

**COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE No. 2022-CA-0906-I**

DANIEL CAMERON,

APPELLANT/MOVANT

v.

On Appeal From
JEFFERSON CIRCUIT COURT
Case No. 22-CI-03225

EMW WOMEN’S SURGICAL CENTER, et al.,

APPELLEES/RESPONDENTS

**APPELLEES’ RESPONSE IN OPPOSITION TO APPELLANT CAMERON’S
EMERGENCY MOTION FOR INTERMEDIATE RELIEF**

The Attorney General’s emergency request for intermediate relief should be denied because he has failed to show the requisite irreparable harm pursuant to Civil Rule 65.07(6). As the circuit court found, “Defendants will *at most* suffer the harm of delayed enforcement,” a harm which—even if present—is “not sufficient to preclude injunctive relief.” Op. & Order Granting Temporary Inj. at 9 (“TI Order”) (Appellant’s Ex. 4) (emphasis added). Additionally, Attorney General Cameron will not be harmed because “the state has no interest in enforcing an unconstitutional law.” *Id.* Indeed, the circuit court held that “Plaintiffs have established significant doubt as to the constitutionality of the laws at issue” and therefore “the state’s interest in enforcing these laws is uncertain.” *Id.* Furthermore, injunctive relief “will merely restore the status quo that has existed in Kentucky for nearly fifty years.” *Id.* Moreover, the circuit court found that any potential harm to the Attorney General is outweighed by harm to Plaintiffs and their patients: absent an injunction, countless Kentuckians will be denied access to abortion, and will be forced to continue their pregnancies and give birth against their will, risking harm to their health and lives.

Id. at 8–9. For all of these reasons, discussed further below, Attorney General Cameron’s request for emergency relief should be denied.

I. Factual and Procedural Background

This case concerns the constitutionality of two Kentucky laws that collectively would eliminate access to abortion in the Commonwealth, the “Trigger Ban,” KRS 311.772, and the “Six-Week Ban,” KRS 311.7701–11. *See* Ver. Compl. ¶ 4 (Appellant’s Ex. 1). The Trigger Ban criminalizes all abortions in the Commonwealth, with very narrow exceptions, and was enacted to “become effective immediately upon, and to the extent permitted, by the occurrence of . . . [a]ny decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*.” KRS 311.772. The Six-Week Ban criminalizes abortions starting at approximately six weeks of pregnancy, as measured from the patient’s last menstrual period. KRS 311.7704–06; *see also* Ver. Compl. ¶¶ 32–33. Neither law has ever taken effect in Kentucky.¹

On June 27, 2022, 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 argument from both sides, Judge Perry entered a

¹ The Six-Week Ban was enjoined by a federal court until June 30, 2022, the same day the circuit court issued a Restraining Order. *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019), *dismissed without prejudice*, Order, ECF 94 (W.D. Ky. June 30, 2022). The Trigger Ban was also enjoined by the Restraining Order on June 30, and likely could not take effect until entry of judgment in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), *see* TI Order at 11–12, which occurred on July 26, 2022.

Restraining Order that temporarily blocked Defendants from enforcing the challenged statutes until he could rule on Plaintiffs' request for a temporary injunction. Immediately following entry of the non-appealable restraining order, the Attorney General 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 the Kentucky Supreme Court, and that motion was denied on July 5. Order Den. Mot. For Intermediate Relief, 2022-SC-0266-OA (Ky. July 5, 2022) (attached as Appellees' Ex. 1).

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 granted Plaintiffs' request for a temporary injunction. The court held that Plaintiffs had constitutional standing to bring their claims, and could raise the rights of their patients. TI Order at 5–7. The court then proceeded with the temporary injunction analysis and held that Plaintiffs and the patients on whose behalf they proceed would suffer irreparable harm if relief was not granted, including because Plaintiffs were being forced to turn away hundreds of patients who would be subject to the harms and health risks of forced pregnancy and childbirth. *Id.* at 7–8. The court balanced the equities, and found that the “denial of this healthcare procedure is detrimental to the public interest.” *Id.* at 8. The court recognized “the economic harms that Kentuckians would suffer under the laws at issue,” with the burdens of the lack of access to abortion falling “hardest on poorer and disadvantaged members of society.” *Id.* As for harm to Defendants, the court found that “any harm the Defendants may suffer is outweighed by the interest of the Plaintiffs.” *Id.* at 9. The court recognized that “at most”

Defendants will suffer “the harm of delayed enforcement.” *Id.* And, the injunctive relief will “merely restore the status quo that has existed in Kentucky for nearly fifty years.” *Id.* The court also found substantial questions going to the merits of Plaintiffs’ constitutional claims. For example, the court found that the Trigger Ban “is an arguably unconstitutional delegation of legislative authority, not just to a different branch of government, but to a different jurisdictional body entirely” in violation of Sections 27, 28, and 29 of the Kentucky Constitution. *Id.* at 11. The court also found Plaintiffs had shown a substantial question going to the merits of their claims that the Six-Week Ban violates various constitutional rights, including the right to privacy and the right to self-determination. *Id.* at 12–19.

