COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2022-SC-326-I

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,

Movants / Appellants

v.

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

Respondent / Appellee

ATTORNEY GENERAL DANIEL CAMERON'S RESPONSE TO PETITIONERS' CR 65.09(3) MOTION

In an unremarkable application of this Court's precedent, the Court of Appeals stayed a temporary injunction that prohibited the Attorney General and other officials from enforcing duly enacted statutes based on a novel theory of constitutional law. Just last year, this Court made clear that such injunctions are inappropriate in all but the rare circumstance in which a plaintiff can overcome the presumption of constitutionality afforded to enactments of the General Assembly. *See Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021). That is because

"non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Id.* And so absent a "clear, complete and unmistakable" infringement on a plaintiff's constitutional rights, "equitable considerations support enforcing a legislative body's policy choices" until final judgment. *Id.* (citation omitted).

These well-established principles should be the beginning and end of the Court's analysis here—just as they were for the Court of Appeals below. The plaintiffs in this case challenge two duly enacted laws based on the novel theory that the Kentucky Constitution contains an unwritten right to abortion—a right that no court in this Commonwealth has ever recognized. They are free to make such claims and pursue them to final judgment. But this Court has made plain that the extraordinary remedy of a temporary injunction is not appropriate for claims that rely on such an unprecedented legal theory. Nothing in the text or history of the Kentucky Constitution supports a right to abortion. And no decision from this Court or its predecessor has even suggested such a right exists. Given that "[a] temporary injunction should not issue in doubtful cases," *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 161 (Ky. 2009) (quotation omitted), there is no doubt that the circuit court abused its discretion in granting such extraordinary relief here. The Court of Appeals recognized as much and properly granted a stay pending appeal. For the reasons that follow, this Court should deny the plaintiffs' request for extraordinary relief, transfer the matter,

and set an expedited briefing schedule on the Attorney General's CR 65.07 motion.

BACKGROUND

After the U.S. Supreme Court held that the federal constitution provides no right to an abortion, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–43 (2022), the plaintiffs—two abortion facilities and a physician-owner of EMW (together, the "Facilities")—sued in state court to block enforcement of two laws regulating abortion in Kentucky. The first, the Human Life Protection Act, prohibits most abortions in the Commonwealth. KRS 311.772. The second, Kentucky's Heartbeat Law, prohibits abortions after an unborn human being "has a detectable fetal heartbeat." KRS 311.7705(1). Importantly, the Human Life Protection Act allows "a licensed physician to perform a medical procedure necessary in [his or her] reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman." KRS 311.772(4)(a). The Heartbeat Law provides likewise. KRS 311.7705(2), .7706(2).

The Facilities' primary legal theory for challenging these laws—which the Facilities do not even discuss in their CR 65.09 motion—is that the Kentucky Constitution contains an unwritten right to abortion. This purported right appears nowhere in the Constitution's text, has no support in the Debates that led

to the Constitution's adoption, and has never been recognized by a court anywhere in the Commonwealth. *See* AG's CR 65.07 Motion, Exhibit 1 at 14–32.[1] In fact, nearly 150 years ago, Kentucky's highest court explicitly recognized the General Assembly's authority to prohibit abortion "at any time during the period of gestation." *Mitchell v. Commonwealth*, 78 Ky. 204, 209–10 (Ky. 1879).

After the Facilities moved for a temporary injunction based on their novel legal theory, the circuit court held an evidentiary hearing. The hearing, which looked like what one might expect from a legislative committee hearing in the Capitol Annex, centered primarily on the Facilities' attempt to show that prohibiting abortion is not sound public policy. Yet even that effort fell short. The Facilities' primary witness, Dr. Ashlee Bergin, who then performed abortions at EMW, refused to answer basic questions about the biological characteristics of an unborn child. *See, e.g.*, TR 62:23–64:11, 66:2–24, 68:4–25, 76:5–21, 77:3–14, 78:1–9.[2] When asked directly whether an unborn child is a human being, she refused to answer, responding, "I don't think of it in those terms." TR 66:22.

