Supreme Court of Kentucky

No. 2022-SC-0329

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

v.

Court of Appeals, No. 2022-CA-0906;
Jefferson Circuit Court,
No. 22-CI-03225

EMW WOMEN'S SURGICAL CENTER, P.S.C., on behalf of itself, its staff, and its patients, *et al.* — *Appellees*

OPENING BRIEF OF ATTORNEY GENERAL DANIEL CAMERON

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CERTIFICATE OF SERVICE

On September 19, 2022, I served this brief via U.S. mail on: Michele Henry, Craig Henry PLC, 401 West Main Street, Suite 1900, Louisville, Kentucky 40202; Brigitte Amiri, Chelsea Tejada, Faren Tang, ACLU Foundation, 125 Broad Street, 18th Floor, New York, New York 10004; Heather L. Gatnarek, ACLU of Kentucky, 325 Main Street, Suite 2210, Louisville, Kentucky 40202; Wesley W. Duke, Office of Secretary, Cabinet for Health and Family Services, 275 East Main Street 5W-A, Frankfort, Kentucky 40621; Carrie Flaxman, Planned Parenthood Federation of America, 1110 Vermont Avenue, NW, Suite 300, Washington, D.C. 20005; Leah Godesky, Kendall Turner, O'Melveny & Myers LLP, 1999 Avenue of the Stars, Los Angeles, California 90067; Leanne Diakov, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; Thomas B. Wine, Jason B. Moore, Office of the Commonwealth's Attorney, 30th Judicial Circuit, 514 West Liberty Street, Louisville, Kentucky 40202; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Clerk, Jefferson Circuit Court, 600 West Jefferson Street, Louisville, Kentucky 40202. As this is an appeal under CR 65.07, no certified record on appeal exists.

Matthew F. Kuhn

INTRODUCTION

This appeal concerns whether the Kentucky Constitution protects the right to obtain an abortion. The text of the Constitution, case law interpreting it, and the Commonwealth's century-long history of protecting unborn human life to the fullest extent possible all confirm that the regulation of abortion in Kentucky is an issue left to the people's representatives in the General Assembly.

STATEMENT CONCERNING ORAL ARGUMENT

The Court's opinion and order granting transfer stated that oral argument will be heard on November 15, 2022. The Attorney General looks forward to addressing the Court at that time.

STATEMENT OF POINTS & AUTHORITIES

STATEMENT OF THE CASE

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

When two Justices on Kentucky's high court penned these words, the U.S. Supreme Court had just decided *Roe v. Wade*, 410 U.S. 113 (1973), and thus overturned Kentucky's decades-long prohibition of abortion passed by the General Assembly. In the 50 years that followed, abortion became "one of the most contentious policy and political issues of our time." *See EMW Women's Surgical Ctr., P.S.C. v. Cameron*, --- S.W.3d ---, 2022 WL 3641196, at *4 (Ky. Aug. 18, 2022) (Minton, C.J., concurring in part and dissenting in part). More to the point, *Roe v. Wade* "sparked a national controversy that . . . embittered our political culture for a half century." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2241 (2022). And it did so by putting the judiciary at the center of the political firestorm.

The decision below threatens to take Kentucky's judiciary down that same path. Less than a month after the U.S. Supreme Court's decision in *Dobbs*, a single circuit judge created the Kentucky version of *Roe v. Wade*. The circuit court temporarily enjoined the enforcement of two duly enacted laws regulating abortion after declaring that there is a substantial likelihood that the Kentucky Constitution protects abortion.

As to this legal conclusion, the Attorney General will not mince words. The claim that Kentucky's Constitution protects abortion is detached from anything that resembles ordinary legal reasoning. Since 1879, Kentucky's courts have recognized the General Assembly's prerogative to prohibit abortion. *See Mitchell v. Commonwealth*, 78 Ky. 204, 209–10 (Ky. 1879). And just before *Roe* was decided, this Court's predecessor reaffirmed that regulating abortion is a matter for the legislature. *See Sasaki v. Commonwealth*, 485 S.W.2d 897, 902–04 (Ky. 1972) (*Sasaki I*), *vacated by Sasaki v. Kentucky*, 410 U.S. 951 (1973). No Kentucky case has come close to saying otherwise. That is because, like the U.S. Constitution, Kentucky's Constitution "is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process." *See Dobbs*, 142 S. Ct. at 2306 (Kavanaugh, J., concurring).

By holding otherwise, the circuit court arrogated to itself the General Assembly's policy-making prerogative to "weigh[] interests" that are "heavy" and "important." *See EMW*, 2022 WL 3641196, at *2 (Keller, J., concurring in result only). If the Court upholds the circuit court's reasoning, its docket will soon be filled with case after case asking how far the newfound right to abortion goes. Does the alleged right restrict the General Assembly from prohibiting abortions in which an unborn child is ripped apart limb by limb while his or her heart is beating? KRS 311.787(2). Or does the Kentucky Constitution allow the General Assembly to ban performing abortions that the provider knows are sought because of the race, gender, or disability of an unborn child? KRS 311.731(2). Or does our Constitution allow the General Assembly to merely require that, before an abortion, a pregnant woman be shown the ultrasound

image of her unborn child and hear her child's heartbeat? KRS 311.727(2). Make no mistake, if the Court recognizes an unwritten right to abortion in the Kentucky Constitution, issues like these will soon be at the Court's doorstep, given that the Appellees have spent years challenging virtually every restriction on abortion in Kentucky, no matter how modest. *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander,* 978 F.3d 418 (6th Cir. 2020); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785 (6th Cir. 2020), *vacated by* 2022 WL 2866607 (6th Cir. July 21, 2022); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019).

No one doubts that the "[d]ebate regarding abortion access will continue to permeate our political discourse for years to come." *See EMW*, 2022 WL 3641196, at *3 (Minton, C.J., concurring in part and dissenting in part). Although Kentuckians disagree about whether *Roe* should have been overturned, the virtue of this new paradigm is that Kentuckians now get to decide *for themselves* an issue that implicates "matters of life, death, and health." *See id.* at *2 (Keller, J., concurring in result only). If Kentuckians think the two laws at issue here are too restrictive, they can elect legislators who share their views so that the Commonwealth's public policy can self-correct. After *Dobbs*, there is now "the possibility for compromise at the local level." *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 537 (6th Cir. 2021) (en banc) (Sutton, J., concurring). Such compromises may well lead to state policies that are "more stable, less political, more fair, [and] sometimes mo[re] lasting." *See id.*

* * *

On June 24, 2022, the U.S. Supreme Court decided *Dobbs*. The Court held that its decisions establishing a federal right to abortion—*Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)—"must be overruled" because those decisions were "egregiously wrong from the start." *Dobbs*, 142 S. Ct. at 2242–43. The Court thus "return[ed] the issue of abortion to *the people's elected representatives*." *Id.* at 2243 (emphasis added).

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

The first, the Human Life Protection Act, prohibits most abortions in the Commonwealth. KRS 311.772(3)(a). The second, Kentucky's Heartbeat Law, prohibits an abortion after an unborn child has a detected heartbeat. KRS 311.7706(1). Both laws contain a health exception to protect pregnant women. The Human Life Protection Act allows "a licensed physician to perform a medical procedure necessary in [his or her] reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman." KRS 311.772(4)(a). The Heartbeat Law provides similarly. KRS 311.7705(2), .7706(2)(a).

The circuit court issued a restraining order as to both laws without providing one word of factual or legal analysis. Ex. 2. The circuit court also scheduled a hearing on the Facilities' motion for a temporary injunction for the next week. That hearing, however, looked like what one would expect from a legislative committee hearing in the Capitol Annex, not a judicial proceeding about questions of constitutional law.

The Facilities tried to show that prohibiting abortion is not sound public policy. Yet even that effort fell short. Their primary witness, Dr. Ashlee Bergin, who at the time performed abortions at EMW, refused to answer basic questions about unborn children. When asked whether she views an unborn child as a patient, she responded: "I just don't think of it in those terms." Ex. 3 at 65:3. When asked whether an unborn child is a human being, she countered again: "I don't think of it in those terms." *Id.* at 66:22. And when asked whether the fertilization process creates human life, Dr. Bergin stated that "I never have really given the matter much -- that much thought." *Id.* at 76:11–12.

The Facilities' other witness, Jason Lindo, an economics professor, fared no better. His testimony "stands for the proposition that Kentucky's laws restricting or banning abortions will lead to fewer abortions in the Commonwealth." *Id.* at 133:22–134:1. Professor Lindo saw this as leading to "deleterious economic consequences," because raising children is expensive and would disrupt some women's career development. *Id.* at 137:2–8, 163:18–23. Professor Lindo, however, was "not familiar" with Kentucky's safe-haven law, *id.* at 163:24–164:1, which gives a parent who brings an

infant to a specified location the right to leave the child there anonymously, KRS 216B.190(3); KRS 405.075(2).

