No. 2022-SC-0329-TG

In the
Supreme Court of Kentucky

DANIEL CAMERON

Appellant,

v.

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

Appellees.

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

APPELLEES' RESPONSE TO APPELLANT'S OPENING BRIEF

Heather L. Gatnarek (KBA No. 95113)
ACLU of Kentucky
325 West Main Street, Suite 2210
Louisville, KY 40202
Telephone: (502) 581-9746
heather@aclu-ky.org

Brigitte Amiri*
Chelsea Tejada*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633
bamiri@aclu.org
ctejada@aclu.org

Carrie Y. Flaxman*
Planned Parenthood Federation of America
1110 Vermont Avenue, NW, Suite 300
Washington, D.C. 20005
(202) 973-4830
carrie.flaxman@ppfa.org

Michele Henry (KBA No. 89199)
Craig Henry PLC
401 West Main Street, Suite 1900
Louisville, KY 40202
Telephone: (502) 614-5962
mhenry@craighenrylaw.com

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

** admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, I filed, via hand-delivery, the original and nine (9) true and correct copies of this brief by delivering to Kelly Stephens, Clerk of the Supreme Court of Kentucky, State Capitol Room #235, 700 Capitol Ave., Frankfort, KY 40601. I further certify that on that same date I served the same by First-Class U.S. Mail and email on the following:

Hon. Mitch Perry, Circuit Judge
Jefferson County Judicial Center
700 West Jefferson Street
Louisville, KY 40202

Matt Kuhn
Counsel for Appellant Daniel Cameron
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, KY 40601
Matt.Kuhn@ky.gov

Wesley Duke
Counsel for Defendant Eric Friedlander
Office of Legal Services
Cabinet for Health and Family Services
275 East Main Street 5W-A
Frankfort, KY 40621
WesleyW.Duke@ky.gov

Leanne Diakov
Counsel for Defendant Michael Rodman
Kentucky Board of Medical Licensure
310 Whittington Parkway, Suite 1B
Louisville, KY 40222
Leanne.diakov@ky.gov

Jason Moore
Counsel for Defendant Thomas Wine
Office of the Commonwealth's Attorney,
30th Judicial Circuit
514 West Liberty Street
Louisville, KY 40202
jbmoore@louisvilleprosecutor.com

In accordance with CR 76.12(6), Counsel further certifies that they did not withdraw the record from the Clerk of the Circuit Court.

Heather L. Gatnarek (KBA No. 95113)
Counsel for Appellees EMW Women's Surgical Center, P.S.C., and Ernest Marshall, M.D.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE 1

Bevin v. Commonwealth ex rel. Beshear, 563 S.W.3d 74 (Ky. 2018). 1, 2
Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978) 1
Beshear v. Goodwood Brewing Co., 635 S.W.3d 788 (Ky. 2021) ... 1, 2
Dawson v. Hamilton, 314 S.W.2d 532 (Ky. 1958) 3

ARGUMENT 3

I. The Circuit Court Correctly Held That Plaintiffs Have Third-Party Standing 3

Associated Indus. of Ky. v. Commonwealth, 912 S.W.2d 947 (Ky. 1995) 3, 4
Warth v. Seldin, 422 U.S. 490 (1975) 4, 7
Commonwealth Cabinet for Health & Fam. Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc., 566 S.W.3d 185 (Ky. 2018) 4
June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103 (2020) 5, 6
Powers v. Ohio, 499 U.S. 400 (1991) 5
Craig v. Boren, 429 U.S. 190 (1976) 5, 6
Singleton v. Wulff, 428 U.S. 106 (1976) 5, 6, 7
Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 5
Diamond v. Charles, 476 U.S. 54 (1986) 6
Kowalski v. Tesmer, 543 U.S. 125 (2004) 6
Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) 7

II. The Circuit Court Properly Found That a Temporary Injunction Is Warranted 7

A. The Circuit Court Properly Found That Plaintiffs and Their Patients Would Suffer Irreparable Harm Absent an Injunction 7

CR 65.04(1) 7, 8, 11
Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020) 7
Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978) 8, 11
Cameron v. Beshear, 628 S.W.3d 61 (Ky. 2021) 8
Gonzales v. Carhart, 550 U.S. 124 (2007) 10
Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) 10
Commonwealth v. Steadman, 411 S.W.3d 717 (Ky. 2013) 11

B. The Circuit Court Properly Found That the Balance of Equities Favors a Temporary Injunction 11

Legis. Rsch. Comm'n v. Fischer, 366 S.W.3d 905 (Ky. 2012) 12

Beshear v. Goodwood Brewing Co., 635 S.W.3d 788 (Ky. 2021) 12
Cameron v. Beshear, 628 S.W.3d 61 (Ky. 2021) 12

C. The Circuit Court Properly Found That Plaintiffs Have Raised Substantial Questions on the Merits of Their Claims............................... 13

Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978).................... 13

1. Constitutional Rights to Privacy and Self-Determination Claims....... 14

Ky. Const. § 1 14
Ky. Const. § 2 14

a. The Text of the Constitution Supports the Circuit Court's Finding 14

Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).................... 15
Hodes & Nauser, MDs, P.A. v. Schmidt,
440 P.3d 461 (Kan. 2019) 15
Ky. Const. § 1 15
Bevin v. Commonwealth ex rel. Beshear,
563 S.W.3d 74 (Ky. 2018). 15

b. Case Law Interpreting the Relevant Constitutional Provisions Supports the Circuit Court's Finding 15

Ky. Const. § 1 15
Ky. Const. § 2 15
Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).................... 15
Woods v. Commonwealth, 142 S.W.3d 24 (Ky. 2004) 15
Dist. Bd. of Tuberculosis Sanatorium Trustees for Fayette Cnty. v. City of Lexington, 12 S.W.2d 348 (Ky. 1928) 15

c. Kentucky History Supports the Circuit Court's Finding.............. 17

Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).................... 17
Mitchell v. Commonwealth, 78 Ky. 204 (1879)................................. 18
Ky. State Bd. for Elementary & Secondary Ed. v. Rudasill,
589 S.W.2d 877 (Ky. 1979) 18
Debates from 1890 Constitutional Convention.................................. 19
United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020).................. 19
Sasaki v. Commonwealth, 485 S.W.2d 897 (Ky. 1972)...................... 19
Posey v. Commonwealth, 185 S.W.3d 170 (Ky. 2006)....................... 20
Seum v. Bevin, 584 S.W.3d 771 (Ky. App. 2019).............................. 20
Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)...... 20
Ky. Const. § 26 20

d. The Circuit Court Correctly Applied Strict Scrutiny 20

Sasaki v. Commonwealth, 485 S.W.2d 897 (Ky. 1972)...................... 21

Preterm-Cleveland v. Yost, Case No. A2203203 (Ohio Ct. Com. Pl. Oct. 12, 2022) ... 21
Planned Parenthood Nw., Haw., Alaska, Ind., Ky., Inc. v. Members of the Med. Licensing Bd. of Ind., Cause No. 53C06-2208-PL-001756 (Ind. Cir. Ct. Sept. 22, 2022) ... 21
Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978) ... 21

