COMMONWEALTH OF KENTUCKY

KENTUCKY SUPREME COURT

CASE No. 2022-SC-0266-OA

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,

Real Parties in Interest

EMW WOMEN'S SURGICAL CENTER, P.S.C., ERNEST MARSHALL, M.D., AND PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, AND KENTUCKY, INC.'S RESPONSE IN OPPOSITION TO PETITIONER CAMERON'S EMERGENCY MOTION FOR INTERMEDIATE RELIEF

Petitioner's emergency request for intermediate relief makes three extraordinary requests of this Court, all of which should be rejected under this Court's precedent and rules for a case in

this posture. Indeed, the Petitioner asks this Court to (1) set aside the circuit court's non-reviewable entry of a Restraining Order, (2) prohibit the circuit court from exercising its authority to enter further injunctive relief, and (3) divest the circuit court of its jurisdiction and transfer the case to this Court. This Court should reject Petitioner's profound overreach. As the Court of Appeals recognized three days ago, 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, Petitioner could obtain relief in the appellate courts. Order Den. Mot. for Intermediate Relief, No. 2022-CA-0780-OA at 15 (Ky. App. July 2, 2022) ("July 2 Order"). That is not the law. Petitioner's requests are improper under the court rules and this Court lacks jurisdiction to hear an interlocutory appeal of the Restraining Order. Even if that were not the case, there are no extraordinary circumstances to warrant the issuance of the requested relief, and Petitioner has failed to show irreparable harm.

This case concerns the constitutionality of two Kentucky laws that collectively 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. The Trigger Ban criminalizes abortions in the Commonwealth, with very narrow exceptions, and was enacted to "become effective immediately upon . . . the occurrence of . . . any 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. A federal court preliminarily enjoined the Six-Week Ban, but that case was dismissed and the injunction dissolved on June 30, in light of the United States Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, 2022 WL 2276808 (U.S. June 24, 2022). Order, ECF 94, No. 3.19-cv-178 (W.D. Ky. June 30, 2022).

On Monday, 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, The Honorable Mitch 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—tomorrow morning. Petitioners filed an emergency motion for intermediate relief with the Court of Appeals on June 30. Plaintiffs responded on July 1, and Court of Appeals Judge Glenn E. Acree denied the motion on July 2.

I. This Court Lacks Jurisdiction to Address This Case In This Posture.

Petitioner admits that the Kentucky Supreme Court has held that there is no right to seek interlocutory relief from a restraining order. *See* Att'y Gen. Daniel Cameron's Pet. Writ Mandamus & Prohibition 37 (citing *Ky. High Sch. Athletic Ass'n v. Edwards*, 256 S.W.3d 1, 3 (Ky. 2008)). For that reason alone, Petitioner's motion should be denied.

This Court has an independent obligation to ensure it has jurisdiction over the instant motion. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005) ("'This [C]ourt must determine for itself whether it has jurisdiction.'" (quoting *Hubbard v. Hubbard*, 197 S.W.2d 923, 923 (Ky. App. 1946)). And in *Kentucky High School Athletic Association*, this Court 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 this 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))). Dissolution of a restraining order is precisely what Petitioner seeks here in his request for this Court to "set aside" the circuit court's entry of a Restraining Order. Att'y Gen. Daniel Cameron's Emergency Mot. Intermediate Relief 2.

In a blatant attempt to circumvent Kentucky's clear policy against appellate court review of the issuance or denial of a restraining order, Petitioner fashions this request as a motion for "intermediate relief" pursuant to Civil Rule 76.36. The Court should treat Petitioner's request as what it is: a motion to appeal the circuit court's grant of the Restraining Order. Because this Court

lacks jurisdiction over such an interlocutory appeal, CR 65.07, *Ky. High Sch. Athletic Ass'n v. Edwards*, 256 S.W.3d 1, 3 (Ky. 2008), Petitioner's motion should be denied. To hold otherwise would pave a path for litigants to circumvent well-established and long-enforced procedural rules to immediately "appeal" the grant or denial of a restraining order that is otherwise unappealable, CR 65.07, and solely within the circuit court judge's discretion, CR 65.03(2).

II. There Are No Extraordinary Circumstances to Warrant the Issuance of the Requested Intermediate Relief.

Even if Petitioner's attempt to circumvent the non-appealability of restraining orders under Civil Rule 65.07 were not procedurally improper, this Court should deny Petitioner's motion for intermediate relief because the circumstances do not merit the extraordinary remedy of Civil Rule 76.36. As the Court of Appeals recognized in this case, July Order at 3–4, Petitioner could have moved the circuit court to dissolve the Restraining Order, CR 65.03(2), rendering a request for relief under Civil Rule 76.36 inappropriate. The filing of an original action in an appellate court under Civil Rule 76.36 is "an 'extraordinary remedy and we have always been cautious and conservative both in entertaining petitions for and in granting such relief.' Indeed, it would be rare circumstances that would justify this Court granting a writ of prohibition against the Court of Appeals." *Russell County, Kentucky Hospital District Health Facilities Corp. v. Ephraim McDowell Health, Inc.*, 152 S.W.3d 230, 236 (Ky. 2004). It would be even rarer circumstances that would justify the issuance of intermediate relief while the Court considers whether to grant Civil Rule 76.36's "extraordinary remedy." This is not one of those rare circumstances.