Professor Lindo also testified that a disproportionate number of minority women receive abortions. Ex. 3 at 148:10–16. He thus agreed that if the laws at issue are enjoined, there would be fewer minority children born in the Commonwealth in the coming years. *Id.* at 148:21–149:7. When asked whether more minority children in Kentucky was a good or bad thing, Professor Lindo refused to answer: "I am not making any value judgments here today." *Id.* at 149:8–10.

The Commonwealth's witnesses crystallized the terms of debate even further. Dr. Monique Chireau Wubbenhorst, an OB-GYN who trained at Brown, Harvard, and Yale, *id.* at 176:18–25, explained how a distinct human being forms right after fertilization, and that within about four weeks the cells that will eventually make up the cardiovascular system have already formed, *id.* at 185:12–188:3. By nine to ten weeks, "the fetal heart functions as it will in the adult." *Id.* at 188:13. Soon after, "fingerprints are discernible," and the unborn child will have detectable electrical activity in his or her brain. *Id.* at 188:17–20.

The Commonwealth also presented the testimony of a renowned professor of public bioethics. Professor Carter Snead testified that Kentucky's statutory definition of an unborn human being is "a fairly standard definition that represents one perspective in the mainstream of the debate about the moral standing of the unborn human

being." *Id.* at 256:8–10. Kentucky's policy judgment, Professor Snead continued, "reflects the view, a capacious view of the human family that includes all human beings, born and unborn." *Id.* at 257:8–10.

The circuit court granted the Facilities' motion for a temporary injunction as to both laws. Ex. 4 at 20. In doing so, the circuit court not only held that there is a "substantial likelihood" that Kentucky's Constitution protects abortion, it also held that the challenged laws likely violate the equal-protection provisions in Sections 1, 2, and 3 of the Constitution, as well as the religious-freedom protection in Section 5. *Id.* at 1. The Facilities, however, never pressed the latter two claims. Finally, the circuit court held that the Human Life Protection Act is likely an unconstitutional delegation of legislative authority. *Id.*

The Attorney General promptly sought interlocutory relief under CR 65.07. The Court of Appeals (L. Thompson, J.) stayed the circuit court's temporary injunction under CR 65.07(6). Ex. 5 at 6. On a motion for extraordinary relief under CR 65.09, this Court declined to lift that stay and transferred this matter to its docket. *EMW*, 2022 WL 3641196, at *1 (plurality op.).

ARGUMENT

A party adversely affected by a temporary injunction can seek immediate appellate relief. CR 65.07(1). An appellate court reviews that temporary injunction for an abuse of discretion. *Boone Creek Props., LLC v. Lexington-Fayette Urb. Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 38 (Ky. 2014). Although this standard of review gives deference to a circuit judge, that deference only goes so far. A temporary injunction cannot be

"arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Cameron v. Beshear*, 628 S.W.3d 61, 72 (Ky. 2021) (citation omitted). More to the point, an error of law amounts to an abuse of discretion. *Id.* As does the circuit court substituting its view of the public interest for that determined by the Kentucky General Assembly. *See id.* at 78. An abuse of discretion also occurs when the circuit court fails to address the irreparable harm caused by not enforcing a duly enacted law. *See id.* at 73.

To secure a temporary injunction, a movant must show three things. First, the movant must show a "substantial question" on the merits. *Id.* at 71 (citation omitted). A temporary injunction, in other words, should not issue in "doubtful cases." *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 161 (Ky. 2009) (citation omitted). Second, the movant must show that he or she will suffer irreparable harm. *Cameron*, 628 S.W.3d at 71. In a case challenging the constitutionality of a statute, the irreparable-harm showing is "tied to" the movant's likelihood of success on the merits, given that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Id.* at 73. And third, the movant must show that the equities weigh in his or her favor, which includes consideration of the public interest. *Id.* at 71.

On all three counts, the circuit court badly abused its discretion. Most importantly, there is no conceivable basis for finding that the Facilities will prevail on the merits. And because there is no legal support for their novel claims, the Facilities cannot show an irreparable injury. Lastly, the equities overwhelmingly weigh against a temporary injunction because the Commonwealth and the public are irreparably harmed

whenever a court enjoins enforcement of a duly enacted statute. All the more so given that protecting unborn human life is at stake here.

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

The circuit court was egregiously wrong in its evaluation of the merits. Only by ignoring the text of Kentucky's Constitution, overlooking the Commonwealth's history, and expanding Kentucky precedent beyond its breaking point was the circuit court able to divine—for the first time in the Commonwealth's history—an unwritten right to abortion in the Kentucky Constitution. The Facilities are of course allowed to pursue such a novel claim to final judgment. But their case is "doubtful" at best, so a temporary injunction is not appropriate in the meantime. *See Thompson*, 300 S.W.3d at 161 (citation omitted).

The discussion below of the merits proceeds like this: First, the Attorney General discusses the Facilities' lack of constitutional standing. Second, he discusses the Facilities' claim that the Kentucky Constitution contains an unwritten right to an abortion. Third, he discusses the other claims considered by the circuit court.[1] Fourth, at the direction of the Court, the Attorney General discusses the effect of Kentucky's prohibition of abortion after 15 weeks on the two laws at issue here.

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[1] The circuit court found that the Human Life Protection Act "does not adequately give notice" of its effective date. Ex. 4 at 11–12. In their CR 65.07 response in the Court of Appeals (at 22 n.2), the Facilities conceded that this claim is now moot. The Attorney General agrees. If the Court disagrees, the Attorney General incorporates his argument (at 45–47) from the CR 65.07 motion he filed in the Court of Appeals.

A. The Facilities lack third-party standing.[2]

The circuit court should have turned away the Facilities' claim that the Kentucky Constitution protects abortion based on standing alone. Constitutional standing is a prerequisite to any suit filed in Kentucky's courts. *Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 196 (Ky. 2018). "Before one seeks to strike down a state statute he must show that the alleged unconstitutional feature *injures him.*" *Second St. Props., Inc. v. Fiscal Ct. of Jefferson Cnty.*, 445 S.W.2d 709, 716 (Ky. 1969) (emphasis added).

Even if the Kentucky Constitution protects the right to an abortion (it does not), any such right would belong to pregnant women, not to abortion providers. The Facilities do not claim that they have a constitutional right to perform abortions. Instead, they try to represent the alleged constitutional rights of pregnant women, none of whom are parties here. Ex. 1 ¶¶ 96, 102, 126, 130.

This Court has rejected just such an effort to represent a third party's rights in a constitutional challenge to state law. *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995). In *Associated Industries*, an employer sought to represent its employees' interests in challenging a Kentucky law that affected them, which meant that "the affected parties" were "not before the court." *Id.* at 950. The Court refused to allow third-party standing, holding that "[t]he assertion of one's own legal rights and interests must be demonstrated and the claim to relief *will not rest* upon the legal rights

[2] The Attorney General preserved this argument in his response to the motion for a temporary injunction (at 2 n.2, 4) and in his incorporated motion to dismiss (at 4–6).

of third persons." *Id.* at 951 (emphasis added). This holding forecloses any assertion of third-party standing here. The Facilities are doing exactly what *Associated Industries* prohibits—"rest[ing] upon the legal rights of third persons" to bring suit. *See id.*

The circuit court relied on federal case law about abortion to conclude otherwise. Ex. 4 at 6. It is true that, before *Dobbs*, federal courts created a special carve-out to allow abortion providers to represent pregnant women. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118–20 (2020) (plurality op.); *Singleton v. Wulff*, 428 U.S. 106, 113–18 (1976) (plurality op.). But *Dobbs* discredited that precedent by holding that these cases "*ignored* the Court's third-party standing doctrine." 142 S. Ct. at 2275 (emphasis added). And *Dobbs* included an illustrative footnote showing how abortion case law had bent the normal rules for third-party standing. *Id.* at 2275 n.61. *Dobbs* can only be read to conclude that abortion-specific rules about third-party standing are no more. *See SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, 40 F.4th 1320, 1328 (11th Cir. 2022) ("Because we take the Supreme Court at its word, we must treat parties in cases concerning abortion the same as parties in any other context."). In fact, although it found third-party standing, the circuit court acknowledged that *Dobbs* "expressed displeasure with how abortion related litigation has proceeded with the doctrine of third party standing." Ex. 4 at 6 n.2.

Even if the Court were to overrule *Associated Industries* and hold that third-party standing can exist sometimes, this is not one of those circumstances. The U.S. Supreme Court's decision in *Kowalski v. Tesmer* outlines the "limited" situations in federal court in which one party can assert another's rights: when a plaintiff shows (i) he or she "has

a 'close' relationship with the person who possesses the right," and (ii) there is "a 'hindrance' to the possessor's ability to protect his own interests." 543 U.S. 125, 129–30 (2004) (citation omitted).

