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# Supreme Court of Kentucky

Case No. 2022-SC-0329

DANIEL CAMERON in his official capacity  
as Attorney General of the Commonwealth of Kentucky,

*Appellant*

v. Court of Appeals, No. 2022-CA-0906;  
Jefferson Circuit Court,  
No. 22-CI-03225

EMW WOMEN'S SURGICAL CENTER, P.S.C.,  
on behalf of itself, its staff, and its patients, *et al.*

*Appellees*

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**BRIEF OF SIXTEEN RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS  
COMMITTED TO PRESERVING RELIGIOUS FREEDOM FOR ALL  
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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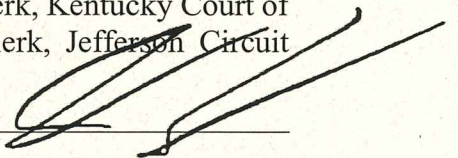
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**STATEMENT OF POINTS AND AUTHORITIES**

**INTEREST OF *AMICI CURIAE* AND PURPOSE OF BRIEF .....1**

*Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1972) .....1

*Prescott v. Okla. Capitol Preservation Comm’n*, 373 P.3d 1032 (Okla. 2015).....1

*McDonald v. Sch. Bd.*, 246 N.W.2d 93 (S.D. 1976).....1

*Sumnum v. Pleasant Grove City*, 345 P.3d 1188 (Utah 2015).....1

**ARGUMENT .....2**

**I. Our constitutional order is designed to protect religious pluralism. ....3**

*Engel v. Vitale*, 370 U.S. 421 (1962).....3

*Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010).....3

        Samuel Weaver, Note, *Protecting Unbelief: Restoring Section Five of Kentucky’s Constitution*, 110 Ky. L.J. 173 (2022).....3

        Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 Ky. L.J. 1 (1991).....3

*Commonwealth v. Phoenix Amusement Co.*, 44 S.W.2d 830, 834 (Ky. 1931)..... 3, 4

*Melton’s Encyclopedia of American Religions* 1 (8th ed. 2009) .....4

        Pluralism Project: Harvard Univ., *A New Multi-Religious America* (2020), <https://bit.ly/3SB5zU8> .....4

*In U.S., Decline of Christianity Continues at Rapid Pace*, Pew Rsch. Ctr. (Oct. 17, 2019), <https://pewrsr.ch/3CiliCn> .....4

*Bowling Green, KY and the Nascent Stages of Religious Diversity* (2013), Pluralism Project Archive, <https://bit.ly/3UofL4a>.....4

        Kirby Adams, *Discussing Faith and Race: Black Leaders, Scholars to Host Festival of Faiths in Louisville*, Courier J. (Aug. 19, 2021), <https://bit.ly/3eZ700b> .....5

*Women Start 1st Islamic Sorority*, Wash. Times (Jan. 4, 2006), <https://bit.ly/3DM1pEW> .....5