The cases Petitioner cites to support the issuance of the requested intermediate relief only highlight the extraordinary, procedurally anomalous circumstances—not present here—that might warrant such unusual intervention by an appellate court. In *Russell*, the circuit court had issued an

ex parte "restraining order" that mandated the defendant take action even though Civil Rule 65.01 requires that restraining orders "only *restrict* the doing of an act." *Id*. at 232 n.2 (emphasis added); *see also id*. at 233. This Court acknowledged that "[p]erhaps, this is the basis, at least in part, for the Court of Appeals's serious concerns with the restraining order issued by the circuit court." *Id*. at 232 n.2. The same cannot be said here. The circuit court in this case issued a classic restraining order: it *prevents* Defendants from enforcing the challenged laws, and only while the circuit court promptly considers the request for a temporary injunction.

Petitioner also attempts to rely on an interim order by this Court in *Beshear v. Acree*, 615 S.W.3d 780, 797 (Ky. 2020). In that case, the court entered "[o]n July 17, 2020 and pursuant to Section 110 of the Kentucky Constitution . . . an order staying all orders of injunctive relief issued by lower courts of the Commonwealth in COVID-19 litigation pending further action of the Court. Noting the need for a clear and consistent statewide public health policy, the Court recognized that the Kentucky legislature has expressly given the Governor broad executive powers in a public health emergency." *Id.* Indeed, in that case, unlike here, there were multiple circuit courts issuing various COVID-19-related restraining orders amid a rapidly unfolding and novel worldwide pandemic, and this Court recognized an extraordinary need for consistency across the Commonwealth. That case is no analogue to the instant action.

In a straightforward situation like this, where there is only one case and the circuit court's order merely restrains Defendants in an effort to maintain the status quo while the court expeditiously considers a request for a temporary injunction, it would be inappropriate for this Court to grant an order setting aside the circuit court's Restraining Order or staying further orders of injunctive relief.

III. Petitioner Has Not Demonstrated Irreparable Harm.

Petitioner's motion should also be denied because Petitioner has not demonstrated that he will suffer irreparable harm under the Restraining Order, as required for intermediate relief 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 3, during the short period the Restraining Order is in place while the circuit court considers the temporary-injunction motion. As a threshold matter, and as Judge Acree correctly observed, the Trigger Ban should not be considered to be in effect.[1] And the Trigger Ban is unenforceable for the additional and independent reason that its triggering provision improperly delegates legislative authority in

[1] July 2 Order at 8–9. Plaintiffs had no choice but to stop providing abortions until the entry of the Restraining Order because of the seriousness of the criminal and licensure penalties at stake and because of Petitioner Cameron's public statement that he would begin enforcing the Trigger Ban on June 24. His view on what constitutes the triggering event is in the minority among Attorneys General of states with similar trigger bans. *Compare* Advisory from Ky. Att'y Gen. Daniel Cameron (June 24, 2022), https://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=1227 (stating that Kentucky Trigger Ban is in effect as of June 24), w*ith* Advisory from Tex. Att'y Gen. Ken Paxton on Texas Law upon Reversal of *Roe v. Wade* (June 24, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory%20(updated%20draft%2006.21.2022)%20(1).pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term (Texas Attorney General announcing that Texas's trigger ban will go into effect 30 days after the transmission of the Supreme Court's judgment); Tennessee's Heartbeat Law Now in Effect: Attorney General Slatery Responds to Sixth Circuit's Ruling, (June 28, 2022), https://www.tn.gov/attorneygeneral/news/2022/6/28/pr22-21.html (Tennessee Attorney General stating that he would notify the Tennessee Code Commission of the triggering event for Tennessee's Trigger Ban once the Supreme Court transmits is judgement, likely in mid-July); *and* Kelcie Mosely-Morris, *Idaho Attorney General Says Abortion Ban Likely to Take Effect Mid-August*, Idaho Capitol Sun (June 24, 2022) (Idaho Attorney General's office reported that transmission of the certified judgement is the triggering event for Idaho's trigger ban). While these other states' trigger bans go into effect thirty days after the triggering event, they still interpret that triggering event to be the transmission of the judgment, not the issuance of an opinion.

violation of Kentucky's separation of powers guarantees, Pls.' Mem. Supp. Mot. Restraining Order & Temp. Inj. at 31–33, a point to which Petitioner has offered no response at all.

Delay in enforcement of the abortion bans, moreover, cannot be considered *irreparable* harm to Petitioner, especially in the context of a temporary restraining order. As the Court of Appeals recognized, taken to its logical conclusion, Petitioner's argument would mean that a restraining order preventing any statute from taking effect could always be immediately reversable by this court under Civil Rule 76.36(4), despite there being no right to appeal a circuit court's grant of a restraining order. July 2 Order at 15. Petitioner's proposed exception would swallow the longstanding rule whole.

Additionally, here, Petitioner cannot show irreparable harm where a nearly fifty-year status quo is maintained pending a decision on the motion for temporary injunction. *See Russell*, 152 S.W.3d at 237 ("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."). As the record presented to the circuit court plainly demonstrates, Plaintiffs have provided Kentuckians with safe access to abortion care for decades Ver. Compl. ¶¶ 13–15, 54–55, and the Restraining Order merely maintains that status quo.

Furthermore, 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. At 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), and this Court should not disturb those findings under the extraordinary request under CR 76.36(4). Even if the court finds that there is irreparable harm, which there is not, the granting of intermediate relief under Civil Rule 76.36(4) is discretionary and should not be issued in the instant case, *see supra* Section II.

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 remarkable speed to rule on Plaintiffs' motion for temporary injunction, and will conduct an evidentiary hearing tomorrow, July 6—barely a week after this case was first filed. Once the circuit court decides that matter, with the benefit of live witness testimony and further argument, the Restraining Order at issue here will dissolve and the order on the temporary injunction, whether granted or denied, may be properly appealed 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 5, 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
Christoper.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