RESPONDENTSUPREME COURT OF KENTUCKY
CASE NO. 2022-SC-0329-TG

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

ON APPEAL FROM COURT OF APPEALS
NO. 2022-CA-0906-I
&
ARISING FROM JEFFERSON CIRCUIT COURT
NO. 22-CI-03225

V.

DANIEL CAMERON, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY **RESPONDENT**

BRIEF OF *AMICI CURIAE*, REPRESENTATIVE NANCY TATE AND SENATOR ROBBY MILLS, IN THEIR OFFICIAL CAPACITIES AS CO-CHAIRS OF THE KENTUCKY GENERAL ASSEMBLY PRO-LIFE CAUCUS

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CERTIFICATE OF SERVICE

I served this brief on October 4, 2022, via U.S. Mail on: Michele Henry,401 West Main Street, Suite 1900, Louisville, Kentucky 40202; Brigitte Amiri,125 Broad Street, 18th Floor, New York, New York 10004; Heather L. Gatnarek, 325 Main Street, Suite 2210, Louisville, Kentucky 40202; Carrie Y. Flaxman, 1110 Vermont Avenue, NW, Suite 300, Washington, D.C. 20005 and Leah Godesky, 1999 Avenue of the Stars, Los Angeles, CA 90067; Hon. Larry Thompson, Kentucky Court of Appeals, 600 Democrat Drive Frankfort, KY 40601and Hon. Mitch Perry, Jefferson Circuit Court, 700 W. Jefferson Street, Louisville, KY 40202, and via hand-delivery on Matthew F. Kuhn, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601.

Jean W. Bird

STATEMENT OF POINTS AND AUTHORITIES

Interest of Amici Curiae

The *amici curiae* are Kentucky state legislators representing the official Pro-Life Caucus of the Kentucky General Assembly. We write to defend (1) the prerogative of the General Assembly to make public policy and (2) its role as the proper branch -- consisting of the people's elected representatives -- to balance compelling state interests in the health and welfare of women and children through the political and legislative processes.

May It Please The Court:

ARGUMENT

"We now overrule [Roe and Casey] and return that authority ***to the people and their elected representatives.***"[1]

I. INTRODUCTION.

The United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–43 (2022) did not reject an imposition of *federal* judicial will in favor of the imposition of a *state* judicial will. It rejected the imposition of <u>any</u> judicial policy preferences in favor of *a solution to be arrived at by the people and their elected representatives in the legislature.* Abortion, clearly, is not addressed either explicitly or by implication in Kentucky's current Constitution. Until the latter part of the 20th century, such a right was entirely unknown in American law. *Dobbs* at 2242–43. This Court should not repeat, on the state level, the calamitous miscalculation of attempting to settle this profound moral and social decision through imposition of a "right" that has never existed in common law, statutory law, or in any of our previous Kentucky constitutions.

To repeat the mistakes of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), *overruled by Dobbs, 142 S.Ct.* at 2242 and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992), *overruled by Dobbs, 142 S.Ct.* at 2242, and "discover" a right to abortion in "emanations" and "penumbras" from the Kentucky Constitution would perpetuate the perception of a politicized judiciary and a politicized Constitution. It would doom Kentucky courts to endless litigation and judicial regulation,

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[1] *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2284 (2022) *(emphasis added).*

much as it did the federal courts for the last 50 years, trying in vain to construct a workable judicial framework for balancing the compelling state interests in protecting the life of a pre-born child and in protecting the rights and health of mothers and fathers. Those interests are for the legislature to balance, not the courts. Abortion is a political issue, not a constitutional right, and the legislative branch is where political consensus will be found, if it can be found at all.

II. *DOBBS* RETURNED THE ABORTION ISSUE TO THE STATE LEGISLATURE, NOT THE STATE COURTS.

A. The Legislature Is The Proper Branch to Make Policy.

The U.S. Supreme Court in *Dobbs* did not return the issue of abortion policy to the states; rather, it returned it "to the people and their elected representatives," i.e., state *legislatures*. The legislature is the proper arena for the resolution of "fundamentally differing views." *Sasaki v. Commonwealth,* 485 S.W.2d. 897, 902 (Ky. 1972), ("*Sasaki I"), quoting Corkey v. Edwards,* 322 F. Supp. 1248, 1254 (D.C. 1971). It is the General Assembly that speaks for the public's interest, not the judiciary, and so no Kentucky court should "substitute its view of the public interest for that expressed by the General Assembly." *Cameron v. Beshear*, 628 S.W.3d 61, 78 (Ky. 2021) (quoting *Boone Creek Props., LLC. v. Lexington-Fayette Urban Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014)).

