APPENDIX

TABLE OF CONTENTS

APPENDIX A

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File Name: 20a0169p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5516

[Filed: June 2, 2020]

EMW WOMEN'S SURGICAL CENTER, P.S.C., on behalf of itself, its staff, and its patients; ASHLEE BERGIN, M.D., M.P.H. and TANYA FRANKLIN, M.D., M.S.P.H., on behalf of themselves and their patients,

Plaintiffs-Appellees,

v.

ERIC FRIEDLANDER, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Family Services,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

App. 2

No. 3:18-cv-00224—Joseph H. McKinley, Jr., District Judge.

Argued: January 29, 2020

Decided and Filed: June 2, 2020

Before: MERRITT, CLAY, and BUSH, Circuit Judges.

COUNSEL

ARGUED: Matthew F. Kuhn, OFFICE OF THE GOVERNOR, Frankfort, Kentucky, for Appellant. Andrew D. Beck, AMERICAN CIVIL LIBERTIES UNION OF NEW YORK, New York, New York, for Appellees. **ON BRIEF:** Matthew F. Kuhn, M. Stephen Pitt, S. Chad Meredith, Brett R. Nolan, OFFICE OF THE GOVERNOR, Frankfort, Kentucky, for Appellant. Andrew D. Beck, Alexa Kolbi-Molinas, Meagan M. Burrow, Elizabeth Watson, AMERICAN CIVIL LIBERTIES UNION OF NEW YORK, New York, New York, Amy D. Cubbage, ACKERSON & YANN, Louisville, Kentucky, Heather Lynn Gatnarek, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, for Appellees. Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, Ester Murdukhayeva, OFFICE OF THE NEW YORK ATTORNEY GENERAL, New York, New York, Alexandria Preece, MORRISON & FOERSTER LLP, San Diego, California, Roxann E. Henry, MORRISON & FOERSTER LLP, Washington, D.C., Kimberly A. Parker, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Amici Curiae.

CLAY, J., delivered the opinion of the court in which MERRITT, J., joined. BUSH, J. (pp. 33–43), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. This case asks whether a state can require patients to undergo a procedure to end potential fetal life before they may receive an abortion performed through the method most common in the second trimester of pregnancy—dilation and evacuation. Kentucky House Bill 454 does just that. Plaintiffs, Kentucky's sole abortion clinic and two of its doctors, argue that House Bill 454 violates patients' constitutional right to abortion access prior to fetal viability because the burdens the law imposes significantly outweigh its benefits. Defendant Eric Friedlander, the Acting Secretary of Kentucky's Cabinet for Health and Family Services, disagrees. He contends that Kentucky may constitutionally require patients to undergo such a procedure because it is a reasonable alternative to the standard dilation and evacuation abortion. The district court agreed with Plaintiffs and permanently enjoined Kentucky from enforcing House Bill 454.

For the reasons set forth below, we **AFFIRM** the district court's judgment.

BACKGROUND

Factual Background

In the first trimester of pregnancy, a physician may perform an abortion through two methods. She may offer medication to induce a process like miscarriage, or she may perform a surgical abortion, using suction to remove the contents of the uterus intact. But these methods are only effective in the initial weeks of pregnancy. Starting around fifteen weeks of pregnancy, measured from the time of the individual's last menstrual period ("LMP"), physicians must use the dilation and evacuation ("D&E") method. D&E is the standard method used in the second trimester, accounting for 95% of second-trimester abortions performed nationwide. To perform a D&E, a physician first dilates the patient's cervix, and then uses instruments and suction to remove the contents of the uterus. At this stage of pregnancy, the fetus has grown larger than the cervical opening, and so fetal tissue separates as the physician draws it through that narrow opening.

This leads us to Kentucky's House Bill 454 ("H.B. 454" or "the Act"), which was signed into law on April 10, 2018. H.B. 454 provides, in relevant part:

> No person shall intentionally perform or induce or attempt to perform or induce an abortion on a pregnant woman . . . [t]hat will result in the bodily dismemberment, crushing, or human vivisection of the unborn child . . . [w]hen the probable post-fertilization age of the unborn child is eleven (11) weeks or greater [(*i.e.*,

> thirteen (13) weeks or greater as measured since the last menstrual period)][1]. . . .

(H.B. 454, R. 43-1 at PageID #244.) "[B]odily dismemberment, crushing, or human vivisection" includes:

> a procedure in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts portions, pieces, or limbs of the unborn child from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that . . . slices, crushes, or grasps . . . any portion, piece, or limb of the unborn child's body to cut or separate the portion, piece, or limb from the body.

(*Id.* at ##243–44.) While H.B. 454 does not use the words "dilation and evacuation" or "D&E," the parties agree that it references the standard D&E. Because fetal tissue separates as physicians remove it from the uterus during the standard D&E, H.B. 454 forbids D&E abortions when performed on "living unborn" fetuses—or, in clinical terms, prior to "fetal demise."

H.B. 454 does not identify any workaround for physicians who seek to perform or patients who seek a

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[1] Like Plaintiffs, the Secretary, and the district court before us, we identify the relevant stage of pregnancy based on the number of weeks since the individual's last menstrual period, or weeks "LMP." However, H.B. 454 identifies the stage of pregnancy based on the number of weeks "post fertilization." (H.B. 454, R. 43-1 at PageID #244.) Eleven weeks post fertilization is equivalent to thirteen weeks LMP.

D&E after thirteen weeks. The Act does not suggest that physicians should or must induce fetal demise prior to performing a D&E. Specifically, it does not discuss any procedures for inducing fetal demise.

H.B. 454 provides for a single exception to this prohibition: physicians may perform a D&E prior to fetal demise in a "medical emergency." (*Id.* at #244.) A "medical emergency" is a situation that a physician deems to "so complicate[] the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function." (*Id.*); Ky. Rev. Stat. § 311.720(9).

Violation of H.B. 454 is a Class D felony, (H.B. 454, R. 43-1 at PageID #247), for which providers may receive up to five years of imprisonment, Ky. Rev. Stat. § 532.060(2)(d), and adverse licensing and disciplinary action, *id.*, §§ 311.565, 311.606.

Procedural Background

On the day H.B. 454 was signed, Plaintiffs EMW Women's Surgical Center ("EMW") and its two obstetrician-gynecologists, Dr. Ashlee Bergin and Dr. Tanya Franklin, brought suit against various Kentucky officials to challenge it. EMW is Kentucky's only licensed outpatient abortion facility, and Dr. Bergin and Dr. Franklin are the only doctors providing surgical abortions at EMW. Plaintiffs argued that H.B. 454 is facially unconstitutional because it effectively bans the most common second-trimester abortion procedure—the D&E—and therefore imposes an undue

burden on the right to elect abortion prior to viability, in violation of the Fourteenth Amendment. Plaintiffs moved for a temporary restraining order and a preliminary injunction shortly thereafter.

The parties entered a joint consent order, under which the Commonwealth defendants agreed that they would not take steps to enforce H.B. 454 until the district court ruled upon Plaintiffs' motions. The court later ordered the parties to continue following the terms of the consent order until the case was tried on the merits.

Aside from then-Secretary of Kentucky's Cabinet for Health and Family Services, Adam Meier, and Commonwealth Attorney Thomas B. Wine, all of the defendants were voluntarily dismissed prior to trial. The district court heard Plaintiffs' case in a five-day bench trial in November 2018.

Before the court, Plaintiffs presented their argument as to H.B. 454's unconstitutionality. Defendants Meier and Wine, for their part, argued that H.B. 454 did not ban D&E abortions, but simply required individuals seeking a D&E abortion after thirteen weeks to first undergo a procedure to induce fetal demise. They identified three possible methods of inducing fetal demise: by injecting digoxin into the fetus or amniotic sac, by injecting potassium chloride into the fetal heart, or by cutting the umbilical cord in utero. Plaintiffs responded that none of these three procedures was a feasible workaround to H.B. 454. Both parties presented substantial expert testimony and evidence about the safety, efficacy, and feasibility of each of these procedures.

On May 8, 2019, the district court entered judgment for Plaintiffs and an order permanently enjoining the enforcement of H.B. 454. *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807, 826 (W.D. Ky. 2019). At bottom, the district court found that H.B. 454 imposed an undue burden on one's right to elect an abortion prior to viability, in violation of the Fourteenth Amendment. *Id.* In particular, it concluded that none of the three identified procedures was a feasible option for inducing fetal demise and, therefore, H.B. 454 effectively banned D&E abortions. *Id.* at 823.

This timely appeal followed. Former defendant Commonwealth Attorney Wine did not join this appeal. Due to the recent change in administration from prior Kentucky Governor Matt Bevin to current Governor Andy Beshear, now-Acting Secretary of Kentucky's Cabinet for Health and Family Services Eric Friedlander ("the Secretary") has replaced Adam Meier as the named Defendant-Appellant in this case. *See* Fed. R. Civ. P. 25(d) ("An action does not abate when a public officer who is a party in an official capacity . . . ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party.").

DISCUSSION

Kentucky is not the first state to pass legislation requiring fetal demise prior to the performance of a D&E. At least ten other states have passed similar laws. *See, e.g.*, Ala. Code § 26-23G-1 *et seq.*; Ark. Code. Ann. § 20-16-1801 *et seq.*; Ind. Code §§ 16-34-2-7(a), 16-18-2-96.4; Kan. Stat. Ann. § 65-6741 *et seq.*; Okla. Stat. Ann. § 1-737.7 *et seq.*; La. Stat. Ann. § 1061.1.1 *et*

seq.; Miss. Code Ann. § 41-41-151 *et seq.*; Ohio Rev. Code § 2919.15(B); Tex. Health & Safety Code Ann. § 171.151 *et seq.*; W. Va. Code Ann. § 16-2O-1 *et seq*. In nearly every state, plaintiffs have challenged those laws as unduly burdening the right to elect abortion before viability, as Plaintiffs have done here. And in every challenge brought to date, the court has enjoined the law, finding that it indeed unduly burdens that right. *See, e.g.*, *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1327, 1329–30 (11th Cir. 2018) (affirming permanent injunction of Ala. Code § 26-23G-1 *et seq.*), *cert denied sub nom. Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606 (2019); *Bernard v. Individual Members of Ind. Med. Licensing Bd.*, 392 F. Supp. 3d 935, 962, 964 (S.D. Ind. 2019) (preliminarily enjoining Ind. Code §§ 16-34-2-7(a), 16-18-2-96.4); *Planned Parenthood of Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848, 869, 872 (S.D. Ohio 2019) (preliminarily enjoining Ohio Rev. Code § 2919.15(B)); *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938, 953–54 (W.D. Tex. 2017) (permanently enjoining Tex. Health & Safety Code Ann. § 171.151 *et seq.*); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1064–65, 1111 (E.D. Ark. 2017) (preliminarily enjoining Ark. Code. Ann. § 20-16-1801 *et seq.*); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 467–68, 504 (Kan. 2019) (affirming temporary injunction of Kan. Stat. Ann. § 65-6741 *et seq.*); *see also, e.g.*, *Planned Parenthood of Cent. N.J. Farmer*, 220 F.3d 127, 145–46, 152 (3d Cir. 2000) (affirming permanent injunction of a partial-birth abortion ban, finding that its fetal-demise workaround would constitute an undue burden); *Evans v. Kelley*, 977 F. Supp. 1283, 1318–20 (E.D. Mich. 1997) (permanently enjoining a similar law). The district court here reached the same

conclusion. *Meier*, 373 F. Supp. 3d at 826. While these cases do not dictate this Court's decision, we find them highly persuasive. *See Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015) ("Our review is even more deferential where . . . multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings."); *cf. Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017) ("[A]ll else equal, a finding is more likely to be plainly wrong if some judges disagree with it.").

All this said, our duty is to assess the record in this case and independently review the district court's decision to permanently enjoin H.B. 454. "A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998)). When considering a district court's decision to grant a permanent injunction following a bench trial, we apply three standards of review. We review the scope of injunctive relief for an abuse of discretion, the district court's legal conclusions *de novo*, and the court's factual findings for clear error. *Id.*

In this and all cases, the clear error standard presents a particularly high hurdle for the appellant to overcome. The district court compiled a thorough judicial record over the course of a five-day bench trial, during which the parties presented a wealth of testimonial and documentary evidence. In reviewing the court's factual findings based on that record, we ask only if its "account of the evidence is plausible in

light of the record viewed in its entirety." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985). If so, we must affirm the district court's finding. We consider a factual finding clearly erroneous only when we are "left with the definite and firm conviction that a mistake has been committed." *Id.* at 573 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "Where there are two permissible views of the evidence, the [district court's] choice between them cannot be clearly erroneous." *Id.* at 574.

With this groundwork laid, we turn to the issues presented on appeal.[2]

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[2] At the threshold, we address a point belabored by the dissent. In the proceedings below, the Secretary cursorily argued that Plaintiffs do not have standing to assert this challenge. The district court rightly rejected this notion. *Meier*, 373 F. Supp. 3d at 813. The Secretary does not renew this argument on appeal, but merely states that he "preserves his right to argue that EMW lacks standing to prosecute this case on behalf of women seeking an abortion." (Def. Br. at 25, n.3.) Generally speaking, "a party does not preserve an argument by saying in its opening brief (whether through a footnote or not) that it may raise the issue later." *United States v. Huntington Nat'l Bank*, 574 F.3d 329, 331 (6th Cir. 2009).

Nevertheless, the dissent makes the unsupportable assertion that we are always required to *sua sponte* address prudential third-party standing arguments, even when the parties do not raise them. We are not convinced that the cases upon which the dissent relies require us to do so. *C.f. Craig v. Boren*, 429 U.S. 190, 193–94 (1976) (holding that third-party standing is a prudential issue, not a constitutional one). In any event, we need not answer that question now because this case does not present any third-party standing issue. (Perhaps this is also the reason the Secretary does not press the issue on appeal.) As we recently explained, physician plaintiffs "unquestionably have standing to

sue on their *own* behalf" when a law threatens them with criminal prosecution. *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 923 n.10 (6th Cir. 2020); *see also, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973). Even if Plaintiffs were not directly regulated by H.B. 454 and only asserted their patients' rights, the Supreme Court has long since determined that abortion providers have standing to do so. *See Singleton v. Wulff*, 428 U.S. 106, 117 (1976). And it has found that providers have standing even when their interests are arguably in potential conflict with patients'—as when regulations assertedly protect the health and safety of patients. *See, e.g.*, *City of Akron*, 462 U.S. at 440 n.30; *Danforth*, 428 U.S. at 62; *Doe v. Bolton*, 410 U.S. at 188.

Casting aside this Supreme Court precedent, the dissent proclaims that Plaintiffs do not have standing because their interests potentially conflict with those of their patients. In so concluding, the dissent wrongly assigns to itself the district court's due fact-finding role, without providing any justification for doing so. Regardless, the supposed conflicts the dissent identifies do not exist. The dissent misleadingly uses studies suggesting some would prefer to undergo a fetal-demise procedure before receiving a D&E. But this attacks a straw man. Plaintiffs do not argue that individuals should not be *permitted* to undergo a fetal-demise procedure if they desire to do so; instead, they argue that individuals should not be *compelled* to undergo a fetal-demise procedure whether or not they desire to. Even if some have an interest in undergoing a fetal-demise procedure, this says nothing about whether they have an interest in being compelled by Kentucky to undergo a fetal-demise procedure. The dissent next suggests, out of thin air, that Plaintiffs do not desire to acquire the training necessary to perform digoxin injections. But the dissent points to no evidence supporting this proposition, and it cannot create a conflict through bare assertion. Thus, its arguments are altogether without merit.

I.

Nearly fifty years ago, the Supreme Court declared that the Fourteenth Amendment protects an individual's right to elect to have an abortion. *Roe v. Wade*, 410 U.S. 113, 153–54 (1973). Twenty years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), the Court reaffirmed what it identified as *Roe*'s essential holdings:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Under this framework, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879. On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the

right to choose." *Id.* at 877. According to the Secretary, H.B. 454 serves the Commonwealth's interests in respecting the dignity of human life, preventing fetal pain, and protecting the ethics, integrity, and reputation of the medical community. Neither the district court nor Plaintiffs questioned that the Commonwealth indeed held these interests or that it might justifiably regulate abortion to further them. Neither do we. The Commonwealth "may use its voice and its regulatory authority to show its profound respect" for the dignity of human life. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). Preventing fetal pain is part and parcel of this interest. Likewise, states "ha[ve] an interest in protecting the integrity and ethics of the medical profession." *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).

However, no Commonwealth interest may justify "placing a substantial obstacle in the path of a woman seeking an abortion" prior to viability. *Casey*, 505 U.S. at 877. Such an obstacle would unduly burden the right to choose prior to viability, in violation of the Fourteenth Amendment. *Gonzales*, 550 U.S. at 146. H.B. 454 applies to abortions beginning at thirteen weeks LMP, well before the point of viability. The question before this Court, then, is whether H.B. 454 imposes an undue burden. As explained by the Supreme Court in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), we answer this question by weighing "the burdens a law imposes on abortion access together with the benefits those laws confer."

This is where the Commonwealth's problems begin. The Secretary takes issue with the district court's application of this test. He asserts that there are multiple ways to apply the undue burden analysis, and "*Hellerstedt* does not apply here because its balancing test arose in the context of a law that a state claimed protected women's health." (Def. Br. at 28 (citing *Hellerstedt*, 136 S. Ct. at 2310).) Because the Commonwealth interests behind H.B. 454 are purportedly more "intangible," the Secretary says, it is the legislature's place—and not the courts'—to assess whether the Commonwealth's interest justifies regulating abortion. The Secretary suggests that *Gonzales* articulated a separate test that applies where a state acts to express respect for human life—that is, "the State may use its regulatory power to bar certain procedures and substitute others," so long as the alternative procedures do not impose an undue burden in the form of "significant health risks." (*Id.* at 26–27 (emphasis omitted) (quoting *Gonzales*, 550 U.S. at 158, 161).)

Like other courts presented with this argument, we find it unpersuasive. *See, e.g.*, *Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 817 (7th Cir. 2018) ("The State is incorrect that the standard for evaluating abortion regulations differs depending on the State's asserted interest or that there are even two different tests . . . ."); *Hopkins*, 267 F. Supp. 3d at 1055 (rejecting argument that "the Supreme Court has created two distinct undue burden tests, depending on what interests the state seeks to regulate"). In *Hellerstedt*, the Supreme Court inferred that the state had legislated in the interest of

protecting women's health. 136 S. Ct. at 2310. Yet the Court did not distinguish that case from *Gonzales* based on the state's interest; in fact, it cited *Gonzales*'s analysis. *See id.* at 2309–10 (citing *Gonzales*, 550 U.S. at 165–66). The *Hellerstedt* Court explained that it simply applied "[t]he rule announced in *Casey*, . . . [which] requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2309. In *Gonzales*, the Court also explained that "*Casey*, in short, struck a balance," and it simply "applied [*Casey*'s] standards to the cases at bar." *Gonzales*, 550 U.S. at 146. *Casey* itself did not suggest that any separate test applied to regulations based on an interest in the dignity of human life; instead, it presented the "woman's right to terminate her pregnancy before viability" and "the interest of the State in the protection of potential life" as two sides of an equation. *Casey*, 505 U.S. at 871. Nor have other lower courts understood there to be two different analyses. Courts regularly apply the undue burden analysis, as articulated in *Hellerstedt*, to regulations passed in the interest of protecting the dignity of human life. *See, e.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 983–84 (7th Cir. 2019); *J.D. v. Azar*, 925 F.3d 1291, 1328, 1333, 1335 (D.C. Cir. 2019); *Williamson*, 900 F.3d at 1326–27; *Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d at 824–25, 831.

The Secretary also relies upon *Gonzales* to assert that there is "medical uncertainty over whether [H.B. 454' s] prohibition creates significant health risks," and that legislatures have "wide discretion to pass legislation in areas where there is medical and

scientific uncertainty." (Def. Br. at 27 (quoting *Gonzales*, 550 U.S. at 163–64).) But *Hellerstedt* addressed this very argument. *See* 136 S. Ct. at 2310. It explained that "[t]he statement that legislatures, and not courts, must resolve questions of medical uncertainty is . . . inconsistent with this Court's case law." *Id.* It clarified that while *Gonzales* suggested that courts must apply deferential review to legislative fact findings, that deference should not be "[u]ncritical" and courts "must not 'place dispositive weight' on those 'findings.'" *Id.* (alteration in original) (quoting *Gonzales*, 550 U.S. at 165–66); *see also Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 (6th Cir. 2020). In the case of H.B. 454, the legislature made no findings of fact addressing the medical safety of the Secretary's suggested procedures; in fact, H.B. 454 does not acknowledge these procedures at all. Thus, there are no legislative findings of fact to which this Court could even defer. As discussed below, the district court appropriately considered the medical evidence surrounding H.B. 454's safety and found that it presented impermissible, unduly burdensome risks to those seeking a D&E prior to viability.

