No. 2022-SC-0329

Supreme Court of Kentucky

DANIEL CAMERON,
APPELLANT,
v.
EMW WOMEN'S SURGICAL CENTER, ET AL.,
APPELLEES.

ON APPEAL FROM THE JEFFERSON CIRCUIT COURT
DIVISION THREE, NO. 22-CI-3225
HON. MITCH PERRY, PRESIDING

BRIEF OF PREGNANCY HELP CENTER MEDICAL CLINIC, BSIDEU FOR LIFE PREGNANCY & LIFE SKILLS CENTER, AND THE FAMILY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 3rd day of October, 2022, he caused ten (10) true and exact copies of this Brief, to be served via hand-delivery to Hon. Kelly Stephens, the Clerk of the Kentucky Supreme Court, Capital Building, Room 209, 700 Capital Avenue, Frankfort, KY 40601; one copy via first class mail, postage prepaid, to each of the following: Hon. Kate Morgan, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; Hon. Mitchell Perry, Jefferson Circuit Court, 700 W. Jefferson

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STATEMENT OF POINTS & AUTHORITIES

INTRODUCTION

Kentucky's Constitution is silent about abortion. Thus, like the United States Constitution, it is neutral on this contentious issue. And "[b]ecause the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring). The People of Kentucky have spoken through their representatives. The plaintiffs' demand that their moral and business preferences—their belief that pre-viability life has *no* value—be imposed on the People should be rejected.

The United States Supreme Court tried to impose a judicial vision of abortion-on-demand for nearly 50 years, to disastrous results. It struggled to identify the constitutional basis of such a right, veering from privacy in *Roe v. Wade*, 410 U.S. 113, 154 (1973), to autonomy and mysteries of life in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). It could not decide the parameters of such a right, careening from trimesters in *Roe* to viability in *Casey*. It could not identify why viability mattered but in purely "circular" fashion. *Dobbs*, 142 S. Ct. at 2311 (Roberts, C.J., concurring in judgment). It could not provide a workable standard to adjudicate any right to abortion, eventually recognizing that its "undue burden" test "is inherently standardless." *Id.* at 2272 (majority opinion) (cleaned up). It adopted an abortion right that put the United States in the dubious company of a handful of countries hostile to basic human rights, "among them China and North Korea." *Id.* at 2312 (Roberts, C.J.). Its invented abortion right distorted vast swaths of the law, including "[s]tatutory interpretation, the rules of civil procedure, the standards for appellate review of legislative factfinding, and the First Amendment." *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 451 (6th Cir. 2021) (Thapar, J., concurring in judgment in part and dissenting in part). And its constitutional rule precipitated the deaths of more than 63 million unborn children in America.

Now, several abortionists whose business interests are at stake want this Court to make all these mistakes and more. They want this Court to take sides on one of the most

contentious questions of our time: whether an unborn child deserves legal protection. And they want this Court to categorically hold that unborn life—at least before some arbitrary point of viability, which is unknowable, circumstance-dependent, and always changing—has no value at all. They claim that the Constitution enshrines their moral belief that pre-viability life deserves *no* protection.

Unsurprisingly, the abortionists' extraordinary ideological view has never prevailed in our legislative process. Abortionists will continue pressing that view in the court of public opinion; their business model demands it. But this Court should not countenance abortionists' strained effort to invoke a constitutional provision that guarantees life and liberty to take away the ability of the People to protect unborn life. The Constitution does not impose the plaintiffs' moral perspective on all Kentuckians. The Court too should be neutral.

Fortunately, upholding Kentucky's laws would not require the Court to decide when life begins. After surveying medical evidence and making express findings, the General Assembly determined that pre-viability unborn life is worthy of legal protection. This legislative determination is consistent with the scientific evidence now available. "[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007). At five weeks' gestation (just three weeks after conception), the unborn child's heart starts beating. By six weeks, brain waves are detectable. By seven weeks, the child can move and starts to develop sensory receptors. By ten weeks, multiple organs begin to function, and the child has the neural circuitry for spinal reflex, an early response to pain. By twelve weeks, the child can open and close fingers and sense stimulation from the outside world, and has assumed the human form. And medical interventions after fifteen weeks (other than abortion) use analgesia to prevent suffering. At this point of pregnancy, abortionists must rip the child "piece by piece" from the womb. *Gonzales*, 550 U.S. at 136.

