No. 20-601

In the
Supreme Court of the United States

DANIEL CAMERON, ATTORNEY GENERAL, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

EMW WOMEN'S SURGICAL CENTER, P.S.C., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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JUNE 14, 2021

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 30, 2020
PETITION FOR WRIT OF CERTIORARI GRANTED MARCH 29, 2021

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

United States District Court
for the Western District of Kentucky (Louisville)

No. 3:18-cv-00224-JHM-RSE

EMW Women's Surgical Center, P.S.C., et al. v. Meier, et al.

Date Filed	#	Docket Text
04/10/2018	1	COMPLAINT against Andrew G. Beshear, Scott Brinkman, Michael S. Rodman, Thomas B. Wine Filing fee $ 400, receipt number 0644-2621358., filed by EMW Women's Surgical Center, P.S.C., Ashlee Bergin, Tanya Franklin, M.D.. (Attachments: # 1 Cover Sheet, # 2 Cover Sheet Addendum, # 3 Exhibit A - HB 454) (DJT) (Entered: 4/1/2018)
* * *		
04/11/2018	6	MOTION for Temporary Restraining Order and Preliminary Injunction by Plaintiffs Ashlee Bergin, EMW Women's Surgical Center, P.S.C., Tanya Franklin, MD (Attachments: # 1 Memorandum in Support Memorandum in Support of TRO/PI Motion, # 2 Exhibit Exhibit 1- Bergin Declaration, # 3 Exhibit Exhibit

		2- Davis Declaration, # 4 Proposed Order Proposed Order) (Cubbage, Amy) (Entered: 04/11/2018)
* * *		
04/11/2018	10	TEXT ORDER by Chief Judge Joseph H. McKinley, Jr. on 4/11/2018: The Court will conduct a telephonic hearing on Plaintiffs' motion for temporary restraining order [DN 6] on Thursday, April 12, 2018, at 11:30 AM CDT. Counsel shall connect to the conference by dialing toll free 1-877-873-8017 and entering access code 6833907#. This Notice of Electronic Filing is the Official ORDER for this entry. No document is attached. cc: Counsel of record, Chad Meredith: chad.meredith@ky.gov, Talcott Camp: tcamp@aclu.org (EAS) (Entered: 04/11/2018)
* * *		
04/12/2018	23	COURT PROCEEDINGS held before Chief Judge Joseph H. McKinley, Jr.: Telephone Conference held on 4/12/2018. (Court Reporter April Dowell.) (EAS) (Entered: 04/13/2018)

04/12/2018	24	JOINT CONSENT ORDER by Chief Judge Joseph H. McKinley, Jr. on 4/12/18: Defendant's brief in opposition to Motion due by 5/2/2018. Plaintiffs' reply in further support of their motion shall be due 5/17/2018. On 5/22/2018, the parties shall exchange lists containing all witnesses who will testify at the 6/5/2018, preliminary injunction hearing. Evidentiary Hearing set for 6/5/2018 at 9:00 AM in Louisville Courtroom before Chief Judge Joseph H. McKinley Jr..cc: counsel (DJT) (Entered: 04/13/2018)
* * *		
05/08/2018	41	ORDER for proceedings held before Magistrate Judge Dave Whalin: Telephone Conference held on 5/4/2018. Defendants' deadline for filing a response to Plaintiffs' motion for preliminary injunctive relief is extended to 5/8/2018, and Plaintiffs' deadline to reply is extended to 5/22/2018. Discovery due by 8/15/2018. Dispositive Motions due by 9/28/2018. Preliminary Junction hearing remains set for 6/5/2018 at 9:00 AM in Louisville Courtroom before Chief Judge

		Joseph H. McKinley Jr.. cc: counsel (JM) (Entered: 05/08/2018)
05/08/2018	42	RESPONSE to Motion re 6 MOTION for Temporary Restraining Order and Preliminary Injunction, MOTION for Preliminary Injunction filed by Andrew G. Beshear. (Buckner, La Tasha) (Entered: 05/08/2018)
05/08/2018	43	RESPONSE to Motion re 6 MOTION for Temporary Restraining Order and Preliminary Injunction filed by Scott Brinkman. (Attachments: # 1 Exhibit A-HB 454, # 2 Exhibit B–Dermish Tr., # 3 Exhibit C-PPFA Guidelines, # 4 Exhibit D-Biggio Declaration, # 5 Exhibit E-Berry Tr., # 6 Exhibit F-Silverthorn Tr., # 7 Proposed Order) (Pitt, M.) (Entered: 05/08/2018)
* * *		
05/11/2018	46	Proposed Agreed Order/ Stipulation by Andrew G. Beshear. (Buckner, La Tasha) (Entered: 05/11/2018)
* * *		

05/16/2018	49	ANSWER to 1 Complaint, with Jury Demand by Scott Brinkman. (Pitt, M.) (Entered: 05/16/2018)
	* * *	
05/21/2018	51	STIPULATION AND ORDER OF DISMISSAL UPON CONDITIONS OF ANDREW G. BESHEAR by Chief Judge Joseph H. McKinley, Jr. on 5/21/2018: Pursuant to Fed. R. Civ. P. 41(a)(2) Defendant Beshear is hereby dismissed without prejudice. cc: counsel (JM) (Entered: 05/21/2018)
	* * *	
05/22/2018	54	REPLY to Response to Motion re 6 MOTION for Temporary Restraining Order and Preliminary Injunction filed by Ashlee Bergin, EMW Women's Surgical Center, P.S.C., Tanya Franklin, MD. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3) (Cubbage, Amy) (Entered: 05/22/2018)
	* * *	
05/29/2018	56	ORDER for proceedings held before Chief Judge Joseph H. McKinley, Jr.: Telephone Conference held on 5/24/2018. The evidentiary hearing scheduled for 6/5/2018, is vacated.

		The parties shall continue to abide by the terms of the Consent Order 24 suspending enforcement of the Act until the trial on the merits. Trial set for 11/13/2018 at 10:00 AM in Louisville Courtroom before Chief Judge Joseph H. McKinley Jr.. The parties shall confer and submit a proposed litigation plan to the Court no later than 6/8/2018. cc: counsel, SH (JM) (Entered: 05/29/2018)
* * *		
06/13/2018	58	ORDER by Chief Judge Joseph H. McKinley, Jr. on 6/13/2018: The Court ADOPTS the joint litigation plan (DN 57); This matter remains on the Court's trial docket for 11/13/2018, at 10:00 AM EST, U.S. Courthouse, Louisville, Kentucky. cc: counsel (JM) (Entered: 06/13/2018)
* * *		
10/31/2018	79	ORDER from proceedings held before Chief Judge Joseph H. McKinley, Jr.; Pretrial Conference held on 10/31/2018: The telephonic final pretrial conference scheduled for 11/2/2018, at 2:00 PM is vacated. Should the bench trial not be completed by 11/16/2018, the Court will resume trial on

		November 19, 2018, if necessary. Defendants Andrew G. Beshear and Michael S. Rodman have been dismissed from this action. Adam W. Meier, Secretary of Kentuckys Cabinet for Health and Family Services is hereby substituted for Defendant Scott Brinkman. The Clerk is directed to modify the case caption in CM/ECF as follows to reflect the remaining properly named Defendants: EMW Womens Surgical Center, P.S.C., et al. v. Meier, et al. By separate order, the Court will enter the protective order offered by the Plaintiffs. However, a designation of confidential or attorneys eyes only shall not necessarily mean the information will be sealed by the Court from the public record. (Court Reporter Terri Turner.) cc: Counsel (DJT) (Entered: 10/31/2018)
* * *		
11/02/2018	83	PRETRIAL MEMORANDUM by Adam W. Meier. (Attachments: # 1 Exhibit 1 - Levatino Expert Report, # 2 Exhibit 2 - Thorp Expert Report, # 3 Exhibit 3 - Bramer Expert Report, # 4 Exhibit 4 - Malloy Expert Report,

		# 5 Exhibit 5 - Curlin Deposition Transcript, # 6 Exhibit 6 - Snead Deposition Transcript, # 7 Exhibit 7 - Planned Parenthood's Standards, # 8 Exhibit 8 - Berry Opening Expert Report) (Pitt, M.) (Entered: 11/02/2018)
* * *		
11/02/2018	85	PRETRIAL MEMORANDUM by Ashlee Bergin, EMW Women's Surgical Center, P.S.C., Tanya Franklin, MD. (Attachments: # 1 Exhibit A - Defendants' Objections and Responses to Plaintiffs' First Discover) (Beck, Andrew) (Main Document 85 replaced on 11/5/2018) (JM). (Attachment 1 replaced on 11/5/2018) (JM). (Entered: 11/02/2018)
11/03/2018	86	MOTION to Strike and Substitute 85 Pretrial Memorandum. Document or Part to be Stricken and/or Substituted: Pretrial Memorandum by Plaintiffs Ashlee Bergin, EMW Women's Surgical Center, P.S.C., Tanya Franklin, MD (Attachments: # 1 Exhibit Exhibit 1-- Corrected Pretrial Memorandum, # 2 Exhibit Exhibit 1A-- Exhibit A to

		Corrected Pretrial Memorandum (Defendant's Objections and Responses to Discovery), # 3 Proposed Order Proposed Order) (Cubbage, Amy) (Entered: 11/03/2018)
* * *		
12/17/2018	102	FILING OF OFFICIAL TRANSCRIPT of Bench Trial held on 11/15/18 - afternoon session - before Judge Joseph H. McKinley. Court Reporter April R. Dowell, Telephone number 502-625-3779. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/7/2019. Redacted Transcript Deadline set for 1/17/2019. Release of Transcript Restriction set for 3/18/2019. (Dowell, April) (Entered: 12/17/2018)
12/17/2018	103	FILING OF OFFICIAL TRANSCRIPT of Bench Trial, Volume 4, held on 11/16/18, before Judge Joseph H. McKinley. Court Reporter April R. Dowell, Telephone number 502-625-3779. Transcript may be viewed at the

		court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/7/2019. Redacted Transcript Deadline set for 1/17/2019. Release of Transcript Restriction set for 3/18/2019. (Dowell, April) (Entered: 12/17/2018)
12/27/2018	104	FILING OF OFFICIAL TRANSCRIPT of Bench Trial, Volume 5-B, held on 11/19/18, before Judge Joseph H. McKinley. Court Reporter April R. Dowell, Telephone number 502-625-3779. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/7/2019. Redacted Transcript Deadline set for 1/17/2019. Release of Transcript Restriction set for 3/18/2019. (Dowell, April) (Entered: 12/17/2018)
* * *		

12/19/2018	106	FILING OF OFFICIAL TRANSCRIPT of Bench Trial (Volume 1) held on 11/13/2018, before Judge Joseph H. McKinley, Jr. Court Reporter Dena Legg, Telephone number 502-625-3778. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/9/2019. Redacted Transcript Deadline set for 1/22/2019. Release of Transcript Restriction set for 3/19/2019. (DL) (Entered: 12/19/2018)
12/19/2018	107	FILING OF OFFICIAL TRANSCRIPT of Bench Trial (Volume 2) held on 11/14/2018, before Judge Joseph H. McKinley, Jr. Court Reporter Dena Legg, Telephone number 502-625-3778. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/9/2019. Redacted Transcript Deadline set for

		1/22/2019. Release of Transcript Restriction set for 3/19/2019. (DL) (Entered: 12/19/2018)
12/19/2018	108	FILING OF OFFICIAL TRANSCRIPT of Bench Trial (Volume 3-A) held on 11/15/2018, before Judge Joseph H. McKinley, Jr. Court Reporter Dena Legg, Telephone number 502-625-3778. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/9/2019. Redacted Transcript Deadline set for 1/22/2019. Release of Transcript Restriction set for 3/19/2019. (DL) (Entered: 12/19/2018)
12/19/2018	109	FILING OF OFFICIAL TRANSCRIPT of Bench Trial (Volume 5-A) held on 11/19/2018, before Judge Joseph H. McKinley, Jr. Court Reporter Dena Legg, Telephone number 502-625-3778. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained

		through PACER. Redaction Request due 1/9/2019. Redacted Transcript Deadline set for 1/22/2019. Release of Transcript Restriction set for 3/19/2019. (DL) (Entered: 12/19/2018)
* * *		
01/09/2019	111	EXHIBIT INVENTORY (re Bench Trial held 11/13/2018) (JM) (Entered: 01/10/2019)
01/28/2019	112	NOTICE of Filing of Deposition of William Kim Brady by Adam W. Meier re 104 Transcript - Court Official,, (Attachments: # 1 Exhibit Deposition of Dr. William Kim Brady, # 2 Exhibit Deposition Exhibit 1, # 3 Exhibit Deposition Exhibit 2, # 4 Exhibit Deposition Exhibit 3, # 5 Exhibit Deposition Exhibit 4, # 6 Exhibit Deposition Exhibit 5, # 7 Exhibit Deposition Exhibit 6, # 8 Exhibit Deposition Exhibit 7, # 9 Exhibit Deposition Exhibit 8, # 10 Exhibit Deposition Exhibit 9, # 11 Exhibit Deposition Exhibit 10) (York, Catherine) (Entered: 01/28/2019)
* * *		
02/25/2019	118	BRIEF Post-Trial Brief (Attachments: # 1 Exhibit Certificate of Service) by Ashlee Bergin, EMW Women's Surgical

		Center, P.S.C., Tanya Franklin, MD. (Kolbi-Molinas, Alexa) (Entered: 02/25/2019)
02/25/2019	119	BRIEF Post-Trial Brief by Adam W. Meier. (Pitt, M.) (Entered: 02/25/2019)
* * *		
03/27/2019	121	BRIEF / Plaintiffs' Post-Trial Reply Memorandum by Ashlee Bergin, EMW Women's Surgical Center, P.S.C., Tanya Franklin, MD. (Kolbi-Molinas, Alexa) (Entered: 03/27/2019)
03/27/2019	122	NOTICE of Filing Plaintiffs' Proposed Findings of Fact & Conclusions of Law by Ashlee Bergin, EMW Women's Surgical Center, P.S.C., Tanya Franklin, MD (Attachments: # 1 Proposed Findings of Facts and Conclusions of Law) (Kolbi-Molinas, Alexa) (Entered: 03/27/2019)
03/27/2019	123	BRIEF Secretary Meier's Post-Trial Reply Brief by Adam W. Meier. (Pitt, M.) (Entered: 03/27/2019)
03/27/2019	124	Proposed Findings of Fact by Adam W. Meier. (Pitt, M.) (Entered: 03/27/2019)
* * *		

05/10/2019	126	MEMORANDUM OPINION INCORPORATING FINDINGS OF FACT AND CONCLUSIONS OF LAW by Judge Joseph H. McKinley, Jr on 5/8/2019: 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. cc: counsel (JM) (Entered: 05/10/2019)
05/10/2019	127	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. 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. This action is DISMISSED with prejudice. cc: counsel (JM) (Entered: 05/10/2019)
05/15/2019	128	NOTICE OF APPEAL as to 127 Judgment,,, 126 Memorandum & Opinion, by Adam W. Meier. Filing fee $ 505, receipt number 0644-2866053. (Pitt, M.) (Entered: 05/15/2019)
* * *		
05/28/2019	132	FILING OF OFFICIAL TRANSCRIPT of Telephonic Pretrial Conference held on 10/31/2018, before Judge Joseph H. McKinley, Jr. Court Reporter Terri Turner, Telephone number 270-415-6417. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/18/2019. Redacted Transcript Deadline set for 6/28/2019. Release of Transcript Restriction set for 8/26/2019. (TT) (Entered: 05/28/2019)

05/28/2019	133	FILING OF OFFICIAL TRANSCRIPT of Telephonic Hearing held on 11/6/2018, before Judge Regina S. Edwards. Court Reporter Terri Turner, Telephone number 270-415-6417. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/18/2019. Redacted Transcript Deadline set for 6/28/2019. Release of Transcript Restriction set for 8/26/2019. (TT) (Entered: 05/28/2019)
* * *		
05/30/2019	135	FILING OF OFFICIAL TRANSCRIPT of Telephonic Status Hearing held on 04/12/18, before Judge Joseph H. McKinley. Court Reporter April R. Dowell, Telephone number 502-625-3779. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/20/2019. Redacted

		Transcript Deadline set for 7/1/2019. Release of Transcript Restriction set for 8/28/2019. (Dowell, April) (Entered: 05/30/2019)
* * *		

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Sixth Circuit

No. 19-5516

EMW Women's Surgical Center, et al. v. Eric Friedlander, et al.

