Kentucky Supreme Court

CASE NO. 2022-SC-329-TG

EMW WOMEN'S SURGICAL CENTER, P.S.C., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS; ERNEST MARSHALL, M.D., ON BEHALF OF HIMSELF AND HIS PATIENTS; PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, AND KENTUCKY, INC., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS, **MOVANTS**

v.

DANIEL CAMERON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY **RESPONDENT**

AMICUS BRIEF OF KENTUCKY RIGHT TO LIFE ASSOCIATION

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CERTIFICATE OF SERVICE

This is to certify that true and accurate copies of the foregoing Amicus Curiae Brief of Kentucky Right to Life Association, were served by to: Hon. Mitch Perry, 700 W. Jefferson Street, Louisville, KY 40202; Hon. Matt Kuhn, Hon. Brett Nolan, Kentucky Attorney General's Office, 700 Capitol Ave., Ste. 118, Frankfort, KY 40601; Heather L. Gatnarek, ACLU of Kentucky Foundation, 325 West Main Street, Suite 2210, Louisville, Kentucky 40202 (and to other Counsel of record for the Plaintiffs before the Circuit Court); Hon. Wesley Duke, 275 E Main St, 5W-A, Frankfort, KY 40621; Hon. Michael Rodman, 310 Whittington Pkwy, Suite 1B, Louisville, KY 40222, and Hon. Thomas B. Wine, 514 West Liberty Street, Louisville, KY 40202; and upon Hon. Kelly Stephens, 700 Capitol Ave., #209, Frankfort, KY 40601, by ordinary mail on this 28 day of September, 2022.

Christopher Wiest, Counsel for
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I. INTRODUCTION

This Court granted a Motion for Transfer from the Court of Appeals, regarding a Temporary Injunction entered by the Jefferson Circuit Court on July 22, 2022, enjoining duly enacted statutes from Kentucky's legislative branch, and crafting out of whole cloth a never-before-found right to terminate the life of another human being which, not surprisingly, contravenes more than 100 years of precedent from Kentucky's Courts. In its haste to issue its ends-justifies-any-means decision, the Circuit Court failed to balance, much less even mention, the significant irreparable harm and public interest at issue with respect to those previable children in Kentucky whose very lives are now without any legal protection.

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This matter was filed by Kentucky abortion clinics, clinic operators and a clinic owner (the "abortionists") asking a Jefferson Circuit Court judge to use the Kentucky Constitution as a pretext to craft a never-before-recognized right to an abortion. Following the recent United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the issue of abortion was de-federalized. Our nation's highest Court determined that abortion is different from actual privacy rights found under the Fourteenth Amendment, because it does not involve merely private conduct, but does involve interests beyond those of the mother, namely the right of the unborn child to live. The U.S. Supreme Court held that these questions, whether to allow abortion and, if so, under what circumstances, are best left to the states and their legislatures to decide.

Well, the Jefferson Circuit Court disagrees. For the first time in more than 100 years in this Commonwealth, a judge has decided it is not up to the legislature to balance delicate issues of life and autonomy. Rather, the Courts should apparently usurp legislative authority, using the Kentucky Constitution as a convenient excuse, in order to craft a new "constitutional right" out of whole cloth. In so doing, the Circuit Court's Order enabled the termination of innocent human life, and the abortionists ask this Court to permit them to re-resume that termination.

VII. ARGUMENT

Our present Constitution was adopted in 1891. *Zuckerman v. Bevin*, 565 S.W.3d 580 (Ky. 2018). This Court has articulated its belief that, in informing the meaning and import of our Commonwealth's Constitution, reference **must be made** to the debates and understanding of the constitutional convention delegates at the time of the Constitution's adoption. *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006) (reviewing the right to bear arms in terms of Section 1, subsection 7, and referencing both common understanding, and the debates); *Bevin v.*

Commonwealth ex rel. Beshear, 563 S.W.3d 74 (Ky. 2018) (in determining meaning of Kentucky Constitution, reference made to both common practice at the time of Kentucky Constitution's adoption, as well as the debates); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302 (Ky. 2010) (same); *Fletcher v. Graham*, 192 S.W.3d 350 (Ky. 2006) (same).