To uphold the Act would not require this Court to consider the implications of these scientific facts; the People have already done so through their elected representatives. That

some voters were motivated by religious beliefs is unremarkable; such beliefs led to the abolition of slavery, and practically *every* law involves underlying moral motivations. What matters is the People's decision that pre-viability life is worth protecting. Accepting the abortionists' theory, on the other hand, would require this Court to "impose on the [P]eople a particular theory about when the rights of personhood begin." *Dobbs*, 142 S. Ct. at 2261. It would require this Court to substitute a moral and philosophical belief that pre-viability life has no value for the General Assembly's scientific judgment that abortion ends "the life of an 'unborn human being.'" *Id.* at 2258. In other words, the abortionists want this Court to hold that the Kentucky Constitution "*requires* the State[] to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed." *Id.* at 2261. That extraordinary demand seeks relief far beyond this Court's judicial power to say what the law is: "It is not the role of the courts to substitute their judgment for the legislative enactment, for to do so would be to usurp the power reserved for the legislative authority." *Bell v. Bell*, 423 S.W.3d 219, 223 n.11 (Ky. 2014) (cleaned up).

The Court should reject the plaintiffs' radical reinterpretation of the Kentucky Constitution. As with many controversial issues, the issue of abortion is not decided by the Constitution. "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 (cleaned up). The People's representatives "can do what [this Court] can't: listen to the community, create fact-specific rules with appropriate exceptions, gather more evidence, and update their laws if things don't work properly." *Slatery*, 14 F.4th at 462 (Thapar, J.). The People now get to decide how to protect unborn life.

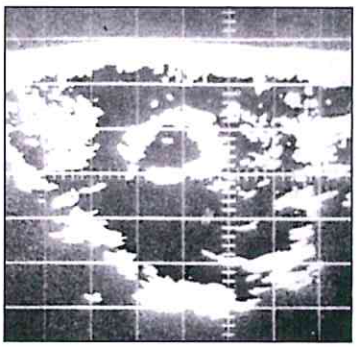
ARGUMENT

I. The People's decision to protect unborn life reflects scientific fact.

Scientific knowledge both underscores the legitimacy of the General Assembly's decisions here and undermines any argument for a novel constitutional right to abortion. Medical advancements have produced scientific evidence that makes clear today what the U.S.

Supreme Court in *Roe* could not understand: the human fetus is a living being from the moment of conception and can move, smile, and feel pain in the womb.

When the Court decided *Roe* in 1973, scientific knowledge about fetal development was limited, with fetology only recognized as a new field of science that same year.[1] Indeed, the Court had been told that "in early pregnancy" "embryonic development has scarcely begun." Brief for Appellant 20, *Roe*, 1971 WL 128054. Thus, "[a]s to the question 'when life begins,' the *Roe* majority maintained that 'at that point in the development of man's knowledge,' it was 'not in a position to speculate.'" *Slatery*, 14 F.4th at 450 (Thapar, J.) (quoting *Roe*, 410 U.S. at 159). The Court purported to rely on what it considered to be "the well-known facts of fetal development" to conclude that a pre-viability "fetus, at most, represents only the potentiality of life." *Roe*, 410 U.S. at 156, 162. Only in the late 1970s—years after *Roe*—did the use of ultrasound machines expand.[2] Unlike the prototypes in limited use in 1973, routine ultrasounds can now provide high-quality three-dimensional images in real time that reveal the fetus to be much more developed than the Court in *Roe* could have known. Reflecting these advances in medical knowledge, ultrasound imagery available at the time of *Roe* looked much different from the imagery available today, as shown by these fifteen-week ultrasounds from 1973 and today[3]:



[1] Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* 113 (2011).
[2] Malcolm Nicholson & John E.E. Fleming, *Imaging and Imagining the Fetus: The Development of Obstetric Ultrasound* 232 (2013).
[3] Stuart Campbell, *A Short History of Sonography in Obstetrics and Gynaecology*, 5 FVV-ObGyn 217 (2013); Kristen J. Gough, *Second Trimester Ultrasound Pictures* (Dec. 5, 2019), https://perma.cc/J2NV-GT6M.

We know that "[f]rom fertilization, an embryo (and later, fetus) is alive and possesses its unique DNA."[4] The fusion of the oocyte and the sperm create the zygote "in less than a single second."[5] In a "biological sense," "the embryo or fetus is whole, separate, unique and living" from conception. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (en banc). "Of course, that new life is not yet mature—growth and development are necessary before that life can survive independently—but it is nonetheless human life." *Hamilton v. Scott*, 97 So. 3d 728, 746–47 (Ala. 2012) (Parker, J., concurring).

