

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2022-SC-_____

EMW WOMEN’S SURGICAL CENTER,
P.S.C., on behalf of itself, its staff, and its patients;
ERNEST MARSHALL, M.D., on behalf of
himself and his patients; and **PLANNED**
PARENTHOOD GREAT NORTHWEST,
HAWAI’I, ALASKA, INDIANA, AND
KENTUCKY, INC., on behalf of itself, its staff,
and its patients

Appellants

v.

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

Appellee.

**PLAINTIFFS-APPELLANTS’ MOTION FOR EMERGENCY INTERLOCUTORY
RELIEF PURSUANT TO CIVIL RULE 65.09**

INTRODUCTION

Pursuant to Civil Rule 65.09(3), Plaintiffs-Appellants EMW Women’s Surgical Center, P.S.C.; Ernest Marshall, M.D.; and Planned Parenthood Great Northwest, Hawai’i, Alaska, Indiana, and Kentucky, Inc., (collectively, “Plaintiffs”) respectfully move this Court to vacate the Court of Appeals’ stay of the circuit court’s entry of a temporary injunction. Order Granting Mot. For Emergency Relief (“COA Order”) (App. Ex. 1). The Court of Appeals’ Order has upended fifty years of the status quo by halting abortion access in the Commonwealth. Patients previously scheduled for abortion care are now being turned away, and they will continue to be turned away

absent relief from this Court. As the circuit court held, every day that abortion is banned results in irreparable harm to Kentuckians who are forced to remain pregnant against their will, at substantial risk to their health, life, and well-being. Op. & Order Granting Temporary Inj. at 9 (“TI Order”) (App. Ex. 5-D). Many of these Kentuckians will never be able to obtain abortions, and will experience the irreversible and lifelong consequences of forced pregnancy, forced childbirth, and forced childbearing. *Id.* at 7–9. These are harms that can never be undone, and they constitute “extraordinary cause” warranting vacatur of the Court of Appeals’ Order and restoration of the temporary injunction. CR 65.09(1).

Furthermore, the Court of Appeals’ abuse of discretion in issuing the stay in the absence of any meaningful harm to Attorney General Cameron—much less the “irreparable injury” required by Civil Rule 65.07(6)—also provides extraordinary cause for relief under Civil Rule 65.09. As the circuit court held, Attorney General Cameron would “at most suffer the harm of delayed enforcement”—harm which, where there is “significant doubt as to the constitutionality of the laws at issue,” may well be nonexistent. TI Order at 9. This Court should immediately vacate the stay.

BACKGROUND

This case involves two near-total bans on abortion in Kentucky (collectively, “the Bans”). Abortion is a very safe and common, but highly time-sensitive, form of medical care on which Kentuckians have relied for decades. One of the challenged laws is KRS 311.772 (“Trigger Ban”), which criminalizes virtually all abortions. The other, KRS 311.7701–11 (“Six-Week Ban”), criminalizes abortion after embryonic cardiac activity can be detected, which is very early in pregnancy, around six weeks as measured from a patient’s last menstrual period. Plaintiffs are two clinics and a physician who provide abortion in Kentucky.

Following the U.S. Supreme Court’s determination that there is no longer a federal constitutional right to abortion, *see Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), on June 27, 2022, Plaintiffs filed the underlying action in Jefferson County Circuit Court and moved for a restraining order and/or temporary injunction. On June 30, the circuit court entered a restraining order. Order Granting RO (App. Ex. 5-B). Immediately following entry of the non-appealable restraining order, Defendant Attorney General Cameron filed a petition for writ of mandamus and prohibition, and an emergency motion for intermediate relief, with the Court of Appeals. Two days later, Court of Appeals Judge Glenn E. Acree denied the motion. *Cameron v. Perry*, No. 2022-CA-0780-OA, 2022 WL 2443398, at *5 (Ky. App. July 2, 2022). On July 3, the Attorney General then filed an almost-identical petition for writ of mandamus and prohibition, and an emergency motion for intermediate relief with this Court, and that motion was denied on July 5. Order Den. Petitioner’s Emergency Mot. For Intermediate Relief (App. Ex. 2-A).