Date Filed	#	Docket Text
05/15/2019	1	Civil Case Docketed. Notice filed by Appellant Adam Meier. Transcript needed: y. (AEG) [Entered: 05/15/2019 02:26 PM]
		* * *
07/11/2019	17	CORRECTED APPELLANT BRIEF filed by Mr. Mark Stephen Pitt for Adam Meier. Certificate of Service:07/11/2019. Argument Request: requested. [19-5516] (MSP) [Entered: 07/11/2019 01:13 PM]
		* * *
09/09/2019	23	APPELLEE BRIEF filed by Ms. Alexa Kolbi-Molinas for Ashlee Bergin, EMW Women's Surgical Center, P.S.C. and Tanya Franklin, MD Certificate of Service:09/09/2019. Argument

Request: requested. [19-5516] (AK) [Entered: 09/09/2019 06:21 PM]

* * *

10/07/2019 35 REPLY BRIEF filed by Attorney Mr. Mark Stephen Pitt for Appellant Adam Meier Certificate of Service:10/07/2019. [19-5516] (MSP) [Entered: 10/07/2019 09:32 PM]

* * *

12/09/2019 37 MOTION filed by Mr. Mark Stephen Pitt for Adam Meier for M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, Brett R. Nolan to withdraw as counsel for Adam Meier, in his official capacity as Secretary of the Cabinet for Health and Family Services. Certificate of Service: 12/09/2019. [19-5516] (MSP) [Entered: 12/09/2019 09:25 AM]

12/11/2019 38 ORDER filed granting Appellant's motion for M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn and Brett R. Nolan to withdraw as counsel [37]. Entered by order of the court. (RB) [Entered:

		12/11/2019 02:58 PM]
12/16/2019	39	ORAL ARGUMENT SCHEDULED for 9:00 a.m. (Eastern Time) on Wednesday, January 29, 2020. (JRH) [Entered: 12/16/2019 09:55 AM]
		* * *
12/30/2019	41	APPEARANCE filed for Appellant Adam Meier by Matthew F. Kuhn. Certificate of Service: 12/30/2019. [19- 5516] (MFK) [Entered: 12/30/2019 03:41 PM]
12/30/2019	42	Oral argument acknowledgment filed by Attorney Mr. Matthew Franklin Kuhn for Appellant Adam Meier. Certificate of Service: 12/30/2019. [19-5516] (MFK) [Entered: 12/30/2019 03:55 PM]
		* * *
01/23/2020	45	APPEARANCE filed for Appellant Eric Friedlander by Brett R. Nolan. Certificate of Service: 01/23/2020. [19-5516] (BRN) [Entered: 01/23/2020 01:47 PM]

01/23/2020	46	APPEARANCE filed for Appellant Eric Friedlander by M. Stephen Pitt. Certificate of Service: 01/23/2020. [19-5516] (MSP) [Entered: 01/23/2020 01:51 PM]
01/23/2020	47	APPEARANCE filed for Appellant Eric Friedlander by S. Chad Meredith. Certificate of Service: 01/23/2020. [19-5516] (SCM) [Entered: 01/23/2020 01:57 PM]
01/28/2020	48	APPEARANCE filed for Appellant Eric Friedlander by Daniel Cameron. Certificate of Service: 01/28/2020. [19-5516] (DJC) [Entered: 01/28/2020 11:12 AM]
01/29/2020	49	CAUSE ARGUED by Mr. Matthew Franklin Kuhn for Appellant Eric Friedlander and Mr. Andrew Beck for Appellees EMW Women's Surgical Center, P.S.C., Tanya Franklin, MD and Ashlee Bergin before Merritt, Circuit Judge; Clay, Circuit Judge and Bush, Circuit Judge. (LTK) [Entered: 01/29/2020 11:57 AM]

* * *

06/02/2020	53	OPINION and JUDGMENT filed: AFFIRMED. Decision for publication. Gilbert S. Merritt, Eric L. Clay (AUTHORING), and John K. Bush (DISSENTING), Circuit Judges. (CL) [Entered: 06/02/2020 12:51 PM]
06/11/2020	54	MOTION filed by Mr. Matthew Franklin Kuhn for Eric Friedlander for Daniel Cameron, S. Chad Meredith, Matthew F. Kuhn, Brett R. Nolan to withdraw as counsel for Eric Friedlander, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Family Services. Certificate of Service: 06/11/2020. [19-5516] (MFK) [Entered: 06/11/2020 11:48 AM]
06/11/2020	55	APPEARANCE filed for Proposed Intervenor Daniel J. Cameron by Barry L. Dunn. Certificate of Service: 06/11/2020. [19-5516] (BLD) [Entered: 06/11/2020 06:41 PM]

06/11/2020	56	MOTION to INTERVENE filed by Barry L. Dunn for Attorney General Daniel Cameron, on Behalf of the Commonwealth of Kentucky. Certificate of Service: 06/11/2020. [19-5516] (BLD) [Entered: 06/11/2020 07:28 PM]
06/12/2020	57	NOTIFICATION filed by Ms. Heather Lynn Gatnarek for Ashlee Bergin, EMW Women's Surgical Center, P.S.C. and Tanya Franklin, MD regarding intent to oppose motion to intervene. Certificate of Service: 06/12/2020. [19-5516] --[Edited 06/12/2020 by AEG] (HLG) [Entered: 06/12/2020 01:48 PM]
06/15/2020	58	RESPONSE in opposition filed regarding a motion to intervene, [56]; previously. Response from Attorney Mr. Andrew Beck for Appellees Ashlee Bergin, EMW Women's Surgical Center, P.S.C. and Tanya Franklin, MD Certificate of Service:06/15/2020. [19-5516] (AB) [Entered: 06/15/2020 08:01 AM]
06/16/2020	59	REPLY filed by Mr. Barry Lee Dunn for Daniel J. Cameron regarding Motion to Intervene

(Docket 56) Certificate of Service: 06/16/2020. [19-5516] (BLD) [Entered: 06/16/2020 02:07 PM]

06/16/2020 60 TENDERED petition for rehearing en banc. Received from Attorney Mr. Barry Lee Dunn for Proposed Intervenor Daniel J. Cameron. (BLH) [Entered: 06/16/2020 04:05 PM]

06/24/2020 61 ORDER filed: DENYING motion to intervene [56] and DISMISSING the tendered petition for rehearing en banc. Decision not for publication. Gilbert S. Merritt, Eric L. Clay, and John K. Bush (DISSENTING), Circuit Judges. (CL) [Entered: 06/24/2020 02:40 PM]

* * *

07/07/2020 63 NOTICE OF DOCKETING ERROR, ENTRY REMOVED. Name of Document: PETITION for en banc rehearing filed by Mr. Barry Lee Dunn for Daniel J. Cameron.. Type of Error: not granted leave to file; not party. (BLH) [Entered: 07/08/2020 03:24 PM]

07/07/2020	64	TENDERED petition for en banc rehearing. Received from Attorney Mr. Barry Lee Dunn for Proposed Intervenor Daniel J. Cameron. Not party. (BLH) [Entered: 07/08/2020 03:26 PM]
07/16/2020	65	ORDER filed: 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. Gilbert S. Merritt, Eric L. Clay, and John K. Bush, Circuit Judges (BLH) [Entered: 07/16/2020 08:37 AM]
07/16/2020	66	MANDATE ISSUED with no costs taxed. (AEG) [Entered: 08/03/2020 09:17 AM]
11/04/2020	67	ORDER filed GRANTING motion to withdraw as counsel [54] filed by Mr. Matthew Franklin Kuhn, Mr. Daniel Cameron, Mr. S. Chad Meredith and Mr. Brett R. Nolan. Gilbert S. Merritt, Eric L. Clay, and John K. Bush, Circuit Judges. (AEG) [Entered: 11/04/2020 05:43 PM]
11/10/2020	68	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellant

		Daniel Cameron. Supreme Court Case No:20-601, 10/30/2020. (CL) [Entered: 11/10/2020 02:54 PM]
		* * *
03/29/2021	70	U.S. Supreme Court letter filed: The petition for a writ of certiorari [68] is granted limited to Question 1 presented by the petition. Supreme Court Case No: 20-601, 03/29/2021. (CL) [Entered: 03/29/2021 03:39 PM]

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
KENTUCKY
LOUISVILLE DIVISION**

Case No.: 3:18-cv-00224-JHM

[Filed May 21, 2018]

EMW WOMEN'S SURGICAL CENTER, P.S.C., *et al.*,	)
Plaintiffs,	)
v.	)
ANDREW G. BESHEAR, *et al.*,	)
Defendants.	)

STIPULATION AND ORDER OF DISMISSAL UPON CONDITIONS OF ANDREW G. BESHEAR

Plaintiffs EMW Women's Surgical Center, P.S.C., Ashlee Bergin, M.D., M.P.H, and Tanya Franklin, M.D., M.S.P.H., and Defendant Andrew G. Beshear, hereby enter into the following stipulations and agreements concerning the disposition of the above-captioned matter, which the Court hereby Orders:

1. Defendant Beshear hereby stipulates to service of process upon him.

2. Pursuant to Fed. R. Civ. P. 41(a)(2) Defendant Beshear is hereby dismissed without prejudice.

3. Conditions of Dismissal:

a. This Order shall not be considered in any way to be an admission or concession by Defendant Beshear that he is a proper party to this action, or has any power or enforcement authority relating to HB 454 (2018). Defendant Beshear generally reserves all rights, claims, and defenses that may be available to him, and specifically reserves all rights, claims, and defenses relating to whether he is a proper party in this action and in any appeals arising out of this action.

b. The dismissal of Defendant Beshear without prejudice is conditioned upon, and subject to the agreement of, Defendant Beshear and all personnel employed by or associated with the Office of the Attorney General of the Commonwealth of Kentucky to not bring any future enforcement, action of any kind with respect to Plaintiffs arising from HB 454 (2018) or the facts alleged in Plaintiffs' Complaint until this Court enters a final judgment in the matter disposing of all of the claims, and the exhaustion of any and all appeals that may arise in this action.

c. The conditions set forth in paragraph 3(a) are subject to this Court's plenary jurisdiction to enforce the conditions herein.

d. Defendant Beshear, in his official capacity as Attorney General of the Commonwealth of Kentucky, agrees that any final judgment in this action concerning the constitutionality of HB 454 (2018) will be binding on the Office of the Attorney General,

subject to any modification, reversal or vacation of the judgment on appeal; however, nothing in this Order prevents the Office of the Attorney General of the Commonwealth of Kentucky from investigating or taking action on any other complaint, which does not arise from or is not related to HB 454 (2018) or the facts alleged in Plaintiffs' Complaint.

e. In light of the current procedural posture of this action and the dismissal without prejudice, neither Plaintiffs nor Defendant Beshear are "prevailing parties" under 42 U.S.C. § 1988, and therefore neither are responsible for attorney's fees or costs with respect to each other. This provision is not an adjudication of any later claim or petition under 42 U.S.C. § 1988 should Defendant Beshear later be determined by this Court or another court of competent jurisdiction to be a party.

4. Nothing in this Order shall be deemed to affect or adjudicate the pending claims against the remaining Defendants.

IT IS SO ORDERED.

s/ Joseph H. McKinley Jr. [seal]
Joseph H McKinley, Jr., Chief Judge
United States District Court

May 21, 2018

Have seen and agreed:

s/Amy D. Cubbage (with permission)
Amy D. Cubbage, Interim Legal Director
ACLU of Kentucky
401 West Main Street, Suite 1200
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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

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

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 19-5516

[Filed December 9, 2019]

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.	)
ADAM MEIER, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services	)
Defendant - Appellant	)
And	)
THOMAS B. WINE, et al.	)
Defendants	)

On Appeal from the United States District Court
For the Western District of Kentucky at Louisville,
Case No. 3:18-cv-224-JHM

MOTION TO WITHDRAW AS COUNSEL

M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, and Brett R. Nolan (together, "Undersigned Counsel") move to withdraw as counsel for Appellant Adam Meier, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services ("Secretary Meier"). In support, Undersigned Counsel state that, as of December 10, 2019, they no longer will be employed in their current positions with the Office of the Governor of Kentucky. Catherine E. York will continue to represent Secretary Meier in this matter.

Respectfully submitted,

s/ M. Stephen Pitt
M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn
Brett R. Nolan
Office of the Governor
700 Capital Avenue, Suite 101
Frankfort, Kentucky 40601
(502) 564-2611
Counsel for Appellant

[*** Certificates omitted***]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 19-5516

[Filed December 11, 2019]

ORDER

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.	)
ADAM MEIER, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services	)
Defendant - Appellant	)
and	)
THOMAS B. WINE, et al.	)
Defendants	)

Upon consideration of Appellant's motion for M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn and Brett R. Nolan to withdraw as counsel,

It is **ORDERED** that the motion is **GRANTED**

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: December 11, 2019 s/ Deborah S. Hunt

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: December 30, 2019]

Appearance of Counsel

Appeal No.: **19-5516**

Case Title: **EMW Women's Surgical Center, P.S.C.** vs. **Eric Friedlander**

List all clients you represent in this appeal:

Eric Friedlander, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Family Services (automatically substituted under Fed. R. App. P. 43(c)(2) for Adam Meier)

☒ Appellant ☐ Petitioner ☐ Amicus Curiae ☐Criminal Justice Act (Appointed)

☐ Appellee ☐ Respondent ☐ Intervenor

☒ Check if a party is represented by more than one attorney.

☒ Check if you are lead counsel.

If you are substituting for another counsel, include that attorney's name here:

By filing this form, I certify my admission and/or eligibility to file in this court.

Attorney Name: **Matthew F. Kuhn**

Signature: s/ **Matthew F. Kuhn**

Firm Name: **Kentucky Office of the Attorney General**

Business Address: **700 Capital Avenue, Suite 118**

City/State/Zip: **Frankfort, Kentucky 40601**

Telephone Number (Area Code): **(502) 696-5300**

Email Address: **Matt.Kuhn@ky.gov**

Please ensure your contact information above matches your PACER contact information. If necessary, update your PACER account.

CERTIFICATE OF SERVICE

The electronic signature above certifies that all parties or their counsel of record have been electronically served with this document as of the date of filing.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: January 23, 2020]

Appearance of Counsel

Appeal No.: **19-5516**

Case Title: **EMW Women's Surgical Center, et al.** vs. **Eric Friedlander**

List all clients you represent in this appeal:

Eric Friedlander, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services

☒ Appellant ☐ Petitioner ☐ Amicus Curiae ☐Criminal Justice Act (Appointed)

☐ Appellee ☐ Respondent ☐ Intervenor

☒ Check if a party is represented by more than one attorney.

☐ Check if you are lead counsel.

If you are substituting for another counsel, include that attorney's name here:

By filing this form, I certify my admission and/or eligibility to file in this court.

Attorney Name: **Brett R. Nolan**

Signature: s/ **Brett R. Nolan**

Firm Name: **Office of the Attorney General**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: January 23, 2020]

Appearance of Counsel

Appeal No.: **19-5516**

Case Title: **EMW Women's Surgical Center, et al.** vs. **Eric Friedlander**

List all clients you represent in this appeal:

Eric Friedlander, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services

☒ Appellant ☐ Petitioner ☐ Amicus Curiae ☐Criminal Justice Act (Appointed)

☐ Appellee ☐ Respondent ☐ Intervenor

☒ Check if a party is represented by more than one attorney.

☐ Check if you are lead counsel.

If you are substituting for another counsel, include that attorney's name here:

By filing this form, I certify my admission and/or eligibility to file in this court.

Attorney Name: **M. Stephen Pitt**

Signature: s/ **M. Stephen Pitt**

Firm Name: **Office of the Attorney General**

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Telephone Number (Area Code): **(502) 696-5300**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: January 23, 2020]

Appearance of Counsel

Appeal No.: **19-5516**

Case Title: **EMW Women's Surgical Center, et al.** vs. **Eric Friedlander**

List all clients you represent in this appeal:

Eric Friedlander, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services

☒ Appellant ☐ Petitioner ☐ Amicus Curiae ☐Criminal Justice Act (Appointed)

☐ Appellee ☐ Respondent ☐ Intervenor

☒ Check if a party is represented by more than one attorney.

☐ Check if you are lead counsel.

If you are substituting for another counsel, include that attorney's name here:

By filing this form, I certify my admission and/or eligibility to file in this court.

Attorney Name: **S. Chad Meredith**

Signature: s/ **S. Chad Meredith**

Firm Name: **Office of the Attorney General**

Business Address: **700 Capital Avenue, Suite 118**

City/State/Zip: **Frankfort, Kentucky 40601**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: January 28, 2020]

Appearance of Counsel

Appeal No.: **19-5516**

Case Title: **EMW Women's Surgical Center, et al.** vs. **Eric Friedlander**

List all clients you represent in this appeal:

Eric Friedlander, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services

☒ Appellant ☐ Petitioner ☐ Amicus Curiae ☐Criminal Justice Act (Appointed)

☐ Appellee ☐ Respondent ☐ Intervenor

☒ Check if a party is represented by more than one attorney.

