Case No. 22-5832

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, AND KENTUCKY, INC., on behalf of itself, its staff, and its patients, *et al.*,

Plaintiffs-Appellees

v.

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

Defendant-Appellant

On Appeal from the United States District Court
for the Western District of Kentucky
Case No. 3:22-cv-198

BRIEF OF APPELLANT ATTORNEY GENERAL DANIEL CAMERON

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STATEMENT REGARDING ORAL ARGUMENT

The Attorney General requests oral argument. This appeal involves the constitutionality of a Kentucky statute and raises important issues about the party-presentation principle, third-party standing, and the proper scope of an injunction.

STATEMENT OF JURISDICTION

The plaintiffs—Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, and Kentucky, Inc., and EMW Women's Surgical Center—invoked the district court's jurisdiction in part under 28 U.S.C. § 1331 because the case raises a federal question under the Constitution. The district court refused to dissolve part of its preliminary injunction on August 30, 2022. Op. & Order, R.97, PageID#1569–98. And the Attorney General timely appealed on September 19, 2022. Notice of Appeal, R.101, PageID#1647–49.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court refused to dissolve part of an injunction. Such a refusal can be express or in practical effect. *Hadix v. Johnson*, 228 F.3d 662, 668 (6th Cir. 2000). An express refusal can include a ruling that is "tantamount to an order refusing to dissolve an injunction." *Id.* (holding that part of an order explicitly refused to terminate a consent decree even though it said the opposite). And a refusal in practical effect has two more requirements: the order must potentially raise serious and irreparable consequences and can be effectively challenged only by an immediate appeal. *Id.* Either way the Court views the issue, the district court's order meets the test.

The district court refused to dissolve part of its injunction on the basis that the statute at issue likely violates substantive due process. Op. & Order, R.97,

PageID#1582. And while the court said that the motion to dissolve remained submitted for further review, "in reality the court explicitly refused to" dissolve the injunction. *Hadix*, 228 F.3d at 668. And it did so after ruling against the Attorney General on every element of the preliminary-injunction standard.

Besides, even if characterized as refusing to dissolve in practical effect, the two extra factors are met. Enjoining parts of HB 3 inflicts irreparable harm on Kentucky by prohibiting it from enforcing its duly enacted law. And that harm can be mitigated only by an immediate appeal. The Supreme Court has held exactly that in applying the practical-effect factors. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) ("Unless that statute is unconstitutional, this would seriously and irreparably harm the State, and only an interlocutory appeal can protect that State interest." (footnote omitted)). This Court has jurisdiction.

STATEMENT OF ISSUES

The issues for the Court to decide are:

1. Whether the district court should have dissolved the entire preliminary injunction.
2. Whether the district court violated the party-presentation principle by relying on a claim the Facilities never made and neither party briefed.
3. Whether the Facilities have shown third-party standing to assert a claim on behalf of pregnant women seeking nonelective abortions.
4. Whether the district court should have lifted the injunction for elective abortions when it found a constitutional violation only for nonelective abortions.
5. Whether the Facilities have third-party standing to assert a claim on behalf of pregnant women seeking abortions.
6. Whether provisions of the challenged law violate the substantive-due-process rights of pregnant women seeking abortions.
7. Whether provisions of the challenged law violate the Facilities' procedural-due-process rights.

STATEMENT OF THE CASE

Kentucky passed House Bill 3 back in April—two months before the Supreme Court issued *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). HB 3 is a comprehensive overhaul of several different laws regulating abortion. Its topics range from informed consent to the regulation of abortion-inducing drugs to the proper disposal of fetal remains. By and large, HB 3's reforms are common-sense measures designed to protect the health of pregnant women, promote the integrity of the medical profession, and affirm the value of unborn life.

One provision, for example, simply requires physicians to obtain a copy of government-issued identification and written consent from a legal guardian before performing an abortion on a minor. The reason for such a law hardly needs explaining: Kentucky has a strong interest in preventing minors from making choices about serious, life-altering procedures without the consent of their legal guardians. And so there should never have been any doubt that this provision of HB 3 (just like many others) is constitutional.

Yet the district court initially enjoined Attorney General Cameron from enforcing that provision along with dozens of others after concluding that they are impossible to comply with. In the district court's view, that alleged inability to

comply violated Planned Parenthood's and EMW's procedural-due-process rights and their patients' substantive-due-process rights. Neither holding was ever right. But *Dobbs* removed all doubt. It now makes no difference whether the Facilities can immediately comply. If a State can prohibit abortions, it can also prohibit abortions until compliance is possible. And yet, even after *Dobbs*, the district court refused to lift its injunction as to a large swath of HB 3.

After *Dobbs*, the district court no longer relied on its faulty procedural-due-process holding. Nor did it apply rational-basis review to save its substantive-due-process holding, as the Facilities below argued it should. Instead, the district court charted its own course—with no argument or briefing from the parties—to hold that there is a substantive-due-process right to nonelective abortions. And it found that parts of HB 3 violate that right. Then, rather than tailoring its relief to only nonelective abortions, the district court continued to facially enjoin several parts of HB 3 as to both nonelective and elective abortions.

This Court should reverse. It should lift the preliminary injunction as to all of HB 3. The Attorney General is likely to succeed on the merits, and each other preliminary-injunction factor weighs in his favor.

House Bill 3

The Kentucky General Assembly enacted HB 3 on April 14, 2022.[1] The law covers a lot of ground. It updates the notice-and-consent requirements for performing abortions on minors, § 1(2), provides new registration requirements for physicians providing abortion-inducing drugs, § 6, changes the regulations governing the disposal of fetal remains, §§ 20–22, and restricts abortions after the gestational age of 15 weeks, § 34. These are just a handful of HB 3's changes.

