ¶ 50. As the circuit court found, in 2018, there were 16.6 per 100,000 pregnancy related deaths in Kentucky. TI Order at 3. Pregnancy is about twice as deadly for Black Kentuckians as it is for white Kentuckians. Tr. 34:7–9; Bergin. Aff. ¶ 24; Ver. Compl. ¶ 51; *see also* TI Order at 8 (circuit court noted that "the burden of abortion bans falls hardest on poorer and disadvantaged members of society").

Pregnancy typically lasts forty weeks from last menstrual period to delivery, and exerts myriad physical changes on every pregnant patient. Tr. 23:17–22; Bergin Aff. ¶ 8. One of the main changes involves an increase in blood volume, and 30–60% increase in cardiac output. Tr. 23:24–24:16; Bergin Aff. ¶ 8. Blood volume changes can put patients at risk for anemia, which can lead to a risk of preterm labor or delivery, or risk of needing a blood transfusion. *Id.* Pregnant patients face a fivefold increase in the risk of blood clots that can cause heart attack, stroke, or death, because of the increase in clotting factors in the blood and the enlarged uterus compressing the blood vessel that helps blood flow through the lower half of the body. Tr. 26:19–27:17. Blood clots can include deep vein

thrombosis (DVT), which is a blood clot that oftentimes occurs in the legs. *Id.* DVT can be treated with blood thinners, but if the clot moves from the legs to the lungs, it can be dangerous and even fatal. *Id.* Blood clots that develop in the arteries can lead to heart attack or stroke. *Id.*

As the uterus grows and the diaphragm gets pushed upwards, pregnant patients experience a decrease in overall lung capacity, often causing them to feel out of breath. Tr. 24:24–25:3; Bergin Aff. ¶ 9. Pregnancy can also exacerbate preexisting medical conditions, such as asthma. Bergin Aff. ¶ 10. About a third of patients with asthma experience a worsening of the condition, which can require additional treatment or even hospitalization. Tr. 25:3–10; Bergin Aff. ¶ 10. Patients with asthma are also at an increased risk for preterm labor and delivery as well as potentially developing high blood pressure, which can be dangerous. Tr. 25:10–15; Bergin Aff. ¶ 10.

Pregnant patients are also at risk of developing high blood pressure and a condition called preeclampsia, which puts them at risk for seizures or even a stroke. Tr. 28:11–29:13; Bergin Aff. ¶ 16. If preeclampsia becomes severe, patients can retain fluid in the lungs, which makes it difficult for them to maintain oxygen saturation. Tr. 28:17–20; Bergin Aff. ¶ 16. It can also put patients at risk for complications with liver and renal function. Tr. 28:20–22; Bergin Aff. ¶ 16. Patients with diabetes or who develop it during their pregnancy are also at higher risk for developing preeclampsia, and the diabetes can also lead to increased fetal growth, which can cause fetal injury or demise at the time of delivery. Tr. 28:22–29:13; Bergin Aff. ¶ 14.

Other preexisting conditions that can worsen during pregnancy include sickle cell disease, lupus or other collagen vascular diseases, substance use disorder, infectious

diseases such as HIV or hepatitis, and epilepsy. Tr. 25:18–24; Bergin Aff. ¶¶ 11, 17. A patient with preexisting chronic kidney disease is at risk for developing anemia, high blood pressure, or worsening of kidney function during pregnancy or after delivery, including to the point of requiring dialysis. Tr. 26:5–15; Bergin Aff. ¶ 17.

Approximately 10–15% of pregnancies end in miscarriage. Tr. 29:16–18; Bergin Aff. ¶ 18. In some cases, the patient does not pass all of the products of conception, and may develop an infection, including sepsis, or increased bleeding or even hemorrhage. Tr. 29:20–25; Bergin Aff. ¶ 18. Patients whose water breaks prematurely are also at risk for bacterial infection, which can spread to the bloodstream and cause sepsis. Tr. 27:20–28:7. They are also at risk for abruption, in which the placenta separates from the uterine wall and causes bleeding or fetal demise. *Id.*

Furthermore, childbirth, whether through vaginal or cesarean delivery, is a significant medical event typically involving substantial pain and several weeks or months of recovery time. Tr. 30:13–32:7; Bergin Aff. ¶¶ 19–21, 25. Even a normal pregnancy can suddenly become life-threatening during labor and delivery, when increased blood flow to the uterus places the patient at risk of hemorrhage and, in turn, death. Bergin Aff. ¶¶ 20–21; Tr. 31:23–32:2. Childbirth also carries other risks, such as infection, including intrauterine inflammation and infection or chorioamnionitis. Tr. 30:22–25; Bergin Aff. ¶ 19. Patients who deliver via Cesarean section (C-section) face additional risks. These may include bleeding, injury to surrounding organs, such as the bowel and the bladder, and increased risk of developing DVT. Tr. 31:1–10; Bergin Aff. ¶ 20. Patients who have multiple C-sections are at risk for morbidly adherent placenta, where the placenta grows into the prior C-section scar, and then at the time of delivery does not detach, which can

lead to bleeding, hemorrhage, and hysterectomy. Tr. 31:11–19; Bergin Aff. ¶ 20. Patients who deliver vaginally are at an increased risk for perineal tears that can cause problems with the bowel and bladder function. Tr. 31:19–23; Bergin Aff. ¶ 21. Whether delivery happens via C-section or vaginally, patients need time to recover, which can affect their ability to care for children or return to work or school. Tr. 32:3–7; Bergin Aff. ¶ 25.

At the time of or after delivery, patients may develop peripartum cardiomyopathy, which is a weakening of the heart muscle that can prevent oxygen from being delivered to other organs, which can in turn cause complications with organ function. Tr. 32:7–17; Bergin Aff. ¶ 22. Some patients will recover from peripartum cardiomyopathy, but others will have permanently reduced heart function as a result. Tr. 32:17–21; Bergin Aff. ¶ 22. Moreover, after delivery, approximately 15% of patients will experience postpartum depression, which can lead to feelings of anxiety, guilt, and suicidal ideation; put a new parent at risk of being unable to care for herself or her baby; and interfere with bonding and the infant's ability to thrive. Tr. 33:13–25; Bergin Aff. ¶ 23.

