NO. 22-CI-003225 JEFFERSON CIRCUIT COURT
ELECTRONICALLY FILED DIVISION THREE (3)
JUDGE MITCH PERRY

EMW WOMEN'S SURGICAL CENTER, P.S.C., *et al.* PLAINTIFFS

v.

DANIEL CAMERON, in his official capacity as
Attorney General of the Commonwealth of Kentucky, *et al.* DEFENDANTS

ATTORNEY GENERAL DANIEL CAMERON'S MOTION TO DISMISS

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") include ten Counts in their Verified Complaint, eight of which relate to substantive constitutional claims.[1] Of the eight substantive claims, Plaintiffs only have standing to bring two of them and both of those claims will be moot by July 19, 2022.

This Court has no jurisdiction to hear Plaintiffs' attempts to challenge the Human Life Protection Act and the Heartbeat Law on the basis of privacy and self-determination. Kentucky case law forecloses the use of third-party standing, and Plaintiffs do not allege any personal injury related to privacy or self-determination. Nor does this Court have jurisdiction over Plaintiffs' claims as to the unlawful delegation of authority and approval by an authority other than the General Assembly—claims that relate *only* to the Human Life Protection Act and not to the

[1] Counts 1–8 assert substantive claims. The other two counts, 9 and 10, relate to requests for relief.

Heartbeat Law—because they are generalized grievances. And even if Plaintiffs had standing, they fail to state claims that entitle them to relief.

Therefore, Defendant Daniel Cameron in his official capacity as Attorney General of the Commonwealth of Kentucky moves the Court to dismiss the Plaintiffs' Complaint under CR 12.02(a) and (f).

BACKGROUND

On June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Court overturned *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), and held that the U.S. Constitution does not protect a right to abortion. Accordingly, the *Dobbs* decision "return[s] the issue of abortion to the people's elected representatives." 142 S. Ct. at 2243.

Elected representatives in Kentucky enacted the Human Life Protection Act in 2019. The Act established the law regarding abortion in Kentucky in the event a decision of the Supreme Court freed the Commonwealth from the federally-imposed legalization of abortion under *Roe*. Once *Dobbs* "restor[ed] to the Commonwealth of Kentucky the authority to prohibit abortion," KRS 311.772(2)(a), the law went into effect immediately, prohibiting all abortions in the Commonwealth unless the procedure is necessary to prevent death, substantial risk of death, or "serious, permanent impairment of a life-sustaining organ." KRS 311.772(4). In response to *Dobbs*, Plaintiffs filed this action to block enforcement of the Human Life Protection Act, as well as Kentucky's Heartbeat Law.

The General Assembly passed Senate Bill 9—the Heartbeat Law—also in 2019. The Heartbeat law prohibits abortion after an unborn child's "heartbeat has been detected." KRS 311.7706(1). Like the Human Life Protection Act, it contains exceptions for when an abortion is "intended to prevent the death" or "serious risk of the substantial and irreversible impairment of a major bodily function" of the woman. KRS 311.7706(2). Unlike the Human Life Protection Act, the Heartbeat Law went into effect immediately upon the Governor signing the bill on March 15, 2019. Enforcement of it had been enjoined by a federal district court in reliance on *Roe* and federal law, but in light of *Dobbs*, the temporary restraining order against the Heartbeat Law was dissolved on June 29, 2022. *EMW Women's Surgical Ctr., P.S.C. v. Secretary of Kentucky's Cabinet for Health & Fam. Servs.*, No. 3:19-cv-00178 (W.D. Ky. June 29, 2022).

Plaintiffs claim that both of these laws violate a never-before-recognized state constitutional right to abortion protected by Sections 1 and 2 of the Kentucky Constitution. Compl. ¶¶ 91–102, 123–30. Plaintiffs also claim that the triggering provision in the Human Life Protection Act is an impermissible delegation of legislative power, an improper approval by an authority other than the General Assembly, and unconstitutionally vague and unintelligible. Compl. ¶¶ 103–11, 112–22.

Three days after Plaintiffs sued, this Court issued a restraining order prohibiting the Attorney General from enforcing the Human Life Protection Act and the Heartbeat Law against Plaintiffs and their staff. A hearing on Plaintiffs' Motion

for Temporary Injunction was held on July 6, 2022, and the Court heard from two witnesses proffered by Plaintiffs and two witnesses proffered by Attorney General Cameron. Plaintiffs and Attorney General Cameron have filed simultaneous findings of fact and conclusions of law. Attorney General Cameron has also filed a Response to Plaintiff's Motion for Temporary Injunction.

STANDARD OF REVIEW

"Whether a court should dismiss an action pursuant to CR 12.02 is a question of law." *Lincoln Trail Grain Growers Ass'n, Inc. v. Meade Cnty. Fiscal Ct.*, 632 S.W.3d 766, 770 (Ky. App. 2021) (citing *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002)). "The pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true," *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987) (citing *Ewell v. Central City*, 340 S.W.2d 479, 480 (Ky. 1960)), but when "it appears the pleading party would not be entitled to relief under any set of facts which could be proved," the trial court should grant the motion to dismiss. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (quoting *Pari–Mutuel Clerks' Union of Ky., Local 541 v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)).