☐ Check if you are lead counsel.

If you are substituting for another counsel, include that attorney's name here:

By filing this form, I certify my admission and/or eligibility to file in this court.

Attorney Name: **Daniel Cameron**

Signature: s/ **Daniel Cameron**

Firm Name: **Kentucky Office of the Attorney General**

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Please ensure your contact information above matches your PACER contact information. If necessary, update your PACER account.

CERTIFICATE OF SERVICE

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

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.
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.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5516

[Filed June 11, 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
Honorable Joseph H. McKinley, Jr.

MOTION TO INTERVENE & MOTION TO EXPEDITE REVIEW BY ATTORNEY GENERAL DANIEL CAMERON, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY

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INTRODUCTION

In its panel decision, the Court addressed the constitutionality of 2018 House Bill 454 ("H.B. 454"), a Kentucky statute that prohibits—as Secretary Friedlander previously described it—the grisly act of dismembering an unborn child during an abortion while he or she is still alive. [App. R. 17 at 2]. Passed by the Kentucky General Assembly, H.B. 454 was signed into law by the Governor on April 10, 2018. But on the same day that H.B. 454 became law, Plaintiffs-Appellees EMW Women's Surgical Center, P.S.C. and its two obstetrician-gynecologists brought suit against various Kentucky officials.

Until recently, Secretary Friedlander, in his official capacity as Acting Secretary for the Cabinet for Health and Family Services, has defended H.B. 454 in this litigation. Now, Secretary Friedlander has reversed course. He has informed the Attorney General that he will not seek rehearing en banc or file a petition for a writ of certiorari from the Court's panel decision. Secretary Friedlander has, however, communicated

that he will not oppose the Attorney General's motion to intervene in this litigation on behalf of the Commonwealth of Kentucky.

In Secretary Friedlander's absence, the responsibility to press on in this appeal falls to Daniel Cameron—the duly elected Attorney General of the Commonwealth of Kentucky and the lawyer for the people of Kentucky. Ky. Rev. Stat. ("KRS") 15.020; *Commw. ex rel. Beshear v.Commw. ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). As the chief law officer of the Commonwealth, Attorney General Cameron moves the Court to allow him to pick up the mantle and intervene on behalf of the Commonwealth in defense of H.B. 454.

FACTUAL BACKGROUND

H.B. 454 became law on April 10, 2018. That same day, Plaintiffs filed this lawsuit. *See EMW Women's Surgical Center, P.S.C. v. Friedlander*, --- F.3d ---, 2020 WL 2845687, at *2 (6th Cir. June 2, 2020). Then-Secretary Adam Meier defended H.B. 454 before the district court, while the Commonwealth's Attorney General at the time, Andrew Beshear, chose not to defend the bill.[1] On May 10, 2019, and following a bench trial, the district court entered final judgment

[1] On May 21, 2018, the district court entered an order dismissing former Attorney General Beshear, who had been sued in his official capacity, from the litigation "without prejudice." [Stip. & Order, R. 51, Page ID##697–99]. In the order, Attorney General Beshear "specifically reserv[ed] all rights, claims, and defenses relating to whether he is a proper party in this action and in any appeals arising out of this action." [*Id.* at PageID#697].

declaring H.B. 454 unconstitutional. *EMW Women's Surgical Center, P.S.C. v. Meier*, 373 F. Supp. 3d 807, 826 (W.D. Ky. 2019). On May 15, 2019, then-Secretary Meier appealed to this Court. The parties concluded their briefing on October 7, 2019.

Shortly thereafter, on November 5, 2019, Kentucky held its general election for statewide constitutional officers. Daniel Cameron was elected as Kentucky's Attorney General. Former Attorney General Beshear was elected Governor and was sworn in on December 7, 2019. Attorney General Cameron was sworn in on December 17, 2019. One day prior to Attorney General Cameron assuming office, this Court scheduled oral argument in this matter for January 29, 2020. [App. R. 39]. Less than a month before oral argument, Secretary Friedlander, an appointee of Governor Beshear, was substituted for former Secretary Meier as a Defendant-Appellant. [App. R. 43]. The Court held oral argument on January 29, 2020—less than 45 days after Attorney General Cameron took office.

On June 2, 2020, the Court rendered its opinion affirming the district court's judgment and finding H.B. 454 unconstitutional. *Friedlander*, 2020 WL 2845687, at *1. Judge Bush dissented. He pointed out that courts have "routinely conferred third-party standing on abortion providers without engaging in a serious analysis" of the requirements for standing and found that there is a "potential conflict of interest that destroys Plaintiffs' standing to bring this facial constitutional challenge against H.B. 454." *Id.* at *18–*19 (Bush, J., dissenting).

Judge Bush also criticized the panel's issuance of its opinion shortly before the Supreme Court's disposition of *June Medical Services, LLC v. Russo*, 18-1323, 18-1460. *Friedlander*, 2020 WL 2845687, at *24 (Bush, J., dissenting). One of the questions presented in *June Medical* is particularly pertinent to—and perhaps dispositive of—this case: whether abortion providers have third-party standing to invoke the constitutional rights of potential patients in challenging abortion laws. *See id.* Equally as important, *June Medical* poses questions about the meaning and scope of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Resolution of those issues about *Hellerstedt* may substantially affect the determination of whether H.B. 454 is constitutional, as evidenced by the panel's repeated reliance on *Hellerstedt*. *See Friedlander*, 2020 WL 2845687, at *3–*17.

Because the Supreme Court's imminent decision in *June Medical* may fundamentally alter the standing analysis required in abortion litigation and may clarify the meaning and scope of *Hellerstedt*, and because of Secretary Friedlander's decision not to pursue this case further, Attorney General Cameron respectfully moves to intervene on behalf of the Commonwealth of Kentucky to ensure that its interests with respect to H.B. 454 are represented before this Court and, potentially, before the Supreme Court.

ARGUMENT

I. Attorney General Cameron is entitled to intervene of right on behalf of the Commonwealth.

A party may intervene of right if:

> (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). These four factors must 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)).

A. The Attorney General's motion on behalf of the Commonwealth is timely.

This Court weighs five factors to determine whether a motion to intervene is timely. They are:

> 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. 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)).

Regarding the first factor, Attorney General Cameron recognizes that this suit has substantially progressed. A state's intervention following the issuance of an appellate decision, however, is amply justified in circumstances such as this. The en banc Ninth Circuit reversed a panel's decision not to allow a state to intervene post-judgment because "[i]f we do not permit California to intervene as a party . . . there is no party in that case that can fully represent its interests." *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 941 (9th Cir. 2016) (en banc). That was because the original parties had declined to file a petition for en banc review. *Id.* at 940. So too here.[2] In another case,

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[2] Moreover, the Supreme Court sometimes invites an *amicus curiae* to brief and argue issues that have been abandoned by the parties. *See generally* Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907 (2011). Although not

the Ninth Circuit granted post-judgment intervention so that a state could file a petition for rehearing and a petition for certiorari. *Day v. Apoliona*, 505 F.3d 963, 966 (9th Cir. 2007) (order) ("Unless the State of Hawaii is made a party to these proceedings, no petition for rehearing can be filed in this Court, and there will be no opportunity for the Supreme Court to consider whether to grant certiorari."). As this Court has recognized in the closely related context of whether to grant intervention to a party seeking to appeal from a district court's judgment, "courts often permit intervention even after final judgment, for the limited purpose of appeal . . . ." *United States v. Detroit*, 712 F.3d 925, 932 (6th Cir. 2013).

Under the second factor, this Court has previously endorsed the exact purpose for which Attorney General Cameron seeks to intervene on behalf of the Commonwealth—to ensure that the validity of a state law is fully defended. In *Associated Builders & Contractors, Saginaw 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 this Court reversed. *Id.* at 390. In so doing, it recognized the importance of allowing a state to defend its laws through an appeal. The Court reasoned that "[t]he

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directly applicable, such a practice involves permitting a new "party" to a case that has advanced even past the stage at which this case finds itself.

existence of a substantial unsettled question of law is a proper circumstance for allowing intervention and appeal." *Id.* at 391. The ability of the state to appeal, the Court emphasized, "should be *liberally granted* where the judgment of the trial court raises substantial and important questions of law in relation to its correctness." *Id.* (emphasis added).

A similar concern is present here. Litigation about the constitutionality of laws like H.B. 454 is ongoing throughout the country. *Whole Women's Health v. Paxton*, 17-51060 (5th Cir.); *Hopkins v. Jegley* 17-2879 (8th Cir.). In fact, the issue is being litigated elsewhere in this circuit, as Judge Bush's dissent noted. *See Friedlander*, 2020 WL 2845687, at *22 (Bush, J., dissenting). This Court is the second circuit to weigh in on the issue. *W. Ala. Women's Center v. Williamson*, 900 F.3d 1310 (11th Cir. 2018), *cert denied* 139 S. Ct. 2606 (2019). In light of this ongoing litigation, there can be little doubt that there are "substantial and important questions of law" about the correctness of the panel's decision. *See Perry*, 115 F.3d at 391. The fact that the panel has already held H.B. 454 unconstitutional does not undermine this conclusion. *See Day*, 505 F.3d at 966 ("We note that Hawaii's legal arguments on the merits . . . are by no means frivolous, although we have concluded after careful consideration that they cannot be accepted under prior Ninth Circuit precedent."). The fact that the panel's decision was divided is proof positive of the "substantial and important questions of law" at play.

In addition, the Supreme Court is poised to decide *June Medical* which may well bear directly on the

correctness of the panel's decision. As discussed above, *June Medical* could provide substantial guidance about the meaning of *Hellerstedt* and about whether abortion providers have third-party standing—the issue on which Judge Bush dissented. *See Friedlander*, 2020 WL 2845687, at *24 ("One of the questions raised in *June Medical Services* is whether abortion providers have third-party standing to invoke constitutional rights of potential patients in challenging abortion laws."). The fact that two other circuits considering the constitutionality of live-dismemberment abortion laws like H.B. 454 have stayed those appeals to await *June Medical* underscores this point. Mar. 13, 2019 Order, *Whole Women's Health v. Paxton*, 17-51060 (5th Cir.); Mar. 19, 2020 Order, *Hopkins v. Jegley*, 17-2879 (8th Cir.). In short, the pendency of *June Medical* alone establishes that there are "substantial and important questions" as to the correctness of the panel decision. *See Perry*, 115 F.3d at 391.

Turning to the third timeliness factor, as previously noted, Attorney General Cameron was sworn in on December 17, 2019—not even six months ago. By that time, the Court had already scheduled oral argument, after which attorneys in Attorney General Cameron's office were retained to present oral argument on behalf of Secretary Friedlander. [App. R. 39]. But on June 9, 2020, Secretary Friedlander communicated that he would no longer defend H.B. 454. It was only at that time—*two days ago*—that Attorney General Cameron learned of his need to intervene on behalf of the Commonwealth to continue the defense of H.B. 454. As the Fifth Circuit recognized in a similar context, a court analyzing the timeliness of a motion to intervene

must consider "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." *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994). Here, Attorney General Cameron acted almost immediately upon learning that Secretary Friedlander was ending his defense of H.B. 454.

Regarding the fourth timeliness factor, the existing parties will not be prejudiced by the Attorney General's intervention on behalf of the Commonwealth. Indeed, Secretary Friedlander has already communicated to the Attorney General that he will not oppose this motion. Although the Attorney General's intervention on behalf of the Commonwealth will mean that this litigation will continue, that does not unduly prejudice the Plaintiffs-Appellees. On behalf of the Commonwealth, Attorney General Cameron is simply picking up where Secretary Friedlander left off. It does not prejudice the Plaintiffs-Appellees merely to have to litigate this case to its conclusion, whether before this Court or the Supreme Court. *See Buck v. Gordon*, 959 F.3d 219, 225 (6th Cir. 2020) ("The Dumonts and St. Vincent have *already* engaged in substantial discovery in the *DuMont* litigation, cutting *against* a finding of undue delay and prejudice because the same facts are relevant to the case brought by St. Vincent."); *see also Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977) ("[T]he relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case.").

Finally, regarding the fifth timeliness factor, Attorney General Cameron incorporates all of the unusual factors discussed above that demonstrate why intervention should be allowed. Those include the posture of this appeal at the time Attorney General Cameron assumed office; recently discovering that Secretary Friedlander will no longer defend H.B. 454; the Supreme Court's issuance of a potentially dispositive precedent within a few weeks; the fact that two other circuits have stayed challenges to live-dismemberment abortion laws to await issuance of *June Medical*; and that an injunction is currently in place to prevent enforcement of H.B. 454.

After considering all of these factors, and evaluating Attorney General Cameron's motion to intervene on behalf of the Commonwealth "in the context of all relevant circumstances," the Court should hold that the Attorney General's motion on behalf of the Commonwealth is timely. *See Zelman*, 636 F.3d at 284 (quoting *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472–73 (6th Cir. 2000)).

B. The Commonwealth through the Attorney General has a substantial legal interest in the subject matter of this case.

As to the second factor governing intervention of right—whether the Commonwealth through Attorney General Cameron has a sufficient legal interest in this matter—there can be no doubt. This Court subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right," *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), and

has determined that the term "'interest' is to be construed liberally," *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6thCir. 1987).

As this Court 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), *pet'n for certiorari docketed* (2020). 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); *see also* KRS 418.075(1). 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) (emphasis added). "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).

In light of Attorney General Cameron's status and duties as the Commonwealth's "chief law officer," there can be no question that he possesses a sufficient legal interest in this matter on behalf of the Commonwealth. This Court has squarely held that a state, through its

Attorney General, has a "*manifest legal interest* in defending the constitutionality of [its] laws." *N.E. Ohio Coalition for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006) (emphasis added). Therefore, Attorney General Cameron, on behalf of the Commonwealth, clearly satisfies the second factor to intervene as of right.

C. The Attorney General's interests on behalf of the Commonwealth may be impaired and are not adequately represented.

Finally, the Attorney General's interests on behalf of the Commonwealth may be impaired by this litigation and will not be adequately represented absent intervention. "[T]he requirement of impairment of a legally protected interest is a minimal one: the requirement is met if the applicant shows 'that representation of his interest may be inadequate.'" *Id.* (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)) (internal quotation marks omitted). Similarly, "[t]he State's burden with respect to establishing that its interest is not adequately protected by the existing party to the action is a minimal one; it is sufficient to prove that the representation *may* be inadequate." *Id.* at 1008.

Without intervention, the Commonwealth will be unable to enforce H.B. 454 going forward. As discussed above, Secretary Friedlander has decided that he is done defending H.B. 454. Unless the Attorney General on behalf of the Commonwealth becomes a party, Secretary Friedlander's decision will "hinder the State's ability to litigate the validity of the [Kentucky]

law." *Id.* at 1007–08. This directly impairs the Commonwealth's sovereign interests—interests that the Attorney General must represent. *See* KRS 15.020.

In addition, absent intervention, the Commonwealth's interests, as represented by the Attorney General, will not be adequately protected. *See Blackwell*, 467 F.3d at 1008 (recognizing that the state "has an independent interest in defending the validity of [its] laws and ensuring that those laws are enforced"). Secretary Friedlander's recent decision not to pursue this litigation further demonstrates the severity of the impairment of those interests. *See id.* ("The difference of opinion regarding whether to appeal the TRO is merely illustrative of the underlying divergent interest of the Secretary and the State."); *Perry*, 115 F.3d at 391 ("[A] decision not to appeal by an original party to the action can constitute inadequate representation of another party's interest." (citation omitted)).

II. The Attorney General on behalf of the Commonwealth should be granted permissive intervention.

Alternatively under Rule 24(b)(2), the Court may grant permissive intervention if the motion to intervene is timely and if the intervenor alleges "at least one common question of law or fact" that is already raised in the pending lawsuit. *Michigan*, 424 F.3d at 445 (discussing Fed. R. Civ. P. 24(b)(1)(B)). If those threshold requirements are met, the court "must then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion,

intervention should be allowed." *Id.* (quoting *Miller*, 103 F.3d at 1248).

For the reasons discussed above, this motion is timely. Likewise, Attorney General Cameron on behalf of the Commonwealth seeks to press "at least one common question of law" that has been raised in this suit—namely, the constitutionality of H.B. 454. Attorney General Cameron is seeking to assume the mantle of advocating the Commonwealth's interests in defending its laws, and the sovereign will of its people, through the exhaustion of all appellate remedies. As such, the Commonwealth's intervention, by and through the Attorney General, will not prejudice the other parties. Permissive intervention should be granted.