The Bans' narrow exceptions will not protect pregnant Kentuckians from catastrophic health consequences, including death. As the circuit court found, the threat of criminal and licensure penalties for violating the Bans may force doctors "to wait until women are in dire medical conditions before interceding," TI Order at 14, even though "it is medically and ethically unacceptable to force a patient [to] deteriorate to the point at which she would become clearly eligible for the exception," *id.* at 3; Br. *Amici Curiae* Supp. Pls.' Mot. Restraining Order & Temp. Inj. ("ACOG & AMA Br.") (attached as Pls.' App'x Ex. 8) at 18–19 ("It is untenable to force pregnant patients to wait until their medical condition escalates to the point that abortion is necessary to prevent death or permanent

injury."). As the leading medical organizations explained in their amicus brief submitted to the circuit court, "[t]he Kentucky Bans and their exceptions are too vague to give clinicians workable guidance about what procedures are permitted or prohibited." ACOG & AMA Br. at 18. Even Defendant's own expert acknowledged that physicians should intervene at a "clinically appropriate time," rather than wait until a pregnant patient is facing "irreversible damage," Tr. 238:20–24, as the Bans would require, KRS 311.7706(2)(a) (Six-Week Ban exception for "substantial and irreversible impairment of a major bodily function"); KRS 311.772(4)(a) (Trigger Ban exception for "serious, permanent impairment of a life-sustaining organ"). Under these laws, patients who want to continue their pregnancies may "have legitimate concerns about their ability to receive adequate care, and the possibility their health and safety will be deemed subordinate to the life of a fetus." TI Order at 14.

Moreover, many of the most serious, and potentially fatal, complications present later in pregnancy or at the time of delivery. *See infra*; *see also, e.g.*, Tr. 26:6–15, 30:17–31:10, 32:6–17. Defendant's expert also admits that it is not always possible to tell from the outset which patients experiencing complications may ultimately die. Tr. 206:14–19. For Kentuckians who would have obtained abortions but for the Bans and ultimately suffer grievous harm or die during pregnancy or delivery, the Bans' narrow exceptions offer cold comfort. And individuals facing health complications that fall short of imminent death or "permanent impairment of a life-sustaining organ" or "major bodily function" are left entirely without recourse. This includes patients who face miscarriage where there is embryonic or fetal cardiac activity, who will not receive care unless or until they meet the medical emergency definitions.

Furthermore, physicians, such as Dr. Bergin, consider it their moral and ethical obligation to provide abortion to those who have decided to have them, including for patients who face health risks or who have suffered sexual assault. Tr. 23:3–7. The prohibitions on abortion "impermissibly interfere with the patient-physician relationship and undermine longstanding principles of medical ethics." ACOG & AMA Br. at 3; *see also id.* at 21–22. Accordingly, Plaintiffs are also irreparably harmed by the Bans.

2. The Bans Cause Irreparable Harm to Especially Vulnerable Patients.

Forced pregnancy also compounds the anguish of patients facing exceptionally traumatic or tragic circumstances. The Bans contain no exceptions for rape survivors. Dr. Bergin testified that a number of EMW's patients have been sexually assaulted, and if they are forced to carry their pregnancies to term and give birth against their will, they would possibly face the additional trauma of being constantly reminded of the violation committed against them. Bergin Aff. ¶ 31; *see also* Tr. 38:1–5. The Bans also lack an exception for lethal fetal anomalies, and many patients "find the prospect of continuing a pregnancy to term and giving birth to an infant who will not survive" extremely distressing. Bergin Aff. ¶ 30; *see also* Tr. 38:5–7. Pregnancy also increases the risk of intimate partner violence, with the severity of the violence escalating during or after pregnancy. Ver. Compl. ¶ 43. Indeed, homicide has been identified as a leading cause of maternal mortality, the majority caused by an intimate partner. *Id.* For Kentuckians experiencing intimate partner violence, forced pregnancy thus exacerbates the risk of new or increased violence, and further—often permanently—tethers the victim to their abuser: individuals who seek abortions but are unable to obtain them are more likely to experience physical violence

from an intimate partner, even years after the abortion denial. Lindo Aff. ¶ 75; Tr. 117:25–119:5.

3. The Bans Cause Irreparable Harm to Patients' Lives and Well-Being.

In addition to the deleterious consequences to their health, Kentuckians who are prevented from obtaining abortions face a multitude of other consequences that potentially affect every aspect of their lives, including their ability to care for themselves and their existing children, to keep their jobs, to go to school, and to support themselves and their families. TI Order at 9. As the circuit court found, continuing a pregnancy "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 government interference." *Id.* "Adding another child can put exponential strain on an already struggling family and can lead to detrimental outcomes for all involved." *Id.* Furthermore, "[a]n unplanned pregnancy can also derail a woman's career or educational trajectory." *Id.* "Across the United States, approximately 72% of women obtaining abortions are under the age of 30," which "is the stage of life where people are completing their education and establishing a career." *Id*. And the "burden of abortion bans falls hardest on poorer and disadvantaged members of society." *Id.* at 8.

Two-thirds of Kentucky abortion patients already have children, Tr. 130:3–14; Lindo Aff. ¶ 27, and for many, the ability to care for their existing children is a major factor in their abortion decision. For example, one recent EMW patient is a stay-at-home mother of two children under four years old whose pregnancies were so debilitating she required a home IV pump, lost thirty pounds and a tooth from constant vomiting, and she couldn't eat or sleep. Jane Doe 6 Aff. ¶¶ 3, 5. She decided to have an abortion because she felt she

could not be a good mother and full-time caregiver to her two very young children while experiencing such incapacitating pregnancy-related illness. *Id.* ¶¶ 6–7. Another patient is a recently widowed working mother of a preschooler, who chose abortion in part to avoid complicating life for her grieving child and compromising the childcare arrangements she relies on to work. Jane Doe 1 Aff. ¶¶ 1–2, 4, 5. A third patient is a single mother of two, working long hours at multiple jobs and living with her parents after losing her home in a recent tornado, who decided to have an abortion because another pregnancy would have compromised her housing and derailed her efforts to rebuild her family's life after the tornado. Jane Doe 3 Aff. ¶¶ 1–3, 8–9. Other patients already struggling financially, struggling with childcare, and working irregular hours also cited the need to care for and to protect their existing children as a reason for their abortion decisions. Jane Doe 2 Aff. ¶¶ 2, 5; Jane Doe 3 Aff. ¶ 10; Jane Doe 4 Aff. ¶ 6; Jane Doe 5 Aff. ¶ 6.