The district court at first enjoined the Attorney General from enforcing each of these provisions—along with dozens of others. And even after *Dobbs*, it refused to lift its injunction as to many of them. Consider a few relating to abortion-inducing drugs and fetal remains.

1. Section 6 of HB 3 provides that only qualified physicians registered with Kentucky's Cabinet for Health and Family Services may provide abortion-inducing drugs. § 6(1). Section 8 requires a physician to obtain informed consent before providing such drugs, and Section 9 imposes reporting requirements for the physician after he or she provides the drugs. To go along with those requirements, Section 15 directs the Cabinet to create a program to "oversee and regulate the distribution and dispensing of abortion-inducing drugs." § 15(1). And Section 17

[1] A copy of the bill is available at R.1-1, PageID#25–96.

lists eligibility requirements for qualified physicians to register. Those include examining a patient in person before providing an abortion-inducing drug, having a patient sign a consent form, and maintaining hospital admitting privileges at a nearby hospital. § 17(1)(b)–(c), (2)(a).

2. Section 20 requires a permit from a coroner before cremating the remains of a child after fetal death—the same permit already required for other cremations under existing law. *See* Ky. Rev. Stat. § 213.081. Section 22 imposes new requirements on handling fetal remains. An abortion provider must notify the parents that they have the ability to either "take responsibility" for disposing of the fetal remains or "relinquish the responsibility" to the provider. § 22(2)(a). And it prohibits providers from disposing of fetal remains as "medical or infectious waste," buying or selling fetal remains, or transporting fetal remains for other than select purposes. § 22(4).

The preliminary injunction and first appeal

One day after the General Assembly enacted HB 3, Planned Parenthood sued the Attorney General to block its enforcement. Compl., R.1, PageID#1. But this is not the typical challenge to an abortion law. In the main, Planned Parenthood does not challenge HB 3's substantive requirements. Instead, it claims only that HB 3 creates administrative requirements that are impossible to comply

with until the Cabinet creates forms and promulgates regulations. *Id.* at PageID#22 (¶ 67) (alleging that HB 3 "creat[es] a de facto ban on all forms of legal abortion" by "requiring Plaintiff to use agency forms and processes not yet available"). Three of the complaint's four claims rest only on that basis: that the alleged inability to comply violates Planned Parenthood's procedural-due-process rights, its substantive-due-process rights, and its patients' substantive-due-process rights. *Id.* at PageID#21–22. And the fourth claim alleges that certain provisions violate its patients' substantive-due-process rights to privacy. *Id.* at PageID#23.

Planned Parenthood immediately moved for a temporary restraining order and preliminary injunction. Mot., R.3, PageID#108. But it relied on only two of its four claims: that the alleged inability to comply violated its procedural-due-process rights and its patients' substantive-due-process rights. *Id.* at PageID#120–22.[2] So Planned Parenthood's arguments boiled down to the same contention: HB 3 effectively bans abortion because it requires filling out forms and complying with regulations that do not yet exist. *Id.* at PageID#108, 114–18. To show that,

[2] In the background section of its motion, Planned Parenthood briefly alluded to patient-privacy concerns. *Id.* at PageID#116 & n.6. But it nowhere elaborated or pressed that argument. Indeed, the argument section said nothing about it. *See id.* at PageID#119–24.

Planned Parenthood listed several provisions that it asserted "operate to bar abortion in Kentucky due to their immediate effect." *Id.* at PageID#117. But rather than ask the district court to enjoin enforcement of only those provisions, it asked the court to bar *all* of HB 3 from taking effect—full stop.

The district court did just that. Op. & TRO, R.27, PageID#242. Although it acknowledged that a temporary restraining order is an "extraordinary remedy" that Planned Parenthood "bears the burden of justifying," the court still enjoined all of HB 3. *Id.* at PageID#249–50 (citations omitted). Despite noting that Planned Parenthood had failed to provide the district court with enough information to "determine which individual provisions and subsections are capable of compliance," the court shifted the burden to the Attorney General and enjoined the whole law. *Id.* at PageID#242. And it did so even though Planned Parenthood did not challenge parts of HB 3 (like Section 34(1), preventing abortions after 15 weeks) and even though some provisions have nothing to do with compliance (like Section 10(3), preventing abortion-inducing drugs from being provided in a school facility or on state grounds).

Soon after, EMW and Dr. Ernest Marshall moved to intervene. Mot. Intervene, R.28, PageID#262. The court granted that motion the next day (without giving the Attorney General the chance to respond). Order, R.32, PageID#386.

It also directed EMW to file its own preliminary-injunction motion only one business day before the scheduled evidentiary hearing on Planned Parenthood's motion. *Id.* at PageID#392. The only difference between EMW's motion and Planned Parenthood's is that EMW also challenged the 15-week prohibition in HB 3. Prelim. Inj. Mot., R.38, PageID#506.

The district court then held a preliminary-injunction hearing. Hr'g Tr., R.51, PageID#654. It considered both the compliance argument and the 15-week-prohibition argument. *Id.* at PageID#772. Neither Planned Parenthood nor EMW put on any evidence. Even though the Attorney General had disputed whether the Facilities made good-faith efforts to comply with the fetal-remains parts of the law, the Facilities chose not to produce evidence to "make a clear showing" of their good-faith efforts—as was then required under *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418, 440–41 (6th Cir. 2020).

