

COMMONWEALTH OF KENTUCKY
KENTUCKY COURT OF APPEALS
CASE No. 2022-CA-0780-OA

DANIEL CAMERON

PETITIONER

v.

HON. MITCH PERRY, Judge, 30th Judicial
Circuit, Jefferson Circuit Court

RESPONDENT

and

**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

REAL PARTIES IN INTEREST

**REAL PARTIES IN INTEREST’S RESPONSE IN OPPOSITION TO PETITIONER
CAMERON’S EMERGENCY MOTION FOR INTERMEDIATE RELIEF**

Petitioner’s emergency request for intermediate relief following the lower court’s entry of a Restraining Order is both extraordinary and procedurally improper. The Kentucky Supreme Court has made clear that “appellate courts lack jurisdiction” to hear an interlocutory appeal of a restraining order. *Ky. High Sch. Athletic Ass’n v. Edwards*, 256 S.W.3d 1, 4 (Ky. 2008). Even if this Court had jurisdiction to consider Petitioner’s motion, which it does not, it should deny the motion because Petitioner has failed to show irreparable harm. If Petitioner’s arguments were accepted, it would mean that any time a lower court granted a restraining order preventing the enforcement of a law, the defendants could obtain relief in this Court. That is not the law. Petitioner’s motion should be denied.

This case concerns the constitutionality of two Kentucky laws that collectively eliminate access to abortion in the Commonwealth. *See* Ver. Compl. ¶ 4. On Monday, June 27, Plaintiffs 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”) filed a complaint on behalf of themselves, their staff, and their patients, alleging that the challenged laws violate multiple provisions of the Kentucky Constitution. Ver. Compl. ¶¶ 91–130. That same day, Plaintiffs moved for entry of an immediate emergency restraining order, followed by a temporary injunction, to prevent irreparable harm to Plaintiffs and their patients, including forced continued pregnancy, which poses serious risks to patients’ health and well-being. On June 30, after hearing from both sides, Judge Perry entered a restraining order that temporarily blocks Petitioner Cameron and the other defendants from enforcing the challenged statutes until the parties can submit further briefing and evidence regarding Plaintiffs’ request for a temporary injunction. To that end, an evidentiary hearing is set for Wednesday, July 6—less than two business days from now.

I. This Court Lacks Jurisdiction to Address the Merits of This Case

Petitioner admits the Kentucky Supreme Court has held that there is no right to seek interlocutory relief from a restraining order. Att’y Gen. Daniel Cameron’s Pet. Writ Mandamus & Prohibition 29 (citing *Ky. High Sch. Athletic Ass’n v. Edwards*, 256 S.W.3d 1, 3 (Ky. 2008)). For this reason alone, Petitioner’s motion should be denied. The court in *Kentucky High School Athletic Association* made clear that despite the similarity between restraining orders and temporary injunctions, there is no right to appeal or to seek interlocutory relief from a restraining order. 256 S.W.3d at 3 (noting that CR 65.07(1) “creat[es] a right to seek interlocutory relief *only* for orders related to temporary injunctions”); *id.* (“The rules do not provide for appellate relief

from the grant or denial of a restraining order.” (quoting *Common Cause of Ky. v. Commonwealth*, 143 S.W.3d 634, 636 (Ky. App. 2004)); *id.* (“There is no right of appeal to the Court of Appeals from an order either granting, denying, modifying, or dissolving a restraining order. Appellate relief may only be sought after the [trial] court has taken action on a motion for a temporary injunction, or has entered a final judgment.” (alteration in original) (quoting 7 Phillips, *Kentucky Practice* Rule 65.03, at 665)). In the Kentucky Supreme Court’s own words, “[b]ecause the Civil Rules make no provision for appeals from restraining orders, the appellate courts lack jurisdiction to address the merits of” a motion to dissolve a restraining order. *Id.* at 4 (“If the trial court’s order . . . is the [grant or] denial of a restraining order, then it is not final or otherwise reviewable and thus is not within this Court’s authority to review.” (alteration in original) (quoting *Common Cause*, 143 S.W.3d at 636)); *id.* (“The Court of Appeals has jurisdiction to review interlocutory orders of the Circuit Court in civil cases, but *only as authorized by rules* promulgated by the Supreme Court.” (emphasis added) (quoting KRS 22A.020(2))).

Petitioner makes no attempt to explain why this Court has jurisdiction in the face of this unequivocal, binding precedent. Rather, he offers only a bare assertion that he is harmed by the Restraining Order. But Petitioner’s claimed harm cannot bestow jurisdiction on this Court. Nor does it distinguish this case from any other action involving a restraining order; explain Petitioner’s flagrant attempt to circumvent the rule prohibiting an interlocutory appeal in this posture, *see* CR 65.07(1); or overcome the rule plainly stating that granting or dissolving such an order is at the circuit court judge’s discretion, CR 65.03(2). Potential harms to both parties are always at issue in a proceeding for a restraining order—that is why the standard for granting a restraining order includes a balancing of the equities, which considers any “harm to the defendant.” *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978). If the courts of this Commonwealth thought

that a circuit court's balancing at the restraining order stage ought to be subject to immediate review by this Court, the Civil Rules would provide for such interlocutory relief. Instead, the Rules allow for an appeal from the grant or denial of a temporary injunction, but not the grant or denial of an emergency restraining order. *See* CR 65.07(1).