III. Intervention should be granted based upon Attorney General Cameron's role as a government party.

Rule 24(b)(2)(A) gives special consideration to government parties who seek permissive intervention into a lawsuit. For a government party, all that the rule requires is (i) a timely motion (ii) into a lawsuit where "a party's claim or defense is based on . . . a statute . . . administered by the officer or agency" (iii) with consideration of whether "the intervention will unduly delay or prejudice the adjudication of the original parties rights." *See id.* Under this rule, "permissive intervention is liberally granted to government officials 'when sought because an aspect of the public interest with which [the officer] is officially concerned is involved in the litigation.'" *Donahoe v. Arpaio*, 2012 WL 2675237, at *3 (D. Ariz. July 6, 2012)

(citing *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967); *S.E.C. v. U.S. Realty & Improvement Corp.*, 310 U.S. 434 (1940)). District courts across this circuit have granted permissive intervention to government officials under Rule 24(b)(2). *Smith v. Fed. Hous. Fin. Agency*, 2013 WL 12121334, at *2 (E.D. Tenn. Jan. 22, 2013); *Gillie v. Law Office of Eric A. Jones, LLC*, 2013 WL 4499955, at *5 (S.D. Ohio Aug. 21, 2013). This Court should do the same.

Here, Attorney General Cameron has a duty to defend the Commonwealth. *See, e.g.*, KRS 15.020. Moreover, Attorney General Cameron has specific authority to administer H.B. 454 and other abortion-related laws. KRS 15.241 provides the Attorney General with the authority to seek injunctive relief to prevent violations of certain abortion-related laws and the administrative regulations promulgated in furtherance thereof. Therefore, the requirements of Rule 24(b)(2) are met. For the reasons described above, this motion to intervene is timely and will not prejudice the existing parties or unduly delay the resolution of this matter.

MOTION FOR EXPEDITED REVIEW

Under Sixth Circuit Rule 27(c), and for the reasons set forth above, the Attorney General respectfully requests that this Court grant expedited review of this motion to intervene, as he has demonstrated good cause as to why the motion should receive expedited review—namely, in light of the upcoming deadline for filing a petition for rehearing and Secretary Friedlander's decision not to pursue this litigation

further. The filings required by Sixth Circuit Rule 27(c)(2) are attached.

CONCLUSION

On behalf of the Commonwealth of Kentucky, Attorney General Daniel Cameron respectfully requests that he be permitted to intervene and that this motion receive expedited review.

Respectfully submitted,

s/ Barry L. Dunn
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 19-5516

[Filed June 12, 2020]

EMW WOMEN'S SURGICAL CENTER, P.S.C., *et al.*,	)
Plaintiffs-Appellees	)
v.	)
ERIC FRIEDLANDER, in his official capacity as Acting Secretary of the Cabinet for Health and Family Services of the Commonwealth of Kentucky	)
Defendant-Appellant	)

On Appeal from the United States District Court for the Western District of Kentucky at Louisville, Case No. 3:18-cv-224-JHM

NOTICE OF INTENT TO OPPOSE

Plaintiffs-Appellees in the above-captioned appeal hereby notify the Court of their intent to oppose the motion to intervene filed yesterday, June 11, 2020, by Kentucky Attorney General Daniel Cameron, Dkt. 56, and respectfully request until June 22, 2020 to respond. *See* Fed. R. App. P. 27 (responses "must be filed within 10 days after service of the motion unless the court shortens or extends the time"). Plaintiffs-

Appellees do not believe that intervention by the Attorney General for purposes of seeking *en banc* review should be permitted. To permit the orderly resolution of the intervention motion, however, Plaintiffs-Appellees would not oppose an extension of the deadline to file a petition for rehearing *en banc*, which the Attorney General cites as the basis for his request for expedited review.

According to the Attorney General, who until just yesterday represented Defendant-Appellant Secretary Friedlander in this matter, *see* Dkt. 55, he learned on June 9, 2020, that Secretary Friedlander would not be pursuing *en banc* review of this Court's June 2 Opinion and Order, *see* Dkt. 56 at 11. Yet, while the Attorney General was well aware that the deadline to file a petition for rehearing *en banc* in this case is June 16, 2020, *see* Fed. R. App. P. 40(a)(1), he waited two days to inform the parties and this Court of his intention to move to intervene. To provide Plaintiffs-Appellees and the Court adequate time to consider this extraordinary request, Plaintiffs-Appellees respectfully request that they be permitted the ten days authorized by Federal Rule of Appellate Procedure 27 to respond, and have no objection to this Court extending the deadline for seeking *en banc* review to adequately consider the issue.

If, however, the Court is not inclined to extend the *en banc* petition deadline, Plaintiffs-Appellees respectfully request until 6 p.m. on Monday, June 15 to respond to the Attorney General's motion.

Dated: June 12, 2020.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 19-5516

[Filed June 15, 2020]

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

Plaintiffs-Appellees

v.

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

Defendant-Appellant

On Appeal from the United States District Court for the Western District of Kentucky at Louisville, Case No. 3:18-cv-224-JHM

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION TO INTERVENE BY ATTORNEY GENERAL DANIEL CAMERON

INTRODUCTION

Two years after the Attorney General sought and received a court-ordered stipulation of dismissal from this case, six months after the current Attorney General took office, and one week after this Court

affirmed the judgment below, the Attorney General moves to intervene to pursue *en banc* or certiorari review. The relief he requests is as unwarranted as it is unprecedented. Faithfully applying Federal Rule of Procedure 24's timeliness requirement, this Court has never authorized intervention after a panel decision. And *no* court in the entirety of federal jurisprudence has done so to allow what the Attorney General wishes to do here: Press a new argument that the party on whose side intervention is sought deliberately forfeited on appeal.

The unprecedented untimeliness of the Attorney General's motion alone mandates that it be denied, but there is far more. The Attorney General's Office relinquished its interest in this case when it sought and received a court-ordered stipulation of dismissal, meaning that the Attorney General lacks a Rule 24 interest in the appeal, lacks Article III standing, and should be judicially estopped from attempting to reverse course at the eleventh hour. And the Attorney General's disagreement with Appellant's litigation strategy not to pursue extraordinary post-decision review does not establish inadequacy of representation. The motion must be denied.

BACKGROUND[1]

H.B. 454 (the "Act") prohibits the standard second-trimester abortion method. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 19-5516, 2020 WL 2845687, at *14 (6th Cir. June 2, 2020).

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[1] Unless otherwise indicated, all quotation marks and citations have been omitted and all emphases supplied.

The Act took effect upon then-Governor Bevin's signature on April 10, 2018, and Plaintiffs filed suit that same day, naming the Attorney General, in his official capacity, as one of the Defendants. [Compl. R.1, PageID##1–2]. The following month, the Attorney General, acting in his official capacity, stipulated to the entry of a court order voluntarily dismissing his Office from the litigation. [Stipulation & Order of Dismissal, R. 51, PageID##697-699]. The Attorney General's dismissal was subject to a series of conditions, including, *inter alia*:

> (1) "the agreement of [the Attorney General] and all personnel employed by or associated with the Office of the Attorney General [] to not bring any future enforcement[] action of any kind with respect to Plaintiffs arising from H.B. 454 . . . until a Court enters a final judgment in the matter disposing of all the claims, and the exhaustion of any and all appeals that may arise"; and
>
> (2) the agreement of the Attorney General, "in his official capacity [], that any final judgment . . . concerning the constitutionality of H.B. 454 (2018) will be binding on the Office of the Attorney General, subject to any modification, reversal or vacation of the judgment on appeal."

[*Id.*] The Executive Director of the Kentucky Board of Medical Licensure was also voluntarily dismissed from the case before trial, leaving then-Secretary for the Cabinet of Health and Family Services Meier (the "Secretary") and the Commonwealth Attorney to

defend the Act. [*See* Stipulations and Orders of Dismissal, R.51-52, PageID##697-702].

After a five-day bench trial in November 2018, during which both sides presented extensive expert testimony and documentary evidence, the District Court concluded that H.B. 454's enforcement would effectively ban abortion beginning at 15 weeks, imposing an undue burden, and entered judgment for Plaintiffs. *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807, 826 (W.D. Ky. 2019). The District Court's decision was supported by detailed factual findings, *id.* at 817-25, which mirrored the findings of every court considering comparable evidence in challenges to similar restrictions, *id.* at 815-17.

The Commonwealth (via the Secretary) appealed. In its appeal, the Commonwealth did not press the third-party standing argument that had been rejected by the District Court, *Meier*, 373 F. Supp. 3d at 813, purporting to "preserve[] [the] right to argue that EMW lacks standing to prosecute this case on behalf of women seeking an abortion." App. Br. at 25 n.3; *but see United States v. Huntington Nat'l Bank*, 574 F.3d 329, 331 (6th Cir. 2009) ("[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.").

Prior to appellate argument, Kentucky held elections, with Andy Beshear being elected Governor and Daniel Cameron elected Attorney General. The new Attorney General did not attempt to intervene in this matter; rather, along with the same lawyers who had litigated the case from the beginning, he entered

an appearance on behalf of now-Acting Secretary Friedlander. *See e.g.*, Dkts. 5-6, 11, 45-48.

On June 2, 2020, this Court issued its opinion affirming the District Court's judgment. *EMW*, 2020 WL 2845687, at *17. This Court concluded that the Commonwealth failed to preserve any argument on third-party standing, noting that the Commonwealth had not renewed on appeal the standing arguments that had been "cursorily argued" and "rightly rejected" below, and that a single-sentence reference in the Commonwealth's brief did not preserve the issue. *Id.* at *4 n.2.

On the merits, this Court emphasized the fact-bound nature of the District Court's judgment, explaining that "the clear error standard . . . presents a particularly high hurdle for the appellant to overcome," and concluding that the "thorough judicial record [compiled] over the course of a five-day bench trial," *id.* at *4, amply supported the District Court's factual findings on all fronts, *id.* at *7-14; *see also id.* at *8, *10-11. This Court also recognized that "in every challenge [to similar laws] brought to date," courts have made similar factual findings and "enjoined the law, finding that it indeed unduly burdens th[e] [abortion] right." *Id.* at *3 (collecting cases); *id.* at *7, *10-11.

Now—nearly two years after the Attorney General stipulated to his dismissal from this action, nearly six months after entering an appearance on behalf of the Secretary, and over a week after this Court issued its decision—the Attorney General moves to intervene on the basis that the Secretary elected not to pursue the

extraordinary steps of seeking rehearing *en banc* or petitioning for certiorari. The motion announces the Attorney General's intent to seek *en banc* review on the issue of third-party standing, notwithstanding that the issue was never briefed on appeal.

ARGUMENT

I. Intervention as of Right Is Improper.

Four factors govern the Court's review of the Attorney General's extraordinary request to intervene as of right after this Court decided this case. The movant must establish that "(1) their motion to intervene was timely; (2) a substantial, legal interest in the subject matter of the case; (3) their ability to protect that interest may be impaired without intervention; and (4) the parties before the court may not adequately represent their interest." *In re Troutman Enters., Inc.*, 286 F.3d 359, 363 (6th Cir. 2002); *see also* Fed. R. Civ. P. 24(a)(2). The Attorney General "must prove each of the four factors; failure to meet one of the criteria will require that the motion to intervene be denied." *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005). Given the posture of this case, the Attorney General cannot satisfy even one factor, let alone four.

A. The Attorney General's Motion Is Untimely.

The Attorney General's motion is not merely untimely. It falls so far outside Rule 24's timeliness threshold that the Attorney General cannot identify a single decision where intervention was authorized after a court of appeals' decision under anything comparable to the circumstances present here. To call

such eleventh-hour maneuvering "timely" would strip that word of meaning.

This Court considers five factors to assess an intervention motion's timeliness, evaluating them "in the context of all relevant circumstances":

> 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). As this Court has made clear, "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, at *2 (6th Cir. 1995). The Attorney General's motion exemplifies such disfavored filings.

With respect to the first factor, the Attorney General pays lip service to the "substantial[]" progression of this suit, Mot. to Intervene, dkt. 56 ("Mot.") 6, but points to cases where intervention has been authorized following the district court's judgment for purposes of *taking* an appeal, *id.* at 7-8 (citing, *e.g.*, *United States v. Detroit*, 712 F.3d 925, 932 (6th Cir. 2013)). Even in those circumstances, courts have routinely admonished that appellate-stage intervention

is permissible "only in an exceptional case for imperative reasons." *Amalgamated Transit Union Intern., AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985); *accord In re Syntax-Brillian Corp.*, 610 F. App'x 132, 135 n.6 (3d Cir. 2015) (noting the "high threshold for intervening for the first time on appeal"); *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997); *BASF-Inmont*, 52 F.3d at *5.

But those are decidedly not the circumstances here—where intervention is sought not to appeal, but to seek *en banc* review after the court of appeals has decided the case—and thus the decisions the Attorney General invokes on timeliness are largely inapposite. *See, e.g.*, *Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 389 (6th Cir. 1997) (addressing intervention to appeal district court decision). "Where, as 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*, 771 F.2d at 1553 (emphasis in original); *see also id.* at 1553 n.5 (citing decisions "uniformly" holding such motions untimely); *accord* 7C Charles Alan Wright & Arthur R. Miller, Fed. Practice and Procedure § 1916 (3d ed. 2020) ("There is even more reason to deny an application to intervene made . . . after the judgment has been affirmed on appeal.").

Indeed, so disfavored are such motions that the Attorney General can identify *no* decision authorizing such belated intervention from this Circuit, and just

two in the entirety of federal jurisprudence. Mot. 7 (citing *Peruta v. Cty of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007)). Those two decisions, meanwhile, do not help the Attorney General. As the Ninth Circuit took pains to emphasize, the proposed intervention in *Apoliona*, while profoundly belated, would not "interject new issues into the litigation," 505 F.3d at 966. And in *Peruta*, the court held intervention was timely because the state-intervenor *could not have known* the constitutionality of its laws were at issue until the panel issued its decision. 824 F.3d at 940. That is the very opposite of the Attorney General's motion, which seeks to interject new arguments about third-party standing, which the Appellant in this case—represented until just moments ago by the Attorney General himself—had expressly declined to pursue. *See EMW*, 2020 WL 2845687, at *4 n.2.

This attempt, through last-minute intervention, to litigate issues that Appellant chose to forfeit throughout the pendency of this appeal likewise demonstrates the Attorney General's deficiencies on other timeliness factors—namely, "the purpose for which intervention is sought" and "the prejudice to the original parties." *Blount-Hill*, 636 F.3d at 284. Simply put, intervening to seek *en banc* review of arguments deliberately forfeited *by the same lawyers* on appeal is a purpose entirely unsupported by any of the precedent the Attorney General cites. *See, e.g.*, *Peruta*, 824 F.3d at 941; *Day*, 505 F.3d at 966. And waiting until the *en banc* stage to raise arguments that Appellant forfeited would unquestionably prejudice Appellees, who "have an interest in the expeditious and efficient disposition

of this action" and who should not be required to respond to last-minute argument-by-ambush. *Blount-Hill*, 636 F.3d at 286-87. The Attorney General is not "picking up where Secretary Friedlander left off." Mot. 11-12. He is picking up what Secretary Friedlander left out. At this late hour, that is prejudicial. *See, e.g.*, *Day*, 505 F.3d at 966 ("interject[ing] new issues into the litigation" at this stage would be prejudicial); *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1232 (1st Cir. 1992) (attempted intervention causing "last minute disruption" is prejudicial).[2]

Moreover, "the length of time preceding the application during which the proposed intervenor[] knew or should have known of [his] interest in the case" further reflects the untimeliness of the Attorney General's filing. *Blount-Hill*, 636 F.3d at 284. Decisions from this and other Circuits demonstrate that public statements of a new administration on the topic at issue in ongoing litigation may put would-be

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[2] While the Attorney General places primary emphasis on his newfound desire to litigate third-party standing—calling it "potentially dispositive" despite not having preserved the point when representing the Appellant, Mot. 4—he also wishes to intervene to challenge the merits of the Court's decision. As noted above, this Court has never authorized intervention at such a late stage of a case. The Attorney General has not justified his request that the Court break new ground here, where the panel's fact-bound decision (a) affirms trial findings that the Appellant did not even attempt to argue were clearly erroneous, *see EMW*, 2020 WL 2845687, at *12; and (b) aligns with an unbroken consensus of courts, *id.* at *3. *Cf. United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) (Murphy, J., concurring in the denial of rehearing en banc) ("[T]he circuits have historically been loath to create a split where none exists.").

intervenors on notice that their interests in the litigation are implicated. *See Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2017 WL 10350992, at *1 (6th Cir. Mar. 27, 2017) (timeliness of intervention measured from beginning of new administration where "EEOC's recent actions imply that the new administration will less aggressively pursue transgender rights"); *United States House of Representatives v. Price*, No. 16-5202, 2017 WL 3271445, at *2 (D.C. Cir. Aug. 1, 2017) ("The States have filed within a reasonable time from when their doubts about adequate representation arose due to accumulating public statements by high-level officials . . .").