But, before delving into those debates and the history of abortion regulation in this Commonwealth from the 1870s to the present, two related background points bear mentioning.

First, whenever this Court "has interpreted the Constitution of Kentucky in a manner which differs from the interpretation of parallel constitutional rights by the Supreme Court of the United States," "it has been because of Kentucky constitutional text, the Debates of the [Kentucky] Constitutional Convention, history, tradition, and relevant precedent." *Brashars v. Commonwealth*, 25 S.W.3d 58, 61 (Ky. 2000), *quoting Commonwealth v. Cooper*, 899 S.W.2d 75 (Ky. 1995).

Second, analysis also begins with the presumption that legislative acts are constitutional. *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 43 (Ky. 2009). And "all fair and reasonable inferences in favor of upholding the validity of the statute" must be drawn. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 806 (Ky. 2009). "In Kentucky, a statute carries with it the presumption of constitutionality; therefore, when we consider it, 'we are 'obligated to give it, if possible, an interpretation which upholds its constitutional validity.'" *Id.* "To the extent that there is reasonable doubt as to a statute's constitutionality, all presumptions will be in favor of upholding the statute, deferring to the 'voice of the people as expressed through the legislative department of government.'" *Id.* "A constitutional infringement must be '**clear, complete and unmistakable**' in order to render the statute unconstitutional." *Id.* (emphasis added).

A. There has never been a right to terminate the life of another innocent human being conferred in Kentucky's Constitution, and there is no such right today. Rather, the power to regulate abortion rests with the Kentucky Legislature.

In 1879 (twelve years *prior* to the adoption of the current Kentucky Constitution), the Kentucky Court of Appeals (then Kentucky's highest Court) decided the matter of *Mitchell v. Commonwealth*, 78 Ky. 204 (Ky. 1879). The dispute in that case was whether the law at the time, and specifically the common law, prohibited abortion prior to quickening.[1] The Court concluded that the common law did not prohibit abortion prior to quickening, but did prohibit it after quickening, just not as murder. Significant for this matter, the Court unquestionably concluded that the legislative branch **could and should** outlaw abortion prior to quickening:

> In the interest of good morals and for the preservation of society, the law should punish abortions and miscarriages, willfully 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 of 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 <u>that ought to be provided against by the law-making department of the government. The limit of our duty is to determine what the law is, and not to enact or declare it as it should be</u>**. *Id.* at 210-211. (emphasis added).

Would Kentucky's highest court declare that the legislature "ought to provide against" abortion from the moment of conception if Kentucky's legislature had no such authority? To ask this question is to answer it.

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[1] "Quickening," of course, was a concept at common law that generally referred to when the pregnant woman could feel the child in the womb or otherwise detect signs of its life. William Blackstone, Commentaries on the Laws of England, at *123, *129-38 (1765). At common law, it was a felony to procure an abortion after quickening. *Id.* As early as 1250, English common law punished abortion. Henry de Bracton (1968) [c. 1250]. "The crime of homicide and the divisions into which it falls," George E. Woodbine (ed.). *On the Laws and Customs of England.* Vol. 2. Translated by Samuel Edmund Thorne. p. 341. OCLC 1872. Today, with the advent of modern medical machinery, that can occur as early as five weeks after implantation. Tr. 192:2–22.

Abortion was not advanced as any sort of "right" at our Constitutional Convention. In fact, the word "abortion" is only found three times in the 1890-1891 Debates. The first, on page 1099, makes clear that abortion was acknowledged to be a crime:

> I have been told, since I came to Frankfort, in one of the counties of this Commonwealth, not very long ago, a young man was indicted for the offense of abortion on a young woman; that afterwards they married; they lived together in peace; that it was a happy union, and that that young man, in order to cover up the disgrace upon his wife and relieve himself after he married the woman, went to the Governor and obtained a pardon. 1890–91 Debates at 1099 (Delegate Auxier speaking).

The second, on page 2476, notes that abortion was also a crime in Indiana. And the third refers to abortion in a different context. *See, e.g.*, *Clark v. Commonwealth*, 63 S.W. 740, 744–47 (Ky. 1901); *Goldnamer v. O'Brien*, 33 S.W. 831, 831–32 (Ky. 1896); *Calloway Cnty. Sheriff's Dept. v. Woodall*, 607 S.W.3d 557, 572 (Ky. 2020) ("Cases decided contemporaneously or close in time to the constitutional convention would appear to be persuasive of Delegates' intent.").