II. The Attorney General Has Not Demonstrated Irreparable Harm Under CR 65.07(6).

The Attorney General has not demonstrated that he will suffer irreparable harm as required for emergency relief under Civil Rule 65.07(6), and his motion should be denied for three reasons.

First, as the circuit court correctly held, delay in enforcement of the abortion bans cannot be considered irreparable harm to Defendant. TI Order at 9 (“Defendants will at most suffer the harm of delayed enforcement,” a harm which—even if present—the circuit court correctly found is “not sufficient to preclude injunctive relief.”). That alleged “harm” is present in every case where a temporary injunction is granted barring enforcement of state law. Taken to its logical conclusion, the Attorney General’s argument would mean that a state official would automatically demonstrate “irreparable harm” under 65.07(6) anytime a law is temporarily enjoined, thereby always entitling the state official to emergency relief during the temporary injunction appeals process. This is plainly not the law. *See, e.g., Cameron*, 2022 WL 2443398, at *6; *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).

Second, the circuit court found “the state has *no* interest in enforcing an unconstitutional law,” TI Order at 9 (emphasis added), and because “the Plaintiffs have established significant doubt as to the constitutionality of the laws at issue . . . the state’s interest in enforcing these laws is uncertain.” *Id.* In response, Defendant misrepresents the standard for temporary injunctive relief by claiming that a temporary injunction should never issue when there is any doubt as to the merits of a constitutional claim. Appellant’s Mot. at 2. But that is not the test. Instead, Plaintiffs only need to show a “serious question warranting a trial on the merits,” *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978), where, as here, Plaintiffs demonstrated irreparable injury and that the balance of equities weighs in favor of an injunction.² TI Order at 7–10. Accordingly, given that the circuit court found that Plaintiffs have shown serious questions as to the merits of their case, the challenged statutes are at least of uncertain constitutionality and Defendant is not irreparably harmed by the entry of a temporary injunction until a trial on the merits. *See* TI Order at 9.

Third, as the circuit court recognized, the temporary injunction merely preserves the fifty-year status quo, TI Order at 9, and Defendant cannot be irreparably harmed by preservation of the status quo. *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 of the Court of Appeals merely preserve the status quo.”). Furthermore, the circuit court has already weighed any harm to the Attorney General against the extraordinary and irreparable harms that Plaintiffs’ patients face from the change to a decades-

² The circuit court also correctly found that Plaintiffs have constitutional standing: Plaintiffs are injured by the Bans’ criminal penalties that would prevent them from “lawfully engaging in both medication and procedural abortions,” Defendants’ enforcement authority is the cause of the injury, and injunctive relief preventing enforcement of the Bans redresses the injury. TI Order at 6–7. Further, as abortion providers, Plaintiffs meet all the requirements of third-party standing in order to assert the rights of their patients because “the challenged laws regulate[] [Plaintiffs’] conduct, including by threat of sanctions, the providers ha[ve] every incentive to resist efforts at restricting their operations, and the providers [a]re far better positioned than their patients to challenge the restrictions.” *Id.* at 6. Plaintiffs have standing in their own right to bring the nondelegation claims and have third-party standing to assert their patients’ constitutional rights to privacy and self-determination.

long status quo and inability to access abortion in Kentucky as a result of the challenged laws. TI Order at 8–9. 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 to their lives. *Id.* at 3–4, 7–9. Indeed, if the laws were permitted to take effect, each day in effect would increase the risk of complications related to pregnancy or abortion for Kentuckians who are pushed later into pregnancy by the lack of abortion care in the Commonwealth. *Id.* at 3–4. These harms are not theoretical. As the circuit court found, nearly 200 patients seeking abortion were turned away because Attorney General Cameron threatened enforcement of the Bans before the restraining order was entered. *Id.* at 7. The circuit court correctly found that forcing Plaintiffs’ patients to suffer the irreparable and life-altering physical, emotional, and economic harms of unexpected pregnancy, childbirth, and parenthood far outweigh any potential harm to Defendant Cameron. *Id.* at 8–9. The balancing of the equities among any competing harms is for the sound discretion of the trial court, *see* CR 65.03(2), and this Court should not disturb those findings.

Conclusion

For all of the foregoing reasons, Attorney General Cameron has failed to show the requisite irreparable harm, and his Emergency Motion for Intermediate Relief pursuant to CR 65.07(6) should be denied.

DATE: August 1, 2022

Respectfully Submitted,

/s/ Michele Henry

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CERTIFICATE OF SERVICE

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

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