The circuit court did not engage with this two-part test. Had it done so, the circuit court would have found that the Facilities cannot invoke any third-party rights that pregnant women may have. The Facilities have offered no evidence to establish that they have a "close" relationship with unidentified, future pregnant women who will seek an abortion. *See June Med. Servs.*, 140 S. Ct. at 2168 (Alito, J., dissenting) ("[A] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure.").[3] And the fact that the Facilities seek to represent an unnamed and undefined group of future pregnant women underscores the lack of a close relationship. *See Kowalski*, 543 U.S. at 130–31. Indeed, the Supreme Court has held that a pediatrician cannot defend a State's abortion law on the theory that unborn children are his future potential patients. *See Diamond v. Charles*, 476 U.S. 54, 66 (1986). And the Facilities have offered no evidence to establish that pregnant women cannot protect their own rights. To the contrary, "a woman who challenges an abortion restriction can sue under a pseudonym, and many have done so." *June Med. Servs.*, 140 S. Ct. at 2168 (Alito, J., dissenting).

[3] The Facilities have criticized relying on Justice Alito's dissent from *June Medical* to discuss the contours of third-party standing. But *Dobbs* relied on it to show how prior decisions "have ignored the Court's third-party standing doctrine." *Dobbs*, 142 S. Ct. at 2275 & n.61.

B. The Kentucky Constitution does not protect abortion.[4]

1. The Kentucky Constitution does not mention abortion.

When Kentucky courts interpret our Constitution, they "look first and foremost to the express language of the provision." *Westerfield v. Ward*, 599 S.W.3d 738, 747 (Ky. 2019). But the word "abortion" appears nowhere in any of the 263 provisions that make up Kentucky's charter—a point the circuit court acknowledged. Ex. 4 at 10.

Without a textual hook for its holding, the circuit court resorted to the lofty notion that our framers "craft[ed] broad sentiments, ideas, and rights they value and cho[]se to protect." *Id.* The circuit court also stated that Kentucky's Constitution "must protect more than just the words explicitly enumerated on the page in order for the purpose behind the words to have effect." *Id.* The circuit court cited nothing for its words-don't-matter theory of constitutional interpretation. And it is easy to see why. This notion offends "[t]he basic rule" of constitutional interpretation: "to interpret a constitutional provision according to what was said and not what might have been said; according to what was included and not what might have been included." *See Commonwealth v. Claycomb*, 566 S.W.3d 202, 215 (Ky. 2018) (citation omitted). In fact, "[n]either legislatures nor courts have the right to add to or take from the simple words and meaning of the [C]onstitution." *Id.* (citation omitted). And it is "presumed that in fram-

[4] The Attorney General preserved this argument in his response to the motion for a temporary injunction (at 2 & n.2) and in his incorporated motion to dismiss (at 11–21).

ing the [C]onstitution great care was exercised in the language used to convey its meaning and as little as possible left to implication." *Westerfield*, 599 S.W.3d at 748 (citation omitted).

In short, the text of the Constitution shows that the Facilities' case is "doubtful" at best. *See Thompson*, 300 S.W.3d at 161 (citation omitted).

2. The Debates confirm that the Constitution does not protect abortion.

The Debates that led to our Constitution also cut against the Facilities. The Debates show that not one Delegate even suggested that Kentucky's Constitution would protect abortion.

The word "abortion" appears only three times in the Debates. Debates from 1890 Constitutional Convention at 1099, 2476, and 4819. First, the Delegates recognized that abortion was a crime in the Commonwealth. That recognition came during a discussion of the Governor's pardon power. *Id.* at 1099. The second reference to abortion notes that it was also a crime in Indiana, *id.* at 2476, and the final reference uses the term in a different context not relevant here, *id.* at 4819. So if the Debates shed any light on the issue, they recognize that abortion can be a crime. More importantly, the fact that no Delegate stated that the provisions under consideration

would protect the right to abortion is compelling evidence that Kentucky's Constitution does not contain such a right.

3. Kentucky case law and history foreclose an unwritten right to abortion.

The circuit court's merits analysis simply cannot overcome nearly a century-and-a-half of judicial precedent, not to mention the Commonwealth's century-long history of protecting unborn human life to the fullest extent allowed by law.

a. As early as 1879, this Court's predecessor recognized the common-law crime of performing an abortion because, at the time, Kentucky's statutes were "silent in reference to this matter." *Mitchell*, 78 Ky. at 205, 210. At issue in *Mitchell* was whether an indictment charging an individual with performing an abortion needed to specify that "the woman was quick with child," *id.* at 210, meaning that she had felt the baby move in the womb, *Dobbs*, 142 S. Ct. at 2249. While some authority supported the claim that abortion was prohibited at all stages at common law, *Mitchell*, 78 Ky. at 206–07, *Mitchell* reasoned that, under the common law, the indictment needed to specify that the woman was quick with child, *id.* at 210.

But *Mitchell* did not stop there. Instead, it explained exactly how the General Assembly could regulate abortion beyond what the common law prohibits:

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

Id. at 209–10 (emphasis added). This passage can only be read as recognizing the General Assembly's legislative power to prohibit abortion at any point during pregnancy. *See id.* To repeat, nearly 150 years ago, this Court's predecessor held that "the law should punish abortions and miscarriages, wilfully produced, at any time during the period of gestation" and that this "ought to be provided against by the law-making department of the government." *Id.*

Mitchell came at a key time in our constitutional history—just 12 years before we adopted our current Constitution. This means that when the Delegates came to the Debates, they discussed matters against *Mitchell*'s background rule that the General Assembly had the power to "punish abortions and miscarriages, wilfully produced, at any time during the period of gestation." *See id.* And as discussed above, not one Delegate disclaimed *Mitchell.* As a result, there is no basis to dispute that our current Constitution did anything but carry forward *Mitchell's* recognition that the General Assembly can prohibit all abortions.[5] *See Wilson v. Commonwealth*, 60 S.W. 400, 401 (Ky. 1901) (recognizing after *Mitchell* and after our Constitution was adopted that "[t]here is no statute in this state changing the common-law rule").

b. In 1910, the General Assembly acted consistent with *Mitchell* by passing a law regulating abortion more strictly than the common law. This law changed the "restricted common law rule [from *Mitchell*] . . . in this jurisdiction." *Fitch v. Commonwealth*,

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[5] The circuit court briefly discussed *Mitchell*, Ex. 4 at 13–14, but it failed to acknowledge the decision's recognition that the General Assembly can prohibit abortion "at any time during the period of gestation." *Mitchell*, 78 Ky. at 209. *Mitchell* matters here not because of what it said about the common law, but because of what it said about the General Assembly's policy-making prerogative.

165 S.W.2d 558, 560 (Ky. 1942). The 1910 law prohibited performing an abortion at *any* stage of pregnancy with an exception to preserve the life of the mother. The statute provided:

> It shall be unlawful for any person to prescribe or administer to any pregnant woman, or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or substance, whatsoever, with the intent thereby to procure the miscarriage of such woman, or with like intent, to use any instrument or means whatsoever, unless such miscarriage is necessary to preserve her life.

1910 Ky. Acts, Ch. 58, § 1, *codified at* Ky. Stat. 1219a (1915), *recodified at* KRS 436.020 (1942). Thus, starting in 1910, Kentucky prohibited all abortions except when necessary to preserve the mother's life.

This statute remained on the books for 63 years—until after *Roe* was decided. Not once did this Court's predecessor suggest that this prohibition was unconstitutional. And the Court had plenty of opportunities to do so. Before *Roe*, this Court's predecessor "regularly affirmed convictions for abortion without any hint that either the prosecutions or convictions violated the Kentucky Constitution." Paul Benjamin Linton, *Abortion Under State Constitutions, A State-by-State Analysis* 177 (3d ed. 2020).

In fact, mere months before *Roe*, this Court's predecessor unanimously rejected a constitutional challenge to Kentucky's prohibition of abortion. In *Sasaki I*, the Court determined that "the State has a compelling reason for an interest in the existence of the current abortion statute." 485 S.W.2d at 902 (citation omitted). The Court also held that any balancing of interests in deciding whether and at what stage to prohibit abortion "would be a matter for the legislature." *See id.* (citation omitted). The Court took pains to note its "obligation to exercise judicial restraint in nullifying the will and desires

expressed by a duly enacted statute of long standing on a matter of deep significance to the way of life, attitude or mind and individual personal faith of the whole people of a sovereign state." *Id.* (citation omitted). So committed was this Court's predecessor to this principle that it upheld the 1910 statute even though the Court "fe[lt] the statute could and should be reformed to more fairly recognize the interest of the pregnant woman." *Id.* (citation omitted).

Obviously, *Roe* shifted this landscape as a matter of federal law. In *Roe*'s wake, this Court's predecessor begrudgingly acknowledged that it was "compelled" to find Kentucky's prohibition of abortion unconstitutional under the federal Constitution. *Sasaki II*, 497 S.W.2d at 714. But three Justices wrote separately to emphasize that the General Assembly has the power to prohibit abortion and that *Roe* was wrong to conclude otherwise. Justice Osborne believed that *Roe* "usurp[ed] the rights of the several states in this Union to determine for themselves what constitutes a crime and to enforce their own criminal laws." *Id.* (Osborne, J., concurring). Justice Reed, joined by Chief Justice Palmore, said that *Roe* was not based on "any legal principle that the judiciary may properly rely upon." *Id.* at 715 (Reed, J., concurring). More specifically, Justice Reed and Chief Justice Palmore underscored that the regulation of abortion should be referred "to the political process even though groups would be angered." *Id.* at 715. They summed up:

> Although it is much cheaper and easier to ask a court to order the social change wanted rather than to go through the time-consuming, expensive and inconvenient process of persuading voters or legislators, the fact remains that the proper forum to accomplish a change such as is involved here is a policy process to be consigned to the legislature.