Setting aside the Secretary's argument, then, we must apply the undue burden analysis, as explained in *Hellerstedt*.[3] We therefore turn to consider the district

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[3] Although we decline to apply the purportedly separate test the Secretary suggests, we note that H.B. 454 would fail that test, too. The Secretary suggests that a law "imposes an undue burden only when the regulation creates a substantial obstacle to previability abortion by 'creat[ing] significant health risks' for women." (Def. Reply Br. at 10–11 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 162 (2007)).) For the reasons explained later in this opinion, the

court's assessment of the burdens H.B. 454 imposes.

A. Burdens

An undue burden exists if a statute's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878. The Supreme Court has repeatedly affirmed that laws that amount to a prohibition of the most common second-trimester abortion method impose such a burden. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 930, 938–39 (2000) (finding that a Nebraska statute effectively prohibiting D&E abortions constituted an undue burden); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 78–79 (1976) (striking down a ban on saline amniocentesis, then the method "most commonly used nationally . . . after the first trimester"); *see also Gonzales*, 550 U.S. at 150–54, 164–65 (contrasting a permissible law prohibiting only dilation and extraction ("D&X") abortions,[4] and not standard D&E, with the unconstitutional law at issue in *Stenberg*). This Court has duly applied those holdings, explaining simply that "if a statute prohibits pre-viability D & E procedures, it is unconstitutional." *Northland Family Planning,*

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district court did not err in finding that H.B. 454 creates significant health risks by compelling individuals to undergo fetal-demise procedures.

[4] In a D&X procedure, a physician dilates a patient's cervix to allow the fetus to partially pass through. *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 440 (6th Cir. 2003). When the fetus emerges past the cervix, the physician uses tools to access and remove the contents of the fetal skull, before removing the rest of the fetal body from the patient. *Id.*

Inc. v. Cox, 487 F.3d 323, 330 (6th Cir. 2007); *accord Eubanks v. Stengel*, 224 F.3d 576, 577 (6th Cir. 2000); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) ("Because the definition of the banned procedure includes the D & E procedure, the most common method of abortion in the second trimester, the Act's prohibition on the D & X procedure has the effect 'of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" (quoting *Casey*, 505 U.S. at 877)). If H.B. 454 effectively prohibits the D&E procedure, then, it poses a substantial obstacle to abortion access prior to viability and is an undue burden.

H.B. 454 criminalizes a physician's performance of a standard D&E abortion unless fetal demise occurs before the fetus is removed from the uterus. The Secretary argues that H.B. 454 does not ban D&Es because physicians may lawfully administer D&Es if they first induce fetal demise through one of three methods: digoxin injection, potassium chloride injection, or umbilical cord transection. The Secretary asserts that the Commonwealth may constitutionally require individuals to undergo these procedures because they are "reasonable alternative[s]" to a standard D&E. (Def. Br. at 27, 33 (citing *Gonzales*, 550 U.S. at 163).)

Before considering the feasibility of each of these procedures, we pause to note a fundamental flaw in the Secretary's argument. Fetal-demise procedures are not, by definition, *alternative* procedures. A patient who undergoes a fetal-demise procedure must still undergo the entirety of a standard D&E. Instead, fetal-demise

procedures are *additional* procedures. Additional procedures, by nature, expose patients to additional risks and burdens. No party argues that these procedures are necessary or provide any medical benefit to the patient. The district court's findings suggest that these procedures impose only additional medical risks. Thus, we consider them inherently suspect. *See, e.g.*, *Adams & Boyle*, 956 F.3d at 926 (concluding that applications of a temporary ban on abortions during the COVID-19 pandemic that "would require [a woman] to undergo a more invasive and costlier procedure tha[n] she otherwise would have . . . constitutes 'beyond question, a plain, palpable invasion of rights secured by [the] fundamental law'" (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905))); *Paxton*, 280 F. Supp. 3d at 948 ("Although the court will consider the argument [that physicians may induce fetal demise through one of the proposed methods], the State's reliance on adding an additional step to an otherwise safe and commonly used procedure in and of itself leads the court to the conclusion that the State has erected an undue burden on a woman's right to terminate her pregnancy prior to fetal viability."); *id.* at 953 (similar); *see also, e.g.*, *Danforth*, 428 U.S. at 78–79 (striking down Missouri's ban on saline amniocentesis because it "forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed"); *Williamson*, 900 F.3d at 1326 (similar); *Farmer*, 220 F.3d at 145 (similar); *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 500 (D.N.J. 1998) (similar), *aff'd sub nom. Farmer*, 220 F.3d 127; *Evans*, 977 F. Supp. at 1318 (similar). In essence, H.B. 454 conditions an individual's right to choose on her willingness to

submit herself to an additional painful, risky, and invasive procedure. At some point, that requirement itself becomes so onerous that it would substantially deter individuals from seeking an abortion. This is surely an undue burden.

Our consideration of the Secretary's proposed means of inducing fetal demise only solidifies this conclusion. The district court correctly found that none of these methods is a feasible workaround to H.B. 454. We address each method in turn.

1. Digoxin Injections

The first fetal-demise method the Secretary identifies is digoxin injections. As the district court explained, "[t]o inject digoxin, physicians begin by using an ultrasound machine to visualize the woman's uterus and the fetus. The physician then inserts a long surgical needle through the patient's skin, abdomen, and uterine muscle, to inject digoxin into the fetus" or the amniotic fluid. *Meier*, 373 F. Supp. 3d at 818. Because digoxin can take up to twenty-four hours to work, physicians generally must administer this injection the day before performing a D&E. *Id.* at 818–19.

The district court found that digoxin injections were not a feasible method for inducing fetal demise for five reasons. First, with between a 5% and 20% failure rate, digoxin injections do not reliably induce fetal demise and so patients may require a second injection, the effects of which have not been studied. *Id.* at 818. Second, digoxin injections are also insufficiently studied when administered before eighteen weeks

LMP, and would therefore essentially be experimental for the approximately 50% of patients who would receive injections before this point. *Id.* Third, various factors make it difficult or impossible for many patients to receive a digoxin injection prior to a D&E. *Id.* Fourth, digoxin injections expose patients to substantial added health risks. *Id.* Finally, digoxin injections subject patients to additional logistical and emotional burdens by requiring them to undergo a risky and invasive procedure and by requiring them to invest resources in making a visit to their physician to have the injection twenty-four hours before receiving a D&E. *Id.* at 818–19.[5]

Much of the Secretary's argument pertaining to digoxin injections amounts to an attempt to relitigate

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[5] The district court found that digoxin injections are generally "not terribly difficult to perform," but that they "still [are] not a feasible option for fetal-demise" for the five reasons indicated. *Meier*, 373 F. Supp. 3d at 818. Yet the dissent repeatedly asserts that the problem is simply that Plaintiffs do not desire to receive the training necessary to give the injections. This assertion has no grounding in the facts as the district court found them, and, as previously discussed, the dissent provides no support for it. In any event, the possibility that Plaintiffs could be trained to perform digoxin injections is irrelevant if digoxin injections are not otherwise a feasible workaround to H.B. 454. The evidence pointed to by the dissent provides no reason to question the district court's conclusion that they are not. As detailed above, each of the factual findings relating to digoxin injection's feasibility was a permissible view of the evidence. *See Anderson*, 470 U.S. at 574. Apparently recognizing this, the dissent does not suggest that any of the court's findings were clearly erroneous. Instead, it simply asserts the facts as it sees them. But it is not our role to find facts, particularly in the absence of evidence, when we have no basis to reverse the district court's permissible findings. *See id.*

factual issues. He contends that digoxin injections do not fail as frequently as the district court found, that receiving multiple injections is safe, that receiving injections before eighteen weeks is safe, and that some of the risks identified by the district court are minimal or theoretical. In essence, the Secretary takes issue with the district court's decision to credit Plaintiffs' experts and cited studies over his own.

The Secretary's strategy is misguided. Even if we were inclined to disagree with the district court's factual findings, we may not reverse those findings merely because we are "convinced that had [we] been sitting as the trier[s] of fact, [we] would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74. As a federal appellate court, "we must let district courts do what district courts do best—make factual findings—and steel ourselves to respect what they find." *Taglieri v. Monasky*, 907 F.3d 404, 408 (6th Cir. 2018). In reviewing a grant of permanent injunction following a bench trial, we ask simply whether the district court's view of the evidence was permissible. *Anderson*, 470 U.S. at 574.

The record supports each of the district court's factual findings. Expert testimony presented at trial, supported by medical studies, suggested that digoxin injections fail between 5% and 20% of the time.[6] (Tr.

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[6] The Secretary also argues that even a 20% failure rate does not make H.B. 454 facially invalid because this does not constitute an undue burden on the requisite large fraction of individuals for whom the restrictions are relevant. As this argument goes to the appropriateness of facial relief, we address it in considering what relief Plaintiffs are due. But at this juncture, it is worth noting

Vol. I, R. 106 at PageID #4391; Tr. Vol. II, R. 107 at PageID ##4675–76; Tr. Vol. IV, R. 103 at PageID #3911.) We cannot override the district court's decision not to credit competing evidence that suggested the lower bound of this failure rate is 2%, (*e.g.*, Tr. Vol. I, R. 106 at Page ID #4391; Tr. Vol. III-B, R. 102 at PageID ##3737, 3743), and we would not be compelled to conclude that digoxin injections are feasible even if we could. As a legal matter, the Secretary also contends that Plaintiffs should be bound by the statement in their complaint that digoxin fails between 5% and 10% of the time. But "[i]n order to qualify as [a] judicial admission[], an attorney's statement must be deliberate, clear and unambiguous." *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997). The complaint's statement that "digoxin simply fails to cause demise in *approximately* 5–10% of cases," (Compl., R. 1 at PageID #8 (emphasis added)), leaves ample room for Plaintiffs to show that the failure rate is higher.

Likewise, evidence supports the district court's conclusion that performing successive digoxin injections would amount to an experimental medical procedure, because no medical literature identifies the correct dose for or the risks of a second digoxin injection. (*See, e.g.*, Tr. Vol. I, R. 106 at PageID ##4395–96; Tr. Vol. II, R. 107 at PageID #4678; Tr. Vol.

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that digoxin injections' failure rate is not the only thing that makes them an infeasible workaround to H.B. 454. Thus, we need not consider whether this failure rate, standing alone, would be sufficient to suggest that H.B. 454 unduly burdens a large fraction of the population it restricts.

III-B, R. 102 at PageID #3792.) The court's conclusion regarding the use of digoxin injections before eighteen weeks LMP is also well grounded: according to witness testimony, no studies have been performed on the efficacy, dosage, or safety of digoxin injections before seventeen weeks, and just one study includes a few individuals at seventeen weeks' pregnancy. (Tr. Vol. I, R. 106 at PageID ##4396–97; Tr. Vol. IV, R. 103 at PageID ##3984–85.)

The court's conclusion that digoxin injections are not available to many patients also is not clearly erroneous. Multiple experts testified that factors including placental positioning, fetal positioning, obesity, the presence of uterine fibroids, and the presence of cesarean-section scars can interfere with or prevent the successful administration of a digoxin injection. (Tr. Vol. I, R. 106 at PageID ##4387–88; Tr. Vol. III-B, R. 102 at PageID ##3793–94; Tr. Vol. IV, R. 103 at PageID ##4000–01.) Moreover, expert testimony and studies suggested that patient contraindications—including multiple gestations, fetal abnormalities, digoxin or cardiac glycoside sensitivities and allergies, cardiac abnormalities, renal failure, bleeding disorders, and use of certain medications—may prevent the safe administration of a digoxin injection. (Tr. Vol. I, R. 106 at PageID ##4388–90.) Despite the Secretary and the dissent's assertions otherwise, the district court's finding that digoxin injections are not generally technically difficult to perform does not remotely conflict with its conclusion that they cannot successfully be performed on all patients or that they are technically difficult to perform in some situations. In the event that an individual cannot receive a digoxin

injection for any of these reasons, H.B. 454 could prevent her from receiving a D&E. There is no exception to H.B. 454's restrictions for those who cannot undergo one of the proposed fetal-demise procedures.[7]

While the district court's opinion did not include specific record citations to support its conclusion that that digoxin injections subject patients to additional health risks, *Meier*, 373 F. Supp. 3d at 818, this too is supported by the evidence. Expert testimony suggested that digoxin injections may increase patients' risk of vomiting, infection, bowel or intestinal rupture, sepsis, and general hospitalization. (Tr. Vol. I, R. 106 at PageID ##4400–06; Brady Dep., R. 112-1 at PageID #5242.) Digoxin injections can also lead to extramural delivery, meaning delivery outside a clinic environment, which further increases medical risks (including the risk of hemorrhaging) and may also be painful and emotionally traumatic. (Tr. Vol. I, R. 106 at PageID ##4405–09; Brady Dep., R. 112-1 at PageID #5242.)

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[7] The only exception to H.B. 454's prohibition is for instances of "medical emergency." (H.B. 454, R. 43-1 at PageID #244.) The unavailability of a digoxin injection generally does not "so complicate[] the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function." (*Id.*); Ky. Rev. Stat. § 311.720(9). On appeal, the Secretary does not argue that this medical exception covers any of the situations in which a fetal-demise procedure would be unavailable.

The Secretary says that these negative effects rarely occur and dismisses them as "marginal or insignificant risks generalized to the entire population of women seeking . . . abortions [at the relevant time]." (Def. Br. at 35 (alterations in original) (quoting *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 447 (6th Cir. 2003)).)[8] The Secretary draws this language

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[8] In his reply brief, the Secretary contends for the first time that whether the three fetal-demise procedures pose significant risks is a constitutional fact subject to *de novo* review. A constitutional fact is one "upon which the enforcement of the constitutional rights of the citizen depend." *Crowell v. Benson*, 285 U.S. 22, 56 (1932); *see also* Henry Paul Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 230, 254–55 (1985) (describing constitutional fact review as "judicial review of the adjudicative facts decisive of constitutional claims" and summarizing *Crowell*).

To be sure, this Court has explained, in the context of abortion cases, that "an appellate court is to conduct an independent review of the record when constitutional facts are at issue." *Voinovich*, 130 F.3d at 192; *see also Women's Med. Prof'l Corp. v. Taft*, 353 F.3d at 442. But we have not clarified what that "independent review" means, nor have we identified any constitutional facts to which we apply that independent review. *See, e.g., Voinovich*, 130 F.3d at 192; *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d at 442. In both of the cases the Secretary cites to support his argument, the Court reviewed legal questions pertaining to statutory construction, including how a health exception in a statute regulating abortion should be interpreted. *Voinovich*, 130 F.3d at 208–10; *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d at 443–51. This Court did not hold in either case that the existence of a significant health risk is a constitutional fact. The Secretary's argument turns on his assertion that a law "imposes an undue burden only when the regulation creates a substantial obstacle to previability abortion by 'creat[ing] significant health risks' for women," implying that the undue burden analysis turns exclusively on whether a law presents significant health risks. (Def. Reply Br. at 10–11 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 162 (2007)).) Of course, in

from *Women's Medical Professional Corp. v. Taft*, in which this Court considered whether a state could forbid D&X abortions if the statute doing so provided for a health exception. 353 F.3d at 446–47. Noting that Supreme Court precedent required exceptions for "when the procedure is necessary to prevent a significant health risk," this Court concluded that the Supreme Court did not intend to require medical exceptions to include "marginal or insignificant risks generalized to the entire population of women seeking late second-trimester abortions." *Id.* We found it significant that the law in question "specifically exclude[d]" D&Es from its restrictions, as D&Es provided a safe alternative to the D&X procedure. *Id.* at 438, 451–53. As the Supreme Court later explained, in comparing D&X and D&E abortions, there was substantial medical uncertainty "over whether the barred procedure [*i.e.*, D&X] is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives [*i.e.*, D&E]." *Gonzales*, 550 U.S. at 166–67.

By contrast, under H.B. 454, an individual is left with no safe alternative to undergoing a fetal-demise procedure, and the record shows, with no medical

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balancing the benefits and burdens H.B. 454 imposes, we consider more than just health risks alone.

We consider the question of whether a procedure poses a significant health risk a mixed question of fact and law. What risks a procedure poses is a question of fact, and whether those risks are significant is a question of law. Accordingly, we apply clear error review to the former question and *de novo* review to the latter question.

uncertainty, that a D&E without a fetal-demise procedure may be necessary to preserve an individual's health. Indeed, in every circumstance, a fetal-demise procedure poses additional health risks beyond those present with a D&E alone, and so it always places an individual's health in jeopardy. Accordingly, every court to consider the question has found that digoxin injections pose impermissible, significant risks to those who would be compelled to undergo them. *See, e.g.*, *Williamson*, 900 F.3d at 1323–24, 1327; *Bernard*, 392 F. Supp. 3d at 949, 960; *Yost*, 375 F. Supp. 3d at 858; *Paxton*, 280 F. Supp. 3d at 949; *Hopkins*, 267 F. Supp. 3d at 1039, 1060–61; *Evans*, 977 F. Supp. at 1301, 1318; *Schmidt*, 368 P.3d at 678; *see also Farmer*, 220 F.3d at 145–46 (discussing digitalis, another cardiac glycoside); *Verniero*, 41 F. Supp. 2d at 500 (same), *aff'd sub nom. Farmer*, 220 F.3d 127; *accord Meier*, 373 F. Supp. 3d at 818. We agree.

Finally, the district court found that digoxin injections impose additional logistical and emotional burdens on patients because they may increase the length of the D&E procedure by a day and because they require patients to undergo an additional invasive, painful, and likely scary procedure. *Meier*, 373 F. Supp 3d at 818–19. The Secretary's argument that D&E procedures regularly take two days anyway is unavailing; even if he is correct, the record suggests that an additional day may be required for some patients to undergo a digoxin injection. (*See* Tr. Vol. I, R. 106 at PageID ##4396, 4432; Tr. Vol. II, R. 107 at PageID #4768.)

In sum, we see no error in the district court's analysis of the feasibility of using digoxin injections to induce fetal demise prior to a D&E. Digoxin injection is an unreliable procedure that may not effectively cause fetal demise, presents unknown risks when administered multiple times or before eighteen weeks, may not be administrable at all based on the patient's health history and characteristics, increases medical risks under any circumstance, and creates additional emotional and logistical challenges for patients. Based on these findings of fact, digoxin injections are not a safe or effective workaround to H.B. 454.

2. Potassium Chloride Injections

As a second possibility, the Secretary suggests that an abortion provider may induce fetal demise by injecting potassium chloride into the fetus or the fetal heart. As described by the district court, physicians using this method "begin by using an ultrasound machine to visualize the patient's uterus and fetus. The physician then inserts a long surgical needle through the woman's skin, abdomen, and uterine muscle, and then into either the fetus or, more specifically, the fetal heart." *Meier*, 373 F. Supp. 3d at 819. At this stage, the fetal heart is approximately the size of a dime. *Id.* If injected into the fetal heart, potassium chloride causes fetal demise almost immediately. *Id.* The physician may then perform a standard D&E.

The district court found that potassium chloride injections were not a feasible method for inducing fetal demise for three reasons. First, potassium chloride injections cannot be completed on every individual seeking a D&E. *Id.* at 820. Second, they subject

patients to serious health risks. *Id.* Third, potassium chloride injections are extremely challenging and require substantial technical training to perform—training that the physician Plaintiffs do not have and cannot easily acquire. *Id.* at 819–20.

In contesting the district court's first finding, the Secretary again quibbles with the district court's decision to credit Plaintiffs' expert testimony over his own. But ample evidence grounded the district court's conclusion that potassium chloride injections would not be successful for many seeking a D&E—because of factors including obesity, fetal and uterine position, cesarean-section or other scar tissue, and uterine fibroids—in addition to the procedure's independent possibility of failure. (Tr. Vol. I, R. 106 at PageID ##4423, 4551–52; Tr. Vol. IV, R. 103 at PageID ##3966, 4187–89.)

With regard to the district court's second finding, the Secretary does not dispute that potassium chloride injections pose health risks to patients. And the record clearly suggested that potassium chloride injections increased patients' risks of infection, bleeding, cramping, uterine or bowel perforation, uterine atony and hemorrhaging, and cardiac arrest. (*See, e.g.*, Tr. Vol. I, R. 106 at PageID ##4423–24, 4561–62; Tr. Vol. III-B, R. 102 at PageID ##3802–06; Tr. Vol. IV, R. 103 at PageID ##4198–99.) The Secretary does contest the significance of these risks, but this argument fails for the same reasons it failed previously. H.B. 454 cannot be said to impose only marginal or insignificant risks because no safe alternative exists and because it requires every individual seeking a D&E abortion to

expose themselves to these risks. Again, every court to consider whether potassium chloride injections present substantial risk has agreed that they do. *Williamson*, 900 F.3d at 1322, 1324, 1327; *Farmer*, 220 F.3d at 145–46; *Bernard*, 392 F. Supp. 3d at 950–51, 960; *Yost*, 375 F. Supp. 3d at 860, 868; *Paxton*, 280 F. Supp. 3d at 950–51; *Hopkins*, 267 F. Supp. 3d at 1040, 1062–63; *Verniero*, 41 F. Supp. 2d at 500*, aff'd sub nom. Farmer*, 220 F.3d 127; *Evans*, 977 F. Supp. at 1301, 1318; *accord Meier*, 373 F. Supp. 3d at 820.