Pregnancy-related healthcare is also expensive, and not always covered by insurance, even for those who are fortunate enough to have insurance. TI Order at 3. The financial burdens of pregnancy and childbirth weigh even more heavily on patients without insurance, who are disproportionately people of color. Lindo Aff. ¶ 59; Tr. 113:15–114:10. Those giving birth experience catastrophic health expenditures at rates significantly greater than their similarly-aged, non-childbearing counterparts. Lindo Aff. ¶ 59. A costly pregnancy, particularly for people already facing an array of economic hardships, could have long-term and severe impacts on a family's financial security. TI Order at 8–9. The costs of parenting a child resulting from an unexpected pregnancy further compound these hardships; indeed, studies show that individuals denied an abortion often face years of economic hardship and insecurity, as compared with those who were able to access

abortion. Lindo Aff. ¶¶ 60–61; Tr. 96:19–97:6. Overall, rigorous data analysis shows a significant increase in financial distress over time among those who are unable to access a wanted abortion as compared with comparable individuals who did obtain abortions. Lindo Aff. ¶¶ 62–72; Tr. 111:5–15.

Regardless of an individual's plans to parent or place the child for adoption, pregnancy, delivery, and recovery will impact and potentially imperil the ability to find or maintain employment, provide for her family, and care for any existing children. Lindo Aff. ¶¶ 59, 61; Bergin Aff. ¶ 29. As the circuit court observed, "[n]ot all Kentuckians are legally protected from pregnancy discrimination in the workplace, or entitled to the reasonable accommodations they may need to perform their jobs while pregnant." TI Order at 4. "Kentuckians are not entitled to paid time off for pregnancy, delivery, or recovery." *Id.* Even unpaid leave is out of reach for some Kentuckians, as described by one recent EMW patient who was concerned that her inflexible work schedule would make it impossible for her to even attend routine prenatal appointments. Jane Doe 3 Aff. ¶¶ 8–9. Pregnancy can also impose hardships on Kentuckians whose primary responsibilities include unpaid caregiving work as described by Jane Doe 6, the stay-at-home mother whose pregnancies made her too sick to completely care for her children while her partner worked outside the home. Jane Doe 6 Aff. ¶¶ 1–7. Children in a family affected by abortion denial are likely to experience a decrease in resources, including both increased rates of poverty and less available parental time, which have significant impacts on children's lifelong educational and economic outcomes, as well as those children's general well-being and life expectancy. Lindo Aff. ¶¶ 80–82; Tr. 130:3–131:24.

4. The Bans Cause Irreparable Harm to Patients Who Travel Out of State.

Even Kentuckians who are ultimately able to travel out of the Commonwealth in order to obtain abortions will face increased risk to their health. As the circuit court found, while abortion is very safe—and safer than childbirth—the risks increase as the pregnancy progresses and therefore "any delays in scheduling and performing an abortion comes with more serious risks." TI Order at 8. Travel to other states for abortion care often causes these delays because of the need to raise funds, make travel arrangements, and the time for travel itself. Lindo Aff. ¶¶ 53–55; Tr. 127:19–128:11. Further, following the *Dobbs* decision, there are fewer places to access abortion, and the providers in states where abortion remains available are facing dramatically increased demand, which compounds delays. *See* TI Order at 4; Lindo Aff. ¶¶ 36, 42, 53; Tr. 129:19–120:2.

For many individuals, the burdens of travel will make it impossible to obtain an abortion. TI Order at 4; Lindo Aff. ¶¶ 35–43, Tr. 121:19–122:11. For example, individuals with limited financial resources may be unable to raise the funds needed to pay for a more expensive abortion later in pregnancy. Lindo Aff. ¶¶ 35–43; Tr. 127:19–128:11; *see* Jane Doe 4 Aff. ¶ 13; Jane Doe 6 Aff. ¶ 13. Considering all of the evidence, the circuit court concluded that "waiting until final judgement on the issues presented here, without injunctive relief, would be effectively meaningless" to the Kentuckians prevented by the Bans from obtaining abortions. TI Order at 7–8.

5. The Bans Cause Irreparable Harm to Constitutional Rights.

Finally, constitutional injury itself constitutes irreparable injury warranting temporary injunction. *E.g.*, *Fletcher v. Graham*, 192 S.W.3d 350, 356–57 (Ky. 2006) (finding that violations of the Kentucky Constitution constitute "great injustice and

irreparable injury" for the purposes of writ of mandamus); *Powell v. Graham*, 185 S.W.3d 624, 629 (Ky. 2006) (holding that violations of defendants' Fifth Amendment rights constitute "great injustice and irreparable injury" for mandamus purposes); *see also Am. C.L. Union of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003) ("[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Although the ultimate constitutionality of these Bans has not yet been determined, the circuit court has found "at the very least a substantial question as to the merits regarding the constitutionality of" the Bans, both as to Plaintiffs' third-party claims and Plaintiffs' own unlawful delegation claim. TI Order at 20.

Accordingly, for all the reasons discussed above, the circuit court did not abuse its discretion in finding that the irreparable harm requirement has been met.

B. The Circuit Court Properly Found That the Balance of Equities Favors an Injunction.

The circuit court correctly balanced the equities—including "possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo"—and properly found that each factor weighs in favor of an injunction. TI Order at 8–9 (quoting *Maupin*, 575 S.W.2d at 699).

First, in assessing the public interest, the circuit court followed the sound legal principles recently set forth by this Court, and gave significant weight to the interest in public health. *See* TI Order at 8 (citing *Beshear v. Acree*, 615 S.W.3d 780, 830 (Ky. 2020)). As the finder of fact, with the benefit of live witness testimony from both sides, the circuit court found that pregnancy and childbirth carry significant medical risks while, in contrast, abortion is extremely safe, and found that Defendant's medical expert did not offer any

evidence to the contrary. TI Order at 3–4. The court also found that the medical emergency exceptions in the Bans are "insufficient" to protect patients, and that in states with similar laws, the scope of exceptions is "creating confusion and concern in healthcare settings as doctors, in order to avoid incurring civil and criminal liability, are forced to wait until women are in dire medical conditions before interceding." *Id.* at 3, 14. The circuit court also properly weighed the disproportionate burden the Bans would place on "poorer and disadvantaged members of society," *id.* at 8, as well as the financial, educational, and professional harms that the Bans will impose on Kentuckians. *Id.* at 9.

Second, the circuit court appropriately weighed potential harm to Defendant against the other interests at issue in this case, and found that "any harm the [Defendant] may suffer is outweighed by the interests of the Plaintiffs" because Defendant would "at most suffer the harm of delayed enforcement," and, given the "significant doubt as to the constitutionality of the laws," it is "uncertain" that Defendant has any interest at all that could be harmed by the injunction of the Bans. TI Order at 9.

