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
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 6, 2022, the Court held a hearing on Plaintiffs' Motion for a Temporary Injunction. Plaintiffs and Defendant Attorney General Daniel Cameron each offered two witnesses. The proof offered by the witnesses—including Plaintiffs' witnesses—confirmed that Plaintiffs do not have standing to obtain the relief they seek. Further, the proof made abundantly clear that Plaintiffs' case is premised on a disagreement with the General Assembly over public policy, not on a question of the law.[1]

Fundamentally, the proof made plain that Plaintiffs failed to carry their burden to demonstrate irreparable harm or the other factors governing injunctive relief, and therefore, there is no basis on which this Court may grant a temporary injunction of KRS 311.772 and KRS 311.7701–7711. And while Plaintiffs will suffer no irreparable harm if this Court does not restrain enforcement of the challenged laws, the Commonwealth is already suffering irreparable harm with its duly-enacted laws enjoined while Plaintiffs are allowed to engage in practices that the General

[1] The Attorney General further addresses both of these issues in his Motion to Dismiss.

Assembly has identified as unlawful killing of Kentuckians.[2] This Court should therefore deny the motion for a temporary injunction of KRS 311.772 and KRS 311.7701–7711.

PROPOSED FINDINGS OF FACT

I. Procedural Background

1. In 2019, the Kentucky General Assembly enacted the Human Life Protection Act, now codified in KRS 311.772. The Act prohibits abortion unless, according to the "reasonable medical judgment" of a licensed physician, the procedure is necessary "to prevent the 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). The terms of the Act specified that its provisions would become effective immediately upon an amendment to the U.S. Constitution restoring to the Commonwealth the authority to prohibit abortion or "any decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973)." KRS 311.772(2).
2. On June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 142 S. Ct. 2228 (Jun. 24, 2022) and overturned *Roe* in every respect. The *Dobbs* decision thereby fulfilled the prerequisite for KRS 311.772 to go into effect. As a result, on June 24, 2022

[2] Attorney General Cameron fully discusses the harms at issue in this case in his Response to the Plaintiffs' Motion for a Temporary Injunction.

abortion became illegal in the Commonwealth with the exception of the circumstances described in Section (4) of the Act.

3. Plaintiffs brought this challenge in response, alleging both the Human Life Protection Act and Kentucky's Heartbeat Law are unconstitutional.
4. In 2019, the Kentucky General Assembly passed Senate Bill 9, which prohibited abortions after a fetal heartbeat has been detected. Senate Bill 9 was codified in KRS 311.7701–11. Plaintiffs EMW and Ernest Marshall previously challenged this law in federal court. *EMW Women's Surgical Center, PSC v. Friedlander*, No. 3:19-cv-00178. The United States District Court for the Western District of Kentucky enjoined the law and later stayed proceedings pending the Supreme Court's decision in *Dobbs*. After the *Dobbs* decision was handed down, Attorney General Cameron moved to dissolve the temporary restraining order restraining enforcement of KRS 311.7701–11. On June 30, 2022, the federal district court granted the Attorney General's motion and dissolved the temporary restraining order. The case was dismissed without prejudice on the plaintiffs' motion.
5. On the same day, this Court granted the Plaintiffs' motion for a restraining order and enjoined Defendants from enforcing KRS 311.7701–11.
6. The Court held a hearing on the Plaintiffs Motion for Temporary Injunction of both KRS 311.772 and KRS 311.7701–11 on July 6, 2022. The Plaintiffs and the Attorney General each proffered two witnesses.

II. Background on Abortion Providers in Kentucky

7. Plaintiff Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc. ("Planned Parenthood") is a nonprofit corporation incorporated in the state of Washington. (Compl. at 6). It operates a facility in Louisville, Kentucky. (*Id.*). At this facility, Planned Parenthood provides chemical abortions up to 10 weeks LMP and surgical abortions up to 13 weeks and 6 days LMP. (Joint Stipulation, at 2).