During the fifth week, "[t]he cardiovascular system is the first major system to function in the embryo," with the heart and vascular system appearing in the middle of the week.[6] By the end of the fifth week, "blood is circulating and the heart begins to beat on the 21st or 22nd day" after conception.[7] By six weeks, "[t]he embryonic heartbeat can be detected."[8] After detection of a fetal heartbeat—and absent an abortion—the overwhelming majority of unborn children will now survive to birth.[9] Also during the sixth week, the child's nervous system is developing, with the brain already "patterned" at this early stage.[10] The earliest neurons are generated in the region of the brain responsible for thinking, memory, and other higher functions.[11] The child's face is developing - cheeks, chin, and jaw starting to form.[12]

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[4] *Slatery*, 14 F.4th at 450 (Thapar, J.) (citing Enrica Bianchi, et al., *Juno Is the Egg Izumo Receptor and Is Essential for Mammalian Fertilization*, 508 Nature 483, 483 (2014)).

[5] Am. Coll. of Pediatricians, *When Human Life Begins* (Mar. 2017), https://perma.cc/Z9W5-UN9T; *see also* Ulyana Vjugina & Janice P. Evans, *New Insights into the Molecular Basis of Mammalian Sperm-Egg Membrane Interactions*, 13 Frontiers Bioscience 462, 462–76 (2008); Maureen L. Condic, *When Does Human Life Begin? A Scientific Perspective* 5 (2008).

[6] Keith L. Moore et al., *The Developing Human E-Book: Clinically Oriented Embryology* 8945 (Kindle ed. 2020).

[7] *Id.* at 2662.

[8] *Id.* at 2755; *accord* WebArchive, Planned Parenthood, *What happens in the second month of pregnancy?* (July 25, 2022), https://tinyurl.com/2jvsvh34

[9] Joe Leigh Simpson, *Low Fetal Loss Rates After Ultrasound Proved-Viability in First Trimester*, 258 J. Am. Med. Ass'n 2555, 2555–57 (1987).

[10] Thomas W. Sadler, *Langman's Medical Embryology* 72 (14th ed. 2019); *see generally id.* at 59–95.

[11] *See, e.g.*, Irina Bystron et al., *Tangential Networks of Precocious Neurons and Early Axonal Outgrowth in the Embryonic Human Forebrain*, 25 J. Neuroscience 2781, 2788 (2005)

[12] *See* Sadler, *supra* note 10, at 72–95.

At seven weeks, cutaneous sensory receptors, which permit prenatal pain perception, begin to develop.[13] The unborn child also starts to move.[14] During the seventh week, "the growth of the head exceeds that of other regions" largely because of "the rapid development of the brain" and facial features.[15] At eight weeks, essential organs and systems have started to form, including the child's kidneys, liver, and lungs.[16] The upper lip and nose can be seen.[17] At nine weeks, the child's ears, eyes, teeth, and external genitalia are forming.[18]

At ten weeks, vital organs begin to function, and the child's hair and nails begin to form.[19] By this point, the neural circuitry has formed for spinal reflex, or "nociception," which is the fetus's early response to pain.[20] Starting around ten weeks, the earliest connections between neurons constituting the subcortical-frontal pathways—the circuitry of the brain that is involved in a wide range of psychological and emotional experiences, including pain perception—are established.[21]

At the time of *Roe*, "the medical consensus was that babies do not feel pain."[22] Only during the late 1980s and early 1990s did any of the initial scientific evidence for prenatal pain begin to emerge.[23] Today, the "evidence for the subconscious incorporation of pain into neurological development and plasticity is incontrovertible."[24] Every modern review of