Finally, before the Bans, abortion was legal and accessible in Kentucky for fifty years, and the circuit court's issuance of a temporary injunction properly preserved the status quo, TI Order at 9, to protect the health and lives of Kentuckians. Accordingly, for all these reasons, the circuit court did not abuse its discretion in finding that the balance of the equities favored granting a temporary injunction.

C. The Circuit Court Properly Found That Plaintiffs Have Raised Substantial Questions on the Merits of Their Claims.

Because the circuit court correctly found that the other temporary injunction factors are in Plaintiffs' favor, temporary injunctive relief is merited as long as Plaintiffs have raised "a serious question warranting a trial on the merits." *Maupin*, 575 S.W.2d at 699;

accord Commonwealth ex rel. Conway v. Shepherd, 336 S.W.3d 98, 104 (Ky. 2011) (agreeing trial court was "duty bound" to issue temporary injunction where doing so would prevent irreparable injury and serve public interest, and plaintiff raised "serious questions" as to merits); *Rogers v. Lexington-Fayette Urb. Cnty. Gov't*, 175 S.W.3d 569, 571 (Ky. 2005). The circuit court did not abuse its discretion in holding that Plaintiffs presented "at the very least a substantial question as to the merits" of whether the Bans violate rights at the core of the Kentucky Constitution, including the right to privacy and non-delegation principles. TI Order at 20.[2]

1. Constitutional Rights to Privacy and Self-Determination Claims

The circuit court properly held that Plaintiffs have raised substantial questions on the merits of their claims that the Trigger Ban and Six-Week Ban violate the constitutional rights to privacy and self-determination protected by Sections 1 and 2 of the Kentucky Constitution. The circuit court found—based on the text of the Constitution, relevant case law interpreting that text, and the history and traditions of the Commonwealth—that the Bans impact the fundamental rights to privacy and self-determination. The circuit court then appropriately applied strict scrutiny analysis and found that there are serious questions going to the merits of whether the challenged laws violate these fundamental rights because there is no sufficiently compelling governmental interest.

[2] The circuit court also correctly found serious questions on the merits of Plaintiffs' claims that the Trigger Ban is vague and unintelligible, TI Order at 11–12, but Plaintiffs concede that those claims are moot as of the U.S. Supreme Court's issuance of judgment in *Dobbs* on July 26, 2022.

a. The Bans implicate the constitutional rights to privacy and self-determination.

The Constitution explicitly protects the "inherent and inalienable rights" of all Kentuckians, Ky. Const. § 1, including the guarantee of individual "liberty," Ky. Const. §§ 1 (1), 1 (3), & 2. Liberty is one of the "broad sentiments, ideas, and rights," TI Order at 10, in the Constitution, and "it is [the] role of the judiciary to interpret the enumerated words and give effect to the meaning behind them." TI Order at 10. As this Court has stated, "to declare the meaning of constitutional provisions is a primary function of the judicial branch . . . . To desist from declaring the meaning of constitutional language would be an abdication of [the Court's] constitutional duty." *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 83 (Ky. 2018) (citation omitted). The determination of what is encompassed within the inalienable right to "liberty" must be conducted independent of the federal courts' interpretation of similar provisions in the federal constitution. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992), *overruled on equal protection grounds by Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020) ("[U]nder our system of dual sovereignty, it is [the Kentucky Courts'] responsibility to interpret and apply [the Kentucky] state constitution independently."); *Crayton v. Commonwealth*, 846 S.W.2d 684, 685 (Ky. 1992) ("American federalism embodies a dual sovereignty whereby state courts must apply their own constitutions and safeguard the rights of their citizens secured thereby."); *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 908 S.W.2d 104, 107 (Ky. 1995) ("Kentucky courts are not bound by decisions of the United States Supreme Court when deciding whether a state statute . . . impermissibly infringes upon individual rights guaranteed by the state constitution, as long as the state constitutional protection does not fall below the federal floor."); *Commonwealth v. Reed*,

647 S.W.3d 237, 255 (Ky. 2022) (Minton, C.J., concurring) ("We are tethered neither to the decisions of the United States Supreme Court nor to the reasoning embodied in those decisions when interpreting the meaning of the Kentucky Constitution."). Indeed, this Court has recognized that "[s]tate constitutions may offer greater protections for their citizens than the federal constitution." *Steelvest*, 908 S.W.2d at 107; *see also Crayton*, 846 S.W.2d at 685 ("While the Supreme Court of the United States is the final arbiter of federal constitutional law . . . this Court and other state courts are at liberty to interpret state constitutions to provide greater protection of individual rights than are mandated by the United States Constitution."); *Florida v. Powell*, 559 U.S. 50, 59 (2010) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." (citation omitted)).

Kentucky courts routinely fulfill their duty to independently interpret the meaning of provisions in the Commonwealth's Constitution. This Court has already determined that the explicit constitutional guarantee of individual "liberty" encompasses the right to privacy and the right to self-determination. *Wasson*, 842 S.W.2d at 491 (finding "the guarantees of individual liberty provided in our 1891 Kentucky Constitution" protect the "right of privacy" and "offer greater protection of the right . . . than provided by the Federal Constitution," and holding the privacy right includes Kentuckians' right to privately engage in same-sex sexual conduct); *Woods v. Commonwealth*, 142 S.W.3d 24, 31–32 (Ky. 2004) ("[T]he right of a competent person to forego medical treatment by either refusal or withdrawal . . . derives from the common law rights of self-determination . . . and in the

liberty interest protected by the Fourteenth Amendment to the United States . . . and, perhaps even more so, by Section 1 of the Constitution of Kentucky." (citations omitted)).

As discussed in more detail below, the circuit court relied on the sound legal principles in this Court's precedents to find that, at a minimum, there are substantial questions going to the merits of whether the Bans violate the recognized constitutional rights to privacy and self-determination because they "will have wide ranging effects on family planning decisions that are traditionally protected from governmental imposition." TI Order at 14.

i. The Constitution protects a fundamental right to privacy, which includes the right to abortion.