Regarding the district court's finding that potassium chloride injections require technical skill and training that is not available to Plaintiffs, the Secretary argues that this is no issue. Even if the physician Plaintiffs themselves do not have and cannot acquire the requisite training, the Secretary says, EMW can simply hire physicians who do. According to the Secretary, because EMW has not attempted to hire such physicians, Plaintiffs themselves have caused this obstacle to abortion access, not H.B. 454.

This argument misses the point. Whether Plaintiffs could find some way to provide potassium chloride injections is only relevant if those injections otherwise present a feasible workaround to H.B. 454. They do not. Potassium chloride injections cannot be performed on many patients and present substantial added health risks even when they can be. It would be irrational to require Plaintiffs to go to the effort and expense of attempting to hire other physicians in order to prove that they cannot make a dangerous and potentially ineffective procedure available to their patients. The burden here is undoubtedly caused by H.B. 454.

But even setting this analysis aside, the Secretary's argument also fails for other reasons. First, neither Supreme Court precedent nor this Court's precedent requires Plaintiffs to prove that EMW could not have hired physicians with the skills and training necessary to perform potassium chloride injections. For this proposition, the Secretary cites *Gonzales*, noting that physicians need not have "unfettered choice" in what abortion procedures they may use and that regulations may require them to perform procedures that are "standard medical options." (Def. Br. at 20 (quoting *Gonzales*, 550 U.S. at 163, 166).) But the point of the district court's findings is that potassium chloride injection is not a standard medical option, and Plaintiffs could not provide that procedure even if they would so choose, because they have no available avenue to develop the necessary skills. We agree.

The Secretary cites to *June Medical Services L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2015), *cert. granted*, 140 S. Ct. 35 (2019), to support his argument. In that case, the Fifth Circuit upheld a Louisiana law requiring abortion providers to gain admitting privileges at a nearby hospital. The court found that the plaintiff physicians had failed to show that the law presented an undue burden because they had not applied for admitting privileges or otherwise shown that had they "put forth a good-faith effort to comply with [the law], they would have been unable to obtain privileges." *Id.* at 807. Because the plaintiffs failed to make this showing, the Fifth Circuit concluded that "[t]heir inaction severs the chain of causation." *Id. But see id.* at 830 (Higginbotham, J., dissenting) (explaining that *Hellerstedt* "did not require proof that every abortion

provider . . . put in a good-faith effort to get privileges and had been unable to do so"). The Fifth Circuit thus took issue not with the plaintiffs' failure to attempt to hire or replace themselves with other physicians who had admitting privileges, but with their failure to show that they could not have obtained admitting privileges had they tried. *See id.* at 807. In the case at bar, the district court found that Plaintiffs "have no practical way to learn how to perform this procedure safely," due to "the length of time it would take to learn the procedure and the lack of training available within the Commonwealth." *Meier*, 373 F. Supp. 3d at 820. The Secretary does not dispute this finding, and the record supports it. (*See, e.g.*, Tr. Vol. I, R. 106 at PageID ##4573–74; Tr. Vol. II, R. 107 at PageID ##4732–33; Tr. Vol. IV, R. 103 at PageID ##4185–86.) Thus, plaintiffs succeed even under the heightened showing required by the Fifth Circuit in *Gee*.

Still, Supreme Court precedent does not support such a requirement. Nor does Sixth Circuit precedent. Notably, the Supreme Court granted a stay of the Fifth Circuit's decision, *Gee*, 139 S. Ct. 663 (2019) (mem.), and the Court does not stay a decision absent a "significant possibility that the judgment below will be reversed," *Philip Morris U.S.A. Inc. v. Scott*, 561 U.S. 1301, 1302 (2010). Far from requiring plaintiffs to specifically and affirmatively show good-faith efforts to comply with a challenged law, Supreme Court precedent suggests that plaintiffs may demonstrate an undue burden "by presenting direct testimony as well as plausible inferences to be drawn" from the evidence, *Hellerstedt*, 136 S. Ct. at 2313, including the inference that any good-faith efforts would fail to alleviate the

burden. Common sense suggests that when only a small subset of physicians have undergone the extensive training required to perform a procedure, it would be difficult to impossible for an abortion clinic to recruit one of those physicians. Still, the relevant question in abortion cases is not whether it would unduly burden a provider to comply with a law, but whether compliance would unduly burden their patients' right to elect abortion prior to viability. And it is even clearer that should Kentucky require a procedure that only a small subset of physicians can administer—in comparison to the large number who can administer a D&E—it would restrict the number of D&Es that could be provided in Kentucky, thereby burdening those seeking a D&E.

Altogether, the district court's well-supported findings suggest that if patients were required to undergo a potassium chloride injection prior to a D&E, they would be subjected to a medically risky and unreliable procedure, which they may not be able to receive successfully and to which they would have only limited access, given the dearth of Kentucky providers trained to administer the procedure. These findings demonstrate that potassium chloride injections are not a feasible workaround to H.B. 454.

3. Umbilical Cord Transection

Finally, the Secretary suggests that abortion providers may induce fetal demise through umbilical cord transection. To administer this procedure, the physician first dilates a patient's cervix and then—using an ultrasound for guidance—ruptures the amniotic membrane in order to allow access inside the

amniotic sac, where the umbilical cord is located. This causes the amniotic fluid to drain from the uterus, shrinking its size and making it more difficult to visualize and grasp the umbilical cord. The physician then inserts an instrument through the cervix and locates the umbilical cord, which at this stage is approximately the width of a piece of yarn. Grasping the umbilical cord, the physician inserts another instrument through the cervix and cuts the cord. Once the cord is cut, the physician waits for the fetal heartbeat to stop, which can take up to ten minutes. The physician may then administer a standard D&E.

The district court found that this, too, was not a workable method for inducing fetal demise. It provided three reasons for that finding. First, umbilical cord transection is technically challenging because of the difficulty of visualizing the uterus and locating and grasping the umbilical cord. *Meier*, 373 F. Supp. 3d at 821 (citing Tr. Vol. I, R. 106 at PageID ##4434–36; Tr. Vol. II, R. 107 at PageID ##4669–70, 4672). Second, it is essentially experimental because there has only been one study focused on the procedure. *Id.* (citing Tr. Vol. I, R. 106 at PageID ##4438–41; Tr. Vol. III-B, R. 102 at PageID ##3808–09). Finally, umbilical cord transection carries serious health risks, including blood loss, infection, and uterine injury. *Id.* at 821–22 (citing Tr. Vol. I, R. 106 at PageID ##4436–37; Tr. Vol. II, R. 107 at PageID ##4669, 4673).

The Secretary does not meaningfully challenge any of these findings, which again are more than adequately supported by the record. He argues only that the one study of umbilical cord transection

suggests the procedure is feasible, safe, and effective, as does the fact that an EMW expert and an EMW doctor had performed umbilical cord transections in the past. But on clear error review, we will not override the district court's decision not to credit a single medical study after finding that it "does not provide the type or quality of evidence that warrants reaching generalized conclusions about the feasibility or reliability of umbilical cord transection." *Id.* at 821. And the simple fact that umbilical cord transections have been performed at some point does not suggest that they are safe in every instance or that they pose no additional, significant risks to those who would be compelled to undergo them.

The Secretary also takes issue with the district court's statement that umbilical cord transections "pose[] another hurdle for the provider because if they cut fetal tissue instead of, or in addition to the cord" while searching for it in the uterus, "they have arguably violated the Act." *Id.* (citing Tr. Vol. I., R. 106 at PageID ##4435–36; Tr. Vol. II, R. 107 at PageID ##4669–70). The Secretary responds that, because of H.B. 454's intent requirement, it does not apply when a physician accidentally dismembers a fetus prior to demise, and so it would not be enforced against a physician in this circumstance. But, as the Eleventh Circuit has explained in a similar case, "[m]id-litigation assurances are all too easy to make and all too hard to enforce, which probably explains why the Supreme Court has refused to accept them." *Williamson*, 900 F.3d at 1328 (citing *Stenberg*, 530 U.S. at 940–41); *accord Stenberg*, 530 U.S. at 945–46; *Yost*, 375 F. Supp. 3d at 868. Nor does this argument disturb the court's

conclusion that the technical difficulty of umbilical cord transection makes it an infeasible workaround to H.B. 454.

Taken together, these findings demonstrate that should patients be required to undergo an umbilical cord transection prior to receiving a D&E, they would be subjected to a medically risky and experimental procedure that, given its technical challenges, fewer providers may be equipped to administer. These findings inevitably lead to the conclusion that umbilical cord transection—like digoxin and potassium chloride injections—is not a feasible workaround to H.B. 454.

B. Benefits

After taking stock of the burdens imposed by H.B. 454, we must next consider the Act's benefits. The Secretary asserts that H.B. 454 provides three primary benefits: It "shows Kentucky's profound respect for unborn life. It eliminates the possibility of unborn children feeling pain while being dismembered. And [it] protects the integrity of the medical profession." (Def. Br. at 57.)

The Secretary contends that a statement by the district court—namely, "the fact that the Act furthers legitimate state interests does not end this constitutional inquiry"—suggests the district court found that H.B. 454 did advance the Commonwealth's asserted interests. *See Meier*, 373 F. Supp. 3d at 817. This conclusion is debatable, at best.

The district court clearly concluded that H.B. 454 did not benefit the Commonwealth's interest in preventing fetal pain because "it is very unlikely that

a fetus can feel pain before 24 weeks," at which point physicians no longer perform D&Es. *Id.* at 823; *accord Yost*, 375 F. Supp. 3d at 865. In so finding, the court dismissed the Secretary's expert's testimony suggesting that a fetus may feel pain as early as fifteen weeks, purportedly because the development of a fetus's ability to feel pain is like "a dimmer switch" that "turn[s] on over weeks of development." (Tr. Vol. IV, R. 103 at PageID ##4020–21); *Meier*, 373 F. Supp. 3d at 822. Instead, the court credited Plaintiffs' expert testimony, supported by multiple studies, that it is not possible for a fetus to feel pain before twenty-four weeks because "fetal pain perception requires consciousness, which in turn requires two elements absent in a fetus before 24 weeks: intact [neural] connections from the periphery [of the brain] to the thalamus and then to the cortex, and a sufficiently developed cerebral cortex." *Meier*, 373 F. Supp. 3d at 822 (citing Tr. Vol. IV, R. 103 at PageID ##4140–55, 4180–82, 4210). Given the abundant evidence supporting Plaintiffs' account of pain perception, the district court's conclusion was not clearly erroneous. And, accepting that a fetus cannot feel pain during the period in which D&Es are administered, we conclude that H.B. 454 does not benefit this Commonwealth interest.

The district court made no clear findings regarding whether or how H.B. 454 advanced the Commonwealth's interest in demonstrating respect for the dignity of human life. Upon consideration, we note that the Commonwealth's interests in preventing fetal pain and demonstrating respect for human life are substantially intertwined, if not subsumed in one another. While H.B. 454 would prohibit separation of

fetal tissue prior to fetal demise, it would not prohibit separation of fetal tissue following fetal demise. The most obvious potential benefit to separating fetal tissue post-demise rather than pre-demise is that it eliminates any possibility of fetal pain. But the district court permissibly found that it is impossible for a fetus to feel pain during the period in which D&Es are administered, and so H.B. 454 provides no benefit in that regard. Nevertheless, even recognizing the impossibility of fetal pain at this point, some may believe that separating fetal tissue prior to fetal demise is more "brutal and inhumane" than or "implicates additional ethical and moral concerns" beyond those implicated by separating fetal tissue following demise. *See Gonzales*, 550 U.S. at 157–158. In recognition of that fact, we assume that H.B. 454 provides some limited benefit in this regard. *See Women's Med. Prof'l Corp. v. Taft*, 353 F.3d at 444 ("[A state's] expression of . . . important and legitimate interests warrants a measure of deference . . . .").

Turning to the Commonwealth's final interest in protecting the ethics, integrity, and reputation of the medical profession, the district court also came to no clear findings or conclusions regarding if or how H.B. 454 benefited this interest. We note that H.B. 454 would require physicians to subject their patients to additional harmful, experimental, and invasive medical procedures, in contravention of their ethical duties. (*See, e.g.*, Tr. Vol. II, R. 107 at PageID ##4819–20 ("H.B. 454 is inconsistent with the principle of nonmaleficence, the principle that physicians should not do unjustified harm to their patients" because fetal-demise procedures "offer[] only risks to [the

patient], only the risk of harm, and do[] not offer [the patient] any potential for medical benefits.").) And to the extent that physicians have any obligation to not do harm to a fetus, performing a D&E on a fetus prior to fetal demise subjects it to little harm, if any, because it cannot feel pain. If H.B. 454 provides any benefit to the Commonwealth's interest in the medical profession, it also provides countervailing damage to that interest. We therefore conclude that H.B. 454 provides little to no benefit in this regard.

C. Balancing

Altogether, H.B. 454 imposes substantial burdens on the right to choose. Because none of the fetal-demise procedures proposed by the Secretary provides a feasible workaround to H.B. 454's restrictions, it effectively prohibits the most common second-trimester abortion method, the D&E. In the balance against these burdens, we weigh the minimal benefits that H.B. 454 provides with respect to the Commonwealth's asserted interests. These benefits are vastly outweighed by the burdens imposed by H.B. 454.[9] Thus, H.B. 454 unduly burdens the right to choose, in violation of the Fourteenth Amendment.

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[9] The Secretary takes issue with the district court's interpretation of *Hellerstedt* as establishing that a regulation constitutes an undue burden when the burdens it imposes exceed its benefits. The Secretary argues that a regulation constitutes an undue burden only when the burdens it imposes *substantially* outweigh its benefits. But we need not decide this question today. H.B. 454 fails under any version of the undue burden analysis because it provides minimal benefit while imposing substantial burdens on the right to elect an abortion prior to viability.

Should H.B. 454 be allowed to go into effect, it would cause Plaintiffs' patients to suffer "'continuing irreparable injury' for which there is no adequate remedy at law." *Baird*, 438 F.3d at 602 (quoting *Kallstrom*, 136 F.3d at 1067). The Secretary does not dispute the district court's determinations as to any of the other elements of the permanent injunction analysis. In any event, those arguments would be without merit.

Summary

Because the burdens imposed by H.B. 454 dramatically outweigh any benefit it provides, H.B. 454 unduly burdens an individual's right to elect to have an abortion prior to viability. Thus, H.B. 454 violates the Fourteenth Amendment. We affirm.

II.

We turn, then, to the appropriate relief. Plaintiffs sought—and the district court granted—facial relief in the form of a declaration that H.B. 454 is unconstitutional and a permanent injunction against the enforcement of H.B. 454. *Meier*, 373 F. Supp. 3d at 826. Facial relief is available when a challenged law places a substantial obstacle in the path of an individual's access to abortion prior to viability in "a large fraction of cases in which [the provision at issue] is relevant." *Hellerstedt*, 136 S. Ct. at 2320 (alteration in original) (emphasis omitted) (quoting *Casey*, 505 U.S. at 895). The Secretary argues that the district court wrongly declared H.B. 454 facially unconstitutional.

In place of a facial challenge, the Secretary asserts, Plaintiffs' claims are better handled through as-applied challenges. *Gonzales* explained that as-applied challenges are "the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." 550 U.S. at 167. Based on this, the Secretary contends that situations where fetal-demise procedures are not feasible due to "side effects, failed injections, contraindications, the inability to perform fetal death procedures on certain women, and the alleged inability to perform digoxin injections before 18 weeks" are such "discrete and well-defined instances" that the individuals who face them should instead bring as-applied challenges. (Def. Br. at 61–62.)

But this set of circumstances is not "discrete and well-defined," because individuals cannot anticipate whether they will suffer from side effects or failed injections. As Plaintiffs point out, those in the midst of failing procedures or suffering from side effects cannot rewind time and litigate an as-applied challenge because they will "already have suffered the very harm the Constitution prohibits Kentucky from inflicting on [them]." (Pls. Br. at 62.) Nor are H.B. 454's burdens limited to those who find themselves in the situations the Secretary describes—others will be exposed to added emotional and logistical burdens, to potentially dangerous and experimental procedures, and to the risk that their fetal-demise procedure may go awry.

In his broader challenge to the district court's award of facial relief, the Secretary contends that the district

court used the wrong denominator to decide whether H.B. 454 unduly burdens a large fraction of individuals. As the Supreme Court has explained, "the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'" *Hellerstedt*, 136 S. Ct. at 2320 (alterations in original) (quoting *Casey*, 505 U.S. at 895). The district court determined that the relevant denominator was all individuals seeking a D&E during the time frame in which that procedure is typically administered. *Meier*, 373 F. Supp. 3d at 824–25; *accord, e.g.*, *Williamson*, 900 F.3d at 1326; *Bernard*, 392 F. Supp. 3d at 963; *Paxton*, 280 F. Supp. 3d at 952; *Hopkins*, 267 F. Supp. 3d at 1067. The Secretary argues that the denominator should also include individuals contemplating an abortion even before the point in pregnancy when D&Es are performed, because they might choose to get an abortion prior to thirteen weeks, rather than have to undergo a fetal-demise procedure. We disagree. The question is not whether an individual seeking an abortion might consider H.B. 454 relevant, but whether H.B. 454 actually applies to restrict her. H.B. 454 is not responsible for preventing someone from having a D&E before the point that D&Es are performed; therefore, H.B. 454 does not actually restrict such individuals and they are not properly considered in the denominator.

The question then becomes what portion of this population would be unduly burdened by H.B. 454. The Secretary complains that the district court did not adequately define or estimate the number of individuals who would be unduly burdened by H.B. 454. To the contrary, the district court did estimate the

number of relevant individuals who would be burdened: its estimate was 100%. *Meier*, 373 F. Supp. 3d at 824. The Secretary counters that H.B. 454 at most unduly burdens those who suffer from "side effects, failed injections, and conditions that make fetal-demise procedures more difficult (obesity, fibroids, etc.) or impossible (contraindications)." (Def. Br. at 59.) He asserts that this population is relatively small and does not make up 100% of the population seeking a D&E.

Again, we disagree. H.B. 454 does not burden only those who suffer from side effects, failed indications, and the aforementioned conditions. *All* individuals who seek a D&E abortion in the second trimester must undergo a fetal-demise procedure. For some, these procedures may not be possible, and H.B. 454 may prevent them from receiving a D&E altogether. They would surely be unduly burdened. Some more may discover, mid-procedure, that an injection has failed, that the umbilical cord cannot be located, or that some other complication occurred. They, too, would be unduly burdened by the medical harm the procedure causes or by being compelled to undergo additional, untested medical procedures to induce fetal demise. But all those required to undergo a fetal-demise procedure will be compelled to expose themselves to the negative consequences to their health, to invest additional time in the procedure, and to subject themselves to an additional invasive and potentially experimental procedure. Thus, the district court correctly found that 100% of the relevant population would be unduly burdened by this law.

The dissent, for its part, presents a new argument on the Secretary's behalf. It says that "H.B. 454 will not operate as a substantial obstacle to those women who prefer digoxin injections." This argument is meritless, even if we could set aside the lack of factual findings on this issue and assume that some individuals may indeed prefer to undergo a fetal-demise procedure before a D&E. An obstacle is an obstacle, regardless of whether some might be willing to overcome it. Even those who may be willing to subject themselves to a fetal-demise procedure are exposed to the medical risks, uncertain consequences, potential unavailability, and time and emotional burden that procedure entails.

The Secretary next asserts that in order for H.B. 454 to constitute an undue burden, "practically all" of the individuals affected must face a substantial obstacle to abortion access. (*Id.* at 40–41, 58 (quoting *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 369 (6th Cir. 2006)); Def. Reply Br. at 29.) As explained, H.B. 454 unduly burdens not just "practically" all, but actually all of the individuals affected, and so this argument is factually meritless.

This argument is also legally meritless. In *Cincinnati Women's Services*, this Court explained that it "has previously found that a large fraction exists when a statute renders it nearly impossible for the women actually affected by an abortion restriction to obtain an abortion." 468 F.3d at 373 (citing *Voinovich*, 130 F.3d at 201). It did not suggest that this is the *only* circumstance in which we will find that a large fraction exists. And the "practically all" language that the

Secretary cites comes from this Court's suggestion that "*[o]ther circuits* . . . [have] only found a large fraction when practically all of the affected women would face a substantial obstacle." *Id.* (emphasis added). In fact, *Cincinnati Women's Services* avoided identifying a threshold at which this Court might find that a "large fraction" of individuals are unduly burdened, but it implied that threshold could be even less than a majority of women affected. *See id.* at 374. The Court explained that "a challenged restriction need not operate as a *de facto* ban for all or even most of the women actually affected," but "the term 'large fraction' which, in a way, is more conceptual than mathematical, envisions something more than the 12 out of 100 women identified here." *Id.* There can be no question that H.B. 454 burdens considerably more than the fraction at issue in *Cincinnati Women's Services.*

The Secretary further argues that the district court did not properly address his contention that there is no burden because "affected women can simply travel to other nearby clinics" outside of Kentucky. (Def. Br. at 60–61.) On this point, the Secretary attempts to "incorporate[] his arguments" from *E.M.W. Women's Surgical Center, P.S.C. v. Meier*, No. 18-6161 (6th Cir. argued Aug. 8, 2019), which is currently pending before a panel of this Court. He claims that "five circuit judges agree with [him] on this point." (*Id.* at 61 n.9 (citing *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 933–34 (7th Cir. 2015) (Manion, J., dissenting); *Whole Woman's Health v. Cole*, 790 F.3d 563, 596–98 (5th Cir. 2015) (per curiam), *rev'd on other grounds by Hellerstedt*, 130 S. Ct. at 2292; *Jackson Women's*

Health Org. v. Currier, 760 F.3d 448, 461–67 (5th Cir. 2014) (Garza, J., dissenting)).)

