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

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

Petitioner

v.

HON. GLENN E. ACREE,
Judge, Kentucky Court of Appeals,

Respondent

and

HON. MITCH PERRY,
Judge, 30th Judicial Circuit, Jefferson Circuit Court;
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; **ERIC FRIEDLANDER**, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services; **MICHAEL S. RODMAN**, in his official capacity as Executive Director of the Kentucky Board of Medical Licensure; and **THOMAS B. WINE**, in his official capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky.

Real Parties in Interest

ATTORNEY GENERAL DANIEL CAMERON'S
EMERGENCY MOTION FOR INTERMEDIATE RELIEF

Pursuant to CR 76.36(4), Ky. Const. § 110(2)(a), and CR 81, Attorney General Daniel Cameron respectfully moves this Court for an emergency order (i) directing that the restraining order entered by Jefferson Circuit Court Division 3 in Case No. 22-CI-3225 be set aside, (ii) prohibiting the Jefferson Circuit Court from entering further injunctive relief pending further order of this Court, and (iii) transferring this matter to this Court as soon as the Jefferson Circuit Court resolves the pending motion for a temporary injunction.

As described in his writ petition, which the Attorney General incorporates here in full, the errors of the Court of Appeals and the circuit court are such that the Attorney General is entitled to a writ. And filing a writ in this Court and seeking intermediate relief is procedurally proper at this juncture, as this Court recognized just two years ago. *Beshear v. Acree*, No. 2020-SC-0313-OA (Ky. July 17, 2020); *accord Russell Cnty., Ky. Hosp. Dist. Health Facilities Corp. v. Ephraim McDowell Health, Inc.*, 152 S.W.3d 230, 235 (Ky. 2004) ("The obvious and appropriate remedy in such a case would be a writ of prohibition from this Court, but such a writ can only be obtained by an *original action* in this Court.").

To be entitled to intermediate relief upon filing a writ, a petitioner need only show that "he/she will suffer immediate and irreparable injury" prior to 20 days after filing the petition. CR 76.36(4). Here, there is no question that the Attorney General and the Commonwealth will suffer immediate and irreparable

injury unless this Court orders that the restraining order entered below be set aside—in fact, that injury is already occurring. It is black-letter law that the "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021). That's because whenever the General Assembly passes a law, it makes an "'implied finding' that the public will be harmed if the statute is not enforced." *Id.* at 78 (citation omitted). And so every day that the Attorney General is barred from enforcing the will of the people constitutes per se irreparable harm to the Commonwealth and its citizens. *Id.* at 73.

The degree of irreparable harm is especially pronounced here. The General Assembly has declared it the policy of the Commonwealth to protect the lives of unborn children. Once an abortion has been performed, the life of that unborn child is over. No court order can bring the child back. To be sure, there are instances in which timing matters for an expectant mother who requires an abortion because her life is in danger. And the General Assembly has protected that expectant mother in such circumstances. *See* KRS 311.772(4)(a), .7705(2), .7706(2). So all the restraining order does here is ensure that the Commonwealth, the Attorney General, and the public must bear the irreparable harm of Kentucky's laws going unenforced. And even more importantly, the restraining order guarantees that unborn lives will be lost while the underlying

litigation proceeds. If that is not the kind of irreparable harm contemplated by CR 76.36(4), what is?

The Court of Appeals concluded otherwise based on a series of errors. For example, even though this Court has held that the "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public," *Cameron*, 628 S.W.3d at 73, and even though this Court has held that the Attorney General is empowered to protect the public's interests, *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 361–66 (Ky. 2016), the Court of Appeals nevertheless found that "there is no party in this action claiming a direct and special interest that would be injured by a failure to enforce the statutes in question," Op. & Order at 7. But how could that be? The public is injured by the non-enforcement of statutes. And the Attorney General represents the public. And so of course there is irreparable injury here—just as there was by the non-enforcement of a statute in *Cameron*.

Yet pause for a moment to consider the implications of the Court of Appeals' reasoning. The individuals most harmed by non-enforcement of these laws are the unborn children whose lives are ended by abortion. They certainly have "a direct and special interest that would be injured by a failure to enforce the statutes in question." Op. & Order at 7. Yet who can protect their interests in court? It must be the Attorney General. As a matter of state law, an unborn child is every bit a human being. KRS 311.720(8) ("'Human being' means any

member of the species homo sapiens from fertilization until death."). The Attorney General's duty to protect the public does not somehow diminish when he is protecting unborn children.