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[1] Under CR 65.09(3)(b), any decision by this Court to review the Facilities' motion requires reviewing "both the emergency motion and the motion for relief under CR 65.07." The Attorney General incorporates his CR 65.07 in full and attaches it to this response for the Court's convenience.

[2] Because there is no certified record in this case, the Attorney General filed a transcript of the evidentiary hearing in the record below. The Facilities attached that transcript to their motion, and the Attorney General cites the same throughout this response.

The only other witness the Facilities called was Jason Lindo, a professor of economics. He testified that the Human Life Protection Act and the Heartbeat Law will result in fewer abortions in Kentucky and the birth of more children. TR 122:12–20, 133:22–134:1, 136:22–137:1. Lindo saw this as leading to "deleterious economic consequences," TR 137:2–8, 163:18–23, because raising children is expensive and could disrupt career development for some women. Lindo was unaware of, and did not consider for purposes of his analysis or testimony, Kentucky's Safe Haven Law, KRS 216B.190. *See also* KRS 405.075(2); TR 163:24–166:22. The law affords a parent, who brings a newborn infant to an emergency room and expresses an intent to leave and not return, the right to remain anonymous and to leave at any time. Lindo also testified that "policy makers can take or leave this evidence," TR 138:13–14, and that when considering laws such as the Human Life Protection Act and the Heartbeat Law, "[p]olicy makers probably will be considering many other factors when they're making these decisions," TR 139:5–7.

Perhaps what was most notable from the hearing is the evidence the Facilities did not produce. Although the Facilities refer in their motion to health risks associated with pregnancy as an example of harm that pregnant women might face if the two statutes remain in effect, the Facilities did not produce anyone who needed an abortion for health reasons but would not be able to

obtain one under the exceptions in each law. Nor is that surprising: As the Attorney General's expert witness explained (and as the Court of Appeals noted below), the exceptions in each law give the medical community what it needs to protect the health of any pregnant mother. *See* TR at 196:8–10, 208:19–21, 238:21–239:16. Even Dr. Bergin admitted that medical professionals can adequately treat the vast majority of pregnancy-related health complications that a pregnant woman might face. TR 24:16–23, 57:8–18; *see also* TR 195:5–199:10.

Despite the fact that the Facilities' claim is without any legal precedent, and despite their lack of evidence, the circuit court granted a temporary injunction against enforcing the laws under CR 65.04. Large parts of the circuit court's decision read like a policy paper. The court, for example, declared that "abortion is a form of healthcare," as if that is somehow within the purview of a court of law. TI Order at 8. The court also opined that whether to have a child "is a decision that has perhaps the greatest impact on a person's life and as such is best left to the individual to make, free from unnecessary governmental interference." *Id.* at 9. A more explicit legislative policy declaration would be hard to imagine. And in a decision about constitutional law, remarkably, the court based its opinion on its concern that "[p]regnancy, childbirth, and the resulting raising of a child are incredibly expensive." *Id.*

After the circuit court entered its temporary injunction, Attorney General Cameron moved under CR 65.07 for relief in the Court of Appeals. The Attorney

General also asked for immediate relief under CR 65.07(6). The Court of Appeals (L. Thompson, J.) granted that motion in a short, well-reasoned opinion that is consistent with decades of precedent from this Court.

The Facilities then moved under CR 65.09 for extraordinary relief from this Court.