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[13] Kanwaljeet S. Anand & Paul R. Hickey, Special Article, *Pain and Its Effects in the Human Neonate and Fetus*, 317 New Eng. J. Med. 1321, 1322 (1987).
[14] Alessandra Pionetelli, *Development of Normal Fetal Movements: The First 25 Weeks of Gestation* 98, 110 (2010).
[15] Keith L. Moore et al., *The Developing Human: Clinically Oriented Embryology* 65–84.e1 (11th ed. 2020).
[16] *See* Sadler, *supra* note 10, at 72–95.
[17] Moore et al., *supra* note 15, 1–9.e1.
[18] *See* Sadler, *supra* note 10, at 72–95.
[19] *See id.* at 106–127; Moore et al., *supra* note 15, at 65–84.e1; Johns Hopkins Med., *The First Trimester*, https://perma.cc/8N6H-M6CN.
[20] *See, e.g.*, Int'l Ass'n for the Study of Pain, *IASP Terminology*, https://perma.cc/5PV5-5T9H.
[21] Lana Vasung et al., *Development of Axonal Pathways in the Human Fetal Fronto-Limbic Brain: Histochemical Characterization and Diffusion Tensor Imaging*, 217 J. Anatomy 400, 400–03 (2010).
[22] Am. Coll. of Pediatricians, *Fetal Pain: What is the Scientific Evidence?* (Jan. 2021), https://perma.cc/JM3T-XQV8.
[23] *Id.*
[24] Curtis L. Lowery et al., *Neurodevelopmental Changes of Fetal Pain*, 31 Seminars Perinatology 275, 275 (2007).

prenatal pain consistently issues the same interpretation of the data: by ten to twelve weeks, a fetus develops neural circuitry capable of detecting and responding to pain.[25] Even more sophisticated reactions occur as the unborn child develops further.[26] And new developments have provided still more evidence strengthening the conclusion that fetuses are capable of experiencing pain in the womb.[27]

As early as ten or eleven weeks, the fetus shows awareness of his or her environment.[28] Studies of twins, for example, show that by ten to eleven weeks, twins engage in "inter-twin contact."[29] The fetus also begins to perform "breathing movements" that "increase progressively" as he or she develops in the womb.[30]

At eleven weeks, the unborn child's diaphragm is developing.[31] The child has hands and feet, ears, open nasal passages on the tip of the nose, and a tongue.[32] "[A]n unborn child visibly takes on the human form in all relevant aspects by 12 weeks' gestation." *Slatery*, 14 F.4th at 450 (Thapar, J.) (cleaned up). The child can open and close fingers, starts to make sucking motions, and senses stimulation.[33] The child's digestive system begins to function, white blood cells develop, and the pituitary gland produces hormones.[34] And the child's

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[25] *See, e.g.*, Carlo V. Bellieni & Giuseppe Buonocore, *Is Fetal Pain a Real Evidence?*, 25 J. Maternal-Fetal & Neonatal Med. 1203, 1203–08 (2012); Richard Rokyta, *Fetal Pain*, 29 Neuroendocrinology Letters 807, 807–14 (2008).

[26] *See* Royal Coll. of Obstetricians & Gynaecologists, *Fetal Awareness: Review of Research and Recommendations for Practice* 5, 7 (Mar. 2010), https://perma.cc/4V84-TEMC; Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. Am. Med. Ass'n 947, 948–49 (2005).

[27] *See* Lisandra Stein Bernardes et al., *Acute Pain Facial Expressions in 23-Week Fetus*, *Ultrasound Obstetrics & Gynecology* (June 2021), https://perma.cc/V8BU-PZK4.

[28] Umberto Castiello et al., *Wired to Be Social: The Ontogeny of Human Interaction*, 5 PLOS One, Oct. 2017, e13199, at 1, 9.

[29] *Id.*

[30] Pionetelli, *supra* note 14, at 40.

[31] *Id.* at 31.

[32] Moore et al., *supra* note 15, 1–9.e1; Prachi Jain & Manu Rathee, *Embryology, Tongue* (last updated Aug. 11, 2020), https://perma.cc/FCP4-7788.

[33] Pionetelli, *supra* note 14, at 50, 61–62; Slobodan Sekulic et al., *Appearance of Fetal Pain Could Be Associated with Maturation of the Mesodiencephalic Structures*, 9 J. Pain Rsch. 1031, 1034–35 (2016).

[34] Sadler, *supra* note 10, at 230–55.

vocal cords are developing.[35]

Moreover, by twelve weeks, the parts of the central nervous system leading from peripheral nerves to the brain are sufficiently connected to permit the peripheral pain receptors to detect painful stimuli.[36] Thus, the unborn "baby develops sensitivity to external stimuli and to pain much earlier than was believed" when *Roe* and *Casey* were decided. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (cleaned up).