2. Unlawful Delegation Claim ... 21

Dawson v. Hamilton, 314 S.W.2d 532 (Ky. 1958) ... 21
KRS 311.772(2)(a) ... 22
Caesars Riverboat Casino, LLC v. Beach, 336 S.W.3d 51 (Ky. 2011) ... 22
Bloemer v. Turner, 137 S.W.2d 387 (Ky. 1939) ... 22
Ky. Const. § 60 ... 23
Walton v. Carter, 337 S.W.2d 674 (Ky. 1960) ... 23

3. Equal Protection and Religious Freedom Claims ... 23

Cmty. Fin. Servs. Bank v. Stamper, 586 S.W.3d 737 (Ky. 2019) ... 24
Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002) ... 24
Mitchell v. Hadl, 816 S.W.2d 183 (Ky. 1991) ... 24

CONCLUSION ... 24

COUNTERSTATEMENT OF THE CASE

Defendant seeks to erase the role of the judiciary and give a blank check to the General Assembly to pass laws insulated from judicial review. Defendant argues that this Court should defer to the General Assembly on each prong of the temporary injunction test. But this fundamentally misunderstands the role of Kentucky's courts. As this Court has held, "[t]he Court's power to determine the constitutional validity of a statute does not infringe upon the independence of the legislature," and refusing to adjudicate such cases "would be an abdication of [courts'] constitutional duty." *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 82–83 (Ky. 2018) (internal quotation marks omitted).

The Attorney General urges acquiescence to the General Assembly in an attempt to escape the applicable standard of review. That standard requires this Court to defer to the circuit court's factual findings and assess whether the circuit court abused its discretion. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978). As to the first prong of the temporary injunction test—irreparable harm—Defendant argues that the judiciary should play no role in assessing the harm caused by the Bans because the General Assembly already balanced the risks when passing the challenged laws and included a medical emergency exception. Opening Br. Att'y Gen. Daniel Cameron ("AG Br.") at 40, 43. But this argument ignores that it is the circuit court's role to consider evidence and "make accurate and adequate findings of fact." *Beshear v. Goodwood Brewing Co.*, 635 S.W.3d 788, 797 (Ky. 2021). Here, the circuit court found, based on the Commonwealth's own statistics, that abortion is substantially safer than childbirth and, therefore, the Bans will cause irreparable harm to Kentuckians who are forced to carry their pregnancies to term and give birth, and that the medical exception is too narrow to protect patients' health and

lives. Op. & Order Granting Temporary Inj. ("TI Order") at 3, 8, 14. Moreover, in addition to health harms, the circuit court found, based on undisputed evidence, that people forced to carry pregnancies to term and give birth may lose their jobs, be unable to finish their education, or fall deeper into poverty. *Id*. at 3–4, 9.

As to the second prong of the temporary injunction analysis—balance of the equities—Defendant relies on inapposite case law to claim that "it is the General Assembly that determines what best serves the public." AG Br. at 45. Defendant again misunderstands the role of the judiciary. It is the province of the circuit court to "determine the detriment to the public interest" and "weigh[] the equities" in its temporary injunction decision. *Goodwood*, 635 S.W.3d at 797. Furthermore, if Defendant were correct that the harm of non-enforcement of a law could always trump harm to the moving party, courts could never grant a temporary injunction to prevent the enforcement of a statute. That is plainly not the law. Moreover, contrary to Defendant's claim that the circuit court failed to consider harms to Defendant, the circuit court did, and concluded that "when balanced against the harms of the Plaintiffs," they are "not sufficient to preclude injunctive relief." TI Order at 9.

Finally, the circuit court did not abuse its discretion in finding that Plaintiffs presented serious questions going to the merits of their constitutional claims. Defendant again argues that the General Assembly "has [] the policy-making prerogative to prohibit all abortions." AG Br. at 19. But the General Assembly cannot pass laws that are insulated from judicial review. It is this "scheme of checks and balances that has protected freedom and liberty in this country and in this Commonwealth for more than two centuries." *Bevin*, 563 S.W.3d at 83. Here, contrary to Defendant's assertion, *see* AG Br. at 21, the circuit

court did not abuse its discretion by relying on this Court's seminal privacy case to find that there are serious questions going to the merits of Plaintiffs' privacy claim. TI Order at 13. Moreover, the circuit court properly held that Kentucky's history supports Plaintiffs' claims, rather than Defendant's view, because abortion was permitted at the time the Kentucky Constitution was ratified. *Id*. The circuit court also separately found serious questions going to the merits of Plaintiffs' claim that the Trigger Ban is an unlawful delegation of legislative authority. *Id.* at 11. Contrary to Defendant's assertion, the Trigger Ban's delegation to the U.S. Supreme Court is just as unconstitutional as the delegation to Congress found unlawful in *Dawson v. Hamilton*, 314 S.W.2d 532 (Ky. 1958). For all of these reasons, discussed further below and in Appellees' Opening Br. ("Pls.' Br."), this Court should affirm the temporary injunction.

ARGUMENT

I. The Circuit Court Correctly Held That Plaintiffs Have Third-Party Standing.

The Attorney General does not seem to seriously dispute that Plaintiffs satisfy Kentucky's constitutional standing requirements. *See* Pls.' Br. at 12. There could be no disagreement, then, that Plaintiffs have standing to bring their unlawful delegation claim against the Trigger Ban. Instead, Defendant argues that Plaintiffs "lack third-party standing" to raise the rights to privacy and self-determination claims on behalf of their patients. AG Br. at 10. Defendant appears to contend that third-party standing is never permitted in Kentucky and that, even if it were, it is not appropriate in this case. AG Br. at 10–12. Neither assertion is correct.