8. Plaintiff EMW Women's Surgical Center, P.S.C. ("EMW") is a Kentucky corporation located in Louisville. For first trimester abortions, EMW performs suction curettage abortions, (VR 7-6-2022 at 11:11:16–23, Transcript at 81), and provides chemical abortions up to 10 weeks LMP. (Joint Stipulation at 1; VR 7-6-2022 at 11:11:26–29, Transcript at 60). EMW also performs dilation and evacuation ("D&E") abortions up to 15 weeks LMP. (Joint Stipulation, at 1; VR 7-6-2022 at 10:42:12–43:38, Transcript at 60). In 2017, EMW reported performing 1,489 chemical abortions, 1,168 suction curettage abortions, and 523 D&E abortions. (VR 7-6-2022 at 10:33:06–10:35:28, Transcript at 53–54).

9. Plaintiff Ernest Marshall, M.D. is a board-certified obstetrician gynecologist who owns EMW and performs abortions there. (Joint Stipulation at 1–2).

10. Ashlee Bergin, M.D., M.P.H. is a board-certified obstetrician gynecologist, who also performs abortions at EMW. (VR 7-6-2022 at 10:37:44–55, Transcript at 56). She performs chemical and D&E abortions. (VR 7-6-2022 at 10:28:18–38, Transcript at 47–48).

11. Dr. Bergin does not have a contract with EMW and is not an employee of EMW; she performs abortions at EMW as part of her role as Assistant Professor at the University of Louisville School of Medicine in the Department of Obstetrics, Gynecology, and Women's Health. (VR 7-6-2022 at 10:22:40–55, 10:25:00–07, Transcript at 44–45). The University of Louisville pays her, and EMW reimburses the University for her time at EMW. (VR 7-6-2022 at 10:25:37–52, Transcript at 45). EMW does pay Dr. Bergin directly for any overnight or weekend services she provides at EMW. (VR 7-6-2022 at 11:33:06–36, Transcript at 84).

12. Dr. Bergin is not affiliated with Planned Parenthood. (VR 7-6-2022 at 10:21:30–38, Transcript at 42).

13. Dr. Bergin and EMW perform D&E abortions beginning in the second trimester, once the fetus reaches fourteen weeks zero days gestation. (VR 7-6-2022 at 10:28:38–54, 11:11:37–50, Transcript at 48–49, 81). The D&E procedure involves what KRS 311.787 defines as dismemberment of the fetus and what Dr. Bergin describes as "tissue separation." Dr. Bergin admits that "dismemberment" and "tissue separation" refer to the same physical procedure. (VR 7-6-2022 at 10:31:07–17, Transcript at 51).

14. House Bill 454 prohibits dismemberment abortions. The law was enjoined by a federal district court and then affirmed by a panel of the Sixth Circuit. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785 (6th Cir. 2020). Attorney General Cameron sought leave to intervene to file a motion for

rehearing en banc. The motion was denied by the same panel. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 831 Fed. Appx 748 (6th Cir. 2020). But the United States Supreme Court granted a writ of certiorari and affirmed the Attorney General's right to intervene to defend the law. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022). Consequently, the case is not final, and the Attorney General's motion for rehearing en banc is before the full Sixth Circuit Court of Appeals. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, Case No. 19-5516 (6th Cir.).

15. At EMW, "[p]atients are required to submit payment prior to being seen and evaluated." (VR 7-6-2022 at 10:32:28–36, Transcript at 52). Abortions cost $750-2,000. (VR 7-6-2022 at 10:32:41–45, Transcript at 52). Patients must make arrangements to pay in advance. (VR 7-6-2022 at 10:32:57–10:33:04, Transcript at 52).

III. Background on Other Witnesses

16. Jason Lindo is a professor of economics at Texas A&M University. (VR 7-6-2022 at 11:37:27–31, Transcript at 89). His field of research is health economics. (VR 7-6-2022 at 11:39:40–41, Transcript at 91). He was tendered by Plaintiffs as an expert in "economics and policy evaluation." (VR 7-6-2022 at 11:40:43–49, Transcript at 92).

