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SUPREME COURT

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*

RESPONSE BRIEF OF ATTORNEY GENERAL DANIEL CAMERON

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CERTIFICATE OF SERVICE

On October 24, 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, ACLU Foundation, 125 Broad Street, 18th Floor, New York, New York 10004; Heather L. Gatnarek, ACLU of Kentucky, 325 West Main Street, Suite 2100, 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 Y. Flaxman, Planned Parenthood Federation of America, 1110 Vermont Avenue, N.W., 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; and 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

STATEMENT OF POINTS & AUTHORITIES

INTRODUCTION

The Facilities spend most of their brief arguing that a right to abortion *should* exist because in their view it is good public policy. But the Court says what the law is, not what it should be. Whether the Kentucky Constitution protects abortion depends not on balancing competing policy interests, but on constitutional text, history, and case law. So framed, the legal question at the heart of this case is not a close call. Our Constitution does not mention abortion. Kentucky prohibited abortion for many decades before *Roe v. Wade*, 410 U.S. 113 (1973). And for nearly 150 years, Kentucky case law has recognized the General Assembly's prerogative to prohibit abortion.

But the Court need not reach that legal issue to dissolve the temporary injunction issued below. That is because the Facilities lack third-party standing to represent pregnant women, the non-parties with standing to claim a right to abortion. Just last month, the Court unanimously held that third-party standing is not permitted when a plaintiff tries to represent "unspecified, third-party clients" with no explanation of why those clients "are unable to represent their own interests in the courts of this Commonwealth." *See Bradley v. Commonwealth ex rel. v. Cameron*, --- S.W.3d ---, 2022 WL 4398116, at *7 (Ky. Sept. 22, 2022). That describes to a tee what the Facilities are trying here.

ARGUMENT

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

The Facilities wait until the end of their brief to discuss the merits of their claims. They seem to hope that if they frame their policy arguments as sufficiently

compelling, it will not matter that the claimed right to abortion has no basis in constitutional text, history, or case law. But the Facilities cannot skate by with such a doubtful legal claim. Even if the Facilities could establish irreparable harm (they cannot), "injunctive relief is still not justified" without showing a "substantial possibility" that they "will ultimately prevail on the merits." *See Beshear v. Acree*, 615 S.W.3d 780, 830 (Ky. 2020) (citation omitted).

The Facilities cannot make that showing. For one thing, they lack third-party standing to argue that the Kentucky Constitution protects abortion. For another, their likelihood of success on the merits is doubtful at best. Just consider their ask: They want the Court to recognize, for the first time in the Commonwealth's 230-year history, an unwritten right to abortion in our Constitution that contradicts its text, the Commonwealth's history, and Kentucky case law. Such a claim is precisely the type of "doubtful" issue that should "await trial of the merits." *See Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978).

A. The Facilities lack standing to claim that the Kentucky Constitution protects abortion.

The Court need not address whether the Kentucky Constitution protects abortion for the simple reason that the Facilities lack standing to bring that claim. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek . . . ."). The Facilities suggest (at 12–15) that they have both first-party standing for themselves and third-party standing on behalf of pregnant women.

Taking each in turn, the Facilities did not plead that as abortion providers they have a constitutional right *to perform* abortions.[1] Instead, their claim is that pregnant women have a privacy and self-determination right *to receive* an abortion. AG Ex. 1 ¶¶ 7, 96, 102, 126, 130. But any such right would belong only to pregnant women. As a result, the Facilities' theory of this case requires that they demonstrate third-party standing to sue on behalf of pregnant women.

Just last month, the Court outlined the rules of the road for third-party standing. The Court reaffirmed 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 rights of third persons." *Bradley*, 2022 WL 4398116, at *6 n.29 (citation omitted). The Court also unanimously rejected a claim to third-party standing when a party tried "to represent unspecified, third-party clients without any argument that these clients are unable to represent their own interests in the courts of this Commonwealth." *Id.* at *7.

That is exactly what the Facilities are trying to do. As in *Bradley*, the Facilities cannot explain why their "unspecified clients cannot sue to remedy the injuries alleged in the complaint." *See id.* at *6. The Facilities suggest (at 14–15) that pregnant women cannot bring such claims while keeping their names private. In making this argument, the Facilities cite as evidence *pseudonymous* affidavits from women who had an abortion.

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[1] The Facilities have not alleged a constitutional right to perform abortions for obvious reasons. "The few courts that have considered this claimed right have generally rejected it." *Planned Parenthood of Heartland, Inc. v. Reynolds*, 962 N.W.2d 37, 55–56 (Iowa 2021); *accord Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc) ("The Supreme Court has never identified a freestanding right to perform abortions.").

