SUPREME COURT OF KENTUCKY

2022-SC-0326-I
2022-SC-0329-TG

DANIEL CAMERON,

Appellant/Movant,

v.

EMW WOMEN'S SURGICAL CENTER, P.S.C., ET AL.

Appellees/Respondents.

BRIEF OF AMICUS CURIAE DEMOCRATS FOR LIFE OF AMERICA IN SUPPORT OF APPELLANT/MOVANT

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*** Counsel for Amicus Curiae wishes to acknowledge the dedicated efforts of Anthony R. Gordon, NV. Bar #2278, and William F. Kelley, Md. Bar ID #9806230272, Dist. Of Col. Bar ID #1722955 in the preparation of this brief.**

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I filed via Federal Express overnight the original and nine (9) true copies of this motion to Kelly Stephens, Clerk of the Supreme Court of Kentucky, State Capitol Room #235, 700 Capitol Ave., Frankfort, KY 40601. I further certify that I served a true copy of the same via Federal Express on: Matt Kuhn, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky, 40601; Heather L. Gatnarek, ACLU of Kentucky, 325 Main Street, Suite 2210, Louisville, Kentucky 40202; Wesley W. Duke, Office of Secretary, Cabinet for Health and Family Services, 275 East Main Street SW-A, Frankfort, Kentucky 40621; Leanne Diakov, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; Thomas B. Wine, Jason B. Moore, Office of the Commonwealth's Attorney, 30th Judicial Circuit, 514 West Liberty Street, Louisville, Kentucky 40202; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Clerk, Jefferson Circuit Court, 600 West Jefferson Street, Louisville, Kentucky 40202. As this is an appeal under CR 65.07, no certified record on appeal exists.

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STATEMENT OF POINTS AND AUTHORITIES

INTEREST OF AMICUS

Democrats for Life of America (DFLA) represents the pro-life wing of the Democratic Party that advocates for a holistic approach to the protection of all human life. DFLA seeks to protect human life at all stages as the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA encourages the Democratic Party's commitments to the supporting of women and children, strengthening families and their communities, and ensuring equality of opportunity, reduction in poverty, and providing an effective social safety net to guarantee that all people have sufficient access to food, shelter, health care, and life's other necessities. DFLA's members are a diverse group of individuals that come from a variety of differing ethnic, racial, religious, and ethical backgrounds that share a common belief and goal that destruction of human life at any stage is both unfit and unnecessary for the flourishing of a civil society, and that legalized abortion stands diametrically opposed to the promotion of human rights.

PURPOSE OF BRIEF AND INTRODUCTION

This case presents a unique opportunity for the Kentucky Supreme Court to reject the diminished protection of unborn human life that the Supreme Court of the United States found in *Roe v. Wade,* a jurisprudential

approach that the Court now holds was "egregiously wrong from the start." 410 U.S. 113 (1973); *Dobbs v. Jackson,* 142 U.S. 2228, 3327 (2022). DFLA's Amicus Brief argues that Kentucky should refrain from finding that a right to destroy human life is in its state constitution. This previously adopted approach by the nation's highest court has caused immense political, societal, and cultural gridlock nationwide that has harmed the balance of powers and further radicalized the country's two major political parties. Adopting that approach in Kentucky would continue to radicalize the policy positions of political parties in Kentucky, jeopardize the legitimacy of Kentucky courts, and prevent political consensus from being reached on key issues, even those unrelated to abortion.

Additionally, this brief argues that Kentucky's ban on abortion does not violate the equal protection clauses of either the Fourteenth Amendment to the United States Constitution or Sections 1, 2, & 3 of Kentucky's Constitution.

ARGUMENT

I. THE ADOPTION OF A CONSTITUTIONAL RIGHT TO TERMINATE HUMAN LIFE WOULD CONTINUE TO RADICALIZE THE POLICY POSITIONS OF POLITICAL PARTIES IN KENTUCKY, JEOPARDIZE THE LEGITIMACY OF KENTUCKY COURTS, AND PREVENT POLITICAL CONSENSUS FROM BEING REACHED ON KEY ISSUES, EVEN THOSE UNRELATED TO ABORTION.

The Kentucky Supreme Court should reject any request to find a constitutional right to abortion in the Kentucky Constitution, so as to

preserve the Kentucky General Assembly's ability to govern, protect the Kentucky Supreme Court's credibility, and prevent the radicalization and divisiveness of the abortion debate within the political process.