ARGUMENT

Rule 65.09 allows for relief "only for extraordinary cause." CR 65.09(1). "Demonstrating extraordinary cause is not an easy task—in fact [this Court] ha[s] recognized that the movant faces an 'enormous burden' when requesting relief pursuant to CR 65.09." *Chesley v. Abbott*, 503 S.W.3d 148, 152 (Ky. 2016) (citation omitted). There is no doubt that the underlying merits of this case are critically important to Kentucky, which is why the Court should transfer the Attorney General's CR 65.07 motion to its docket. But there is nothing about the interlocutory decision below that justifies extraordinary relief from this Court in the meantime. Far from it. The Court of Appeals' decision was an unremarkable application of this Court's precedent. Vacating it would upend decades of law and cast doubt on decision after decision from this Court. The Court should therefore deny the motion for extraordinary relief.[3]

[3] At the request of the Attorney General, the Court of Appeals has recommended transferring the CR 65.07 motion to this Court in light of the "great and immediate public importance" of resolving the merits of the Facilities' constitutional

I. The Court of Appeals did not abuse its discretion in granting a stay pending appeal.

The Court of Appeals stayed the temporary injunction based on well-established principles from this Court. Those principles are best summarized as follows: A duly enacted statute is presumptively constitutional and amounts to the General Assembly's implied finding as to what policies are in the public's best interest. That presumption of constitutionality can only be overcome by showing that the statute amounts to a clear, complete, and unmistakable constitutional violation. Absent such a showing, a temporary injunction enjoining enforcement of such a duly enacted law is inappropriate because non-enforcement of such a law constitutes irreparable harm to the public and the government.

The circuit court ignored nearly all of those well-established principles when it temporarily enjoined enforcement of two duly enacted laws based on a novel claim to a constitutional right to abortion that no court in Kentucky has ever recognized. By staying that injunction pending appeal, the Court of Appeals did nothing more than reaffirm the policy-making prerogative of the General

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claims. CR 74.02(2). The Court could alternatively exercise its discretion to review the Facilities' motion under CR 65.09, which has the effect of automatically transferring the CR 65.07 motion to the full court. *See* CR 65.09(3)(b). If the Court does so, the Court should still deny relief for the reasons set forth in this response and the Attorney General's CR 65.07 motion, which the Attorney General incorporates in full. *See Boone Creek Props., LLC v. Lexington-Fayette Urb. Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 38, 41 (Ky. 2014) (granting review under CR 65.09 but denying the requested relief).

Assembly by restoring the presumption of constitutionality that every statute is entitled to. In short, it did exactly what this Court told it to just one year ago in *Cameron v. Beshear.*

1. In *Cameron*, the Governor challenged the constitutionality of several newly enacted statutes that restricted his authority "to take unilateral action during declared emergencies." 628 S.W.3d at 67. The Governor's suit turned on several novel claims about executive authority under the Kentucky Constitution. *Id.* at 74–78. The circuit court found that there was a "substantial question" as to the merits of his claims and enjoined enforcement of the new laws based on the court's view that the public would be harmed if the Governor's statewide approach to managing COVID-19 was interrupted while the pandemic remained ongoing. *See id.* at 67, 72, 78.

But this Court unanimously reversed. In doing so, it gave the roadmap for resolving this case as well. Four points, in particular, matter here: *First*, the Court explained that every statute enacted by the General Assembly is entitled to a presumption of constitutionality that can be overcome only by showing a "clear, complete and unmistakable" infringement. *Id.* at 73 (citation omitted). *Second*, the Court held that "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government," *id.*, and that the General Assembly—not the judiciary—decides what is in the public's interest, *id.* at 73, 78. *Third*, the Court held that because "the General Assembly is the policy-making body

for the Commonwealth, not . . . the courts, equitable considerations support enforcing a legislative body's policy choices." *Id.* at 73. And *fourth*, the Court explained that in constitutional challenges to validly enacted legislation, "[w]hether the [plaintiff] has shown an irreparable injury is tied to his constitutional claims and likelihood of success." *Id.*

Based on those principles, the Court in *Cameron* reversed the temporary injunction with relative ease. The plaintiff in that case had raised unprecedented constitutional claims that lacked clear or unmistakable support from either the text of the Constitution or this Court's decisions. And so even though some members of the Court found the Governor's claims plausible and worth further consideration on remand, *see id.* at 80–81 (Hughes, J., concurring), the Court unanimously reversed the issuance of the temporary injunction. Every part of that analysis applies with equal force here.

