COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2022-CA-___

DANIEL CAMERON, in his official capacity as Attorney General of the Commonwealth of Kentucky, — *Appellant/ Movant*

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

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; **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 & 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. — *Appellees/ Respondents*

ATTORNEY GENERAL DANIEL CAMERON'S EMERGENCY MOTION FOR INTERMEDIATE RELIEF

Pursuant to CR 65.07(6), CR 76.34, and SCR 1.030(3), Attorney General Daniel Cameron respectfully asks a member of this Court to immediately stay the circuit court's temporary injunction until the resolution of his CR 65.07 motion. As described in the Attorney General's CR 65.07 motion, which the Attorney General incorporates here in full, the circuit court's errors are such that the Attorney General is entitled to an immediate stay of the temporary

injunction—an injunction that, according to the Supreme Court, causes "irreparable harm to the public and the government" every day it is in place. *Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021).

To be entitled to intermediate relief, a party need only show that he or she "will suffer immediate and irreparable injury before the [CR 65.07] motion will be considered by a panel." CR 65.07(6). Here, that showing is straightforward: It is black-letter law that "[n]on-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron*, 628 S.W.3d at 73. That is 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 moment that the Attorney General is barred from enforcing the will of the people through their duly elected representatives constitutes per se irreparable harm to the Commonwealth and its citizens.

The nature of the irreparable harm is particularly pronounced here. The General Assembly has declared it the policy of the Commonwealth to protect the lives of unborn children. *See generally* KRS 311.772 (the Human Life Protection Act), .7701–11 (the Heartbeat Law). Once an abortion has been performed, the life of that unborn child is over. No court order can bring that 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 temporary injunction 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 troubling, the temporary injunction guarantees that unborn lives will be lost while the underlying litigation proceeds. If that is not the kind of irreparable harm contemplated by CR 65.07(6), what is?

On the other side of the ledger is the complete absence of harm to the Facilities. That is because the alleged harm here—an infringement on the right to abortion—is nonexistent. An injunction like the one entered below is only proper when it is "clearly shown" that "the movant's *rights* are being or will be violated." CR 65.04(1) (emphasis added). But as explained in the Attorney General's CR 65.07 motion, the Facilities' novel claim to a state constitutional right to abortion is found nowhere in the text or history of Kentucky's Constitution. AG's CR 65.07 Mtn. at 14–26. No part of the Kentucky Constitution mentions abortion, and the only possibly relevant references to abortion during the constitutional Debates in 1891 discussed how performing abortion was a crime. *Id.* at 14–16. As early as 1879, Kentucky's high court recognized the General Assembly's prerogative to prohibit abortion if it chose to do so. *Id.* at 16–18. And from 1910 until the decision in *Roe v. Wade*, Kentucky

statutorily prohibited abortion at all stages of pregnancy. *Id.* at 18–22. The claim at the heart of this case is simply unprecedented.

The Facilities, like any other plaintiffs, are free to pursue novel and unprecedented claims. But the extraordinary remedy of a temporary injunction, which requires "clearly" establishing that the Facilities' rights will be violated, is not the place for such novel or unprecedented legal theories. *See Maupin v. Stansbury*, 575 S.W.2d 695, 697 (Ky. App. 1978); *see also Bingo Palace v. Lackey*, 310 S.W.3d 215, 216 (Ky. 2009) ("[D]oubtful cases should await trial of the merits." (citation omitted)); *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 161 (Ky. 2009) ("A temporary injunction should not issue in 'doubtful cases.'" (citation omitted)); *Oscar Ewing, Inc. v. Melton*, 309 S.W.2d 760, 762 (Ky. 1958) ("[D]oubtful cases should await final judgment"); *Gordon v. Morrow*, 218 S.W. 258, 260, 269 (Ky. 1920) (dissolving an injunction premised on "novel questions of law" that "had no foundation in fact or law"). And that is particularly true in a case like this one where—in contrast to the unprecedented claims of the Facilities—it is undisputed that enjoining the enforcement of duly enacted laws amounts to per se irreparable harm.

To the extent the Court is concerned with the effect of its order on third parties (such as pregnant women who might need to terminate a pregnancy due to health risks), those concerns have already been addressed by the General Assembly. Both the Human Life Protection Act and the Heartbeat Law give

clinicians flexibility to act to protect the health and safety of an expectant mother. KRS 311.772(4), .7705(2), .7706(2). And so the only irreparable harm that has been clearly established in this case is the harm to the public and the Commonwealth from non-enforcement of these two duly enacted statutes. *Cameron*, 628 S.W.3d at 73.

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For these reasons, and those in the Attorney General's CR 65.07 motion, a member of the Court should grant immediate relief under CR 65.07(6) by staying the temporary injunction while a panel considers the Attorney General's CR 65.07 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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