17. Monique Chireau Wubbenhorst, M.D., M.P.H. is a board-certified obstetrician gynecologist, who has practiced for over thirty years. (VR 7-6-2022 at 1:51:52–1:52:01, Transcript at 176–77). The focus of her clinical work has been on

underserved populations, specifically including African American women, inner-city women, and women in Appalachia. (VR 7-6-2022 at 1:52:18–25, Transcript at 176). She has taught both clinical medicine and ethics in medicine at Harvard, and taught residents and medical students in clinic while at Duke University. (VR 7-6-2022 at 1:52:45–1:53:19, Transcript at 176–77). Dr. Wubbenhorst has written around twenty peer-reviewed articles or papers, including one looking at the impact of socioeconomic status and racism for pregnancy outcomes in black, white, and Hispanic women, and others on pregnancy risks including pre-eclampsia, high blood pressure, and stroke. (VR 7-6-2022 at 1:53:40–55:08, Transcript at 178–79). For the hearing on Plaintiffs' Motion for Temporary Injunction, Dr. Wubbenhorst was qualified as an expert witness for the Attorney General in the field of medicine, specifically obstetrics, gynecology, and women's health. (VR 7-6-2022 at 1:58:21–26, Transcript at 181).

18. O. Carter Snead is a professor of law at the University of Notre Dame where he is also a professor of Political Science and the Director of the de Nicola Center for Ethics and Culture. (VR 7-6-2022 at 3:31:40–50, Transcript at 243–44). His research is in the area of public bioethics, which is an interdisciplinary field of inquiry that involves the law and philosophy. (VR 7-6-2022 at 3:32:50–3:33:15, Transcript at 244–45). Professor Snead has conducted research in public bioethics both in his capacity as a faculty member at the University of Notre Dame and as general counsel to the President's Council on Bioethics,

which was a White House Advisory Committee. (VR 7-6-2022 at 3:33:24–40, Transcript at 245). He also led the U.S. delegation for the negotiation of the Universal Declaration on Bioethics and Human Rights at UNESCO. (VR 7-6-2022 at 3:35:19–40, Transcript at 246–47). He was offered as an expert witness in public bioethics. (VR 7-6-2022 at 3:40:51–53, Transcript at 251).

19. No woman who is a current or prospective patient of EMW or Planned Parenthood offered testimony. Nor did Plaintiffs identify anyone who is allegedly aggrieved by the Human Life Protection Act or the Heartbeat Law. This includes the six anonymous women who submitted "Jane Doe" affidavits on behalf of Plaintiffs.

20. EMW offered no employee to testify at the July 6 hearing.

21. Planned Parenthood offered no employee to testify at the July 6 hearing.

IV. Risk of Pregnancy, Childbirth, and Abortion

22. Pregnancy and childbirth carry some risks, but maternal mortality is rare overall. (VR 7-6-2022 at 2:15:32–38, Transcript at 195–99). In Kentucky, there were 76 and 61 maternal mortality deaths in 2018 and 2019 respectively—and not all of these were pregnancy related. (Pls.' Exhibit 10 at 6). Maternal mortality is defined as the death of any female between the ages of 15-55 who was pregnant within one year of death or pregnant at death and died from any cause. (*Id.*). While pregnancy-associated deaths, which include causes such as substance abuse, motor vehicle collisions, and other accidental causes, accounted for 51% of maternal deaths in 2018, only 16% of maternal deaths in

2018 were pregnancy-related. (*Id*. at 10). This means, in 2018, twelve women died from pregnancy-related causes. Kentucky's 2018 pregnancy-related mortality rate was lower than the 2018 national rate of 17.4 per 100,000 live births. (*Id*.).

23. Many pregnancy and childbirth risks can be managed and mitigated. (VR 7-6-2022 at 2:15:40–46, Transcript at 196). Indeed, the Maternal Mortality Review Committee determined that 88% of Kentucky's pregnancy-related deaths were preventable. (Pls.' Exhibit 10 at 15).

24. As gestation age increases, risk of death or complication during abortion increases. The mortality rate for women undergoing an abortion is reported as 0.7 overall, but while it is 0.3 per 100,000 at 8 weeks gestation, it is 6.7 per 100,000 by 17 weeks gestation. (Pls.' Exhibit 2 at 39). For each week of gestation, the risk of death increases by 38%, and for women at a gestation of more than 21 weeks, the risk of death during an abortion is 76 times higher than the risk of death during an abortion in the first trimester.[3] (VR 7-6-2022 at 2:22:20–38, Transcript at 200–01). This means that by the time the woman is at 25 weeks gestation, the mortality rates for abortion greatly exceed maternal mortality rates. (VR 7-6-2022 at 2:22:46–52, Transcript at 200–01).