Unborn Child at Thirteen Weeks[37]

At thirteen weeks, the bone structure is forming in the child's arms and legs,[38] and the intestines are in place within his or her abdomen.[39] At fourteen weeks, the roof of the child's mouth has formed, and his or her eyebrows begin to fill in.[40] By fifteen weeks, "the fetus is extremely sensitive to painful stimuli," and physicians (other than those performing abortions) take this fact "into account when performing invasive medical procedures on the fetus."[41] Even more neural circuitry for pain detection and transmission develops between sixteen and twenty weeks, including spinothalamic fibers, which are responsible for the

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[35] Johns Hopkins All Children's Hosp., *A Week-by-Week Pregnancy Calendar: Week 12*, https://perma.cc/32GP-WZYX.
[36] Sekulic et al., *supra* note 33, at 1034–35.
[37] Moore et al., *supra* note 15, at 85–98.e1.
[38] Mayo Clinic, *Pregnancy Week by Week: Fetal Development: The 2nd Trimester* (June 30, 2020), https://perma.cc/M7PA-6T9A.
[39] Mayo Clinic, *Pregnancy Week by Week: Fetal Development: The 1st Trimester* (June 30, 2020), https://perma.cc/D7JW-H6YW.
[40] Peter J. Taub & John M. Mesa, *Embryology of the Head and Neck, in Ferraro's Fundamentals of Maxillofacial Surgery* 3, 4, 6 (Peter J. Taub et al. eds., 2d ed. 2015).
[41] Sekulic et al., *supra* note 33, at 1036.

transmission of pain from the periphery to the thalamus.[42] By eighteen weeks, painful stimuli will cause the baby *in utero* to exhibit stress-induced hormonal responses.[43] Studies show that "the fetus reacts to intrahepatic vein needling with vigorous body and breathing movements."[44] The fetus also reacts to such stimuli with "hormonal stress responses," with rising hormone levels "independent of those of the mother."[45]

These recent discoveries have led scientists to conclude that "the human fetus can feel pain when it undergoes surgical interventions and direct analgesia must be provided to it."[46] For this reason, anesthesiologists commonly recommend pain relievers for the fetus during potentially painful procedures.[47] As one group of scholars explains, "the fetus is extremely sensitive to painful stimuli," and "[i]t is necessary to apply adequate analgesia to prevent the suffering of the fetus."[48] Other scholars agree with this assessment.[49]

Thus, in every other medical practice at this stage of fetal development, physicians recognize the need to protect the unborn child in the womb and prioritize the child's health, even when making treatment plans for the child's mother.[50] By contrast, abortionists use no analgesia as they "dismember the fetus" "limb from limb" until the fetus "bleeds to death." *Stenberg v. Carhart*, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting).

Also at fifteen weeks, unborn children kick their legs, move their arms, and start

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[42] Ritu Gupta et al., *Fetal Surgery and Anesthetic Implications*, 8 Continuing Educ. Anesthesia, Critical Care & Pain 71, 74 (2008).
[43] Stuart W. G. Derbyshire, *Can Fetuses Feel Pain?*, 332 Brit. Med. J. 909, 910 (2006).
[44] Xenophon Giannakoulopoulos et al., *Fetal Plasma Cortisol and b-endorphin Response to Intrauterine Needling*, 344 Lancet 77, 77–78 (1994).
[45] Rachel Gitau et al., *Fetal Hypothalamic-Pituitary-Adrenal Stress Responses to Invasive Procedures are Independent of Maternal Responses*, 86 J. Clinical Endocrinology & Metabolism 104, 104 (2001).
[46] Carlo V. Bellieni, *Analgesia for Fetal Pain During Prenatal Surgery: 10 Years of Progress*, 89 Pediatrics Rsch. 1612, 1612 (2021).
[47] Sekulic et al., *supra* note 33, at 1036.
[48] *Id.*
[49] *See, e.g.*, Carlo V. Bellieni et al., *Use of Fetal Analgesia During Prenatal Surgery*, 26 J. Maternal-Fetal Neonatal Med. 90, 94 (2013).
[50] *See, e.g.*, Ryan M. Antiel et al., *Weighing the Social and Ethical Considerations of Maternal-Fetal Surgery*, 140 Pediatrics, Dec. 2017, e20170608, at 1, 3–4.

curling their toes.[51] And by sixteen weeks, the child's eyes are moving side-to-side, and they can perceive light.[52] Between seventeen and eighteen weeks, the unborn child's fingers and toes each develop their own unique prints.[53] By eighteen weeks, the child can hear his or her mother's voice, and the child can yawn.[54] The nervous system is also developing the circuitry for all five senses.