Facilities Ex. 7. Those Jane Doe affidavits, however, show that pregnant women can in fact share details about their desire to seek an abortion without compromising their privacy. After all, pseudonyms are a staple of abortion litigation, most famously in *Roe* itself. And Kentucky courts are amenable to plaintiffs suing pseudonymously. *See, e.g.*, *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260 (Ky. App. 2005); *accord Ky. Bar Ass'n v. Unnamed Att'y*, 414 S.W.3d 412 (Ky. 2013).

In any event, in the few weeks since the Facilities filed their opening brief, three Kentucky women have sued to challenge Kentucky's laws regulating abortion. *Sobel v. Cameron*, No. 22-CI-5189 (Jefferson Cir. Ct.) (Ex. 1). These women did not sue pseudonymously. Instead, they sued in their *own names* to assert their *own claims*. This is proof positive that Kentucky women do not need the Facilities to speak for them. As in *Bradley*, the Facilities cannot explain why their "unspecified clients cannot sue to remedy the injuries alleged in the complaint." *See* 2022 WL 4398116, at *6.

But that is not the only problem with the Facilities' invocation of third-party standing. They also are trying to stand in the shoes of unidentified pregnant women who might be future clients. *Bradley*, however, held that third-party standing is unavailable to protect the alleged rights of "unspecified, third-party clients." *Id.* at *6–7; *accord Kowalski v. Tesmer*, 543 U.S. 125, 130–31 (2004) (plaintiff lawyers lacked close relationship with potential future clients). The most the Facilities have done is point to women who already had an abortion. Facilities Ex. 7. And although EMW canceled around 200 appointments before the circuit court issued a restraining order, AG Ex. 3 at 41:18–19, the Facilities have not represented to the Court that a single pregnant woman has

asked them to speak for her in this case, *see Bradley*, 2022 WL 4398116, at *6 ("Importantly, no client or litigant . . . has been named as a plaintiff on the face of [the plaintiff's] complaint.").

In sum, *Bradley* relieves the Court of the obligation to consider whether the Kentucky Constitution protects abortion. All the Court needs to do is reaffirm the proposition it just unanimously adopted: a plaintiff lacks third-party standing to "represent unspecified, third-party clients without any argument that these clients are unable to represent their own interests in the courts of this Commonwealth." *Id.* at *7. To be clear, this is not to say that no one can bring a claim that the Kentucky Constitution protects abortion. A case raising that question with a proper plaintiff may well arrive on the Court's docket in the future. But this is not that case.

B. The Kentucky Constitution does not protect abortion.

Like the federal Constitution, the Kentucky Constitution is "neither pro-life nor pro-choice." *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring). It thus "leaves the issue for the people and their elected representatives to resolve through the democratic process." *See id.*

The Court "often" interprets the Kentucky Constitution to grant no more protection than the federal Constitution. *See Gingerich v. Commonwealth*, 382 S.W.3d 835, 839–40 (Ky. 2012). Of course, federalism means that the Court need not do so. *Commonwealth v. Reed*, 647 S.W.3d 237, 255 (Ky. 2022) (Minton, C.J., concurring). But the Court does not interpret our Constitution differently just to be different. The Court

does so only if there is a Kentucky-specific reason. When the Court reaches a conclusion that "differ[s] from the [U.S.] Supreme Court, it has been because of Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent." *Commonwealth v. Cooper*, 899 S.W.2d 75, 78 (Ky. 1995). Put differently, Kentucky's Constitution provides different protection "only where the dictates of our Kentucky Constitution, tradition, and other relevant procedures call for such action." *Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky. 1992). And although our Constitution differs from the federal one in certain respects, the Court has warned against those differences "encourag[ing] lawsuits espousing novel theories to revise well-established legal practice and principles." *Id.*

The question before the Court is whether there is something specific about our Constitution, our history, or our case law that requires rejecting *Dobbs* as a matter of state constitutional law. There is not. The Facilities have not argued that, as a textual matter, the Kentucky Constitution provides greater protection for abortion than the federal Constitution. This is for good reason, given that the word "abortion" nowhere appears in Kentucky's Constitution. AG Br. at 13–14. The Facilities also have not argued that the Debates from our constitutional convention help their cause. Again, with good reason, given that no Delegate suggested that the new constitution would protect abortion. *Id.* at 14–15. Indeed, to the extent abortion was discussed during the Debates, it was in the context of abortion being a crime. *Id.*

With no support in the constitutional text and the Debates, the Facilities turn to Kentucky case law and history for help. But those two sources only undermine the Facilities' position.