II. The challenged abortion bans run roughshod over religious pluralism. ....	5
A. When human life begins raises deep, inherently religious questions that implicate freedom of conscience. ....	5
Linda Greenhouse & Reva B. Siegel, <i>Before (and After) Roe v. Wade: New Questions About Backlash</i> , 120 Yale L.J. 2028 (2011). ....	5
<i>Resolution 2018-D032, Advocate for Gender Equity, Including Reproductive Rights, in Healthcare</i> , Archives of the Episcopal Church, <a href="https://bit.ly/3xYYh1Z">https://bit.ly/3xYYh1Z</a> .....	6
Chris Davies, <i>Let’s Talk about Abortion</i> , United Church of Christ: Witness for Justice (Feb. 18, 2021), <a href="https://bit.ly/37SyNZs">https://bit.ly/37SyNZs</a> .....	6
<i>Reproductive Justice</i> , United Church of Christ, <a href="https://bit.ly/3swceU8">https://bit.ly/3swceU8</a> .....	6
<i>Abortion/Reproductive Choice Issues</i> , Presbyterian Church (U.S.A.) Presbyterian Mission, <a href="https://bit.ly/3kj3JIId">https://bit.ly/3kj3JIId</a> . ....	6
<i>Right to Choose: 1987 General Resolution</i> , Unitarian Universalist Ass’n, <a href="https://bit.ly/3qUZvtZ">https://bit.ly/3qUZvtZ</a> .....	6
<i>Resolution on State Restrictions on Access to Reproductive Health Services</i> , Cent. Conf. of Am. Rabbis (Apr. 2008), <a href="https://bit.ly/3j0dDiE">https://bit.ly/3j0dDiE</a> .....	7
<i>Resolution: Right to Reproductive Choice</i> , Reconstructionist Rabbinical Ass’n, <a href="https://bit.ly/3gfEup0">https://bit.ly/3gfEup0</a> .....	7
<i>Resolution on Reproductive Freedom in the United States</i> , Rabbinical Assembly (May 21, 2012), <a href="https://bit.ly/3mfM1I4">https://bit.ly/3mfM1I4</a> .....	7
Rabbi Lori Koffman, <i>Jewish Perspectives on Reproductive Realities</i> , Nat’l Council of Jewish Women, <a href="https://bit.ly/3kpdS5Y">https://bit.ly/3kpdS5Y</a> .....	7
Belden Russonello Strategists LLC, <i>2016 Survey of Catholic Likely Voters Conducted for Catholics for Choice 5–6</i> (2016), <a href="https://bit.ly/3ridKZW">https://bit.ly/3ridKZW</a> .....	7
Khaleel Mohammed, <i>Islam and Reproductive Choice</i> , Religious Coal. for Reprod. Choice, <a href="https://bit.ly/3xXvCKM">https://bit.ly/3xXvCKM</a> .....	7

Abed Awad, *Alabama’s Abortion Law Is Not ‘Christian Sharia,’ Professor Says. Sharia Isn’t as Inflexible, as Draconian.*, Abed Awad, Esq. (July 11, 2020), <https://bit.ly/3M5JqeH>. .....7

Omar Suleiman, *Islam and the Abortion Debate*, Yaqeen Inst. (Sept. 20, 2022), <https://bit.ly/3C7bvh0>.....7

*Hindus in America Speak Out on Abortion Issues*, Hinduism Today (Sept. 1, 1985), <https://bit.ly/3BZubAu> .....8

Dheepa Sundaram, *Hindu’s Classical Texts Strictly Forbid Abortion. Here’s Why Many Hindus Don’t.*, Religion News Service (May 20, 2022), <https://bit.ly/3BEpStj> .....8

Steph Herold, *What It’s Like for Jewish Moms Who Are Abortion Providers*, Kveller (May 15, 2017), <https://bit.ly/3RiqYkh> .....8

Carol Joffe, *Working with Dr. Tiller: His Staff Recalls a Tradition of Compassionate Care at Women’s Health Services of Wichita*, Rewire (Aug. 15, 2011), <https://bit.ly/3S4rUK6>.....8

Tiffany Arnold, *An Interview with Dr. LeRoy Carhart*, Patch (Aug. 16, 2011), <https://bit.ly/3xHWG3g>.....8

**B. Kentucky’s abortion bans impose one religiously based view of abortion on all, increasing incentives to use political institutions in ways that may incite religiously based conflict. ....8**

*Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980).....9

*Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).....9, 14

*Calloway Cnty. Sheriff’s Dep’t v. Woodall*, 607 S.W.3d 557 (Ky. 2020).....9

*House Floor Session*, 2019 Gen. Assemb., Pt. 1 (Feb. 15, 2019), <https://bit.ly/3qYTnAV>.....9

*House Floor Session*, 2019 Gen. Assemb., Pt. 2 (Feb. 15, 2019), <https://bit.ly/3RoBTcb> .....10

*House Floor Session*, 2019 Gen. Assemb., Pt. 5 (Mar. 14, 2019), <https://bit.ly/3UvxYNn>.....10