Then in 1910, 31 years after Kentucky's highest court stated that the General Assembly had full authority to adopt, and should adopt, a statute against abortion, and after passage of the Kentucky Constitution, the Kentucky General Assembly passed its first abortion statute (1910 Ky. Acts, Chapter 58, codified at Ky. Stat. 1219a):

CHAPTER 58.

AN ACT defining the crime of abortion and prescribing a penalty therefor.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§1. It shall be unlawful for any person to prescribe or administer to any pregnant woman, or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or substance, whatsoever, with the intent thereby to procure the miscarriage of such woman, or with like intent, to use any instrument or means whatsoever, unless such miscarriage is necessary to preserve her life; and any person so offending, shall be punished by a fine of not less than five hundred nor more than one thousand dollars, and imprisoned in the State prison for not less than one nor more than ten years. Abortion; Penalty.

Thereafter, legislative regulation of abortion from the moment of conception continued in this Commonwealth from 1910 through 1973, as it was codified within the Kentucky Revised Statutes at KRS 436.020 throughout that period of time. *See Commonwealth v. Allen*, 191 Ky. 624 (Ky. 1921); *Fitch v. Commonwealth*, 291 Ky. 748 (Ky. 1941); *Dalzell v. Commonwealth*, 312 S.W.2d 354 (Ky. 1958); *Richardson v. Commonwealth*, 312 S.W.2d 470 (Ky. 1958); *Brown v. Commonwealth*, 440 S.W.2d 520 (Ky. 1969).

Entirely skipping this relevant context and history, the abortionists and the Circuit Court jumped 100 years through time and cited to *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), which recognized a limited right to privacy under Sections 1 and 2 of the Kentucky Constitution. This Court in *Wasson* expressly limited its holding in a way that could not possibly support creating a new "constitutional right" to abortion 30 years after *Wasson*. That is because in appropriately referring back to the 1890-1891 debates, this Court determined in *Wasson* that any rights to liberty had a caveat, namely: "provided that he shall in no wise injure his neighbor in so doing." *Id.* at 494. This Court in *Wasson* then cited with approval *Commonwealth v. Campbell*, 133 Ky. 50 (1909), which was a case that invalidated an ordinance prohibiting the **private use and possession** of liquor. The Court in *Campbell* understood the legal significance of causing harm to others and stated clearly: "[l]et a man therefore be ever so abandoned in his principles, or vicious in his practice, **provided he keeps his wickedness to himself**, and does not offend against the rules of public decency, he is out of the reach of human laws." *Id.* at 386 (emphasis added).

Ultimately, this Court in *Wasson* held that "[t]he clear implication is that immorality in private which does '**not operate to the detriment of others**,' is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." 842 S.W.2d 487, 496. And, in

keeping with *Wasson,* just two years ago this Court affirmed that the Kentucky Bill of Rights does not confer "unfettered rights" to private citizens where the life or death of others is at stake. *Beshear v. Acree*, 615 S.W.3d 780, 816-817 (Ky. 2020), *citing Nourse v. City of Russellville*, 257 Ky. 525, 78 S.W.2d 761, 764 (Ky. 1935) ("[t]he conservation of public health should be of as much solicitude **as the security of life**. It is an imperative obligation of the state, and its fulfillment is through inherent powers.").

But here, the Circuit Court improperly cited *Wasson* for the proposition that there is an "unfettered" right to privacy outside one's home which involves the right to irreparably harm another. So, rather than upholding this Court's precedent, the Circuit Court issued a decision rejecting this Court's precedent and enjoined duly enacted legislation in order to create a "right to privacy" that does "operate to the detriment of others", and does infringe upon "the security of life" of the most vulnerable of others: the right to kill unborn children.