25. Risk of mortality is higher for black women both for childbirth and abortion. (VR 7-6-2022 at 2:23:38–47, Transcript at 201). For childbirth, black women have a mortality rate that is two and a half to three times higher than white

[3] For this information, Dr. Wubbenhorst relied on: Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729 (April 2004).

women. (VR 7-6-2022 at 2:23:47–53, Transcript at 201). The higher risk during pregnancy is related to underlying cardiovascular risk factors seen in black women. (VR 7-6-2022 at 2:24:23–33, Transcript at 202). For abortion, black women have three to four times the mortality rate of white women. (VR 7-6-2022 at 2:27:38–44, Transcript at 203). "[A]fter gestational age, race is the biggest predictor of mortality from abortion." (VR 7-6-2022 at 2:28:22–27, Transcript at 203). Black women have the highest rates of abortion and tend to have higher rates of abortion in the second trimester where the procedure is riskier. (VR 7-6-2022 at 2:27:46–2:28:00, Transcript at 204–05).

26. Obstetrician gynecologists have two patients: the woman and the fetus. (VR 7-6-2022 at 1:59:34–39, Transcript at 183).

27. This practice of treating both the woman and the unborn child as patients has been reinforced by the perinatal revolution, in which the field of fetal surgery and fetal treatment in utero has expanded significantly over the last twenty to thirty years. (VR 7-6-2022 at 2:00:21–39, Transcript at 184). The standard of care for an anesthesiologist is to provide anesthesia for the unborn baby during in-utero surgeries, and insurance companies reimburse for the cost of anesthesia for the fetus. (VR 7-6-2022 at 2:01:28–37, Transcript at 185).

28. Abortion is not essential healthcare. "Healthcare is defined as procedures and care that palliate, prevent, or treat a disease. And abortion does none of those things. It's a procedure that has the intent to destroy a human being." (VR 7-6-2022 at 2:36:38–54, Transcript at 212).

V. Development and Identity of the Unborn Child

29. Fertilization is the process by which a male gamete—a sperm cell—penetrates the zona pellucida, or the outer transparent layer of the female gamete, the egg. This results in conception, which is the merging of the two pronuclei into one nucleus, which is called a zygote. A new and distinct human being exists at this point. (VR 7-6-2022 at 2:01:56–2:02:48, Transcript at 185–86).

30. The zygote is self-organizing and will begin to become more and more developed over time. (VR 7-6-2022 at 2:02:31–39, Transcript at 185–86).

31. One of the earliest systems to develop in the unborn child is the cardiovascular system. By about four weeks, the primordial cells that will eventually make up the cardiovascular system are already present and active. (VR 7-6-2022 at 2:04:09–2:04:47, Transcript at 187). Usually around five weeks, the cardiomyocytes, which are the progenitors of cardiac cells, begin to contract. (VR 7-6-2022 at 2:04:56–2:05:10, Transcript at 187–88). By about four to five weeks, the primordial cells form a tube, which then begins to fold and differentiate over the next few weeks. As it folds, it begins to differentiate into an organ with four apertures, which will eventually form the vessels of the heart. The cardiac valves begin to form around eight weeks. And by nine to ten weeks, "the fetal heart functions as it will in the adult." (VR 7-6-2022 at 2:05:11–41, Transcript at 188; *see also* Compl. ¶ 68 (admitting that "cardiac activity typically becomes detectable" around the sixth week)).

32. The nervous system also develops early. It begins to differentiate around five weeks. By seven weeks gestation, the first synapses are observable in the spine. Electrical activity is detectable in the brain by about eight to nine weeks. (VR 7-6-2022 at 2:05:44–59, Transcript at 188).

33. Limb buds develop around four weeks gestation and continue to extend until around six weeks. By ten weeks, fingerprints are discernible. (VR 7-6-2022 at 2:05:58–2:06:09, Transcript at 188).

34. The unborn child is distinct from the mother. The child has its own unique DNA. (VR 7-6-2022 at 10:46:03–19, Transcript 62; VR 7-6-2022 at 2:02:14–19, Transcript at 185). The child has its own blood supply that is separate from the mother's. (VR 7-6-2022 at 10:46:20–27, Transcript at 62–63; VR 7-6-2022 at 2:06:23–48, Transcript at 189). The child has its own discernible heartbeat. (VR 7-6-2022 at 10:46:29–10:47:02, Transcript at 63–64; VR 7-6-2022 at 2:07:58–08:08, Transcript at 190). And the child has its own fetal brain wave activity. (VR 7-6-2022 at 2:07:58–08:08, Transcript at 190).