Id. Thus, following *Roe*, at least three members of this Court's predecessor remained firm in the conviction that regulating abortion is a matter for the legislature.

There is one final bookend to Kentucky's long history of protecting unborn life to the greatest extent allowed by law. The year after *Roe* was decided, the General Assembly revised its abortion-related statutes to comply with *Roe*. *See Wolfe v. Schroering*, 388 F. Supp. 631, 633 (W.D. Ky. 1974), *aff'd in part, rev'd in part*, 541 F.2d 523 (6th Cir. 1976). Although the legislature repealed the prohibition of abortion dating to 1910, 1974 Ky. Acts, Ch. 255, § 19, it did so only because of *Roe*. And soon after *Roe*, the General Assembly made its intent clear: "If . . . relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of *all* human beings regardless of their degree of biological development *shall be fully restored.*" KRS 311.710(5) (1982) (emphasis added), 1982 Ky. Acts, Ch. 342, § 1(5). This provision remains a part of Kentucky law to this day, 40 years later. So during the decades that *Roe* was the law of the land, Kentucky's legislature was unflagging in its view that "all" human life should be protected.

* * *

In sum, in the 140 plus years since *Mitchell*, the General Assembly has had the policy-making prerogative to prohibit all abortions. This Court's predecessor reaffirmed as much in *Sasaki I* just months before *Roe* was decided. Consistent with this case law, from 1910 until after *Roe*, the General Assembly prohibited all abortions, with an exception to protect the mother's life. And even after *Roe*, three members of Kentucky's high court reiterated the General Assembly's legislative power in this regard.

And shortly after *Roe* and following, the General Assembly continually expressed Kentucky's policy preference to protect all human life. The Human Life Protection Act and the Heartbeat Law are simply part of this century-long tradition of protecting unborn human life in the Commonwealth to the fullest extent possible.

Why does this history matter? It matters because it shows just how jarring to our legal system the circuit court's holding really is. Its holding contradicts more than a century of Kentucky jurisprudence and history. Not only that, the circuit court's decision flouts "the actual, practical construction that has been given to [the Constitution] by the people." *See Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957). This rich history should not be so lightly discarded—particularly not at the temporary-injunction stage. *See Thompson*, 300 S.W.3d at 161. Instead, under the circumstances, it should be "entitled to controlling weight." *See Grantz*, 302 S.W.2d at 367.

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

With the constitutional text, case law, and history so clearly against it, the circuit court retreated to Kentucky case law that has nothing to do with abortion. Ex. 4 at 12–13. Essentially the only case that the circuit court cited was *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). But it extends *Wasson* beyond even its own terms to derive from it a constitutional right to abortion.

In *Wasson*, this Court held that a criminal statute prohibiting consensual sexual intercourse "with another person of the same sex" violated a right to privacy in Kentucky's Constitution. *Id.* at 488, 492–99. To state the obvious, *Wasson* had nothing to do with abortion. In fact, abortion was nowhere mentioned in the decision. Nor does

Wasson say anything that impeaches the conclusion of *Mitchell* and *Sasaki I* that the General Assembly can prohibit all abortions if it sees fit.

The circuit court reached a contrary conclusion by relying on *Wasson*'s discussion of a right to privacy. Ex. 4 at 13. The circuit court read *Wasson* very broadly, rejecting any assertion that it "is limited to the context of private sexual activity between consenting adults." *Id.* at 13 n.6. By the circuit court's telling, *Wasson* stands for "a much broader and more fundamental right" to privacy. *Id.*

This expansive reading ignores what *Wasson* said about its own scope. *Wasson* carefully and repeatedly emphasized that the right to privacy it recognized does not extend to conduct that adversely affects someone else. For example, in discussing the constitutional Debates, the Court quoted a Delegate who discussed "protect[ing] each individual in the rights of life, liberty, and the pursuit of happiness, provided that he shall in no wise injure his neighbor in so doing." 842 S.W.2d at 494 (citation omitted). *Wasson* expressly adopted this limiting principle, holding that private conduct "which *does not operate to the detriment of others*, is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." *Id.* at 496 (emphasis added) (internal quotation marks omitted). That is to say, *Wasson* expressly premised its holding on the conduct at issue "not operat[ing] to the detriment of others."[6] *Id.*

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[6] According to *Wasson*, the "leading case" on the right to privacy in Kentucky is *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. 1909). *Campbell* dealt with a person who possessed "liquor for his own use, and for no other purpose." *Id.* at 384. This Court's predecessor held that "[t]he history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he *committed no offense*

In framing its analysis, *Wasson* returned to this point so many times that it cannot be missed. *See id.* at 493 (Sexual intercourse "conducted in private by consenting adults is not beyond the protections of the guarantees of individual liberty . . . ."); *id.* at 494–95 ("It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society." (emphasis omitted) (citation omitted)); *id.* at 496 ("The power of the state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults and weaknesses, which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concerns." (citation omitted)).

This repetition in *Wasson* cannot be written off as idle language. It was *Wasson* making clear—over and over—that the right recognized there has no application when one person's conduct harms another. That is to say, whatever the scope of Kentucky's right to privacy, it does not protect conduct that operates to the detriment of another. Even the dissent agreed that this was the "major premise" of *Wasson*. *Id.* at 505 (Lambert, J., dissenting).

Taking *Wasson* at its word, *Wasson* does not apply here for the simple reason that abortion in fact operates to the detriment of someone else: most obviously, unborn

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against public decency by being intoxicated . . . ." *Id.* at 385 (emphasis added). *Campbell* thus recognizes the same limiting principle as *Wasson*.

children.[7] The U.S. Supreme Court has recognized this very distinction. As the Supreme Court explained in *Dobbs*, "decisions involving matters such as intimate sexual relations, contraception, and marriage"—*i.e.*, cases like *Wasson*—are "fundamentally different . . . because [abortion] destroys what [*Roe and Casey*] called 'fetal life' and what the law now before us describes as an 'unborn human being.'" *See* 142 S. Ct. at 2243. More to the point, "[w]hat sharply distinguishes the abortion right" from a case like *Wasson* is that "[a]bortion destroys what [*Roe* and *Casey*] call 'potential life.'" *See id.* at 2258. This simple distinction drives a massive wedge between *Wasson* and the alleged right to end unborn human life.[8]

Even the two Justices who would have granted a stay here recognized this "serious" argument. *See EMW*, 2022 WL 3641196, at *4 (Minton, C.J., concurring in part and dissenting in part) ("[T]he Attorney General also advances serious allegations of irreparable harm, alleging that any abortions performed during the pendency of this litigation cannot be reversed."). And this Court's predecessor held that "the State has a compelling interest in the preservation of potential human life." *Sasaki I*, 485 S.W.2d at 902 (citation omitted). More to the point, abortion "destroy[s] potential life." *Id.* at 902 n.1 (citation omitted).

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[7] Abortion also undermines the integrity of the medical profession. Ex. 3 at 258:21–259:3.

[8] *Wasson* is also distinguishable because the historical tradition there was not what it is here. The statute in *Wasson* "punishe[d] conduct which has been historically and traditionally viewed as immoral, but much of which has never been punished as criminal." 842 S.W.2d at 491. Here, by contrast, Kentucky has a century-long tradition of prohibiting abortion to the fullest extent allowed by law.

The Facilities, for their part, have not disputed that abortion forever ends unborn life. Their only witness on this topic—Dr. Bergin—altogether refused to engage on the subject. Dr. Bergin "ha[d] not come across" any literature "suggesting that the fetus is actually a patient and should be treated as a patient by the OB-GYN." Ex. 3 at 65:9–14. When asked whether she agrees that human life begins at fertilization, she admitted that "I never have really given the matter much -- that much thought." *Id.* at 75:20–76:12. And when asked whether she agrees with Kentucky's statute defining a "human being" as including the time from fertilization until birth, Dr. Bergin responded that "I haven't really given this matter much thought. I probably need to think on it and could tell you specifically what I think." *Id.* at 76:18–77:14. So when given the opportunity to explain why abortion does not irretrievably harm unborn children, the Facilities offered nothing but non-answers.

There is a reason for that. In unrefuted testimony, Dr. Wubbenhorst[9] testified about a survey of 5,500 biologists, many of whom support abortion access, in which 96 percent of the biologists agreed that life begins at fertilization.[10] *Id.* at 212:16–23. The science of fetal development shows why this overwhelming biological consensus exists. An unborn child's heartbeat can be detected as early as five weeks, with the

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[9] The circuit court discounted Dr. Wubbenhorst's and Professor Snead's testimony simply because they work at the University of Notre Dame, a Catholic institution. Ex. 4 at 4–5, 19 n.14. The circuit court, by contrast, did not find any problem with the testimony of Dr. Bergin, who was paid to perform abortions at EMW. Ex. 3 at 45:20–21, 85:9–16. This double standard is a definitional abuse of discretion.