Scientific sources are clear that human life begins at conception. Moore, Keith L., *Essentials of Human Embryology*, Toronto: B.C. Decker Inc, 1988, p.2 ("Human development begins after the union of male and female gametes or germ cells during a process known as *fertilization* (conception)."); *Stinnett v. Kennedy*, 232 So. 3d 202, 220-221 (Al. 2016) (observing that "life begins at conception"); *Nealis v. Baird*, 996 P.2d 438, 453 (OK 1999) (same); *Cheaney v. State*, 285 N.E.2d 265, 268 (IN 1972) (same).[2] Legal authority has long recognized this scientific reality, that an unborn child is in existence from the moment of conception. Prosser and Keeton on Torts, § 55 "Prenatal Injuries" at 368 (5th Ed. 1984); 42 Am.Jur.2d "Infants" § 3;

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[2] Halley and Harvey, "The Beginning of Life," 69 J. Kans. Med. Soc. 384 (1968); "Biologically as well as ethically the only logical and satisfactory view of the embryo is to regard it as a human being from the outset. It has from the outset a degree of independence with regard to the mode of its growth and development and, though receiving nutrition from the mother, the manner of its development is not controlled by her." John Marshall, M. D., Medicine and Morals 66 (1964).

Steinberg v. Brown, 321 F. Supp. 741 (D.C. Ohio 1970), observed that "biologically, when the spermatozoon penetrates and fertilizes the ovum, the result is the creation of a new organism which conforms to the definition of life...." *Id.* at 746. "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it." *Id.* at 746-747. *See, also*, Michael Holzapfel, Comments, *The Right to Live, The Right to Choose, and the Unborn Victims of Violence Act*, 18 J. Contemp. Health L. & Pol'y 431 (2002). And, legal commentaries as far back as 1968 have shown that viability is "impractical of application." Norman, Torts: Prenatal Injuries - Liability and Live Birth, 21 Okla. L. Rev. 114 (1968).

Not surprisingly, briefing before the United States Supreme Court in *Dobbs*, 142 S.Ct. 2228, both from secular sources and from a variety of faith groups, reflected a wealth of knowledge regarding the sanctity of human life from the very moment of conception.[3] This briefing demonstrated that (i) *Roe v. Wade*, 410 U.S. 113 (1973) and its trimester framework was unworkable; (ii) *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and its pre- and post-viability framework was unworkable (because, among other things, there are no bright lines on viability); and (iii) states (including Kentucky) have long-held interests in not only protecting maternal health, but also in protecting pre-born human life, and in protecting against harm to the medical profession in a civil society.[4] This briefing also

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[3] http://www.supremecourt.gov/DocketPDF/19/19-1392/184580/20210721170924501_41204%20pdf%20Parker.pdf (last accessed 9/20/2022).

[4] http://www.supremecourt.gov/DocketPDF/19/19-1392/184772/20210723123330497_NRLC.Dobbs%20Amici%20Brief.pdf (last accessed 9/20/2022).

Most significantly, the Amicus Brief of Biologists as Amici Curiae in Support of Neither Party filed in *Dobbs*, 142 S.Ct. 2228, at 24-28, https://perma.cc/C6DL-4G7Y (last accessed 9/20/2022).

demonstrated that judicial-line drawing at viability was untenable because viability depended on numerous factors.[5]

In addition to striking down the trigger law (KRS 311.772), the Circuit Court also concluded there was an unconstitutional delegation for the trigger law under Sections 27, 28, and 29, as well as vagueness, holding that it was improper to permit the operation of a statute to turn on a decision by the United States Supreme Court. Of course, Kentucky's Courts have long distinguished between legislation that requires the approval of someone else versus those *that are triggered by an event. Clay v. Dixie Fire Ins. Co.*, 168 Ky. 315, 181 S.W. 1123 (Ky. 1916) (Law that goes into effect on approval by the General Assembly, though the conditions under which it shall apply depend upon the legislatures of the foreign states is permissible); *Johnson v. Commonwealth*, 291 Ky. 829, 165 S.W.2d 820 (Ky. 1942) (Law that set conditions for when it is triggered is permissible); *Commonwealth ex rel. Meredith v. Johnson*, 292 Ky. 288, 166 S.W.2d 409, 1942 Ky. LEXIS 73 (Ky. 1942) (same); *Duncan v. Smith*, 262 S.W.2d 373, 1953 Ky. LEXIS 1090 (Ky. 1953) (same); *Commonwealth v. Associated Industries of Kentucky*, 370 S.W.2d 584, 1963 Ky. LEXIS 76 (Ky. 1963) (Some power can be vested in bodies, including federal approvals, other than the legislature so long as delegating authority retains right to revoke such power).