First, the Human Life Protection Act and the Heartbeat Law are entitled to a presumption of constitutionality that can only be overcome by showing a "clear, complete and unmistakable" infringement. *Id.* at 73 (citation omitted). On this point, the Facilities' own motion acknowledges that they cannot meet this high standard. At best, the Facilities argue that there is "significant doubt" as to

the constitutionality of the two laws.[4] Motion at 7–8 (arguing that they have overcome the presumption of constitutionality by raising "significant doubt" about the laws). But a temporary injunction should not issue in doubtful cases. *Thompson*, 300 S.W.3d at 161. Rather, the Facilities must show a "clear, complete and unmistakable" infringement on their constitutional rights—something they absolutely cannot do. And so the Facilities falter right out of the gate.

Second, "non-enforcement of [the Human Life Protection Act and the Heartbeat Law] constitutes irreparable harm to the public and the government," *Cameron*, 628 S.W.3d at 73. The Facilities ignore *Cameron* and argue that any harm here is only from "delayed enforcement," which they claim is not irreparable. Motion at 8. But their position is impossible to square with *Cameron* (a case the Facilities fail to cite even once in their motion). *Cameron* arose in the same posture as this case currently stands: The circuit court issued a temporary injunction and the Attorney General moved under CR 65.07 to have that injunction vacated. This Court did not hold that the temporary injunction amounted to a lesser form

[4] To be sure, there is not any doubt—much less "significant doubt"—about the constitutionality of the laws at issue here. *See* Exhibit 1 at 14–41. The fact that the Facilities fail to even address the merits of their claims in their motion tells this Court all it needs to know about the strength of their legal theory.

of harm because it would "at most" cause merely a "delay" in enforcement. Rather, the Court was clear: "non-enforcement" by means of a temporary injunction "constitutes irreparable harm to the public and the government." *Id.* at 73.

The Facilities also argue (again, contrary to *Cameron*) that it cannot be that non-enforcement of a validly enacted statute always amounts to irreparable harm because it will always entitle the government to a stay under CR 65.07. But that argument glosses over how the presumption of constitutionality relates to the finding of irreparable harm. A temporary injunction is appropriate to prevent enforcement of a law that is unmistakably unconstitutional. That is, if a plaintiff can overcome the presumption of constitutionality at the temporary-injunction stage by showing a "constitutional infringement [that is] clear, complete and unmistakable," *Cameron*, 628 S.W.3d at 73 (cleaned up), the presumption of irreparable harm will similarly fall. These principles are inextricably linked.

That is exactly what happened in *Legislative Research Commission v. Fischer*, 366 S.W.3d 905 (Ky. 2012), the only case the Facilities rely on to argue that the temporary injunction here does not cause irreparable harm. In *Fischer*, this Court affirmed a temporary injunction against a redistricting law. But it did so because the law violated "legal precedent established nearly twenty years" earlier. *Id.* at 907. So clear, complete, and unmistakable was the violation, in fact, that the LRC's primary argument on appeal was that the Court should "overrule the constitutional standards for redistricting" set decades before. *Id.* at 908. Where the

controlling precedent and constitutional principles are so clear, a plaintiff can in fact overcome the ordinary presumption of constitutionality, thereby diminishing any claim of irreparable harm from the temporary injunction.

But that is not this case. In this case, it is the Facilities—not the defendants—that ask the Court to chart a new path and overrule existing precedent. Their claim that the Kentucky Constitution contains an unwritten right to abortion is without any authority whatsoever. In fact, it is contrary to *Mitchell*—a case decided by this Court's predecessor nearly 150 years ago. 78 Ky. at 209–10. And the only case that the circuit court relied on below to find such a right had nothing to do with abortion at all. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 488, 492–99 (Ky. 1992). Any expansion of *Wasson* to encompass a new constitutional right to abortion would be just that—an *expansion*. (As explained in the Attorney General's CR 65.07 motion, expanding *Wasson* in this manner is contrary to *Wasson*'s very terms. *See* Exhibit 1 at 22–26.) But because this Court has never recognized such a right, there is no serious argument that the laws at issue impose a "clear, complete and unmistakable" constitutional infringement, and so the presumption of irreparable harm that follows non-enforcement of these laws remains.