We reject the Secretary's argument out of hand. This Circuit has firmly established that, on appeal, parties may not even "incorporat[e] by reference . . . arguments made at various stages of the proceeding in the district court." *Northland Ins. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003). They certainly may not incorporate arguments made in altogether different proceedings. And the authorities the Secretary cites in support of his proposition are of no assistance. The only majority decision supporting his point has been overturned by the Supreme Court, and dissenting opinions from out-of-circuit cases are of no weight in our analysis. Moreover, many more circuit judges—indeed, many more circuit courts, including the majority in two of the cases the Secretary cites—have rejected this argument. *See, e.g.*, *Azar*, 925 F.3d at 1332 ("The undue-burden framework has never been thought to tolerate any burden on abortion the government imposes simply because women can leave the jurisdiction."); *Schimel*, 806 F.3d at 918–19 (rejecting as "untenable" the proposition that "the harm to a constitutional right [can be] measured by the extent to which it can be exercised in another jurisdiction" (alteration in original) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011))); *Currier*, 760 F.3d at 449 (holding that a state "may not shift its obligation to respect the established constitutional rights of its citizens to another state"). As the Supreme Court explained in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938), obligations are "imposed by the Constitution upon the States

severally as governmental entities—each responsible for its own laws establishing the rights and duties of persons within its borders." States may not shift the burden of their constitutional obligations to other states, "and no State can be excused from performance by what another State may do or fail to do." *Id.*

As a last attempt to save H.B. 454, the Secretary contends that this Court should tailor its remedy by granting only limited injunctive relief. The Secretary asks this Court to "take[] a scalpel-like approach" and carve out H.B. 454's unconstitutional applications from its purported constitutional applications, leaving intact some skeleton of the prior Act. (Def. Br. at 62.) This argument fails for several reasons. First, the Secretary did not make this argument before the district court, and so it is not preserved for our review. *See, e.g.*, *Big Dipper Entm't v. City of Warren*, 641 F.3d 715, 719–20 (6th Cir. 2011). But even if he had made this argument, we cannot "rewrit[e] state law to conform it to constitutional requirements." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). Specifically, we are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Stenberg*, 530 U.S. at 944 (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)). H.B. 454 does not even mention the fetal-demise procedures that the Secretary claims provide ready workarounds to its otherwise-complete prohibition of D&E abortions. It certainly cannot be construed to require those procedures in only the specific situations the Secretary identifies. And even if it could be, our undue burden

analysis suggests that H.B. 454 unduly burdens one's right to elect an abortion prior to viability even in those situations.

Summary

H.B. 454 imposes an undue burden on not just a large fraction, but all of the individuals it restricts, and so facial relief is appropriate. We cannot rewrite H.B. 454 in order to limit that relief to certain especially unconstitutional applications of the law. Accordingly, we affirm the district court's grant of facial relief in the form of a permanent injunction.

CONCLUSION

For these reasons, we **AFFIRM** the district court's decision.

DISSENT

JOHN K. BUSH, Circuit Judge, dissenting. This case concerns a statute, H.B. 454, that affects women's rights to abortions under the Fourteenth Amendment. What's odd about this case—but not unusual in the abortion context—is that not a single person whose constitutional rights are directly impacted by the law is a party to the case. What's even odder—but again, not uncommon in abortion litigation—is that none of those individuals even testified at trial. In many cases the absence of the very people that the case is about would be the end of the matter: the case would be dismissed for lack of standing. But in abortion cases, courts have held that the absence of the

constitutionally-affected parties does not matter. In such cases the interests of the abortion providers who bring the suit are deemed to be aligned with those of the affected parties, their patients.

Here, however, there is a potential conflict of interest between Plaintiffs and their patients: for whatever reason—be it financial, litigation strategy, or otherwise—EMW's physicians have refused to obtain the necessary training to perform fetal demise, even though uncontroverted studies presented at trial show that many, and perhaps a substantial majority, of women would choose fetal demise before undergoing a D&E procedure. Such women may favor the effect of H.B. 454, which would, among other things, require EMW's doctors to be trained in fetal demise if they are to perform the D&E procedure. Contrary to this patient preference, EMW's doctors simply do not want to provide fetal demise before a D&E procedure, and their opposition to fetal demise creates a potential conflict of interest that deprives them of standing to bring this facial challenge against H.B. 454.

Plaintiffs are two abortion providers and an abortion clinic. Their only claims for relief rest on the premise that H.B. 454 "violates Plaintiffs' patients' right to liberty . . . privacy . . . [and] bodily integrity guaranteed by the due process clause of the Fourteenth Amendment to the U.S. Constitution." Plaintiffs' claim is thus based solely on the rights of their patients, because abortion providers "do not have a Fourteenth Amendment right to perform abortions." *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc). The Majority holds that

Plaintiffs have third-party standing to sue on behalf of their patients, but it does not sufficiently fulfill our "independent obligation to assure that standing exists." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).[1]

Oral argument in this case highlighted why Plaintiffs do not have standing because of the potential conflict of interest identified above. Plaintiffs' counsel was asked what EMW's physicians would do if a patient asked for fetal demise before a D&E. The answer of Plaintiffs' counsel made clear that the

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[1] Defendants challenged Plaintiffs' standing before the district court, (R. 108 at PageID 5034–35), but even if they had not, and contrary to the Majority's assertion, we would not be relieved of our duty to ensure that standing requirements have been met. *See Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) (holding that there is "no authority for the plaintiffs' argument that prudential standing requirements may be [forfeited] by the parties" and declining to "recogniz[e] a distinction between prudential and constitutional standing requirements in this context"); *see also Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357 (D.C. Cir. 2000) ("[I]n this circuit we treat prudential standing as akin to jurisdiction, an issue we may raise on our own"); *MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 747 (7th Cir. 2007) ("[N]onconstitutional lack of standing belongs to an intermediate class of cases in which a court can notice an error and reverse on the basis of it even though no party has noticed it"); *Thompson v. Cty. of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) (holding that "we have an independent obligation to examine . . . [prudential] standing under arguments not raised below"). In creating a distinction between Article III standing and prudential standing in the forfeiture context, the Majority opinion conflicts with the clear weight of the law, including precedent from this court. (*See* Majority Op. at n.2).

physicians would do nothing to honor this request and that her only option would be to travel out of state for the procedure. This admission and the evidence presented at trial demonstrate a potential conflict of interest that destroys Plaintiffs' standing to bring this facial constitutional challenge against H.B. 454.

I.

Whether a plaintiff has standing to bring suit is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Examination of the standing issue "involves two levels of inquiry." *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). The first is "of a constitutional dimension" and involves determining whether the plaintiff has suffered an injury in fact that is likely to be redressed by a favorable decision. *Id.* (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). The second is "prudential" and concerns whether "the plaintiff is the proper proponent of the rights on which the action is based." *Id.* (citing *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)).

Relevant to the second inquiry, the Supreme Court has held that generally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of [other] parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citing *Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam)). There is a "limited . . . exception" to this general rule when the third party can show: (1) that the third party has "a 'close' relationship with the person who possesses the right," and (2) that "there is

a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004) (citation omitted).[2]

In *Singleton v. Wulff*, a case involving a challenge to limits on Medicaid funding for abortions in Missouri, a plurality of the Supreme Court held that the plaintiff-physicians satisfied the closeness and hindrance requirements for third-party standing.

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[2] Although I am bound by this court's and the Supreme Court's precedent that third-party standing is a question of prudential jurisdiction, I note that constitutional considerations also underlie my conclusion that Plaintiffs lack standing in this case. *See Lexmark Int'l v. Static Control Components*, 572 U.S. 118, 127 n.3 (2014) (reserving the question of whether third-party standing should be treated as a component of Article III jurisdiction). I have my doubts that an injury can be "particularized" enough to constitute an injury in fact when the alleged injury belongs solely to a third party, as it does here. *See Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 n.1 (1992) ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."). Due process concerns also drive my decision. Plaintiffs are essentially seeking to act as a representative for a class of all their patients affected by H.B. 454. The Due Process Clause requires "that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (citing *Hansberry v. Lee,* 311 U.S. 32, 42-43, 45, 85 L. Ed. 22, 61 S. Ct. 115 (1940)). As in the class action context, it would be inequitable, and perhaps deleterious to due process rights, to allow a putative representative for a group of people to proceed with litigation in a representative capacity when those who are purportedly represented may not desire the relief that the putative representative seeks. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 80 (1978) (citation omitted) (holding that third-party standing should be limited to "avoid[] . . . the adjudication of rights which those not before the Court may not wish to assert").

428 U.S. at 118. The plurality explained that the close relationship between doctors and patients was "patent" since a woman cannot "safely secure an abortion without the aid of a physician." *Id.* at 117. And a woman faced multiple hindrances to challenging the Missouri law, including "a desire to protect the very privacy of her decision [to abort] from the publicity of a court suit" and "the imminent mootness . . . of any individual woman's claim" when she is no longer pregnant. *Id.* While the plurality acknowledged that these obstacles are "not insurmountable," it nevertheless concluded "that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Id.* at 117–18.

Since *Wulff* was decided, we and our sister circuits have routinely conferred third-party standing on abortion providers without engaging in a serious analysis of whether the plaintiffs have satisfied the closeness and hindrance requirements.[3] But, we should

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[3] *See, e.g.*, *Planned Parenthood Ass'n of Cincinnati, Inc.*, 822 F.2d at 1396 n.4 (citing *Margaret S. v. Edwards*, 794 F.2d 994, 997 (5th Cir. 1986)) ("[T]he Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases."); *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 223 (6th Cir. 1991); *see also Planned Parenthood of N. New Eng. v. Heed*, 390 F.3d 53, 56 n.2 (1st Cir. 2004), *vacated sub nom. Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006); *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1347–48 (2d Cir. 1989); *Am. Coll. Of Obstetricians & Gynecologists, Penn. Section v. Thornburgh*, 737 F.2d 283, 289 n.6 (3d Cir. 1984), *aff'd sub nom. Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 194 n.16 (4th Cir. 2000); *Margaret S.*, 794

not read *Wulff* so broadly to confer third-party standing virtually any time an abortion provider seeks to invalidate an abortion regulation. First, only a plurality of the *Wulff* Court, not a majority, held that the providers had third-party standing. But more critically, *Wulff* was a case in which the interests of the plaintiffs and the rights-holders were parallel, because both providers and patients had an interest in removing state funding limits on abortion. *Wulff* is not applicable in a case like this, where providers have a potential conflict of interest with many, if not most, of their patients, and the closeness requirement of *Kowalski* is thus not satisfied.

To be sure, *Wulff* and cases following that decision emphasize the doctor-patient relationship as the basis for abortion providers to have third-party standing to assert their patients' constitutional rights. "But a close personal relationship" such as between a doctor and a patient "is neither necessary nor sufficient for third party standing." *Amato v. Wilentz*, 952 F.2d 742, 751 (3d Cir. 1991). "Even a close relative will not be heard to raise positions contrary to the interests of the third party whose rights he or she claims to represent: the litigant would then hardly be a vigorous advocate of the third party's position." *Id.* at 751–52. For example, in *Gilmore v. Utah*, 429 U.S. 1012 (1976), the mother of a

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F.2d at 997; *Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908, 910–11 (7th Cir. 2015); *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 757 n.7 (8th Cir. 2018); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 916–18 (9th Cir. 2004); *Planned Parenthood Ass'n of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991).

man convicted of murder lacked third-party standing to seek a stay of her son's execution where he "himself knowingly and intelligently . . . waive[d]" his right to appeal. *Amato*, 952 F.2d at 752 (citing *Gilmore*, 420 U.S. at 1013).

Plaintiffs have the burden of establishing that they satisfied all of the requirements for Article III and prudential standing, including the closeness requirement for third-party standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing Fed. R. Civ. Pro. 56(e)) (holding that "the party invoking federal jurisdiction bears the burden of . . . 'set[ting] forth' by affidavit or other evidence 'specific facts'" supporting their claim to standing); *Amato*, 952 F.2d at 750 ("[W]e will bear in mind that third party standing is exceptional: the burden is on the [plaintiff] to establish that it has third party standing, not on the defendant to rebut a presumption of third party standing."). Plaintiffs failed to satisfy their burden. None of Plaintiffs' patients, with whom they claim a close relationship, testified at trial. Indeed, Plaintiffs did not even invoke a specific patient's rights. Instead, Plaintiffs relied on their "relationship[s] with as yet unascertained" patients. *Kowalski*, 543 U.S. at 131. Such "hypothetical . . . relationship[s]" do not satisfy *Kowalski*'s closeness requirement. *See id.*

What is more, the evidence presented at trial shows that although Plaintiffs have an interest in challenging H.B. 454, a substantial majority of their patients may very well favor the effect of H.B. 454 because they prefer fetal demise prior to a D&E. Such a potential conflict of interest precludes a finding of closeness. *See*

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 (2004) (holding that the plaintiff lacked standing because the interests of the plaintiff and the right-holder were "potentially in conflict"); *Mercer v. Michigan State Bd. of Educ.*, 419 U.S. 1081 (1974), *aff'g* 379 F. Supp. 580 (E.D. Mich. 1974) (affirming a district court decision that denied a public school teacher standing to assert the rights and parents, when the district court could not determine "whether or not any parents or students desire these laws to be changed.").[4]

Dr. Thorp, a professor in the School of Medicine at the University of North Carolina, testified at trial that in one study examining women's preferences for fetal demise procedures, "73 percent . . . reported that if

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[4] "The extent of potential conflicts of interest between the plaintiff and the third party whose rights are asserted matters a good deal. While it may be that standing need not be denied because of a slight, essentially theoretical conflict of interest, we have held that genuine conflicts strongly counsel against third party standing." *Amato*, 952 F.2d at 750 (citing *Polaroid Corp. v. Disney*, 862 F.2d 987, 1000 (3d Cir. 1988)); *accord Pony v. Cty. of Los Angeles*, 433 F.3d 1138, 1147 (9th Cir. 2006) (citations omitted) ("A litigant is granted third-party standing because the tribunal recognizes that her interests are aligned with those of the party whose rights are at issue and that the litigant has a sufficiently close connection to that party to assert claims on that party's behalf."); *Harris v. Evans*, 20 F.3d 1118, 1124 (11th Cir. 1994) (en banc) ("Courts have repeatedly emphasized that the key to third-party standing analysis is whether the interests of the litigant and the third party are properly aligned, such that the litigant will adequately and vigorously assert those interests."); *Canfield Aviation, Inc. v. National Transp. Safety Bd.*, 854 F.2d 745, 748 (5th Cir. 1988) (citing *Wulff*, 428 U.S. at 114–15) ("When examining [whether a plaintiff has third-party standing], courts must be sure . . . that the litigant whose rights he asserts have interests which are aligned").

given the choice, they prefer to receive digoxin before the D&E procedure." (R.102 at PageID 3756) In another study, the Jackson study, 92 percent of women "reported a strong preference for fetal death before abortion." (R. 102 at PageID 3734) Dr. Curlin, a professor in the School of Medicine at Duke University, testified:

> We know from studies of women who are undergoing abortion that they are conscious of what is happening to their fetus and that for many that's quite disturbing, and I think [the Jackson study] gives some not very surprising evidence that at least a substantial portion of women would prefer that something be done so that that fetus has died before it's dismembered.

(R. 104 at PageID 4309).

Even the study that Plaintiffs presented admitted that "several studies have reported a preference for feticide before evacuation." (R. 106 at PageID 4448). Another study cited by Plaintiffs stated, "Majority of subjects, 73 percent, reported that, if given the choice, they preferred to receive digoxin before the D&E procedure." (R. 106 at PageID 4497). Granted, these studies are only circumstantial evidence of the preferences of EMW's patients, but they were the *only* evidence of such preference presented at trial because, as noted, none of those patients testified.

The reasons why a woman would make the choice for fetal demise were demonstrated at trial. Dr. Anthony Levantino testified that in a D&E procedure, the "[f]etus dies from dismemberment from literally

having arms and legs pulled off"; "[it] bleed[s] to death." (R. 102 at PageID 3710). Another physician, Dr. David Berry, described a D&E procedure in which the doctor "pulled out a spine and some mangled ribs and the heart was actually still beating." (R. 103 at PageID 3884). It is not difficult to understand why a majority of women would want the heart to stop beating before the fetus undergoes such an ordeal. As the Supreme Court has recognized, "No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life." *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007). This is because "[t]he fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb." *Stenberg v.* Carhart, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting) (citation omitted).[5] Plaintiffs themselves acknowledged as much, given that they did not question "the legitimacy" of "interests" that would favor stopping the heartbeat before D&E begins. *EMW Women's Surgical Center, P.S.C. v. Meier*, 373 F. Supp. 3d 807, 817 (W.D. Ky. 2019).

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[5] The gruesomeness of the D&E procedure is a reason that many abortion patients may prefer to avoid it altogether by having the abortion performed by aspiration earlier in the pregnancy, before limbs have begun to form. *See Pre-Term Cleveland, et al. v. Attorney Gen. of Ohio, et al.*, No. 20-3365, 2020 WL 1673310, at *4 (6th Cir. Apr. 6, 2020) (Bush, J., concurring in part and dissenting in part) (noting that one factor to be considered in assessing the constitutionality of a COVID-19 emergency order delaying abortion procedures is "the preference of many women for having the abortion while the aspiration method can be performed, rather than the dilation & evacuation procedure that is required for later abortions."). H.B. 454 imposes no requirement of fetal demise before an abortion by the aspiration method may be performed.

These interests exist regardless of whether the unborn life feels any pain from the D&E procedure. These interests also are significant enough that a woman, even after hearing of the health risks involved, might opt for fetal demise simply to be assured that the fetus was not alive when its limbs were torn apart.[6]

Plaintiffs, however, have interests that do not align with those women who want fetal demise before D&E. For example, EMW's physicians do not want to receive the training needed to give the injections, even though the evidence at trial was that injections are not difficult

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[6] Although the district court found that digoxin injections can carry significant health risks, the court did not find that the health risks are so significant that most or even some women, if made known of the health risks, would forgo a fetal demise procedure. There is evidence in the record demonstrating that many or most women would decide that the value of a digoxin injection, at least in terms of peace of mind that the fetal heart is no longer beating when D&E occurs, outweighs the health risks of the injection. The Steward study, for example, found that of 4,096 patients who received digoxin injections, only 0.04 percent—or 4 in 10,000—had infections, and only .3 percent—or 3 in 1,000—experienced extramural delivery. (R. 102 at PageID 3741). The Tocce study of 1,662 patients, which involved transvaginal, rather than transabdominal, digoxin injections (as in the Steward study), involved a higher rate of health risk, but not by much: 0.49 percent for infection and 0.12 for extramural delivery. (R. 102 at PageID 3744). In any event, it is not necessary in assessing an abortion provider's third-party standing to make a factual finding as to the number of patients who actually would choose fetal demise if informed of the health risks. What matters is whether there is a *potential* that a patient would do so, for as noted, third-party standing is defeated if the interests of the plaintiff and the right-holder are merely "*potentially* in conflict." *Newdow*, 542 U.S. at 15 (emphasis added). The evidence demonstrates that there is a potential conflict here.

to administer, training to perform the procedure is available, and such injections are within the reasonable medical scope of care.

The district court stated that digoxin injections can be "difficult, if not impossible, to administer," *Meier*, 373 F. Supp. 3d at 838, but this statement was contradicted by the district court's factual finding that digoxin injections "are not terribly difficult to perform, as it can also be administered into the amniotic fluid." *Id.* One study introduced into evidence concluded that "[i]n our clinical experience where patients do not receive intravenous sedation, we have found it easy to administer intrafetal injection[s]," (R. 102 at PageID 3758), and in another study presented at trial, even medical residents performed them, (R. 102 at PageID 3733–34).