On July 22, 2022, after conducting an evidentiary hearing and receiving proposed findings of fact and conclusions of law from the parties, the circuit court found Plaintiffs met the requirements for temporary injunctive relief and granted Plaintiffs’ request for a temporary injunction. The court held that Plaintiffs and their patients would suffer irreparable harm if relief were not granted, including because Plaintiffs were forced, in a matter of a few short days, to turn away *hundreds* of patients who would be subject to the harms of forced pregnancy and childbirth. TI Order at 7–8. Absent injunctive relief, the circuit court found that Plaintiffs’ patients would be forced to continue their pregnancies and give birth against their will, exposing them to increased health risks and potentially putting their lives in danger. *Id.* The court balanced the equities, and found that the “denial of this healthcare procedure is detrimental to the public interest,” and recognized that Kentuckians would suffer “economic harms” as a result of the abortion bans, with

the burdens falling “hardest on poorer and disadvantaged members of society.” *Id.* at 8. The circuit court also noted that the injunctive relief would “merely restore the status quo that has existed in Kentucky for nearly fifty years.” *Id.* at 9. As for harm to Defendants, the court found that, “at most,” Defendants will suffer “the harm of delayed enforcement,” that Defendants’ interest in enforcing the Bans is “uncertain,” and, as such, “any harm the Defendants may suffer is outweighed by the interest of the Plaintiffs.” *Id.* at 9. The court also found substantial questions going to the merits of Plaintiffs’ constitutional claims. *Id.* at 10–20.

On July 28, Defendant Attorney General Cameron sought CR 65.07 interlocutory relief and CR 65.07(6) emergency intermediate relief from the temporary injunction in the Court of Appeals, and filed a motion requesting that the Court of Appeals recommend transfer to this Court pursuant to CR 74.02(5). Att’y Gen. Daniel Cameron’s CR 65.07 Mot. Interlocutory Relief (App. Ex. 5); Att’y Gen. Daniel Cameron’s Emergency Mot. Intermediate Relief (App. Ex. 4); Att’y Gen. Daniel Cameron’s Emergency Mot. Ct. App. Recommend Transfer of Case (App. Ex. 3). That same day, Defendant Cameron moved to request that this Court transfer the pending CR 65.07 appeal and consolidate it with Defendant Attorney General’s original action in this Court. Plaintiffs joined the motion to transfer and consolidate, albeit for different reasons. On August 1, the Court of Appeals granted Defendant Cameron’s CR 65.07(6) motion for emergency intermediate relief and immediately stayed the circuit court’s order temporarily enjoining Defendants from enforcing the challenged laws.

ARGUMENT

I. A Stay of the Temporary Injunction Causes Irreparable Harm to Plaintiffs and Their Patients.

There is “extraordinary cause” warranting interlocutory relief under Civil Rule 65.09 because of the immediate and irreparable harms that would occur in the absence of a temporary

injunction. *See Rogers v. Lexington-Fayette Urb. Cnty. Gov't*, 175 S.W.3d 569, 570 (Ky. 2005) (recognizing “extraordinary cause” for granting relief in right-to-vote context). This case involves the ability of Kentuckians to access essential and time-sensitive healthcare. The challenged Bans have eliminated access to abortion in Kentucky and they are imposing irreparable harm on Plaintiffs and their patients in a variety of ways, including by forcing Kentuckians to remain pregnant, and eventually give birth, against their will. As the circuit court held, “waiting until final judgment on the issues presented here, without injunctive relief, would be effectively meaningless to many people because they would either be past gestational age restrictions or would have been forced to carry their pregnancies to term.” TI Order at 8. Those forced to remain pregnant and give birth against their will face the risks of harm that “result from, and [can] be exacerbated by, pregnancy.” *Id.* This includes exacerbation of existing conditions such as sickle cell disease, lupus, and asthma. Tr. of July 6, 2022 Hr’g on Pls.’ Mot. Temporary Inj. 25:20-21, 25:3-10 (App. Ex. 5-C). Pregnant patients also have a fivefold increase in the risk of blood clots that can cause heart attack, stroke, or death, *id.* 27:2-14; can develop pre-eclampsia which can result in seizures, stroke, and breathing problems, *id.* 28:15-20; and are at risk of complications during delivery that can cause injury to other organs or hemorrhage that can result in a hysterectomy, *id.* 31:2-4, 16-19.