Here, the Attorney General has known of—and publicly criticized—Governor Beshear's position on abortion since well before both took office.[3] If the Attorney General wished to guarantee that this litigation would exhaust every discretionary and extraordinary step (rehearing *en banc*, petitions for certiorari), he has been on notice that his litigation preferences might not carry the day since he and Governor Beshear took office more than six months ago. It is telling that the motion does not even attempt

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[3] *See, e.g.*, Bruce Schreiner & Dylan Lovan, *Democratic Candidates Stake Out Stances on Abortion*, Associated Press (Apr. 30, 2019), https://apnews.com/8943d79e37724da6ab0f370c312f9a50; Ryland Barton, Cameron, *Stumbo Square Off In Kentucky Attorney General Debate*, Kentucky Public Radio (Oct. 14, 2019), https://wfpl.org/cameron-stumbo-square-off-in-kentucky-attorneygeneral-debate/ ("Current Attorney General Andy Beshear has said he will not defend some of the [abortion] laws"; then-candidate Cameron criticized that position).

to identify any impediment to seeking intervention then, as opposed to in the "final stages" of this appeal after the Court decided the case. *BASF-Inmont Corp.*, 52 F.3d at *2.

The final timeliness factor focuses on "the existence of unusual circumstances militating against or in favor of intervention." *Blount-Hill*, 636 F.3d at 284. That the timing of the Attorney General's motion is not just unusual but unprecedented militates firmly against intervention. This Court has never found a post-panel decision intervention motion timely, and *no* federal court has done so under the circumstances here—where intervention is sought "*after* the court of appeals has decided a case" in order to pursue *en banc* review of an issue not briefed by the parties because it was forfeited by the lawyers who now represent the would-be intervenor. *Amalgamated Transit*, 771 F.2d at 1553 (emphasis in original). The Attorney General's motion is untimely, and for that reason alone it must be denied.

B. The Attorney General Cannot Establish Article III Standing Or a Substantial Legal Interest in the Subject Matter.

Even if the Attorney General's motion to intervene were timely, it would fail. Supreme Court and Sixth Circuit precedent instructs that where, as here, the proposed intervenor attempts to "appeal a decision the primary party does not challenge, an intervenor must independently demonstrate standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *see also Chapman v. Tristar Products, Inc.*, 940 F.3d 299, 304 (6th Cir. 2019) ("[I]ntervenors must establish

Article III standing if they wish to *appeal* the outcome of a lawsuit."); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005) (same). Article III's injury-in-fact requirement—which "mandates that [a] party allege such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction"—is "stricter than the substantial interest inquiry" for intervention as right. *Providence Baptist Church*, 425 F.3d at 318. As set forth below, the Attorney General fails to satisfy Rule 24's substantial legal interest requirement, and he therefore necessarily lacks the "personal stake" necessary for Article III standing to press the appeal. *Id.*; *see also Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) (where "[m]ovants lacked any significant protectable interest that would make them eligible for intervention under Rule 24(a)[,] [i]t necessarily follows that they lack Article III standing to appeal the merits of the constitutional holding below").

Rule 24 requires that an intervenor have a "direct, substantial, legally protectable interest" in the action, such that it is a "real party in interest in the transaction which is the subject of the proceeding." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1246 (6th Cir. 1997). "[T]his does not mean that any articulated interest will do." *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir. 2007). Rather, "[t]o intervene as a matter of right, the [proposed intervenor] must show that an unfavorable disposition of the action may impair [its] ability to protect [its] interests in the litigation."

Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991).

The sole "legal interest" asserted by Attorney General—a general interest in "defend[ing] actions on behalf of the [] Commonwealth" derived from his "status and duties as the Commonwealth's 'chief law officer,'" Mot. 14-16—falls short. The Attorney General renounced any official-capacity interest in defending the Act and resolved his role in this case when he sought and entered into the May 21, 2018 court-ordered stipulation of dismissal. [Stipulation & Order of Dismissal, R. 51, PageID##697-699].[4]

"A party's stipulations are binding on that party and may not be contradicted by him at trial or on appeal. It follows from these two propositions that a government official, sued in his representative capacity, cannot freely repudiate stipulations entered into by his predecessor in office during an earlier stage of the same litigation." *Morales Feliciano v. Rullan*, 303 F.3d 1, 7-8 (1st Cir. 2002) (Secretary bound by stipulation entered with the consent and active cooperation of his predecessor in office); *see also Corbin v. Blankenburg*, 39 F.3d 650, 654 (6th Cir. 1994) ("[A] substituted party steps into the same position of the

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[4] This assumes *arguendo* that such an interest would be sufficient in the first place, which this Court's prior decisions call into question. *Cf. Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d. 1412, 1416 (6th Cir. 2016) ("General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law."); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 444-46 (6th Cir. 2019).

original party."). Attorney General Cameron, as the "individual officeholder," cannot now use intervention to sidestep the court-ordered agreement that *his Office*—"the real party in interest" in an official capacity suit—sought and committed to. *Karcher v. May*, 484 U.S. 72, 78 (1987) ("[T]he real party in interest in an official-capacity suit is the entity represented and not the individual officeholder.").

The equitable doctrine of judicial estoppel likewise precludes what the Attorney General seeks to do here. After having "assume[d] a certain position in a legal proceeding, and succeed[ed] in maintaining that position," the Attorney General cannot engage in an about-face "simply because his interests have changed" and "assum[e] a contrary position" that is "to the prejudice the party who acquiesced to the previous position." *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) (quoting *N.H. v. Me.,* 532 U.S. 742, 749 (2001)); *see also Yniguez v. State of Ariz.*, 939 F.2d 727, 738-39 (9th Cir. 1991) (Attorney General estopped from intervening to appeal decision after previously securing his dismissal from the case by representing to the district court that he did not want to be a party to the litigation).

Having relinquished any official-capacity interest in defending the Act, the Attorney General has no leg to stand on. To the extent he claims some free-floating interest on behalf of the Commonwealth *separate and apart* from his official duties, he provides nothing to support this. Indeed, every citation in the Attorney General's brief regarding his role and duties as "chief law officer" speak to the *official-capacity* authority

that, for purposes of this litigation, was resolved in May 2018. Mot. 14-15. When stripped of the veil of "official-capacity" authority, all that remains is the Attorney General's general ideological "interest" in defending an abortion restriction. But as this Court has made clear, such an interest "cannot be deemed substantial." *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2017) (internal citations omitted). Accordingly, the Attorney General lacks a "substantial legal interest" in the matter, and, of necessity, cannot satisfy the stricter requirement of Article III standing, which is required to press this appeal.

C. Denial of Intervention Will Not Impair the Attorney General's Interests, Which Have Been Adequately Represented by Secretary Friedlander.

The Attorney General cannot satisfy the third and fourth factors for intervention as of right either. *See Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 343 (6th Cir. 2007). Because the Attorney General cannot establish a substantial legal interest "on behalf of the Commonwealth" in maintaining this appeal, let alone Article III standing, it follows *a fortiori* that his ability to protect such an interest will not be impaired if intervention is denied. Indeed, the Attorney General could not even enforce H.B. 454 unless, *e.g.*, (1) the Commonwealth attorney "requests in writing the assistance of the Attorney General," Ky. Rev. Stat. § 15.190, or (2) the Governor requests his participation in writing, *id.* § 15.200. Thus, regardless of the outcome of this litigation, the Attorney General

would have no independent enforcement authority under H.B. 454, and thus no such interest could be impaired by the denial of intervention in this case.[5]

Further, the Attorney General is incorrect that his purported interests are not adequately represented by the Secretary simply because the Secretary opted not to seek *en banc* review. Mot. 15-17, 19-20. "[D]isagreement over litigation strategy . . . does not, in and of itself, establish inadequacy of representation." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *see also Ruiz v. Collins*, 981 F.2d 1256, 1256 (5th Cir. 1992) (representation not "inadequate because [counsel] will not make all the arguments [the proposed intervenor] would make if he had his druthers"). And while this Court has held that "a decision not to appeal by an original party to the action *can* constitute inadequate representation of another party's interest," *Mich. State AFL-CIO*, 103 F.3d at 1248, such cases have been limited to decisions to appeal from district court decisions, *see* Mot. 15-17. Indeed, as discussed *supra*, appellate-stage intervention is generally

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[5] Nor does the Attorney General have an absolute duty under Kentucky law to defend H.B. 454. As this Court has recognized, Kentucky law "does not require the Attorney General to represent the Commonwealth 'where it is made the duty of the Commonwealth's attorney []' instead." *EMW v. Beshear*, 920 F.3d at 445 (quoting Ky. Rev. Stat. § 15.020). In fact, even in state court, "the Attorney General is not required by law to participate in any proceeding . . . regarding a potential constitutional challenge." *Com. v. Hamilton*, 411 S.W. 3d 741, 751 (Ky. 2013). Thus, even if the Attorney General had a substantial legal interest in this matter (which he does not), the extent to which this interest would be "impaired" if intervention is denied is vastly overstated.

disfavored, and is reserved only for exceptional circumstances. *See also Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 396 (6th Cir. 1993) ("The intervenors chose to rely on the Attorney General's best efforts, which they were entitled to do. They are not, however, entitled to then enter the proceedings after the case has been fully resolved, in an attempt to achieve a more satisfactory resolution."). This Court has never held that the decision not to petition for *en banc* review or certiorari constitutes inadequate representation.

This case provides no justification for breaking new ground. The Attorney General does not dispute that the Secretary "vigorously defended against the challenge[] [to H.B. 454] within the bounds of existing law and court decisions." *Ragsdale v. Turnock*, 941 F.2d 501, 505 (7th Cir. 1991). This includes appealing the District Court decision below. But seeking *en banc* review is altogether different. As this Court's rules make plain, a "petition for rehearing en banc is *an extraordinary procedure* intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or *an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent*." 6 Cir. I.O.P. 35(a). For this reason, this Court has recognized that "[c]ounsel fully discharges his or her duty in a case without filing a petition for rehearing en banc" unless the case meets these "rigid standards." 6 Cir. R. 35(c).

To the extent the Attorney General now disagrees with the Secretary's decision not to invoke this extraordinary procedure, reserved for only the most extreme cases, it is just that—a disagreement. The

panel's fact-bound decision places this case far outside the bounds of what is considered appropriate for *en banc* review, *see* 6. Cir. I.O.P. 35(a)—or *certiorari*, for that matter, *see* Supreme Court R. 10. Moreover, there is no conflict with Supreme Court or Sixth Circuit precedent, as the panel's decision is likewise consistent with every district, appellate, and Supreme Court case to ever consider a ban on D&E abortion. *See EMW II*, 2020 WL 2845687 at *3, *6. That the primary basis for the Attorney General's putative *en banc* petition appears to be an issue *his own lawyers* forfeited when they represented the Secretary in this case only further underscores that the issue here is not one of inadequate representation by the Secretary, but a difference of opinion and strategy. That is not a sufficient basis to justify intervention, particularly at this late stage in the litigation.

II. The Attorney General Should Not Be Granted Permissive Intervention.

The Attorney General's request for permissive intervention should also be denied. To obtain permissive intervention under Rule 24(b)(1), a proposed intervenor must "establish that the motion for intervention is timely and alleges at least one common question of law or fact." *Michigan*, 424 F.3d at 445. "The decision to permit intervention is wholly discretionary." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019). Because of its discretionary nature, courts "analyze the timeliness element more strictly than [they] do with intervention as of right." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997); *see also R*

& G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 8 (1st Cir. 2009) (timeliness requirement for permissive intervention is stricter than requirement for intervention as of right, which itself has "considerable bite"). In exercising its discretion, the Court must also "balance undue delay and prejudice to the original parties," as well as "any other relevant factors" to determine whether to allow intervention. *Michigan*, 424 F.3d at 445.

For the reasons described above, the Attorney General's motion is untimely; late-breaking permissive intervention would therefore cause significant prejudice to Plaintiffs-Appellees and undue disruption of these proceedings. The Attorney General does not cite a single authority––Sixth Circuit or otherwise—granting permissive intervention at the *en banc*-petition or even appellate stage of the case. *See* Mot. 17-18. That is because this Court routinely denies as untimely permissive-intervention motions at far earlier stages. *See, e.g., Blount-Hill*, 636 F.3d at 287; *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 757 (6th Cir. 2018); *accord Hodges, Grant & Kaufmann v. U.S. Gov't, Dep't of Treasury, I.R.S.*, 762 F.2d 1299, 1302 (5th Cir. 1985).[6]

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[6] The issues of untimeliness here are compounded by the practical risks stemming from "the State's having two representatives at the same time," which would "needlessly complicate" this case. *Kaul*, 942 F.3d at 803-04 (denying legislature's permissive-intervention motion when it sought to second-guess attorney general's strategic litigation decisions). The Secretary, as a representative of the Commonwealth, has determined that further litigation of this fiercely litigated dispute exposes the Commonwealth to increased costs and risks of attorneys' fees obligations without a

Nor is the Attorney General's request for special permissive-intervention consideration under Rule 24(b)(2)(A) compelling. *See* Rule 24(b)(2)(A) (providing that "on a 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"). As set forth *supra*, the Attorney General has no independent authority to "administer" H.B. 454. Moreover, as also set forth *supra*, to the extent he can administer H.B. 454 at all, his Office asked to be dismissed from this case, and was dismissed upon a stipulated court order wherein the Attorney General agreed to be bound by the judgment.

CONCLUSION

For the foregoing reasons, the Attorney General's motion should be denied.

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corresponding benefit. The Attorney General, purporting to represent interests of the same Commonwealth, is attempting to substitute his judgment for the reasoned strategic decision the Commonwealth's advocate has already made.

Dated: June 15, 2020

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5516

[Filed June 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. 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
Honorable Joseph H. McKinley, Jr.

REPLY IN SUPPORT OF MOTION TO INTERVENE BY ATTORNEY GENERAL DANIEL CAMERON, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY

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INTRODUCTION

This case is about the constitutionality of a Kentucky law enacted by the state legislature with a broad, bipartisan majority. Surely the Commonwealth has a significant interest in ensuring that its laws are defended in front of every court and in every appeal. That's all this motion is about. Within 48 hours of learning that Secretary Friedlander would no longer defend H.B. 454, Attorney General Cameron moved to intervene on behalf of the Commonwealth, so as to prevent a duly enacted law from being rendered invalid because of a state official's inaction.

The Plaintiffs object, but not because there is any real prejudice that will result from the Attorney General's intervention. Nor because any case law forecloses such a request. They object because Kentucky's recent election might afford them a litigation windfall of sorts, as the public official previously representing the Commonwealth's interest in this case will no longer do so. But the legislative acts of a sovereign state should not live or die on the whims

of one official, particularly when the Commonwealth's chief law officer—who is an independently elected constitutional officer—is willing to step in and assume responsibility. Attorney General Cameron is not asking to do anything more than exhaust the Commonwealth's appellate rights. The law of this circuit and the United States Supreme Court demands he be allowed to do so.

ARGUMENT

I. The motion to intervene is timely.

The Plaintiffs take a myopic approach toward timeliness. They focus on how far the litigation has progressed to the exclusion of the context that drives the overall analysis. In most cases, late-stage intervention is problematic because a new party with different interests attempts to intervene in a way that will disrupt the litigation. So it is no help to point out, as the Plaintiffs do, that "courts have routinely admonished that appellate-stage intervention is permissible only in an exceptional case for imperative reasons." [*See* Plaintiffs' Resp. at 9 (cleaned up)]. *This* is precisely that case.

The Plaintiffs take the wrong lesson from the unusual nature of this case. They claim that motions to intervene at this stage are disfavored, relying on the fact "that the Attorney General can identify *no* decision authorizing such belated intervention from this Circuit." [Resp. at 10]. That's true. But neither do the Plaintiffs identify any decision from this circuit *denying* intervention at this stage.

The better way to resolve the timeliness issue is to look at what other courts have done in similar contexts.

And the only cases bearing a resemblance to this one are those in which the Ninth Circuit granted post-panel intervention to preserve the state's interests. *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 940–41 (9th Cir. 2016) (en banc); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). As here, *Peruta* and *Apoliona* involved the unusual circumstance of a state finding itself with no one to defend its interests after the panel ruled. And in both cases, the Court of Appeals granted intervention to allow the state to finish the appeal by seeking rehearing or *certiorari*. These are common-sense decisions that recognize the sovereign interests at stake when a state has been sued over the validity of its laws.