1. Start with Kentucky case law. The Facilities barely mention *Mitchell v. Commonwealth*, 78 Ky. 204 (Ky. 1879). But any discussion of how Kentucky courts view abortion should begin there. True, *Mitchell* reasoned that the common law did not prohibit abortion before quickening. *Id.* at 210. (More on that later.) But *Mitchell* went further. It also explained—in a passage that the Facilities fail to mention—that the "lawmaking department of the government" can "punish abortions and miscarriages, wilfully produced, *at any time* during the period of gestation." *See id.* at 209–10 (emphasis added). So nearly 150 years ago, this Court's predecessor determined that regulating abortion is left to the General Assembly. In the almost century and a half since *Mitchell*, no Kentucky decision has questioned *Mitchell* or walked it back.

The Facilities also fail to mention *Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972) (*Sasaki I*), *vacated by Sasaki v. Kentucky*, 410 U.S. 951 (1973). No doubt, the Facilities will argue that *Sasaki I* addressed federal, not state, constitutional law. That is true as far as it goes. But *Sasaki I* was emphatic—unanimously so—that the job of regulating abortion is for the General Assembly. Balancing interests in the abortion debate, *Sasaki I* held, "would be a matter for the legislature." *Id.* at 902 (citation omitted). And although the Court in *Sasaki I* wished that the General Assembly had approached abortion policy differently, the Court's bottom line was that "matters of mollification and

reform are subjective matters which *must* be left up to the legislative branch of the government." *Id.* (emphasis added) (citation omitted).

It would be an astonishing exercise of judicial power for the Court to reject *Sasaki I* and now hold that regulating abortion is not actually "a matter for the legislature." *Sasaki I* said the "fundamental law" is this: "[W]e must decline what we consider to be an invitation to decide what is best for [Kentucky]. The legislature is the proper arena for the resolution of 'fundamentally differing views'" about abortion. *See id.* (citation omitted). Although *Sasaki I* said this in the context of a federal constitutional challenge, such unequivocal language about the "fundamental law" all but shuts the door on any suggestion that our state Constitution protects abortion.

Rather than deal with *Mitchell* and *Sasaki I*, the Facilities stake their case on the right to privacy discussed in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).[2] But *Wasson* came with an in-built limiting principle. AG Br. at 20–25. *Wasson* expressly cabined its holding to say that Kentucky's right to privacy does not protect conduct that harms another. 842 S.W.2d at 496 ("The clear implication is that immorality in private 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."). *Wasson* said this over and over. AG Br. at 21–22. And just months after *Wasson*, its author cautioned

[2] The Facilities point out that *Wasson* said that Kentucky's right to privacy is broader than its federal counterpart. At that time, *Bowers v. Hardwick*, 478 U.S. 186 (1986), was the law of the land. That is no longer the case. *Lawrence v. Texas*, 539 U.S. 558 (2003). So *Wasson*'s holding now tracks the protections provided by the federal Constitution.

against the decision "encourag[ing] lawsuits espousing novel theories to revise well-established legal practice and principles." *Holbrook*, 847 S.W.2d at 55.

The Facilities offer two responses. First, they focus on *Wasson*'s language about the conduct at issue being an "incendiary moral issue." 842 S.W.2d at 495. From this language, the Facilities divine a rule that restricts the General Assembly from legislating about the "incendiary moral issue[s]" of the day. Facilities Br. at 34–36. This rule applies here, the argument goes, because abortion is "the subject of broad moral disagreement." *Id.* at 35. No one doubts that Kentuckians disagree profoundly about abortion—just as they do about lots of things, like legalizing drug use, gambling, and physician-assisted suicide. But "broad moral disagreement" does not oust the General Assembly from the field. After all, "[o]ur Legislature 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); *accord Zuckerman v. Bevin*, 565 S.W.3d 580, 588 (Ky. 2018) ("[A]n act will not be declared void on the ground that it is opposed to the spirit supposed to pervade the Constitution, or is against the nature and spirit of the government, or is contrary to the general principles of liberty, or the genius of a free people." (citation omitted)). That Kentuckians broadly disagree about an issue is not a reason to place it beyond the General Assembly's control. It is a reason to leave the issue to the branch of government most responsive to the people. Nothing in *Wasson* says that the General Assembly cannot legislate about "incendiary moral issue[s]."

The Facilities' second response to *Wasson*'s limiting principle is to say that abortion does not really harm someone else. To be more precise, they argue that "[w]hether

an 'other' is harmed by abortion goes to the very moral question at issue in the debate over abortion." Facilities Br. at 35. As the Facilities see it, *Wasson* not only protects conduct that does not harm others, it also protects one's ability to decide for oneself whether one's conduct harms others.