Alex Acquisto, <i>Abortion Now Banned in KY After Supreme Court Ruling. What State’s ‘Trigger Law’ Says.</i> , Lexington Herald Leader (June 24, 2022), <a href="https://bit.ly/3BHgLIIm">https://bit.ly/3BHgLIIm</a> .....	11
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961).....	11
Sarah Varney, <i>When Does Life Begin? As State Laws Define It, Science, Politics and Religion Clash</i> , NPR (Aug. 27, 2022), <a href="https://n.pr/3dDx0hi">https://n.pr/3dDx0hi</a> .....	11
Kim Chandler & Blake Paterson, <i>Alabama Governor Invokes God in Banning Nearly All Abortions</i> , A.P. News (May 16, 2019), <a href="https://bit.ly/3rbYiPF">https://bit.ly/3rbYiPF</a> .....	12
Austin Bailey, <i>Arkansas Senators Pass Near-Total Abortion Ban; It Now Goes to House</i> , Ark. Times (Feb. 22, 2021), <a href="https://bit.ly/3dO6Mc4">https://bit.ly/3dO6Mc4</a> .....	12
Press Release, Gov. Kevin Stitt, Governor Stitt Celebrates Nine New Pro-Life Laws with Ceremonial Bill Signing (Sept. 9, 2021), <a href="https://bit.ly/3SFgHiX">https://bit.ly/3SFgHiX</a> .....	12
<b>C. Respecting access to abortion limits political control over matters that are irreducibly religious, and so avoids further undermining public trust in our political institutions. ....</b>	<b>13</b>
Stephen Holmes, <i>Gag Rules or the Politics of Omission, in Constitutionalism and Democracy</i> (Jon Elster & Rune Slagstad eds., 1993) .....	13, 14
<i>Stone v. Graham</i> , 599 S.W.2d 157 (Ky. 1980).....	13
1 Wharton’s Criminal Law § 5 (Torcia, 14th ed. 1978) .....	13
<i>Stone v. Graham</i> , 449 U.S. 39 (1980).....	13
<i>Bevin v. Commonwealth ex rel. Beshear</i> , 563 S.W.3d 74 (Ky. 2018).....	14
John Stuart Mill, <i>On Liberty</i> 3-5 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859).....	14
<i>Public Trust in Government: 1958-2022</i> , Pew Rsch. Ctr. (June 6, 2022), <a href="https://pewrsr.ch/3C5klfc">https://pewrsr.ch/3C5klfc</a> .....	14
<b>CONCLUSION .....</b>	<b>15</b>

## INTEREST OF *AMICI CURIAE* AND PURPOSE OF BRIEF

*Amici* are organizations that share a commitment to preserving religious freedom for all. They deeply value the rich religious diversity that the Kentucky Constitution has enabled to grow and thrive, and they recognize that this healthy pluralism cannot exist when government picks and chooses among religions and enforces conformity to the dictates of any faith. They therefore support legal rules that avoid religious favoritism and thereby forestall religiously based oppression, discord, and strife.

In granting a temporary injunction against two of Kentucky’s abortion bans—a trigger ban and a six-week ban—the circuit court held that the bans “impermissibly establish[] a distinctly Christian doctrine of the beginning of life, and . . . unduly interfere[e] with the free exercise of other religions that do not share that same belief.” Opinion & Order Granting Temporary Inj. 16. Because the parties did not rely on this theory below, this Court may choose not address it if the appeal can be disposed of on independent grounds. But if the Court does resolve the applicability of Section 5 of the Kentucky Constitution, *amici* seek to ensure that it does so with a full appreciation of the importance of Section 5 in protecting religious pluralism and discouraging religious strife, including by prohibiting the legislature from imposing one religious belief on all.<sup>1</sup>

The organizations joining this brief as *amici curiae* are Americans United for Separation of Church and State; American Humanist Association; Bend the Arc: A Jewish

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<sup>1</sup> State constitutions may provide broader protections for religious liberty than those in the federal constitution—and other state courts have so held. *See, e.g., Paster v. Tussey*, 512 S.W.2d 97, 101—2 (Mo. 1972) (*en banc*); *Prescott v. Okla. Capitol Preservation Comm’n*, 373 P.3d 1032, 1033 (Okla. 2015); *McDonald v. Sch. Bd.*, 246 N.W.2d 93, 97 n.3 (S.D. 1976); *Summum v. Pleasant Grove City*, 345 P.3d 1188, 1193 (Utah 2015). The unique language in Section 5 of the Kentucky Constitution warrants the same treatment.