ARGUMENT

I. This Court lacks jurisdiction because Plaintiffs do not have constitutional standing.

Constitutional standing is a prerequisite to any suit filed in Kentucky's courts. *See Commonwealth Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 196–99 (Ky. 2018)). If a plaintiff cannot show he is "entitled to have the court decide the merits of the

dispute or of particular issues," the "court lacks original jurisdiction . . . because the case is nonjusticiable due to the plaintiff's failure to satisfy the constitutional standing requirement." *Lincoln Trail,* 632 S.W.3d at 770–71. In adopting the analysis for constitutional standing from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992),[2] the Kentucky Supreme Court said that for a party to sue, it must have injury, causation, and redressability. *Sexton*, 566 S.W.3d at 196; *accord Overstreet v. Mayberry*, 603 S.W.3d 244, 260 (Ky. 2020). The Court explained that this means "[a] plaintiff must allege *personal* injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (citation omitted) (emphasis added). Accordingly, Plaintiffs cannot rely on third-party standing to assert an injury and must instead demonstrate a personal injury—which they have not done.

A. Counts 1, 2, 7 and 8: Kentucky courts do not allow third-party standing.

In Counts 1, 2, 7, and 8 of the Verified Complaint, Plaintiffs allege that the Human Life Protection Act and the Heartbeat Law violate their "patients' right of privacy as guaranteed by Sections One and Two of the Kentucky Constitution," Compl. ¶¶ 96; 126, and their "patients' right to self-determination as guaranteed by" the same. *Id.* at ¶¶ 102; 130. But even if Plaintiffs could demonstrate that the protections of Sections 1 and 2 of the Kentucky Constitution could be extended to

[2] Kentucky's formal adoption of the *Lujan* test makes U.S. Supreme Court cases about constitutional standing, at the very least, extremely persuasive. *See, e.g., Ward v. Westerfield*, 2022 WL 1284024, 2020-SC-0520-I, at *3 (Ky. Apr. 28, 2022) (not final) (looking to "persuasive" federal authority for guidance in dismissing a lawsuit, after partial judgment, for lack of constitutional standing).

protect a right to abortion—and they cannot—that right would belong only to pregnant women.[3] And no pregnant woman seeking an abortion is a plaintiff here. Therefore, there is no one to allege the kind of personal injury that Kentucky courts require.

While some lower federal courts have had a practice of ignoring the U.S. Supreme Court's doctrine on third-party standing in abortion cases,[4] Kentucky courts have no such lack of clarity. In Kentucky, plaintiffs must assert their "own" legal rights: "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, 950–51 (Ky. 1995) (holding that an association "designated as an employer of persons who engage in lobbying activities with the legislative and executive branches of state government . . . lack[ed] standing to challenge [two statutes] on behalf of [its] employee lobbyists"); *Ward v. Westerfield*, --- S.W.3d ---, 2022 WL 1284024, at *4 (Ky. Apr. 28, 2022) ("[A]ll litigants . . . must allege a concrete and particularized injury-in-fact to invoke the jurisdiction of Kentucky courts.") (not final).

Plaintiffs have not made the requisite showing that they are entitled to review by this Court because at no point have they alleged, much less demonstrated, how the laws harm them in any personal way that relates to their privacy and self-determination claims.[5] So Counts 1, 2, 7 and 8 must be dismissed for lack of standing.

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[3] Plaintiffs do not disagree since they clearly alleged that the laws violate their "patients' right[s]." See Compl. ¶¶ 96, 102, 126, 130.

[4] *Dobbs* has now indicated those federal decisions are likely no longer good law, 142 S. Ct. at 2275 (stating that the decisions "ignored the Court's third-party standing doctrine"), so even in federal court, it would be doubtful that plaintiffs would have standing.

[5] To the extent Plaintiffs were attempting to raise procedural due process claims relating to enforcement of criminal penalties and loss of business, they did not do so in their Complaint other

B. Counts 3 and 4: A generalized grievance is not sufficient for standing.

In Counts 3 and 4 of the Verified Complaint, Plaintiffs allege that KRS 311.772 contains an unlawful delegation of legislative authority and allows for an unconstitutional approval by authority other than the General Assembly in violation of Sections 27, 28, 29, and 60 of the Kentucky Constitution. Plaintiffs lack standing to bring these claims as well.

