UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
Electronically filed

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

Plaintiffs

v.

ERIC FRIEDLANDER, *et al.*,

Defendant

and

COMMONWEALTH OF KENTUCKY *ex rel.* Attorney General Daniel Cameron

Intervening Defendant

Civil Action No. 3:19-cv-00178-DJH

COMMONWEALTH OF KENTUCKY'S EMERGENCY MOTION TO DISSOLVE

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (June 24, 2022), makes clear that the temporary restraining orders that have been restraining enforcement of House Bill 5 and Senate Bill 9 for over three years should be dissolved immediately. In fact, the Plaintiffs agree. (*See* Mot. Dismiss, Doc. 92, PageID.1040). They have asked the Court to dismiss their case without prejudice because *Dobbs* mandates a ruling in the Commonwealth's favor. The Commonwealth intends to respond to the motion for dismissal without prejudice in the ordinary course. *See* L.R. 7.1(c). But until that issue can be fully briefed and resolved, this Court should immediately dissolve the injunctions prohibiting the Commonwealth from enforcing House Bill 5 and Senate

Bill 9 because—as the Plaintiffs agree—*Dobbs* eliminates whatever legal grounds might have existed for such injunctions.

The Commonwealth of Kentucky, ex rel. Attorney General Daniel Cameron, thus respectfully requests that the Court immediately enter an order dissolving the injunctions against House Bill 5 and Senate Bill 9.

BACKGROUND

There is no need for a detailed factual background here. Kentucky enacted House Bill 5 (HB 5) and Senate Bill 9 (SB 9) in 2019. Both laws regulate abortion by prohibiting physicians from performing abortions under certain circumstances. HB 5—an anti-discrimination law—prohibits a physician from performing an abortion that he or she knows is sought "in whole or in part, because of . . . [t]he sex of the unborn child"; "[t]he race, color, or national origin of the unborn child"; or "[t]he diagnosis, or potential diagnosis, of Down syndrome or any other disability." SB 9—a heartbeat law—prohibits the performance of abortions after a fetal heartbeat has been detected. Both laws reflect the policymaking prerogative of the General Assembly to protect "prenatal life at all stages of developing." *See Dobbs*, 2022 WL 2276808, at *42.

Both laws have been enjoined by the Court since March 2019, when the Plaintiffs filed suit. The Plaintiffs alleged that both laws are "[i]n direct conflict with *Roe v. Wade*" because they "criminalize pre-viability abortions." (Doc. 5, PageID.71). Within a week of the lawsuit being filed, the Court entered temporary restraining orders against both bills. (Doc. 14, Doc. 21).

In November 2022, Plaintiffs moved to stay the proceedings until the outcome of several cases, including *Dobbs*, was known. (Doc. 68). The Commonwealth consented to the stay as to SB 9 but opposed the motion with respect to HB 5. (Doc. 69). And in February 2022, the Commonwealth moved to dissolve the temporary restraining order against HB 5 in light of new Sixth Circuit precedent. (Doc. 71). The Court has not yet ruled on the motion to dissolve, so both SB 9 and HB 5 remain temporarily restrained.

On June 24, 2022, the Supreme Court issued its decision in *Dobbs*, removing the basis for a stay of the litigation as to HB 5 and eliminating the legal grounds for the Plaintiffs' challenge to both bills.

ARGUMENT

The Court should immediately dissolve the injunctions against SB 9 and HB 5 because the purported grounds for those injunctions no longer exist in the wake of *Dobbs*. Dissolving a temporary restraining order is appropriate where significant changes in the law or circumstances have occurred. Indeed, courts "must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an instrument of wrong." *Salazar v. Buono*, 130 S. Ct. 1803, 1816 (2010) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2961 (2d ed.)). Once the moving party demonstrates that significant changes have occurred since the injunction was issued, it has met its burden and the injunction must be dissolved. *See Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 415 (6th Cir. 2012). As Plaintiffs acknowledge in their Motion to Dismiss, (Doc.

92, PageID.1045), *Dobbs* is a significant change in law because the Supreme Court overruled both *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which are the legal basis for Plaintiffs' claims.

In granting its injunction against HB 5 and SB 9, the Court found that the Plaintiffs had shown a strong likelihood of success on the merits of their substantive due process challenge based on the Supreme Court's previous recognition of a "right to choose to have an abortion." (Doc. 14, PageID.197 (quoting *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006)). *Dobbs* forecloses that basis for an injunction. Under *Dobbs*, abortion is not "implicitly protected by any constitutional provision, including . . . the Due Process Clause of the Fourteenth Amendment." *Dobbs*, 2022 WL 2276808, at *7. Therefore, it is no longer proper to recognize protection for abortion as a substantive due process right, and a federal court can no longer justify injunctive relief on that basis.

The Plaintiffs agree. (*See* Plaintiff's Mot. to Dismiss, Doc. 92, PageID.1046.) In their motion for a voluntary dismissal, they explain that "the Supreme Court's decision in [*Dobbs*] *is dispositive* of Plaintiffs' privacy federal claims." (emphasis added). Thus, the Plaintiffs have no chance of succeeding on the merits after this intervening change in the law, which was the central basis for the Court's injunctions. That alone is grounds for immediately dissolving the injunction. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020) (explaining that

cases alleging a constitutional violation "often turn on likelihood of success on the merits.").

Even still, the remaining injunctive-relief factors also favor dissolving the temporary restraining orders. First, the Plaintiffs cannot demonstrate that they will suffer an irreparable injury. After *Dobbs*, it is clear that the federal Constitution does not protect the right to an abortion, so Plaintiffs can no longer claim an irreparable injury on that basis. Conversely, the Commonwealth is suffering irreparable injury every day it is enjoined from enforcing its laws. A State "clearly has a legitimate interest in the continued enforceability of its own statutes." *Maine v. Taylor,* 477 U.S. 131, 137 (1986). And therefore, the Commonwealth is irreparably injured whenever it cannot enforce "statutes enacted by representatives of its people." *See Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (citation omitted).

Second, the injunction is causing substantial harm to others. The inability to enforce SB 9 irretrievably harms the unborn children it was enacted to protect. And the continued implementation of the restraining order against HB 5 allows the perpetuation of discrimination through acceptance of the pernicious notion that a person's characteristics—whether race, gender, or disability—are permissible reasons to terminate their lives.

Finally, the public interest is not served by allowing the temporary restraining orders to continue. "[T]he public interest lies in the correct application of federal law." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2005) (citation omitted). This now includes not only the Sixth Circuit case law discussed in

the Commonwealth's original motion to dissolve, but also *Dobbs*. Because *Dobbs* clearly forecloses the reasoning on which this Court relied to grant the temporary restraining orders and makes any continued reliance an incorrect application of federal law, it is in the public interest to dissolve the orders.

CONCLUSION

In the wake of the Supreme Court's decision in *Dobbs*, the Commonwealth asks this Court to immediately dissolve the temporary restraining orders "to relieve inequities that [have] arise[n] after the original order." *Gooch*, 672 F.3d at 414 (citation omitted).

Respectfully submitted,

Daniel Cameron
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CERTIFICATE OF SERVICE

I certify that on June 28, 2022, the above document was filed with the CM/ECF filing system, which electronically served a copy to all counsel of record.

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