To begin, Defendant inaccurately claims that this Court's precedent "forecloses any assertion of third-party standing." *Id*. at 11 (citing *Associated Indus. of Ky. v.*

Commonwealth, 912 S.W.2d 947, 951 (Ky. 1995)). In making this argument, Defendant misreads the sole case upon which he relies and ignores more recent precedent. As to the first point, Defendant's assertion that *Associated Industries* "rejected" third-party standing, AG Br. at 10, is incorrect. Instead, in that case, which cited federal standing law to determine whether there was a justiciable controversy for purposes of Kentucky's Declaratory Judgment Act, this Court found that, because the challenged laws "affected only [others]," the litigant did not suffer the requisite injury to have "'a personal stake in the outcome of the [case].'" *Associated Indus.*, 912 S.W.2d at 951 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). This is in sharp contrast to the case at hand, where Plaintiffs are personally injured by the challenged laws. *See* Pls.' Br. at 12. Accordingly, rather than foreclosing third-party standing, *Associated Industries* merely confirms that a litigant must have personally suffered an injury before being able to assert the rights of others.[1] As to the second point, in 2018, this Court officially adopted the federal standing framework which, in addition to imposing jurisdictional requirements, includes the "major federal prudential standing principles," such as third-party standing. *Commonwealth Cabinet for Health & Fam. Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 193, 196 (Ky. 2018). Third-party standing is thus available in Kentucky without any need "to overrule *Associated Industries*," AG Br. at 11.

---

[1] Indeed, the quote in *Associated Industries* relied upon by Defendant as supposedly foreclosing third-party standing, AG Br. at 10–11 (quoting *Associated Indus.*, 912 S.W.2d at 951), in turn cites a federal case that itself recognizes third-party standing. *Warth*, 422 U.S. at 510 ("[T]his Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights.").

Further, contrary to Defendant's assertion, *id.* at 11–12, both the "close relation" and "hindrance" factors support third-party standing here, *see* Pls.' Br. at 13–15. First, the Attorney General argues that Plaintiffs do not have a "close relation" with their patients by pointing to a *dissenting* opinion that misconstrues this requirement. AG Br. at 12 (citing *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2168 (2020) (Alito, J., dissenting) (claiming relationship between abortion provider and patient "is generally brief and very limited")). To the contrary, a "close relation" for third-party standing relates to the alignment of interests—not the length of relationship—between the litigant and the third party to ensure the litigant is an effective advocate for the third party's rights. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 413–14 (1991) (finding close relation between criminal defendant and excluded jurors because they "have a common interest in eliminating racial discrimination from the courtroom . . . [a]nd, there can be no doubt that [defendant] will be a motivated, effective advocate for the excluded venirepersons' rights"); *Craig v. Boren*, 429 U.S. 190, 195 (1976) (finding beer vendor is entitled to assert the rights of their potential customers "that would be 'diluted or adversely affected'" should the statutes be enforced against plaintiff). Such an alignment of interests is clearly present here, where patients' ability to access abortion is "inextricably bound" with Plaintiffs' ability to engage in the conduct prohibited by the Bans. *See Singleton v. Wulff*, 428 U.S. 106, 114 (1976). This is true irrespective of whether those patients currently seek care from Plaintiffs or will do so only in the future. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683–84 (1977) (contraceptives vendor may assert rights "on behalf of its potential customers"). The only two cases Defendant relies on for a contrary view, AG Br. at 12, both approvingly

cite cases where abortion providers assert their future patients' rights as instances where third-party standing *is* appropriate.[2]

Second, Defendant, again relying only on a dissenting opinion, alleges that Plaintiffs' patients are not hindered from asserting their own rights because "a woman who challenges an abortion restriction can sue under a pseudonym." AG Br. at 12 (citing *June Med. Servs.*, 140 S. Ct. at 2168 (Alito, J., dissenting)). But even assuming that a patient could proceed pseudonymously, that would not address all the barriers that prevent abortion patients from asserting their own rights in court. Plaintiffs' patients retain genuine fears about their private medical decision becoming public—despite a pseudonym—and the potential repercussions for themselves and their families. *See* Pls.' Br. at 14–15. This is a sufficiently "genuine obstacle" to satisfy the hindrance requirement, which, in any event, need not be "insurmountable." *Singleton*, 428 U.S. at 116, 117. Additionally,

> A second obstacle is the imminent mootness. . . . Only a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost. . . . A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.' And it may be that a class could be assembled . . . But if the assertion of the right is to be 'representative' . . . there seems little loss in terms of effective advocacy from allowing its assertion by a physician.

Id. at 117–18 (internal citations omitted). *See also Craig*, 429 U.S. at 194.

Defendant further faults the circuit court for "not engag[ing]" in this step-by-step analysis. AG Br. at 12. But, under the federal framework, that is not necessary in every abortion case because the application of third-party standing in this context is well settled.

[2] *See Diamond v. Charles*, 476 U.S. 54, 65–66 (1986) (citing *Doe v. Bolton*, 410 U.S. 179 (1973) and *Singleton*, 428 U.S. 106); *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (citing, *inter alia*, *Bolton*, 410 U.S. 179, and stating "[b]eyond these examples—none of which is implicated here—we have not looked favorably upon third-party standing").

Singleton, 428 U.S. 114–18. Moreover, contrary to Defendant's assertion, AG Br. at 11, the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), did not overrule third-party standing, generally or as applied to abortion providers. TI Order at 6 n.2. Further, it is axiomatic that third-party standing is appropriate where, as here, "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth*, 422 U.S. at 510. For all of the reasons discussed above, and in Appellees' Opening Brief, the circuit court did not err in finding that Plaintiffs have third-party standing to assert their patients' rights.

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

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

At the outset, Defendant argues that Plaintiffs themselves are not irreparably harmed by the Bans, and any harm to Plaintiffs' patients can only be raised in the balancing of the equities prong. AG Br. at 38–39. Defendant is incorrect on both scores. The irreparable harm inquiry focuses on the harm suffered by the moving parties, CR 65.04(1)—here, Plaintiffs and their patients. As discussed *supra* Section I, the circuit court properly found that Plaintiffs have third-party standing to assert the rights of their patients and as a result, they can raise their patients' irreparable harm. Every federal court to consider irreparable harm in the context of a preliminary injunction sought by abortion providers on behalf of their patients to enjoin an abortion restriction considered irreparable harm to patients. *See, e.g.*, *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927–28 (6th Cir. 2020), *vacated as moot*, *Slatery v. Adams & Boyle, P.C.*, 141 S. Ct. 1262 (2021).