The Circuit Court also held the trigger law was vague, because it could be construed to apply to either to the date *Dobbs* was decided, or the date the mandate was issued. Putting aside

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[5] http://www.supremecourt.gov/DocketPDF/19/19-1392/184905/20210726125612491_19-1932%20Amicus%20Brief%20of%20The%20Catholic%20Medical%20Association%20et%20al..pdf (last accessed 9/21/2022).

http://www.supremecourt.gov/DocketPDF/19/19-1392/185034/20210727130751481_19-1392%20Amicus%20Brief%20of%20Robin%20Pierucci%20MD%20and%20Life%20Legal%20Defense%20Foundation.pdf (last accessed 6/30/2022).

the rule of lenity that would apply to any prosecution in that narrow period, both of those dates already passed at the time the Circuit Court rendered its injunction, thus demonstrating that issue was moot.

The Circuit Court also found an equal protection violation. No less than *Dobbs* wisely rejected that conclusion, stating, "[t]he 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 the other.'" *Id.* at 2245–46. Of course, this Court also already decided that equal protection was not violated by a restriction on abortion. *Sasaki v. Commonwealth*, 485 S.W.2d 897 at 903 (Ky. 1972). And, longstanding U.S. Supreme Court precedent, even in the era of *Roe*, holds likewise. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1984). In fact, the irrationality of the Circuit Court's equal protection reasoning is obvious: if any restriction that implicates pregnancy care constitutes an equal protection violation, it would likely prevent the state medical board from regulating obstetricians or gynecologists, and would likewise prevent the Commonwealth from imposing *any* barriers to abortions (including sanitary requirements in facilities).

And, turning to the last basis found by the Circuit Court, the so-called establishment of religion argument, this Court's predecessor rejected that argument in *Sasaki*, holding that "[t]he State is certainly competent to recognize that the embryo or fetus is potential human life" without violating the establishment of religion. 485 S.W.2d at 903. As Kentucky's highest court observed nearly 70 years ago, "there are 256 separate and substantial religious bodies" in the United States, and trying to "eliminate everything that is objectionable to any of these warring sects, or that which is inconsistent with their doctrines" would leave the law "in shreds." *Rawlings v. Butler*, 290 S.W.2d 801, 805 (Ky. 1956) (citation omitted). Indeed, Courts in this

Commonwealth have a long history of upholding statutory enactments that can be said to further the public good, even if they happen to be in conformity with a particular religious practice. *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942).

Simply put, it is not hyperbole to say the reasoning contained in the Circuit Court's ruling opens pandora's box. Will we now see wholesale challenges to Kentucky's substance abuse laws because such laws are in line with certain religious views and thus "establish" those views as law? *Employment Division v. Smith*, 494 U.S. 872 (1990). Should we strike down our alcoholic beverage control laws as an impermissible "establishment of religion", because some religious believers oppose alcohol? Or perhaps we should invalidate the assisted suicide law, KRS 216.302, because opposition to suicide is formed, in many instances, from religious belief? The illogic of the Circuit Court's ruling is as stunning as its potential for future harm is certain.

Ultimately, when one rightly considers the appropriate constitutional backdrop, the Circuit Court's reasoning and ruling should not stand. Against this backdrop, is it even possible to conclude the Plaintiffs below demonstrated, ***beyond a reasonable doubt,*** that not one but two separate enactments of the Commonwealth's General Assembly, both of which protected human life in conformity with more than 100 years of common law tradition in this Commonwealth, were unconstitutional and must be enjoined? *Caneyville Volunteer Fire Dep't*, 286 S.W.3d 790, 806. Again, to ask this question is to answer it.