Third, as with the temporary injunction in *Cameron*, the Jefferson Circuit Court here "substituted its view of the public interest for that expressed by the General Assembly" and decided for itself what the Commonwealth's public

health policy should be. *See Cameron*, 628 S.W.3d at 78. The Facilities' motion again betrays their own position on this point. Rather than discuss anything that resembles constitutional law, the Facilities argue that this case is about "the ability of Kentuckians to access essential and time-sensitive healthcare." Motion at 5. But the courts are not in the business of deciding whether abortion is "healthcare," as the Facilities believe, or something very different, as many Kentuckians and a majority of the General Assembly believe. Nor are the courts in the business of deciding what kind of healthcare is "essential." Nowhere in the Constitution is that kind of policy-making judgment given to the judiciary. In fact, it has long been recognized that questions about "health and morals" are within the traditional prerogative of the legislature. *See Walters v. Binder*, 435 S.W.2d 464, 467 (Ky. 1968).

Fourth, the Facilities' discussion of irreparable harm fails to grapple with the central problem in their case: the alleged harm they rely on depends entirely on the merits of their unprecedented legal theory. If the Kentucky Constitution does not recognize a right to abortion (it does not), neither the Facilities nor their patients suffer any cognizable harm from enforcing the two statutes. Again, that conclusion comes directly from *Cameron*. In a case like this challenging the constitutionality of a duly enacted law, "[w]hether the [plaintiff] has shown an irreparable injury is tied to his constitutional claims and the likelihood of success." 628 S.W.3d at 73.

It matters quite a bit, then, that the Facilities do not spend even one page discussing the merits of their constitutional claim. They make no effort to defend their novel theory that the Kentucky Constitution contains a never-before-recognized right to an abortion. And so under *Cameron*, this Court simply cannot conclude that the Facilities will suffer irreparable harm from the laws going into effect.

2. The Facilities' last argument is that the Court of Appeals abused its discretion by disrupting the status quo of the last fifty years during which abortion has been legal, albeit because of federal law. But preserving the status quo is about "protect[ing] the *legal rights* of the plaintiff pending the litigation," *Oscar Ewing, Inc. v. Melton*, 309 S.W.2d 760, 761–62 (Ky. 1958) (emphasis added), and it has never been the case that the Kentucky Constitution contains a right to abortion. The fact that federal courts used to recognize a federal right to abortion says nothing about the status quo under Kentucky law.

Since 1879, the status quo in Kentucky has been a recognition under state law that the General Assembly can prohibit abortion at any gestational age. *Mitchell*, 78 Ky. 209–10; *accord Sasaki v. Commonwealth*, 497 S.W.2d 713, 714–15 (Ky. 1973) (concurring opinion by Justice Reed, joined by Chief Justice Palmore, recognizing that abortion is a matter for the General Assembly). And from 1910

until the Supreme Court's decision in *Roe v. Wade*, the General Assembly prohibited all abortions, with an exception for the life of the mother. Exhibit 1 at 16–22.

But even if this Court disagreed as to the status quo, "there is [an] emergency situation [here] by reason of which the public interest is likely to suffer from a stay of enforcement pending disposition of this litigation in the trial court." *See Harrison's Sanitarium, Inc. v. Commonwealth, Dept. of Health*, 417 S.W.2d 137, 139 (Ky. 1967). As the Court of Appeals correctly found, "one cannot discount the reality that any abortions performed in the interim period, in which the pending CR 65.07 motion and the issue of constitutionality of the statutes make their way through the courts, cannot be undone." Order at 5. In other words, the Court of Appeals correctly recognized that unborn human lives will be lost forever absent a stay of the circuit court's temporary injunction.