"[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Ward*, 2022 WL 1284024, at *2 (citation omitted); *see also Lujan,* 504 U.S. at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not" possess constitutional standing). The rule barring adjudication of generalized grievances is a recognition that these issues are "more appropriately addressed in the representative branches." *Lawson v. Office of the Attorney General*, 415 S.W.3d 59, 67 (Ky. 2013) (citation omitted). Therefore, to avoid courts becoming improperly engaged in policy questions, the plaintiff must demonstrate an injury that is distinct, *Beshear v. Acree*, 615 S.W.3d 780, 828 (Ky. 2020), and that not every Kentuckian could assert, *Ward*, 2022 WL 1284024, at *3.

than perhaps with respect to the vagueness and unintelligibility claims. And even if they had, the potential injury due to enforcement of the laws would be hypothetical. So there is no "personal injury" that is "likely to be redressed by the requested relief." *See Beshear v. Acree*, 615 S.W.3d 780, 828 (Ky. 2020) (quoting *Allen v. Wright,* 468 U.S. 737, 751 (1984).

Plaintiffs are wrong that KRS 311.772 involves either unlawful delegation or improper approval by an authority other than the General Assembly, *see infra* Section IV.B., but regardless, they have not demonstrated any direct injury to them that has arisen because of the General Assembly's decision to condition the effectiveness of the law on the happening of one of the two named events. And that is what they must do. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("The party who invokes the [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally."). A challenge that could be asserted by any Kentuckian that raises a generally available grievance is not a justiciable case or controversy.[6] *Ward,* 2022 WL 1284024, at *3 ("A litigant raising a generally available grievance about government, no matter how sincere, and claiming only harm to his and every other citizen's interest in the proper application of the laws, does not state a justiciable case or controversy."). Therefore, Plaintiffs lack standing to bring the claims raised in counts 3 and 4 and the Court should dismiss them under CR 12.02(a).

II. The legality of abortion is a political question in which this Court has no role.

Wholly apart from their lack of standing, Plaintiffs improperly ask this Court to engage in the sort of law-making that our Constitution reserves for the General Assembly. Whether and how to permit abortion is a policy question. And whether and

[6] "[B]ecause the Plaintiffs have not raised a case or controversy, a declaration of rights is not available to the Plaintiffs." *Beshear*, 615 S.W.3d at 828 (internal citation omitted).

how the Commonwealth will protect women and children is a policy question that the Kentucky Constitution places in the hands of the General Assembly. Ky. Const. §§ 27 and 28. "[T]he legislature alone has the constitutional imperative to legislate to protect the public health and welfare." *Seum v. Bevin*, 584 S.W.3d 771, 774 (Ky. 2019); *see also Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 81 (Ky. 2018) (explaining that where "a discretion that is committed by a textually demonstrable provision of the Constitution" is exercised by the legislature, the courts should not interfere).

The Commonwealth's policy-making body, the General Assembly, has determined that human life in the Commonwealth begins at "fertilization." KRS 311.720(8), 311.772(1)(c). The Human Life Protection Act and the Heartbeat Law are implementations of that determination. And such determinations are uniquely reserved for the legislative branch of the Commonwealth. "[T]he Legislature by its statutory declarations is supreme in the adoption of what may be the state's public policy on a particular question." *Bankers Bond Co. v. Buckingham*, 97 S.W.2d 596, 600 (Ky. 1936).

In contrast, courts are not the moral authority of the Commonwealth with the right to supplant the legislature's views of public policy with their own. *Robinson v. Commonwealth*, 212 S.W.3d 100, 106 (Ky. 2006). This remains true even if a court believes the policy chosen by the General Assembly is contrary to the public interest. *See Owens v. Clemons*, 408 S.W.2d 642, 645 (Ky. 1966). Only by maintaining deference to the policy-making authority of the legislature can the judiciary avoid

violating the strict separation of powers instituted by the Kentucky Constitution. *See Seum*, 584 S.W.3d at 775.

Therefore, when a case presents a question that is based solely on policy decisions, the court must decline to exercise jurisdiction. This is true despite the fact that the court may believe that the General Assembly adopted the wrong policy or that it failed to balance competing interests adequately. Overriding the considered judgment of the General Assembly on a matter committed by the Constitution to its discretion would be a direct violation of Sections 27 and 28 of the Constitution. Here, Plaintiffs present nothing more than a policy question. *See infra* Section IV.A. (discussing Plaintiffs complete lack of legal support for a novel state constitutional right to abortion). Therefore, this Court should dismiss Plaintiffs' claims for lack of jurisdiction under the political question doctrine.

III. Counts 5 and 6: Plaintiffs' claims as to vagueness and unintelligibility will be moot on July 19, 2022.

According to Plaintiffs' Complaint, the Human Life Protection Act is unconstitutionally vague and unintelligible because it "leaves it unclear whether it is now in effect [as of June 24, 2022, when the U.S. Supreme Court entered judgment in *Dobbs*], or will go into effect on July 19, 2022, when the mandate issues." Compl. ¶ 117. This Court should dismiss these claims because they will likely be moot well before this motion is even fully briefed.