This Court has found that "the guarantees of individual liberty provided in our 1891 Kentucky Constitution" protect the "right of privacy," and "offer greater protection of the right . . . than provided by the Federal Constitution." *Wasson*, 842 S.W.2d at 491. While the Kentucky Constitution contains "[n]o language specifying 'rights of privacy' *as such*," *id.* at 492, this Court looked to the text and structure of the Constitution and the history and traditions of the Commonwealth to find that the right to "liberty" in Sections 1 and 2 encompass an expansive constitutional right to privacy. *Id.* at 492–99. The Court held that the right protects Kentuckians' ability to privately engage in same-sex sexual conduct without interference from the state, and struck down a law that criminalized such conduct. *Id.*

Just as the *Wasson* Court recognized that the right to privacy protects personal decision making related to consensual sex and intimate relationships "against the intrusive police power of the state," *id.* at 492, so too does the right to privacy protect personal decision making regarding reproduction and family formation. As demonstrated by the

testimony presented to the circuit court, the decision of whether to carry a pregnancy to term and parent affects every aspect of one's personal health and private family life. Such intimate decisions about one's family "are traditionally protected from governmental imposition." TI Order at 14. Because "[t]his is a decision that has perhaps the greatest impact on a person's life," it "is best left to the individual to make, free from unnecessary governmental interference." *Id.* at 9. Prohibitions on abortion strip pregnant Kentuckians of the ability to make this intimate and life-defining decision for themselves and their families and, therefore, "intrude into the traditionally protected familial sphere." *Id.* at 14. The circuit court therefore reasonably concluded that there are substantial questions going to the merits of Plaintiffs' argument that access to abortion is at the core of the constitutional right to privacy recognized in *Wasson* as guaranteed by Sections 1 and 2 of the Constitution.

The Commonwealth's arguments in *Wasson*, which were considered and rejected by this Court, further illustrate why it was reasonable for the circuit court in this case to find a substantial question on the merits of Plaintiffs' right to privacy claim. In *Wasson*, the "Commonwealth recognize[d] such rights [of privacy] exist," 842 S.W.2d at 492, but argued that a statute criminalizing same-sex sexual conduct could not violate those rights, because "homosexual sodomy was punished as an offense at common law" and "it ha[d] been punished by statute in Kentucky since 1860, predating our Kentucky Constitution." *Id.* at 490. In rejecting that argument, this Court observed that the "statute [criminalizing all same-sex sexual conduct] punishes conduct which has been historically and traditionally viewed as immoral, but much of which has never been punished as criminal." *Id*. at 491. But even as to conduct that *was* historically criminalized in Kentucky, the Court held that

"[d]eviate sexual intercourse conducted in private by consenting adults is not beyond the protections of the guarantees of individual liberty in our Kentucky Constitution simply because proscriptions against that conduct have ancient roots. Kentucky constitutional guarantees against government intrusion address substantive rights." *Id.* at 493 (internal citation and quotation omitted).

Thus, the *Wasson* court found that the right to privacy can protect even conduct that was proscribed at common law and when the Kentucky Constitution was ratified. The Court need not go so far in the case at hand: *none* of the conduct at issue here—specifically, termination of pregnancy prior to 15 weeks LMP—was historically criminalized in the Commonwealth. As the circuit court recognized, TI Order at 13–14, protection of the right to abortion is *in accord* with the history and traditions of this Commonwealth, including when the Constitution was ratified in 1891. At that time, Kentucky had not codified *any* statutory limits on abortion. Instead, as the circuit court found, *id.*, abortion was permissible at least until quickening, the point in pregnancy when the pregnant woman first feels fetal movement—which the circuit court recognized is well into the second trimester, TI Order at 13 n.7,[3] and long past the point in pregnancy at which the Bans take effect. *See Mitchell v. Commonwealth*, 78 Ky. 204, 210 (1879) ("[I]t never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child."). As the circuit court noted, TI Order at 13–14, ten

[3] As one scholar has observed, "At the opening of the nineteenth century, abortion was governed by common law, and was not a criminal offense if performed before quickening – the point at which a pregnant woman perceived fetal movement, typically late in the fourth month or early in the fifth month of gestation." Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stanford L. Rev. 261, 281–82 (1992).

years after ratification of the Constitution, this Court again recognized that "[t]here is no statute in this state changing the common-law rule" that "it was not . . . a punishable offense to produce with the consent of the mother an abortion prior to the time when she became quick with child." *Wilson v. Commonwealth*, 60 S.W. 400, 401 (Ky. 1901). Indeed, not only were pre-quickening abortions not prohibited at the time the Constitution was adopted, but it was a matter the state did not concern itself with at all: "Until [quickening], the law took *no notice* of the agency by which a miscarriage was procured, if done with the woman's consent." *Fitch v. Commonwealth*, 165 S.W.2d 558, 560 (Ky. 1942) (emphasis added). "[T]he state of existing things," *Shamburger v. Duncan*, 253 S.W.2d 388, 390–91 (Ky. 1952), at the time the Constitution was ratified, was that, prior to quickening, pregnant Kentuckians could make private decisions about whether to continue a pregnancy and access abortion without any state interference. A finding that the right to privacy protects Kentuckians' ability to access abortion thus aligns with Kentucky history, including at the time of ratification, and the Commonwealth's "rich and compelling tradition of recognizing and protecting individual rights from state intrusion." *Wasson*, 842 S.W.2d at 492.

Further, in *Wasson*, the very notion that same-sex sexual intimacy was considered at that time to be an "incendiary moral issue," *id.* at 495, placed that conduct within the zone of private, moral decision making that is protected by the right to privacy and therefore beyond the reach of the state. *See id.* at 498 ("[T]he decisive factor favoring decriminalization of laws against private homosexual relations between consenting adults is the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality." (quoting Am. L. Inst., Model Penal Code and Commentaries, Part II, 1980 Ed., pp. 371–72)). *See also id.* at 495 ("Notwithstanding [the

Supreme Court Justices'] strong views that drinking was immoral, this same Court . . . in the *Campbell* case recognized that private possession and consumption of intoxicating liquor was a liberty interest beyond the reach of the state."); *Commonwealth v. Harrelson*, 14 S.W.3d 541, 547 (Ky. 2000) (declining to find statute criminalizing private possession of hemp violated constitutional right to privacy because "the alleged moral concerns expressed in [*Wasson*] and [*Campbell*] are not evident here in view of the fact that the statute applies to the health, safety, and well-being of the citizens of Kentucky without reference to so-called 'moral issues'").