B. Without a clear and unambiguous constitutional right at stake, a Circuit Court egregiously oversteps its authority by issuing an injunction, which enables the irreparable harm from the termination of human life

The breadth of the Circuit Court's temporary injunction is stunning. In addition to enjoining KRS 311.772, which prohibits abortions except to save the life of the mother or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman, the

Circuit Court also enjoined an entire statutory section of Kentucky law: KRS 311.7701 through KRS 311.7711. Now enjoined is the non-operative definitional section in KRS 311.7701. Now enjoined is the non-operative findings section of KRS 311.7702. Now enjoined are the limiting provisions of KRS 311.7703 and KRS 311.7708. Now enjoined is a requirement to conduct an examination to determine if the fetus has a heartbeat and to keep records of that determination. KRS 311.7704. Now enjoined is the record-keeping requirement to document the purpose of the abortion. KRS 311.7707. Now enjoined is the requirement for an inspection of facilities under KRS 311.7710. And now enjoined is the severability provision in KRS 311.7711.

Even *if* some new, never-before recognized, and contained nowhere in the Kentucky Constitution's text or history, right to an abortion exists, it is impossible to justify the Circuit Court's wholesale elimination of multiple provisions of Kentucky law that have nothing to do with such a right. True, several provisions of Kentucky's heartbeat law do provide limitations on abortions once a heartbeat is detected, or if no determination of a heartbeat is undertaken: KRS 311.7705 and KRS 311.7706, but the Circuit Court did not limit its order to those circumstances. Instead, the sheer scope of the Circuit Court's temporary injunction demonstrates not reasoned judicial decision making which should have narrowed the remedy to the alleged harm, but rather a wholesale desire to simply second guess the legislature.

Typical temporary injunction practice in this Commonwealth involves a weighing of harms, particularly irreparable harm, to everyone involved. *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. 1978). First, "the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury." *Id.* at 699. Second, "the trial court should weigh the various equities involved," and "consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Id.* And,

"[f]inally, the complaint should be evaluated to see whether a substantial question has been presented." *Id.*

KRLA's volunteer sidewalk counselors, who attempt to minister to those seeking an abortion and dissuade them from doing so, witnessed hundreds of individuals procure abortions from June 30, 2022, through August 2, 2022. Utilizing 2020 abortion data,[6] it is likely approximately 342 abortions were procured during the period that the Circuit Court's temporary restraining order and temporary injunction were in place. To be clear: those 342 children will never be born, they will never grow up, they will never graduate from school or marry. Their lives are no more. And, according to the Commonwealth's Cabinet for Health and Family Services statistics (see above) a disproportionate number of those children (compared to the population at large) were children of color. Disproportionately terminating the lives of children, disproportionately affecting children of color is not the hallmark of a civilized society, and it is all the more offensive to argue there is an alleged constitutional right to do so.

Of course, KRLA is not merely an organization that opposes abortion, it also is an organization that provides life-affirming support. [7] It operates on the front lines of this issue, and has, for decades, stationed volunteer sidewalk counselors outside Kentucky's abortion clinics to offer alternatives to persons who are in crisis, all in an attempt to prevent the termination of unborn life.

Yet, conspicuously absent in the Circuit Court's order is any analysis about *the lives of these unborn children, their* liberty interests, or *their* rights. In granting the Motion for Transfer, and setting this case for briefing, two Justices of this Court thoughtfully stated that: "Rarely,

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[6] https://chfs.ky.gov/agencies/dph/dehp/vsb/Forms/2020KYAbortionAnnualReport.pdf (last visited 9/14/2022).
[7] https://www.krla.org/Topics/Pregnancy_Help (last visited 9/14/2022).

however, are we tasked with weighing interests that are as heavy and as important as those at stake in the case at bar. The interests on both sides of this debate are compelling and bear on the health and welfare of all Kentuckians ... Recognizing that matters of life, death, and health are at stake, time is of the essence." (Order on Mot. Transfer, Keller and Nickell, JJ., concurring).

While KLRA respectfully submits that the interests of the abortionists are *not* life and death (all of the challenged laws have life and impairment of organ exceptions for the mother), at a very minimum, the interests of unborn children to live must be taken into account. Yet, their interests are not even *mentioned* in the analysis by the Circuit Court. Survivors of abortion exist, often with lifelong physical handicaps and emotional scars, but the Circuit Court failed to give them the benefit of even a line of discussion, or a second thought, in its decision.[8] In fact, the Circuit Court got the irreparable harm analysis backwards, as its order actually enabled irreparable harm to hundreds of unborn children. And now, the abortionists want the right to continue that harm.