35. In every case after eight weeks gestation, abortions stop the beating heart of the unborn child. (VR 7-6-2022 at 10:47:43–10:48:00, Transcript 64).

36. The biology demonstrates the General Assembly had a strong basis for protecting the life of the unborn child. And this would remain true even if the legislature were to agree with Dr. Bergin that a human being becomes human through a "gradual process that evolves as the pregnant woman advances in gestational age." (VR 7-6-2022 at 11:04:46–11:06:41, Transcript at 76–77).

Even if Dr. Bergin has not thought of the ethical implications of terminating the life of a fetus that she concedes may be human by the time she performs the abortion, (VR 7-6-2022 at 11:06:42–11:07:14, Transcript at 78), it is appropriate and reasonable for the General Assembly to consider it and legislate accordingly.

VI. Societal Impact of Kentucky's Laws

37. Kentucky's laws restricting or prohibiting abortion will lead to fewer abortions in Kentucky. (VR 7-6-2022 at 12:33:30–38, Transcript at 133–34). This results in additional childbirths. (VR 7-6-2022 at 12:36:35–57, Transcript at 136–37).

38. Some groups of women are over-represented in the number of those obtaining abortions. While black women only account for 8.5% of the women in Kentucky, 34.5% of women obtaining abortions in Kentucky are black. (VR 7-6-2022 at 11:54:43–11:55:19, Transcript at 105). In Kentucky, 87.2% of the women obtaining an abortion in 2020 were unmarried. (VR 7-6-2022 at 11:55:47–11:56:44, Transcript at 106).

39. Fewer abortions mean more minority babies will be born in the Commonwealth. (VR 7-6-2022 at 12:52:42–12:53:24, Transcript at 148–49). Because black women have abortions at more than four times their representation in the population of Kentucky, enjoining the laws will mean four times as many black children will be aborted relative to white children. Conversely with the laws in effect, approximately four times as many black children will be born relative to white children.

40. The suggestion that "too many unwanted minority and poor children . . . caus[es] economic harms" raises ethical concerns that abortion is being used to pursue racist policies. (VR 7-6-2022 at 4:01:49–4:03:01, Transcript at 268–69).

41. An amicus brief signed by Lindo predicts that Kentucky's laws will lead to no more than a 30-40% reduction in abortion rates in the Commonwealth. (Attorney General Exhibit 1).

42. The 2014 abortion rates Lindo used for his analysis, suggesting that 23.7% of women in the U.S. will have an abortion by the time they reach age 45, will not continue post-*Dobbs*. (VR 7-6-2022 at 1:06:17–24, Transcript at 160; VR 7-6-2022 at 1:17:20–19:08, Transcript at 167–68). Therefore, the Court affords low weight to his testimony and conclusions as to the impact of Kentucky's laws on women seeking abortions.

43. Lindo's conclusion that women under the age of 30 have abortions because they are developing their career is based on his experience as a professor at Texas A&M University, not a representative sample of the population of Kentucky women under 30 who are seeking abortions. (VR 7-6-2022 at 12:49:57–12:51:59, Transcript at 146–48). This is speculation, which cannot be reproduced as a reliable fact, therefore, the Court affords the credibility of his testimony and conclusions low weight.

44. Survey responses indicated that more than half of women obtaining an abortion in the United States had a disruptive life event in the year leading up to the abortion. (Lindo Slides; VR 7-6-2022 at 11:50:10–11:51:07 (discussing

statistical data in slides), Transcript at 101–02). Disruptive life events include death of a close friend or family member, separation from partner, having a baby, being unemployed for at least one month, moving two or more times, or being behind on rent or mortgage payments, (*Id.*). If women are having abortions because they are economically depressed or have experienced a "disruptive life event," they may be operating under duress, which "calls into question the ethical norm that anchors the entire theory of reproductive rights in the first instance," which is that the abortion is a choice. (VR 7-6-2022 at 3:59:15–4:01:29, Transcript at 265–68).