That is quite a gloss on *Wasson*. And it reads *Wasson*'s limiting principle right out of the decision. To be clear, not one word of *Wasson* suggests that Kentucky's right to privacy protects the right to decide for oneself whether one's conduct hurts another person. The Facilities do not even try to argue otherwise. Nor do they deal with the many repurcussions of their argument. Surely the Facilities do not believe that *Wasson* protects all private conduct that harms someone else as long as the harming party subjectively believes the conduct is not harmful.

The point here is that the Facilities' take on *Wasson* is—to put it nicely—strained. And so reading *Wasson* the way that the Facilities propose is one of those "doubtful" arguments that cannot justify a temporary injunction. *See Maupin*, 575 S.W.2d at 698.

Yet the bigger problem with the Facilities' view of *Wasson* is that, taken to its logical conclusion, their argument inevitably requires Kentucky to allow abortion on demand. If *Wasson* protects a pregnant woman's right to decide for herself whether an abortion would harm her unborn child, as the Facilities argue, it necessarily follows that *Wasson* bars the Commonwealth from prohibiting abortion at any point during pregnancy—even at full term. Any such limitation, the argument goes, curbs the very privacy right that the Facilities believe *Wasson* protects. To quote the Facilities, "such

moral considerations are best left to be resolved privately by individuals for themselves." Facilities Br. at 35.

The Facilities disclaim arguing for abortion on demand. Although they are unclear about their ask, they seem to want the Court to declare that the Commonwealth cannot regulate abortion before some point—they suggest "quickening or viability" as options.[3] *Id.* at 36. But this is where the Facilities give away the game. What they really want is for the Court to use *Wasson* to create the Kentucky version of *Roe v. Wade*. Their brief all but invites the Court to pick an arbitrary point in pregnancy and declare that abortions before then are protected.

The 50 years following *Roe* show the folly of such judicial line-drawing. *Roe* first drew such a line, only to have the Supreme Court redraw it 20 years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). And then, the Supreme Court rewrote the rule in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), followed by still another change in *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). *See Dobbs*, 142 S. Ct. at 2273–74. As *Dobbs* recognized, the U.S. Supreme Court's abortion line-drawing was "not built to last." *Id.* at 2274 (citation omitted).

The reason why is obvious. Abortion "presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in

[3] A quickening standard would return us to an era when "there were no scientific methods for detecting pregnancy in its early stages." *Dobbs*, 142 S. Ct. at 2251. Now, an unborn child's heartbeat can be detected as early as five weeks, AG Ex. 3 at 192:4–5, and a scientific consensus exists that life begins at fertilization, AG Br. at 24 & n.10. A viability standard would not be any better. *See Dobbs*, 142 S. Ct. at 2268–70 (explaining why). Of course, neither standard can be discerned from Kentucky's Constitution.

protecting fetal life." *Id.* at 2304 (Kavanaugh, J., concurring). And "one interest must prevail over the other at any given point in a pregnancy." *Id.* The judiciary is not the branch of government empowered—or equipped—to balance those interests. Doing so requires the Court to act as a super-legislature, overseeing every policy choice that touches on abortion.

If there is any doubt that this is what the Facilities want, look no further than Kentucky's experience during the five years before *Dobbs*. Those five years give a snapshot of what a Kentucky version of *Roe* would bring about. During those five years, the General Assembly passed law after law related to abortion, followed by lawsuit after lawsuit litigating and re-litigating the scope of *Roe*:

- In 2017, the General Assembly required abortion providers to show pregnant women an ultrasound of their unborn child before performing an abortion. KRS 311.727(2). EMW sued, and years of litigation followed, which a split panel of the Sixth Circuit ultimately resolved. *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019).

- In 2018, the General Assembly prohibited abortions in which an unborn child is torn apart limb from limb. KRS 311.787(2). EMW sued. A five-day trial, a divided appellate decision, and a procedural fight in the U.S. Supreme Court followed. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022); *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).

- In 2019, the General Assembly prohibited abortion when the abortion provider knows it is sought because of the race, gender, or disability status of the unborn child. KRS 311.731(2). EMW again sued, and three years later the case was resolved only because of *Dobbs*. *EMW Women's Surgical Ctr., P.S.C. v. Cameron*, No. 3:19-cv-178, Dkt. 94 (W.D. Ky. June 30, 2022).