At the hearing, the district court said there was not enough "detail in the record to carry the burden as far as" which specific provisions the Facilities could comply with. *Id.* at PageID#785. And yet, as before, the court held that lack of detail not against the Facilities but against the Attorney General. It slightly narrowed its temporary restraining order so that it no longer covered provisions that the Facilities conceded did not apply to them or that were not new. Order, R.49,

PageID#645. But the district court continued to enjoin enforcement of almost everything else—including some provisions "[o]ut of an abundance of caution" and not because the Facilities had carried their burden. *See id.* at PageID#647. All told, the court extended its restraining order for two more weeks and asked for post-hearing briefing.

In that briefing, the Facilities reiterated their argument that several provisions of HB 3 are impossible to comply with before the Cabinet promulgates forms and regulations. But they also raised new arguments that were not in their preliminary-injunction motions (such as arguing certain words of HB 3 were too unclear to comply with). Proposed Findings Fact & Conclusions Law, R.54, PageID#810, 813. And the Facilities submitted post-hearing evidence in a last-ditch effort to show good-faith efforts at complying with the fetal-remains provisions. That consisted of declarations vaguely asserting that they had "begun outreach to crematoria." *Id.* at PageID#868; R.55, PageID#1044; R.56, PageID#1062.

Even still, the district court granted a preliminary injunction that largely mirrored its prior restraining orders. It enjoined enforcement of virtually every provision of HB 3 that requires an abortion provider to record or document any

information on the grounds that the Cabinet must act before compliance is possible. Op., R.65, PageID#1290. The district court applied that reasoning even to provisions that do not require filling out forms or complying with regulations.

It also credited the Facilities' post-hearing declarations as showing that the Facilities made good-faith efforts at compliance. And although it is unclear what constitutional rule the court relied on to reach this conclusion (as neither Facility brought a void-for-vagueness claim), it held that terms like "government-issued identification" lack a level of precision that statutes must have for "highly regulated" industries. *Id.* at PageID#1261, 1267. On top of that, the district court rejected the Attorney General's argument that the Facilities had forfeited any argument on that point by not making it in their preliminary-injunction motions. *Id.* at PageID#1257.

Likewise, the district court rejected the argument that the Facilities had forfeited any privacy claim for preliminary-injunction purposes. It did not matter that the Facilities did not make that argument in their preliminary-injunction motions. *Id.* In the court's view, the Attorney General "opened the door" to those arguments. *Id.*

After the district court entered its preliminary injunction, the Attorney General moved below for a stay pending appeal. Mot., R.67, PageID#1294. The

district court denied that motion. Order, R.69, PageID#1304. The Attorney General then moved for a partial stay pending appeal in this Court. Mot. Partial Stay, *Planned Parenthood Great Nw., Haw., Alaska, Ind., & Ky., Inc. v. Cameron*, No. 22-5451 (6th Cir. May 27, 2022), ECF No. 7-1. And after the Supreme Court issued its opinion in *Dobbs*, the Attorney General renewed and expanded his motion for a stay pending appeal. Renewed Mot. Stay, *Planned Parenthood*, No. 22-5451 (6th Cir. June 28, 2022), ECF No. 25.

Rather than resolve that motion, a panel of this Court dismissed the appeal and remanded the case. Order, R.78, PageID#1386. The motions panel explained that "*Dobbs* potentially significantly alters considerations underlying the preliminary injunction." *Id.* And it determined that the district court was better positioned to first consider the effect of *Dobbs*.

Back at the district court

That same day, the Attorney General moved for emergency relief asking the district court to lift its preliminary injunction. Mot. Lift Prelim. Inj., R.80, PageID#1391. In response, the Facilities reiterated their procedural- and substantive-due-process arguments, recognizing that *Dobbs* required rational-basis review for the latter. Resp., R.82, PageID#1411, 1413. They made no argument that there

is a constitutional right to nonelective abortions, that strict scrutiny would apply to that right, or that HB 3 violated it.

Over two weeks after the Attorney General filed his emergency motion to lift the preliminary injunction, the district court issued an order. Order, R.87, PageID#1507. But the order did not resolve the motion. Rather, it lifted the injunction as to HB 3's 15-week provisions because the Facilities conceded those provisions were constitutional after *Dobbs*. *Id.* at PageID#1509. But the court declined to rule on the rest of the motion—whether to lift the injunction as to the rest of HB 3—explaining it needed more time to analyze the issues under *Dobbs*. *Id.* at PageID#1511. The court also stated it needed to gather more information about the Cabinet's updated forms. *Id.*

On August 30th—over six weeks after the previous order and a full two months after the Attorney General's emergency motion—the district court issued a decision. Op. & Order, R.97, PageID#1569. This time, the court did address—at least in part—the argument that *Dobbs* meant all of HB 3 was constitutional no matter whether the Facilities could comply. Yet the court did not rely on either the procedural- or the substantive-due-process claims for all abortions (the only arguments that the Facilities had pressed). It instead charted its own course.

The district court determined that the holding in *Dobbs* was limited to elective abortions. *Id.* at PageID#1577. And although it expressly recognized that neither party had briefed the issue, the court determined that it had to decide whether the alleged inability to comply with parts of HB 3 violated a constitutional right to nonelective abortions. *Id.* at PageID#1577 n.3. The court then considered and resolved constitutional arguments that no one made, citing evidence outside the record to explain what a "nonelective abortion" is. *See, e.g.*, *id.* at PageID#1578 n.4. And it did so without ever stopping to consider issues like whether the Facilities have standing to assert this new claim that they never brought.