Plaintiffs are wrong that the effective date of the Act is vague or unintelligible, *see infra* Section IV.C., but the Court need not address the merits of those claims because the issue will be resolved within a matter of hours from the filing of this

motion. Even if there was a question as to when the condition set in KRS 311.772(2)(a) would be met, according to Plaintiffs, it will certainly be met by July 19, 2022. Compl. ¶ 117 (providing two options for the effective date of the Human Life Protection Act: either the day the decision was announced, June 24, 2022, or the day the mandate issues, July 19, 2022). Therefore, it is likely that before this Court will be able to issue its decision, there will be no further relief this Court can provide because the claims will be moot. *See Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994) (explaining that a challenge is moot when there is no grievance to resolve). Accordingly, Counts 5 and 6 should be dismissed.

IV. Plaintiffs fail to state a claim upon which this Court can grant relief.

Even if this Court were to find that it has jurisdiction to hear Plaintiffs' claims, it should dismiss them for Plaintiffs' failure to state claims upon which this Court can grant relief. It is Plaintiffs' burden to allege facts that make it plausible the relief they seek is owed to them. *See Morgan v. O'Neil*, 652 S.W.2d 83, 85 (Ky. 1983). But Plaintiffs have not carried their burden.

A. Plaintiffs are not entitled to relief with respect to their privacy and self-determination claims under any set of facts.

Plaintiffs assert a novel and unsupported claim alleging that the right to privacy and right to self-determination protected by Sections 1 and 2 of the Kentucky Constitution extend to protect a right to abortion. There is no legal or factual basis for these claims. And the burden is indeed on Plaintiffs to demonstrate the basis. *Cornelison v. Commonwealth*, 52 S.W.3d at 570, 572–73 (Ky. 2001) ("[T]he Commonwealth does not bear the burden of establishing the constitutionality of a

statute, rather the one who questions the validity of an act bears the burden to sustain such a contention." (internal citation omitted)).

1. The Kentucky Constitution does not support Plaintiffs' novel claim to a right to abortion.

When Kentucky courts interpret provisions in the Kentucky Constitution, they "look first and foremost to the express language of the provision." *Westerfield v. Ward*, 599 S.W.3d 738, 747 (Ky. 2019). There is no text in the Kentucky Constitution that provides, or even hints at, a constitutional right to abortion. Indeed, the word abortion appears nowhere in any of the 263 provisions that make up Kentucky's Constitution. And "[t]he basic rule . . . is to interpret a constitutional provision according to what was said and not what might have been said; according to what was included and not what might have been included." *Commonwealth v. Claycomb ex rel. Claycomb*, 566 S.W.3d 202, 215 (Ky. 2018) (citation omitted).

"Neither legislatures nor courts have the right to add to or take from the simple words and meaning of the constitution." *Id.* (citation omitted). The Kentucky Supreme Court has made this principle clear beyond doubt in recent years. For example, in *Claycomb*, the Court struck down a statutory delay on a litigant's right to access the Court of Justice by simply holding that the text of the Constitution is clear on the issue. *Id.* at 215–16 ("Section 14, originally written and adopted in 1792, does not proscribe the creation of 'undue' or 'unreasonable' delay on a Kentuckian's access to due course of law; Section 14 plainly proscribes delay."). In *Westerfield v. Ward*, the Court emphasized that "[i]t is to be presumed that in framing the constitution great care was exercised in the language used to convey its meaning and

as little as possible left to implication." 599 S.W.3d at 748 (citation omitted). In applying this principle, the Court went so far as to overrule nearly 60 years of precedent because "[n]ow . . . we are unable to square such a statement with the plain text" of the Constitution. *Id.* Constitutional claims must be based on the text of the document, not the creative thinking of a lawyer or judge—and there is nothing in the text of the Constitution that would provide protection for a right to abortion.

The Debates surrounding the ratification of the 1891 Constitution only serve to make this clearer. Our Supreme Court has made plain that the words in the Constitution "should be given the meaning and significance that they possessed at the time they were employed, and the one that the delegates of the convention that framed the instrument, and the people who voted their approval of it, intended to express and impart." *Claycomb*, 566 S.W.3d at 215 (citation omitted). During the Debates, not a single Delegate even suggested that Kentucky's new charter would include a right to abortion. To the extent the 1890-91 Debates even discussed abortion, the Delegates recognized that the practice was prohibited. *See* 1890–91 Debates at 1099, 2476, and 4819.[7] The Debates make clear that the Delegates understood abortion was a crime, a proposition that is entirely inconsistent with any notion that the Framers embedded an unwritten right to abortion in the 1891 Constitution. More importantly, the fact that not a single Delegate argued or even suggested that the provisions under consideration would protect the right to abortion

[7] The Debates of the Constitutional Convention of 1890–91 can be accessed here: https://louisville.edu/law/library/special-collections/kentucky-constitution-collection.

is compelling evidence that Kentucky's Constitution does not contain within it a right to abortion.