In *Dobbs v. Jackson,* the United States Supreme Court in its majority opinion noted that to do anything but overturn *Roe v. Wade* would be to "prolong" the "turmoil" that the court had wrought on the country through its decision in *Roe*. 142 S. Ct. 2228, 3327 (2022); 410 U.S. 113 (1973). Recognizing the stagnation that the court had caused by limiting public debate on the issue, the *Dobbs* majority opinion chose to overturn *Roe* and remove itself from the abortion debate. *Id.,* at 2284. The Court in *Dobbs* recognized its mistake and encouraged debate on the constitutional protection of human life to occur in the states, with Justice Alito's majority opinion stating that "[i] is far better—for this Court and the country—to face up to the real issue without further delay." *Id.,* at 2283.

However, DFLA further contends that it would be mistaken to frame the *Dobbs* decision as merely one animated by the principles of federalism, and that the *Roe* decision was merely one of federal encroachment into state authority. Rather, DFLA asserts that *Dobbs* at its core stands for the proposition that courts everywhere, whether state or federal, are not well-suited to govern the contentious nature of the abortion debate. Indeed, this critique of *Roe's* reasoning has existed since Roe decision was handed down in 1973: Justice Byron White criticized the *Roe* decision in dissent as "an exercise in raw judicial power." *Roe,* 410 U.S. 113, at 222 (*White, J.,*

Dissenting). Almost two decades later, Justice Scalia would echo this view in his dissent in *Casey,* when he stated: "How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus." *Casey,* 505 U.S. 833, at 1000 (*Scalia, J., Dissenting*).

Justice Kavanaugh in *Dobbs* would further echo this in concurrence, stating that "The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. As Justice Rehnquist stated, this Court has not "been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court." *Dobbs,* 142 S. Ct., at 2306 (Kavanaugh, J., Concurring).

If the Kentucky Supreme Court were to take the same approach as *Roe,* the resulting controversy would be no different. Furthering Justice Scalia's point, one need only take a cursory glance at the dozens upon dozens of cases that the Supreme Court of the United States heard regarding abortion between 1973 and 2022, to see the legal quagmire that *Roe* brought the Supreme Court into. *See generally Beal v. Doe*, 432 US 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980);

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 US 416 (1983); *Ohio v. Akron Center for Reproductive Services*, 497 U.S. 502 (1990); *Thornburgh v. American College of Obstetricians and Gynecologists* 476 U.S. 747 (1986); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Webster v. Reproductive Health Services* 492 U.S. 490 (1989); *Stenberg v. Carhart* 530 U.S. 914 (2000); *Gonzales v. Carhart* 127 U.S. 1610 (2007); *Whole Women's Health v. Hellerstedt* 136 U.S. 2292 (2016); *June Medical Services v. Russo* 140 U.S. 2103 (2020); *Whole Women's Health v. Jackson* 141 U.S. 2494 (2021); *Dobbs v. Jackson* 142 U.S. 2228 (2022).

As Justice Scalia noted in his dissent in *Casey*, the Court's futile attempt at governing abortion policy was a "consequence of reading the error filled history book that described the deeply divided country brought together by *Roe*." *Casey*, 505 U.S. at 998 (Scalia, J., Dissenting). Despite the Burger Court's attempt to quell national debate on the issue in *Roe* through its wide-sweeping reasoning, its approach was an utter failure of jurisprudence. *Roe* ultimately caused the debate within the United States Supreme Court regarding the issue of the sanctity of human life to rage unsettled for nearly 50 years. Those same debates on the protection of unborn human rights that occurred at the United States Supreme Court have continued in state courts, in Congress, and in state legislatures with little to no consensus from state to state. This is predominately due to the Court's

blocking of authentic, robust debate within legislatures on the protection of the sanctity of human life, a direct effect of the *Roe* decision.

Downstream from the federal and state courts' destructive attempts to create a social consensus around abortion policy is the polarization of the political parties. As Justice Scalia's dissent in *Casey* wisely observed, "*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." *Casey,* 505 U.S. at 995. (Scalia, J., Dissenting).