The district court held that pregnant women retain "a liberty interest in non-elective, emergency abortion procedures for" their life or health under the Due Process Clause. *Id.* at PageID#1580. But to reach that holding, the court did not engage in the historical analysis that *Dobbs* and the rest of the case law require to determine whether the right is deeply rooted in our history and tradition or essential to our scheme of ordered liberty. *See* 142 S. Ct. at 2246. Instead, the court took the existence of an unenumerated right almost as a given and then applied a shocks-the-conscience analysis taken from bodily-integrity claims. Op. & Order,

R.97, PageID#1581. Again, none of those issues were briefed by any of the parties.[3]

The district court then scaled back its injunction—but not as one might expect. The court did not narrow the injunction to cover only nonelective abortions or even just the provisions of HB 3 that could affect such abortions. Rather, the court lifted its injunction only as to the parts of the law that it determined the Facilities could now comply with based on updated forms issued by the Cabinet. Op. & Order, R.97, PageID#1586–97. But the court refused to lift its facial injunction against enforcing over 30 provisions, including those regulating abortion-inducing drugs and the proper care and disposal of fetal remains.[4]

One last point on the unusual posture that led to this appeal. When the district court refused to dissolve its injunction, it did so without saying the motion

[3] The court also suggested that the Eighth Amendment would require an inmate to be able to get a nonelective abortion and that, although the Facilities "have not yet asserted a claim under the Emergency Medical Treatment and Labor Act," EMTALA would preempt HB 3 if there was a conflict. *Id.* at PageID#1582 nn.6–7. As with the rest of the district court's uninvited discussion of nonelective abortions, the Facilities have not asserted Eighth Amendment claims on behalf of inmates or argued that they are covered by EMTALA. *See* 42 U.S.C. § 1395dd(a).

[4] The court also kept enjoined Section 4(8) on the ground that its required information violated the Facilities' patients' right to privacy, even though the Facilities never asked for a preliminary injunction on that basis. *Id.* at PageID#1592.

was denied. Instead, the court said that the motion would continue to be submitted for consideration. *Id.* at PageID#1598. But that consideration has nothing to do with the merits of the preliminary injunction. The district court definitively ruled against the Attorney General on every preliminary-injunction factor based on its conclusion that the law violates the Constitution so long as the Facilities cannot comply with it. The district court then ordered ongoing status reports from the Cabinet so that it could superintend the agency's ongoing steps to comply with HB 3. *Id.*

The Attorney General then appealed.[5]

SUMMARY OF THE ARGUMENT

The preliminary injunction against HB 3 should be dissolved. *Dobbs* makes that clear. It did away with the Facilities' best argument: that their alleged inability to comply with certain requirements imposed an undue burden on the purported right to an abortion. Without the discarded undue-burden test, the Facilities are left only with rational-basis review or their procedural-due-process claim. But

[5] After he filed his notice of appeal, the district court issued another order. Order, R.103, PageID#1653. In it, the court questioned whether it had jurisdiction to modify the injunction and did not do so. *Id.* at PageID#1658. But it noted that otherwise it would lift the injunction as to several more provisions based on its determination that compliance is now possible. *Id.* Those did not include the provisions related to abortion-inducing drugs and fetal remains.

HB 3 easily passes the former, and binding precedent from this Court forecloses the district court's initial conclusion on the latter.

The district court seemingly recognized this. It declined to rely on its prior procedural-due-process holding when it refused to lift the injunction. And it declined to rule that HB 3 failed rational-basis review under substantive due process. Instead, it concocted a new theory that HB 3 violates a substantive-due-process right to nonelective abortions.

Whether that's true is not at issue here. The Facilities never made that argument below. They never distinguished between nonelective and elective abortions—even after *Dobbs*. Nor did they plead or put on any evidence showing that they regularly perform nonelective abortions. The district court violated the party-presentation principle by itself raising the issue and resolving it—without even ordering supplemental briefing. And that violation is all the more jarring given that the Facilities' lack third-party standing, that the court did not do the necessary historical analysis, and that the result is to facially enjoin a duly enacted state law.

Putting all that aside, even if the district court were right that there is a fundamental right to nonelective abortion, that HB 3 violated that right, and that it was proper to consider the issue on its own initiative, the court erred by granting overbroad relief. The court did not limit its relief to nonelective abortions—the

only constitutional harm it found. It kept HB 3's provisions enjoined as to *all* abortions, nonelective and elective alike. But it is black-letter law that injunctive relief should be no broader than necessary. So no matter how the Court views the district court's uninvited holding about nonelective abortions, the district court erred in not lifting the injunction as applied to elective abortions.

And no other ground supports the preliminary injunction. The purported right to an abortion is no more after *Dobbs*. So too is the exception to third-party standing for abortion claims. That means the Facilities lack standing to assert the substantive-due-process claim on behalf of women seeking abortions. Even so, the claim fails. Each provision of HB 3, even if it does not allow for immediate compliance, passes rational-basis review.

And the procedural-due-process claim—which the district court seemingly abandoned on its way to finding a substantive-due-process right—has always been wrong. This Court has held that no such claim is viable against a generally applicable law like HB 3, especially not in a pre-enforcement challenge.

In short, HB 3 is constitutional. The Attorney General is likely to succeed on the merits, and each other preliminary-injunction factor weighs in his favor. The Court should reverse and lift the injunction.

STANDARD OF REVIEW

The Court reviews the district court's refusal to dissolve its preliminary injunction for an abuse of discretion. *Bazzetta v. McGinnis*, 430 F.3d 795, 802 (6th Cir. 2005). That entails reviewing any legal questions de novo and any findings of fact for clear error. *ACT, Inc. v. Worldwide Interactive Network, Inc.*, 46 F.4th 489, 498 (6th Cir. 2022).