Evidence was also presented that it is possible for EMW's doctors to receive training to perform digoxin injections. Dr. Franklin, one of EMW's doctors, acknowledged that digoxin injections are "very similar to amniocentesis, which I have done in the past," and she admitted that she "technically . . . would be able to" obtain the training to perform the injections. (R. 107 at PageID 4716). Dr. Bergin, EMW's other doctor, similarly testified that "probably with proper training I could learn to do" digoxin injections. (Trial Ex. 420 at 117)

Finally, Dr. Davis—whom EMW called as an expert but did not hire as one of their physicians—acknowledged that an intrafetal or intraamniotic digoxin injection is within the standard of care for an OB/GYN to perform; indeed, she herself had

performed such injections. (R. 106 at PageID 4460). Likewise, the National Abortion Federation states in its 2018 Clinical Policy Guidelines for Abortion Care that an intraamniotic or intrafetal digoxin injection is a permissible option for accomplishing fetal death before a D&E procedure. (R. 106 at PageID 4514–15). Another study funded by a Planned Parenthood affiliate reported that Planned Parenthood's clinics in Los Angeles, California had "protocols" that "dictate[d] the use of digoxin for all second trimester abortions." (R. 102 at PageID 3755–56).

Notwithstanding this evidence, and proof that even Plaintiffs' own physician experts regularly inject digoxin and do so intrafetally, the Plaintiff-physicians have refused to obtain the necessary training to do the injections or to hire a physician like Dr. Davis who has that training. As noted, when questioned at oral argument as to what EMW's doctors would do if a woman asked for a digoxin injection before a D&E procedure, Plaintiffs' counsel responded that her only option would be to travel out of state to have her abortion. And, indeed, there are practitioners in our circuit as close as southwestern Ohio, across the river from Kentucky, who perform digoxin injections. *See Planned Parenthood Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848, 857 (S.D. Ohio 2019) (listing doctors in southwestern Ohio who perform digoxin injections). But, given the evidence of the possibility of obtaining the necessary training to provide the injection, it is questionable why the EMW physicians insist that they cannot obtain this training or hire a doctor who does have that skill.

At the very least, the proof at trial reflects a potential conflict between the interests of the EMW physicians and some, perhaps the majority, of the patients that they seek to represent. All of the evidence presented at trial about patient preference circumstantially supports a finding that at least some—and potentially, most—of patients seen by Plaintiffs would favor the effect of H.B. 454 because those patients would want fetal demise before a D&E. The statute essentially requires that abortion providers at EMW receive the necessary training, which in turn would allow those women who prefer fetal demise to obtain it before the D&E procedure is performed.[7]

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[7] That EMW's physicians say they will not obtain the training in fetal demise, and will stop performing D&E procedures altogether, if H.B. 454 is upheld, is no answer to their conflict-of-interest problem. The patients who want fetal demise are already being denied the D&E procedure they want in Kentucky because of Appellee's position that those patients must go out of state to have the procedure performed with fetal demise. Enactment of H.B. 454 may not immediately change this reality for these women who must go out of state. But, of course, parties to litigation may change their attitude towards a law once it is upheld in court, so if H.B. 454 is allowed to go into effect, EMW's physicians may decide to get the necessary training to comply with the law after all. In addition, in the period since the district court issued its injunction, another provider, Planned Parenthood, has obtained a license to perform abortions in Kentucky. *Planned Parenthood to Expand Abortion Access in Kentucky*, PLANNEDPARENTHOOD.ORG, http://plannedparenthood.org/planned-parenthood-indiana-kentucky/newsroom/planned-parenthood-to-expand-abortion-access-in-kentucky (last visited May 4, 2020). It is entirely possible that physicians at Planned Parenthood in Kentucky, like their counterparts in southwestern Ohio, *see Planned Parenthood Sw. Ohio Region*, 375 F. Supp. 3d at 857, will have the expertise to perform fetal demise. But regardless, so long as EMW's physicians

Because of this potential conflict of interest between Plaintiffs and many or most of their patients, I would hold that Plaintiffs have not shown that they have satisfied the closeness requirement necessary to invoke their patients' rights. *See Newdow*, 542 U.S. at 15.[8]

None of the cases the Majority cites dictate the opposite result. In *City of Akron*, the interests of the "minor patients" and abortion providers were largely parallel, as both wanted to abortions to proceed without involving parents in the decision. *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983), *overruled on other grounds by Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833

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refuse to obtain the necessary training and refuse to offer fetal demise to patients, they have a potential conflict of interest with their patients who want fetal demise.

[8] For similar reasons, I would also hold that a facial challenge is not the proper vehicle here. A facial challenge could be proper only if, "in a large fraction of the cases in which [H.B. 454] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 367 (6th Cir. 2006) (citation omitted). H.B. 454 will not operate as a substantial obstacle to those women who prefer digoxin injections. Given the potential for a D&E procedure to "devalue human life," *Gonzales*, 550 U.S. at 158, many women who are aware of the health risks involved might nonetheless opt for digoxin injections. For those women, requiring doctors to receive training to perform fetal demise would not be unconstitutional. To be sure, the district court did credit Plaintiffs' evidence that D&E abortions will no longer be performed in Kentucky if H.B. 454 goes into effect, and I do not dispute that that fact, if true, would cause H.B. 454 potentially to unduly burden women that do not prefer fetal demise. *Meier*, 474 F. Supp. 3d at 824. As-applied challenges may be brought by those women.

(1992). *Danforth* and *Bolton* are also inapposite, because there, the Supreme Court did not analyze the closeness and hindrance requirements as *Kowalski* requires. *See Planned Parenthood of Cent. Missouri v. Danforth*, 425 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973). Instead, the Court held, without further analysis, that the plaintiff-physicians had standing because the statutes in question subjected them to potential criminal prosecution. *Danforth*, 425 U.S. at 62; *Bolton*, 410 U.S. at 188. While that may speak to the plaintiffs' standing to assert their own rights, it says nothing about the plaintiffs' third-party standing to assert the patients' rights. Just because one may have an injury-in-fact—such that she has standing to assert her own rights—does not mean she has third-party standing to assert the rights of others.

Kowalski instructs that plaintiffs must satisfy the closeness and hindrance requirements in order to assert the rights of others in court. *Kowalski*, 543 U.S. at 129–30. Because Plaintiffs have not shown that they satisfy the closeness requirement in this case, I would hold that they lack third-party standing to sue on behalf of their patients.

II.

Even if the Majority disagrees on the third-party standing analysis, they should nonetheless delay issuing an opinion in this case pending the Supreme Court's disposition of *June Medical Services*. The Supreme Court granted certiorari in that case on October 4, 2019, and argument was held on March 4, 2020. *See June Medical Servs. L.L.C. v. Gee*, 140 S. Ct. 35 (Mem.) (2019). One of the questions raised in *June*

Medical Services is whether abortion providers have third-party standing to invoke the constitutional rights of potential patients in challenging abortion laws. We have broad discretion to stay proceedings to conserve judicial resources and avoid duplicative litigation, and we should exercise that discretion here. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

We recently held in abeyance an appeal that raised an issue the U.S. Supreme Court granted certiorari to decide, pending the Supreme Court's disposition of that issue. *See United States v. Lara*, 679 F. App'x 392, 395 (6th Cir. 2017) ("Because our decision turns on precedent for which the Supreme Court has recently granted certiorari, we hold Lara's challenge in abeyance pending resolution of that issue."). Other circuits have done the same. *Mandel v. Max-France, Inc.*, 704 F.2d 1205, 1206 (11th Cir. 1983) (appeal held in abeyance pending Supreme Court decision); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 47 (2d Cir. 2014) (same); *Golinski v. U.S. Office of Pers. Mgmt.*, 724 F.3d 1048, 1050 (9th Cir. 2013) (same); *Does v. Williams*, No. 01-7162, 2002 WL 1298752, at *1 (D.C. Cir. June 12, 2002) (per curiam) (same). Indeed, the Fifth Circuit held in abeyance a case with substantially similar facts to this case, pending the Supreme Court's disposition of *June Medical Services*. *See Whole Woman's Health, et al. v. Ken Paxton, et al.*, No. 17-51060, Doc. No. 00514871170. The majority's decision to issue an opinion just before the Supreme Court potentially

decides an outcome-determinative issue in our case seems to me an unwise use of judicial resources.

For these reasons, I must respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO: 3:18-CV-00224-JHM

[Filed: May 10, 2019)

EMW WOMEN'S SURGICAL CENTER, P.S.C., et al.	)
PLAINTIFFS	)
V.	)
ADAM W. MEIER et al.	)
DEFENDANTS	)

MEMORANDUM OPINION INCORPORATING FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the court for a bench trial that commended on November 13, 2018 and concluded on November 19, 2018. The court has reviewed the parties' post-trial briefs and the evidence at trial, and its findings of facts and conclusions of law are set forth below.

I. BACKGROUND

A. Procedural History

Plaintiffs, a Kentucky abortion facility and its two board-certified obstetrician-gynecologists ("OB-GYN") Drs. Ashlee Bergin and Tanya Franklin, challenge the constitutionality of a recently enacted Kentucky abortion law. The law at issue regulates second-trimester abortion procedures and is included in House Bill 454 ("H.B. 454" or "the Act"). Plaintiffs allege that the Act's requirement that Kentucky physicians perform a fetal-demise procedure prior to performing the evacuation phase of a standard Dilation and Evacuation ("D&E") abortion—the principal second-trimester abortion method nationally—is a substantial obstacle to a woman's right to choose a lawful pre-viability second-trimester abortion. As such, Plaintiffs argue H.B. 454 is unconstitutional. More specifically, the individual Plaintiffs assert that, if the Act goes into effect, they will stop performing standard D&E abortions altogether due to ethical and legal concerns regarding compliance with the law, thereby rendering abortions unavailable in the Commonwealth of Kentucky starting at 15.0 weeks from the date of a woman's last menstrual period ("LMP").[1]

Defendants respond that the Act has neither the purpose nor the effect of placing an undue burden on a woman seeking a second-trimester abortion. Rather, the Defendants contend that H.B. 454 appropriately advances the Commonwealth's interests

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[1] Unless otherwise indicated, all references to weeks of pregnancy are LMP.

while leaving open alternative means of obtaining an abortion—specifically, by receiving an additional medical procedure to cause fetal-demise prior to the evacuation phase of a standard D&E. The proposed alternative methods for physicians to induce fetal-demise are threefold: (1) digoxin injection; (2) potassium chloride injection; and (3) umbilical cord transection. The Commonwealth maintains that these procedures are safe, available, and reliable methods for causing fetal-demise. Thus, the Commonwealth claims that H.B. 454 does not operate as an undue burden on a woman's right to a second-trimester pre-viability abortion and is thus a constitutional abortion regulation.

On the day the Act was signed, Plaintiffs filed this lawsuit challenging it as a violation of Plaintiffs' patients' Fourteenth Amendment rights to privacy and bodily integrity. [DN 1 ¶¶ 46–49]. Thereafter, Plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunction and the Court convened a telephonic hearing on the Motion. [DN 6]. During the telephonic hearing, the parties agreed to the entry of a consent order suspending enforcement of the Act until the Court ruled on Plaintiffs' motion for preliminary injunctive relief. [DN 24]. The Court later issued an order requiring the parties to continue abiding by the terms of the consent order until the trial on the merits. [DN 56].

B. The Act

H.B. 454 states in relevant part:

> No person shall intentionally perform or . . . attempt to perform . . . an abortion on a pregnant woman that will result in the bodily dismemberment, crushing, or human vivisection of the unborn child when the probable post-fertilization age of the unborn child is eleven (11) weeks or greater, except in the case of a medical emergency.

Act, § 1(2)(a)-(b). "Bodily dismemberment, crushing, or human vivisection" is further defined by H.B.454 as any

> procedure in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts portions, pieces, or limbs of the unborn child from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that . . . slices, crushes, or grasps . . . any portion, piece, or limb of the unborn child's body to cut or separate the portion, piece, or limb from the body.

Id. § 2(18). A "medical emergency" exception is provided for under this framework. Such an emergency is defined as a condition that "so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function[.]" K.R.S. § 311.720(9); *see* Act § 1(1)(b). A physician found to be in violation of the Act commits a Class D felony, subjecting him or her to punishment of up to five years' imprisonment,

KRS § 532.060(2)(d), and can also expose clinics and physicians to adverse licensing and disciplinary action. *See* KRS § 311.565; KRS § 311.606.

The parties do not dispute that after approximately 15 weeks of pregnancy and before a fetus is viable, the most common second-trimester abortion procedure nationwide is a standard D&E without first inducing fetal-demise. It is also undisputed that the Act prohibits the standard D&E abortion unless fetal-demise occurs before any fetal tissue is removed from the woman.

II. DISCUSSION

Plaintiffs seek a permanent injunction of H.B. 454. In determining whether a permanent injunction should issue, four considerations are relevant: (1) whether plaintiff showed actual success on the merits; (2) whether the movant will suffer irreparable injury unless the injunction issues; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012) (outlining the permanent injunction factors). The plaintiff bears the burden of persuasion as to each of these four showings. The court will address each showing but first addresses a justiciability question raised by the Commonwealth.

A. Standing

As a preliminary matter, the Commonwealth asserts that EMW lacks standing to challenge the constitutionality of H.B. 454. Ordinarily, a party cannot claim standing to vindicate constitutional rights

of some third party, in this case the patients of EMW. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). However, this general rule has exceptions. Without engaging in a lengthy analysis about the relationship between EMW and its patients, it is enough to state that it is well-established that it is "appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision . . . ." *Id.* at 118; *see also Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987) (holding that Planned Parenthood and its Medical Director had standing to assert the third-party rights of their patients because the patients' rights are "inextricably bound up with the activity the . . . clinic desires to pursue and seemingly would not be asserted as effectively by the third parties who actually possess those rights") (internal quotation marks omitted); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 328 (6th Cir. 2007) (adjudicating physicians' and clinics' claims on behalf of their abortion patients); *Women's Med. Prof. Corp. v. Voinovich*, 130 F. 3d 187, 191–92 n.3 (6th Cir. 1997) (same).

B. Permanent Injunction – Success on the Merits

To be entitled to permanent injunctive relief, Plaintiffs must first show they succeeded on the merits of their constitutional challenge to the Act.

1. Legal Framework

a. The Undue Burden Test

In the nearly half century since *Roe v. Wade* recognized the Fourteenth Amendment right to decide whether or not to terminate a pregnancy, the Supreme Court has addressed abortion regulations on several occasions. This court's decision is controlled by the precepts articulated in those opinions. Specifically, three basic principles arising from *Planned Parenthood of Southeastern Pa. v. Casey* guide this court. 505 U.S. 833 (1992). In that case, the Supreme Court affirmed the essential holding of *Roe*. *Id.* at 846.

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id. In this case the Court turns its focus to the first and third principles.

According to this framework, before viability, a state may not forbid elective abortion entirely. *See Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quoting *Casey*, 505 U.S. at 879); *see also Stenberg v. Carhart*, 530 U.S. 914, 921 (2000). Further, a state "may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 878). But a state is not left with no power to regulate. Rather, "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* (quoting *Casey*, 505 U.S. at 877) (internal quotation marks omitted).

In 2016 the Supreme Court elaborated on pre-viability regulations. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The Court reiterated that "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.* at 2309 (quoting *Casey*, 505 U.S. 877) (internal quotation marks omitted). Specifically, *Casey* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* The determination of whether a state regulation is a substantial obstacle—and therefore an undue burden—must be assessed in relation to the benefits that the regulation provides. *Id.*

Where a regulation's burdens exceed its benefits, the regulation constitutes a substantial obstacle to a woman's choice and cannot withstand constitutional challenge. *Id.*

b. Second-Trimester Abortion Jurisprudence

Plaintiffs rely heavily on two Supreme Court cases in which the Court reviewed laws intended to ban Dilation and Extraction ("D&X") abortions, otherwise known as partial-birth abortions. *See Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007). Both cases are instructive. Nebraska's statute in *Stenberg* was found to be unconstitutional because the language of the law was such that it prohibited not only D&X abortions, but also could be read to ban the standard D&E abortion. *See Stenberg*, 530 U.S. at 930 ("[I]t 'imposes an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself.") (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992)). In striking down the Nebraska law, the Court elaborated that using the challenged law,

> some present prosecutors and future Attorneys General may choose to pursue physicians who use [the standard] D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision.

Id. at 945–46. Seven years later, the Supreme Court upheld a federal statute specifically aimed at D&X abortion procedures because the more narrowly-written law "allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right." *Gonzales*, 550 U.S. at 165. The "other means" and "generally accepted method" the Supreme Court refers to is the standard D&E procedure without fetal-demise.

At least ten states other than Kentucky have enacted fetal-demise laws similar to the H.B. 454. In many of those states, similar challenges to that here have been raised.[2] In Alabama, the Eleventh Circuit upheld a permanent injunction granted by the district court enjoining Alabama from enforcing a similar fetal-demise law. *See West Ala. Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244 (M.D. Ala. 2017), *aff'd*, *West Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018). The district court concluded that the law at issue imposed an undue burden on women seeking pre-viability D&E abortions and was thus unconstitutional. *Id.*

In Arkansas, a federal district court issued a preliminary injunction to enjoin a similar fetal-demise law. The court found that if the law were to go into effect, the fraction of women for whom the law is relevant would immediately lose the right to obtain a

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[2] There have been no legal challenges raised to the fetal-demise laws in Mississippi and West Virginia. The North Dakota clinic's lawyers are waiting for a decision from the Eighth Circuit on the challenge to similar legislation in Arkansas.

pre-viability abortion anywhere in the state after 14 weeks. *Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017). Arkansas appealed the district court's grant of the preliminary injunction to the Eighth Circuit which heard oral arguments on December 13, 2018.

The Kansas Court of Appeals affirmed a district court's grant of a temporary injunction that enjoined fetal-demise legislation like that at issue here. *Hodes & Nauser MDs, P.A. v. Schmidt*, 368 P.3d 667 (Kan. Ct. App. 2016) (en banc). The Court of Appeals concluded that, "[g]iven the additional risk, inconvenience, discomfort, and potential pain associated with these [fetal-demise] alternatives, some of which are virtually untested, . . . banning the standard D&E, a safe method used in about 95% of second-trimester abortions, is an undue burden on the right to abortion." *Id.* at 678.

In Ohio, a federal district court issued a temporary restraining order, pending an evidentiary hearing on the motion for a preliminary injunction, as to fetal-demise legislation. *Planned Parenthood S.W. Ohio Region v. Yost*, No. 1:19-CV-00118 (S.D. Ohio March 26, 2019) (DN 34). In issuing that order, the court stated that the "weight of legal authority favors" the plaintiffs. *Id.* at 8. That court held an evidentiary hearing as to the preliminary injunction beginning April 10, 2019. On April 18, 2019, the federal district court granted in part a motion for preliminary injunction finding that the plaintiffs were likely to succeed on the merits. *Planned Parenthood S.W. Ohio Region v. Yost*, 2019 WL 1758488, at *16 (S.D. Ohio

Apr. 18, 2019). The court concluded that the fetal-demise legislation burdened a large fraction of women seeking pre-viability, second trimester abortions and was likely unconstitutional as written. *Id.*

In Louisiana, a similar suit has been filed over House Bill 1081 and other abortion regulations passed by the Louisiana legislature. *June Med. Servs. LLC v. Gee*, No. 3:16-CV-0444 (M.D. La. July 1, 2016).

An Oklahoma state district court enjoined enforcement of fetal-demise legislation in 2015. *Nova Health Sys. v. Pruitt*, No. CV-2015-1838 (Okla. Cty. Dist. Ct. Oct. 28, 2015). The court considered the Supreme Court's precedents in *Stenberg* and *Gonzales* and stated that those opinions weighed the state's asserted interests but still found the previous ban on D&E abortions to be unconstitutional. *Id.* slip op. at 7–8. The court ruled that the state's asserted interests were legitimate but likely did not justify the law's burden on a woman's right to terminate a pre-viability pregnancy. *Id.* slip op. at 8. Accordingly, the court granted a temporary injunction preventing the law from taking effect. *Id.* slip op. at 12.

Finally, in Texas, a federal district court held a bench trial and issued a permanent injunction foreclosing enforcement of a law that imposed civil and criminal penalties on physicians who performed standard D&E abortions without first ensuring fetal-demise. *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017). That court assumed, without finding, that the interests asserted by Texas were legitimate but also that "requiring a

woman to undergo an unwanted, risky, invasive, and experimental procedure in exchange for exercising her right to choose an abortion" constituted a substantial burden. *Id.* at 953. Consequently, the court concluded the law was facially unconstitutional and declared it void. *Id.* at 954. The State appealed that decision to the Fifth Circuit which heard oral arguments on November 5, 2018. On March 13, 2019, the Fifth Circuit panel issued a stay, explaining that the court would not resolve the appeal until the Supreme Court disposes of a Louisiana abortion case concerning admitting privileges before it on writ of certiorari. *Whole Woman's Health v. Paxton*, No. 17-51060 (5th Cir. 2019) (Doc. No. 00514871170).