- And in 2022, the General Assembly prohibited abortion after 15 weeks and updated how Kentucky regulates abortion. 2022 Ky. Acts, Ch. 210. Both EMW and Planned Parenthood sued. That case is already on its second trip to the

Sixth Circuit. *Planned Parenthood Great N.W., Hawaii, Alaska v. Cameron*, No. 22-5832 (6th Cir.).

The Attorney General offers this five-year lookback to make a simple point: If the Court creates a Kentucky *Roe*, its next five years (and beyond) will be all about abortion, with the Court defining and re-defining how far the right to abortion goes. A Kentucky *Roe* will thrust the judiciary into what the Court acknowledges is "the most divisive issue in a divisive political culture." *Eubanks & Marshall of Lexington, PSC v. Commonwealth*, No. 2016-SC-328, 2016 WL 4555927, at *3 (Ky. Aug. 25, 2016). And inevitably, a Kentucky *Roe* will erode Kentuckians' belief that the judiciary is simply calling balls and strikes as year after year the courts decide which of Kentucky's abortion laws can be enforced.

If the Court instead leaves the issue to the General Assembly, its members can do what they are elected to do. They can listen to their constituents, hold legislative hearings, draft and pass laws, revise those laws if necessary, and stand for reelection based on their votes. This process will not be perfect, but it at least offers the possibility of resolutions that are "more stable, less political, more fair, [and] sometimes mo[re] lasting." *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 537 (6th Cir. 2021) (en banc) (Sutton, J., concurring).

2. The Facilities also try to ground the claimed right to abortion in the right of self-determination. Facilities Br. at 37–40. In this respect, the Facilities rely on a line of cases that the circuit court did not even cite.

Those cases did not concern abortion. Instead, two of them dealt with "the right of a terminally ill patient to refuse unwanted life-prolonging treatment." *Woods v. Commonwealth*, 142 S.W.3d 24, 31 (Ky. 2004); *DeGrella v. Elston*, 858 S.W.2d 698, 703 (Ky. 1993). Those cases thus concerned a negative right to refuse medical treatment, not as here an alleged affirmative right to undergo a procedure the performance of which is prohibited. For refusal cases like *Woods* and *DeGrella* to apply here, the Court would have to extend them to a new and very different context. Here again, the Facilities are pursuing a "doubtful" argument that should wait for an appeal from final judgment. *See Maupin*, 575 S.W.2d at 698.

The Facilities also fail to mention that the right to refuse medical treatment "is not absolute." *Woods*, 142 S.W.3d at 32; *see also DeGrella*, 858 S.W.2d at 703–04. In fact, several state interests "may limit a person's right to refuse medical treatment." *Woods*, 142 S.W.3d at 32. Those state interests include "preserving life" and "protecting innocent third parties." *Id.* So even if *Woods* and *DeGrella* have some bearing on whether there is a right to abortion, they are best read as rejecting the Facilities' claim that the right to self-determination "embrace[s] an individual's ability to determine for herself whether to carry a pregnancy to term." Facilities Br. at 38.

That the right to self-determination must yield to the Commonwealth's interests in "preserving life" and "protecting innocent third parties" makes sense. The U.S. Supreme Court has held that the States have an interest in protecting fetal life "at all stages of development." *Dobbs*, 142 S. Ct. at 2284. This Court's predecessor has said the

same—even describing that interest as "compelling." *Sasaki I*, 485 S.W.2d at 902 (citation omitted). How best to balance that interest is for the General Assembly. Even the Facilities' self-determination case law recognizes as much. *See Woods*, 142 S.W.3d at 46 ("The problem before us involves complex social, moral and ethical considerations as well as complex legal and medical issues for which the legislative process is best suited to address in a comprehensive manner." (citation omitted)).

The Facilities also rely on *Tabor v. Scobee*, which dealt with the tort liability of a physician who performed a medical procedure to which his patient did not consent. 254 S.W.2d 474, 475 (Ky. 1951). *Tabor* was decided pre-*Roe*, when abortion was prohibited in Kentucky. AG Br. at 16–18. So it is hard to see how *Tabor* supports a constitutional right to abortion. In any event, *Tabor* only concerned performing a medical procedure without the consent of the patient. It has no bearing on the issue here.[4]

3. With no Kentucky case law as support, the Facilities invite the Court to rely on out-of-state case law. Facilities Br. at 36 & n.4. Decisions from sister States can sometimes be helpful in thinking out an issue, but "this Court's North Star is our own Kentucky Constitution." *Beshear*, 615 S.W.3d at 805 n.30. Indeed, the Court has not

[4] The Facilities argue (at 40–41) that combining a right to privacy with a right to self-determination somehow creates a right to abortion. That is like saying zero plus zero equals something other than zero. The Court has recently rejected combining distinct constitutional protections to create an enhanced guarantee. *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 568–69 (Ky. 2020).

hesitated to read our Constitution differently from "the majority of our sister courts." *Commonwealth v. Claycomb*, 566 S.W.3d 202, 216 (Ky. 2018).