In any event, Plaintiffs themselves suffer irreparable harm because the Bans prevent them from providing care that they are ethically obligated to provide, Transcript of July 6

Hearing ("Tr.") (Pls.' App'x Ex. 4) 23:3–7, a type of harm that Defendant wholly ignores. For example, one of Plaintiff EMW's physicians, Dr. Bergin, testified that the Bans' medical emergency exception is too narrow and "it is medically and ethically unacceptable to force a patient to deteriorate to the point at which she would become clearly eligible for the exception." TI Order at 3.[3] Furthermore, in the first few days after the Bans took effect, Plaintiff EMW were forced to turn away hundreds of patients in need of abortion care. *Id*.[4]

Defendant further argues that "the circuit court [] erred as a matter of law by failing to recognize that the irreparable-harm inquiry here is tied to the merits of the [Plaintiffs'] constitutional challenges." AG Br. at 39. This Court's rules and the seminal case on the temporary injunction standard make clear that the irreparable harm inquiry is separate from the question of whether there is a serious question as to the merits. *See, e.g.*, CR 65.04(1); *Maupin*, 575 S.W.2d at 699. The sole case Defendant relies upon for his argument does not hold otherwise. In *Cameron v. Beshear*, this Court dissolved a temporary injunction order that prevented the enforcement of laws that limited the Governor's authority to take unilateral action during declared emergencies. 628 S.W.3d 61, 67, 78 (Ky. 2021). The Governor argued that the challenged law harmed his "constitutional power and authority of his office." *Id*. at 72. The Court held that "[w]hether the Governor has shown an irreparable injury is tied to his constitutional claims and the likelihood of success." *Id* at 73. That is because the *only* injury that the Governor could assert was injury to his constitutional authority, which was identical to his underlying legal claim. *Id.* at 72, 77 &

---

[3] *See also* Br. for Amici Curiae American College of Obstetricians & Gynecologists at 12–15 (explaining the ethical quandary facing doctors confronted with abortion bans).

[4] Contrary to Defendant's suggestion, AG Br. at 41 n.17, the circuit court did not consider any financial harm to Plaintiffs, nor did Plaintiffs plead such harm.

n.21. Even if Defendant were correct, and this Court now conflates the harm and merits inquiries for temporary injunction motions, Plaintiffs should still prevail because, as discussed *infra*, they have demonstrated serious questions as to the merits of their claims.

Defendant also claims the Bans' narrow medical emergency exceptions protect patients from harm. AG Br. at 40. This argument ignores the circuit court's findings that anyone forced against their will to carry a pregnancy to term and give birth faces increased risk to their health overall. *See, e.g.*, TI Order at 3, 8. And as to medical emergencies specifically, the circuit court found that the Bans' narrow exceptions will not protect Kentuckians from catastrophic health consequences, including death. For example, the risk of "incurring civil and criminal liability" for violating the Bans may force doctors "to wait until women are in dire medical conditions before interceding." *Id.* at 14.

Moreover, although Defendant claims that the Bans do not apply in cases of miscarriage, AG Br. at 26–27, absent a binding interpretation from Defendants or the courts, the Bans make no exception for ending a pregnancy in the case of an inevitable miscarriage where fetal demise has not yet occurred. As the circuit court found, "[m]any people are justifiably concerned . . . about their ability to receive adequate care, and the possibility their health and safety will be deemed subordinate to the life of the fetus." TI Order at 14. The Bans "potentially obligate the state to investigate the circumstances and conditions of every miscarriage that occurs in Kentucky." *Id.*

Defendant also claims that the circuit court abused its discretion by failing to quantify the health risks of some specific pregnancy complications. AG Br. at 41–42. But the circuit court did not need to parse the statistics of certain complications to support its finding, based on the Commonwealth's statistics, that *all* pregnant women face risks from

pregnancy that cannot fully be predicted at the outset. TI Order at 3, 8. Defendant also argues the General Assembly balanced the risks of pregnancy when it passed the Bans, and that the laws are therefore insulated from court review. AG Br. at 43. But this argument ignores the judiciary's mandate to evaluate the evidence in the context of assessing a motion for temporary injunction and not simply defer to the legislature. *See supra* at 1. The only case cited by Defendant for his misguided argument is *Gonzales v. Carhart*, 550 U.S. 124 (2007). But that non-binding case does not support Defendant's claim. To the contrary, the U.S. Supreme Court has routinely made clear, including in and after *Gonzales*, that it is the lower courts' province to evaluate and weigh evidence in challenges to abortion restrictions. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 2310 (2016) (reaffirming that courts retain independent constitutional duty to engage in factual findings (citing *Gonzales*, 550 U.S. at 165–66)), *abrogated by Dobbs*, 142 S. Ct. 2228.

Furthermore, Defendant ignores the other ways the Bans cause irreparable harm to Kentuckians. For example, the Bans lack an exception for rape and incest, and if these patients are forced to carry their pregnancies to term and give birth against their will, they may face the additional trauma of being constantly reminded of the violation committed against them. Bergin Aff. (Pls.' App'x Ex. 5) ¶ 31. Defendant also ignores the Bans' lack of an exception for lethal fetal anomalies. As Dr. Bergin explained, many patients "find [] the prospect of continuing a pregnancy to term and giving birth to an infant who will not survive" extremely distressing. *Id.* ¶ 30. Defendant largely dismisses the harm of forced parenthood, and instead simply points to "safe haven" laws "as a way for a parent to give up the infant with no questions asked," AG Br. at 46 n.19, without acknowledging the harm of forced pregnancy and childbirth. In any event, Defendant did not dispute the circuit

court's findings that "[a]dding another child can put exponential strain on an already struggling family and lead to detrimental outcomes for all involved;" that "[a]n unplanned pregnancy can also derail a woman's career or educational trajectory;" and that the "burden of abortion bans falls hardest on poorer and disadvantaged members of society." TI Order at 8–9.