Science today is markedly different than in 1973. We now know that heartbeat detection (the modern-day quickening – when we can detect life) can occur at 5 weeks. Tr. 192:2–22. By nine to ten weeks, "the fetal heart functions as it will in the adult." *Id.* at 188:13. Soon after, "fingerprints are discernible," *id.* at 188:17–19, and the unborn child will have detectable electrical activity in his or her brain, *id.* at 188:17–19.[9] So, even *if* there is some right under the Kentucky Constitution to obtain an abortion and terminate life (and we emphatically have

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[8] https://thelifeinstitute.net/learning-centre/abortion-facts/survivors (last visited 9/14/2022). Testimony of Melissa Ohden, MSW *Founder & Director, The Abortion Survivors Network, and The Abortion Survivors Network Education & Policy Center,* https://www.judiciary.senate.gov/download/melissa-ohden-testimony (last visited 9/14/2022).

[9] Studies and emerging science now document that fetal pain is experienced prior to viability (the line drawn by the Circuit Court), and as early as 12 weeks. *Reconsidering Fetal Pain*, Journal of Medical Ethics, Derbyshire, et. al. https://jme.bmj.com/content/46/1/3 (last visited 9/14/2022).

demonstrated there is not), is the termination of someone's life, who has a beating heart, fingerprints, and detectable electrical activity in his or her brain, within the ambit of that right? If so, is there also a right to terminate life support for an adult clinging to life, who likewise has a heartbeat, fingerprints, and detectable electrical activity in his or her brain? Would we callously avoid discussing their interests, as the Circuit Court did, and instead focus on their next of kin, and what they may lose through hospital bills, or their interests in a quicker inheritance, or the fact that their lives may be made easier if life support were terminated? And what, exactly, is the science, or even logic, behind viability – the line the Circuit Court drew? We submit there is none.

One of the most problematic aspects of the abortionists Brief is their unwillingness, or inability, to draw a line on when life begins and is entitled to protection. It appears that they content that the right they advance is abortion up until the moment of birth. Or, at the very least, they are unwilling to engage in line-drawing on when the rights of the human in utero is entitled to legal recognition of *their* rights. This Court should press them on that issue at oral argument.

These questions, of when life in the womb begins, when a person is capable of feeling pain, or when that life is entitled to the equal protection of law, are fundamentally questions for the General Assembly. That has been the case since at least 1879, *Mitchell*, 78 Ky. 204, and it should remain the case today, particularly given this Court's jurisprudence about the General Assembly's ability to declare and determine public policy in this Commonwealth. *Louisville & Jefferson Cty. Metro. Sewer Dist. v. Hill*, 607 S.W.3d 549, 555 (Ky. 2020). "If there are social and ethical problems in the solutions science offers, these are problems of public policy that belong in the legislative domain, not in the judicial, under our constitutional doctrine of

separation of powers." *Surrogate Parenting Assocs., Inc. v. Commonwealth*, 704 S.W.2d 209, 213 (Ky. 1986).

As demonstrated, on the merits, there is no right to an abortion under the Kentucky Constitution. But even if the question is close (and we submit it is not), *Maupin* commands that "doubtful cases should await trial of the merits." 575 S.W.2d 695, 698. Particularly where statutory enactments of the people's elected representatives come with a presumption of constitutionality that can only be overcome beyond a reasonable doubt. *Caneyville Volunteer Fire Dep't*, 286 S.W.3d 790, 806.

VIII. CONCLUSION

Human life has value. That value has been recognized from the founding of our Commonwealth up to today. Section 1 of our Kentucky Constitution guarantees the right to "life" for a reason. That right is guaranteed because it is a right that is conferred by our nature as human beings. And the science of being a human being, separate from our mother and our father, begins in the womb from the moment of conception. The Circuit Court rejected long-standing precedent in this Commonwealth. There is no right to an abortion in the Kentucky Constitution, and there never has been such a right. The judgment of the Circuit Court should be reversed.

Respectfully submitted,

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