Here, plaintiffs challenge two Kentucky statutes prohibiting abortion, a form of healthcare that is today the subject of broad moral disagreement. *Compare* Tr. 22:21–23:7 (Dr. Bergin provides abortions because she views comprehensive reproductive healthcare as a moral imperative) *with* Tr. 252:23–25 (Mr. Snead believes that "the debate over abortion" is about morals). As the *Wasson* court recognized, such moral considerations are best left to be resolved privately by individuals for themselves. 842 S.W.2d at 495, 498. The moral debate around abortion places it squarely within the constitutional right to privacy. Even if the right recognized in *Wasson* were to protect only "immorality in private which does 'not operate to the detriment of others,'" *id.* at 496, such a limitation would not place abortion beyond the right's protections. Whether an "other" is harmed by abortion goes to the very moral question at issue in the debate over abortion. *See* Tr. 286:12–22 (Defendant's expert Mr. Snead agreeing that there are multiple "ethically defensible position[s]" on abortion). To say that an embryo from the moment of conception is an "other" harmed by abortion would entirely disregard the other side of the moral debate that believes a pregnant individual retains autonomy during pregnancy and a separate, "other"

life does not begin until some later point, such as at quickening or viability. This is precisely the type of "incendiary moral issue" that *Wasson* recognizes is best left to the individual to determine based on their own "private morality." 842 S.W.2d at 495, 498. "[L]egislating penal sanctions solely to maintain widely held concepts of morality and aesthetics is a costly enterprise. It sacrifices personal liberty." *Id.* at 498.

Accordingly, the circuit court reasonably found, relying on the constitutional text, Kentucky history, and relevant case law, that there are serious questions going to the merits of Plaintiffs' claims that the Bans violate the fundamental right to privacy. TI Order at 12–14. Just as this Court recognized that the Commonwealth's constitutional right to privacy protects private same-sex sexual conduct even at a time when the U.S. Supreme Court had found that the federal right to privacy did not, *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), Kentucky's expansive right to privacy protects Kentuckians' freedom to terminate a pregnancy regardless of the U.S. Supreme Court's decision in *Dobbs,* 142 S. Ct. 2228. Indeed, in recognizing that the Kentucky Constitution provides independent protection for the right to abortion regardless of the U.S. Supreme Court's interpretation of the Federal Constitution, Kentucky courts would not stand alone. To date, the highest courts of nearly a dozen states have recognized that their state constitutions independently protect the right to decide whether to continue or terminate a pregnancy, with most of those decisions placing the right to abortion within the constitutional right to privacy.[4] A determination by Kentucky's courts that the

[4] *See Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) (privacy); *Comm. to Def Reprod. Rts. v. Myers*, 625 P.2d 779, 784 (Cal. 1981) (privacy); *In re T W.,* 551 So. 2d 1186, 1192 (Fla. 1989) (privacy); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (privacy); *Pro-Choice Miss. v. Fordice*, 716 So.2d 645, 653 (Miss. 1998) (privacy); *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999) (privacy);

Kentucky Constitution's right to privacy includes reproductive healthcare rights would thus be, "rather than . . . the leading edge of change," merely "part of the moving stream." *Wasson*, 842 S.W.2d at 498.

ii. The Constitution protects a fundamental right to self-determination, which includes the right to abortion.

The "inherent and inalienable right[]" to liberty, Ky. Const. §§ 1(1), 1(3) & 2, also guarantees the right to self-determination and personal autonomy. *See Woods*, 142 S.W.3d at 43 ("We conclude that [the patient's] constitutional right of self-determination far outweighed any interests the Commonwealth may have had . . . ."); *see also DeGrella ex rel. Parrent v. Elston*, 858 S.W.2d 698, 708 (Ky. 1993) (avoiding constitutional question of whether statute "impair[s] rights of self-determination or personal autonomy which the constitution protects").

This Court has recognized that the inherent right to self-determination encompasses an individual's freedom to decline life-sustaining medical treatment, even when it would result in their death. *Woods*, 142 S.W.3d at 31–32 ("[T]he right of a competent person to forego medical treatment by either refusal or withdrawal . . . derives from the common law

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Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 15 (Tenn. 2000) (privacy), *superseded by constitutional amendment,* Tenn. Const. art. I, § 36 (2014); *Right to Choose v. Byrne,* 450 A.2d 925, 934 (N.J. 1982) (privacy and health); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019) (personal autonomy and self-determination); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 853 (N.M. 1998) (Equal Rights Amendment). Lower courts in additional states have also recently blocked abortion bans based on the finding that those laws violate substantive rights protected by their states' constitutions. *Planned Parenthood of Mich. v. Att'y Gen. of the State of Mich.*, No. 22-000044-MM (Mich. Ct. Cl. Sept. 7, 2022) (permanently enjoining enforcement of total abortion ban based on state constitutional right to bodily integrity); *see also Preterm-Cleveland v. Yost*, No. A2203203 (Oh. Ct. Com. Pl. Sept. 14, 2022) (temporarily restraining enforcement of six-week abortion ban based on state constitutional right to freedom in healthcare decisions").

rights of self-determination . . . and in the liberty interest protected by the Fourteenth Amendment to the United States Constitution . . . and, perhaps even more so by Section 1 of the Constitution of Kentucky." (citations omitted)); *DeGrella*, 858 S.W.2d at 709 ("We conclude the right to withdrawal of further medical treatment for a person in a persistent vegetative state exists within the framework of the individual's common law rights of self-determination and informed consent in obtaining medical treatment."). Indeed, this Court has recognized that, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of other, unless by clear and unquestionable authority of law." *DeGrella*, 858 S.W.2d at 703 (quoting *Union Pac. Ry. Co. v. Botsford,* 141 U.S. 250, 251 (1891)); *see also Tabor v. Scobee*, 254 S.W.2d 474, 475 (Ky. 1951) (holding in tort context that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" and that a woman's Fallopian tubes therefore could not be removed in a non-emergent scenario without her express consent (quoting *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914))). The constitutional right to self-determination thus guards every Kentuckian's ability to control their own person by making important and potentially life-altering decisions about their own life, health, and body without unwarranted governmental interference.

The circuit court reasonably found that a prohibition on abortion "compromises a woman's right to self-determination." TI Order at 14. The constitutional right to self-determination previously recognized by this Court would be hollow if it did not embrace an individual's ability to determine for herself whether to carry a pregnancy to term, undergo childbirth, and parent a new child. As the evidence presented by Plaintiffs' experts

demonstrates, every pregnancy carried to full term is a major medical event that affects one's health for 40 weeks, culminates in childbirth, and requires weeks or months of recovery—with potential ramifications on every aspect of an individual's medical, psychological, familial, and economic well-being. A portion of pregnancies also result in major, potentially life-altering complications, and even death. If the right to self-determination means anything, it must include the ability to decide for oneself, without governmental interference, whether to assume these risks and responsibilities. Indeed, as the circuit court recognized,

> [T]here is no other context in which the law dictates that a person's body must be used against her will, even to aid or save the life of another. . . . People cannot be legally coerced into giving blood or donating organs. Bone marrow transplants are not compulsory. When a person dies, their organs can be utilized only if they consent to being an organ donor. These [challenged] laws grant less bodily autonomy to pregnant women than in any of these other instances, or at any other time in the woman's life.