Defendant further argues that the circuit court erred by granting an injunction against the Bans in their entirety. AG Br. at 40–41. Defendant did not make this argument below, and therefore it is waived. *See, e.g.*, *Commonwealth v. Steadman*, 411 S.W.3d 717, 724 (Ky. 2013). If this Court considers this argument, it should be rejected. The circuit court found that the Bans cause widespread irreparable harm, and therefore correctly enjoined them entirely. Indeed, the Bans harm any Kentuckian who is pregnant and needs an abortion, including if she faces health risks, economic harm, or is forced to travel out of state. *See, e.g.*, TI Order at 3–4, 7–9.

Finally, Defendant claims that the circuit court erred by failing to consider the state interest in potential life in the irreparable injury inquiry. AG Br. at 44. Defendant again misreads this Court's precedent on the temporary injunction factors. Courts must focus on the harms faced by the moving parties. CR 65.04(1). Any harm to Defendant is considered in the balancing of the equities prong, *Maupin*, 575 S.W.2d at 699, which is discussed *infra*. Accordingly, for all of these reasons, the circuit court did not abuse its discretion in finding that the Bans irreparably harm Plaintiffs and their patients.

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

The circuit court properly exercised its discretion to conclude that the balance of equities weighs in favor of a temporary injunction. *See* Pls.' Br. at 26–27. The circuit court

found that banning abortion would impose serious health and financial costs on Kentuckians, especially those most disadvantaged, who are least likely to obtain care out of state, TI Order at 8, and most likely to be the victims of Kentucky's abysmal maternal mortality rate, Ver. Compl. (Pls.' App'x Ex. 2) ¶¶ 50–51. Defendant raises a series of unavailing objections to the circuit court's determination. First, Defendant argues that the judiciary should have no role in balancing the equities because the public interest is never served by enjoining a statute and that Defendant will always be harmed by such an injunction. AG Br. at 45. But if this were the standard, a temporary injunction could never issue against a statute. This is plainly not the law. *See, e.g.*, *Legis. Rsch. Comm'n v. Fischer*, 366 S.W.3d 905, 919 (Ky. 2012) (affirming temporary injunction of legislative redistricting plan passed by General Assembly). To the contrary, it is well-established that balancing the equities requires "the *court* [to] consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Goodwood*, 635 S.W.3d at 795 (emphasis added) (quoting *Maupin*, 575 S.W.2d at 699); *see also* TI Order at 8–9 (quoting same).

Defendant attempts to rely again on *Cameron v. Beshear*, which is inapposite. In that case, this Court held that because the Governor's emergency powers derived from statutes, not the Constitution, the General Assembly could limit those powers; by granting a temporary injunction in that case, the lower court substituted its view of the public interest for that of the General Assembly. 628 S.W.3d at 78. Here, in the context of a constitutional challenge to a statute, it is the judiciary's role to interpret the Constitution, including assessing the temporary injunction factors. *See supra* at 1.

Moreover, contrary to Defendant's claim, AG Br. at 48, the circuit court considered the harm to Defendants and their interests, and held that "[t]his harm, when balanced against the harms of the Plaintiffs, is not sufficient to preclude injunctive relief." TI Order at 9. Although the district court did not directly address Defendant's interest in fetal life when balancing the equities, the circuit court considered it in the context of whether Plaintiffs have shown serious questions going to the merits of their challenges, TI Order at 18 (finding that the state's interest in potential fetal life "pre-viability is not a compelling enough state interest to justify such an unparalleled level of intrusion and invasiveness into the fundamental area of choosing whether or not to bear a child"). Because the state's interest in potential life is not compelling until viability, it also cannot outweigh the harm to patients seeking pre-viability abortion care.

Finally, Defendant attempts to flip the status quo analysis on its head by arguing that the "status quo" is the General Assembly's purported authority to prohibit abortion unchecked by the Constitution. AG Br. at 49–50. It is illogical to argue that the status quo is anything other than the way things stood at the advent of this case. Abortion has been legal and available in Kentucky for the last five decades, up until the challenged Bans were permitted to take effect earlier this year. The circuit court correctly held that the "requested injunctive relief will merely restore the status quo that has existed in Kentucky for nearly fifty years." TI Order at 9.

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

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

circuit court did not abuse its discretion in holding that Plaintiffs presented "at the very least a substantial question as to the merits" of whether the Bans violate rights at the core of the Kentucky Constitution, including the right to privacy and non-delegation principles, TI Order at 1, 20.

1. Constitutional Rights to Privacy and Self-Determination Claims.

The circuit court reasonably held that Plaintiffs have raised substantial questions on the merits of their claims that the Six-Week Ban violates Sections 1 and 2 of the Constitution. TI Order at 20. Defendant makes the unfounded assertion that the circuit court reached this result "[o]nly by ignoring the text of Kentucky's Constitution, overlooking the Commonwealth's history, and expanding Kentucky precedent beyond its breaking point." AG Br. at 9. As explained in Appellee's Opening Brief and in further detail below, these arguments are patently incorrect.

a. The Text of the Constitution Supports the Circuit Court's Finding.

Defendant first argues that because the word "abortion" does not itself appear in the Constitution, access to abortion cannot be constitutionally protected. *Id.* at 13. But the Kentucky Constitution is not so limited. *See* TI Order at 10. The Constitution protects *all* of Kentuckians' "inherent and inalienable rights," "*among* which"[5] are the rights to

[5] "Section 1, in enumerating certain inherent rights, does not purport to be exclusive. Its words are that those may be reckoned *among* every person's inalienable rights." *Commonwealth v. Wasson*, 842 S.W.2d 487, 503 (Ky. 1992) (Combs, J., concurring), *overruled on equal protection grounds by Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020). Indeed, "[t]he Constitution does not create any rights of, or grant any rights to, the people. It merely recognizes their primordial rights, and constructs a government as a means of protecting and preserving them." *Id.* at 502. *Cf. Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 502 (Kan. 2019) (finding Kansas

"libert[y]" and to "seeking and pursuing their safety and happiness." Ky. Const. § 1 (emphasis added). The enumerated rights are broad values[6] that must be interpreted in order to "give effect to the meaning behind them." TI Order at 10. Contrary to Defendant's claim that the circuit court engaged in a "words-don't-matter-theory of constitutional interpretation," AG Br. at 13, the circuit court fulfilled its judicial duty of determining what may be encompassed within explicitly guaranteed constitutional rights, like the right to liberty. *Bevin*, 563 S.W.3d at 83.

b. Case Law Interpreting the Relevant Constitutional Provisions Supports the Circuit Court's Finding.