* * *

Under the well-established principles that this Court laid out in *Cameron*, it was obvious error for the circuit court to enter a temporary injunction. The Court of Appeals did not abuse its discretion in staying that injunction during the pendency of the Attorney General's appeal.

II. The Facilities cannot show irreparable harm even if they were right on the merits.

The bulk of the Facilities' motion argues that enforcing the Human Life Protection Act and the Heartbeat Law will cause irreparable harm. That argument is wrong on both the law and the facts.

1. Two points on the law. First, and as discussed above, whether the Facilities can show irreparable harm depends entirely on the likelihood of success on the merits. *See Cameron*, 628 S.W.3d at 73. But their motion fails to discuss the merits at all. Presumably that is because the text and history of our Constitution weigh decisively against them. Exhibit 1 at 14–32. Never in the history of the Commonwealth has a court recognized a constitutional right to abortion. And so the Facilities' entire theory of harm is based on a constitutional right that does not exist. Because they cannot demonstrate a likelihood of success on the merits, they cannot establish irreparable harm. *Id.*

Second, even if the Kentucky Constitution recognized a right to abortion, that right would belong to the future patients of the Facilities, not the Facilities themselves. *See* Compl. ¶¶ 96, 102, 126, 130. But a temporary injunction requires showing that "the *movant's* rights are being or will be violated . . . and *the movant*

will suffer immediate and irreparable injury." CR 65.04(1) (emphasis added). Absent from the Facilities' motion is any discussion about their own rights as corporations or the irreparable harm that they will themselves suffer.[5]

2. Even if, contrary to *Cameron*, the Facilities could prove irreparable harm without discussing the merits, and even if the Facilities could rely on the alleged harm to the third parties, their argument still comes up short.

The Facilities make two claims about the alleged irreparable harm to pregnant women who might seek an abortion. First, they argue that "'[t]hose forced to remain pregnant and give birth against their will face the risks of harm that 'result from, and [can] be exacerbated by, pregnancy.'" Motion at 5. But there is no evidence in the record that any of the Facilities' patients are seeking an abortion because of health risks that do not fall within the exceptions in each law. *None.* That is likely because, as Dr. Bergin admitted, medical professionals are capable of treating pregnant women who develop ailments during pregnancy. TR 24:16–23, 57:8–18; *see also* TR 195:5–199:10. And as the Court of Appeals recognized, both laws provide clear exceptions for the highly unusual risks that threaten the life of a pregnant woman.

[5] As explained below, this problem also means that the Facilities lack constitutional standing, which is an independent basis for the Court to deny their motion.

The Facilities take issue with that conclusion of the Court of Appeals. According to the Facilities, these exceptions provide no protection for "pregnant Kentuckians from catastrophic consequences, including death." Motion at 5. For support, the Facilities cite only the circuit court's statement that the laws may force physicians "to wait until women are in dire medical conditions before interceding." *Id.* That conclusion has no support in the record apart from the conclusory and self-serving assertion of Dr. Bergin, who failed to give any specifics about how a woman who does not meet the health exceptions in the laws might need an abortion to save her life. There is a reason that the Facilities cite only minimal portions of the record and instead rely on the circuit court's mischaracterization of the facts: There is simply no evidence in the record that a pregnant woman who needs an abortion because of risks to her life is unable to do so under the exceptions in each statute. *See* TR at 195:5–196:10, 207:8–208:21, 238:10–239:16.

On even less solid ground is the Facilities' claim that the laws will cause irreparable economic harm. This claim only serves to highlight the policy-driven aspects of the circuit court's decision. The Facilities would presumably agree that the costs or burdens of raising a child do not justify infanticide. And so it is not really the economics of raising a child that drives the Facilities' claim here. Indeed, economics cannot justify the circuit court's decision given Kentucky's safe-haven laws. KRS 216B.190(3); KRS 405.075(2). Rather, baked into this argument

about economic harm is a policy judgment that the life of an unborn child is of no moral value. Only if a court *first* makes that profoundly moral decision—a decision well outside the realm of the judicial power—could it then decide that the financial strain of raising children is relevant. But making such moral judgments about when the value of human life is worth protecting is not within the province of the courts. *See Walters*, 435 S.W.2d at 467.