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

heartbeat evident at around eight to ten weeks. *Id.* at 191:2–192:22. As the Heartbeat Law recognizes, an unborn child's heartbeat serves as a "key medical predictor that an unborn human individual will reach live birth." 2019 Ky. Acts, Ch. 20, § 2(5).

The heartbeat is not the only marker of human life that develops very early in pregnancy. An unborn child's nervous system begins to differentiate at around five weeks. Ex. 3 at 188:8–22. By seven weeks, the first synapses can be observed in the spine. *Id.* By eight to nine weeks, electrical activity can be detected in the brain. *Id.* An unborn child's hands begin to develop around four weeks. *Id.* And by about ten weeks, fingerprints can be discerned. *Id.*

All this evidence about the development of unborn children is undisputed on this record. And Dr. Bergin admitted the truth of some of it. She acknowledged that "a live fetus that's developing towards full term has a heartbeat by the eighth week or so" and that this heartbeat is distinct from the pregnant mother's. *Id.* at 63:9–15. When asked whether an abortion after that point stops a beating heart, Dr. Bergin agreed that "the end of the pregnancy stops that beating heart of the baby in every case." *Id.* at 64:6–11.

In short, the evidence that abortion operates to the detriment of someone else—an unborn child—went unchallenged in circuit court. This evidence shows just how distinguishable *Wasson* is. At bottom, the Facilities' argument rests on extending *Wasson* beyond its express terms based on a factual issue that the Facilities conceded—a notion that is "doubtful" at best. *See Thompson*, 300 S.W.3d at 161 (citation omitted).

5. The two laws pass constitutional scrutiny.

Because the Kentucky Constitution does not protect the right to obtain an abortion, rational basis review applies. *Beshear v. Acree*, 615 S.W.3d 780, 816, 826 (Ky. 2020) (applying rational basis review to health-related laws); *accord Dobbs*, 142 S. Ct. at 2283–84. Legitimate state interests that justify the Human Life Protection Act and the Heartbeat Law include, among others, preserving unborn human life at all stages, protecting maternal health and safety, mitigating fetal pain, and safeguarding the integrity of the medical profession. *See Dobbs*, 142 S. Ct. at 2284; *accord SisterSong Women of Color*, 40 F.4th at 1325–26 (upholding Georgia's heartbeat law under rational basis review).

Even if this Court were to apply some form of heightened scrutiny (it should not), the Human Life Protection Act and the Heartbeat Law still survive review. This Court's predecessor held that the Commonwealth "has a compelling reason for an interest in the existence of the current abortion statute." *See Sasaki I*, 485 S.W.2d at 902 (citation omitted). The Human Life Protection Act and the Heartbeat Law protect the lives of unborn children while providing the flexibility that physicians need to protect the health and safety of pregnant women. KRS 311.772(4); KRS 311.7706(2).

In reaching a different conclusion, the circuit court offered a series of problems that it speculated would arise if the challenged laws are enforced. The circuit court suggested that the laws would "potentially obligate the state to investigate the circumstances and conditions of every miscarriage that occurs in Kentucky." Ex. 4 at 14. That could not be more wrong. Neither law applies when a pregnant mother suffers a miscarriage. KRS 311.772(3)(a) (applying only when a person "knowingly" acts "with the

specific intent of causing or abetting the termination of the life of an unborn human being"); KRS 311.7706(1) (applying only when a person "intentionally" performs an abortion "with the specific intent of causing or abetting the termination of the life of the unborn human individual"). And lest any doubt remain, both laws make clear that they do not apply to a pregnant woman. KRS 311.772(5); KRS 311.7706(4).

The circuit court also suggested that there is now "uncertainty" about the "future legality and logistics of In Vitro Fertilization." Ex. 4 at 14. That is wrong, too. Neither law in any way affects IVF procedures. *E.g.*, KRS 311.772(1)(b) (defining "[p]regnant" to mean "having a living unborn human being within her body through the entire embryonic and fetal stages"); KRS 311.7706(1) (applying only after a fetal heartbeat has been detected). The circuit court lastly predicted that child-support, tax, estate, confinement, driving, and even child-labor issues would arise if it denied a temporary injunction. *See* Ex. 4 at 17. This speculation has no basis. The two laws at issue regulate abortion and nothing else.

C. The circuit court improperly sustained claims that the Facilities never brought.[11]

Not only did the circuit court invent a new constitutional right, it also found for the Facilities on two claims they did not bring. Without so much as an allegation from the Facilities, the circuit court held that the Human Life Protection Act and the Heartbeat Law likely violate both equal-protection and religious-liberty principles. Ex. 4 at 1.

[11] The Attorney General did not get the opportunity to preserve these arguments.

The circuit court (at 10) justified prosecuting the Facilities' case for them by citing cases in which the parties made minor errors, like "fail[ing] to cite" the applicable regulation, *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929–30 (Ky. 2002), or failing to discuss a statute, *Cmty. Fin. Servs. Bank v. Stamper*, 586 S.W.3d 737, 740 (Ky. 2019). But it overlooked that courts "do not, or should not, sally forth each day looking for wrongs to right." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citation omitted). Instead, courts "wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Id.* (citation omitted); *accord Delahanty v. Commonwealth*, 558 S.W.3d 489, 503 n.16 (Ky. App. 2018) ("The premise of our adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." (citation omitted)).

The circuit court's decision to insert new claims into this case is itself grounds for dissolving this part of the temporary injunction. Even so, the two claims that the circuit court raised for the Facilities fail on the merits.

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

As the circuit court recognized, Sections 1, 2, and 3 of the Kentucky Constitution function "much the same way" as the Fourteenth Amendment's Equal Protection Clause by ensuring that "similarly situated persons are treated alike." Ex. 4 at 15. This Court has accordingly recognized that a "single standard" can be applied to both federal and state equal-protection challenges. *Commonwealth v. Howard*, 969 S.W.2d 700, 704 (Ky. 1998).

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

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

Even if the Court looks beyond *Dobbs*, the Human Life Protection Act and the Heartbeat Law survive scrutiny. In *Sasaki I*, this Court's predecessor held that Kentucky's prohibition of abortion did not violate equal protection. 485 S.W.2d at 903. In that case, the party challenging the law argued that the law disproportionately affected poor women. *Id.* While acknowledging that "a rich woman has greater economic freedom than a poor woman," the Court reasoned that this difference "is

not in and of itself a fact which would vitiate the statute on constitutional grounds." *Id.* (citation omitted).

The circuit court framed its equal-protection discussion differently, but this does not change the bottom line. Rather than focus on economic distinctions among women, as in *Sasaki I*, the circuit court found differential treatment between men and women. It reasoned: "As similarly situated parties to the creation of life, the woman and the man must be treated equal under the law." Ex. 4 at 15. But women and men are not similarly situated as to abortion, given that only women can become pregnant. So a law that only affects pregnant women does not treat similarly situated persons differently. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . ."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993) ("[I]he disfavoring of abortion . . . is not *ipso facto* sex discrimination.").

A contrary rule could rob Kentucky women of many pregnancy-related benefits. For example, KRS 218A.274 gives pregnant women "priority" in accessing substance-abuse treatment or recovery services. And KRS 214.160(1) requires a physician to test a pregnant woman for syphilis as soon as the physician "is engaged to attend the woman and has reasonable grounds for suspecting that pregnancy exists." Under the circuit court's reasoning, laws like these could violate equal-protection principles by treating men and pregnant women differently.

2. The laws do not violate Section 5.

The circuit court also erred in holding that the Human Life Protection Act and Heartbeat Law likely violate Section 5 of the Kentucky Constitution. Without the benefit of briefing, the circuit court decided that these laws codify a "distinctly Christian and Catholic belief." Ex. 4 at 15. This, the circuit court decided, infringes on religious liberty because the General Assembly has decided that life begins at fertilization even though religious faiths "hold a wide variety of views on when life begins." *Id.* But this claim is self-refuting at least as to the Heartbeat Law, which does not prohibit abortion after fertilization.

Even still, believing that life begins at fertilization is a secular view, not solely a religious one. The view that life begins at fertilization is "the leading biological view on when a human's life begins." Brief of Biologists as Amici Curiae Supporting Neither Party at 3, 24–28, *supra* at 24 & n.10; Ex. 3 at 212:16–20. So even if the challenged laws require adopting the view that life begins at fertilization, that view is the one supported by biology. That only some religious views align with the overwhelming view of biologists does not turn the policy judgment of the General Assembly into a forbidden establishment of religion.