Defendant does not dispute that this Court has interpreted Section 1 and 2's right to liberty as protecting the right to privacy and the right to self-determination. *See Wasson*, 842 S.W.2d at 491; *Woods v. Commonwealth*, 142 S.W.3d 24, 31–32 (Ky. 2004). But he contends that, by looking to such precedent, the circuit court "retreated" to irrelevant case law. AG Br. at 20. To the contrary, the circuit court properly relied on this Court's precedent interpreting the constitutional provisions at issue and applied it to this case to find substantial questions going to the merits of Plaintiffs' claims under Sections 1 and 2. TI Order at 14. *See also Dist. Bd. of Tuberculosis Sanatorium Trustees for Fayette Cnty. v. City of Lexington*, 12 S.W.2d 348, 351 (Ky. 1928) ("The Constitution as written has been construed by this court, and that construction, accepted and acquiesced in for many years, is as much a part of the instrument as if it had been written into it at its origin.").

Constitution "protects all Kansans' *natural right* of personal autonomy," which includes abortion) (emphasis added).

[6] *See, e.g.*, *Wasson*, 842 S.W.2d at 494 (referring to the "broadly stated guarantee of individual liberty").

Defendant tries to distinguish *Wasson* in numerous ways, AG Br. at 20–25, all of which fail. First, Defendant argues that case is irrelevant because "abortion was nowhere mentioned in the [*Wasson*] decision." AG Br. At 20. But *Wasson* is directly on point because it both reaffirmed that the Kentucky Constitution protects an expansive right to privacy and held that the conduct at issue in that case, though not explicitly found in the text of the Constitution, is protected by that right. 842 S.W.2d at 491–92. Second, it is not "expanding Kentucky precedent beyond its breaking point," AG Br. at 9, to reason that the right to privacy—which *Wasson* recognized protects same-sex sexual conduct—also puts other intimate and life-defining decisions, such as whether and when to have children, beyond the reach of the state. *See* TI Order at 13 n.6.

Third, Defendant argues that "*Wasson* does not apply here" because the right to privacy recognized in that case "does not extend to conduct that adversely affects someone else," and, in his view, abortion "operates to the detriment of someone else." AG Br. 21–23. But Defendant's argument conveniently omits another important consideration repeatedly reiterated in *Wasson*: the principle that "[t]he majority has no moral right to dictate how everyone else should live." 842 S.W.2d at 496. Indeed, as this Court noted, "[m]any issues that are considered to be matters of morals are subject to debate, and no significant state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority." *Id.* at 498 (quoting *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980)). As evidenced by statements in the record,[7] from

[7] *Compare* Tr. 286:12–22 (Defendant's expert Mr. Snead stating there is "a broad disagreement about" when life begins) *with* Tr. 23:3−7 (Plaintiffs' medical expert testifying that it is her moral and ethical duty to provide comprehensive reproductive health care for her patients, including abortion).

the Attorney General himself,[8] amici,[9] and this Court,[10] whether terminating a pregnancy affects an "other" is a moral question that is debated. This is precisely the type of "incendiary moral issue" that *Wasson* recognizes is best left to the individual to determine based on their own "private morality." 842 S.W.2d at 495, 498. While Defendant believes the legislature should decide this issue for all Kentuckians, *e.g.*, AG Br. at 3, the Constitution requires such moral decision-making be left to the pregnant individual. Like the prohibition on same-sex sexual conduct challenged in *Wasson*, laws banning abortion are "not proper in the realm of the temporal police power," even as such laws "provide[] punishment for what many believe to be abhorrent crimes against nature and perceived sins against God." 842 S.W.2d at 498 (quoting *Bonadio*, 415 A.2d at 50).

c. Kentucky History Supports the Circuit Court's Finding.

Further, the circuit court's holding is in accord with Kentucky's "rich and compelling tradition of recognizing and protecting individual rights from state intrusion." *Wasson*, 842 S.W.2d at 492. As the circuit court noted, "the history the Defendants rely on . . . actually tends to potentially weaken their case." TI Order at 13. This is because, at the time of ratification of the Kentucky Constitution, abortion prior to quickening was

[8] "[M]any Kentuckians agree with th[e] proposition [that abortion is a form of healthcare]. But just as many profoundly disagree with it." AG Br. at 45.

[9] *Compare* Br. of Amici Curiae Kentucky Religious Coalition for Reproductive Choice *with* Amicus Br. of Kentucky Right to Life Association.

[10] Op. & Order Denying Emergency Relief at 6 (Minton, CJ., concurring in part and dissenting in part) ("Few modern issues have proven more significant, and more politically contentious, than access to abortion. Individuals and groups on both sides of the debate hold passionate and sincere convictions regarding their respective positions. Debate regarding abortion access will continue to permeate our political discourse for years to come."); *id.* at 9 ("[T]his case involves one of the most contentious policy and political issues of our time.").

permitted without any barriers under Kentucky common law and, as Defendant concedes, "Kentucky's statutes were 'silent in reference to this matter.'" AG Br. at 15 (quoting *Mitchell v. Commonwealth*, 78 Ky. 204, 205 (1879)). Unable to dispute this fact, Defendant argues that even if the General Assembly did not regulate abortion at that time, it has nevertheless always had the "legislative power to prohibit abortion at any point during pregnancy." AG Br. at 16. This both ignores Kentuckians' freedoms as they existed when the Constitution was ratified and forgets that the Constitution is Kentucky's supreme law.