The Plaintiffs wrongly argue that this case is different from those. Contrary to their claim otherwise, Attorney General Cameron does not intend to "interject new arguments" into this litigation, nor could he have known prior to last week that the Commonwealth's interests would not be adequately represented. While the Plaintiffs identified third-party standing as a "new issue," it was addressed by the trial court, discussed during oral argument on appeal, and analyzed in Judge Bush's dissent.[1] Regardless, the Attorney General intends to continue defending the law on the merits, particularly in light of the pending *June Medical* decision and its effect on *Hellerstedt*—the case figuring most prominently in the panel's decision. So, the Plaintiffs' "new issue" argument is just sleight of hand.

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[1] Third-party standing, which is considered a matter of prudential standing, cannot be waived. *See Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994).

Moreover, Attorney General Cameron could not have known earlier that Secretary Friedlander would forgo litigating this case. The Secretary had retained counsel from the Attorney General's office to represent him at oral argument. By taking that step, rather than simply dismissing the appeal, Secretary Friedlander gave no indication he would reverse course. Just as in the Ninth Circuit decisions, Attorney General Cameron intervened as soon as he learned of Secretary Friedlander's decision. Thus, to agree with the Plaintiffs is to split with the Ninth Circuit.

Tellingly, the Plaintiffs barely acknowledge precedent from this circuit that allowed appellate intervention under similar circumstances. *See Assoc. Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 389–90 (6th Cir. 1997). As here, the attorney general in *Perry* intervened to prosecute an appeal once he discovered that the official representing the state no longer intended to do so. This Court allowed it, acknowledging hat the state's interest was no longer adequately represented. *Id.* at 391. Yet the Plaintiffs devote barely a sentence in their brief to discussing *Perry*, distinguishing it on the specious grounds that it concerned an appeal from the trial court, not an *en banc* rehearing or appeal to the Supreme Court. [Resp. at 9]. Why does that matter? Surely a state's interest on appeal is just as significant whether appearing before a three-judge panel, an *en banc* court, or in the Supreme Court.

Instead of discussing this circuit's precedent, the Plaintiffs point to *Amalgamated Transit Union International, AFL-CIO v. Donovan*, 771 F.2d 1551

(D.C. Cir. 1985), a case denying intervention by a municipal body after the panel's decision. *Id.* at 1553–54. The Plaintiffs leave out *why* the *Donovan* court denied intervention. It held that intervention would be "unduly disruptive and place[ ] an unfair burden on the parties to the appeal" because the intervenor sought to represent *entirely new interests*. *Id.* at 1553. That is not the case here. As even the Plaintiffs acknowledge, Secretary Friedlander represented the *Commonwealth's interest* in this litigation, [Resp. at 4], and Attorney General Cameron seeks only to represent that same interest now.[2]

The Plaintiffs also contend that the Attorney General should have intervened earlier because Governor Beshear's stance on abortion was well-known. [Resp. at 12–13]. But this misses the point and, if the premise is accepted, will lead to a plethora of motions to intervene in federal litigation after administrations change. Less than two weeks after Attorney General Cameron began his term, Secretary Friedlander—Governor Beshear's top health-care official—requested attorneys within the Office of the Attorney General to represent him before this Court. [*See* Appearance, App. R. 41]. And not just any attorney, it was the attorneys who represented the previous Secretary prior to the election. Under those

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[2] Other cases the Plaintiffs cite suffer from this same flaw. The Plaintiffs do not distinguish between *new* parties that represent *new* interests intervening late in the game. *See, e.g., In re Syntax-Brillian Corp.*, 610 F. App'x 132, 135 n.6 (3d Cir. 2015) (rejecting motions to intervene without discussion of who the parties are); *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000) (denying a "conclusory motion" to intervene by multiple parties).

circumstances, how could Attorney General Cameron have known that Secretary Friedlander would decline to continue the appeal after the panel's decision? Even after Governor Beshear's inauguration, his administration continued to defend the law before this Court.

The premise that Attorney General Cameron waited too late to file this motion strains credulity. He filed a 20-page motion within 48 hours of learning that Secretary Friedlander would no longer defend Kentucky's law. He is not asking for delays that might disrupt the ordinary appellate process. The Attorney General has moved swiftly to ensure that the existing deadlines will still be met.[3] This is the definition of a timely request.

II. The Attorney General has standing to represent the Commonwealth's interests on appeal.

"A state may designate an agent to represent its interests in court. This is most commonly the state's Attorney General." *State by and through Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 515 (6th Cir. 2019). Kentucky is no different.

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[3] Despite objections over timeliness, the Plaintiffs indicated they have no objection to extending the time for parties to file for rehearing *en banc*. [App. R. 57]. But Attorney General Cameron did not request a delay, and in fact, asked the Court for expedited review. Absent an extension, he intends to tender his petition for rehearing *en banc* by the end of the day, which is the ordinary deadline for filing.

The Plaintiffs contend that the Attorney General lacks standing to defend the Commonwealth's interest on appeal. They argue that he has no personal interest in this litigation other than his "general interest in 'defend[ing] actions on behalf of the [] Commonwealth' derived from his 'status and duties as the Commonwealth's 'chief law officer.'" [Resp. at 15, 16]. But what else does the Attorney General need? According to the cases *cited by the Plaintiffs*, the answer is nothing.

The Plaintiffs cite *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019), a case in which the Supreme Court recently held that the Virginia House of Delegates lacked standing to defend a suit on behalf of the state. Yet the decision only affirms the Attorney General's standing here:

> [A] a State has standing to defend the constitutionality of its statute. No doubt, then, the State itself could press this appeal. And, as this Court has held, a State must be able to designate agents to represent it in federal court.

Id. at 1952 (cleaned up). The Virginia House was dismissed because "the House ha[d] not identified any legal basis for its claimed authority to litigate on the State's behalf." *Id.* Rather, "[a]uthority and responsibility for representing the State's interests in civil litigation, Virginia law prescribes, rest exclusively with the State's Attorney General." *Id.*

So what does Kentucky law say about the Attorney General's right to represent the state when its laws are subject to constitutional challenge? As it turns out, a

lot. Under Kentucky law, the Attorney General must appear in court on behalf of the Commonwealth whenever the state has an interest that needs protecting. *See* Ky. Rev. Stat. 15.020. Kentucky law even provides separate authority to "prosecute an appeal . . . in any case from which an appeal will lie whenever, in his judgment, the interest of the Commonwealth demands it." Ky. Rev. Stat. 15.090. These statutes simply codify the Attorney General's longstanding "common-law authority to represent the interests of the people." *Beshear v. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). As the Kentucky Supreme Court has explained, the Attorney General possesses "broad powers to . . . defend actions on behalf of the people of the Commonwealth." *Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009). The Attorney General's standing to defend the Commonwealth's interest is well established.

The Plaintiffs also claim that the Attorney General lacks standing because of a prior stipulation and order that dismissed the former Attorney General (now Governor) below. The Plaintiffs liken this to a consent decree and argue that the current Attorney General cannot intervene in this case on behalf of the Commonwealth because of Governor Beshear's prior decision. [Resp. at 17 (citing *Morales Feliciano v. Rullan*, 303 F.3d 1, 7–8 (1st Cir. 2002)].

What the Plaintiffs leave out is that the stipulation and dismissal was without prejudice and specifically reserved "all rights, claims, and defenses that may be available to [Attorney General Beshear]," including "all rights, claims, and defenses relating to whether he is a

proper party in this action *and in any appeals* arising out of this action." [R. 51, PageID#697 (emphasis added)]. The stipulation, in other words, stipulates to nothing meaningful. Former Attorney General Beshear agreed not to enforce H.B. 454 against the Plaintiffs only on the condition that he be dismissed without prejudice. [*Id.*]. But he reserved all legal rights, claims, and defenses—*i.e.*, his ability to defend H.B. 454. So even if this order binds Attorney General Cameron when he acts on behalf of the Commonwealth (it does not), the terms do not prevent intervening. Contrast this with the Plaintiffs' favored case, where a stipulation "imposed obligations . . . to report on the progress, and otherwise monitor the activities, of the new Corporation." *Rullan*, 303 F.3d at 8. Clearly, the stipulation at issue here does nothing of the sort.

Moreover, the Plaintiffs' invocation of judicial estoppel is misplaced. "Judicial estoppel will [only] be invoked against the government when it conducts what 'appears to be a knowing assault upon the integrity of the judicial system.'" *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 2005). Or as the Supreme Court explained:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.

Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 60 (1984).

Judicial estoppel does not apply. It requires that the estopped party take "a contrary position under oath in a prior proceeding and that the prior position was accepted by the court." *Owens*, 54 F.3d at 275. Neither of those things happened here.

Moreover, there is no evidence anyone engaged in the kind of gamesmanship that judicial estoppel is intended to prevent.[4] *See id.* What gamesmanship is there from agreeing to a stipulation of dismissal *without prejudice* in which the parties agree to reserve all rights to future claims and defenses, particularly when another state official (*i.e.*, the Secretary) has agreed to defend the challenged law? The Plaintiffs do not say, and finding estoppel here may lead government parties to remain in litigation even when another government party represents their interest on the off chance that future circumstances change.

III. Secretary Friedlander is not adequately representing the Commonwealth's interests.

The Plaintiffs refuse to concede even the most obvious issue in their objections. They claim that the Commonwealth's interests continue to be adequately

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[4] A practical point is likewise in order. The Plaintiffs' primary argument is timeliness. Had Attorney General Cameron moved to intervene sooner, the Plaintiffs would have undoubtedly argued that the Attorney General's rights were adequately represented by the Secretary because he was, at that time, pursuing all available remedies. The Plaintiffs cannot have it both ways.

represented by Secretary Friedlander because his decision not to continue defending the H.B. 454 is simply "litigation strategy." What strategy is that? The Commonwealth has a "manifest legal interest in defending the constitutionality of [its] laws," *N.E. Ohio Coalition for Homeless & Servs. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006), which Secretary Friedlander has now abandoned. Under *Perry*, such a decision is not in the interest of the Commonwealth. *See Perry*, 115 F.3d at 390–91.

CONCLUSION

Attorney General Cameron wants nothing more than to ensure that the Commonwealth's laws are fully defended through every stage of this appeal. He does not seek to reopen this case or cause any delay to the parties. He simply wants to exhaust Kentucky's appellate options on behalf of the people of this state. This Court should grant his motion to intervene.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5516

[Filed June 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. 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
Honorable Joseph H. McKinley, Jr.

PETITION FOR REHEARING *EN BANC* BY ATTORNEY GENERAL DANIEL CAMERON, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY

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[*** Tables omitted ***]

RULE 35 STATEMENT & INTRODUCTION

Kentucky's House Bill 454 requires abortion providers to perform dilation and evacuation abortions, D&E abortions for short, more humanely. More specifically, the statute ensures that an unborn child does not die by "dismemberment from literally having arms and legs pulled off." *See* Op. at 38 (Bush, J., dissenting) (citing trial testimony). The panel found that the Commonwealth lacks the sovereign authority to enforce such a statute.

Over Judge Bush's dissent, the panel concluded that abortion providers have third-party standing to invoke their patients' rights *even if* there is a potential conflict of interest between the patients and the providers. *Id.* at 7–8 n.2. This cannot be reconciled with the Supreme Court's holding that "third-party standing is defeated if the interests of the plaintiff and the right-holder are merely '*potentially* in conflict.'" *Id.* at 39 n.6 (Bush, J., dissenting) (quoting *Elk Grove Unified Sch. Dist. v.*

Newdow, 542 U.S. 1, 15 (2004)). The panel also ruled on this issue without waiting for the Supreme Court to decide *June Medical Services, LLC v. Russo*, Nos. 18-1323, 18-1460, which concerns third-party standing of abortion providers.

On the merits, the panel's decision is equally flawed. In particular, the panel eviscerated the holding of *Gonzales v. Carhart*, 550 U.S. 124 (2007). According to the panel, a law that changes an abortion procedure without providing a medical benefit to women is "inherently suspect." Op. at 13. This meaningfully limits states' ability to pass laws that "promot[e] respect for human life at all stages in the pregnancy." *Gonzales*, 550 U.S. at 163. The panel further minimized this sovereign interest by simply "assum[ing]," but not finding, that prohibiting the live dismemberment of an unborn child has only "some limited benefit" to the Commonwealth. Op. at 25.

The panel also discarded *Gonzales*'s holding that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163. In this circuit, that holding is no longer on the books. Op. at 10–11. The panel neglected to mention that it created a split with the Eighth Circuit on this point. *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017), *cert. denied* 138 S. Ct. 2573 (2018).

The panel also split with the Fifth Circuit's holding in *June Medical Services, LLC v. Gee*, 905 F.3d 787, 807 (5th Cir. 2018), *cert. granted* 140 S. Ct. 35 (2019), that to prove an undue burden, an abortion provider

must make a good-faith effort to comply with the challenged statute. Op. at 21–22. As with its third-party-standing holding, there was no reason for the panel to reach this issue before the rendition of *June Medical*. Yet, the panel's doing so underscores the importance of this issue.

For the reasons explained below, the panel's decision contains precedent-setting errors of exceptional public importance. 6th Cir. I.O.P. 35(a); Fed. R. App. P. 35(b)(1)(B). It also directly conflicts with the Supreme Court's decisions. Fed. R. App. P. 35(b)(1)(A). The full Court should rehear this case.

BACKGROUND

The Kentucky General Assembly passed H.B. 454 with broad, bipartisan support.[1] The law regulates D&E abortions—a gruesome procedure that requires using "grasping forceps" to "tear apart" an unborn child. *See Gonzales*, 550 U.S. at 135–36. To make this procedure less grisly, H.B. 454 requires that a physician performing a D&E first ensure that the unborn child has already died.

This law promotes Kentucky's interests in respecting the dignity of life and protecting the integrity of the medical profession. As one expert testified at trial, the D&E procedure involves "tearing a living human being apart limb from limb and one that literally is the size of your hand or even bigger in some cases." [Levatino, R.102, PageID#3714]. That's

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[1] https://apps.legislature.ky.gov/record/18rs/hb454.html (last visited June 15, 2020).

why the Supreme Court found that "[n]o one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life." *Gonzales*, 550 U.S. at 158. Indeed, an expert testified at trial about a D&E abortion in which the doctor "pulled out a spine and some mangled ribs and the heart was actually still beating." Op. at 38 (Bush, J., dissenting) (citation omitted).

There are three reasonable medical procedures for causing fetal death prior to performing a D&E. *Gonzales* itself mentioned two of them. *Gonzales*, 550 U.S. at 136, 164. Digoxin injections are widely used. [*E.g.*, Thorp, R.102, PageID#3736, 3739]; Op. at 39 n.6, 40 (Bush, J., dissenting). Potassium-chloride injections likewise are a well-established regimen. [*E.g.*, Thorp, R.102, PageID#3759–60]. And though less studied, umbilical cord transection also is a feasible, efficacious, and safe alternative. [*Id.* at PageID#3771].

After a five-day bench trial, the district court concluded that none of these procedures was an acceptable alternative to live dismemberment of an unborn child. *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807, 818–22 (W.D. Ky. 2019). The district court also rejected then-Secretary Meier's third-party-standing argument. *Id.* at 813.

The panel affirmed. It rejected the viability of all three fetal-death procedures, Op. at 13–24, despite overwhelming expert testimony to the contrary as well as key concessions by the Plaintiffs' experts. The panel also adopted a newfound standard for reviewing laws that alter an abortion method. According to the panel, a change to an existing abortion procedure that does

not medically benefit the woman is "inherently suspect." *Id.* at 12–13. The panel also found that *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), overruled *Gonzales*'s holding about the role of medical uncertainty in a facial challenge. Op. at 10–11.

Judge Bush dissented. He concluded that the Plaintiffs lack third-party standing because of a "potential conflict of interest between Plaintiffs and their patients." *Id.* at 33 (Bush, J., dissenting). He found such a potential conflict because the Plaintiffs want to perform D&E abortions without first causing fetal death, while "uncontroverted studies show that many, and perhaps a substantial majority, of women would choose fetal demise before undergoing a D&E procedure."*Id.*

All of this occurred shortly before the Supreme Court is expected to decide *June Medical*, which raises questions about third-party standing, the meaning of *Hellerstedt's* balancing test, and an array of issues that could affect this case. By comparison, two other circuits have stayed an appeal that challenges a law like H.B. 454 pending the resolution of *June Medical*. Mar. 13, 2019 Order, *Whole Women's Health v. Paxton*, 17-51060 (5th Cir.); Mar. 19, 2020 Order, *Hopkins v. Jegley*, 17-2879 (8th Cir.).