In the decades since *Roe,* political commentators have recognized that the division between the political parties on abortion has only worsened. *See* Jillian Weinberger, How the US polarized on abortion — even as most Americans stayed in the middle, Vox, https://www.vox.com/23055389/roe-v-wade-timeline-abortion-overturn-political-polarization (Jun. 24, 2022). In the 1990 Pennsylvania gubernatorial election, polls showed that voters' preference between pro-life Democratic Governor Robert P. Casey Sr., and pro-choice Republican Party nominee Barbara Hafer lined up more with their views on abortion than along party registration. T. Jelen, Perspectives on the Politics of Abortion, Praeger Publishers. p. 76 (1995). In 2010, over sixty (60) Democrats in the United States House of Representatives were identified as voting "pro-life." *Mary E. Harned, J.D. The Stupak Amendment to H.R.3962 — Maintaining Existing Law* https://aul.org/2009/11/11/the-stupak-amendment-to-h-r-3962-maintaining-existing-law/ (Nov. 11, 2009) (explaining the passage of the

pro-life "*Stupak Amendment*, added to H.R. 3962 by a vote of 240-194, with 64 Democrats voting in favor of the amendment.") Compare the political makeup of past decades to the current 2022 Congress, where there is only one pro-life Democrat so identified in the timeframe between *Roe* and *Dobbs*.[1] In sum, *Roe* is a direct cause of the mass exodus of pro-life members and elected officials from the Democratic party that we have seen over the last three decades.

Gallup polling over the last three decades also shows that the nation has been sharply divided on its views on abortion since the days of the Clinton Presidency. Abortion, Gallup, https://news.gallup.com/poll/1576/abortion.aspx (last accessed Oct. 02, 2022). According to these same polls, many Americans simultaneously hold a position that they did not wish to see *Roe v. Wade* overturned, but still supported a ban on abortions after 15 weeks. *See* Jacob Sullum, Do Americans Who Support Roe v. Wade Understand Its Implications?, Reason, https://reason.com/2022/05/04/do-americans-who-support-roe-v-wade-understand-its-implications/ (May 04, 2022).

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[1] This is explained by the vote in the 2021 House Budget cycle, where Appropriations Committee Democrats voted to remove both the Hyde Amendment and the Weldon Amendment from the annual budget. A motion to include the amendments in the bill failed in committee, with only one Democrat voting in favor of including the amendments. U.S. House of Representatives, Committee on Appropriations, Full Committee Vote on Labor, Health and Human Services, Education, and Related Agencies Bill FY 2022, 117th Cong., 1st Sess. (July 15, 2021), https://docs.house.gov/meetings/AP/AP00/20210715/113908/CRPT-117-AP00-Vote001-20210715.pdf.

To add another piece of evidence that *Roe* specifically has fanned the flames of division in the period between the *Casey* and *Dobbs* decisions: many states have overturned or reconsidered their own precedents on abortion. One example of the bitter debates lies in the use of taxpayer dollars to fund abortions. In 1977, the United States Supreme Court found that it was not constitutionally required for states to fund abortions with taxpayer dollars. *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977). Similarly, the United States Supreme Court has upheld federal bans of taxpayer funding of abortion. *Harris v. McRae*, 448 U.S. 297 (1980). However, these decisions, like *Roe,* did not settle the issue of abortion funding and the debate on whether government should be required to fund abortions has continued to rage at the state level. For example, Pennsylvania's decades-old precedents on whether bans on taxpayer-funded abortion are currently being challenged. *See Fischer v. Dept. of Pub. Welfare*, 502 A.2d 114 (Pa. 1985); *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs*, 249 A.3d 598 (Pa. Commw. Ct. 2021), appeal granted. And in 2018, West Virginia voters approved a constitutional amendment that overturned a decision by the state Supreme Court that provided a fundamental right to abortion and taxpayer-funded abortion. Compare *West Virginia Women's Health Center v. Panepinto,* 446 S.E.2d 658 (1993) to W. Vir. Const. Art. IV, Sec. 57.