First, Defendant notes that in 1879 the Court of Appeals believed that "the law-making department of the government" "should punish abortions." AG Br. at 16 (quoting *Mitchell*, 78 Ky. at 209–10). But this *dicta* about policy preferences is irrelevant to the question of whether the Kentucky Constitution protects the right to abortion, which was not a question presented in *Mitchell*. Even if this *dicta* were an authoritative statement on the legislature's authority to ban abortion in 1879, it was made twelve years *before* ratification of the current Constitution, which was adopted in an effort to "broaden[] . . . protection of individual rights." *Wasson*, 842 S.W.2d at 497. And, as discussed, pre-quickening abortion was one of the freedoms Kentuckians enjoyed at the time of ratification. *That* is the legal backdrop within which the constitutional debates occurred. *Contra* AG Br. at 15–16. Defendant argues that the Delegates' silence on abortion demonstrates that there was a "background rule that the General Assembly had the power to 'punish abortion,'" AG Br. at 16, but the better explanation is that no Delegate discussed abortion because they did not believe that the new Constitution should change the common law status quo, namely that Kentuckians were at liberty to access abortion. *See Ky. State Bd. for Elementary & Secondary Ed. v. Rudasill*, 589 S.W.2d 877, 880 (Ky. 1979) ("It is

generally recognized that the convention of 1890 was comprised of competent and educated delegates who were sincerely concerned with individual liberties.”).[11]

Second, Defendant insists that history demonstrates the Constitution cannot protect abortion because after the General Assembly passed an abortion ban in the twentieth century, “this Court’s predecessor [did not] suggest that this prohibition was unconstitutional.” AG Br. at 17. But neither this Court, nor its predecessor, has considered the question of whether the Kentucky Constitution protects the right to abortion because the question has never been presented. As the Attorney General himself argues, courts should “‘wait for cases to come’” and “‘not[] sally forth each day looking for wrongs to right.’” AG Br. at 28 (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)). The lack of a response to a question never presented does not provide evidence of the answer. And despite Defendant’s deceptive framing that “mere months before *Roe*, this Court’s predecessor unanimously rejected a constitutional challenge to Kentucky’s prohibition of abortion,” AG Br. at 17 (citing *Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972), *vacated by Sasaki v. Kentucky*, 410 U.S. 951 (1973)), that case *only* involved questions under the federal Constitution.

Third, the Attorney General contends that statements by the legislature and in the *Mitchell* and *Sasaki* cases demonstrate the General Assembly’s legislative power to prohibit abortion to the greatest extent “allowed by law.” AG Br. at 15–20. But “the fullest extent *allowed by law*,” AG Br. at 15 (emphasis added); *see also id.* at *i*, 19, 20, & 23 n.8,

---

[11] Defendant is correct that there is a single mention in the constitutional debates of the existence of “the offense of abortion,” Debates from 1890 Constitutional Convention at 1099, but this simply meant, as at common law, an abortion provided past quickening or without the woman’s consent. *See* Pls.’ Br. at 33–34.

is limited by the supreme law of Kentucky: the Constitution. *Posey v. Commonwealth*, 185 S.W.3d 170, 176 (Ky. 2006) ("The Kentucky Bill of Rights has always been, and continues to be, recognized as the supreme law of this Commonwealth."). "[R]ights preserved to the people pursuant to [the Bill of Rights] of our constitution cannot be usurped by legislative fiat." *Id.* While "[t]he legislature certainly has the sole imperative to legislate to protect the public health and welfare[,] . . . it is always constrained by the dictates of the state . . . constitution[]. Legislation in any area may not trespass upon the constitutional rights of Kentuckians." *Seum v. Bevin*, 584 S.W.3d 771, 774–75 (Ky. App. 2019).[12] Indeed, the very purpose of the Bill of Rights is to protect Kentuckians from state overreach. *See* Ky. Const. § 26.

d. The Circuit Court Correctly Applied Strict Scrutiny.

Presented for the first time with the question of whether the Kentucky Constitution protects abortion, the circuit court reasonably found, relying on the constitutional text, relevant case law, and Kentucky history, that "the Six Week Ban implicates numerous fundamental rights protected by the Kentucky Constitution." TI Order at 17. The circuit court correctly rejected Defendant's argument that rational basis review should apply, AG Br. at 26, and instead properly applied the strict scrutiny reserved for fundamental rights. The circuit court found that "the state's purported interest in protecting potential fetal life pre-viability is not a compelling enough state interest to justify such an unparalleled level of intrusion and invasiveness into the fundamental area of choosing whether or not to bear

[12] Defendant argues that the U.S. Supreme Court in *Dobbs* "'return[ed] the issue of abortion to the people's elected representatives.'" AG Br. at 4 (quoting *Dobbs*, 142 S. Ct. at 2243). But the U.S. Supreme Court did not suggest—nor could it—that this Court was prohibited from adjudicating the constitutionality of Kentucky's law based on Kentucky's Constitution.

a child." TI Order at 18. Defendant argues that the circuit court decision is erroneous by citing to the *Sasaki* case, AG Br. at 26 (citing 485 S.W.2d 897), which, as discussed *supra* at 19, involved only federal questions of law and was later vacated. The circuit court did not abuse its discretion in finding that there is a substantial question as to the merits of whether the Six-Week Ban[13] violates the fundamental rights to privacy and self-determination under the Kentucky Constitution.[14] The "actual overall merits of the case" will be addressed another day, but as in *Maupin*, even if this Court "believe[s] that a speedy resolution of this case is necessary, [it] cannot say on this CR 65.07 motion that the trial court abused its discretion by issuing . . . the temporary injunction." *Maupin*, 575 S.W.2d at 699–700.

2. Unlawful Delegation Claim.

As the circuit court correctly held, Plaintiffs have raised a serious question on the merits of whether the Trigger Ban is an unconstitutional delegation of legislative power in violation of the separation of powers protected by the Kentucky Constitution. TI Order at 11. Where, as here, the legislature passes a statute that springs into effect only upon a decision by another jurisdiction, and only to the extent permitted by that decision, it unconstitutionally delegates determination of "[w]hat conduct shall in the future constitute a crime in Kentucky." *Dawson*, 314 S.W.2d at 536. It subjects Kentuckians to a criminal

---

[13] This same analysis would also apply to the Trigger Ban. *See* Pls.' Br. at 44 n.6.