45. A focus on pure economic costs of raising a child ignores the benefits of children to the family and to society. (*See* VR 7-6-2022 at 3:52:00–3:53:28, Transcript at 261–62). And simply saying that abortion promotes economic good is not sufficient to conclude that abortion should be pursued as a policy. (VR 7-6-2022 at 3:56:07–16; Transcript at 264).

46. Lindo testified that "policy makers can take or leave this evidence," (VR 7-6-2022 at 12:39:21–24, Transcript at 139), 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." (VR 7-6-2022 at 12:40:10–15, Transcript at 139).

47. Lindo was unaware of, and did not consider for purposes of his analysis or testimony, Kentucky's Safe Haven Law, KRS 216B.190. 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. Therefore, the Court affords low weight to Lindo's testimony and conclusions as to whether the costs of child rearing can be seen as unavoidable.

48. "All that matters for a person's basic human rights, moral regard, and the protection of the law is whether or not they're living members of the human species." (VR 7-6-2022 at 3:44:23–30, Transcript at 254). Members of the medical and bioethics communities find the General Assembly's definition of the unborn child as a living member of the human species to be accurate and consistent with the opinions of others in those fields. (VR 7-6-2022 at 1:59:09–25, Transcript at 183, VR 7-6-2022 at 3:46:00–46, Transcript at 255–56).

49. Plaintiffs offered no testimony that considered the health or economic issues from the perspective of the unborn child.

50. Consideration from the perspective of the unborn child is necessary "if you begin with the premise that at every gestational stage, we're talking about the same organism," (VR 7-06-2022 at 3:42:33–37, Transcript at 253)—which the General Assembly does. *See, e.g.,* KRS 311.772(1)(c). "It's a form of unjust discrimination to ignore the moral standing of [the unborn child] when you are asked to balance those interests against the other interests that are at issue in the context of abortion involving the burdens that a woman faces." (VR 7-06-2022 at 3:42:38–57, Transcript at 253).

PROPOSED CONCLUSIONS OF LAW

I. Standing

1. 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).
2. In adopting the analysis for constitutional standing from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), 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; *Overstreet v. Mayberry*, 603 S.W.3d 244, 260 (Ky. 2020).
3. Kentucky's formal adoption of the *Lujan* test makes U.S. Supreme Court cases about constitutional standing, at the very least, 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).
4. Injury must be personal to the Plaintiffs. "A plaintiff must allege *personal* injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Sexton,* 566 S.W.3d at 196 (emphasis added).
5. The practice of some federal courts to ignore third-party standing doctrine in abortion cases has been called into serious doubt after the Supreme Court noted in *Dobbs* that the practice was an example of how *Roe* and *Casey* had

"led to the distortion of many important . . . legal doctrines, and that effect provides further support for overruling those decisions." *Dobbs*, 142 S. Ct. at 2275.

6. Kentucky courts have been clear that there is no third-party standing. "The 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) (holding that an association "designated as an employer of persons who engage in lobbying activities with the legislative and executive branches of state government" lacked standing to challenge two statutes "on behalf of [its] employee lobbyists").

7. Allegations that the Human Life Protection Act and the Heartbeat Law violate the Plaintiffs' "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*. ¶¶ 102; 130, do not demonstrate Plaintiffs have constitutional standing. Any potential rights and injury would belong only to pregnant women.

8. "[A]ll litigants . . . must allege a concrete and particularized injury-in-fact to invoke the jurisdiction of Kentucky courts." *Ward*, 2022 WL 1284024, at *4. The absence of a concrete and particularized injury-in-fact means this Court lacks jurisdiction "because the case is nonjusticiable due to the plaintiff's failure to satisfy the constitutional standing requirement." *Lincoln Trail Grain*

Growers Ass'n, Inc. v. Meade Cnty. Fiscal Ct., 632 S.W.3d 766, 770–71 (Ky. App. 2021).

9. "[A] plaintiff raising only a generally available grievance about government" does not possess constitutional standing. *Lujan*, 504 U.S. at 573–74; *Ward*, 2022 WL 1284024 at *2 ("When 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." (citation omitted)).

10. The rule barring adjudication of generalized grievances is a recognition that these issues are "more appropriately addressed in the representative branches." *See Lawson v. Office of the Attorney General*, 415 S.W.3d 59, 67 (Ky. 2013). 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.