ARGUMENT

The district court erred in not lifting the injunction as to all of HB 3. To justify lifting an injunction, there must first be a significant change "in fact, law, or circumstance since the previous ruling." *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 414 (6th Cir. 2012) (citation omitted). Of course, *Dobbs* was that change in law. But this case comes in an unusual posture. After *Dobbs*, a motions panel of this Court dismissed the Attorney General's initial appeal of the original injunction and remanded the whole case—both the substantive- and procedural-due-process claims—for the district court to reexamine in light of *Dobbs*. Order, R.78, PageID#1386. So the inquiry here is straightforward.

That inquiry turns on the familiar preliminary-injunction factors: whether the Facilities have shown that they are likely to succeed on the merits, that they are likely to suffer irreparable harm without the injunction, that the balance of

equities favor them, and that an injunction is in the public interest. *ACT, Inc.*, 46 F.4th at 498. For claimed constitutional violations, likelihood of success on the merits is usually the determinative factor. *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 560 (6th Cir. 2021). And that is the case here. The Attorney General is likely to succeed on the merits because HB 3 is constitutional. So each other factor cuts in his favor.

I. The Attorney General is likely to succeed on the merits.

The district court's sole reason for continuing the injunction after *Dobbs* was its conclusion that HB 3 violates a fundamental right to nonelective abortions so long as the Facilities cannot comply with parts of the law. But whether there is such a right is not an issue in this case because no one ever raised it. And so the district court violated the party-presentation principle when it refused to dissolve its preliminary injunction based on this claim alone.

Nor is there any other ground in the record to support the district court's injunction. Even if the Facilities cannot comply with some provisions of HB 3, that does not create a procedural- or substantive-due-process problem.

A. The district court erred by adopting an argument the Facilities never made to grant an overbroad injunction.

Start with what the district court held. It held that there is a fundamental right to nonelective abortion for the health or life of a pregnant woman. And it

found that the Facilities' alleged inability to comply with parts of HB 3 violated that right because it purportedly prevents them from performing such abortions. The district court then kept the injunction in place for all abortions, not just those that are nonelective. Disentangling the errors in all of that is difficult, but here goes.

1. Most obviously, the district court violated the party-presentation principle. Courts must ordinarily "rely on the parties to frame the issues for decision" and act as a "neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citation omitted). The party-presentation principle ensures that courts do so. *Id.* It requires that courts stay within the bounds of what the parties have actually argued and the claims they have actually raised.

Of course, the principle is not absolute. On occasion, a "modest initiating role for a court is appropriate." *Id.* But that is not the norm. Typically, courts must act as "essentially passive instruments of government," deciding only the questions presented by the parties and not "looking for wrongs to right." *Id.* (citation omitted). And when a modest initiating role is appropriate, almost always the proper course is to order supplemental briefing so that a party has "the opportunity to present whatever legal arguments he may have." *Singleton v. Wulff*, 428

U.S. 106, 120 (1976); *see Sineneng-Smith*, 140 S. Ct. at 1582 (listing the few times the Court went beyond the parties' arguments but ordered supplemental briefing).

The key case is *Sineneng-Smith*. There, the Ninth Circuit ordered supplemental briefing from amici (and the parties if they wanted) on an issue the defendant had not "so much as hint[ed]" at. *Sineneng-Smith*, 140 S. Ct. at 1580. The defendant had raised vagueness and First Amendment arguments related to her own conduct. *Id.* at 1581. She had never raised an overbreadth argument based on the conduct of others. The Ninth Circuit on its own inserted that issue into the case with no justifying extraordinary circumstances. *Id.* The Supreme Court then reversed in a unanimous decision because the Ninth Circuit violated the party-presentation principle by raising a legal theory that the defendant never asserted.

Here is no different. On its own initiative, the district court decided that there is a constitutional right to nonelective abortion. The Facilities never made that argument. They never even distinguished between elective and nonelective abortions when given an opportunity to defend the preliminary injunction after *Dobbs*. Instead, their only argument on remand about substantive due process was that HB 3 failed rational-basis review for all abortions. Resp., R.82, PageID#1413.

They never "so much as hint[ed]" at a separate argument for nonelective abortions. *See Sineneng-Smith*, 140 S. Ct. at 1580. In fact, the district court acknowledged in its order that neither party had briefed the issue, and so it admitted to resolving the issue on its own. Op. & Order, R.97, PageID#1577 n.3.

What's more, there were no extraordinary circumstances justifying the district court's departure from the rules of the road. *Sineneng-Smith* makes that clear too. There, the Supreme Court offered examples of two times it had ordered briefing on a "constitutional issue implicated, but not directly presented." 140 S. Ct. at 1582. But in both cases, the Supreme Court noted that the parties had raised the issue below. *Id.* So by addressing the issue, the Court was not the first to insert it into the case. And in both cases, there were other circumstances justifying the Court reaching it: in one, the statutory argument turned on the constitutional issue, and in the other, lower courts needed guidance. *Id.* Nothing of the sort is present here. No party raised the issue, and that should have been "definitive of the matter here." *See Citizens Coal Council v. U.S. E.P.A.*, 447 F.3d 879, 905 (6th Cir. 2006) (en banc). The district court should have left the issue for a later case when it was raised by a party. And it certainly should not have resolved the issue without even asking for supplemental briefing.

2. The violation of the party-presentation principle is particularly jarring here—for three reasons.

First, nothing in the record below shows a likelihood that the Facilities have third-party standing to assert the rights of pregnant women seeking nonelective abortions.[6] The Facilities must establish standing for each claim. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 255 (6th Cir. 2018). If they fail to do so for a claim, then it cannot support a preliminary injunction. *See Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020).