[14] The circuit court's order temporarily enjoining the Bans is in lockstep with lower court decisions in neighboring states following *Dobbs*. *See, e.g.*, Preliminary Injunction Order, *Preterm-Cleveland v. Yost*, Case No. A2203203 (Ohio Ct. Com. Pl. Oct. 12, 2022) (preliminarily enjoining six-week abortion ban as likely violative of Ohio Constitution); Order Granting Plaintiffs' Motion for Preliminary Injunction, *Planned Parenthood Nw., Haw., Alaska, Ind., Ky., Inc. v. Members of the Med. Licensing Bd. of Ind.*, Cause No. 53C06-2208-PL-001756 (Ind. Cir. Ct. Sept. 22, 2022) (preliminarily enjoining near-total abortion ban as likely violative of Indiana Constitution).

standard set not for Kentucky by Kentucky, but instead "based upon . . . [federal] considerations which have no direct relationship with the interests of Kentucky" with "no assurance whatever that any future changes . . . would conform to the best interests of our Commonwealth." *Id.*

Defendant makes a distinction between "incorporating future federal law as the law of Kentucky," which he admits is unconstitutional, and "saying that Kentucky law extends as far as the federal constitution allows." AG Br. at 35. But this argument is wrong for two reasons. First, the federal Constitution *is* federal law. Second, the General Assembly passed the Trigger Ban with the intent that it would not function until some future *change* to federal constitutional law. KRS 311.772(2)(a). By anticipating a future change to federal law, the Trigger Ban "incorporate[s] future federal law as the law of Kentucky"—the very thing Defendant concedes Kentucky statutes may not do. AG Br. at 35. It is an abdication of the General Assembly's duty to determine "[w]hat conduct shall in the future constitute a crime in Kentucky . . . in view of the then existing conditions when the need for such a statute arises." *Dawson*, 314 S.W.2d at 536. Moreover, the case Defendant relies on regarding long-arm jurisdiction is inapposite. AG Br. at 35 (citing *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 56–57 (Ky. 2011)). That case compares Iowa's long-arm statute to Kentucky's long-arm statute to make the point that if the intent of Kentucky's "statute were to reach the outer limits of federal due process" it could have been drafted like Iowa's statute. *Beach*, 226 S.W.3d at 56–57. Furthermore, *Bloemer v. Turner*, 137 S.W.2d 387, 391 (Ky. 1939), cited by Defendant, AG Br. at 34, relates only to the delegation of authority to *state agencies* under a particular statute. None of the cases Defendant cites involves unlawful delegation under Kentucky's Constitution of a Kentucky

criminal law that springs into place by a future change in federal law, like the laws challenged here and in *Dawson*.

Finally, Defendant makes the irrelevant and incorrect assertion that the Trigger Ban is not a violation of Section 60 of the Kentucky Constitution. AG Br. at 35–36. Section 60 prohibits laws that are "enacted to *take effect* upon the approval of any other authority than the General Assembly." Ky. Const. § 60 (emphasis added). But, as this Court's predecessor has held, Section 60 cases are not relevant to pure nondelegation claims. *Dawson*, 314 S.W.2d at 535. In any event, the only case Defendant cites in the Section 60 context concerns a statute that took effect when passed, but became relevant in the presence of some background condition. AG Br. at 36 (citing *Walton v. Carter*, 337 S.W.2d 674, 678 (Ky. 1960) (concerning a provision of law that only became *operative* if certain bonds remained unsold)). The Trigger Ban, in contrast, was enacted to "*become* effective" only upon a certain "decision of the United States Supreme Court." KRS 311.772(2)(a) (emphasis added). This is precisely what Section 60 prohibits.

3. Equal Protection and Religious Freedom Claims.

Defendant argues Plaintiffs did not raise an equal protection or religious freedom claim, and therefore it was improper for the circuit court to consider whether the challenged statutes violate those constitutional rights. *See* AG Br. at 28. But the circuit court's discussion of the protections under equal protection includes a woman's bodily autonomy and self-determination, TI Order at 15, a claim which Plaintiffs squarely raised. Ver. Compl. ¶¶ 97–102, 127–30. Moreover, Plaintiffs argued below that a penumbra of constitutional rights protect the right to abortion, and the circuit court's decision adopts that penumbral approach. TI Order at 16 ("All of these considerations together stand for

the proposition that government intrusion into the fundamentally private sphere of self-determination as contemplated by these laws is to be prohibited.").

Even if Plaintiffs did not directly or indirectly raise the equal protection and religious freedom claims, the overarching legal question presented in this litigation is whether the Bans violate the Kentucky Constitution. The court is within its bounds to *sua sponte* raise additional ways the challenged laws may not conform with constitutional requirements. TI Order at 10 (citing *Cmty. Fin. Servs. Bank v. Stamper*, 586 S.W.3d 737, 740–41 (Ky. 2019) (holding lower court "did not err by considering applicability of a [law] not otherwise considered by the parties" because "courts may *sua sponte* resort to the applicable legal authority at any stage of the proceedings"); *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 930 (Ky. 2002) ("[W]hen a party fails to argue a theory on which he is entitled to win . . . we are of the opinion that insofar as the pleadings, the evidence, the rules of procedure and the principles of law permit, an appellate court should resolve cases on their merits, aided by but not necessarily restricted to the arguments of counsel." (quoting *First Nat'l Bank of Louisville v. Progressive Cas. Ins. Co.*, 517 S.W.2d 226, 230 (Ky. 1974)); and *Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991) ("When the facts reveal a fundamental basis for decision not presented by the parties, it is our duty to address the issue . . . .")). Accordingly, the circuit court did not abuse its discretion in making these further holdings. Even if it did, the error is harmless because, separately, the circuit court held there are substantial questions going to the merits of Plaintiffs' privacy, self-determination, and unlawful delegation claims, *see supra*.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

DATE: October 24, 2022

Respectfully submitted,

____

Heather L. Gatnarek (KBA No. 95113)
ACLU of Kentucky
325 West Main Street, Suite 2210
Louisville, Kentucky 40202
(502) 581-9746
heather@aclu-ky.org

Counsel for Appellees EMW Women's Surgical Center, P.S.C., and Ernest Marshall, M.D.

Brigitte Amiri*
Chelsea Tejada*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2633
bamiri@aclu.org
ctejada@aclu.org

Counsel for Appellees EMW Women's Surgical Center, P.S.C., and Ernest Marshall, M.D.

Carrie Y. Flaxman*
Planned Parenthood Federation of America
1110 Vermont Avenue, NW, Suite 300
Washington, D.C. 20005
(202) 973-4830
carrie.flaxman@ppfa.org

Counsel for Appellee Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc.

Michele Henry (KBA No. 89199)
Craig Henry PLC
401 West Main Street, Suite 1900
Louisville, Kentucky 40202
(502) 614-5962
mhenry@craighenrylaw.com

Counsel for Appellees

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

Counsel for Appellees

** admitted pro hac vice*