The errors do not stop there. The Court of Appeals also justified its ruling by finding that there is no evidence "that any Real Party In Interest will violate the statutes in question before the Jefferson Circuit Court's hearing to decide whether to convert the temporary restraining order to a temporary injunction." Order at 7. Again, that is plainly wrong. This case only exists because the Facilities asked for a restraining order so that they could continue performing abortions in violation of state law. As the Facilities explained below: "Unless this Court grants immediate injunctive relief, Plaintiffs will be forced to continue turning away all patients seeking abortion in Kentucky." Memo. in Support at 17.

More to the point, if the Court of Appeals found that there was no evidence that the Facilities would violate the laws before the hearing on the temporary injunction, that itself would be grounds to set the restraining order aside because it would mean that the Facilities are not suffering any harm. *See* CR 65.03 ("A restraining order may be granted . . . only if (a) it clearly appears from specific facts shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before the adverse party or his

attorney can be hear in opposition[.]"). Said another way, if the Facilities have no intent to violate the laws, what point does a restraining order serve other than to cause irreparable harm by preventing enforcement of two duly enacted statutes?[1]

The Court of Appeals also denied relief based on its doubt that the two laws at issue are even in effect. The Facilities did not raise this issue in the Court of Appeals, and so it is unsurprising that the court's analysis missed a key fact: the Heartbeat Law is *not* a trigger law. It took effect in March 2019, which is why a federal court dissolved an injunction against the law days after *Dobbs*. So even if the Human Life Protection Act is not yet in effect (which it is, Writ at 35–37), the same would not be true of the Heartbeat Law. And of course, the Facilities have never argued otherwise. The Court of Appeals reached this issue on its own initiative without briefing and badly missed the mark.

The Court of Appeals also questioned whether intermediate relief from a restraining order in a writ posture is proper. But this Court already answered that question in *Russell County*. There, the plaintiff obtained a restraining order. 152 S.W.3d at 232. The defendant then filed a writ of prohibition, an emergency motion for a stay of the restraining order, and a CR 65.07 motion in the Court

[1] Media reports indicate that the Facilities are currently relying on the Jefferson Circuit Court's restraining order to continue performing abortions in violation of state law. Deborah Yetter, *Kentucky appeals court rules on AG Daniel Cameron's push to again stop abortions*, Louisville Courier Journal (July 2, 2022), https://perma.cc/8FQM-ETZC ("EMW and Planned Parenthood were able to resume abortion services Friday under Perry's order.").

of Appeals. *Id.* The Court of Appeals found the CR 65.07 motion to be procedurally improper, but granted the emergency motion for a stay while it considered the writ. *Id.* The plaintiff then sought relief in this Court, filing a writ, an emergency motion to stay the relief granted by the Court of Appeals, and a CR 65.09 motion. *Id.*

In concluding that it could entertain the writ against the Court of Appeals, this Court found that "although the orders entered by the Court of Appeals did not state the authority for the temporary stay, such authority is *expressly given* in the 'intermediate relief' provision of CR 76.36(4) and, as such, the Court of Appeals has jurisdiction to enter a temporary stay." *Id.* at 236–37 (emphasis added). And although the Court did not end up granting a writ in *Russell County*, the Court outlined exactly why the procedure of taking the writ there was proper. *Id.* at 234–36. The Attorney General here does nothing more or nothing less than what was done in *Russell County*.

It bears repeating that every day that the Human Life Protection Act and Heartbeat Law are not enforced is a day that the Commonwealth and its people suffer irreparable harm. *See Cameron*, 628 S.W.3d at 73. And every day that abortions are performed in violation of Kentucky's duly enacted statutes is a day that the lives of unborn children are lost forever. That is not a harm that can be undone, and yet a single circuit judge has allowed this irreparable harm to occur apparently based on a purported constitutional right that no court has ever

recognized. And the Court of Appeals failed to set aside that order based on one erroneous conclusion after another. If ever a writ were necessary, it is now.

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The Attorney General seeks an immediate order (i) directing that the Jefferson Circuit Court's restraining order be set aside, (ii) prohibiting the Jefferson Circuit Court from entering further injunctive relief pending further order from this Court, and (iii) transferring this matter to this Court for resolution as soon as the Jefferson Circuit Court resolves the pending motion for a temporary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 3, 2022, a copy of the above was filed by electronic mail to the Clerk of the Supreme Court of Kentucky and served on the below by electronic mail. Service by U.S. mail will be accomplished on the below on July 5, 2022. Hard copies of the above will also be provided to the Clerk of the Supreme Court on that date.

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