At twenty weeks, the sex-specific reproductive organs have developed enough to permit identification of the child's sex by ultrasound, and girls have eggs in their ovaries.[55] Around this time, "facial expressions begin to appear consistently, including 'negative emotions.'"[56] These movements "require the involvement and coordination of more than one muscle."[57]

At twenty-one weeks, the physical and neurological development of the unborn child is sufficiently mature that, in some cases, the child can survive childbirth.[58] This is far earlier than was true in 1973 or 1992. *See Casey*, 505 U.S. at 860. At this stage of development, the child can also swallow and experience different tastes depending on what the mother eats. At twenty-two weeks, the child's senses are improving.[59] The child's ability to detect light from outside the womb (such as from a flashlight) can be observed.

Between 23% and 60% of infants born at twenty-two weeks who receive active

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[51] Johns Hopkins All Children's Hosp., *A Week-by-Week Pregnancy Calendar: Week 15*, https://perma.cc/62JP-CXL3.
[52] Mayo Clinic, *supra* note 38.
[53] Johns Hopkins Med., *The Second Trimester*, https://perma.cc/M7WA-6PC5.
[54] *Id.*; *see also* Cleveland Clinic, *Fetal Development: Stages of Growth* (last updated Apr. 16, 2020), https://perma.cc/YG92-KRH4.
[55] *See, e.g.*, Kavita Narang et al., *Developmental Genetics of the Female Reproductive Tract, in Human Reproductive and Prenatal Genetics* 129, 132, 135 (Peter C. K. Leung & Jie Qiao eds., 2019).
[56] Pionetelli, *supra* note 14, at 80.
[57] *Id.*
[58] *See* Kaashif A. Ahmad et al., *Two-Year Neurodevelopmental Outcome of an Infant Born at 21 Weeks' 4 Days' Gestation*, 140 Pediatrics, Dec. 2017, e20170103, at 1–2, https://perma.cc/D9UR-KHDU.
[59] Johns Hopkins All Children's Hosp., *A Week-by-Week Pregnancy Calendar: Week 22*, https://perma.cc/7VR8-2LFX.

hospital treatment survive,[60] many without immediate or long-term neurologic impairment.[61] And the true figures could be much higher, for imposing particular values on "viability" "create[s] facts": "A policy that limits treatment for infants born at 24 weeks' gestation will lead to [comparatively] low survival rates for those infants. Those [comparatively] low survival rates will seem to justify and validate the policy, even if the true causal relationship runs in the other direction."[62]

At 23 weeks, the child's skin tone changes color as his or her capillaries form and blood fills them under the skin.[63] At 24 weeks, the baby's face is nearly fully formed, with eyelashes, eyebrows, and hair clearly visible. Only after all this development did the decision below believe that the People could have an interest in protecting the child. *See* Op. 17.

II. Barring the People from protecting unborn life would be a radical departure from the judicial role under the Kentucky Constitution.

As shown above, the General Assembly's judgment that pre-viability life deserves legal protection is amply supported by scientific fact. The question, then, is whether anything in the Kentucky Constitution forbids this conclusion and *mandates* that the State permit the unlimited taking of pre-viability life. It does not.

The abortionists' theory hinges on one case articulating a general right to privacy. That case, in broad dicta, said 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," guarantees that supposedly import the theories of "the 19th

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[60] Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 New Eng. J. Med. 1801, 1804 (2015); Katrin Mehler et al., *Survival Among Infants Born at 22 or 23 Weeks' Gestation Following Active Prenatal and Postnatal Care*, 170 J. Am. Med. Ass'n Pediatrics 671, 675 (2016).

[61] *See, e.g.*, Noelle Younge et al., *Survival and Neurodevelopmental Outcomes Among Periviable Infants*, 376 New Eng. J. Med. 617, 622, 627 (2017) (describing study showing "an increase in the rate of survival without neurodevelopmental impairment from 2000 through 2011"); Antti Holsti et al., *Two-Thirds of Adolescents who Received Active Perinatal Care After Extremely Preterm Birth Had Mild or No Disabilities*, 105 Acta Paediatrica 1288, 1296 (2016) (similar).

[62] John D. Lantos & William Meadow, *Variation in the Treatment of Infants Born at the Borderline of Viability*, 123 Pediatrics 1588, 1589 (2009).