That would include the claim injected into the case by the district court that there is a constitutional right to nonelective abortion. But the Facilities cannot assert that claim on their own behalf. It of course belongs to pregnant women seeking such an abortion. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 914 (6th Cir. 2019) (en banc). So the Facilities must show that they have third-party standing, which requires showing they have a close relationship to those women.[7] *See Ass'n of Am. Physicians & Surgeons v. U.S. FDA*, 13 F.4th 531,

[6] Of course, because the district court acted on its own without even ordering supplemental briefing, the Attorney General never had the chance to make this argument below.

[7] As explained below, in *Dobbs*, the Supreme Court rejected its prior case law allowing abortion facilities to use third-party standing to represent pregnant woman.

547 (6th Cir. 2021). And for a preliminary injunction issued during the pleadings stage, that showing requires clearly alleging sufficient facts. *See Hargett*, 978 F.3d at 386.

Putting all that together, at a minimum the Facilities needed to clearly allege that they perform nonelective abortions. Otherwise, there could be no argument that they have the close relationship necessary for third-party standing. But nowhere in their complaints do they clearly allege that they perform nonelective abortions. They merely say that they provide "reproductive health care, including abortion." Compl., R.1, PageID#4; Compl. R.33, PageID#396. That is not clearly alleging.[8]

Second, the party-presentation violation is especially problematic here because this is not a question that any precedent readily resolves. Whether the Constitution protects an unenumerated right is a complex question. It requires a court

[8] Perhaps the allegation that they perform "abortion" covers both elective and nonelective. But perhaps it only covers elective abortion—the more common usage of the word. That ambiguity means that the Facilities have not clearly alleged that they perform nonelective abortions as required to establish third-party standing. And the party-presentation principle only highlights this issue. For example, if the Facilities had brought the nonelective-abortion claim themselves, then the Attorney General may have contested whether they perform nonelective abortions with enough regularity to give rise to the necessary close relationship. And the Facilities then could have put on evidence at a hearing—as required for contested facts. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 246 (6th Cir. 2011).

to first identify the alleged right with a "careful description" that is not cast in general terms. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (citation omitted); *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007). And then it requires the court to engage in a detailed historical analysis about whether that specific right is "deeply rooted in this Nation's history and tradition." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (citation omitted); *see also Dobbs*, 142 S. Ct. at 2246–57.

Yet the district court did not approach the issue like that. Instead, it concluded that because the holding in *Dobbs* addressed elective abortion and because courts have recognized a right to bodily integrity, it must be the case that the Constitution protects a right to nonelective abortion. Op. & Order, R.97, PageID#1579–81. But that is not how courts resolve questions about unenumerated fundamental rights. *See Dobbs*, 142 S. Ct. at 2246 ("And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.").

The point here is not that the district court's bottom-line conclusion was right or wrong. Indeed, perhaps the relevant history shows it is ultimately right.[9]

[9] If there is a right to nonelective abortions, it does not follow that HB 3 violates it. Throughout HB 3, there are exceptions for abortions performed during a medical emergency. *See* §§ 1(9), 27(1), 34(2)(b). And the district court recognized that. *See* Op. & Order, R.97, PageID#1580–81. The only alleged violations it found were for the abortion-inducing-drugs and fetal-remains requirements. *See id.* at

The point is simply that "[i]n our federal system, legal arguments are to be tested through the fire of adversarial argument." *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 831 F. App'x 748, 759 (6th Cir. 2020) (Bush, J., dissenting), *rev'd sub nom. Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022). That's part of why the party-presentation principle exists. But that adversarial process did not happen here.[10]

Third, all these problems happened against the backdrop of "deeper, constitutional considerations" that arise when a federal court enjoins enforcement of a duly enacted state law. *See Cameron*, 142 S. Ct. at 1010. No doubt, "[f]ederal nullification of a state statute is a grave matter." *Maine v. Taylor*, 477 U.S. 131, 135 (1986). And so courts must approach constitutional challenges to state law with "respect for the place of the States in our federal system." *Arizonans for Off. English*

PageID#1581. But even if the Facilities cannot yet comply with those requirements, a woman can still receive a nonelective abortion. She can receive a surgical abortion, take responsibility for disposing of the fetal remains, and have them interred by a funeral establishment. §§ 22(2)(a), (4)(d)(2.).

[10] One last point about how the district court's wayfaring is problematic. The court devoted part of its opinion to discussing the difference between elective and nonelective abortions, including citing extra-record evidence about how "[t]he medical community" distinguishes the procedures. Op. & Order, R.97, PageID#1577–78. Again, that is precisely why the party-presentation rule exists. The district court held that the Constitution protects the right to obtain a nonelective abortion with no briefing or evidence about what in fact qualifies as a nonelective abortion. *Id.* at PageID#1577 n.3.

v. Arizona, 520 U.S. 43, 75 (1997). Because "a State's opportunity to defend its laws in federal court should not be lightly cut off," *Cameron*, 142 S. Ct. at 1011, the party-presentation principle takes on added importance in this context.

3. Still, suppose that the Facilities had made the argument about nonelective abortions and so it was proper for the district court to decide this issue. The district court erred again by granting overbroad relief that facially enjoined parts of a statute based on what the court determined were narrow, as-applied problems.

It is black-letter law that "[i]f injunctive relief is proper, it should be no broader than necessary to remedy the harm at issue." *United States v. Mia. Univ.*, 294 F.3d 797, 816 (6th Cir. 2002). Both the Supreme Court and this Court have said so time and again. *See Califano v. Yamaski*, 442 U.S. 682, 702 (1979) (explaining that the "the scope of injunctive relief is dictated by the extent of the violation established"); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) ("Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" (citation omitted)); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069 (6th Cir. 1998) ("Injunctive relief involving matters subject to state regulation may be no broader than necessary to remedy the constitutional violation."); *cf. United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021) ("In general, 'when confronting a constitutional

flaw in a statute, we try to limit the solution to the problem' . . . ." (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006))). And the Attorney General pointed that out to the district court multiple times. *See* Resp., R.21, PageID#204–05; Post-Hr'g Br., R.63, PageID#1147.