If there is to be a consensus reached, or an equilibrium established, on the question of abortion, it must derive its legitimacy from the people – not judges. "*Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* 'inflamed' a national issue that has remained bitterly divisive for the past half century." *Dobbs* at 2279.

A political solution arrived at through the democratic process, not a judicially imposed solution, is the best hope for a solution that all of the people will accept. "In the years prior to [the *Roe*] decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process." *Dobbs* at 2241. Even such liberal jurist and abortion rights champion as Justice Ruth Bader Ginsburg recognized that the legislative process would have been more appropriate to reach consensus on the issue: "*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue." R. Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (1992).

Voters have already begun to voice through the democratic process their views on abortion restrictions. In Kansas, voters rejected a constitutional amendment that would have allowed legislators to regulate abortion. A similar measure is on the ballot in Kentucky this November, asking voters to decide whether the Kentucky Constitution should exclude any right to an abortion. If that measure passes policies related to abortion will remain a legislative prerogative, as Kentucky courts had ruled from a point in time prior to our present Constitution all the way to *Roe*. (*See Mitchell v. Commonwealth*, 78 Ky. 204 (1879); *Sasaki I)*.

But if Kentuckians vote to give Kentucky courts the ability to divine a right to an abortion in the Constitution (a right that previous courts found nonexistent), the question remains– why would the Court want or need to do so? Those same voters can vote to elect representatives who can find consensus on abortion restrictions that are more palatable to a voting majority of Kentuckians. If the Kentucky amendment does not pass, the Constitution remains silent on the issue of abortion, but the voters have spoken and

begun the political and democratic processes to reflect that will. There is no need for this court to repeat the mistakes of the federal judiciary and throw fuel on the fire of this burning debate in such a way that undermines faith in the judicial branch.

"The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Dobbs*, 142 S.Ct. at 2243, *quoting Casey*, 505 U. S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part). "That is what the Constitution and the rule of law demand." *Dobbs,* 142 S.Ct. at 2243. That process is already underway in Kentucky.

B. Usurping The Issue From The Legislature Has Damaged The Perception Of The Judiciary And Its Constitutional Role.

Shortly after *Roe* took the abortion issue out of legislative and political hands, justices of Kentucky's highest court predicted the politicization of the courts that would result from judicial intrusion into the public policy arena:

> When the judicial arm of government acts on no existing principle ... and the judiciary, because of personal views as to desirable social policy, appears to be the ally of certain causes regardless of law, the moral authority of law is damaged in the eyes of the general population.

Sasaki v. Commonwealth, 497 S.W.2d 713, 715 (Ky. 1973) ("*Sasaki II*") (Reed, J. concurring). Those justices decried that the courts were being used to enact policy changes that were the province of the political branches, rather than interpret and apply the law:

> Although it is much cheaper and easier to ask a court to order the social change wanted rather than to go through the time-consuming, expensive and inconvenient process of persuading voters or legislators, the fact remains that the proper forum to accomplish a change such as is involved here is a policy process to be consigned to the legislature.

Sasaki II, at 715 (Reed, J. concurring).

The *Dobbs* court likewise recognized, with the benefit of hindsight, that the creating of a new constitutional right, effectively striking the abortion laws in every state,[2] - did incalculable damage to the perception of the judicial branch and its constitutional role. "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." *Casey*, 505 U.S. at 995–996, 112 S.Ct. 2791 (opinion of Scalia, J.). Though much of the present-day commentary focuses on the *Dobbs* decision as having newly created the perception of the judiciary as a political branch, it was through efforts to protect *Roe* that the judicial confirmation process became poisoned, partisan "litmus tests" for judges were established, and the public came to view constitutional rights as things that judges could vote to create or abolish, rather than read in the text of the Constitution. As Justice Byron White stated in dissent, *Roe* represented the "exercise of raw judicial power," *Roe*, 410 U. S. at 222, (White, J., dissenting), - and the citizenry took notice. Reasonable minds may differ as to what degree *Roe* and *Casey* are responsible for the current dysfunction of Congress, but no reasonable observer could deny that the nation has increasingly looked to the courts to create policy, and sidelined the legislature in the process.

The General Assembly is the policy-making branch of our government, and is an inherently political branch. The judiciary should avoid straining to find, as did the *Roe* court, a constitutional right to an abortion that simply does not exist in the Kentucky

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[2] *Dobbs* at 2241, *citing* L. Tribe, Forward: Toward a Model of Rules in Due Process of Life and Law, 87 Harv.L.Rev. 1, 2 (1973 (Tribe).