[63] Cleveland Clinic, *supra* note 54.

century English philosopher and economist, John Stuart Mill." *Commonwealth. v. Wasson*, 842 S.W.2d 487, 496 (Ky. 1992). Whatever the soundness of that dicta,[64] it is irrelevant here. As Justice Ginsburg explained, "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy." *Gonzales*, 550 U.S. at 172 (dissenting opinion). Even *Roe* recognized that "[t]he pregnant woman cannot be isolated in her privacy" and that abortion "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education." 410 U.S. at 159. *Dobbs* confirmed the point, calling abortion "critically different": unlike *personal* privacy rights, "[a]bortion destroys" "what the law at issue in this case regards as the life of an unborn human being." 142 S. Ct. at 2258, 2260 (cleaned up); *id.* at 2277, 2280; *see also Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting) ("A transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word."). Thus, "[o]ur Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated." *Dobbs*, 142 S. Ct. at 2257.[65]

The plaintiffs' privacy claim depends on this Court deciding that, contrary to *Dobbs*, the common law, Kentucky's and most States' laws for centuries, and the laws of at least 117 countries,[66] pre-viability life has no value. According to the abortionists here, they have

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[64] "Many a state law"—prohibiting polygamy, illicit drug use, adult incest, prostitution, bestiality, and obscenity, among others—"promotes public morals in a way that John Stuart Mill would disapprove, but he was not among the drafters of the [Kentucky Constitution]. (The overlap between Mill's *On Liberty* and Mr. Herbert Spencer's *Social Statics* is considerable, but Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 75–76 (1905), has prevailed and *Social Statics* is not part of the Constitution. Neither is *On Liberty*.)" *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 537 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing en banc); *see also Zuckerman v. Bevin*, 565 S.W.3d 580, 588 (Ky. 2018) ("[A]n act will not be declared void on the ground that it is opposed to the spirit supposed to pervade the Constitution, or is against the nature and spirit of the government, *or is contrary to the general principles of liberty*, or the genius of a free people." (emphasis added)).

[65] If John Stuart Mill's beliefs are relevant, *see supra* note 64, he thought that even animals should be protected by the State: "The reasons for legal intervention in favour of children, apply not less strongly to the case of those unfortunate slaves and victims of the most brutal part of mankind, the lower animals." John Stuart Mill, Principles of Political Economy 958 (Sir William Ashley ed. 1936).

[66] At least "117 countries . . . either ban abortion outright or sharply limit its availability to narrow instances." *Slatery*, 14 F.4th at 449 (Thapar, J.).

a "moral" "belie[f]" that "a separate, 'other' life does not begin until some later point, such as . . . viability." Opening Br. 35–36. As shown, science cannot account for that belief; science teaches that the fetus is a unique human organism from the moment of conception. And as *Dobbs* recognized, viability is an irredeemably arbitrary line for courts to decide that life is worth protecting. 142 S. Ct. at 2269–70. Viability depends on the technology available, the quality of medical care, and the health of the fetus and his or her mother. *Id.* A viability rule might mean that a 23-week-old boy is "worthy" of protecting but a 23-week-old girl is not. That is not a judicially neutral line.

In all events, adopting the viability rule would be a sheer imposition of the plaintiffs' and the circuit court's personal beliefs on the People. When it comes to legislation, questions of right and wrong are supposed to be decided by the People, not the courts. "[T]he propriety, wisdom and expediency of legislation is exclusively a legislative question." *Manning v. Sims*, 308 Ky. 587, 592, 213 S.W.2d 577, 580 (1948). "[C]ourts are not at liberty to declare a statute invalid because, in their judgment, it may be unnecessary." *Zuckerman*, 565 S.W.3d at 588. Instead, "when the power of the Legislature to enact a law is called in question, the court should proceed with the greatest possible caution and should never declare an act invalid until after every doubt has been resolved in its favor." *Manning*, 308 Ky. at 592, 213 S.W.2d at 580. As reflected by the fact that Kentucky regulations of abortion and its Constitution have co-existed for over a century, these regulations are fully constitutional. *See generally Dobbs*, 142 S. Ct. at 2296 (showing that abortion—both before and after quickening—was a crime in Kentucky in 1910). They accord with science. They accord with the People's views. And they may not be struck down simply because the plaintiffs have a moral (and financial) belief that unborn life is valueless. *See* Interlocutory Order 7 (Minton, C.J., concurring in part and dissenting in part) (Courts "say[] what the law is, not what we think it should say based upon personal views or political expediency."); *id.* at 9 (noting that this is a "policy and political issue[]").