So no matter what else the Court does with the nonelective-abortion claim, at a minimum it should narrow the injunction so that it only applies for nonelective abortions.

B. No alternative basis exists on which to affirm the preliminary injunction.

There is no other legal basis that supports the district court's preliminary injunction. The court declined to consider whether HB 3 violates substantive due process for all abortions under the rational-basis standard. It also declined to readopt its prior holding that HB 3 violates the Facilities' procedural-due-process rights so long as there are provisions they cannot yet comply with. Even so, neither claim can save the injunction.[11]

[11] Neither of the Facilities' two remaining claims are in play at this stage. Although the Facilities pleaded a first-party substantive-due-process claim and a third-party right-to-privacy claim in their complaints, they did not press those claims in their preliminary-injunction motions. The only mention of the patient-privacy concern is a passing comment in the background of Planned Parenthood's motion. Mot., R.3, PageID#116 & n.6. So those claims are forfeited for preliminary-injunction purposes. *See E. Brooks, Inc. v. Shelby Cnty.*, 588 F.3d 360, 371 (6th Cir. 2009); *id.* at

i. The substantive-due-process claim fails.

Start with the substantive-due-process claim. But before getting to its merits, the Facilities have a problem. They lack third-party standing to assert the claim on behalf of women seeking abortions. *Dobbs* makes that clear.

1. Before *Dobbs*, the Supreme Court allowed abortion facilities to sue on behalf of women seeking abortions. But in *Dobbs*, the Court expressly said that was wrong. 142 S. Ct. at 2275; *see also EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 19-5516, 2022 WL 2866607, at *2 (6th Cir. July 21, 2022) (Bush, J., concurring and dissenting in part) ("But *Dobbs* has since explicitly cast [abortion third-party-standing] precedents into grave doubt."). The Court explained that its prior abortion cases "ignored the Court's third-party standing doctrine" and then cited three dissenting opinions explaining why abortion facilities lack third-party standing. *Dobbs*, 142 S. Ct. at 2275 & n.61 (citing *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2167–68 (2020) (Alito, J., dissenting); *id.* at 2173–43 (Gorsuch, J., dissenting); *Whole Woman's Health v. Hellerstedt*, 579 U.S 582, 632 & n.1 (2016) (Thomas, J., dissenting)). It doesn't get much clearer than that. If prior abortion

372 (Moore, J., concurring in judgment); *Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 624 (6th Cir. 2013). That means the district court erred in not lifting the injunction as to Section 4(8) on the ground that it violated the Facilities' patients' right to privacy. Op. & Order, R.97, PageID#1592. Of course, the Facilities can make that claim in the normal course of litigation.

cases allowing for third-party standing *ignored* the doctrine, then they were wrong. The favorably cited dissents were right: abortion facilities lack third-party standing to sue on behalf of women seeking an abortion.

And *Dobbs* can only be read as the Supreme Court instructing lower courts to no longer ignore the ordinary rules for third-party standing. *See SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, 40 F.4th 1320, 1328 (11th Cir. 2022) ("[W]e can no longer engage in those abortion distortions in the light of a Supreme Court decision instructing us to cease doing so."). This is not a circumstance in which the logic of a later case merely undercuts a prior one. *See Ass'n of Am. Physicians & Surgeons*, 13 F.4th at 542. That's because the Supreme Court directly repudiated its prior precedents. So this Court should "take the Supreme Court at its word" and correctly apply the third-party-standing doctrine. *See SisterSong*, 40 F.4th at 1328.

That doctrine requires three things. For a party to assert the constitutional rights of a third party, it must show that it has suffered a separate injury, that it has a close relationship to the third party, and that there is some hindrance to the third party protecting its own interest. *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 455 (6th Cir. 2017). The Facilities have not shown the latter two.

They have offered nothing to suggest that they have a close relationship with women seeking an abortion. *See June Med. Servs.*, 140 S. Ct. at 2168 (Alito, J., dissenting) ("[A] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure."). And merely alluding to an unnamed, undefined group of hypothetical future women drives home that there is no close relationship. *See id.* at 2174 (Gorsuch, J., dissenting) ("Normally, the fact that the plaintiffs do not even know who those women are would be enough to preclude third-party standing."); *Kowalski v. Tesmer*, 543 U.S. 125, 130–31 (2004).

Nor have the Facilities shown any hindrance to women seeking an abortion from advancing their own interests. No doubt, "a woman who challenges an abortion restriction can sue under a pseudonym, and many have done so." *June Med. Servs.*, 140 S. Ct. at 2168 (Alito, J., dissenting). Indeed, "women have challenged abortion regulations on their own behalf in case after case." *Id.* at 2174 (Gorsuch, J., dissenting) (collecting cases); *Whole Woman's Health*, 579 U.S at 632 n.1 (Thomas, J., dissenting) (collecting more cases). In short, the Facilities have not shown third-party standing. So they cannot bring the claim that HB 3 violates the rights of women seeking an abortion.

2. To be sure, the Attorney General did not raise third-party standing below. And under the current state of the law, the doctrine is prudential, not jurisdictional. *See June Med. Servs.*, 140 S. Ct. at 2117 (plurality opinion); *id.* at 2139 n.4 (Roberts, C.J., concurring). But this Court can still reach the issue. *See Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 n.2 (6th Cir. 2014) (explaining that third-party standing can be raised by the Court); *MainStreet Org. of Realtors v. Calumet City*, 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 . . . ."). And it should.