In the unique context of abortion, the Facilities' out-of-state case law is unpersuasive. One of those cases relied on *Roe* and adopted *Casey*'s now-overruled test. *Pro-Choice Miss. v. Fordice*, 716 So.2d 645, 651, 655 (Miss. 1998).[5] Four of the decisions relied on an express provision in their respective state constitution establishing a right to privacy, which the Kentucky Constitution lacks. *Armstrong v. Montana*, 989 P.2d 364, 371–74 (Mont. 1999); *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (Alaska 1997); *In re T.W.*, 551 So.2d 1186, 1190–92 (Fla. 1989); *Comm. to Def. Reprod. Rights v. Myers*, 625 P.2d 779, 784 (Cal. 1981). Others of the decisions relied on distinct circumstances or constitutional text. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 472, 474 (Kan. 2019) (per curiam); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 850–53 (N.M. 1998); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 30–31 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925, 933 (N.J. 1982). And in neighboring Tennessee, the people passed a constitutional amendment that overruled the very decision that the Facilities cite. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000), *abrogated by* Tenn. Const. art. I, § 36.

The Facilities also neglect to mention that other state courts of last resort have approached the abortion question very differently. *Planned Parenthood Great Nw. v. Idaho*, --- P.3d ---, 2022 WL 3335696, at *6 (Idaho Aug. 12, 2022) ("[G]iven the legal

[5] A Mississippi trial court recently distinguished *Fordice* on this basis and allowed the State's trigger law and heartbeat law to be enforced. *Jackson Women's Health Org. v. Dobbs*, No. 25CH1:22-cv-739, Dkt. 39 at 6 (Miss. Chanc. Ct. July 5, 2022) (Ex. 3).

history of abortion in Idaho, we cannot simply infer such a right exists absent *Roe* without breaking new legal ground, which should only occur after the matter is finally submitted on the merits."); *Planned Parenthood of Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 715–16, 735–44 (Iowa 2022) (rejecting the "proposition that there is a fundamental right to an abortion in Iowa's Constitution subjecting abortion regulation to strict scrutiny"). Even still, whether the Kentucky Constitution protects abortion is a question that can only be answered by *our* constitutional text, history, and case law.

4. This brings us to the Facilities' discussion of Kentucky history. In their view, "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." Facilities Br. at 33 (emphasis omitted).

That telling of our history would be foreign to even the most amateur student of Kentucky history. It ignores that starting in 1910 (a mere 20 years after our Constitution was adopted), the Commonwealth prohibited all abortions, except when necessary to protect the pregnant mother's life. This statute continued in force until *Roe* was decided more than six decades later. AG Br. at 16–17. And following *Roe*, our General Assembly made clear—for the next 40 years—that Kentucky would return to prohibiting abortion if *Roe* were overruled. *Id.* at 19. This full century of Kentucky history bears directly on whether our Constitution protects abortion. *See Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957) (giving weight to the fact that "the people for the last 65 years" have interpreted the Constitution a certain way); *Agric. & Mech. College v. Hager*, 87 S.W. 1125, 1128–29 (Ky. 1905) (similar). In fact, if the Facilities were correct

that the Kentucky Constitution protects abortion, it would follow that Kentucky violated its Constitution for more than six decades while the 1910 law was in force.

Rather than discuss the last century of Kentucky history, the Facilities direct all their attention to *Mitchell*. As they point out (at 33), *Mitchell* found that the common law did not prohibit abortion before quickening. 78 Ky. at 210. The Facilities seem to think that because pre-quickening abortion was not prohibited at common law, it is now constitutionally protected.

Mitchell itself rejects such a notion. Although *Mitchell* stated the common-law rule, it also recognized that the General Assembly can change the common law. As *Mitchell* put it, "[i]n 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." *Id.* at 209. This, *Mitchell* continued, "ought to be provided against by the law-making department of the government." *Id.* at 210. And after the General Assembly passed the 1910 law prohibiting abortion, this Court's predecessor correctly understood the statute to "change[]" the common law "in this jurisdiction." *Fitch v. Commonwealth*, 165 S.W.2d 558, 560 (Ky. 1942).