Last, the circuit court held that because some supporters of these laws expressed their religious beliefs—and some of the State's witnesses were "affiliated with a religious institution"—the laws are "impermissibl[e]" "theocratic based policymaking." Op. 16, 19 n.14. Balderdash. *First*, the General Assembly legislated based on scientific fact, and many secular people consider abortion the taking of a life. Some religious people do not. The only entity imposing its moral views was the circuit court. Kentucky's law is certainly "no more a 'theological' position than is the [abortionists' and circuit court's] own judgment that viability is the point at which the state interest becomes compelling." *Thornburgh v. ACOG*, 476 U.S. 747, 795 n.4 (1986) (White, J., dissenting); *see Dobbs*, 142 S. Ct. at 2312 (Roberts, C.J.) ("the viability rule" "is and always has been completely unreasoned"); Op. 18 and Appellees' Opening Br. 43 (each proving the point).

Second, the motivations of unidentified supporters do not make up the law. *Cf. Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Joseph E. Seagram & Sons*, 211 S.W.2d 122, 125 (Ky. 1948) ("It is firmly settled that the courts will not inquire into motives which impel . . . legislative or administrative action, for that does not affect its legality or validity.").

Third, the holding below constitutes "an outrageous discrimination against religious believers." Eugene Volokh, *Is It Unconstitutional for Laws to Be Based on Their Supporters' Religiously Founded Moral Beliefs?*, Volokh Conspiracy (May 10, 2022), https://perma.cc/22KC-77FT. "[*M*]*ost* of the coercive laws that we hotly debate"—from endangered species laws to laws against murder—reflect society's moral views. *Id.* And it is constitutionally irrelevant whether those moral views come from religion or elsewhere. "Religious people have moral views just like secular people do, and they're just as entitled as secular people to use the political process to enact their views into law." *Id.* (cleaned up). "Would we say that opposition to slavery was illegitimate because it was mostly overtly religious?" *Id.* And "secular people's moral views" "may rest on unproven and probably unprovable metaphysical assumptions" as much as anyone else's (*id.*)—as the abortionists show. Opening Br. 36 ("life does not begin until some [unidentified] later point").

In sum, the judiciary may not substitute its moral or policy views for those of the People, who spoke through their representatives and chose to protect unborn life. That choice is both consistent with scientific evidence and permitted under Kentucky's Constitution. This Court is *not* "called upon to weigh competing interests" here (Interlocutory Order 5 (Keller, J., concurring in result)); that is the People's job, and they have already done it. The laws here *are* the "the expression of the[ir] will" (*id.* at 6); whether they vote to pass a prophylactic constitutional amendment prompted by past judicial overreach to make clear what should already be apparent—that the Kentucky Constitution does not give abortionists a right to terminate unborn children—is irrelevant to the meaning of the laws they already passed. *Cf. Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1747 (2020) ("[S]peculation about why a later [body] declined to adopt new legislation offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier [body] did adopt." (cleaned up)).[67] The People govern themselves, even—especially—when it comes to "matters of life, death, and health." Interlocutory Order 5 (Keller, J.).

CONCLUSION

Imposing the abortionists' desired rule—subjecting to heightened scrutiny every abortion regulation up until (at least) viability—would not only be a grievous departure from the judiciary's proper role in our system of government and "produc[e] a make-it-up-as-you-go abortion jurisprudence,"[68] but it would also end the lives of countless unborn children. This Court should reverse.

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[67] That is particularly true given the wholly deceptive nature of the abortionists' campaign against the amendment, casting it as a constitutional ban on abortion. *E.g.*, Angela Cooper, *Proposal to Amend Kentucky Constitution and Completely Ban Abortion Care to Appear on 2022 Ballots*, ACLU Kentucky (Aug. 6, 2021), https://bit.ly/3qUsBcP. *But see* Paul Benjamin Linton, *Neutralizing State Constitutions as a Source of Abortion Rights: The Path Forward*, 34 Regent U. L. Rev. 471, 474 (2022) (explaining that the proposed amendment does not ban abortion, but is a "neutrality amendment" that only prohibits courts from interpreting the State Constitution as a source of abortion rights).

[68] *Slatery*, 14 F.4th at 438 (Thapar, J.).

Respectfully submitted,

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