With such stark political divisions on this issue that were exacerbated and ultimately caused by the Supreme Court's decision in *Roe*,

this Court should defer the question of the lengths to which the state can and should protect the sanctity of human life to the Kentucky General Assembly. The General Assembly has more political accountability to Kentuckians to deliberate and enact legislation to protect human life. To allow this judicial body to find a right to abortion in the state's constitution would impede the duties rightfully assigned to the state legislature. To protect state legislative authority, prevent political polarization, and protect its own credibility, the Kentucky Supreme Court should not repeat the same mistake that the United States Supreme Court made in *Roe.*

II. THE KENTUCKY HUMAN LIFE PROTECTION ACT AND KENTUCKY'S HEARTBEAT LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF EITHER THE KENTUCKY OR THE UNITED STATES CONSTITUTION

Arguments made by both the plaintiffs and the Circuit Court state that the Kentucky laws in question propose equal protection violation concerns. Plaintiff's Brief, at 8, 48. This argument lacks merit and as noted below, has been soundly rejected by the United States Supreme Court in *Dobbs,* 142 S.Ct, at 2235. The *Dobbs* Court's view is prevailing here in light of *Com. v. Howar*d, where this Court recognizes that a single standard applies to both federal and state equal protection challenges. *Com. v. Howar*d, 969 S.W. 2d, 700, 705 (Ky. 1998). As such, this Court must follow the United States Supreme Court's approach on any alleged equal protection violations.

It should be pointed out that there currently exists no United States Supreme Court precedent which establishes that a state's regulation of abortion is a sex-based classification. *See Sessons v, Morales-Santana*, 137 S.Ct. 1678, 1689 (2017). Therefore, the Kentucky laws in question in this case are not subject to any "heightened scrutiny" standard. Additionally, the U.S. Supreme Court has held that regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny, unless the regulation is a "mere pretext designed to effect an invidious discrimination against members of one sex or another." *Geduldig v. Aiello*, 417 U.S. 484, 496 fn. 20 (1974). In the present case, there is no such evidence here that the Kentucky Legislature was using such an invalid discriminatory pretext in either the Kentucky Human Life Protection Act or Kentucky Heartbeat Law.[2] As a direct result therefore, laws regulating or prohibiting abortion are not subject to heightened scrutiny under United States Supreme Court precedent, and are therefore governed by the same standard of review of other health and safety measures. Courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa*, 372 U.S. 726, 729-739 (1963). *See* also *Dandridge v. Williams*, 397 U.S. 471, 484-486 (1970), *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). Moreover, statutes

[2] In their Appellees' Opening Brief they do not deny that the Kentucky Human Life Protection Act and Kentucky Heartbeat Law could apply to both a trans-male individual, as well, against anyone else who freely identifies as female or binary, no matter their biological identification at birth.

regulating abortion, like other health and welfare laws, are entitled to a "strong presumption of validity," and must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Heller v. Doe*, 509 U.S. 312, 319-320 (1993). *See also FCC v. Beach Communications. Inc,* 508 U.S. 307, 313 (1993); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical of Okla., Inc*, 348 U.S. 483, 491 (1955); and *Gonzales v. Carhart*, 550 U.S. 124, 157-158 (2007) (legitimate state interests include respect for and preservation of prenatal life at all stages of development).

In the present case, the court should determine that the Kentucky General Assembly has validly enacted both the Kentucky Human Life Protection Act and Kentucky Heartbeat Law because "the State has an interest in the protection of potential life." *Sasaki v. Commonwealth*, 485 S.W.2d 897, 904 (Ky. Ct. App. 1972) (Kentucky's abortion statute represents a legitimate exercise of its legislative authority, and there is nothing in the Constitution of the United States which compels its nullification.") Even applying rational basis review to the Kentucky laws in this case, the laws should stand because no evidence of animus against a certain class exists. The United States Supreme Court has stated that the "goal of preventing abortion" does not constitute "invidiously discriminatory animus against women." *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 273-274. Because Kentucky follows the United States

Supreme Court approach on equal protection violations, it must also find no animus in this case. As such, the laws survive rational basis review.

In summary, under *Ferguson v. Skrupa, supra,* the Kentucky Legislature presumably had a legitimate state interest in enacting both the Kentucky Human Life Protection Act and Kentucky Heartbeat Law, which includes the respect for and preservation of prenatal life at all stages of development. This Court has already provided deference to the legislature by refusing to usurp the legislative role and its own precedent: the statute was appropriately considered by the General Assembly and noted that nothing in the U.S. Constitution compels otherwise. As a result, Appellee's Equal Protection challenges under the *Fourteenth Amendment to the United States Constitution* and Kentucky *Sections 1,2, and 3* fail for lacking legal merit.

CONCLUSION

For the above reasons, the Kentucky Supreme Court should affirm the Court of Appeals' stay of the circuit court's temporary injunction.

Respectfully submitted,

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