Partnership for Justice; Central Conference of American Rabbis; General Synod of the United Church of Christ; Global Justice Institute, Metropolitan Community Churches; HEART Women and Girls; Hindu American Foundation; Kentucky Religious Coalition for Reproductive Choice; Men of Reform Judaism; Muslim Advocates; People For the American Way; Religious Coalition for Reproductive Choice; Sikh Coalition; Union for Reform Judaism; and Unitarian Universalist Association.

### **ARGUMENT**

The Commonwealth of Kentucky, at its very best, is a refuge for diverse faiths and viewpoints respecting matters of religion. That is no accident: It stems from the robust protection of matters of belief and conscience in the Kentucky Constitution.

Upholding Kentuckians' right to abortion care reflects these concerns. Religions hold a wide variety of beliefs about what life is and when it begins—beliefs that animate much of the debate around abortion. The debate about the nature and beginning of life is thus grounded in irreducible matters of conscience that, for many people, turn on inherently religious considerations. In enacting the trigger ban and six-week ban, Kentucky legislators sought to impose their religious beliefs about life and abortion on all Kentuckians. Doing so threatens a healthy religious pluralism and compounds the threat of religiously based strife by creating stronger incentives for religious groups to seek to impose their own beliefs through legislation so as to prevent others' beliefs from being forced on them. The bans also hazardously increase the already substantial mistrust of our political institutions, by miring them yet more deeply in theological matters that they are not institutionally competent to resolve. The trigger ban and six-week ban should therefore be enjoined.

## **I. Our constitutional order is designed to protect religious pluralism.**

1. Protections for religious freedom both at the federal level and in Kentucky specifically stem from historical experience. Religious dissenters fled established religions in Europe, and the religiously based political conflict and persecution that came with those establishments, by emigrating to colonial America. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 427 (1962). Yet “when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country . . ., they passed laws making their own religion the official religion of their respective colonies.” *Id.* at 427; *accord Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 686 (Ky. 2010) (Cunningham, J., concurring). This history was well understood by the early settlers of Kentucky, many of whom were religious dissenters fleeing Virginia’s established church to seek a place where their varied beliefs could thrive. *See* Samuel Weaver, Note, *Protecting Unbelief: Restoring Section Five of Kentucky’s Constitution*, 110 Ky. L.J. 173, 187–91 (2022); *see also* Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 Ky. L.J. 1, 30–31 (1991).

Thus, ever since Kentucky’s first constitution in 1792, “it has been the constitutional policy of the state that ‘no preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical policy’” and that “[n]o human authority shall, in any case whatever, control or interfere with the rights of conscience.” *Commonwealth v. Phoenix Amusement Co.*, 44 S.W.2d 830, 834 (Ky. 1931) (quoting Ky. Const. § 5).

Section 5 of Kentucky’s Constitution ensures that “[n]either [a law’s] enactment nor



its enforcement may be predicated and sustained upon a religious theory, belief, or sentiment.” *Phoenix Amusement Co.*, 44 S.W.2d at 834-35 (explaining that a law addressing work on Sundays could be enforced only because it, in fact, “was not intended to and did not do so on the theory that the day was a day of worship especially supported and maintained by religious doctrines or sentiments”). By imposing this restriction, the Kentucky Constitution prevents one religious group from using the government to encode its beliefs into law. And it discourages religious groups from vying with each other for political control in an effort to protect themselves from religious imposition by others.