11. "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." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Because Plaintiffs 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, they do not have

constitutional standing to bring their challenges to the Human Life Protection Act as an unlawful delegation of authority and unconstitutional approval by a body other than the General Assembly.

12. A challenge is moot when there is no grievance to resolve. *Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994).

13. By Plaintiffs own acknowledgement, (Compl. ¶ 117), the Human Life Protection Act will certainly be in effect by July 19, 2022 when the U.S. Supreme Court issues the mandate for *Dobbs*. Therefore, as of July 19, 2022 this Court has no grievance before it to resolve as to the vagueness and intelligibility challenges to the effective date of the Human Life Protection Act.

II. Temporary Injunctive Relief

14. In Kentucky, a law is presumed constitutional, with all reasonable inferences drawn in favor of upholding it. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 806 (Ky. 2009) (plurality opinion).

15. A temporary injunction is an "extraordinary remedy" that should be rarely granted. *Maupin v. Stansbury*, 575 S.W.2d 695, 697 (Ky. App. 1978).

16. A doubtful case such as where the injunction would be based on "novel questions of law" with "no foundation in fact or law" should await trial of the merits. *See Gordon v. Morrow*, 218 S.W. 258, 260, 269 (Ky. 1920) (dissolving an injunction premised on "novel questions of law" that "had no foundation in fact or law"); *see also Bingo Palace v. Lackey*, 310 S.W.3d 215, 216 (Ky. 2009) (quoting *Maupin*, 575 S.W.2d at 698); *Commonwealth ex rel. Conway v.*

Thompson, 300 S.W.3d 152, 161 (Ky. 2009) ("A temporary injunction should not issue in 'doubtful cases.'" (citation omitted)).

17. Temporary injunctive relief is appropriate only where a plaintiff "has shown that [it] will suffer immediate and irreparable injury, that the various equities involved favor issuance of the temporary injunction, and that a substantial question exists on the merits." *Beshear v. Goodwood Brewing Co.*, 635 S.W.3d 788, 795 (Ky. 2021); *Maupin*, 575 S.W.2d at 699.

A. Irreparable Injury

18. The court must find the plaintiff will be personally irreparably harmed before granting a motion for temporary injunction. "A plaintiff must allege *personal* injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Sexton*, 566 S.W.3d at 196 (emphasis added). Finding the Plaintiff will be irreparably harmed "is an essential prerequisite for the issuance of a temporary injunction." *Boone Creek Props., LLC v. Lexington-Fayette Urb. Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 39 (Ky. 2014).

19. The claim must be an assertion of one's own rights, and cannot "rest upon the legal rights of third persons." *Associated Indus.*, 912 S.W.2d at 951; *Maupin*, 575 S.W.2d at 698 ("In order to show harm to his rights, a party must first allege possible abrogation of a concrete personal right.").

20. "[T]he clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur prior to trial." *Maupin*, 575 S.W.2d at 698.

B. Balance of Equities

21. Before granting temporary injunctive relief, "the trial court must find 'that an injunction will not be inequitable, *i.e.* will not unduly harm other parties or disserve the public.'" *Goodwood Brewing Co.,* 635 S.W.3d at 795 (quoting *Price v. Paintsville Tourism Comm'n*, 261 S.W.3d 482, 484 (Ky. 2008)).

22. "[N]on-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021) (citation omitted). That's because whenever the General Assembly passes a law, it makes an "'implied finding' that the public will be harmed if the statute is not enforced." *Id*. at 78 (citation omitted).

23. Any action that bars the Attorney General from enforcing the will of the people constitutes per se irreparable harm to the Commonwealth and its citizens. *See, id*. at 73.

24. The non-enforcement of even ordinary statutes amounts to irreparable harm; the non-enforcement of the Human Life Protection Act and Heartbeat Law amounts to something far more grave because these laws prohibit what the General Assembly has determined is the unjustified taking of unborn human life.

C. Substantial Question on the Merits

25. When interpreting provisions of the Kentucky Constitution, Kentucky courts "look first and foremost to the express language of the provision." *Westerfield v. Ward*, 599 S.W.3d 738, 747 (Ky. 2019).