In *Paxton*, the court aptly summarized a district court's role when faced with such a decision: "Once the Supreme Court has defined the boundaries of a constitutional right, a district court may not redefine those boundaries. Further the role of the district court is to preserve a right, not to search for a way to evade or lessen the right." *Paxton*, 280 F. Supp. 3d at 945. As such, the *Stenberg* and *Gonzales* decisions control, and the evolving fetal-demise litigation in the lower courts inform this constitutional challenge. Just as the law at issue in *Paxton*, H.B. 454 "has the undisputed effect of banning the standard D&E procedure when performed before fetal demise," because of the extensive burdens that accompany the law. *Id.* The Supreme Court's determination that "laws with the effect of banning the standard D&E procedure result in an undue burden upon a woman's right to have an abortion and are therefore unconstitutional" is binding. *Id.*

2. The Interests of the Commonwealth of Kentucky

One requirement that *Casey* and its progeny establish for pre-viability regulations is that a state regulation of the abortion procedure must be substantiated by a legitimate or valid purpose. The Commonwealth argues that H.B. 454 protects the ethics, integrity, and reputation of the medical community and expresses respect for the dignity of human life—interests, it notes, advanced by the federal law upheld in *Gonzales*. [DN 119 at 4]. Plaintiffs do not dispute the legitimacy of those interests. [DN 118 at 30 n.32].

Indeed, the Supreme Court said in no uncertain terms that "the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). The Court also reaffirmed that "the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child[.]" *Id.* at 158.

But the fact that the Act furthers legitimate state interests does not end this constitutional inquiry. Even though the act may further a legitimate state interest, a pre-viability abortion restriction must still survive the undue burden test. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 ("[A] statute which, while furthering [the interest in potential life or some other] valid interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its

legitimate ends.") (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992)); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1320–21 (11th Cir. 2018). The court now considers the burden imposed on women.

3. Burden on Women

Plaintiffs outline in detail all of the burdens attendant to the proposed fetal-demise procedures. As a summation of all the problems with the proposed fetal-demise procedures, Plaintiffs offered the testimony of Dr. Franklin, one of the named Plaintiffs. Dr. Franklin explained that because of the burdens the Act would impose, both ethically and legally, she and her colleague Dr. Bergin will stop performing standard D&E abortions if the Act goes into effect. Such a decision by these doctors would render abortions unavailable within the state of Kentucky to women who are 15 weeks pregnant.

The Commonwealth, in contrast, says the Act does not impose the burdens articulated by Plaintiffs because there are three methods by which abortion providers can safely and reliably cause fetal-demise before performing a D&E procedure: (1) digoxin injection; (2) potassium chloride injection; and (3) umbilical cord transection. It is necessary to discuss each of the Commonwealth's proposed methods of fetal-demise to explain why each is an unusable workaround.

a. Digoxin Injections

The Commonwealth's first proposed method is the use of digoxin injections—the least technically

challenging but also the least reliable. To inject digoxin, physicians begin by using an ultrasound machine to visualize the woman's uterus and the fetus. The physician then inserts a long surgical needle through the patient's skin, abdomen, and uterine muscle, to inject digoxin into the fetus. Although such injections are not terribly difficult to perform, as it can also be administered into the amniotic fluid, it is still not a feasible option for fetal-demise for several reasons.

First, and most importantly, digoxin injections are not reliable for inducing fetal-demise. When injected into the fetus or amniotic fluid, digoxin has a failure rate ranging between 5% and 20%. Tr. Vol. I 62:5–13 [DN 106]; Tr. Vol. II 53:6–54:18 [DN 107]; Tr. Vol. IV 41:10–13 [DN 103]. If the first dose of digoxin fails to cause fetal-demise, the Act would require an abortion provider to either inject a second dose or try an alternative method of fetal-demise. There is no medical literature on the proper dosage for a second digoxin injection or the potential risks associated with another injection. Tr. Vol. I. 66:16–67:2 [DN 106]; Tr. Vol. II 56:8–21 [DN 107]; Tr. Vol. III-B 102:5–19 [DN 102]. As such, successive digoxin injections would subject a patient seeking a D&E to an experimental medical procedure. Tr. Vol. I 67:3–9 [DN 106].

Second, a variety of factors affect whether a provider is actually able to inject digoxin into the fetus or amniotic fluid—placental positioning, fetal positioning, obesity, and the presence of uterine fibroids or cesarean-section scars can make such injections more difficult, if not impossible, to

administer. Tr. Vol. I 58:21–59:13 [DN 106]; Tr. Vol. II 39:1–19 [DN 107]; Tr. Vol. III-B 103:12–15, 104:3–13 [DN 102]; Tr. Vol. IV 99:17–24 [DN 103]. Further, digoxin cannot be administered to women with known contraindications. Tr. Vol. I 59:24–61:22 [DN 106].

Third, digoxin injections are essentially experimental for women before 18 weeks of pregnancy, and about 50% of second-trimester abortions in Kentucky are performed before 18 weeks of pregnancy. *See* PX 128 (summarizing data of EMW's second-trimester abortion procedures); Tr. Vol. II 56:22–24 [DN 107]. The vast majority of studies on digoxin injections focus on pregnancies at or after 18 weeks. Only a few studies include cases of women at 17 weeks of pregnancy and no study has been done on the efficacy, dosage, or safety of digoxin injections before 17 weeks of pregnancy. Tr. Vol. I 67:25–68:9 [DN 106]; Tr. Vol. IV 114:23–115:3 [DN 103]. Consequently, requiring digoxin use before 18 weeks would force patients to undergo an experimental and potentially harmful medical procedure without any associated benefits.

Fourth, digoxin injections subject patients to increased health risks. The parties' experts agreed that digoxin injections are associated with heightened risks of infection, extra mural delivery, vomiting, and hospitalization, compared to standard D&E alone. The best studies submitted to the judicial record support this conclusion about the relative safety of digoxin injections. The court finds that even when administered successfully after 18 weeks, digoxin

injections carry the abovementioned significant, added health risks to the standard D&E procedure.

Finally, additional logistical and emotional burdens are associated with a digoxin injection. Digoxin works slowly—sometimes taking up to 24-hours if effective—requiring physicians to administer the injection the day before the scheduled D&E. As such, mandating a digoxin injection prolongs the length of a D&E abortion from one day to two, requiring a woman to pay additional costs—child care, transportation, overnight travel, and others—to have the procedure. This burden, of having to make multiple trips for the procedure, is especially pronounced for low-income women. Although Plaintiffs do not keep financial records for D&E abortion patients, the court heard testimony about the poverty levels in Kentucky, Tr. Vol. III-A 27:13–29:16 [DN 108], and the poverty rates among abortion patients nationally. *Id.* 33:20–35:3. The court is willing to draw the conclusion that many of the women receiving abortions at EMW are low-income and will suffer adverse economic consequences if the D&E procedure is prolonged to two days. *Id.* 35:12–25. Additionally, there are emotional burdens associated with digoxin injections. Any needle procedure, particularly one with a large needle and no correlative medical benefit, will cause emotional distress for some patients. Tr. Vol. I 120:16–121:4 [DN 106].

Because of the unreliability of the procedure, unknown risks associated with second doses, unknown risks for women before 18 weeks of pregnancy, additive risk of complications, increased travel burden, and the pain and invasiveness of the procedure, the court finds

that a digoxin injection is not a feasible method of inducing fetal-demise before performing the evacuation phase of a D&E abortion. The court concludes that in all instances the procedure would create a substantial obstacle to a woman's right to an abortion.

b. Potassium Chloride Injections

The Commonwealth's second proposed fetal-demise method is the intra-fetal or intra-cardiac injection of potassium chloride. Like digoxin injections, physicians administering potassium chloride injections begin by using an ultrasound machine to visualize the patient's uterus and fetus. The physician then inserts a long surgical needle through the woman's skin, abdomen, and uterine muscle, and then into either the fetus or, more specifically, the fetal heart. When the injection is administered directly to the fetal heart, fetal-demise is achieved almost immediately. However, based on the evidence, the court finds that potassium chloride injections are not a feasible method of causing fetal-demise before standard D&E procedures for several reasons.

First, and most importantly, injecting potassium chloride requires great technical skill and is an extremely challenging procedure to perform. Tr. Vol. I 228:18–231:12 [DN 106]. A provider's goal is to inject the substance directly into the fetal heart, which at approximately 15–16 weeks is about the size of a dime. Even around 20–22 weeks, the fetal heart remains very small, about the size of a quarter. *Id.* at 212:6–12; *see also id.* at 88:1–3; Tr. Vol. IV 23:13–18, 317:17–20 [DN 103]. It is undisputed that Plaintiffs have not been trained to perform this procedure. Tr. Vol. II 39:20–25

[DN 107]; Bergin Depo., 120:1–12, 121:4–13 [PX 420]. Intra-fetal and intra-cardiac potassium chloride injections are not taught in OB-GYN residencies or in family-planning fellowships, such as the ones Plaintiffs completed. Tr. Vol. I 88:4–13 [DN 106]; Tr. Vol. II 39:20–40:12, 40:2–22 [DN 107]; Tr. Vol. III-B 111:7–9 [DN 102]; Tr. Vol. IV 107:5–7, 314:18–315:17 [DN 103]. In fact, these injections are generally only taught in subspecialist fellowship programs, such as maternal-fetal medicine ("MFM") and reproductive endocrinology and infertility fellowships. Tr. Vol. I 88:14–89:5, 226:24–227:17 [DN 106]; Tr. Vol. II 40:1–12 [DN 107]; Tr. Vol. IV 259:21–260:12 [DN103]. These fellows go through several years of highly supervised and specialized training. The injection is typically used by such subspecialists for selective reduction of pregnancies in women with multiple gestations. Tr. Vol. I 88:24–89:5 [DN 106].

It would be impossible for Plaintiffs to receive this specialized training within Kentucky because no hospital in the Commonwealth offers this type of training. Tr. Vol. II 110:19–111:4 [DN 107]. Even if this subspecialist training were available in Kentucky, the Plaintiff's expert, Dr. Lynn Simpson, credibly testified that it could take years to see enough patients and perform enough supervised injections to be competent to perform the procedure. Tr. Vol. I 244:25–245:22 [DN 106]; Tr. Vol. IV 315:18–316:17 [DN103]. Based on the length of time it would take to learn the procedure and the lack of training available within the Commonwealth, the court finds that Plaintiffs have no practical way to learn how to perform this procedure safely.

Second, as with digoxin, potassium chloride injections are not a feasible method because they cannot be completed on every woman seeking a standard D&E. Obesity, fetal and uterine position, cesarean-section scar tissue, and uterine fibroids may complicate or even prevent completely the administration of the injections in many women. Tr. Vol. I 94:7–12, 222:6–223:15 [DN 106]; Tr. Vol. IV 317:21–319:9 [DN 103]. Further, as conceded by the Commonwealth's expert, a correctly-administered potassium chloride injection cannot be relied upon to cause fetal-demise in every single case. Tr. Vol. IV 96:4–11 [DN 103].

Finally, again, like digoxin, potassium chloride injections carry serious health risks to the woman. Such injections increase the risk of uterine or other internal organ perforation as well as the risk of infection. Tr. Vol. I 94:13–95:1, 232:20–234:10 [DN 106]; *see e.g.*, Tr. Vol. III-B 114:21–116:3 [DN 102]. An additional risk associated with this procedure is the potential harmful effect on the woman's heart—because potassium chloride has harmful effects on the heart, inadvertently injecting it into the woman's circulation can cause cardiac arrest, though there is only a single documented case. *See e.g.*, Tr. Vol. I 95:2–16 (discussing PX 19) [DN 106]. These risks would only be exacerbated by untrained physicians performing the potassium chloride procedure.

As with digoxin injection, potassium chloride injection is an unnecessary and potentially harmful medical procedure with no counterbalancing medical benefit for the woman. This procedure is technically

very challenging and carries with it serious health risks for the woman. Additionally, there is no practical way for Plaintiffs to receive adequate training so that they may perform these injections competently. This being the case, the court finds potassium chloride injection to be an unworkable method for physicians attempting to induce fetal-demise before performing the evacuation phase of a standard D&E abortion in Kentucky. To the extent such an injection could or would be used, the court finds that, like a digoxin injection, the procedure would create a substantial obstacle to a woman's right to an abortion based on the significant health risks associated therewith.

c. Umbilical Cord Transection

The Commonwealth's final proposed method of fetal-demise is umbilical cord transection. To perform this procedure, the provider dilates the woman's cervix enough to allow the passage of instruments to transect the cord. Once the cervix is dilated, the physician uses an ultrasound for guidance and punctures the amniotic membrane, causing the amniotic fluid to drain from the uterus. Then, the physician inserts an instrument into the uterus, locates, and grasps the cord and, with another instrument, cuts the cord. Tr. Vol. I 105:2–108:9 [DN 106]; Tr. Vol. II 46:14–47:10 [DN 107]. At this stage in the second-trimester, the umbilical cord is about the width of a piece of yarn. Tr. Vol. I 105:20–24 [DN 106]. The physician then waits for the fetal heartbeat to stop, which generally occurs within 10 minutes. The physician then may perform the evacuation phase of the standard D&E. Several factors

render this procedure an unworkable method for inducing fetal-demise.

First, several aspects of the procedure make cord transection a technically difficult procedure—lack of visualization following the rupture of the amniotic sac, the shrinking size of the uterus, and the small size of the umbilical cord. As to the lack of visualization, before the amniotic sac is punctured, the physician can easily visualize the fetus and umbilical cord due to the contrast on the ultrasound between those components and the amniotic fluid. However, once a physician ruptures the amniotic sac and the fluid begins to drain, they can no longer rely on an ultrasound image to visualize the different components of the fetus and guide the instruments to the cord—the provider essentially performs the transection blind. Tr. Vol. I 106:8–14 [DN 106]; Tr. Vol. II 47:4–7, 50:14–25 [DN 107]. Also, because of the rupturing of the amniotic sac, the uterus begins to contract bringing the fetus and the umbilical cord together, no longer separated by the buoyant amniotic fluid. Thus, the physician must identify, reach, and cut the cord with a surgical instrument without visualization or space between different types of tissue. This poses another hurdle for the provider because if they cut fetal tissue instead of, or in addition to the cord, they have arguably violated the Act. Tr. Vol. 1 106:24–107:6 [DN 106]; Tr. Vol. II 47:23–48:9 [DN 107]. Finally, the blind procedure and close nature of all the uterine materials make locating the umbilical cord, roughly the width of a piece of yard, technically very difficult. Tr. Vol. I 105:20–24 [DN 106].

Second, cord transection is not a feasible method for fetal-demise because it is essentially an experimental procedure that carries no medical benefits to the patient. The Commonwealth claims that cord transection is a viable, safe option to cause fetal-demise based on a single study—a retrospective case series without any control group. Tr. Vol. I 109:22–112:7 [DN 106]. In addition to providing a low level of evidence, the study only looked at umbilical cord transections performed by two providers at a single location. Tr. Vol. III-B 118:10–119:11 [DN 102]. The study does not provide the type or quality of evidence that warrants reaching generalized conclusions about the feasibility or reliability of umbilical cord transection, particularly in light of the serious risks that are outlined below. *Id.* at 119:12–16.

Umbilical cord transection carries serious health risks, including blood loss, infection, and uterine injury. A physician may have to make multiple passes into the uterus while attempting to locate the umbilical cord. In doing so, each pass increases the risk of infection and uterine damage. Tr. Vol I 107:7–108:2 [DN 106]; Tr. Vol. II 51:7–10 [DN 107]. As performing cord transection involves blindly searching for the umbilical cord, the risk of these complications would be in addition to the risks inherent to the standard D&E alone. Additionally, while locating and transecting the cord, then waiting for the fetal heart to stop, the uterus will be contracting and the placenta will begin to separate and bleeding will occur. Tr. Vol. I 107:15–21 [DN 106]; Tr. Vol. II 47:1–22, 51:4–7 [DN 107].

For the reasons set out above, the court finds that umbilical cord transection as a method of fetal-demise prior to the evacuation phase of a standard D&E would impose a substantial obstacle to a woman's right to pre-viability abortion.

4. Balancing of Benefits and Burdens – Application of the Undue Burden Test

As stated above, to determine whether a law regulating abortion constitutes an undue burden on the right to terminate a pregnancy pre-viability, the court must balance the state's interests underlying a law against the obstacles imposed by the law to women's access to abortion. Where a regulation's burdens exceed its benefits, the regulation constitutes a substantial obstacle to a woman's choice—such a regulation cannot withstand constitutional challenge. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

Having just outlined the burdens associated with the Act, it is necessary to further discuss one of the Commonwealth's asserted interests and correlative benefit. The Commonwealth asserts that its interest in fetal dignity is bolstered because, according to its expert witness, the fetuses subjected to standard D&E abortions can feel pain.

The court heard testimony from competing experts, Dr. Colleen Malloy for the Commonwealth and Dr. Steven Ralston for the Plaintiffs. Dr. Malloy is employed as a neonatologist at Northwestern University. Importantly, Dr. Malloy has never performed a procedure on a pregnant woman or a fetus. Tr. Vol. IV 201:6–14 [DN 103]. Dr. Malloy testified that

a fetus can certainly feel pain by 22 weeks and possibly as early as 15 weeks. *Id.* at 150:16–19, 159:13–22. Dr. Malloy described the onset of fetal pain as a dimmer switch turning on gradually over the course of the fetus's development. *Id.* at 150:23–151:21. In other words, she explained, though developing neural elements necessary for pain perception may be immature, they are not inactive. Dr. Malloy testified that two organizations share her opinion with respect to fetal pain—the American Academy of Pro-Life Obstetricians and Gynecologists and the Christian Medical and Dental Association. *Id.* 159:23–160:4.

Dr. Ralston, a well-credentialed MFM who chairs the OB-GYN Department at the University of Pennsylvania, testified that the overwhelming medical consensus is contrary to that of Dr. Malloy—that fetal pain perception is impossible before 24 weeks. *Id.* at 270:11–285:9. Dr. Ralston expressly testified that Dr. Malloy's opinion "is a minority outlier opinion." *Id.* at 274:13–22. In support of this conclusion, Dr. Ralston cited several organizations that share his opinion, including the Royal College of Obstetricians and Gynecologists and the American College of Obstetricians and Gynecologists, two reputable medical organizations. *Id.* at 310:4–311:118. Dr. Ralston explained that this consensus is based on the understanding in the scientific community that fetal pain perception requires consciousness, which in turn requires two elements absent in a fetus before 24 weeks: intact connections from the periphery to the thalamus and then to the cortex, and a sufficiently developed cerebral cortex. *Id.* at 270:11–285:12, 310:4–312:9, 340:5–15. Dr. Ralston testified that the

existence of a developed cortex and intact neurocircuitry—the above listed connections—are necessary for any degree of pain perception, thus refuting Dr. Malloy's dimmer switch theory. Further, Dr. Ralston testified that evidence suggests pain perception is unlikely at any point during pregnancy due to factors that preclude consciousness in utero. *Id.* at 285:15–297:3, 340:5–23.

Based on Dr. Ralston's credible testimony, the extensive studies cited therein, and the consensus of the vast majority of the medical community, the court concludes that it is very unlikely that a fetus can feel pain before 24 weeks. Because H.B. 454 concerns second-trimester abortions performed between 15 and 21.6 weeks, fetal pain is not a concern. The Commonwealth's argument that H.B. 454 provides a benefit of preventing fetal pain from the standard D&E abortion fails.

Still yet, the Commonwealth asserted two interests advanced by the Act that were recognized as legitimate in *Gonzales*—protecting the ethics, integrity, and reputation of the medical community and expressing respect for the dignity of human life even in the absence of fetal pain. However, Kentucky cannot pursue these interests in a way that completely denies women the constitutionally protected right to terminate a pregnancy before the fetus is viable. Here, the Commonwealth avers that its interests are sufficiently strong to justify the burdens the Act would impose on Kentucky women because they would retain the ability to terminate pregnancy at or after 15 weeks by first undergoing a fetal-demise procedure. However,

the Commonwealth's argument is premised on the idea that it is feasible for Plaintiffs to safely and reliably utilize the three proposed fetal-demise methods examined above. For the reasons discussed above—the methods' associated risks, technical difficulty, untested nature, time and cost associated with performing them, and the lack of training opportunities—the court concludes on the current record that the proposed fetal-demise methods are not feasible for inducing fetal-demise before standard D&E at EMW. *See W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1327 (11th Cir. 2018) (concluding that based on the findings the proposed fetal-demise methods place a substantial obstacle in the path of a woman's right to a pre-viability abortion). Consequently, if the court were to allow the Act to go into effect, Kentucky women would lose their right to pre-viability abortion access at or after 15 weeks. The Supreme Court specifically addressed such a scenario and held that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992). Consequently, the Commonwealth's interests, while legitimate, are not sufficient to justify such a substantial obstacle to the constitutionally protect right to terminate a pregnancy before viability.