2. Over time, our Nation has become ever more religiously pluralistic. The United States is now home to more than 2,000 religious groups. *Melton’s Encyclopedia of American Religions* 1 (8th ed. 2009); see also Pluralism Project: Harvard Univ., *A New Multi-Religious America* (2020), <https://bit.ly/3SB5zU8>. Jews and Muslims, present since the colonial era, have grown in numbers. See, e.g., Melton 896-897, 925-926.<sup>2</sup> And more than one-quarter of Americans are religiously unaffiliated—including atheists, agnostics, and those who may consider themselves religious or spiritual but do not identify with any particular denomination or house of worship. *In U.S., Decline of Christianity Continues at Rapid Pace*, Pew Rsch. Ctr. (Oct. 17, 2019), <https://pewrsr.ch/3CiliCn>.

Religious diversity has likewise flourished in Kentucky. Consider Bowling Green and its growing populations of Muslims, Jews, Buddhists, and Unitarian Universalists alongside a variety of Protestant denominations. *Bowling Green, KY and the Nascent Stages of Religious Diversity* (2013), Pluralism Project Archive, <https://bit.ly/3UofL4a>. Or

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<sup>2</sup> Many of the earliest Muslims to arrive in America did not, however, come of their own volition: They were enslaved West Africans, whose religious beliefs and practices were not accepted by white society. See Melton 925.

Louisville, which is home to the annual, nationally recognized Festival of Faiths, a celebration of the diversity of religions locally and around the world. Kirby Adams, *Discussing Faith and Race: Black Leaders, Scholars to Host Festival of Faiths in Louisville*, Courier J. (Aug. 19, 2021), <https://bit.ly/3eZ700b>. Or the University of Kentucky, where students started the first Muslim sorority in the United States. *Women Start 1st Islamic Sorority*, Wash. Times (Jan. 4, 2006), <https://bit.ly/3DM1pEW>.

With this increasing diversity, the Kentucky Constitution's safeguarding of the fundamental freedom of conscience is all the more crucial.

## **II. The challenged abortion bans run roughshod over religious pluralism.**

Nowhere in recent decades has the battle over political power to impose particular religious views been more pronounced, more heated, or more dangerous to social stability and religious freedom than in the context of abortion.<sup>3</sup> But as severe as the social tensions are, even worse are the assaults on conscience when inherently religious questions are subjected to ordinary political processes. For time and again, the perceived need to use political power to defend against religious coercion has morphed into coercive imposition of one religious practice at the expense of others.

### **A. When human life begins raises deep, inherently religious questions that implicate freedom of conscience.**

People hold a wide range of religious, moral, and philosophical views about abortion. That is because, if one goes beyond the biological facts about when a fetus may survive independently, one is left to confront the deepest and most profound mysteries about the

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<sup>3</sup> Appellant's assertion that the Supreme Court's decision in *Roe* is the primary cause of that conflict, *see* Appellant's Br. 1, is belied by the historical record. *See, e.g.*, Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 Yale L.J. 2028, 2034, 2076-2085 (2011).

nature of human existence: What constitutes life? What makes a person a person? If a soul exists, what is it? Under what circumstances might ensoulment occur, and what is its significance?

The specific point at which life begins is thus a matter for theologians and philosophers to debate and for individuals to ponder. It is quintessentially a concern of religion, and one that each of us must resolve in accordance with conscience.

Different religions have a variety of answers to these questions. And as a result, numerous religious traditions either specifically approve of or view abortion as a moral decision to be made according to individual conscience. For example, the Episcopal Church believes that “everyone [should] have the right to make decisions about their bodies and those decisions should be between themselves and their provider.” *Resolution 2018-D032, Advocate for Gender Equity, Including Reproductive Rights, in Healthcare*, Archives of the Episcopal Church, <https://bit.ly/3xYYh1Z>. The United Church of Christ has long supported access to abortion services. *See* Chris Davies, *Let’s Talk about Abortion*, United Church of Christ: Witness for Justice (Feb. 18, 2021), <https://bit.ly/37SyNZs>; *Reproductive Justice*, United Church of Christ, <https://bit.ly/3swceU8>. The General Assembly of the Presbyterian Church (U.S.A.) has affirmed that “[h]umans are empowered by the spirit prayerfully to make significant moral choices, including the choice to continue or end a pregnancy.” *Abortion/Reproductive Choice Issues*, Presbyterian Church (U.S.A.) Presbyterian Mission, <https://bit.ly/3kj3JIId>. The Unitarian Universalist Association has described the right to choose an abortion as an “important aspect” of “the right of individual conscience.” *Right to Choose: 1987 General Resolution*, Unitarian Universalist Ass’n, <https://bit.ly/3qUZvtZ>. And within Judaism, life begins at birth, and Reform,