26. Nothing in the text of the Kentucky Constitution expressly—or impliedly—provides for a right to abortion. Indeed, there is not even language specifying a right to privacy in the Kentucky Constitution. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) ("No language specifying 'rights of privacy,' as such, appears in . . . the . . . State Constitution." (emphasis omitted)). "The 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).

27. An actual, practical, and long-continued construction of law is "entitled to controlling weight." *Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957).

28. At no point in the Commonwealth's history has a Kentucky court construed the state constitution to protect a right to abortion. In fact, Kentucky judges have found the opposite. *See, e.g., Sasaki v. Commonwealth*, 497 S.W.2d 713, 714–15 (Ky. 1973) (Reed, J., concurring in an opinion joined by Palmore, C.J.) (explaining there was "no existing legal principle" to justify inserting the

judiciary into the abortion debate). And the General Assembly has consistently and continuously acted to protect the state's interest in the life of the unborn child while rejecting any attempt to find affirmation of a right to abortion in its laws. *See, e.g.*, KRS 311.710(5) (declaring in the year after *Roe* that the "policy of this Commonwealth [is] to recognize and to protect the lives of all human beings regardless of their degree of biological development"); 2022 House Bill 3 § 10(1) (clarifying that "[n]othing in . . . this Act shall be construed as creating or recognizing a right to abortion").

29. The constitutional guaranty of the right of citizens to seek and pursue safety and happiness may be regulated by the General Assembly under the Commonwealth's police power so long as regulations are based upon some reasonable ground for the protection of the interest or welfare of the general public. *Moore v. N. Kentucky Indep. Food Dealers Ass'n*, 149 S.W.2d 755 (Ky. 1941).

30. Strict scrutiny is not appropriate when Plaintiffs fail to demonstrate a fundamental right to abortion. Without first demonstrating that the right to privacy and right to self-determination include a right to abortion, Plaintiffs cannot rely on the character of the rights of privacy and self-determination as fundamental to require the Commonwealth to show the laws further a compelling state interest and to use narrowly tailored means.

31. Because Plaintiffs cannot show that the right to privacy and right to self-determination as protected by the Kentucky Constitution include a right to abortion, the Commonwealth needs only a rational basis for the laws.

32. A law regulating abortion, like other health and welfare laws, "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 142 S. Ct. at 2284 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). "These legitimate interests include respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Id.* (internal citations omitted).

33. There is explicit language protecting the right to life in the Kentucky Constitution. Section 1 of the Kentucky Constitution says that "[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights" including the "right of enjoying and defending their lives."

34. The General Assembly defined "unborn human being" as "an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth." KRS 311.772(1)(c); *see also* KRS 311.781 (similar).

35. Furthermore, the General Assembly has repeatedly recognized that the Commonwealth has a legitimate interest in protecting the life of an unborn human. *See, e.g.*, KRS 311.7702 ("The Commonwealth of Kentucky has legitimate interests from the outset of the pregnancy in protecting . . . the life of an unborn human individual who may be born."); 2022 HB 3 § 32(7) (same).

36. Plaintiffs have not met their burden to demonstrate this Court should grant a temporary injunction. Because Plaintiffs cannot rely on third-party standing and have not identified a personal injury, Plaintiffs have failed to meet the first requirement of the factors for when a temporary restraining order may be granted.

37. Plaintiffs also failed to show that the balance of equities weighs in their favor because they have not proffered any injury that would outweigh the irreparable harm that abortion wreaks on the lives of the unborn. The long-standing history of how the Framers, General Assembly, and Kentucky courts have addressed abortion belies any meaningful argument that Plaintiffs have a substantial question as to the merits.

38. Because Plaintiffs have failed to satisfy each of the factors necessary to warrant extraordinary relief in the form of a temporary injunction, *see Maupin*, 575 S.W.2d 695, Plaintiffs' Motion for Temporary Injunction is DENIED and the Restraining Order is immediately DISSOLVED.

39. Additionally, and alternatively, because Plaintiffs lack constitutional standing and because of the mootness of some of their claims, this Court lacks

jurisdiction. Plaintiffs' Motion for Temporary Injunction is therefore DENIED and the Restraining Order is immediately DISSOLVED. Plaintiffs' claims are DISMISSED with prejudice.

Tendered by,

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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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