TI Order at 15. An individual who is required by the government to remain pregnant and endure childbirth against her will experiences interference of the highest order with her right to possess and control her own person.

Furthermore, as the circuit court recognized, not only do the Bans implicate the right to self-determination "by taking away the choice to have an abortion," but they also do so by "undercut[ting] a woman's choice to have children at all." *Id.* at 14. Laws that treat an embryo as a separate human from the moment of fertilization "raise[] a whole host of concerns" for Kentuckians who may become pregnant, including the potential need for "the state to investigate the circumstances and conditions of every miscarriage that occurs in Kentucky" and "uncertainty regarding the future legality and logistics of In Vitro Fertilization." *Id.* Additionally, the Bans' severely limited medical emergency

exceptions—which force doctors to wait until pregnant patients "are in dire medical conditions before interceding" to provide a needed abortion—also leave Kentuckians who want to have a baby with "legitimate concerns about their ability to receive adequate care [during pregnancy], and the possibility that their health and safety will be deemed subordinate to the life of a fetus." *Id.* Such circumstances clearly implicate Kentuckians' right to self-determination.

A finding that the constitutional right to self-determination protects Kentuckians' ability to access abortion aligns with the text of the constitution, *see, e.g.*, Ky. Const. § 1(1) (all Kentuckians have the "right of enjoying and defending their lives and liberties"), case law interpreting that text, *see, e.g.*, *Woods*, 142 S.W.3d 24, and the history and traditions of this Commonwealth, *see supra* Section III.C.1.a.i (noting that at time of ratification Kentuckians could legally access pre-quickening abortion without any state interference). The circuit court did not abuse its discretion in finding that, "All of these considerations together stand for the proposition that governmental intrusion into the fundamentally private sphere of self-determination as contemplated by these laws is to be prohibited" under the Kentucky Constitution. TI Order at 16.

iii. The Constitution protects the fundamental rights to privacy and self-determination, which combined guarantee the right to abortion.

As discussed above, it was reasonable for the circuit court to conclude that there are substantial questions going to the merits of Plaintiffs' claims that the fundamental right to privacy and the fundamental right to self-determination each independently protect the right to abortion. In addition, these fundamental rights work collectively to protect the right to abortion. Recognized constitutional rights form theoretical, sometimes overlapping,

umbrellas that function to protect other, often more specific, rights. *See Singleton v. Commonwealth*, 740 S.W.2d 159, 161 n.4 (Ky. App. 1986) (acknowledging right "ancillary to both free speech and right of privacy" that "clearly . . . fall[s] within the penumbra of guarantees afforded in the [Commonwealth's] Bill of Rights."). Such penumbral rights, as they are often called, help give "life and substance" to the explicitly recognized right. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Even if the fundamental right to privacy, standing alone, did not protect the right to abortion—which it does, *see supra*—it certainly embraces such a right when paired alongside the recognized right to self-determination, and other constitutional rights, as discussed *infra*. Only when an individual has the autonomy to make the intimate and life-defining decision for herself whether to continue a pregnancy can the guarantees of both the rights to privacy and self-determination, as discussed *supra*, be fulfilled. The right to abortion thus gives "life and substance" to these recognized constitutional rights.

b. The Bans cannot withstand strict scrutiny.

"Strict scrutiny applies to a statute [that] . . . impacts a fundamental right or liberty explicitly or implicitly protected by the Constitution." *Beshear v. Acree*, 615 S.W.3d 780, 815–16 (Ky. 2020). As the circuit court properly found, because the Six-Week Ban "implicates numerous fundamental rights protected by the Kentucky Constitution," TI Order at 17, an exacting strict scrutiny review thus applies.

In fact, most state courts that have found a right to abortion under their state's constitution have applied strict scrutiny.[5] This is so not only because abortion is a fundamental right, but also because:

> Imposing a lower standard than strict scrutiny . . . —when the factual circumstances implicate these rights because a woman decides to end her pregnancy—risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making. It cheapens the rights at stake. The strict scrutiny test better protects these rights.

Hodes, 440 P.3d at 497–98 (finding right of personal autonomy protects right to abortion under Kansas Constitution); *see also Armstrong*, 989 P.2d at 377 (finding state

[5] *See, e.g., Valley Hosp. Ass'n*, 948 P.2d at 969, 971 (finding no "compelling state interest" where policy generally prohibiting elective abortions was solely a matter of conscience); *Comm. to Def Reprod. Rts.*, 625 P.2d at 784, 793, 797 (finding state's interest in protecting a fetus is not compelling enough to justify impairment of "fundamental constitutional right to choose whether or not to bear a child"); *In re T W*, 551 So. 2d at 1192–94 (finding no compelling interest to justify statute that interferes with woman's ability to decide whether to continue a pregnancy); *Women of Minn.*, 542 N.W.2d at 31–32 (finding state's asserted interest in preservation of human life and encouragement of childbirth not compelling enough to outweigh woman's decision about whether to terminate a pregnancy without state interference); *Armstrong*, 989 P.2d at 380, 384 (finding legislature has "no interest, much less a compelling [interest]," in interfering with an individual's fundamental right to obtain a pre-viability abortion); *Planned Parenthood of Middle Tenn.*, 38 S. W.3d at 18 (finding state has a compelling interest in maternal health from the beginning of pregnancy, but a prohibition on all second trimester abortions not performed in a hospital was not narrowly tailored to promote this interest); *Byrne*, 450 A.2d at 934, 937 (finding fundamental right to choose whether to have an abortion outweighs state's interest in protecting potential life); *Hodes*, 440 P.3d at 496 (holding "the strict scrutiny test best protects those natural rights that we today hold to be fundamental" and finding ban on common method of second-trimester abortion fails that test); *N.M. Right to Choose*, 975 P.2d at 854–55 (holding a restriction on funding medically necessary abortions unconstitutional where the state failed to offer a compelling justification for treating men and women differently with respect to medical needs). *See also Hope Clinic for Women v. Flores*, 991 N.E.2d 745, 760, 765–67 (Ill. 2013) (finding state due process clause protects abortion in a manner "equivalent" to the federal constitution but applying strict scrutiny instead of federal undue burden standard); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981) (holding Massachusetts Declaration of Rights affords privacy rights with "no less protection" than the Federal Constitution and finding strict scrutiny applicable).

constitutional right to abortion and finding no compelling governmental interest because, "if the State has the power to infringe the right of procreative autonomy in favor of birth, then, necessarily, it also has the power to *require* abortion under some circumstances").