some institutions believe that life begins at fertilization, the Brahma Kumaris believe that the soul enters the fetus only around the fourth or fifth month of pregnancy, and also that the decision to have an abortion should be based on one's "lifestyle, morals, and values." *Hindus in America Speak out on Abortion Issues*, Hinduism Today (Sept. 1, 1985), <https://bit.ly/3BZubAu>. U.S. Hindus strongly support abortion access, based partly on their belief that "[i]ndividual ethical choice cannot be imposed on others." Dheepa Sundaram, *Hindu's Classical Texts Strictly Forbid Abortion. Here's Why Many Hindus Don't.*, Religion News Service (May 20, 2022), <https://bit.ly/3BEpStj>.

Just as obtaining an abortion may be, and often is, a religiously based choice, so too is providing abortion care. Many Jewish doctors, for example, see a "resonance between their Judaism . . . and their decision to provide abortion care," with one calling her work a "mitzvah" ("commandment"). Steph Herold, *What It's Like for Jewish Moms Who Are Abortion Providers*, Kveller (May 15, 2017), <https://bit.ly/3RiqYkh>. Dr. George Tiller described his work in abortion care as a "ministry." Carol Joffe, *Working with Dr. Tiller: His Staff Recalls a Tradition of Compassionate Care at Women's Health Services of Wichita*, Rewire (Aug. 15, 2011), <https://bit.ly/3S4rUK6>. And another doctor explained that he provided abortions "because of God, not in spite of God." Tiffany Arnold, *An Interview with Dr. LeRoy Carhart*, Patch (Aug. 16, 2011), <https://bit.ly/3xHWG3g>.

**B. Kentucky's abortion bans impose one religiously based view of abortion on all, increasing incentives to use political institutions in ways that may incite religiously based conflict.**

The Kentucky Constitution embodies respect for this diversity of religious and moral viewpoints by prohibiting any governmental preference for one set of beliefs over others. Kentucky's trigger ban and six-week ban violate that restriction, undercut its fundamental aim, and increase incentives for religious groups to grasp at the levers of political power

in constitutional law or medicine but instead that he “come[s] in a little bit different capacity: as a pastor, as a minister of the Gospel.” *Id.* at Pt. 2, 48:20-49:25. He also closed his arguments in favor of the trigger ban by quoting from the Bible. *Id.* at Pt. 2, 50:30-51:26. Another sponsor, Representative Stan Lee, asked, “if [the fetus] was knitted in the womb by God, then would we be derelict in our duty as citizens, as Christians, if we didn’t stand up for them?” *Id.* at Pt. 2, 53:35-53:55. And in discussing where to draw the line on abortion, he explained, “For me, I know where [my limit] is, and I know where it comes from. Mine comes from the Lord.” *Id.* at Pt. 2, 58:00-59:05. The bill’s opponents were likewise pulled into religious debate and discussion, with one asking about a quote from the Bible and another asking that his fellow legislators not question his faith. *Id.* at Pt. 2, 17:55-18:32, 34:05-34:40.

Similar religious justifications were raised as the General Assembly debated the six-week ban. For example, the bill’s main sponsor in the House of Representatives, Chris Fugate, shared: “God’s law says that He gives life, and for us to try to say we shouldn’t pass something because we think it’s going to be illegal in my opinion is not the right thing to do. But let God be God, let us be the people that serve God, and let us be the ones that stand for life.” *House Floor Session*, 2019 Gen. Assemb., Pt. 5, 55:25-55:50 (Mar. 14, 2019), <https://bit.ly/3UvxYNn>. Representative Robert Goforth, who had proposed a similar bill, argued that “[a] life is a gift from God,” explaining that he does everything he can to ensure that fetuses “have the right to life, a life of which God is the author and not man.” *Id.* at Pt. 5, 30:10-30:52. And Representative Hale quoted from the story of Cain and Abel to criticize abortion. *Id.* at Pt. 5, 1:06:10-1:06:40.