The circuit court's Section 5 holding also cannot overcome this Court's precedent. In *Sasaki I*, the Court held that "[t]he State is certainly competent to recognize that the embryo or fetus is potential human life" without creating an establishment of religion. 485 S.W.2d at 903 (citation omitted). Rather than grapple with this statement, the circuit court relied (at 19) on an out-of-context statement that Section 5 requires "a

much stricter interpretation than the Federal counterpart found in the First Amendment's 'Establishment of Religion clause.'" *Neal v. Fiscal Ct., Jefferson Cnty.*, 986 S.W.2d 907, 909–10 (Ky. 1999) (citation omitted). But this statement arose in the "context of state funding for religious schools," *see Ark Encounter, LLC v. Parkinson*, 152 F. Supp. 3d 880, 922 (E.D. Ky. 2016), where Kentucky has a unique provision, Ky. Const. § 189. More importantly, this Court has since held that, as to both the Free Exercise Clause and the Establishment Clause of the First Amendment, Kentucky "jurisprudence is linked to the Supreme Court's interpretation of the First Amendment." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 617 n.78 (Ky. 2014).

There is no reasonable argument that either challenged law violates the First Amendment. The U.S. Supreme Court has explained that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (citation omitted). Kentucky's long history of protecting unborn life (discussed above) is reason enough to reject a Section 5 challenge here. Add to this the fact that a law does not "violate[] the Establishment Clause because it 'happens to coincide or harmonize with tenets of some or all religions.'" *Harris v. McRae*, 448 U.S. 297, 319–20 (1980) (citation omitted) (upholding federal ban on financing abortions with tax dollars against Establishment Clause challenge even though that restriction "may coincide with the religious tenets of the Roman Catholic Church").

It is worth dwelling on how absurd the results would be if the Court adopts the circuit court's Section 5 reasoning. According to the decision below, "[t]he General

Assembly is not permitted to single out and endorse the doctrine of a favored faith for preferred treatment." Ex. 4 at 16. If that is right, how can the Commonwealth criminalize theft? *See, e.g.*, KRS 514.030, .040. After all, the Ten Commandments state, "You shall not steal." *Exodus* 20:15. Yet other religions say that a person who steals food when hungry should be "pardoned from punishment." Arvind Khetia, *In different religions, is stealing ever OK?*, The Kansas City Star, July 23, 2016, https://perma.cc/TN8B-EC9U. Does this mean that, by prohibiting theft, the General Assembly has, to quote the circuit court, "encase[ed] the doctrines of a preferred faith, while eschewing the competing views of other faiths"? Ex. 4 at 19. Of course not. But that is where the circuit court's reasoning leads.

D. The Facilities' delegation claim fails.[12]

The circuit court also erred in finding that the General Assembly likely delegated its legislative authority in the Human Life Protection Act. To be clear, this argument only applies to the Human Life Protection Act. So even if the Court agrees with the circuit court on this point, such a conclusion would have no bearing on the Heartbeat Law.

The General Assembly did not delegate any legislative authority to the U.S. Supreme Court in passing the Human Life Protection Act. That law states that "the provisions of this section shall become effective immediately upon . . . [a]ny decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*, 410

[12] The Attorney General preserved this argument in his response to the motion for a temporary injunction (at 2 n.2) and in his incorporated motion to dismiss (at 21–24).

U.S. 113 (1973), thereby restoring to the Commonwealth of Kentucky the authority to prohibit abortion." KRS 311.772(2)(a) (cleaned up). This provision merely identifies the triggering event for when the Human Life Protection Act took effect. It is not a delegation of legislative power for the General Assembly merely to specify a future event that will prompt a law to take effect.[13] It is well-established that the General Assembly "can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Bloemer v. Turner*, 137 S.W.2d 387, 391 (Ky. 1939) (citation omitted).

Nor does the Human Life Protection Act delegate the scope of its abortion prohibition. Instead, the law simply provides that if the U.S. Supreme Court gives the States more leeway to regulate abortion, the General Assembly exercises its legislative prerogative to prohibit as many abortions as the federal Constitution allows. The Facilities counter by focusing on the statutory language "to the extent permitted" to argue that the General Assembly let the U.S. Supreme Court decide how broadly the law sweeps. But the Facilities confuse a judicial ruling about *Roe* with the legislature deciding how to respond to such a ruling. In any event, the Supreme Court in *Dobbs* overruled *Roe* in its entirety. So any discussion about which abortions the Human Life Protection Act would prohibit if the Supreme Court had ruled more narrowly is academic.

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[13] This type of legislation is common. *Clay v. Dixie Fire Ins. Co.*, 181 S.W. 1123, 1124 (Ky. 1916) (Kentucky's "statutes contain a great many laws that become effective only when the conditions described in the statute exist . . . . ."). For example, the General Assembly has adopted by law a number of interstate compacts that depend on the concurrence of another State. KRS 39A.950; KRS 156.730; KRS 224.18-760. In addition, this past legislative session the General Assembly lowered Kentuckians' income taxes if certain future conditions are met. 2022 Ky. Acts, Ch. 212, § 1(2)(b).

The primary case on which the circuit court relied in finding a delegation problem is not to the contrary. The problem with the statute in *Dawson v. Hamilton* was that it tied Kentucky's standard time to whatever Congress or the Interstate Commerce Commission ("ICC") decided, now or in the future. 314 S.W.2d 532, 535 (Ky. 1958). This Court's predecessor explained that "the adoption by or under authority of a state statute of prospective [f]ederal legislation, or [f]ederal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power." *Id.* (citation omitted).

This principle has no purchase here. Although *Dawson* prohibits the General Assembly from prospectively incorporating future changes by Congress or a federal agency into Kentucky law, *Dawson* does not prohibit the General Assembly from passing legislation that applies as broadly as the federal Constitution allows, which is all that the Human Life Protection Act does. There is good reason for that: some States' long-arm statutes authorize jurisdiction up to the limits of the federal Constitution. *See Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 56–57 (Ky. 2011). At base, there is a meaningful distinction between incorporating future federal law as the law of Kentucky, as in *Dawson*, and saying that Kentucky law extends as far as the federal Constitution allows.

Kentucky precedent interpreting Section 60 of the Kentucky Constitution confirms that a law based on a triggering event is constitutional. That section states that "[n]o law . . . shall be enacted to take effect upon the approval of any other authority than the General Assembly . . . ." Ky. Const. § 60. At its core, the Facilities' delegation

argument is really a Section 60 argument. An examination of Section 60 case law, however, shows that there is a "well settled rule that a legislature may make a law to become operative on the happening of a certain contingency or future event." *Walton v. Carter*, 337 S.W.2d 674, 678 (Ky. 1960) (citation omitted).

E. Kentucky's 15-week law has no bearing here.

When it granted transfer, the Court directed the parties to address whether Kentucky law's prohibiting abortions after 15 weeks, which the General Assembly passed earlier this year, affects the Human Life Protection Act and the Heartbeat Law. *EMW*, 2022 WL 3641196, at *1 (plurality op.). The 15-week law does not affect those laws. That is because the 15-week law says so expressly.

The General Assembly passed the 15-week law by amending several provisions from KRS 311.781 to KRS 311.786 and by adding two new provisions to that statutory range. 2022 Ky. Acts, Ch. 210, §§ 32–35. That statutory span, however, already provided that it "shall not be construed to repeal, by implication or otherwise, any law regulating or restricting abortion" and that "[a]n abortion that complies with . . . KRS 311.781 to 311.786 . . . but violates any otherwise applicable provision of state law shall be deemed unlawful as provided in such provision." KRS 311.786. Thus, the 15-week law is part of a group of statutes that contains a provision stating that none of the statutes in the group affects any other law regulating abortion. On top of that, the 2022 statute including the 15-week law reiterates that "[n]othing" in the law "shall be construed as creating or recognizing a right to abortion." 2022 Ky. Acts, Ch. 210, § 37(2).

This plain statutory language forecloses any assertion that the 15-week law impliedly amends or repeals the Human Life Protection Act and the Heartbeat Law. *See Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 440 (Ky. 1986) (recognizing the General Assembly's power to provide that a law not be construed to affect another law); *accord Fiscal Ct. of Jefferson Cnty. v. City of Anchorage*, 393 S.W.2d 608, 612 (Ky. 1965) (The "law . . . looks with disfavor on repeals and amendments by implication and recognizes them only when they are clear and when it is necessary in order to carry out the obvious intent of the legislature."). Indeed, the Facilities have not argued that the 15-week law affects the Human Life Protection Act and the Heartbeat Law.

The timing of the passage of the 15-week law confirms that the General Assembly did not intend to affect any other law regulating abortion. The General Assembly passed the 15-week law several months before the *Dobbs* decision, when the outcome of that case was not yet known.[14] The original legislative sponsor of the 15-week law explained that he patterned it on the Mississippi law at issue in *Dobbs*. Senate Floor Debate, Part II, at 1:38:06–19 (Mar. 29, 2022) ("In the event that the Supreme Court upholds the Mississippi legislation as constitutional, we will then have a pro-life law in place that would not be subject to a good-faith legal challenge.").[15] This shows that the General Assembly passed the 15-week law not to impliedly amend or repeal any existing law, but to ensure that Kentucky would have a law just like Mississippi's in case

[14] At that time, the Heartbeat Law was enjoined by federal-court order, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178, 2019 WL 1233575, at *2 (W.D. Ky. Mar. 15, 2019), and the Human Life Protection Act was not yet in effect.

[15] This statement can be viewed here: https://www.ket.org/legislature/archives.