There is nothing novel about the General Assembly changing *Mitchell*'s common-law rule. As the Court just explained, "[t]he common law is operative in the Commonwealth until a particular rule is repealed by statute or determined repugnant to the constitution itself." *Simpson v. Wethington*, 641 S.W.3d 124, 129 (Ky. 2022). Put another way, that the common law did not prohibit pre-quickening abortion does not mean that the Constitution now requires that pre-quickening abortion be permitted. *See*

Dobbs, 142 S. Ct. at 2255 ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked authority to do so."). The Facilities cite no case law for the proposition that our Constitution ossified *Mitchell*'s statement of the common law.

C. The other claims provide no basis for affirmance.

The Facilities urge the Court to affirm based on three other claims. The Facilities, however, admit (at 46) that they did not "fully raise[]" the equal-protection and religious-freedom claims sustained by the circuit court. And by "fully raise[]," the Facilities must mean that they failed to include those claims in their complaint. AG Ex. 1 ¶¶ 91–145. In any event, the Facilities make no effort to defend the circuit court's reasoning on those unpreserved claims—other than to summarize what the circuit court said. The Attorney General thus stands on his prior discussion of the circuit court's errors. AG Br. at 28–33.

As to their delegation claim, the Facilities mostly repeat (at 44–45) the argument that the circuit court adopted. But the Facilities cannot overcome that many Kentucky laws, just like the Human Life Protection Act, take effect based on a specified future event. AG Br. at 34 n.13. And the Human Life Protection Act does not delegate legislative power merely by stating that the law applies as far as the federal Constitution allows. *See Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 56 (Ky. 2011) ("[W]e note that if the intent of [Kentucky's long-arm statute] were to reach the outer limits of federal due process, it could easily have been drafted to say precisely that."). After all, many Kentucky laws establish their scope by reference to federal law. *See, e.g.*, KRS

61.650(1)(a), 78.790(1)(a), 199.8965(1)–(2), 311.1947(2)(f). This includes laws with criminal consequences. *See, e.g.*, KRS 17.510(7)(a) & (11)–(12), 141.050(1), .990(3)–(4), 205.8461(2)(b) & (3), 248.752, .762, 527.020(4).

Dawson v. Hamilton is not to the contrary. 314 S.W.2d 532 (Ky. 1958). A clear distinction exists between saying that not-yet-enacted federal law will be the law of Kentucky, as in *Dawson*, *id.* at 535, and merely saying that Kentucky law applies as far as federal law allows, as the Human Life Protection Act does. In the former instance, the General Assembly impermissibly delegates legislative power to set Kentucky law in the future without the state legislature's approval, while in the latter circumstance, the General Assembly simply establishes the scope of Kentucky law.

II. The Facilities have not proved irreparable harm.

The Facilities view the irreparable-harm prong as an invitation to argue public policy. They spend much of their brief (at 15–25) discussing the health risks associated with pregnancy as well as the financial implications of having children. But irreparable harm is not shorthand for what a court sees as unwise public policy. As Chief Justice Palmore and Justice Reed warned after *Roe*, "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." *Sasaki v. Commonwealth*, 497 S.W.2d 713, 715 (Ky. 1973) (*Sasaki II*) (Reed, J., concurring). But "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." *Id.*

Another way to think about the problems with arguing public policy under the guise of irreparable harm is to remember that the Facilities are challenging two duly enacted laws. In this context, the irreparable-harm and merits prongs of the temporary-injunction standard merge to avoid judicial second-guessing of public policy. As the Court recently explained, "[w]hether a [litigant] has shown an irreparable injury is *tied to* his constitutional claims and the likelihood of success." *Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021) (emphasis added). This joint consideration reflects the fact that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Id.* So the Human Life Protection Act and the Heartbeat Law do not cause irreparable harm as a matter of law for the simple reason that they are constitutional.

To establish irreparable harm, the Facilities also claim (at 19) that the health exceptions in the challenged laws "will not protect pregnant Kentuckians from catastrophic health consequences, including death."[6] Note that the Facilities make this claim only in general terms. They do not identify a single specific circumstance in which the health exceptions will not protect a pregnant woman's life or health. If such a circumstance exists, the Facilities should have brought an as-applied challenge to the laws' health exceptions. *See Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (allowing as-applied

[6] The Facilities also make (at 20) a passing statement that the health exceptions are "too vague." They have not brought that claim. AG Ex. 1 ¶¶ 91–145.

challenge "to protect the health of the woman 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"). As noted above, three women already filed an as-applied challenge to Kentucky's laws regulating abortion.