When the trigger ban took effect, Appellant declared in no uncertain terms: “Let [those

who oppose our efforts] see Christ in our response, that empathy and understanding govern our reaction, including the way in which we implement our laws.” Alex Acquisto, *Abortion Now Banned in KY After Supreme Court Ruling. What State’s ‘Trigger Law’ Says.*, Lexington Herald Leader (June 24, 2022), <https://bit.ly/3BHgLIIm>.

3. To be sure, government may permissibly act in ways that “happen[] to coincide” with particular religious beliefs. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). If not, government could seldom act at all. And individuals will often favor one or another policy based at least in part on the teachings of their faith. That they may hold and voice strong religious views about abortion is not the problem.

As the history described above shows, however, it is no coincidence that the challenged abortion bans align with specific religious views. Rather, legislators explicitly linked the bans to religious belief, encoded their religious faith into law, and justified the laws as the implementation of those beliefs. Thus, Appellant’s argument that the bans merely impose a scientific view of when life begins, Appellant’s Br. 31, must fail. *See also* Sarah Varney, *When Does Life Begin? As State Laws Define It, Science, Politics and Religion Clash*, NPR (Aug. 27, 2022), <https://n.pr/3dDx0hi>. And for similar reasons, Appellant’s analogy to laws prohibiting theft, Appellant’s Br. 33, is inapposite: Unlike the abortion bans here, those laws are grounded in secular principles, not religious beliefs.

More fundamentally, whether life begins before viability, and if so, at what point—are questions about the nature of being, human existence, and the soul that, for many people, simply cannot be pondered, much less definitively answered, except in religious terms. The answers must be provided by religion and philosophy.

that has protected freedom and liberty in this country and in this Commonwealth for more than two centuries.” *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 83 (Ky. 2018). When the courts reinforce democratic political institutions against the tyranny of the majority, *see generally* John Stuart Mill, *On Liberty* 3-5 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859), “[l]egislators are enjoined from officially discussing questions which, if placed under the control of electoral majorities, would (it is thought) . . . exacerbate factional animosities.” Holmes 21. “[B]y agreeing to privatize religion, a divided citizenry can enable itself to resolve its *other* differences rationally, by means of public debate and compromise.” *Id.* at 24.

Section 5 of the Kentucky Constitution straightforwardly promotes this end. *Wasson*, 842 S.W.2d at 502–03 (Combs, J., concurring) (“It may be asked whether a majority, believing its own happiness will be enhanced by another’s conformity, may not enforce its moral code upon all. The answer is that, first, morality is an individual, personal—one might say, private—matter of conscience, and dwells inviolate within the fortress of Section 5.”).

That, in turn, helps ensure that minority views—including, importantly, religious ones—can flourish, and that religion remains entirely free to offer answers to the most difficult questions about human existence, while legislatures and executive officials are left to deal with matters more susceptible to political give and take.

3. Those sorts of impositions also have another deleterious effect: They contribute yet more to the already substantial popular mistrust of legislatures, by subjecting to political compromise and majority rule a set of issues on which, for many people on both sides, compromise simply is not possible. *See generally Public Trust in Government: 1958-2022*,

Pew Rsch. Ctr. (June 6, 2022), <https://pewrsr.ch/3C5klfc>. Removing the issues from the scope of permissible legislative action and thereby reducing the temptation to enforce any particular set of religious commitments on those with contrary beliefs may be frustrating to some, but it at least does not cast doubt on the basic idea of majority rule. Courts must make clear that constitutional limits on legislative power, such as the provisions in Section 5, exist to provide an important backstop protecting religious diversity and allowing all religious beliefs the space to flourish.

### CONCLUSION

The Court should lift the stay issued by the Court of Appeals and enjoin the trigger ban and six-week ban.

Respectfully submitted,



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