"To survive strict scrutiny, the government must prove that the challenged [statute] furthers a compelling governmental interest that is narrowly tailored to that interest." *Acree*, 615 S.W.3d at 816. The circuit court reasonably held that there is a substantial question that the Six-Week Ban cannot withstand strict scrutiny because "the state's purported interest in protecting potential fetal life pre-viability is not a compelling enough state interest to justify such an unparalleled level of intrusion and invasiveness into the fundamental area of choosing whether or not to bear a child." TI Order at 17–18. The circuit court found, based on witness testimony, that "a fetus cannot survive on its own outside of the womb until it has reached a gestational age between twenty and twenty-five weeks." *Id.* at 18. The Bans prohibit abortion well before the point of viability and "the state's interest in protecting fetal life before the point of viability has traditionally been viewed as insufficient to justify total or near total bans on abortion in courts across the country." *Id*. at 18 & n.13 (collecting state supreme court cases finding the constitutional right to abortion under state constitutions in Alaska, California, Florida, Minnesota, Montana, Tennessee, New Jersey, and Kansas). The circuit court held that "the fundamental right for a woman to control her own body free from governmental interference outweighs a state interest in potential life before viability." *Id*. at 18. Kentucky's "long and proud history of limiting governmental intrusion and overreach," *id.* at 14, means that "Kentuckians should have control over basic family planning choices." *Id.* at 18. The circuit court did not abuse its discretion in finding that Plaintiffs have raised serious questions on the merits of their

claims that the Six-Week Ban violates the fundamental rights to privacy and self-determination protected by Sections 1 and 2 of the Kentucky Constitution.[6]

2. Unlawful Delegation Claim

As the circuit court correctly held, Plaintiffs have also raised a serious question on the merits of whether the Trigger Ban is an unconstitutional delegation of legislative power. TI Order at 11. "Perhaps no state . . . has a Constitution whose language more emphatically separates and perpetuates . . . the American tripod form of government" than the Commonwealth of Kentucky. *Bd of Trs. of the Jud. Form Ret. Sys. v. Att'y Gen. of Ky.*, 132 S.W.3d 770, 782 (Ky. 2003) (quoting *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922)). Kentucky's Constitution separates governmental power into three branches, Ky. Const. §§ 27 & 28, and vests legislative power solely in the General Assembly, Ky Const. § 29. This "separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be 'strictly construed.'" *Legis. Rsch. Comm'n ex rel. Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984) (quoting *Arnett v. Meredith*, 121 S.W.2d 36, 38 (Ky. 1938)). It is well-established that because "Kentucky is a strict adherent to the separation of powers doctrine . . . the General Assembly cannot delegate any portion of the legislative function to another authority." *Diemer v. Commonwealth*, 786 S.W.2d 861, 864–65 (Ky. 1990); *see also, e.g.*, *City of Louisa v. Newland*, 705 S.W.2d 916, 918 (Ky. 1986). Unlike certain administrative functions that may be delegated with appropriate

[6] Although the circuit court did not include the Trigger Ban in its analysis under the right to privacy and self-determination because it had already found that there were substantial questions going to the merits of Plaintiffs' unlawful delegation challenge to the Trigger Ban, discussed *infra*, the circuit court's right to privacy and self-determination analysis would apply equally to the Trigger Ban.

safeguards, inherently legislative functions are categorically "nondelegable." *Diemer*, 786 S.W.2d at 864.

Determining what conduct is subject to Kentucky criminal law falls "directly under the umbrella of legislative and nondelegable functions" pursuant to Sections 27, 28, and 29 of the Kentucky Constitution. TI Order at 11. Because the Trigger Ban does not itself specify which abortions it will prohibit or when, but instead takes effect only "upon" and "to the extent permitted by" a decision of the U.S. Supreme Court, it violates these foundational nondelegation principles. As this Court's predecessor held in striking down a statute that created criminal penalties for violations of timekeeping standards to be set in the future by the federal government: "[w]hat conduct shall in the future constitute a crime in Kentucky . . . is a matter for the Kentucky legislature to determine" and is "not a matter that may be delegated" to the federal government. *Dawson v. Hamilton*, 314 S.W.2d 532, 536 (Ky. 1958); *see also Johnson v. Commonwealth*, 449 S.W.3d 350, 354–55 (Ky. 2014) (Cunningham, J., concurring) ("The authority to enact laws depriving citizens of their liberty by incarceration" is "the sole charge of the General Assembly."). In *Dawson*, this Court made clear that Kentuckians cannot be subject to criminal laws "based upon . . . [federal] considerations which have no direct relationship with the interests of Kentucky" with "no assurance whatever that any future changes . . . would conform to the best interests of our Commonwealth." *Dawson*, 314 S.W.2d at 536. For these reasons, the circuit court did not abuse its discretion in finding that Plaintiffs raised a substantial question going to the merits of their nondelegation claim.

3. Equal Protection and Religious Freedom Claims

The circuit court also concluded that a temporary injunction would be warranted in view of constitutional concerns not fully raised by the Plaintiffs but on which the circuit court found substantial questions going to the merits. For example, the circuit court found that Sections 1, 2, and 3 of the Kentucky Constitution ensure equal protection of the laws, and this includes bodily autonomy of a pregnant woman, including as part and parcel to the right to self-determination. TI Order at 15. The circuit court held that "there is no other context in which the law dictates that a person's body must be used against her will, even to aid or save the life of another. . . . Only in the context of pregnancy is a woman's bodily autonomy taken away from her." *Id*. The circuit court also held that there was a serious question as to whether the Bans violate Section 5 of the Kentucky Constitution's right of religious freedom. *Id.* The court reasoned that the law is an establishment of religion because it favors one set of religious beliefs, the belief that life begins at fertilization, to the exclusion of other religious beliefs, that have a variety of views about when in pregnancy life begins. *Id*. at 15–16. The circuit court did not abuse its discretion in making these further findings.

IV. Impact of House Bill 3's Prohibition on Abortions After 15 Weeks in Pregnancy.

This Court ordered the parties to "address the application of" the Trigger and Six-Week Bans "in light of the General Assembly's enactment of HB 3 in 2022, a bill amending KRS 311.782 to prohibit abortions after fifteen weeks gestation." Aug. 18 Op. & Order at 3. Plaintiffs clarify that the fifteen-week abortion ban is not at issue here. House Bill 3's fifteen-week abortion ban has been in effect since July 14, 2022, and is unaffected by the injunctive relief granted below.

CONCLUSION

For all the foregoing reasons, this Court should affirm the circuit court's temporary injunction and vacate the Court of Appeals' stay of that temporary relief.

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