5. Intent Requirement

The scienter requirement does not save the Act from its constitutional shortcomings. The Commonwealth contends that the intent requirement in H.B. 454

shields from liability physicians who unintentionally cut fetal tissue when attempting to comply with the Act. Specifically, the Commonwealth argues that because of this intent requirement, "there can be no criminal penalties when a physician performs a D&E procedure under a good-faith, but mistaken, belief that fetal demise has occurred." [DN 119 at 35]. But this assurance leaves the provider at the mercy of a prosecutor's discretion. The provider would face this risk every time they performed a fetal-demise procedure, particularly umbilical cord transection. Given that a prosecution and conviction could impose upon a physician a criminal sentence of up to five years imprisonment and other potential disciplinary and licensing action, it is unsurprising that Dr. Franklin testified that she would stop performing D&E abortions after 15 weeks if the Act went into effect. This deterrence of physicians, like Dr. Franklin, from providing D&E abortions thereby denies Kentucky women access to pre-viability abortions.

6. Large Fraction Test

To prevail on the facial challenge to H.B. 454, Plaintiffs must demonstrate that "in a large fraction of cases in which [the provision at issue] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992). In the large-fraction test, the court uses as the denominator those cases in which the law at issue is relevant which is a narrower class than "pregnant women" or "the class of women seeking abortions." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292,

2320 (2016) (quoting *Casey*, 505 U.S. at 894–95). As such, the court rejects the Commonwealth's argument that the denominator should be all women seeking abortions, not just women seeking a D&E abortion.

The court makes the following findings of fact regarding the fraction of women effected by the Act. EMW is the sole licensed outpatient abortion facility located in Kentucky. Each year, EMW provides more than 3,000 abortions. PX 120. During 2016, 17.47% of those abortions were performed by the standard D&E procedure. PX 120; PX 129. Standard D&E accounts for over 99% of second-trimester abortions in Kentucky. Tr. Vol. II 21:21–23:6 [DN 107]; PX 120. The only alternatives to D&E—induction of labor or hysterotomy—are rare and must be performed in a hospital setting. Tr. Vol. I 36:1–38:22 [DN 106]. A strong majority of standard D&Es currently occur from 15.0 to 17.0 weeks LMP. PX 128. Of the 537 D&Es reported by EMW Louisville in 2016, 57.9% took place during these earliest weeks of the second-trimester. *Id.*

The court determines that H.B. 454 is relevant for all Kentucky women who select standard D&E through the second-trimester and that the Act causes an undue burden for a large fraction of these women. In Kentucky in 2016, 537 women had a standard D&E. PX 129. H.B.454 would unduly burden 100% of these women because, if the Act goes into effect, standard D&E abortions will no longer be performed in the Commonwealth due to ethical and legal concerns regarding compliance with the law.

The Commonwealth argues that if the court uses as the denominator only the women seeking a

second-trimester D&E abortion, the Act still does not affect a large fraction of women because not all women who seek a D&E abortion will find the Act to be a substantial obstacle. The Commonwealth claims that because not all women will suffer the complications associated with the fetal-demise procedures, the large fraction test is not met. [DN 119 at 40–41]. However, the court finds that under the Act, all women seeking a second-trimester abortion at and after 15 weeks would have to endure a medically unnecessary and invasive procedure that may increase the duration of an otherwise one-day standard D&E abortion. Further, the court heard testimony that the individual providers will no longer continue to offer standard D&Es if the Act goes into effect. That is a substantial obstacle and it affects all such women.

Because the Act affects all second-trimester D&E abortion procedures in Kentucky, the relevant class of women here consists of all women in Kentucky who are 15 to 21.6 weeks pregnant and seek an outpatient second-trimester D&E abortion. Plaintiffs successfully demonstrated that H.B. 454 would operate as an undue burden for a large fraction of women for whom the provision is an actual, rather than irrelevant, restriction.

7. Out-of-State Abortion Clinics

The Commonwealth made an argument at trial that the existence of out-of-state abortion clinics would provide a workaround if EMW were to stop performing D&E abortions. This argument is frivolous and can be addressed succinctly. The Commonwealth cannot enact unconstitutional laws and expect other states to

compensate for its constitutional infirmity. *Jackson v. Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014) ("[A] state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights"), *cert. denied*, 136 S. Ct. 2536 (2016); *see also EMW Women's Surgical Ctr., P.S.C. v. Glisson*, No. 3:17-CV-00189, 2018 WL 6444391, at *26 (W.D. Ky. Sept. 28, 2018) (stating that "the availability of abortion services in other states does not cure the infirmities presently imposed by Kentucky law"). Therefore, the availability of the standard D&E procedure in neighboring states is irrelevant and in no way affects this constitutional challenge.

For the foregoing reasons, Plaintiffs successfully showed that H.B. 454 operates as an undue burden on a woman's right to a second-trimester pre-viability abortion—an unconstitutional enactment under current precedent. As such, Plaintiffs satisfied the first of the four requirements for a permanent injunction.

C. Permanent Injunction – Irreparable Harm

As discussed above, Plaintiffs successfully showed the Act will operate as a substantial obstacle to a woman's right to an abortion before the fetus reached viability—a violation of a woman's Fourteenth Amendment rights to privacy and bodily integrity. "[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Am. Civil Liberties Union of Ky. V. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003). Thus, enforcement of H.B. 454 will cause immediate and irreparable harm to Plaintiffs' patients' constitutional rights as a matter of law. *See Whole Women's Health v.*

Paxton, 264 F. Supp. 3d 813, 824 (W.D. Tex. 2017) ("The court concludes that Plaintiffs have established that absent a temporary restraining order they will suffer irreparable harm by being unable to access the most commonly used and safest previability-second-trimester-abortion procedure[.]"); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1068–69 (E.D. Ark. 2017) (concluding that enforcement of the D&E mandate would inflict irreparable harm on the plaintiff and his patients "as there is no adequate remedy at law").

If a permanent injunction does not issue, the fraction of women for whom H.B. 454 is relevant would immediately suffer irreparable harm by losing the right to obtain a pre-viability abortion anywhere in the Commonwealth of Kentucky after 15 weeks. As such, the second requirement for a permanent injunction is satisfied.

D. Permanent Injunction – Remaining Factors

Having shown success on the merits and irreparable harm to the clinic's patients, Plaintiffs must also show that the requested injunction would not cause substantial harm to others and that the public interest would be served by issuance of the injunction. *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012). Plaintiffs do so easily. As to the harm to others, if an injunction does not issue, Kentucky women would lose the right to obtain a pre-viability abortion anywhere in the Commonwealth beginning at 15 weeks. If an injunction does issue, an unconstitutional law passed by Kentucky legislators will not go into effect. Accordingly, substantial harm to others will not result if the injunction issues. Finally, as to the public interest, it is

well-established that the public has no interest in the enforcement of an unconstitutional law. *See, e.g.*, *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Am. Freedom Def. Initiative v. Suburban Mobility Auth. For Reg'l Transp.*, 698 F.3d 885, 896 (6th Cir. 2012) ("The public interest is promoted by the robust enforcement of constitutional rights[.]").

III. CONCLUSION

In reaching this decision, the court was guided by Supreme Court precedent and lower courts' opinions resolving challenges to similar legislation. As appropriately stated by the Eleventh Circuit, "[i]n our judicial system, there is only one Supreme Court, and we are not it. As one of the 'inferior Courts,' we follow its decisions.'" *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1329 (11th Cir. 2018) (citing U.S. Const. art. III § 1).

The Supreme Court's holdings in *Stenberg* and *Gonzales* direct a single result—the Commonwealth's interests in protecting the reputation of the medical community and expressing respect for fetal life, while legitimate, are insufficient to allow a law that would act as a de facto ban on a woman's right to an abortion after 15 weeks to go into effect. The Commonwealth's legitimate interests do not allow the imposition of an additional required medical procedure—an invasive and risky procedure without medical necessity or benefit to the woman—prior to the standard D&E abortion. Here, Kentucky's legitimate interests must give way to the woman's right. The Act, like the one at issue in *Paxton*, "does more than create a structural

mechanism by which the [Commonwealth] expresses profound respect for the unborn. The Act intervenes in the medical process of abortion prior to viability in an unduly burdensome manner." 280 F. Supp. 3d 938, 954 (W.D. Tex. 2017).

Because H.B. 454 "has the effect of placing a substantial obstacle in the path of a woman's choice [, it] cannot be considered a permissible means of serving its legitimate ends." *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). H.B. 454 is facially unconstitutional for the foregoing reasons. Accordingly, the court declares the Act void and will permanently enjoin the Commonwealth from enforcing the Act.

/s/ Joseph H. Mckinley
Joseph H. McKinley Jr., District Judge
United States District Court

May 8, 2019

cc: counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO: 3:18-CV-00224-JHM

[Filed: May 10, 2019]

EMW WOMEN'S SURGICAL CENTER, P.S.C., et al.	)
PLAINTIFFS	)
V.	)
ADAM W. MEIER et al.	)
DEFENDANTS	)

JUDGMENT AND PERMANENT INJUNCTION

This matter having come before the Court for a bench trial commencing on November 13, 2018 and concluding on November 19, 2018, and the Court having issued a Memorandum Opinion and Order on this date, it is hereby

ORDERED and **ADJUDGED** as follows:

(1) Judgment is entered in favor of Plaintiffs. The Court declares that H.B. 454 violates the

Fourteenth Amendment rights of Plaintiffs' patients and, as such, is **VOID**.

(2) Defendants and their officers, agents, and employees, and those persons in active concert or participation with Defendants who receive actual notice of this Order, are **PERMANENTLY ENJOINED** from enforcing H.B. 454 by criminal proceeding, administrative action or proceeding, or any other means; penalizing any person for failure to comply with H.B. 454 by criminal proceeding, administrative action or proceeding, or any other means; and applying, imposing, or requiring compliance with, implementing, or carrying out in any way any part of H.B. 454.

(3) This action is **DISMISSED** with prejudice.

/s/ Joseph H. Mckinley
Joseph H. McKinley Jr., District Judge
United States District Court

May 8, 2019

APPENDIX D

NOT RECOMMENDED FOR PUBLICATION

No. 19-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: June 24, 2020]

EMW WOMEN'S SURGICAL CENTER, P.S.C., on behalf of itself, its staff, and its patients; ASHLEE BERGIN, M.D., M.P.H., on behalf of herself and her patients; TANYA FRANKLIN, M.D., M.S.P.H., on behalf of herself and her patients,

Plaintiffs - Appellees,

v.

ERIC FRIEDLANDER, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Family Services,

Defendant-Appellant,

THOMAS B. WINE, et al.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

O R D E R

Before: MERRITT, CLAY, and BUSH, Circuit Judges.

Daniel Cameron, the Attorney General of Kentucky, moves to intervene as a defendant in this case regarding the constitutionality of Kentucky House Bill 454, which prohibits physicians from administering a dilation and evacuation abortion prior to fetal demise. Defendant-Appellant Eric Friedlander, Acting Secretary of Kentucky's Cabinet for Health and Family Services, has not responded to the motion. Plaintiffs-Appellees EMW Women's Surgical Center, Dr. Ashlee Bergin, and Dr. Tanya Franklin oppose intervention, and Cameron replies. For the reasons set forth below, we **DENY** Cameron's motion to intervene.

Plaintiffs first brought suit against a number of Kentucky officials in their official capacities, including then-Attorney General Andrew Beshear, just after H.B. 454 was signed into effect in April 2018. All but two of the original defendants, including Attorney General Beshear, were dismissed prior to trial. Attorney General Beshear stipulated to his dismissal in May 2018, reserving all rights and claims on appeal. After a five-day bench trial in November 2018, the district court in May 2019 entered judgment for Plaintiffs and an order permanently enjoining the enforcement of H.B. 454. *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807 (W.D. Ky. 2019). Then-Secretary

of the Cabinet of Health and Family Services, Adam Meier, appealed, and throughout fall 2019, the parties submitted briefing to this Court. In January 2020, upon a change in gubernatorial administrations, now-Acting Secretary of the Cabinet of Health and Family Services Eric Friedlander was substituted for Meier as Defendant. Friedlander continued to press the appeal in defense of H.B. 454, now represented by lawyers from the office of newly elected Attorney General Daniel Cameron, the current proposed intervenor. The parties presented argument in this case on January 29, 2020. On June 2, 2020, this Court issued its opinion affirming the district court's judgment. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 19-5516, 2020 WL 2845687 (6th Cir. June 2, 2020).

On June 11, 2020, the Attorney General moved to intervene as of right or, in the alternative, permissively, explaining that the Secretary had chosen not to pursue rehearing en banc or petition for a writ of certiorari and seeking to intervene as a defendant in order to do so.[1] The Attorney General tendered a brief in support of rehearing en banc on June 16, 2020.

This Court reviews four factors in deciding whether to grant a motion for intervention as of right. To succeed on such a motion, the movant must

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[1] The dissent says that the Secretary is no longer actively litigating this case. But the Secretary remains a party, and while he has not filed a timely petition for rehearing en banc, there is and would be nothing to prevent him from changing course and pursuing certiorari, regardless of whether the Attorney General's motion to intervene was granted.

demonstrate that: "1) the [motion] was timely filed; 2) the [movant] possesses a substantial legal interest in the case; 3) the [movant's] ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the [movant's] interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011); *see also* Fed. R. Civ. P. 24(a)(2). "Each of these elements is mandatory, and therefore failure to satisfy any one of the elements will defeat intervention under the Rule." *Id.* While ordinarily we construe the elements broadly in favor of potential intervenors, *see Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007), "a motion to intervene filed during the final stages of a proceeding is not favorably viewed." *United States v. BASF-Inmont Corp.*, 52 F.3d 326 (6th Cir. 1995) (table); *accord, e.g.*, *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985).

Given the stage at which the Attorney General moved to intervene, we are particularly mindful of the requirement of timeliness. In assessing the timeliness of a motion to intervene, we consider five factors:

> 1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the [motion] during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and

> 5) the existence of unusual circumstances militating against or in favor of intervention.

Blount-Hill, 636 F.3d at 284 (quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)).

Considering the first factor, the Attorney General's motion to intervene in this case comes years into its progress, after both the district court's decision and—more critically—this Court's decision. We rarely grant motions to intervene filed on appeal, and we agree with the D.C. Circuit that "[w]here . . . the motion for leave to intervene comes *after* the court of appeals has decided a case, it is clear that intervention should be even more disfavored." *Amalgamated Transit Union Int'l*, 771 F.2d at 1552; *see also id.* at 1553 n.5 (collecting cases "uniformly" finding such motions to be untimely); *accord* 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1916 (3d ed. 2020) ("There is even more reason to deny an application made . . . after the judgment has been affirmed on appeal."). Otherwise, we provide potential intervenors every incentive to sit out litigation until we issue a decision contrary to their preferences, whereupon they can spring to action. Perhaps this is also why the Attorney General is unable to identify any case in which this Court has granted a motion to intervene following issuance of its decision and can identify only two doing so across the whole of federal jurisprudence. *See Peruta v. City of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007). Our own review of the case law yields no more. This factor, then, points decisively against intervention.

Turning to the second factor, the Attorney General seeks intervention for the purpose of filing a petition for rehearing en banc. But this itself is "an extraordinary procedure," and not one that parties are due as a matter of course, as is the case with an appeal. 6 Cir. I.O.P. 35(a). Review on certiorari is likewise "not a matter of right." Sup. Ct. R. 10.[2] Moreover, it is apparent that the foremost argument that the Attorney General seeks to advance on rehearing is a third-party standing argument that the Secretary elected not to present to this Court on appeal, and that he did not flesh out before the district court. At present, Supreme Court precedent suggests this argument should be denied. *See Friedlander*, 2020 WL 2845687, at *4 n.2 (collecting cases).

Regarding the third factor, the Attorney General had ample notice of his interest in this case. Indeed, when Plaintiffs filed their complaint, they named the Attorney General as a defendant. And even accounting for the fact that Attorney General Cameron himself took office only after the initiation of this suit and the stipulated dismissal of the Attorney General as a defendant, Cameron was put on notice of his interest when he swore his oath of office in December 2019,

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[2] Contrary to the dissent's assertions, our denial of the Attorney General's motion to intervene does not prevent further review of our decision on the merits. The parties and even the Attorney General have had ample opportunity to seek further review. The Secretary could have chosen to petition for rehearing en banc and could still choose to petition for certiorari. The Attorney General could have sought to intervene at an earlier date in order to independently access that review. If the parties are now unable to secure further review, it is only due to their own decisions.

before this Court heard oral argument in the case and seven months before its decision. Against these facts, Attorney General Cameron contends that he could not have been aware of his interest because, until recently, the Secretary vigorously defended H.B. 454, with lawyers from the Attorney General's office defending him. But there was every reason for the Attorney General's office to inquire into and prepare for the Secretary's intended course in the event of an adverse decision prior to undertaking his representation of the Secretary.[3]

The time for which the Attorney General has been aware of his interest distinguishes this case from the leading case in which a court of appeals has granted a motion to intervene following issuance of its decision. In *Peruta v. County of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016), the Ninth Circuit allowed the State of California to intervene even after issuing its decision upon concluding that "California had no strong incentive to seek intervention . . . at an earlier stage, for it had little reason to anticipate either the breadth of the panel's holding or the decision of [the defendant] not to seek panel rehearing or rehearing en banc." In this case, by contrast, there was every reason for the Attorney General to anticipate our holding, as it not only hewed close to the issues briefed by the parties,

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[3] The dissent contends that the Attorney General would have been violating privilege had he sought to intervene earlier. But of course, the Attorney General could have sought intervention without disclosing his communications with the Secretary or could have requested the Secretary's permission to disclose those communications, just as he has done in filing his current motion.

but also substantially mirrored the holding of every court to hear a challenge to a fetal-demise law to date. As discussed, the Attorney General could also have anticipated the Secretary's decision regarding petitioning for rehearing en banc and certiorari, given that he himself represented the Secretary.

Turning then to the fourth factor, it is clear that granting the Attorney General's motion would significantly prejudice Plaintiffs. As discussed, Attorney General Cameron seeks to raise in his petition for rehearing en banc a third-party standing argument not raised before this Court and not argued in any particulars before the district court. Yet the Attorney General's own office chose not to raise this argument upon becoming aware that the Supreme Court had granted certiorari in *June Medical Services, LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019). It was not addressed by the parties at oral argument except in response to judges' questioning, nor was it raised via a notice of supplemental authorities filed pursuant to Federal Rule of Appellate Procedure 28(j). This provides us every reason to conclude that the parties and the Attorney General himself—like the majority in this case—thought that it presented no barrier to Plaintiffs' claim. Now the Attorney General seeks to benefit from this Court's decision by asserting an argument first raised by the dissent. This is not the purpose of a motion to intervene, and we agree with Plaintiffs that they "should not be required to respond to last-minute argument-by-ambush." (Pls. Resp. to Mot. to Intervene at 11.)

The prejudice to Plaintiffs, too, distinguishes this case from those in which such delayed motions to intervene have been granted. In *Peruta*, the plaintiffs did not oppose intervention and so conceded the issue of prejudice. 824 F.3d at 940. Here, Plaintiffs make no such concession and, indeed, strongly oppose intervention. In *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007), the court's decision hinged on the fact that "granting the State of Hawaii's Motion to Intervene will not create delay by 'inject[ing] new issues into the litigation,'" as the State had already raised those issues in prior amicus briefing, thus allowing the plaintiffs their due opportunity to respond. *Id.* at 965 (alteration in original) (quoting *Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004)). In the case at bar, Plaintiffs have had no opportunity to respond to the third-party standing argument the Attorney General seeks to raise, nor have they had any reason to anticipate it based upon current Supreme Court precedent.

Finally, we do not think that unusual circumstances militate in favor of intervention here—in fact, given the unusual stage at which the Attorney General seeks to intervene, we think just the opposite. The Attorney General complains that the Supreme Court is soon to issue its decision in *June Medical Services*, and that decision may bolster its new third-party standing argument. We are skeptical of the notion that the Supreme Court will overturn decades of its own precedent in such a manner. But even if the Attorney General is correct, if *June Medical Services* contradicts this Court's decision, the Supreme Court's decision will prevail as a matter of course and this case need not be further litigated on that basis.

Taking these factors in sum, we are convinced that the Attorney General's motion to intervene is untimely. Because the Attorney General has failed to show this necessary element, we need not reach the remaining elements that a proposed intervenor must show on moving for intervention as of right.[4] Likewise, because timeliness is among our foremost considerations in deciding whether to grant permissive intervention, the Attorney General's motion on that basis also fails. *See* Fed. R. Civ. P. 24(b)(1) ("On *timely* motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.") (emphasis added); *see also Blount-Hill*, 636 F.3d at 287. Timeliness is likewise required of a government party who seeks permissive intervention, and so Federal Rule of Civil Procedure 24(b)(2) also does not require us to grant the Attorney General's motion here. *Id.* ("On *timely* motion, the court may permit a . . . state governmental officer . . . to intervene if a party's claim or defense is based on . . . a statute . . . administered by the officer . . . .") (emphasis added). We are thus left with no basis for granting the Attorney General's motion.

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[4] The dissent suggests that our decision contravenes our precedent regarding state attorneys general's legal interest in defending their state laws. But this misrepresents our holding, as we do not reach the issue of whether Attorney General Cameron has a substantial legal interest in the subject matter of this case. Nor do we question whether states' attorneys general may appropriately intervene to defend their states' laws in some—or indeed, even in many—situations. We simply conclude that the Attorney General's intervention in this particular case would be untimely.