Nor do the narrow exceptions to the Bans, on which the Court of Appeals places great weight, *see* COA Order at 5–6, protect pregnant Kentuckians from catastrophic health consequences, including death. For example, as the circuit court found after the benefit of live testimony, the confusion caused by the text of the Bans and the threat of criminal and licensure penalties for violating the Bans may force doctors “to wait until women are in dire medical conditions before interceding,” TI Order at 14, even though “it is medically and ethically unacceptable to force a patient to deteriorate to the point at which she would become clearly

eligible for the exception,” *id.* at 3. “Women have legitimate concerns about their ability to receive adequate care, and the possibility that their health and safety will be deemed subordinate to the life of a fetus.” *Id.* at 14. For Kentuckians who would have obtained abortions but for the Bans and ultimately suffer grievous harm or die later in pregnancy or during delivery because they are enforced, the Bans’ narrow exceptions offer cold comfort. And individuals facing health complications that fall short of imminent death or “permanent impairment of a life-sustaining organ” are left entirely without recourse. Moreover, notably, the Bans lack rape and incest exceptions.

In addition to the deleterious consequences to their health, Kentuckians who are prevented from obtaining abortions while the Bans are in effect will face a multitude of other consequences with the potential to affect every aspect of their lives, including their ability to care for themselves and their existing children, to keep their jobs, to go to school, and to support themselves and their families. TI Order at 9. As the circuit court found, continuing a pregnancy “is a decision that has perhaps the greatest impact on a person’s life.” *Id.* “Adding another child can put exponential strain on an already struggling family and can lead to detrimental outcomes for all involved.” *Id.* Furthermore, “an unplanned pregnancy can also derail a woman’s career or educational trajectory.” *Id.* And the “burden of abortion bans falls hardest on poorer and disadvantaged members of society.” *Id.* at 8.

There are some Kentuckians who will have the means and resources to travel out of state to obtain abortion care. But that will very likely involve delay and, while abortion is very safe and much safer than childbirth, “any delays in scheduling and performing abortion comes with more serious risks.” TI Order at 8. Even temporary gaps in abortion access are thus harmful to Kentuckians. As the circuit court found, when there was confusion as to whether the Bans were in

effect after the Supreme Court overruled *Roe v. Wade* on June 24th but before the circuit court granted the restraining order on June 30th, “EMW turned away almost 200 patients. These patients were denied previously scheduled medical care . . . Some of these women may be able to reschedule their procedures, but others may not.” *Id.* at 7–8.

Moreover, Plaintiffs and their patients are suffering the additional harms inherent in being subjected to an unconstitutional law. Although the ultimate constitutionality of these Bans has not yet been determined, the circuit court—“which must have first say on that issue,” COA Order at 4—has found “at the very least a substantial question as the merits regarding the constitutionality of” the Bans, TI Order at 20. Even if this finding were not conclusive, it would certainly rebut the “presumption” that the Bans are constitutional and thus, that injunction of their enforcement harms Defendant, much less causes the kind of “irreparable injury” required by CR 65.07(6), discussed further below.