II. Petitioner Has Not Demonstrated Irreparable Harm

Even if this Court had jurisdiction to consider Petitioner's motion, it should be denied because Petitioner has not demonstrated that he will suffer irreparable harm under Civil Rule 76.36(4). Petitioner insists that he is irreparably harmed because he is unable to enforce "duly-enacted" laws, Att'y Gen. Daniel Cameron's Emergency Mot. Intermediate Relief 2, during the short period the restraining order is in place while the circuit court considers the motion for temporary injunction. But delay in enforcement cannot be considered *irreparable* harm, especially in the context of a restraining order. Taken to its logical conclusion, Petitioner's argument would mean that a restraining order preventing any statute from taking effect could always be immediately reversible by this court under Civil Rule 76.36(4), despite there being no right to appeal a trial court's grant of a restraining order. The cases Petitioner cites to support his claim of "harm" sufficient to justify circumvention of the non-appealability of the restraining order, Att'y Gen. Daniel Cameron's Emergency Mot. Intermediate Relief 2, were in fact properly up on interlocutory appeal from the grant of a temporary injunction. Petitioner fails to explain how delay in enforcement of laws—especially ones with substantial questions as to their constitutionality—is an injury that could confer jurisdiction on this Court despite a long line of rules and precedent to the contrary and warrant this extraordinary form of relief outside the prescribed operations of this Court.

Furthermore, here, Petitioner cannot show irreparable harm where a nearly fifty-year status quo is maintained pending a decision on the motion for temporary injunction. As the record presented to the circuit court plainly demonstrates, Plaintiffs have provided Kentuckians with safe access to abortion care for decades. The circuit court has already considered any potential harms to the Petitioner and weighed them against the extraordinary and irreparable harms that Plaintiffs' patients face from the change to a decades-long status quo and inability to access abortion in Kentucky as a result of the challenged laws. Pls.' Mem. Supp. Mot. RO & Temp. Inj. 17–21. The abortion bans would force pregnant Kentuckians who would otherwise have an abortion to continue their pregnancies against their will, exposing them to risks to their physical, mental, and emotional health, and even their lives. *Id.* at 5–16, 17–18. Indeed, each day the laws are in effect increases the risk of complications related to pregnancy or abortion for Kentuckians who are pushed later into pregnancy by the lack of abortion care in Kentucky. *Id.* at 18. These harms are not theoretical. As the record demonstrates, nearly 200 patients seeking abortion were turned away in the first few days that Petitioner and the other defendants threatened enforcement of the abortion bans. Aff. Dr. Ernest Marshall, M.D. ¶ 3, June 29, 2022. The balancing of the equities among any competing harms is for the sound discretion of the trial court. *See* CR 65.03(2).

Conclusion

This Court lacks jurisdiction to hear this motion, and even if it did not, Petitioner's motion should be rejected. The circuit court is proceeding with extraordinary speed to rule on Plaintiffs' motion for temporary injunction, and will conduct an evidentiary hearing next week—barely a week after this case was first filed. Once the circuit court decides that matter, with the benefit of live witness testimony, the Restraining Order at issue here will dissolve and the order on the

temporary injunction, whether granted or denied, may be properly appealed to this Court pursuant to Kentucky Rule of Civil Procedure 65.07(1).

The Petitioner's Emergency Motion for Intermediate Relief should be denied.

Respectfully Submitted,

/s/ Michele Henry

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 Plaintiffs

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

*Counsel for Plaintiffs 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

Hana Bajramovic*
Planned Parenthood Federation of America
123 William Street, Floor 9
New York, NY 10038
(212) 261-4593
hana.bajramovic@ppfa.org

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

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

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

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 Plaintiffs

**pro hac vice motions forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I caused five true and accurate copies of this response to be filed with the Court via email and Federal Express delivery, and served a copy by email on the following:

Victor Maddox
Christopher Thacker
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601
Victor.Maddox@ky.gov
Christopher.Thacker@ky.gov

Wesley W. Duke
Office of the Secretary of Kentucky's Cabinet for Health and Family Services
275 E. Main St. 5W-A
Frankfort, KY 40621
WesleyW.Duke@ky.gov

Leanne Diakov
Kentucky Board of Medical Licensure
310 Whittington Pkwy, Suite 1B
Louisville, KY 40222
Leanne.diakov@ky.gov

Jason B. Moore
Jefferson County Commonwealth Attorney Office
514 West Liberty Street
Louisville, KY 40202
jbmoore@louisvilleprosecutor.com

/s/ Michele Henry
Michele Henry (KBA No. 89199)
Counsel for Plaintiffs