Accordingly, we **DENY** the Attorney General's motion to intervene and **DISMISS** his petition for rehearing en banc.

JOHN K. BUSH, Circuit Judge, dissenting. This odd case has become even odder. Plaintiffs prevailed in a trial at which none of the people whose constitutional rights were at stake were parties or even witnesses. Now, after the judgment has been affirmed on appeal, Plaintiffs want to keep away from court not only the people they purport to represent, but also their adversaries. Attorney General Daniel Cameron, acting on behalf of the Commonwealth of Kentucky, sought to intervene after Secretary Friedlander declined to continue the appeal. Plaintiffs opposed the intervention, and the majority sides with Plaintiffs. This result inappropriately and prematurely cuts short the adversarial process. What is more, it flies in the face of our precedent allowing states' attorneys general to intervene on appeal in order to defend their states' laws.

Contrary to what the majority holds, the party who seeks to intervene, the Attorney General of Kentucky, is no Johnny-come-lately. The Attorney General is *the same counsel* who represented Secretary Friedlander in this appeal, and Secretary Friedlander *does not oppose* the substitution of the Attorney General to represent the Commonwealth's interests. Moreover, the Attorney General's arguments defending the substance of H.R. 454 are *identical* to those that Secretary Friedlander made, and although the Attorney General's challenge to Plaintiffs' standing is more developed than was Secretary Friedlander's, standing was objected to

below. In any event, the question of whether we have jurisdiction cannot be ignored, regardless of when the issue was raised.

Plaintiffs' opposition to the Attorney General's motion to intervene is an understandable strategy. With the denial of this motion, there will be no one in this case to defend the challenged state law. It is a plaintiff's dream case: what if every litigant who successfully challenged the constitutionality of a state law could bar the state attorney general from seeking complete appellate review? With the Attorney General denied the right to continue the appeal in defense of the law, there is no one left to file a petition for rehearing en banc on behalf of the Commonwealth's interests. Even more importantly, there is no one left to file a petition for certiorari, since Secretary Friedlander will not do so. As a result, regardless of how the Supreme Court rules in its review of *June Medical Services, LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019)—a ruling that may be issued any day now—the present case will not be governed by the Supreme Court's decision, even though *June Medical* presents questions identical or similar to issues in the present case. Without anyone in court to defend H.B. 454, Plaintiffs' challenge to that law will succeed, even if our ruling in this case proves to be directly contrary to the Supreme Court's holding in *June Medical*. This anomalous result would be the outcome of the majority's decision to deny the Attorney General's motion to intervene.

For these reasons and those stated below, I respectfully dissent. The Kentucky Attorney General

should be allowed to intervene so that the Commonwealth's interests can be defended through the entire appellate process.

I.

Attorney General Cameron's motion to intervene comes to us in unusual circumstances. After the Commonwealth appealed the district court's judgment in this case, Kentucky held elections. Andy Beshear, who had been the Attorney General of the Commonwealth, was elected Governor. In that same election, Daniel Cameron was elected Attorney General and thus is Governor Beshear's successor in that office. Less than a month before oral argument, Secretary Friedlander, an appointee of Governor Beshear, was substituted for former Secretary Meier as a defendant. Secretary Friedlander took the same position in this case as had his predecessor, and he retained Attorney General Cameron to represent him at oral argument. However, after we issued our panel decision, Secretary Friedlander reversed course, advising Attorney General Cameron that he would not seek rehearing or certiorari. The Secretary's decision meant that there was no defendant left in the litigation that would continue the appeal. Two days after learning that Secretary Friedlander would no longer defend H.B. 454, Attorney General Cameron filed a motion to intervene on behalf of the Commonwealth, seeking to assert the Commonwealth's interests in defending its law.

II.

The majority holds that the Attorney General's motion is too little, too late. I respectfully disagree. Under Rule of the Federal Rules of Civil Procedure 24(a)(2), a motion to intervene of right should be granted if the proposed intervenor establishes the following:

> (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest.

United States v. Michigan, 424 F.3d 438, 443 (6th Cir. 2005) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999)). These four elements should be "broadly construed in favor of potential intervenors." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007) (quoting *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991)). As explained below, Attorney General Cameron has established each of the four elements.

1. Timeliness

To determine the timeliness of an application for intervention of right, we consider five factors:

> 1) the point to which the suit has progressed;
> 2) the purpose for which intervention is sought;
> 3) the length of time preceding the application

> during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and 5) the existence of unusual circumstances militating against or in favor of intervention.

Blount-Hill v. Zelman, 636 F.3d 278, 284 (6th Cir. 2011) (quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)). "No one factor is dispositive, but rather the 'determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances.'" *Id.* (quoting *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472–73 (6th Cir. 2000). Based on these five factors, Attorney General Cameron's motion to intervene is timely.

Regarding the first factor, the parties cited three cases in which a party sought to intervene after an appellate panel rendered judgment. In two of the cases, the Ninth Circuit granted motions to intervene, *see Peruta v. Cty. of San Diego*, 824 F.3d 919, 940–41 (9th Cir. 2016) (en banc); *Day Apoliona*, 505 F.3d 963, 965 (9th Cir. 2009), and in the other case, the D.C. Circuit denied such a motion, *Amalgamated Transit Union Intern., AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985). This case is more like *Peruta* and *Day* than *Donovan*. As here, both *Peruta* and *Day* involved the unusual circumstance of a state finding itself with nobody left in the suit to defend its interests after the panel ruled. *Peruta*, 824 F.3d at 941; *Day*, 505 F.3d at 966. And in both cases, the Ninth Circuit granted

intervention to allow the state to finish the appeal by seeking rehearing or certiorari. *Peruta*, 824 F.3d at 941; *Day*, 505 F.3d at 966. In *Donovan*, by contrast, the court denied intervention to seek rehearing or certiorari because Secretary Donovan, a government official and defendant in the lawsuit, was still actively litigating the case. Moreover, the intervenor sought to represent entirely different interests than the government official. *Donovan*, 771 F.2d at 1552. That is not the case here. Secretary Friedlander is no longer actively litigating the case, and Attorney General Cameron seeks to represent the same interest that Secretary Meier and Secretary Friedlander represented throughout the course of litigation—Kentucky's interest in defending its law. This factor weighs heavily in favor of a finding of timeliness.

As to the second factor, we have previously endorsed the very purpose for which Attorney General Cameron seeks to intervene on behalf of the Commonwealth—to ensure that the validity of a state law is defended to the conclusion of the remaining appellate process. In *Associated Builders & Contractors, Saginawy Valley Area Chapter v. Perry*, 115 F.3d 386 (6th Cir. 1997), Michigan's Attorney General moved to intervene following final judgment in the district court upon learning that the state official who was a party would not seek appellate review in a challenge to a state law. *Id.* at 389. The district court denied the motion to intervene, but we reversed and allowed the Attorney General to intervene. *Id.* at 390. That should be the outcome here as well. As did Michigan's Attorney General in *Perry*, Attorney General Cameron moved to intervene to defend his state's interests soon after

learning that the state official in the lawsuit would no longer do so. *See id.* at 389; *see also N.E. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (citation omitted) (granting a motion to intervene because "the interests of the Secretary and the State of Ohio potentially diverge"). Attorney General Cameron's motion is essentially to allow his state to substitute its party representative to defend the constitutionality of its law, which is precisely what we allowed Michigan's Attorney General to do in *Perry*.

The third factor also points in Attorney General Cameron's favor. Attorney General Cameron was very prompt in intervening after he became aware of his need to do so. *See Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) (citation omitted) (holding that the proper "gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties"). Secretary Friedlander communicated that he would no longer defend H.B. 454 on June 9. Two days later, Attorney General Cameron filed his motion to intervene on behalf of the Commonwealth. He obviously responded in a timely manner to Secretary Friedlander's decision. *See id.* (holding that a motion to intervene was timely when it was filed 15 days after the would-be intervenor became aware of its need to intervene); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977) (holding that where would-be intervenors filed their motion less than one month after learning of their interest in the case, they discharged their duty to act quickly).

The majority seems to think that Attorney General Cameron should have anticipated his need to intervene months ago when he swore his oath of office, because "there was every reason for the Attorney General's office to inquire into and prepare for the Secretary's intended course." But there is no evidence that, prior to June 9, the Secretary expressed any intention to Attorney General Cameron not to defend H.B. 454 through the entire appellate process. Quite to the contrary, Secretary Friedlander retained the Attorney General's office to represent him at oral argument in this case. If the Secretary had privately expressed his intentions earlier, it would have been strange indeed—and arguably malpractice—for the Attorney General to move to intervene based on their privileged communication regarding the Secretary's future plans in this case.

All the more confusing, the majority expects Attorney General Cameron to have intervened in a case in which he was already the attorney of record for a party, representing the interests of the Commonwealth—the exact same interests that he seeks to represent now. To top it off, Secretary Friedlander does not oppose Attorney General Cameron's continued representation of the Commonwealth's interests. Given these circumstances, we cannot expect that Attorney General Cameron should have intervened earlier. *See Blount-Hill v. Zelman*, 636 F.3d 278, 287 (6th Cir. 2011) (holding that "actual or constructive knowledge of their interest in th[e] litigation" is necessary to trigger awareness of the need to seek intervention); *Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 F. App'x 782, 788 (6th Cir.

2004) (holding that mere "suspicions" are not enough); *Linton by Arnold v. Comm'r of Health and Env't, State of Tenn.*, 973 F.2d 1311, 1318 (6th Cir. 1992) (recognizing that "the movants had no reason to intervene in the instant action so long as they believed that the [Defendant-State] would protect their interests"). And even if Attorney General Cameron could have anticipated the need to file a motion to intervene a few months ago, that does not mean that we should deny his motion now. *Day*, 505 F.3d at 965 ("[T]he fact that the State of Hawaii is filing its Motion now, rather than earlier in the proceedings, does not cause prejudice to Day and the other plaintiffs, since the practical result of its intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceedings." (citation omitted)).

The fourth factor also weighs in favor of a finding of timeliness. Plaintiffs will not be prejudiced by Attorney General Cameron's intervention on behalf of the Commonwealth. Secretary Friedlander has not opposed the Attorney General's motion, and he seems to have no problem passing the baton to the Attorney General to allow him to take control of the litigation. And although the Attorney General's intervention on behalf of the Commonwealth will mean that this litigation will continue, that does not unfairly prejudice Plaintiffs. When one brings a constitutional challenge to a state law, it is reasonable to expect the state to defend that law through the full appellate process. Furthermore, Attorney General Cameron is not injecting new issues into the litigation; he merely seeks a rehearing or certiorari on the very issues that were decided by our panel on the merits. The Attorney General is thus

simply picking up where Secretary Friedlander left off (actually, to be more precise, Attorney General Cameron is picking up where he left off, since he has always been the attorney of record in this case). *See Peruta*, 824 F.3d at 941 (holding that there was no prejudice in granting the motion to intervene because doing so "will not create delay by injecting new issues into the litigation, but instead will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties" (citation omitted)).

The majority asserts that Attorney General Cameron is seeking to intervene to introduce a "new third-party standing argument," and that prejudices Plaintiffs because they "have had no opportunity to respond" to that argument. But the third-party standing argument is hardly a new issue. Defendants challenged Plaintiffs' standing at the district court level, (R. 108 at PageID 104–105), and the dissent from the panel's decision was devoted almost entirely to that issue. Even if the third-party standing issue were somehow new, granting Attorney General Cameron's motion to intervene would only prejudice Plaintiffs if it could "be said that [he] ignored the litigation or held back from participation to gain tactical advantage." *Day*, 508 F.3d at 966. There is no evidence of such bad faith from Attorney General Cameron here. Instead, he is intervening only because Secretary Friedlander indicated he would not continue the appeal. If Secretary Friedlander had fully exercised his rights on appeal, Plaintiffs would have had to respond to the third-party standing argument anyway at the en banc or certiorari stage. *See League of Woman Voters of*

Mich. v. Johnson, 902 F.3d 572, 578 (6th Cir. 2018) (finding no prejudice and reversing a district court decision denying a motion to intervene because "the new issues that would have arisen had the [motion to intervene been granted] would likely have arisen anyway during the natural course of litigation"). Finally, we have an independent obligation to ensure that we have jurisdiction, so even if Plaintiffs' standing were a new issue, it should not be ignored. *See Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) (holding that there is "no authority for the plaintiffs' argument that prudential standing requirements may be [forfeited] by the parties" and declining to "recogniz[e] a distinction between prudential and constitutional standing requirements in this context").

As to the fourth factor, the highly unusual circumstances present in this case militate in favor of intervention. These circumstances include the recent election of Governor Beshear, the posture of this appeal at the time that Attorney General Cameron assumed office, Attorney General Cameron's role as Secretary Friedlander's attorney during the appellate process, and Attorney General Cameron's recent discovery that Secretary Friedlander would no longer defend H.B. 454.

Because each of the five factors weighs in Attorney General Cameron's favor, his motion to intervene is timely.

2. *The Commonwealth's Legal Interest in the Subject Matter of This Case*

As to the second element governing intervention of right, the Commonwealth through Attorney General Cameron has a substantial legal interest in the subject matter of this case. "[T]his Circuit 'has opted for a rather expansive notion of the interest sufficient to invoke intervention of right.'" *Granholm*, 501 F.3d at 780 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). We have determined that the term "'interest' is to be construed liberally." *Bradley v. Milliken*, 828 F.2d 1186, 1992 (6th Cir. 1987) (citing *Hatton v. County Bd. of Educ. of Maury County, Tenn.*, 422 F.2d 457, 461 (6th Cir. 1970)).

As we recently explained, "[a] state may designate an agent to represent its interests in court. This is most commonly the state's Attorney General." *State by & through Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 515 (6th Cir. 2019). So it is in Kentucky. As a matter of state law, Attorney General Cameron is the Commonwealth's "chief law officer." KRS 15.020. He must "*enter his appearance in* all cases, hearings, and proceedings . . . and attend to *all* litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest." *Id.* (emphasis added). As the Supreme Court of Kentucky has recognized, it is a "bedrock principle[]" of Kentucky law that the Attorney General possesses "broad powers to initiate and defend actions on behalf of the people of the Commonwealth." *Commw. ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009). "There is no question," Kentucky's highest court has emphasized,

"as to the right of the Attorney General to appear and be heard in a suit brought by someone else in which the constitutionality of a statute is involved." *Commw. ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974). Attorney General Cameron, on behalf of the Commonwealth, clearly satisfies the second element to intervene of right.

The majority's decision to the contrary contravenes our precedent. We have held, on multiple occasions, that states' attorneys general have the authority to intervene to defend their states' laws, even at the appellate stage. *See Perry*, 115 F.3d at 390 (noting that the Michigan Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed" (citations omitted)); *Blackwell*, 467 F.3d at 1009 (noting that the Ohio State Attorney General could intervene because he is "the State's chief legal officer and a representative of the people and the public interest" (citation omitted)).

3. *The Attorney General's Ability to Protect the Commonwealth's Interests*

As to the third and fourth elements, the Commonwealth's interests in defending H.B. 454 undoubtedly will be impaired by this litigation and will not be adequately represented absent intervention. Indeed, those interests will not be represented at all. Without intervention, the Commonwealth will be denied the opportunity to continue defending H.B. 454 in court. The Commonwealth's only option now is to seek en banc or certiorari of the denial of the Attorney

General's motion to intervene. Unless the Attorney General on behalf of the Commonwealth becomes a party, Secretary Friedlander's decision not to continue his appeal will not just "hinder," but will perhaps be fatal to "the State's ability to litigate the validity of the [Kentucky] law." *Blackwell*, 467 F.3d at 1008–09 (citations omitted).

III.

Rule 24 of the Federal Rules of Civil Procedure instructs that we "*must* permit anyone to intervene" who establishes the four elements discussed above. Fed. R. Civ. P. 24(a) (emphasis added). Each of those elements weighs decidedly in favor of granting the motion to intervene. Intervention is particularly warranted because, without adding the Attorney General as a party, there will be no one left in the case to defend H.B. 454.

Finally, our views as to the merits of Plaintiffs' constitutional challenge and whether they have standing to sue should not affect our ruling on the motion to intervene. Regardless of whether the majority is correct as to resolution of the issues presented in the case, Plaintiffs are not entitled to a pass as to an opponent. In our federal system, legal arguments are to be tested through the fire of adversarial argument, which includes the full appellate process. I therefore respectfully dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

No. 19-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: July 16, 2020]

EMW WOMEN'S SURGICAL CENTER, P.S.C., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS; ASHLEE BERGIN, M.D., M.P.H., ON BEHALF OF HERSELF AND HER PATIENTS; TANYA FRANKLIN, M.D., M.S.P.H., ON BEHALF OF HERSELF AND HER PATIENTS,	)
Plaintiffs-Appellees,	)
v.	)
ERIC FRIEDLANDER, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF KENTUCKY'S CABINET FOR HEALTH AND FAMILY SERVICES,	)
Defendant-Appellant,	)
THOMAS B. WINE, ET AL.,	)
Defendants.	)

ORDER

BEFORE: MERRITT, CLAY, and BUSH, Circuit Judges.

Upon consideration of the petition for rehearing en banc tendered by the Proposed Intervenor Daniel J. Cameron,

It is ORDERED that the petition is rejected for filing.

JOHN K. BUSH, Circuit Judge, dissenting. I would accept the Attorney General's tendered petition for rehearing en banc for the reasons stated in my dissent from the denial of the Attorney General's motion to intervene. I also note that, notwithstanding the Panel's rejection of his petition today, the Attorney General may have further recourse in this case should he decide to pursue it. It appears that he has independent authority under Kentucky law to file a petition for certiorari as Secretary Friedlander's counsel, despite Governor Beshear's objections. *Cf. Perdue v. Baker*, 586 S.E.2d 606, 610-16 (Ga. 2003) (holding that the Georgia Attorney General had independent authority under Georgia law to represent the State before the U.S. Supreme Court despite the Governor's objections). As I noted in my earlier dissent, Attorney General Cameron has broad, independent authority under Kentucky state law to defend the Commonwealth's statutes. He must "enter his appearance in all cases, hearings, and proceedings . . . and attend to all litigation and legal business in or out of the state required of him by law, or in which the

Commonwealth has an interest." KRS 15.020. The Supreme Court of Kentucky has recognized that it is a "bedrock principle[]" of Kentucky law that the Attorney General possesses "broad powers to initiate and defend actions on behalf of the people of the Commonwealth." *Commw. ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009). "There is no question," Kentucky's highest court has emphasized, "as to the right of the Attorney General to appear and be heard in a suit brought by someone else in which the constitutionality of a statute is involved." *Commw. ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974). Because Attorney General Cameron appears to have independent authority under Kentucky law to file a petition for certiorari as Secretary Friedlander's counsel, this case need not be over quite yet.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 19-5516

[Filed: August 03, 2020]

EMW WOMEN'S SURGICAL CENTER, P.S.C., on behalf of itself, its staff, and its patients; ASHLEE BERGIN, M.D., M.P.H. and TANYA FRANKLIN, MD, M.S.P.H., on behalf of themselves and their patients

Plaintiffs - Appellees

v.

ERIC FRIEDLANDER, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Family Services

Defendant - Appellant

and

THOMAS B. WINE, et al

Defendants

MANDATE

Pursuant to the court's disposition that was filed 06/02/2020 the mandate for this case hereby issues today.

COSTS: None

APPENDIX G

311.787 Prohibit certain abortion procedures when the probable post-fertilization age of the unborn child is 11 weeks or greater, except in the case of a medical emergency -- Penalty not to apply to pregnant woman -- Class D felony.

(1) As used in this section:

(a) "Bodily dismemberment, crushing, or human vivisection" means a procedure in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts portions, pieces, or limbs of the unborn child from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two (2) rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, any portion, piece, or limb of the unborn child's body to cut or separate the portion, piece, or limb from the body. The term includes a procedure that is used to cause the death of an unborn child and in which suction is subsequently used to extract portions, pieces, or limbs of the unborn child after the unborn child's death;

(b) "Medical emergency" has the same meaning as in KRS 311.720;

(c) "Probable post-fertilization age" has the same meaning as in KRS 311.781; and

(d) "Unborn child" has the same meaning as in KRS 311.781.

(2) No person shall intentionally perform or induce or attempt to perform or induce an abortion on a pregnant woman:

(a) That will result in the bodily dismemberment, crushing, or human vivisection of the unborn child; and

(b) When the probable post-fertilization age of the unborn child is eleven (11) weeks or greater;

except in the case of a medical emergency.

(3) A pregnant woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of subsection (2) of this section is not guilty of violating subsection (2) of this section or of attempting to commit, conspiring to commit, or complicity in committing a violation of subsection (2) of this section.

Effective: April 10, 2018

History: Created 2018 Ky. Acts ch. 142, sec. 1, effective April 10, 2018.