Kentucky courts and the General Assembly have always acted consistently with this understanding. As early as 1879, Kentucky's highest court recognized the common law crime of "procuring an abortion."[8] *Mitchell v. Commonwealth*, 78 Ky. 204, 204 (Ky. 1879). It also explicitly recognized that the General Assembly could—and should—prohibit abortion at all stages:

> In the interest of good morals and for the preservation of society, *the law should punish abortions and miscarriages, wilfully produced, at any time during the period of gestation*. That the child shall be considered in existence from the moment of conception for the protection of its rights and property, and yet not in existence, until four or five months after the inception of its being, to the extent that it is a crime to destroy it, presents an anomaly in the law that ought to be provided against by the law-making department of the government.

Id. at 209–10 (emphasis added). As discussed above, not a single Delegate at the 1891 Convention disclaimed what *Mitchell* had so recently held.[9]

Roughly 20 years later, the General Assembly acted on *Mitchell*'s holding. In 1910, the General Assembly enacted law to prohibit performing abortions at any stage of pregnancy. *Dobbs*, 142 S. Ct. at 2296 (outlining Kentucky's 1910 prohibition against abortion). For more than 60 years, the General Assembly maintained this

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[8] The 1849 Debates contain two references to "abortion," neither of which are relevant here. 1849 Kentucky Constitutional Debates at 285, 1020, https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1002&context=ky_cons_conventions.

[9] Nor did the views of Kentucky's high court change after the adoption of the 1891 Constitution. *See, e.g.*, *Wilson v. Commonwealth*, 60 S.W. 400, 401–02 (Ky. 1901); *Clark v. Commonwealth*, 63 S.W. 740, 744–47 (Ky. 1901); *Goldnamer v. O'Brien*, 33 S.W. 831, 831–32 (Ky. 1896); *see also Calloway Cnty.*, 607 S.W.3d at 572 ("Cases decided contemporaneously or close in time to the constitutional convention would appear to be persuasive of Delegates' intent." (cleaned up)).

statutory prohibition throughout the entirety of the pre-*Roe* era. *See, e.g.*, KRS 436.020; Ky. Stat. 1219a.

Not once throughout those decades did Kentucky's highest court ever suggest that the General Assembly's prohibition was unconstitutional. In fact, shortly before *Roe*, Kentucky's highest court unanimously rejected a federal constitutional challenge to Kentucky's statute prohibiting abortions. *See Sasaki v. Commonwealth*, 485 S.W.2d 897, 904 (Ky. 1972), *vacated by Kentucky v. Sasaki*, 410 U.S. 951 (1973). And a three-judge district court likewise rejected a federal constitutional challenge to Kentucky's prohibition of abortions. *Crossen v. Attorney General of Kentucky*, 344 F. Supp. 587, 593 (E.D. Ky. 1972). Only after *Roe* did Kentucky's highest court begrudgingly acknowledge that it was compelled to render KRS 436.020 unconstitutional as a matter of federal law. *Sasaki v. Commonwealth*, 497 S.W.2d 713, 713–14 (Ky. 1973). And even in doing so, three justices wrote separately to express their view that it is within the power of the General Assembly to restrict the practice of abortion in the Commonwealth. *Id*. at 714 (Osborne, J., concurring); *id*. at 714–15 (Reed, J., concurring in an opinion joined by Palmore, C.J.). More specifically, Justice Reed and Chief Justice Palmore recognized "the state's right to *legislate* on the subject" of abortion and extolled the importance of "refer[ring the] issue . . . to the political process even though groups would be angered." *Id.* at 714–15 (Reed, J., concurring in an opinion joined by Palmore, C.J.) (emphasis added). They further explained that there was "no existing legal principle" to justify inserting the judiciary into the abortion debate. *Id*.

Kentucky's highest court was not the only branch of government that made its views known immediately after *Roe*. Importantly, the year after *Roe* was decided, the General Assembly reiterated the Commonwealth's policy on abortion: "If . . . the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of *all* human beings regardless of their degree of biological development shall be fully restored." KRS 311.710(5) (emphasis added). This provision passed the General Assembly overwhelmingly with lopsided votes of 26–2 and 80–7. It remains a part of Kentucky law nearly 50 years later. Throughout the post-*Roe* but pre-*Dobbs* era, the General Assembly enacted numerous statutes regulating abortion. *See generally* KRS 311.710 through KRS 311.830. And it has repeatedly included language in such statutes denying any construction that would recognize a right to abortion. *See, e.g.*, 2022 House Bill 3 § 10(1) (clarifying that "[n]othing in . . . this Act shall be construed as creating or recognizing a right to abortion").

Thus, the statutes at issue in this litigation—the Human Life Protection Act and the Heartbeat Law—simply continue Kentucky's longstanding public policy of protecting unborn life.