The mismatch between the Facilities' as-applied arguments and the facial relief they seek cannot be missed. In effect, the Facilities are claiming that purely elective abortions must be allowed because in some unidentified circumstances involving unidentified pregnant women the health exceptions to Kentucky's laws will not be good enough. That is not how facial challenges to Kentucky law work. *See Claycomb*, 566 S.W.3d at 210. If the Facilities think that the laws' health exceptions are too narrow, they should have challenged them in an as-applied claim, not asked the Court to enjoin the laws themselves in all circumstances.

The Facilities' assertion that the laws' health exceptions are too narrow also contradicts Kentucky's experience. The laws' health exceptions are in fact broader than the health exception to Kentucky's abortion prohibition that applied from 1910 until 1973. AG Br. at 40. And the health exceptions in the Human Life Protection Act and the Heartbeat Law closely mirror the health exception that the U.S. Supreme Court *upheld* in *Casey* under the undue-burden standard. 505 U.S. at 879–80 (upholding Pennsylvania's health exception, which allowed an abortion to "avert [a pregnant woman's]

death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function" (citation omitted)). Thus, the health exceptions in the challenged laws are by no means new to the practice of medicine.

Nor are those health exceptions new for Kentucky doctors. The health exceptions in the Human Life Protection Act and the Heartbeat Law are analogous to a health exception that Kentucky doctors applied beginning in 2017. That year, the General Assembly passed a law prohibiting abortion after an unborn child reaches a probable post-fertilization age of 20 weeks.[7] 2017 Ky. Acts, Ch. 5, § 2(1). That law contained a health exception very similar to the laws challenged here—the 2017 law allowed an abortion when "necessary to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." *Id.* § 2(2)(b). Thus, Kentucky's doctors already have five years of recent experience working under a health exception very much like those here. Notably, the Facilities have identified no problems that arose under the health exception to the 2017 law.

One final point about the exceptions in the challenged laws. At oral argument in this matter, we will not even be five months removed from the U.S. Supreme Court's decision in *Dobbs*. At that point, the General Assembly will not have met to discuss a post-*Dobbs* Kentucky. Our legislators will have yet to consider whether the challenged laws' health exceptions should be amended. Nor will they have debated whether to

[7] This is the law that the General Assembly amended earlier this year to adopt the 15-week law. 2022 Ky. Acts, Ch. 210, § 34.

include exceptions in the challenged laws for victims of rape and incest and for lethal-fetal anomalies, as neighboring Indiana's legislature just decided to do. *Indiana Legislature First to Approve Abortion Bans Post* Roe, Associated Press (Aug. 5, 2022), https://perma.cc/6RBR-WZW7. The virtue of our new paradigm is that if Kentuckians think these or other changes should be made, all they have to do is persuade their legislators of that or vote for new legislators who favor such changes.

The Facilities also claim (at 21) irreparable harm because they "consider it their moral and ethical obligation to provide abortion." This from EMW—whose abortion provider could not say whether an unborn child is a human being because she "ha[d]n't really given this matter much thought." AG Ex. 3 at 77:3–14. Even still, abortion providers cannot override state laws regulating the medical profession simply because they view them as immoral and unethical. For comparison, we would never say that a Kentucky doctor can perform physician-assisted suicide without consequence simply because the doctor considers doing so a moral and ethical duty. So too here. In short, our Constitution does not "elevate the[] status [of abortion providers] above other physicians in the medical community." *See Gonzales*, 550 U.S. at 163.

III. The equities favor dissolving the temporary injunction.

The circuit court abused its discretion several times in identifying and balancing the equities. First, the circuit court failed to mention, much less weigh, the loss of unborn human life that a temporary injunction would allow. Overlooking such an indispensable issue shows that the circuit court never really exercised its discretion. *See Combs v. Commonwealth*, 74 S.W.3d 738, 745 (Ky. 2002) (finding "there is no indication

that the trial court exercised its discretion" when it never "even considered" an issue). The Facilities' brief omits mention of this problem.

Second, the circuit court minimized the harm to the Commonwealth and the public from a temporary injunction. As a matter of law, that harm cannot be mere "delayed enforcement" of Kentucky law, as the circuit court held, AG Ex. 4 at 9, for the simple reason that "non-enforcement of a duly-enacted statute constitutes *irreparable harm* to the public and the government," *Cameron*, 628 S.W.3d at 73 (emphasis added). In defending the circuit court's reasoning, the Facilities never cite *Cameron*.

Third, the circuit court assumed for itself the power to decide what serves the public interest. That is the very same abuse of discretion that the Court set right in *Cameron* by forbidding courts from "substitut[ing] [their] view of the public interest for that expressed by the General Assembly." *See id.* at 78.

CONCLUSION

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

Respectfully submitted,

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