Dobbs upheld that law without overruling *Roe* and *Casey*. *See Dobbs*, 142 S. Ct. at 2310–11 (Roberts, C.J., concurring in the judgment) (arguing for this result). Viewed this way, the General Assembly passed the 15-week law as a failsafe depending on the outcome of *Dobbs*. It was not passed to repeal or amend any other law.

II. The Facilities did not establish irreparable harm.[16]

The circuit court abused its discretion several times over in finding irreparable harm. Such a finding "is a mandatory prerequisite to the issuance of any injunction." *Cameron*, 628 S.W.3d at 71 (citation omitted). The presence of irreparable harm often turns on both the law and the facts. In the case of the former, the circuit court receives no deference from an appellate court. And so a circuit court abuses its discretion whenever its finding of irreparable harm rests on legal error. *Id.* at 72, 78. That is precisely what happened here, as the circuit court made several legal missteps in its irreparable-harm analysis. Its discussion of the facts likewise amounts to an abuse of discretion.

1. Start with the legal errors. Rather than identify any irreparable harm that the Facilities themselves would suffer, the circuit court focused on health risks that pregnant women—*i.e.*, third parties not before the court—could face if they cannot obtain an abortion. Ex. 4 at 7–8. But as noted above, *supra* at 10–12, the Facilities cannot stand in the shoes of pregnant women to assert their claims and thus argue that they suffer harm from the enforcement of the challenged laws. Any harm that pregnant women could face is properly considered as part of the equities, and (as discussed below) must

[16] The Attorney General preserved this argument in his response to the motion for a temporary injunction (at 3–4).

be viewed in light of the General Assembly's authority to decide what is in the best interest of the public, particularly on matters of health. *See Cameron*, 628 S.W.3d at 78.

Even if the Court disagrees, the circuit court still erred as a matter of law by failing to recognize that the irreparable-harm inquiry here is tied to the merits of the Facilities' constitutional challenges to the Human Life Protection Act and the Heartbeat Law. The key case on this point is *Cameron*. There, the Governor challenged the constitutionality of several laws and claimed irreparable harm because, as relevant here, the laws allegedly limited "his ability to protect the public during a global pandemic." *Id.* at 72. Much like the Facilities here, the Governor argued that the laws there would irreparably harm Kentuckians by imposing increased health risks. And much like here, the circuit court in *Cameron* held an evidentiary hearing to make factual findings about the irreparable harm to public health that might follow if the statutes were enforced. *See id.* at 67. Before this Court, the Governor predicted grave harms to the public if the laws took effect: "ICUs filled to capacity, ventilators in short supply, and refrigerated trucks pulling up to hospitals 'as bodies pile up at hospital morgues.'" Initial Brief for Respondents, *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021) (No. 2021-SC-0107-T), 2021 WL 2404982, at *48 (citation omitted).

Yet even those dire predictions did not add up to irreparable harm. *Cameron* explained that those harms could be irreparable only if the Governor's constitutional claims were likely to succeed. *See* 628 S.W.3d at 73. As *Cameron* put it, the Governor's irreparable-harm argument is "*tied to* his constitutional claims and the likelihood of success." *Id.* (emphasis added). Put differently, where a duly enacted law is the alleged

source of irreparable harm, a litigant must show that the law is likely unconstitutional to show anything approaching irreparable harm. Only by succeeding on a constitutional challenge can the litigant overcome the fact that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Id.*

Just as this Court found it unnecessary to consider the merits of the circuit court's fact-finding in *Cameron*, so too is it unnecessary to consider the circuit court's findings related to irreparable harm here. That is because the Facilities' irreparable-harm argument cannot be separated from their argument that the Human Life Protection Act and the Heartbeat Law are unconstitutional. If the Kentucky Constitution does not protect abortion, any health risks for pregnant women who would otherwise obtain an abortion do not amount to irreparable harm as a matter of law.

This is especially true because of the health exceptions in both laws. Both laws allow a pregnant woman to obtain an abortion if her life is at stake or to prevent serious and permanent harms. *See* KRS 311.772(4)(a); KRS 311.7706(2)(a). It follows that the Human Life Protection Act and the Heartbeat Law do not force a pregnant woman to undergo these risks. These health exceptions, notably, are *broader* than the one that existed in Kentucky law from 1910 until 1973, which applied only when "necessary to preserve [a pregnant woman's] life." 1910 Ky. Acts, Ch. 58, § 1, *codified at* Ky. Stat. 1219a (1915), *recodified at* KRS 436.020 (1942).

The circuit court made still-another legal error by granting overbroad injunctive relief. Even if the circuit court appropriately found that pregnancy leads to some health risks that are not covered by the laws' health exceptions and that rise to the level of

irreparable harm (it did not), the circuit court should not have applied its temporary injunction beyond those circumstances. Its temporary injunction, however, prohibits the Attorney General from enforcing the challenged laws against the Facilities in all circumstances, Ex. 4 at 20, even if a pregnant woman seeks an abortion for purely elective reasons that have nothing to do with her health. So obvious a mismatch between the circuit court's theory of irreparable harm and the relief it granted is an obvious abuse of discretion.[17] *See Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (allowing as-applied relief "if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the [abortion] procedure prohibited by the Act must be used"); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem.").

2. The circuit court also abused its discretion in discussing the facts. In finding irreparable harm, the circuit court cited Dr. Bergin's non-specific testimony about "the harms and risks that can result from, and be exacerbated by, pregnancy." Ex. 4 at 8. No one disputes that pregnancy carries health risks for pregnant women. But the circuit

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[17] One last legal error should not be overlooked. The circuit court's discussion of the Facilities having to turn away pregnant women seeking an abortion could be read to suggest a concern that the challenged laws will affect the Facilities' bottom lines. *See* Ex. 4 at 7–8. After all, EMW charges between $750 and $2,000 for an abortion. Ex. 3 at 52:23–25. But on this record, any financial injury to the Facilities is not irreparable. If it were, any time a regulated entity loses clients because of a new law, the business could automatically claim irreparable harm in challenging the law. Such monetary losses, which are the cost of doing business in a regulated field, do not rise to the level of irreparable harm—*i.e.*, "incalculable" damages or "something of a ruinous nature." *See Barnes v. Goodman Christian*, 626 S.W.3d 631, 638 (Ky. 2021) (citations omitted).

court did not identify which health risks it found to be irreparable, nor did it quantify how often those risks actually occur during pregnancy. Such a vague and conclusory discussion of irreparable harm is itself an abuse of discretion. *See Maupin v. Stansbury*, 575 S.W.2d 695, 700 (Ky. App. 1978) (finding abuse of discretion where there was no "clear showing" of irreparable harm).

There is a reason that the circuit court's factual findings on this issue are so thin. Even Dr. Bergin admitted that, as an OB-GYN, she is trained to manage health risks during pregnancy that are "complex" and "complicated." Ex. 3 at 57:8–18. Although Dr. Bergin (like the circuit court) failed to quantify most of the health risks associated with pregnancy, Dr. Wubbenhorst provided the data. She summarized:

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

Id. at 195:16–196:10 (emphasis added).

The circuit court still made a finding of irreparable harm based on its conclusion that these health risks from pregnancy are higher than the risks from abortion. Ex. 4 at 8. (The health risks of abortion to the woman include serious complications and even death, as Dr. Bergin admitted. *Id.* at 36:16–23, 38:24–39:14.) This finding is not only

embedded with legal error, it also amplifies why the irreparable-harm inquiry is intertwined with the likelihood of success on the merits.

Here's why: The task of balancing the health risks of abortion and pregnancy does not fall to the judiciary. The General Assembly "has a broad discretion to determine for itself what is harmful to health and morals or what is inimical to public welfare." *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968). No principle of law prohibits the General Assembly from legislating in areas where there are varying health risks. To the contrary, the General Assembly has "wide discretion" to legislate in such areas. *See Gonzales*, 550 U.S. at 163. So whether the health risks associated with pregnancy justify the General Assembly's legislative decision is simply not something the courts get to decide. It follows, then, that the irreparable-harm inquiry is not a license for a circuit judge to decide whether the General Assembly adopted a law that, in the court's judgment, poses the fewest health risks possible.

That is why the irreparable-harm inquiry is "tied to" the merits in cases that challenge the constitutionality of Kentucky law. *See Cameron*, 628 S.W.3d at 73. If the law is constitutional, it is irrelevant that a trial court disagrees with how the General Assembly weighed the risks. Any irreparable harm flows from whether the law is unconstitutional, not whether the law burdens those who object to it. And that is a legal principle that the circuit court misapplied by usurping for itself the authority to balance the risks of pregnancy and abortion.