This history matters because of the novelty of the Plaintiffs' interpretation of the Kentucky Constitution. Plaintiffs advance an unprecedented theory of the Constitution that is inconsistent with "the actual, practical construction that has been given to [the Constitution] by the people" since its inception. *See Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957). In such a circumstance, the history should

be "entitled to controlling weight." *Id.*; *accord Gayle v. Owen Cnty. Court*, 83 Ky. 61, 69 (Ky. 1885) (explaining that the challenged power of the "Legislature has been too long conceded to be now regarded as an open question"). And this history of consistent rejection of a right to abortion indicates there is no set of facts under which Plaintiffs would be entitled to relief.

2. Plaintiffs identify no Kentucky case law indicating a right to abortion is protected by the Kentucky Constitution.

The case law Plaintiffs identify does not support a contradictory conclusion. First, Plaintiffs point to *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)—a case about the right to privacy that expressly limits its holding in a way that precludes its extension to protect a right to abortion. Pls.' TI Mem. 22–24. *Wasson* is limited by its own terms to private conduct that has no impact on third parties; it cannot lend any support for a right to abortion. The Kentucky Supreme Court held in *Wasson* that a criminal statute punishing consensual sexual intercourse "with another person of the same sex" violated Kentucky's limited right to privacy. 842 S.W.2d at 488, 492–99. Abortion does not fit within this narrow right to privacy. In fact, *Wasson* expressly limited its holding in a way that excludes conduct—like abortion—that affects third parties.[10] As the Court explained, the conduct at issue in

[10] And the Kentucky Supreme Court has continued to cabin *Wasson* to this holding. *See, e.g.*, *Blue Movies, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 317 S.W.3d 23, 29 (Ky. 2010) ("While state courts are free to expand individual rights beyond the federal floor, *see* [*Wasson*], we adjudge that on the issue of regulating sexually oriented businesses, the Kentucky Constitution does not grant broader protections than the federal Constitution, except for the blanket ban on touching as discussed below."); *Colbert v. Commonwealth*, 43 S.W.3d 777, 780 (Ky. 2001) (declining to read *Wasson*'s right to privacy to extend a "greater protection[] to the rights in property interests against warrantless search and seizure"); *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 473–74 (Ky. 1998) (rejecting a *Wasson* right-to-privacy challenge against a statute allowing the collection and dissemination of personal healthcare data).

Wasson "*does not operate to the detriment of others*" and is thus "beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." *Id.* at 496 (internal quotation marks omitted) (emphasis added). That is to say, *Wasson* expressly premised its holding on the conduct at issue "not operat[ing] to the detriment of others." *See id.*

That makes *Wasson* wholly inapplicable here given that abortion does in fact "operate to the detriment" of the unborn. A pregnancy is characterized by the presence of an unborn human being,[11] and abortion functions as a termination of pregnancy. Therefore, "decisions involving matters such as intimate sexual relations, contraception, and marriage" are "fundamentally different [from abortion], as both *Roe* and *Casey* acknowledged, because [abortion] destroys . . . an 'unborn human being.'" *Dobbs*, 142 S. Ct. at 2243. Further, from the standpoint of the unborn child, there is nothing "consensual" about abortion. The fact that abortion—unlike private sexual conduct—"operate[s] to the detriment of [unborn children]" means that *Wasson*'s limited right to privacy simply cannot support the Plaintiffs' novel claim. *See Wasson*, 842 S.W.2d at 496 (citation omitted).

Second, the Plaintiffs' point to three cases recognizing the responsibility of the Commonwealth to protect the lives of those who cannot speak for themselves. *DeGrella ex rel. Parrent v. Elston*, 858 S.W.2d 698, 709–10 (Ky. 1993); *Woods v. Commonwealth*, 142 S.W.3d 24, 31–32, 43–45, 50 (Ky. 2004); *Tabor v. Scobee*, 254

[11] Even if Plaintiffs do not view the unborn child as a human life, the General Assembly has clearly determined that the organism in the womb is an unborn human being "from fertilization to full gestation and childbirth." KRS 311.772(1)(c).

S.W.2d 474, 475 (Ky. 1951)); Pls.' TI Mem. 25–26. This trio of decisions also cut against Plaintiffs because these decisions demonstrate the Commonwealth's profound interest in protecting the rights of persons—like unborn children—who cannot speak for themselves.

In *DeGrella*, the court recognized that "the right to withdrawal of further medical treatment for a person in a persistent vegetative state . . . can be exercised by an incompetent person through the process of surrogate decision-making so long as the wishes of the patient are known." 858 S.W.2d at 709. In other words, "[t]he subject matter of [*DeGrella*] is not judicial power to terminate treatment, but Sue DeGrella's right to terminate treatment, a choice she made before she was reduced to her present state, and retained when this tragedy befell her." *Id.* at 710. It was DeGrella's choice, not that of her guardian ad litem, that the Court evaluated. If *DeGrella* has any relevance here, it supports laws like the Human Life Protection Act and the Heartbeat Law that prohibit the abortion of an unborn child who has not chosen the termination of life for itself.