Constitution, and leave this political policy question "to the people and their elected representatives." *Dobbs*, 142 S.Ct. at 2284.

III. THE LEGISLATURE HAS BALANCED THE INTERESTS OF WOMEN WITH PROTECTING UNBORN LIFE.

It is well settled that a state legislature has the ability and responsibility to enact laws to protect its citizens. A state legislature's interest in protecting its citizens in this manner is all the more critical when a woman is carrying an unborn child: there, the health and well-being of two lives are at stake. Even in *Roe,* the Supreme Court acknowledged that the states "have an important and legitimate interest ... in protecting the potentiality of human life." 410 U.S. 113, 162 (1973). Then, in *Casey,* the Court stated flatly "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," 505 U.S. at 846, and the *Gonzales Court* agreed that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales v. Carhart,* 550 U.S. 124, 157 (2007).

The Commonwealth of Kentucky takes seriously its responsibility to consider the interests of its people in enacting legislation on their behalf:

> The General Assembly finds and declares, according to contemporary medical research, all of the following:
> 1) Medical and other authorities now know more about human prenatal development than ever before, including:
> (a) Between five (5) and six (6) weeks' gestation, an unborn child's heart begins beating;
> (b) At approximately eight (8) weeks' gestation, an unborn child begins to move about in the womb;
> (c) At nine (9) weeks' gestation, all basic physiological functions are present, including teeth, eyes, and external genitalia;
> (d) At ten (10) weeks' gestation, an unborn child's vital organs begin to function, and hair, fingernails, and toenails begin to form;
> (e) At eleven (11) weeks' gestation, an unborn child's diaphragm is

developing, he or she may even hiccup, and he or she is beginning to move about freely in the womb; and

(f) At twelve (12) weeks' gestation, an unborn child can open and close his or her fingers, starts to make sucking motions, senses stimulation from the world outside the womb, and has taken on "the human form" in all relevant aspects under Gonzales v. Carhart, 550 U.S. 124, 160 (2007);

(2) The United States Supreme Court has long recognized that the state has an "important and legitimate interest in protecting the potentiality of human life," Roe v. Wade, 410 U.S. 113, 162 (1973), and specifically that "the state has an interest in protecting the life of the unborn," Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 873 (1992).

KRS 311.7811.

The General Assembly has the power and prerogative to encourage women to choose life, exercising their "rights to conceive and to raise one's children," which are "essential" and "basic civil rights." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). This is why Kentucky actively supports families who need help to provide their children with proper nutrition, healthcare, daycare, and education. This is why Kentucky fosters partnerships with private organizations that serve disadvantaged families in local communities. This is why Kentucky has worked hard to streamline foster care, adoption, and family courts, repeatedly increasing funding for child welfare programs. This is why Kentucky has a confidential putative father registry and baby boxes. This is why Kentucky provides privacy, support, and options to mothers who give birth while incarcerated and extended Medicaid coverage for up to twelve months postpartum. The Kentucky Legislature has enacted numerous laws and committed significant resources -- billions in appropriations -- to support women though all stages of family planning and to support families in caring for children after birth.

At the most recent meeting of the General Assembly's Child Welfare and Oversight Advisory Committee, Dr. Jerry Milner, a national policy expert in child welfare, commented that Kentucky was one of the first states to develop a plan for prevention that focuses on keeping children out of the child welfare system and protecting them from victimization.[3] The Legislature's focus on children, mothers, and family has been unwavering.

The state has a compelling interest in each, and formulates policy to balance those interests and care for its citizens. These are policy choices that the courts are ill-suited to make. The General Assembly can make these policy choices, amend or adapt these policy choices or repeal these policy choices to provide for the interests of its citizens. It can seek, and perhaps reach, consensus on the availability of abortions and the assistance and care given to mothers, children and families. This is the charge to the legislative branch. The Kentucky Constitution contains no right to an abortion, and the General Assembly has a compelling interest in legislation to protect unborn children, as well as mothers and families. A judicial solution will be no solution, but will engender further divisiveness and politicization of the courts. For these reasons, we urge the Court to reverse the Court of Appeals and remand this case to the Jefferson Circuit Court with instructions dissolve the injunction and to dismiss the case.

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[3] Kentucky LRC Committee Meetings, Child Welfare Oversight and Advisory Committee, September 14, 2022, https://www.youtube.com/watch?v=Bc73SLKUaaU.

Respectfully submitted,

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