ARGUMENT

I. The panel's decision conflicts with the Supreme Court's third-party standing doctrine.

The panel held that abortion providers have third-party standing to invoke their patients' rights "even

when the[] [providers'] interests are arguably in conflict with patients'—as when regulations assertedly protect the health and safety of patients." Op. at 8 n.2. This cannot be squared with Supreme Court precedent, under which "third-party standing is defeated if the interests of the plaintiff and the right-holder are merely '*potentially* in conflict.'" *Id.* at 39 n.6 (Bush, J., dissenting) (quoting *Newdow*, 542 U.S. at 15). Not only that, but the panel issued its decision shortly before the decision in *June Medical*, a case that asks whether abortion providers have third-party standing. At a minimum, and in light of the exceptional importance of this issue, rehearing *en banc* should be granted to account for any guidance from *June Medical*. Regardless, the full Court should rehear this case to correct the panel's errors regarding third-party standing.[2]

A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A "limited . . .

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[2] The panel concluded that Secretary Friedlander failed to preserve the issue of third-party standing and deemed "unsupportable" the notion that third-party standing, which currently is a matter of prudential standing, should be treated like Article III standing. Op. at 7 n.2. As Judge Bush noted, *id.* at 34 n.1, this Court long ago determined that there is "no authority for the . . . argument that prudential standing requirements may be waived by the parties" and declined to "[r]ecogniz[e] a distinction between prudential and constitutional standing requirements in this context . . . ."*See Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 n.2 (6th Cir. 2014) (similar).

exception" to this rule exists when a third party shows: (i) that the third party has a "'close' relationship with the person who possesses the right"; and (ii) that "there is a 'hindrance' to the possessor's ability to protect his own interests." *See Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004). A third party naturally lacks a close relationship with the primary party when there is a potential conflict of interest between them. As the Supreme Court told us in *Newdow*, third-party standing does not exist when the interests of the third party and those of the primary party are "potentially in conflict." *Newdow*, 542 U.S. at 15.

A potential conflict of interest unquestionably exists here. "[F]or 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." Op. at 33 (Bush, J., dissenting). More to the point, "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." *Id.*

The evidence from trial demonstrating this potential conflict of interest speaks for itself. *Id.* at 38. One study "reported a strong preference for fetal death before abortion." [Thorp, R.102, PageID#3734]. How strong was that preference? Ninety-two percent of women preferred that fetal death occur before an

abortion. [*Id.*]. Another study found that "[a] majority of subjects, 73 percent, reported that if given the choice, they prefer to receive digoxin before the D&E procedure." [*Id.* at PageID#3755–56]. In the face of these studies, the Plaintiffs failed to meet their burden of proving that their interests are parallel to their patients' interests. Most notably, none of the Plaintiffs' patients testified during trial. Op. at 37 (Bush, J., dissenting). Regardless, women's strong preference for fetal demise prior to a D&E is unsurprising. Because, for many, the "D & E procedure is a procedure itself laden with the power to devalue human life," *Gonzales*, 550 U.S. at 158, "[i]t is not difficult to understand why a majority of women would want the heart to stop beating before the fetus undergoes such an ordeal," Op. at 38 (Bush, J., dissenting).

The Plaintiffs cannot avoid this conclusion by claiming that fetal-death procedures are too difficult to perform. Taking the Plaintiffs' trial testimony at face value, "it is posible for EMW's doctors to receive training to perform digoxin injections." *Id.* at 40 (citing trial testimony). On this point, the district court found that digoxin injections "are not terribly difficult to perform, as it can also be administered into the amniotic fluid." *Meier*, 373 F. Supp. 3d at 818. "And, indeed, there are practitioners in our circuit as close as southwestern Ohio, across the river from Kentucky, who perform digoxin injections." Op. at 40 (Bush, J., dissenting). If Ohio abortion providers can perform digoxin injections, so can their counterparts in

Kentucky.[3] After all, "[p]hysicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures." *Gonzales*, 550 U.S. at 163. Yet, the Plaintiffs "do not want to receive the training needed to give the injections, even though the evidence at trial was that injections are not difficult to administer, training to perform the procedure is available, and such injections are within the reasonable medical scope of care." Op. at 39 (Bush, J., dissenting).

The panel nevertheless concluded that the Supreme Court has "found that [abortion] providers have standing even when their interests are arguably in potential conflict with patients . . . ." *Id.* at 8 n.2. A plurality in *Singleton v. Wulff*, 428 U.S. 106 (1976), did find 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 118. But "we should not read *Wulff* so broadly to confer third-party standing virtually any time an abortion provider seeks to invalidate an abortion regulation." Op. at 36 (Bush, J., dissenting); *see also In re Gee*, 941 F.3d 153, 165 (5th Cir. 2019) (per curiam) (similar). *Wulff* "as 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." Op. at 36 (Bush, J., dissenting).

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[3] A Planned Parenthood clinic in Kentucky recently received an abortion license. Op. at 41 n.7 (Bush, J., dissenting). "It is entirely possible that physicians at Planned Parenthood in Kentucky, like their counterparts in southwestern Ohio, will have the expertise to perform fetal demise." *Id.* (internal citation omitted).

The panel also relied on a trio of Supreme Court decisions to find third-party standing. Op. at 8 n.2. But those decisions don't do the work that the panel claims. *Doe v. Bolton*, 410 U.S. 179 (1973), did not directly concern third-party standing. This would have been unnecessary, given that a woman who was denied an abortion was one of the plaintiffs. *Id.* at 186, 188. Moreover, in *Bolton*, "the Supreme Court did not analyze the closeness and hindrance requirements as *Kowalski* requires."Op. at 42 (Bush, J., dissenting). The same is true of *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), another of the panel's favored cases. Op. at 42 (Bush, J., dissenting). The Court's decision in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), likewise fails to establish third-party standing here because "the interests of the 'minor patients' and abortion providers were largely parallel, as both wanted t[he] abortions to proceed without involving parents in the decision." Op. at 42 (Bush, J., dissenting).

The panel also relied on the criminal provisions in H.B. 454, reasoning that "physician plaintiffs 'unquestionably have standing to sue on their *own* behalf' when a law threatens them with criminal prosecution." *Id.* at 8 n.2 (citation omitted). But the potential for criminal penalties isn't a substitute for the closeness requirement of third-party standing. "Just because one may have an injury-in-fact—such that she has standing to assert her own rights—does not mean that she has third-party standing to assert the rights of others." *Id.* at 42 (Bush, J., dissenting). The presence of criminal penalties "says nothing about the plaintiffs' third-party standing to assert the patients' rights." *Id.*

In any event, the Plaintiffs lack a constitutional right to perform abortions. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc). The Plaintiffs' claims therefore are "based solely on the rights of their patients." Op. at 33 (Bush, J., dissenting).

Regardless, the fact remains that the Supreme Court might soon tell us whether abortion providers have third-party standing. If *June Medical* clarifies this issue, the Court should grant rehearing *en banc* to ensure consistency with *June Medical*.

II. The panel's decision is irreconcilable with *Gonzales*.

The Supreme Court spoke unequivocally in *Gonzales* when it held that "the government has a legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145. The panel's decision is irreconcilable with this principle.

A. In *Gonzales*, the Supreme Court held that the government "may use its regulatory power to bar certain procedures and substitute others" to "promote respect for life, including life of the unborn." *Id.* at 158. *Gonzales* arose after Congress passed a law banning partial-birth abortions. A partial-birth abortion differs from a D&E abortion in that an unborn child is removed "intact or largely intact" before it dies. *Id.* at 136–39.

Like here, the plaintiffs in *Gonzales* argued that this gruesome procedure "as safer for women with certain medical conditions," and might even be "the safest method of abortion" during the relevant time

period. *Id.* at 161. The government disputed these claims, but did not justify the law as providing medical benefits for women. Nor did it need to. As the Supreme Court explained, "[t]he government may use its voice and regulatory authority to show its profound respect for the life within the woman." *Id.* at 157. And that regulatory authority includes the power to require that physicians "use reasonable alternative procedures" in place of those that are particularly inhumane. *See id.* at 163.

B. The panel's decision turns this analysis on its head. The panel declared that altering the D&E procedure to require fetal death beforehand is "inherently suspect." Op. at 12–13. That's because, the majority reasoned, fetal-death procedures do not provide "any medical benefit to the patient." *Id.* In other words, the panel super-imposed heightened scrutiny onto any alteration to an abortion method if there is no medical benefit to the patient.

There is no way to reconcile this holding with *Gonzales*, and it restricts the ability of states to regulate abortion methods for reasons other than to provide medical benefits to women. If states have a legitimate interest in "bar[ring] certain procedures and substitut[ing] others" to promote the dignity of unborn life, *Gonzales*, 550 U.S. at 158, how can a court label any change in an abortion procedure as "inherently suspect" based on the lack of a medical benefit? The panel's decision to apply a presumption against alternative procedures that do not provide a medical benefit is simply a roundabout way to hollow out *Gonzales's* holding. And, moreover, even assuming that

Hellerstedt's balancing test requires courts to (somehow) balance intangible, sovereign interests like promoting respect for life, Op. at 9–10, the panel's "inherently suspect" holding tilts the balance against the state whenever it regulates an abortion method for a reason other than providing a medical benefit to women.

Equally problematic is how dismissively the panel treated the Commonwealth's interest "in demonstrating respect for the dignity of human life." Op. at 25. Because the district court found that it was "very unlikely" that an unborn child can feel pain before 24 weeks, the panel merely "assum[ed]" that H.B. 454 only "provides some limited benefit" from the perspective of respecting life. Op. at 24–25. But *Gonzales* did not tie the state's interest in respecting unborn life to the presence of fetal pain. The dignity of life is not so limited. That's why the Supreme Court has recognized that the state's profound interest begins "from the inception of the pregnancy," *Gonzales*, 550 U.S. at 158—not when an unborn child feels pain.

The panel's failure to recognize the significance of the Commonwealth's interest is no passing matter. It declared the statute unconstitutional, in part, because of the "minimal benefits that H.B. 454 provides with respect to the Commonwealth's asserted interests." Op. at 26. Going forward, this holding will tie the hands of states who seek to regulate abortion to promote respect for unborn life without a showing of the presence of fetal pain.

III. The panel's decision creates or deepens two circuit splits on consequential issues.

The panel majority created or deepened two circuit splits over significant questions of constitutional law.

A. Facing conflicting evidence about the safety risks of the partial-birth abortion ban, the Supreme Court explained in *Gonzales* that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163. "Medical uncertainty," the Court held, "does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.* at 164.

This should have driven the outcome here, as then-Secretary Meier presented significant evidence disputing the Plaintiffs' arguments that the fetal-death procedures are not reasonable alternatives. Yet, the panel declared this part of *Gonzales* no longer binding. Op. at 10–11. Instead, the panel held that *Hellerstedt* overruled—or, more precisely, "clarified"—this aspect of *Gonzales*. *See id.* This conclusion, however, is in substantial tension with *Hellerstedt* itself, which emphasized that the district court below "did not simply substitute its own judgment for that of the legislature." *Hellerstedt*, 136 S. Ct. at 2310. The panel nevertheless green-lighted such judicial second-guessing. Moreover, even if *Hellerstedt* "clarified" *Gonzales*, *Hellerstedt* did not hold, as the panel concluded, that medical uncertainty about the viability of an alternative procedure is altogether irrelevant. *Id.* (citing *Gonzales's* statement that "we must review legislative 'factfinding under a deferential standard'"

and stating that only "[u]ncritical deference" is inappropriate (citation omitted)).

The panel's casting aside of *Gonzales* conflicts with the Eighth Circuit's opinion in *Jegley*, which concerned the constitutionality of a law requiring abortion providers to enter into a contract with doctors who have hospital admitting privileges. *Jegley*, 864 F.3d at 955. In vacating a preliminary injunction, the Eighth Circuit unambiguously reaffirmed the medical-uncertainty doctrine: "[B]ecause *Hellerstedt* expressly relied on *Gonzales v. Carhart*, the Court preserved its command that 'state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty.'" *Id.* at 958 (quoting *Gonzales*, 550 U.S. at 163) (internal citation omitted).

The panel's decision is at odds with *Jegley*. This Court should grant rehearing *en banc* to resolve this exceptionally important issue.

B. The panel's decision also created a circuit split over *Hellerstedt*'s causation requirement. *See Hellerstedt*, 135 S. Ct. at 2313 (requiring a plaintiff to "present evidence of causation").

The Plaintiffs never tried to comply with H.B. 454 by hiring new staff who can perform fetal-death procedures or by training the current staff to do so. [Franklin, R.107, PageID#4666, 4717, 4733–34; Bergin Trial Ex. 420 at 114, 123]. The Plaintiffs therefore failed to prove that H.B. 454, rather than their own intransigence, caused any undue burden. The panel rejected this line of thinking, finding that "Supreme

Court precedent does not support [] a requirement" that a plaintiff "specifically and affirmatively show good-faith efforts to comply with a challenged law." Op. at 21–22. This holding not only waters down *Hellerstedt's* causation requirement, but it also contradicts *Gonzales's* holding that the law "need not give abortion doctors unfettered choice in the course of their medical practice." *Gonzales*, 550 U.S. at 163.

The panel acknowledged that its decision on this point contradicted the Fifth Circuit's decision in the pending *June Medical* matter, Op. at 21–22, which requires a plaintiff to prove "causal connection between the regulation and its burden," *June Medical Servs.,* 905 F.3d at 807. "Were we not to require such causation," the Fifth Circuit reasoned, "the independent choice of a single physician could determine the constitutionality of a law." *Id.*

The Court should grant rehearing *en banc* to reaffirm *Gonzales's* holding that abortion doctors lack "unfettered discretion" and to avoid creating a circuit split with the Fifth Circuit (if *June Medical* does not resolve this issue). If *June Medical* addresses causation, the full Court should rehear this case to resolve this issue.

CONCLUSION

The Court should rehear this case *en banc*.

Respectfully submitted,

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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 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

[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.

[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, 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

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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.

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, 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

[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.

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.

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

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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.

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

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5516

[Filed July 7, 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
Honorable Joseph H. McKinley, Jr.

PETITION FOR REHEARING *EN BANC* OF ORDER DENYING INTERVENTION BY ATTORNEY GENERAL DANIEL CAMERON, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY

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[*** Tables omitted ***]

RULE 35 STATEMENT & INTRODUCTION

This lawsuit began as a challenge to an abortion statute, but it is now a dispute about a state's sovereign ability to ensure that its laws are fully defended through this Court and the Supreme Court.

In its merits decision, the panel, by a 2-1 vote, affirmed a permanent injunction against a Kentucky law that regulates an abortion method. Up to that point in the litigation, Kentucky's top healthcare official had defended the law. However, after the Court's decision, that official reversed course. Within two days, Kentucky's Attorney General stepped up to continue the Commonwealth's defense of its law. He moved to intervene on behalf of the Commonwealth so that he could file a petition for rehearing *en banc* and, if necessary, a petition for certiorari. The panel, again divided 2-1, refused to allow the Commonwealth's "chief law officer" even this modest relief.

The *en banc* Court should rehear this decision. The panel's conclusion that the Attorney General's intervention motion is untimely is profoundly wrong. For starters, it creates a circuit split with the Ninth Circuit, which has twice allowed a state to intervene through its attorney general after a panel decision. *See* Fed. R. App. P. 35(b)(1)(B). Still worse, the panel's decision directly conflicts with circuit precedent about state attorneys general. *See* 6th Cir. IOP 35(a). As Judge Bush put it, the decision "flies in the face of our precedent allowing states' attorneys general to intervene on appeal in order to defend their states' laws." June 24, 2020 Order ("Order"), at 9 (Bush, J., dissenting) (citing, e.g., *Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386 (6th Cir. 1997)).

But even that is not all. The panel's decision came days before the Supreme Court issued *June Medical Services LLC v. Russo*, --- S. Ct. ---, 2020 WL 3492640 (June 29, 2020). The controlling opinion in *June Medical* undermines the heart of the panel's merits decision—namely, its application of a balancing test and its refusal to fully apply *Gonzales v. Carhart*, 550 U.S. 124 (2007). And in the wake of *June Medical*, the Supreme Court has granted certiorari, vacated the judgment, and remanded two cases for further consideration. Importantly, the panel here relied upon *both* of these now-vacated decisions. This Court has repeatedly told litigants that unusual circumstances matter when deciding whether to allow intervention. Surely *this* is such an unusual circumstance.