Similarly in *Woods*, the court discussed the "right of a competent person to forego medical treatment by either refusal or withdrawal." 142 S.W.3d at 31–32 (emphasis added). It is the right of a person to refuse medical care—not the right to end another person's life—that was at issue in *Woods*. Yet even in that situation, *Woods* was careful to note that "this right is not absolute. The individual's liberty interest must be balanced against relevant state interests," two of which include "preserving life" and "protecting innocent third parties." *Id.* at 32. And in the exercise

of that right, the Court expressly noted that "[i]t is also universally accepted that the state may not deprive citizens of their constitutional rights solely because they do not possess the decisional capacity to personally exercise them." *Id.* Not only that, but medical-treatment rights "extend[] not only to the competent but also to the incompetent, 'because the value of human dignity extends to both.'" *Id.* (citation omitted). Ultimately, *Woods* found that to end the life of an individual who cannot speak for himself or herself requires clear and convincing evidence that it is in the best interest of the individual to do so.[12] *Id.* at 43–45, 50. And the Court made sure to note that public-policy decisions of that sort belong with the General Assembly. *Id.* at 45–46.

Tabor was decided pre-*Roe* when abortion was banned in the Commonwealth. KRS 436.020; Ky. Stat. 1219a. So it is difficult to see how anything in *Tabor* could be viewed as a pronouncement about a state constitutional right to abortion. In any event, *Tabor* confronted only a question about performing medical procedures without the consent of the patient. 254 S.W.2d at 475. That is irrelevant here, where the only consent that could be at issue is the lack of consent from an unborn child. Like the other cases, *Tabor* also supports the notion that a doctor cannot end the life of an unborn child without that child's consent. *See id.*

* * *

[12] Although outside the pleadings and therefore not necessary for this motion, the Attorney General notes that the macroeconomic and utilitarian testimony offered at the July 6 hearing by a Texas economist, Jason Lindo, is wholly inadequate to permit the Plaintiffs to demonstrate that ending the life of an unborn child is in the child's best interest.

The burden is on Plaintiffs to demonstrate that they are entitled to relief. While there may be some instances in which a novel theory of law leads to protection for a previously-unrecognized right, to do so when there is not only no textual support in the Constitution, but also long-standing refusal to adopt the idea by the courts and a consistent rejection of the policy that would be implicated by such a right by the government branch tasked with policy-making, would be not merely novel. It would be an exercise in prohibited judicial law-making.

B. Plaintiffs cannot show they are entitled to relief with respect to their unlawful delegation and improper approval claims.

The unlawful delegation and improper approval claims brought in Counts 3 and 4 of the Verified Complaint are barred by case law that clearly demonstrates there is no way Plaintiffs would be entitled to relief. With no way to avoid this precedent, Plaintiffs just ignore it.

The highest court in Kentucky has long been clear that "[t]he legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Bloemer v. Turner*, 137 S.W.2d 387, 391 (Ky. 1939) (citation omitted). Stated another way: "[W]hen we say that the Legislature may not delegate its powers, we mean that it may not delegate the exercise of its discretion as to what the law shall be." *Ratliff v. Hill,* 168 S.W.2d 336, 338 (Ky. 1943) (quoting *Bloxton v. State Highway Comm.*, 8 S.W.2d 392, 395 (1928)).

Only the General Assembly exercised discretion when it determined the scope of Kentucky's post-*Roe* abortion ban. Plaintiffs assert that because KRS 311.772(2)

provides that Kentucky's abortion ban "shall become effective . . . to the extent permitted[] by . . . any decision of the United States Supreme Court" reversing *Roe*, the law improperly delegates the decision regarding what conduct will constitute a crime in Kentucky to the U.S. Supreme Court. Compl. ¶ 107. But this provision does not require, invite, or allow any exercise of legislative power by the Supreme Court. Instead, it provided that if the Supreme Court overruled *Roe*, Kentucky's abortion ban would take effect to the greatest extent possible. The General Assembly exercised its legislative authority and made its policy choice by criminalizing all abortions (unless subject to one of the delineated exceptions). KRS 311.772(3). This policy decision could not be altered by the Supreme Court and would have remained the policy in the Commonwealth even if the Supreme Court had only overturned *Roe* to the extent that states could restrict abortions at fifteen weeks. The provision is a savings clause, not a delegation of any legislative authority.

Furthermore, Kentucky's well-settled rule permits the legislature to pass a law that "become[s] operative on the happening of a certain contingency or future event." *Walton v. Carter*, 337 S.W.2d 674, 678 (Ky. 1960) (citation omitted). This contingency or event may be dependent on the behavior of an out-of-state entity. *Clay v. Dixie Fire Ins. Co.*, 181 S.W. 1123, 1125 (Ky. 1916) (finding the legislature does not surrender legislative authority by conditioning a law on action by an out-of-state entity). Therefore, that the U.S. Supreme Court's decision was a condition precedent for enforcement of the Human Life Protection Act in no way means the General Assembly

unconstitutionally delegated its legislative authority because it was the General Assembly that established the condition. Plaintiffs have not demonstrated otherwise.