Even still, if the Court finds that the circuit court was correct to balance health risks to find irreparable harm, the circuit court still abused its discretion by overlooking

an indispensable aspect of the health risks at stake. In particular, not one word of the circuit court's irreparable-harm analysis considered the loss of unborn human life that would occur if the court granted a temporary injunction. Ex. 4 at 7–8. So weighty a matter—one of life and death—cannot be irrelevant to whether the Facilities have shown irreparable harm. *See EMW*, 2022 WL 3641196, at *4 (Minton, C.J., concurring in part and dissenting in part) ("[T]he Attorney General also advances serious allegations of irreparable harm, alleging that any abortions performed during the pendency of this litigation cannot be reversed."). This is especially true given the volume of abortions that the Facilities perform—over 4,000 per year. Ex. 4 at 3. A loss of unborn human life on this scale should have been considered as part of the irreparable-harm inquiry. It was an abuse of discretion for the circuit court to ignore it. *See Combs v. Commonwealth*, 74 S.W.3d 738, 746 (Ky. 2002) (finding abuse of discretion where "the record provides no evidence that the trial court even considered" an issue).

III. The equities overwhelmingly favor dissolving the temporary injunction.[18]

Before granting a temporary injunction, a circuit court "must find 'that an injunction will not be inequitable, *i.e.* will not unduly harm other parties or disserve the public.'" *Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 795 (Ky. 2021) (citations omitted). The circuit court went badly off the rails in discussing and balancing the equities. And like its analysis of irreparable harm, the circuit court's discussion of the equities is infused with legal errors and thus is not entitled to deference.

[18] The Attorney General preserved this argument in his response to the motion for a temporary injunction (at 4–6).

Start with the public interest. The circuit court found that stopping abortions "is detrimental to the public interest" because "abortion is a form of healthcare." Ex. 4 at 8. The circuit court viewed this issue as so settled that it included no citation of authority. *Id.* Obviously, many Kentuckians agree with this proposition. But just as many profoundly disagree with it. The problem, however, is that the circuit court purported to settle—in a judicial opinion—"one of the most contentious policy and political issues of our time." *See EMW*, 2022 WL 3641196, at *4 (Minton, C.J., concurring in part and dissenting in part). In doing so, the circuit court committed a textbook abuse of discretion by substituting its view of the public interest for the General Assembly's.

The Court corrected this same abuse of discretion last year in *Cameron*. As recounted above, the Governor there challenged several laws limiting his ability to respond to the pandemic. In considering the public interest, "[t]he trial court made extensive findings concerning the COVID-19 pandemic, its ongoing nature, and the good occasioned by the Governor's emergency measures." *Cameron*, 628 S.W.3d at 78. But the circuit court overlooked a key point in this respect: when the constitutionality of a duly enacted law is at stake, it is the General Assembly that determines what best serves the public. The Court could not have been clearer about this point. It held that "[t]he fact that a statute is enacted constitutes the legislature's implied finding that the public will be harmed if the statute is not enforced." *Id.* (cleaned up) (citation omitted). As a result, *Cameron* found that the circuit court abused its discretion by "substitut[ing] its view of the public interest for that expressed by the General Assembly." *Id.*

The circuit court here abused its discretion in the very same way. It declared that "abortion is a form of healthcare" without recognizing that, by passing the laws challenged here, the General Assembly made an "implied finding" that both laws in fact serve the public interest. *See id.* For this simple reason, and just like in *Cameron*, "the public interest strongly favors adherence to" the Human Life Protection Act and the Heartbeat Law. *See id.* As in *Cameron*, the circuit court's "findings substituted its view of the public interest for that expressed by the General Assembly." *See id.*

The circuit court doubled down on this abuse of discretion by expressing concern that "[p]regnancy, childbirth, and the resulting raising of a child are incredibly expensive." Ex. 4 at 9. This line of thinking, however, ignores that the General Assembly, not a circuit judge, decides whether such expenses are in the public interest.[19] As *Cameron* put it, because "the General Assembly is the policy-making body for the Commonwealth . . . , equitable considerations support enforcing a legislative body's policy choices." 628 S.W.3d at 73.

The circuit court also expressed concern that the "poorer and disadvantaged members of society" will be most affected by the Human Life Protection Act and the Heartbeat Law. Ex. 4 at 8. On this topic, Professor Lindo acknowledged that, if the

[19] In any event, the circuit court's concern about financial expenses lacks a limiting principle. Children cost money all the way until the age of 18 (and often well beyond). If the cost of caring for a child is enough to justify enjoining the two laws at issue here, what meaningful distinction stops that decision at 15 weeks of pregnancy, 20 weeks, 40 weeks? In addition, if the cost of caring for a newborn is too much, Kentucky's safe-haven law provides a way for a parent to give up the infant with no questions asked. KRS 216B.190(3); KRS 405.075(2).

challenged laws are enjoined, there will be fewer minority children born in the Commonwealth going forward, given that a disproportionate number of minority women obtain abortions. *See* Ex. 3 at 148:21–149:7. But Professor Lindo would not say whether fewer minority children in Kentucky is a good policy outcome because he did not view his role as making "value judgments."[20] *Id.* at 149:8–10. Professor Lindo was right that such a judgment is not his to make. That judgment rests with the General Assembly, which has decided that all unborn life—minority and not—must be protected. The circuit court abused its discretion by disregarding this expression of the public's interest.

This brings us to the harms to the Commonwealth and its citizens from not enforcing the Human Life Protection Act and the Heartbeat Law. These harms must be balanced when considering the equities of a temporary injunction. *See Cameron*, 628 S.W.3d at 71. On this point, the circuit court committed two patent abuses of discretion. The circuit court disregarded precedent from this Court about the irreparable harm caused by enjoining "a legislative body's policy choices," *id.* at 73, and it ignored the loss of unborn human life that a temporary injunction would allow.

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[20] The circuit court criticized Professor Snead for expressing concern with supporters of abortion "talking about the harms of too many unwanted minority and poor children as causing economic harms." *Id.* at 269:21–23; *see* Ex. 4 at 8. No less than a U.S. Supreme Court Justice shares Professor Snead's concerns. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782–91 (2019) (Thomas, J., concurring). And two of the Appellees previously sued to challenge Kentucky's law prohibiting abortions that an abortion provider knows are sought because of an unborn child's race, gender, or disability. *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178 (W.D. Ky.).

By the circuit court's telling, the harm suffered by the Commonwealth and the public from a temporary injunction is "at most" the "harm of delayed enforcement" of Kentucky's laws. Ex. 4 at 9. But that contradicts black-letter law. In *Cameron*, this Court held that the "non-enforcement of a duly-enacted statute *constitutes irreparable harm* to the public and the government." 628 S.W.3d at 73 (emphasis added). The circuit court was thus wrong to downplay the irreparable harm to the Commonwealth and the public as mere "delayed enforcement" of Kentucky's laws. This Court has expressly said otherwise. The circuit court's failure to account for the irreparable harm to the Commonwealth and the public is an error of law that pervades the circuit court's discussion of the equities.

Yet even that is not the most problematic part of the circuit court's discussion of the equities. The most significant harm to the Commonwealth and the public from non-enforcement of the Human Life Protection Act and the Heartbeat Law is the loss of unborn human life that will follow. The circuit court never accounted for that harm—a harm that the members of this Court who dissented at the stay stage acknowledged. *See EMW*, 2022 WL 3641196, at *4 (Minton, C.J., concurring in part and dissenting in part) ("[T]he Attorney General also advances serious allegations of irreparable harm, alleging that any abortions performed during the pendency of this litigation cannot be reversed.").

Any loss of unborn human life matters, but the sheer volume of abortions performed by the Facilities is staggering. They performed 4,104 abortions in 2020, Ex. 4

at 3—or nearly a dozen abortions every day. The circuit court recognized that its restraining order allowed the Facilities to return to their pre-*Dobbs* business as usual (with one exception).[21] *Id.* at 2. Simple math suggests that the Facilities performed nearly 400 abortions during the 33 days (from June 30 until August 1) that the circuit court's orders prevented the Attorney General from enforcing Kentucky's laws against the Facilities. Even that number may be too low. As the circuit court found, in the six days before it granted a restraining order, EMW canceled around 200 abortions. *Id.* at 3. The overwhelming loss of unborn life at stake here—a loss that can never be undone—should have predominated the circuit court's consideration of the equities. *Yet it was not even mentioned. See Combs*, 74 S.W.3d at 745 (finding abuse of discretion where the "record provides no evidence that the trial court even considered" an issue).

The circuit court's other bases for finding that the balance of equities tips toward the Facilities also come up short. Although the Commonwealth has no interest in enforcing unconstitutional laws, the laws at issue are constitutional. And the circuit court's suggestion that its temporary injunction "restore[s] the status quo" that has existed for 50 years, Ex. 4 at 9, ignores that the status quo under Kentucky law since *Mitchell* has been that the General Assembly can prohibit abortion at any stage of pregnancy. The General Assembly did so continuously from 1910 until 1973. And in the years following *Roe*, the General Assembly affirmed its intent to protect unborn human

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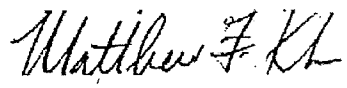
[21] That exception was the prohibition of abortion after 15 weeks. *Planned Parenthood Great N.W. v. Cameron*, No. 3:22-cv-198, 2022 WL 2763712, at *1–2 (W.D. Ky. July 14, 2022).

life to the fullest extent possible. KRS 311.710(5). *This* is the status quo that the circuit court disrupted.

CONCLUSION

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

Respectfully submitted,



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