3. One last point on irreparable harm. So far, the Facilities (and the circuit court below) have wholly failed to engage with what the Court of Appeals deemed the "reality" of this case: that abortions "cannot be undone." Order at 5. The Facilities claim to have turned away 200 patients during *six days* in which Kentucky's abortion prohibitions were in place before the circuit court granted a restraining order. By their own numbers, that means they would likely perform *over a thousand abortions* between now and any final resolution of this case.

The General Assembly, exercising its prerogative to set the public policy of the Commonwealth, has decided that those unborn children are worth protecting. In doing so, the General Assembly made an "implied finding" that the public will be harmed if the lives of those children are lost. *See Cameron*, 628 S.W.3d at 78. Not only did the circuit court ignore this irreparable harm to the public and to those lives lost from abortion, the court went so far as to decide for itself that stopping abortions "is detrimental to the public interest" because "[p]ublic health concerns carry great weight in the public interest analysis." TI

Order at 8. That is the same error the circuit court made in *Cameron*, when it "substituted its view of the public interest for that expressed by the General Assembly." *Cameron*, 628 S.W.3d at 78. Only this time, doing so meant overlooking the unborn lives at stake here.

III. A jurisdictional defect requires denying the Facilities' motion.

On top of everything else, there is a jurisdictional defect that requires the Court to deny the Facilities' motion: The Facilities lack constitutional standing because they cannot bring suit to vindicate a purported right that only belongs to third parties.

The circuit court should have rejected the Facilities' claim that the Constitution protects abortion based on standing alone. Constitutional standing is a prerequisite to any suit filed in Kentucky's courts. *Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 192, 196–99 (Ky. 2018). "Before one seeks to strike down a state statute he must show that the alleged unconstitutional feature injures him." *Second St. Props., Inc. v. Fiscal Court of Jefferson Cnty.*, 445 S.W.2d 709, 716 (Ky. 1969) (citation omitted).

Under *Sexton*, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 566 S.W.3d at 196 (citation omitted). To show a "present and substantial interest in the subject matter," a plaintiff must show that his or her

injury is "concrete and particularized" as well as "actual or imminent." *Id.* at 194–96 (citation omitted). In other words, "[t]he injury must be . . . distinct and palpable, and not abstract or conjectural or hypothetical." *Id.* at 196 (cleaned up).

1. Even if the Kentucky Constitution protected the right to an abortion (it does not), that right would belong only to pregnant women. The Facilities do not disagree. Yet all the same, the Facilities attempt to pursue the alleged constitutional claims of their "patients[]." Compl. ¶¶ 96, 102, 126, 130. But no patient is a party here.

This Court has held that "[t]he assertion of one's own legal rights and interests must be demonstrated and the claim to relief will not rest upon the legal rights of third persons." *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) (citation omitted). This holding forecloses any assertion of third-party standing here. The Facilities are doing exactly what *Associated Industries* prohibits—"rest[ing] upon the legal rights of third persons" to bring suit. As a result, the Facilities lack standing.

2. The circuit court relied entirely on federal abortion case law to conclude otherwise. It is true that before *Dobbs*, federal courts deviated from ordinary third-party standing principles to create a special carve-out in abortion cases. *See, e.g., June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118–19 (2020) (plurality op.); *Singleton v. Wulff*, 428 U.S. 106, 113–18 (1976) (plurality op.). But *Dobbs* expressly undermined that precedent. *Dobbs* held that these cases "*ignored* the Court's third-

party standing doctrine." 142 S. Ct. at 2275 (emphasis added). And to emphasize the point, *Dobbs* included an illustrative footnote showing how abortion case law has deviated from normal rules for third-party standing. *Id.* at 2275 n.61. *Dobbs* could not have been clearer: federal abortion-specific rules about third-party standing are no more. *See SisterSong Women of Color Reprod. Justice Collective v. Governor of Ga.*, --- F.4th ---, 2022 WL 2824904, at *5 (11th Cir. July 20, 2022) ("[T]o the extent that this Court has distorted legal standards because of abortion, we can no longer engage in those abortion distortions in the light of a Supreme Court decision instructing us to cease doing so.").