Similarly, the Human Life Protection Act does not violate Section 60 of the Kentucky Constitution. With some exceptions, Section 60 prohibits laws from taking effect "upon the approval of any other authority than the General Assembly, unless otherwise expressly provided in this Constitution." But as with the delegation of legislative authority, the law may "become operative where certain prescribed conditions exits." *See Young v. Willis*, 203 S.W.2d 5, 7 (Ky. 1947) (discussing *Commonwealth v. Beaver Dam Coal Co.*, 237 S.W. 1086 (1922)). This is distinct from laws that do not take effect even though all prescribed conditions exist because they are dependent on the discretionary approval of some other body or group—which would not be permissible under Section 60. *Id.*

Once the prescribed condition of the U.S. Supreme Court overturning *Roe* occurred, the Human Life Protection Act became immediately operative. There was no discretion on the part of any body—including the U.S. Supreme Court, the Attorney General, and county prosecutors—as to whether it would become operative, or what the provisions of the law would be. The U.S. Supreme Court's only role was in issuing the decision that satisfied the prescribed condition for the law. The Attorney General and county prosecutors can only enforce or prosecute under the law; they have no ability to approve or disapprove of the law. Therefore, there is no violation of Section 60.

Plaintiffs have stated no claim related to the delegation of authority or Section 60 upon which this Court could grant relief.

C. Plaintiffs are not entitled to relief on their vagueness and intelligibility claims.

To avoid being declared inoperative and void, a law must express its intent intelligibly and be "in language that the people upon whom it is designed to operate or who it affects can understand." *Folks v. Barren Cnty.*, 232 S.W.2d 1010, 1013 (Ky. 1950); *Moore v. N. Ky. Indep. Food Dealers*, 149 S.W.2d 755, 758 (Ky. 1941) (explaining a statute should not be invalidated "unless the intention, object and purpose of the legislature was so vaguely presented as to be incapable of intelligent interpretation and correct application"). A person of ordinary intelligence would have no difficulty understanding that the prohibitions contained in the Human Life Protection Act are effective as soon as the Supreme Court issues a decision that overrules *Roe* and restores to the Commonwealth "the authority to prohibit abortion." KRS 311.772(2).

The opinion in *Dobbs* was that decision. *See, e.g., Opinion, Black's Law Dictionary* (11th ed. 2019) (explaining that an opinion is a "court's written statement explaining its decision in a given case."). The Supreme Court said in its *Dobbs* opinion released on June 24, 2022, "We now overrule [*Roe* and *Casey]* and return that authority [to regulate or prohibit abortion] to the people and their elected representatives." *Dobbs,* 142 S. Ct. at 2284. That statement signified the arrival of the moment when the Commonwealth could enforce the prohibition of abortion the General Assembly had intended when it enacted the Human Life Protection Act.

CONCLUSION

This Court should dismiss all of Plaintiffs' claims for lack of jurisdiction. Having failed to identify and proffer any *personal* injury related to the privacy and self-determination claims, Plaintiffs do not have standing to bring Counts 1, 2, 7 and 8. This means there is no claim that can be sustained against the Heartbeat Law, and no injunction should prevent its immediate effectiveness. Because generalized grievances do not provide Plaintiffs with standing, this Court should also dismiss the challenges to the Human Life Protection Act in Counts 3 and 4. And, as of July 19, 2022, there will be no grievance to resolve with respect to the effective date of the Human Life Protection Act, therefore Counts 5 and 6 are moot and the Court no longer has jurisdiction. Therefore, the Human Life Protection Act should also be effective and in force immediately.

Even if this Court were to exercise jurisdiction, Plaintiffs have failed to state claims upon which this Court can grant relief for the reasons stated above. The test and history of the Kentucky Constitution as well as existing law clearly demonstrates that under no set of facts can Plaintiffs show they are entitled to relief.

Accordingly, Plaintiffs' Complaint should be dismissed with prejudice. An appropriate order is tendered with this motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 18, 2022, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system on counsel of record and additionally by email as indicated below:

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JEFFERSON CIRCUIT COURT
DIVISION THREE (3)
JUDGE MITCH PERRY

EMW WOMEN'S SURGICAL CENTER, P.S.C., *et al.*

PLAINTIFFS

v.

DANIEL CAMERON, in his official capacity as
Attorney General of the Commonwealth of Kentucky, *et al.* DEFENDANTS

ORDER

This matter having come before the Court on the Commonwealth of Kentucky's motion to dismiss, and the Court being sufficiently advised,

It is hereby ordered that the Commonwealth's motion to dismiss be, and hereby is, GRANTED. The Plaintiffs' Complaint is hereby DISMISSED WITH PREJUDICE, and any prior restraining order or injunction entered by the Court in this matter is hereby DISSOLVED.

JUDGE MITCH PERRY,
JEFFERSON CIRCUIT COURT