II. The Court of Appeals Abused its Discretion in Finding That the Attorney General Will Suffer Irreparable Harm.

For purposes of a CR 65.09 motion, “an abuse of discretion by the courts below can constitute extraordinary cause.” *Chelsey v. Abbott*, 503 S.W.3d 148, 152 (Ky. 2016). “An abuse of discretion occurs when the judge’s decision is ‘arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Here, the Court of Appeals abused its discretion in granting the emergency stay by finding that Defendant Attorney General Cameron would be “irreparably harmed” simply because the temporary injunction in this case enjoins enforcement of a statute. While it is true that in general, “irreparable harm is presumed” when the government is prevented from enforcing a statute, this Court has “emphasi[zed] . . . the point that the rule creates only a *presumption* of irreparable harm, which opponents of the government’s motion may rebut.” *Boone Creek Properties, LLC v. Lexington-*

Fayette Urban Cnty. Bd. of Adjustment, 442 S.W.3d 36, 40 (Ky. 2014). Where, as here, “Plaintiffs have established significant doubt as to the constitutionality of the laws at issue . . . the state’s interest in enforcing these laws is uncertain.” TI Order at 9.

Taken to its logical conclusion, the Attorney General’s argument would mean that a state official would automatically demonstrate “irreparable harm” under Civil Rule 65.07(6) anytime a law is temporarily enjoined, thereby always entitling the state official to emergency relief during the temporary injunction appeals process, and effectively making a temporary injunction an illusory remedy against *any* statute. This plainly is not the law. *See, e.g., Cameron*, 2022 WL 2443398, at *6 (“agree[ing]” with this assertion as to restraining orders); *Legis. Rsch. Comm’n v. Fischer*, 366 S.W.3d 905, 910 (Ky. 2012) (noting denial of 65.07(6) motion to dissolve temporary injunction preventing implementation of redistricting map). In this case, Defendant Cameron suffers no real harm and is certainly not irreparably injured by the entry of the temporary injunction. As the circuit court correctly found, “Defendants will at most suffer the harm of delayed enforcement,” a harm which—even if present—is “not sufficient to preclude injunctive relief.” TI Order at 9. The alleged harm of delayed enforcement is present in every case where a temporary injunction is granted barring enforcement of state law. The Court of Appeals’ finding is thus unsupported by sound legal principles and would result in unfair disadvantage to any litigant who seeks a temporary injunction in a challenge to the constitutionality of a Kentucky statute.

Indeed, the “common factor” for when interlocutory relief is permitted “is that the order appealed from would strip appellant of some right that could not later be restored.” *Fayette Cnty. Farm Bureau Fed’n v. Martin*, 758 S.W.2d 713, 714 (Ky. App. 1988). There is no such concern for Defendant: if the statutes are ultimately found to be constitutional, Defendant can enforce them from that point forward. In contrast, if the Bans are allowed to take effect while the courts resolve

the serious questions this case raises about their constitutionality, hundreds, if not thousands, of pregnant Kentuckians would be forced to continue their pregnancies against their will and would be forever stripped of their ability to decide for themselves whether it is best to carry the pregnancy to term, give birth, and parent.

Further, the Court of Appeals abused its discretion because it upended the status quo. As the circuit court correctly found, the temporary injunction merely preserved the status quo that has been in place for the last fifty years, TI Order at 9, belying Defendant Cameron's claim of irreparable harm, *see, e.g., Russell Cnty., Ky. Hosp. Dist. Health Facilities Corp. v. Ephraim McDowell Health, Inc.*, 152 S.W.3d 230, 237 (Ky. 2004) ("Petitioner's claim of irreparable harm and injury would likely fail given that the orders . . . merely preserve the status quo.").

CONCLUSION

For extraordinary cause shown, as discussed above, Plaintiffs respectfully request this Court grant Plaintiffs' motion pursuant to Civil Rule 65.09 and immediately vacate the Court of Appeals' stay of the temporary injunction.

DATE: August 2, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2022, I caused ten true and accurate copies of this motion to be filed with the Court, and served a copy by email and mail on the following:

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