Unable to issue an injunction without reliance on the now-discredited abortion-specific rules, the circuit court downplayed this part of *Dobbs* as dicta. TI Order at 6 n.2. All the same, the circuit court acknowledged that *Dobbs* "expressed displeasure with how abortion related litigation has proceeded with the doctrine of third party standing." *Id.* So by the circuit court's admission, it relied entirely on federal case law about which *Dobbs* "expressed displeasure."

3. Even if third-party standing could exist sometimes, this is not one of those circumstances. The U.S. Supreme Court's decision in *Kowalski v. Tesmer* outlines the "limited" situations (in federal court) in which one party can assert another's rights: when a plaintiff shows (i) he or she "has a 'close' relationship with the person who possesses the right," and (ii) there is "a 'hindrance' to the possessor's ability to protect his own interests." 543 U.S. 125, 129–30 (2004)

(citation omitted). These stringent requirements reflect a "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed," then courts "might be 'called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.'" *Id.* at 129 (citations omitted).

The circuit court did not engage with the two-part federal test for third-party standing. The circuit court instead devoted only one substantive paragraph to this issue. TI Order at 6. But that paragraph focuses only on first-party standing, which is not at issue. And that paragraph does not discuss the Facilities' patients. It instead mentions how "[t]he Attorney General is attempting to enforce these statutes against the [Facilities]" and how a temporary injunction purportedly would provide the Facilities "with adequate relief." *Id.* Thus, although the circuit court claimed to find third-party standing, it made no attempt to conduct the right analysis.

Had the circuit court done so, it would have found that the Facilities cannot invoke the alleged rights of pregnant women. *Kowalski* provides the roadmap here. There, Michigan changed its procedure for appointing appellate counsel for indigent criminal defendants who plead guilty. 543 U.S. at 127. Two attorneys sued, "seek[ing] to invoke the rights of hypothetical indigents to challenge the

procedure." *Id.* The Court refused to allow the attorneys to represent the interests of hypothetical future clients. *Id.* at 134. It reasoned that "it would be a short step from the . . . grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring in court the claims of future unascertained clients." *Id.* (ellipsis in original) (citation omitted).

The very same problem arises here. The Facilities are seeking to represent the interests of future hypothetical pregnant women—akin to what the lawyers tried to do in *Kowalski*. By default then, the Facilities lack any "close" relationship with their patients who allegedly "possess[] the right" to abortion. *See id.* at 130 (citation omitted).

In any event, the Facilities have offered no evidence to establish that they have a "close" relationship with pregnant women. See *June Med. Servs.*, 140 S. Ct. at 2168 (Alito, J., dissenting) ("[A] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited."). And the Facilities have offered no evidence to conclude that their patients face a hindrance in protecting their own rights. To the contrary, "a woman who challenges an abortion restriction can sue under a pseudonym, and many have done so." *Id.*

One final point about standing. The U.S. Supreme Court has rejected third-party standing where the interests of the third party and the primary party are "potentially in conflict." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15

(2004), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). This limitation ensures that "the most effective advocate of the rights at issue is present to champion them." *Id.* at 15 n.7 (citation omitted).

The Facilities have a profit-making motive for pursuing this suit. As Dr. Bergin testified, EMW charges every woman between $750 and $2,000 for an abortion. TR 52:20–53:8. The Court should decline to find third-party standing here given the potential conflict of interests between the Facilities and pregnant women.

CONCLUSION

The Court should deny the Facilities' request to vacate the Court of Appeals' decision staying the temporary injunction pending appeal.

Respectfully submitted,

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