The panel's refusal to allow the Attorney General to continue defending Kentucky law is outcome determinative for the Commonwealth and its citizens. *See* 6th Cir. IOP 35(g); *see also Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 524 (1947). "With the denial of [the Attorney General's] 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?" Order, at 9–10 (Bush, J., dissenting).

BACKGROUND

This lawsuit concerns the constitutionality of Kentucky's House Bill 454. This statute requires abortion providers to ensure that an unborn child has died before performing a dilation-and-evacuation ("D&E") abortion, which involves ripping the unborn child apart with forceps. By requiring an unborn child to die before this procedure, HB 454 essentially is a compassion measure. It reflects the fact that "[n]o one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life." *Gonzales*, 550 U.S. at 158.

Two abortion doctors and an abortion clinic nevertheless sued to invalidate HB 454. The Commonwealth, acting through Secretary Adam Meier, defended HB 454 during a five-day bench trial. The district court, however, invalidated HB 454 on its face. *EMW Women's Surgical Center, P.S.C. v. Meier*, 373 F. Supp. 3d 807, 826 (W.D. Ky. 2019). As relevant here, the district court concluded that the law failed the

purported balancing test from *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *Meier*, 373 F. Supp. 3d at 822–23.

Secretary Meier appealed. After the parties completed briefing but before oral argument, Kentucky held its general elections for statewide offices. Kentuckians elected the then-current Attorney General, Andy Beshear, to be Governor and Daniel Cameron to be Attorney General. As a result, Secretary Eric Friedlander, who is Governor Beshear's top healthcare appointee, replaced Secretary Meier as the party in this case. [App. R. 43]. Secretary Friedlander soldiered on in this appeal—at least initially. He retained attorneys in Attorney General Cameron's office to handle oral argument, which they did. [App. R. 41–42, 45–48].

The panel affirmed the district court's judgment. *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 960 F.3d 785, 790 (6th Cir. 2020). As relevant here, the panel rejected Secretary Friedlander's argument that a balancing test does not apply here. The panel found this argument "unpersuasive," reasoning that, under *Hellerstedt*, it must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 796 (citation omitted). The panel also concluded that *Hellerstedt* "clarified" the holding from *Gonzales v. Carhart* that legislatures have "wide discretion to pass legislation in areas where there is scientific and medical uncertainty." *Id.* The panel therefore refused to defer to the Kentucky General Assembly. See *id.* at 797.

Judge Bush dissented on standing grounds. *Id*. at 812–13 (Bush, J., dissenting). He also chided the panel for issuing its opinion without waiting for *June Medical*. *Id*. at 819–20.

Upon receiving the panel's decision, Secretary Friedlander decided to stop defending HB 454. Shortly thereafter, Attorney General Cameron moved to intervene on behalf of the Commonwealth to pick up where Secretary Friedlander left off. [App. R. 56]. Notably, Secretary Friedlander did not oppose the Attorney General's intervention. EMW and its abortion doctors, however, did—realizing they could score a windfall by a gubernatorial administration change. In the meantime, Attorney General Cameron timely tendered a petition for rehearing *en banc*. [App. R. 60]. Secretary Friedlander did not file a petition for rehearing.

The panel, again over Judge Bush's dissent, denied Attorney General Cameron's motion to intervene.

ARGUMENT

The panel's order denying intervention is unprecedented. It says "too bad" to a sovereign state that merely wants to exhaust its appellate remedies in defense of a law that passed Kentucky's General Assembly by lopsided margins. In so doing, the panel unmistakably split with two Ninth Circuit decisions, both of which allowed a state to intervene through its attorney general after a panel opinion. The panel was no kinder to this Court's precedent. The panel's decision "flies in the face of [Sixth Circuit] precedent allowing states' attorneys general to intervene on

appeal in order to defend their states' laws." Order, at 9 (Bush, J., dissenting). Importantly, the panel did all of this days before the Supreme Court's *June Medical* decision. *June Medical* has now come, and it directly undercuts the panel's reasoning. Yet, Attorney General Cameron is now sidelined.

For any or all of these reasons, en banc rehearing is warranted.

I. The panel's decision creates a circuit split.

The panel concluded that Attorney General Cameron's motion to intervene was untimely primarily because the Attorney General did not file it until after the panel issued its decision. Yet, the Ninth Circuit has twice "granted a motion to intervene following issuance of its decision." *See* Order, at 4. Those two opinions cannot be reconciled with the panel's decision.

Start with *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). There, the state of California moved to intervene after the panel decision and once the losing party declined to petition for rehearing *en banc*. *Id*. at 940. As here, the panel refused to allow the state to intervene through its attorney general. *Id*. However, the *en banc* court disagreed. It reasoned that California has a "significant interest" in the case because the panel's decision implicated California law. *Id*. The Court acknowledged that "California sought to intervene at a relatively late stage in the proceeding," but nevertheless allowed intervention because there was no prejudice and because "California had no strong incentive to seek intervention . . . at an earlier stage." *Id*. The bottom

line for the *en banc* court was: "If we do not permit California to intervene as a party . . . there is no party in that case that can fully represent its interests." *Id.* at 491.

In so holding, the Ninth Circuit built on its earlier decision in *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (order). There, Hawaii participated as an *amicus curiae* during the panel stage. However, the panel rejected Hawaii's argument and the losing party declined to seek rehearing. *Id.* at 964–65. The Ninth Circuit allowed Hawaii, through its attorney general, to intervene to "ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties." *Id.* at 965. Even though the panel found Hawaii"s "explanation for why it did not intervene earlier less than entirely persuasive," the court allowed the state to intervene because "[u]nless the State of Hawaii is made a party to these proceedings, no petition for rehearing can be filed in this Court, and there will be no opportunity for the Supreme Court to consider whether to grant certiorari." *Id.* at 966. The panel, in short, refused to "foreclose further consideration of an important issue because of the positions of the original parties, despite the long term impact on the State of Hawaii." *Id.*

The panel distinguished *Peruta* and *Day* on two bases, both unconvincing. First, the panel noted that, in *Peruta*, the state lacked a "strong incentive" to intervene earlier in the litigation because "it had little reason to anticipate either the breadth of the panel's holding or of the decision of [the losing party] not to seek panel rehearing or rehearing en banc." Order, at

6 (quoting *Peruta*, 824 F.3d at 940). But the same is true here. As Judge Bush noted, "Secretary Friedlander retained the Attorney General' office to represent him at oral argument in this case," thus giving every impression that Secretary Friedlander intended to keep defending HB 454. *Id*. at 14 (Bush, J., dissenting). It is "confusing"to "expect[] 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." *Id*.

The panel also distinguished *Peruta* and *Day* on the basis that Attorney General Cameron's tendered petition for rehearing *en banc* argues that EMW and its abortion doctors lack standing, which the panel deemed a new issue. *Id*. at 6–7. New or not, the panel resolved that issue. *See Friedlander*, 960 F.3d at 794 n.2. Regardless, the panel missed the point. As explained below, *June Medical* hollows out the panel's decision *on the merits*—namely, its interpretation of *Hellerstedt* and its refusal to fully apply *Gonzales* based upon *Hellerstedt*. Importantly, Attorney General Cameron's petition vigorously disputed the panel's merits decision because of its misguided reliance on *Hellerstedt*. [App. R. 60 at 15–0]. Thus, in light of *June Medical*, the panel's focus on third-party standing as a reason to deny intervention is a sleight of hand that overlooks the Attorney General's merits arguments. Judge Bush correctly recognized that "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." Order, at 15 (Bush, J., dissenting).

Nor can the panel's decision be justified on the theory that the Attorney General's intervention prejudices EMW and its abortion doctors. It is not prejudicial to require them to litigate the constitutionality of HB 454 to finality. *See Day*, 505 F.3d at 965 (finding no prejudice "since the practical result of [the state's] intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceedings"). "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." Order, at 15 (Bush, J., dissenting).

In splitting with *Peruta* and *Day*, the panel took refuge in *Amalgamated Transit Union International, AFL-CIO v. Donovan*, 771 F.2d 1551 (D.C. Cir. 1985) (per curiam). True, the court there denied a post-panel decision motion to intervene. *Id.* at 1554. But that's where the similarities end. *Donovan* did not concern a state attorney general trying to defend a state's law through the full appellate process. Also, unlike here, the losing party in *Donovan* (a government official) "was still actively litigating the case" when intervention was sought. Order, at 12 (Bush, J., dissenting). In addition, the proposed intervenor in *Donovan* "sought to represent entirely different interests than the government official." *Id. Donovan*, in sum, could not be more different.

II. The panel's decision directly conflicts with Sixth Circuit precedent.

Creating a circuit split is just the beginning. The panel's decision also "flies in the face of [Sixth Circuit] precedent allowing states' attorneys general to intervene on appeal in order to defend their states' laws." *Id*. at 9.

Take *Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*—a decision the panel failed to cite. There, Michigan's Attorney General moved to intervene after the district court found that federal law preempted a state law and after the then-existing state party "decided not to appeal the adverse judgment." 115 F.3d at 389. The district court denied intervention, but this Court reversed. *Id*. at 391. As Judge Bush summarized, "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*." Order, at 13 (Bush, J., dissenting). Viewed this way, Attorney General Cameron's intervention motion is not so much a motion to add a new party as it is a motion for the Commonwealth, through its "chief law officer," Ky. Rev. Stat. 15.020, simply to continue its defense of HB 454. "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." Order, at 9 (Bush, J., dissenting). The panel's single-minded focus on the stage of the proceedings overlooks this simple fact,

especially given that Attorney General Cameron has timely tendered a petition for rehearing.

This Court's willingness to allow state attorneys general to defend their laws—until now, that is—is rooted in the fact that "[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), *pet'n for certiorari docketed*, 19-1137 (2020). "So it is in Kentucky." Order, at 17–18 (Bush, J., dissenting) (summarizing state law). Thus, by denying Attorney General Cameron the ability to defend HB 454, the panel did not just deny intervention to a state official, but it cut off a *sovereign state's ability to defend its duly enacted laws*. It's one thing to invalidate a state law; it's another to tell a state it can't even exhaust its appellate remedies in defense of that law.

This Court's *en banc* opinion in *City of Pontiac Retired Employees Association v. Schimmel*, 751 F.3d 427 (6th Cir. 2014) (per curiam) ("*Schimmel*"), brings this point home. There, Michigan's Attorney General moved to intervene at the panel stage after oral argument based on an order the panel entered just prior to oral argument. The panel, however, denied the motion and issued its opinion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767, 773 (6th Cir. 2013). Judge Griffin dissented, noting that the panel denied intervention "despite the Attorney General's statutorily protected right to intervene in any matter in which the people of Michigan may be interested." *Id.* at 783–84 (Griffin, J., dissenting). The Court then

granted rehearing *en banc* and "allow[ed] the Michigan Attorney General to intervene on behalf of the State of Michigan." *Schimmel*, 751 F.3d at 430.

III. *June Medical* and the subsequent GVRs provide a powerful reason to grant intervention.

As the panel recognized, this Court's intervention standard takes account of "unusual circumstances militating . . . in favor of intervention." Order, at 3 (citation omitted). *June Medical* is the definition of an unusual circumstance.

Now that *June Medical* has been decided, the panel's decision, especially its interpretation of *Hellerstedt*, rests on unsound footing, as described below. Moreover, following *June Medical*, the Supreme Court has granted certiorari, vacated the judgment, and remanded ("GVR") two cases to the Seventh Circuit for further consideration. In both cases, the Seventh Circuit applied the purported balancing test from *Hellerstedt*, as the panel did here. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 817–18 (7th Cir. 2018), *cert. granted, judgment vacated, & remanded*, --- S. Ct. ---, 2020 WL 3578669 (July 2, 2020); *Planned Parenthood of Ind. & Ky., Inc. v. Adams,* 937 F.3d 973, 983-85 (7th Cir. 2019), *cert. granted, judgment vacated, & remanded*, --- S. Ct. ---, 2020 WL 3578672 (July 2, 2020). This shows that but for the panel's decision denying intervention, this case would not be over. If the *en banc* Court merely allows Attorney General Cameron to intervene, the Supreme Court almost certainly would follow with a GVR. The panel's express

reliance on *both* of the now-vacated Seventh Circuit decisions makes this result even more likely. *Friedlander*, 960 F.3d at 796. Perhaps more than anything else, this justifies allowing Attorney General Cameron to continue litigating the constitutionality of HB 454.

The panel nevertheless concluded that *June Medical* could never amount to an unusual circumstance warranting intervention. The panel reasoned: "[I]f *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." Order, at 7. This assurance is small comfort to the Commonwealth, which remains under the permanent injunction against its law that the panel upheld in reasoning that can no longer be justified *mere days after it was issued*. As Judge Bush recognized, "[w]ithout 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*." *Id.* at 10 (Bush, J., dissenting).

The panel's merits decision is in fact "directly contrary" to *June Medical*. Although *June Medical* has six different opinions, the reasoning of Chief Justice Roberts's opinion governs because it has the only rationale on which the five justices who voted for reversal agreed. *See Marks v. United States*, 430 U.S. 188, 193 (1977). As the Chief Justice reasoned, "*Casey's* requirement of finding a substantial obstacle before invalidating an abortion regulation" is a "sufficient basis" for the Court's decision in *Hellerstedt*. *June*

Medical, 2020 WL 3492640, at *26 (Roberts, C.J., concurring in judgment). The plurality's opinion, by contrast, swept more broadly, concluding that courts must weigh the benefits of the law against its burdens. *See id*. at *10 (plurality). As Justice Kavanaugh pointed out: "Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard." *Id*. at *63 (Kavanaugh, J., dissenting).

In his concurrence, Chief Justice Roberts explained that *Hellerstedt* does not invite a "grand 'balancing test in which unweighted factors mysteriously are weighed.'" *See id*. at *23 (Roberts, C.J., concurring in judgment) (citation omitted). This is so, the Chief Justice continued, because "[t]here is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *Id*. As a result, under Casey, "benefits [are] not placed on a scale opposite the law's burdens." *See id*, at *25.

The panel's decision is irreconcilable with the Chief Justice's opinion. Whereas the Chief Justice rejected a balancing test, the panel embraced such a test. It "answer[ed] th[e] question" whether an undue burden exists by "weighing 'the burdens a law imposes on abortion access together with the benefits those laws confer.'" *Friedlander*, 960 F.3d at 795 (quoting *Hellerstedt*, 136 S. Ct. at 2309). This reasoning pervades the opinion: Part I.A of the opinion is labeled "Burdens," Part I.B is "Benefits,"and Part I.C is "Balancing." *Id*. at 797–08.

The panel also rejected the Secretary's argument that "the Commonwealth's interests behind H.B. 454

are purportedly more 'intangible'" and that "it is the legislature's place—and not the courts'—to assess whether the Commonwealth's interest justifies regulating abortion." *Id.* at 796. But Chief Justice Roberts adopted that very argument in *June Medical*: "Pretending that we could pull [such a balancing test] off would require us to act as legislators, not judges . . . ." *June Medical*, 2020 WL 3492640, at *23 (Roberts, C.J., concurring in judgment).

The panel's decision is contrary to *June Medical* in still another respect.[1] The panel rejected the Secretary's argument that the Court should apply the rule from *Gonzales* that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163. *Gonzales* held that a law "can survive [a] facial attack" even when "medical uncertainty persists." *See id.* This holding is especially important here—indeed, *it is dispositive*—in light of the mountain of expert testimony that the Secretary offered during trial. The panel, however, concluded that *Hellerstedt* "clarified" this holding and thus refused to defer to the Kentucky General Assembly. *See Friedlander*, 960 F.3d at 796–97. The Chief Justice's concurrence, however, rejected this court-centric approach. Quoting *Gonzales*, the Chief Justice reasoned that the "traditional rule," which is "consistent with *Casey*," is that "state and federal legislatures [have] wide discretion to pass legislation in areas where there

[1] This aspect of *June Medical* undercuts the panel's purported alternative holding to applying a balancing test. *See Friedlander*, 960 F.3d at 797 n.3.

is medical and scientific uncertainty." *June Medical*, 2020 WL 3492640, at *24 (Roberts, C.J., concurring in judgment). Thus, the Chief Justice applied the very holding from *Gonzales* that the panel rejected.

These are but a sampling of the ways that the panel's decision is incompatible with *June Medical*. Unless the *en banc* Court grants intervention or the Supreme Court reverses, EMW and its doctors will get a win without going the distance, and the above arguments about *June Medical*, which go to the heart of the panel's decision, will not be aired now. EMW and its abortion doctors 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." Order, at 19 (Bush J., dissenting). This is perhaps no truer than in a case challenging the constitutionality of a sovereign state's law. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018) (holding that enjoining a constitutional state law "would seriously and irreparably harm the State").

CONCLUSION

The Court should grant rehearing *en banc*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5516

[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

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