Although the Supreme Court currently characterizes third-party standing as prudential, its proper grounding is in Article III. *See June Med. Servs.*, 140 S. Ct. at 2143–46 (Thomas, J., dissenting) ("The rule against third-party standing is constitutional, not prudential."); *Sineneng-Smith*, 140 S. Ct. at 1586 (Thomas, J., concurring). And the Supreme Court may well correct course soon. That is more than enough reason for the Court to decide to reach the issue.

Besides, the Court can always excuse forfeiture in "exceptional circumstances." *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (citation omitted)). And those exist here. First, applying ordinary third-party-standing principles makes it unnecessary to reach the constitutionality of HB 3. If a court

need not decide a constitutional question, then generally it should not do so. *See, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 664 (2012). Second, *Dobbs* so strongly conveyed that abortion facilities lack third-party standing that it makes little sense to ignore that now. And third, it was only after the Supreme Court clarified that its past cases were wrong that the argument became viable.

After *June Medical* and before *Dobbs*, the argument that the Facilities lacked third-party standing was unlikely to prevail. So the only real chance for the Attorney General to argue that the Facilities lacked that standing below was in his emergency motion to lift the injunction. But because of the irreparable harm from not enforcing HB 3, the Attorney General filed that motion the same day this Court remanded the case. Mot. Lift Prelim. Inj., R.80, PageID#1391. That meant there was little time—just a few hours—to make the third-party-standing argument before the district court. The lack of time also justifies the Court reaching the issue.

In sum, the Court should reach the issue and hold that the Facilities do not have third-party standing to make the substantive-due-process claim on behalf of women seeking abortions.

3. Even so, if the Court reaches the merits of that claim, they are straightforward—whether or not the Facilities can comply with all of HB 3. Before *Dobbs*,

the Facilities had a colorable argument that if they cannot comply with some provisions, because doing so requires the Cabinet to first issue forms and regulations, then they cannot perform some abortions. So HB 3's requirements could arguably constitute an undue burden until the Cabinet fulfilled its obligations under HB 3.

But *Dobbs* did away with the purported right to abortion and discarded the undue-burden standard. It clarified that abortion regulations are subject to the same standard as any other health or safety regulation: rational-basis review. *Dobbs*, 142 S. Ct. at 2284. Under that deferential standard, a "law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" *Id.* (citation omitted). So "if there is a rational basis on which the legislature could have thought that [the law] would serve legitimate state interests," it must be upheld. *Id.*

Dobbs, however, goes even further. The Supreme Court did not just announce the standard for laws that regulate or prohibit abortion. It held that States have legitimate interests in the "respect for and preservation of prenatal life at *all* stages of development," in protecting "maternal health and safety," in eliminating "gruesome or barbaric medical procedures," in mitigating fetal pain, and in preventing discrimination. *Id.* (emphasis added). Prohibiting abortion is rationally related to those—and other—legitimate state interests. *Id.*

That fact easily resolves this claim. Each of HB 3's provisions that the district court refused to lift its injunction on is rationally related to one or many of the legitimate state interests *Dobbs* listed. Consider two examples.

First, take one of the abortion-inducing-drug requirements. Section 15 tasks the Cabinet with creating a certification program to regulate the distribution and dispensing of abortion-inducing drugs. And Section 6 provides that only qualified physicians registered in that program may provide abortion-inducing drugs. § 6(1). There is a rational basis for ensuring that such drugs are distributed in a safe manner by certified facilities and physicians.

Dobbs is unequivocal that protecting maternal health and safety is a legitimate state interest. 142 S. Ct. at 2284. So if Kentucky's General Assembly could rationally think that the abortion-inducing-drug-certification program furthers the safety of women seeking an abortion, then it is constitutional. It makes no difference whether the law effectively prohibits the Facilities from dispensing abortion-inducing drugs before the Cabinet creates the program. If the General Assembly can prohibit abortion-inducing drugs (which it can), then it can prohibit them until its program regulating them is up and running.

Second, consider one of the fetal-remains provisions. Section 22(4) prohibits disposing of fetal remains as medical waste, buying or selling remains, and

transporting the remains other than for select reasons. Put simply, it requires fetal remains to be treated and disposed of with dignity. There is a rational basis for that too. *Dobbs* is again unequivocal that "respect for" unborn life is a legitimate state interest. *Id.* Ensuring that fetal remains are treated and disposed of with dignity shows and fosters respect for unborn life. And it does not matter if that means the Facilities cannot perform abortions if they cannot yet comply. Again, if the General Assembly can prohibit abortion, it can prohibit abortion until compliance is possible. So even if the Facilities cannot comply with the fetal-remains requirements, those requirements are still constitutional.

The Attorney General could go on. But there is no need. Kentucky "has no obligation to produce evidence to sustain the rationality of its action." *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478, 484 (6th Cir. 2021) (en banc) (citation omitted). It is on the Facilities to show that there is no rational basis. *Id.* ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." (citation omitted)). But the Facilities have not come close to doing that.[12]

[12] They provided no argument below negating the many conceivable rational bases that support HB 3. *See* Resp., R.82, PageID#1413–15. Instead, they compared

So even if the Facilities cannot comply with certain requirements in HB 3 until the Cabinet promulgates forms and regulations, and even if that inability to comply prevents them from providing some abortions, the law survives scrutiny. Kentucky has a rational basis for prohibiting abortions until its state agencies can ensure that these provisions are followed. In other words, Kentucky may prohibit abortions until it can adequately determine that the Facilities are safely providing abortion-inducing drugs, properly disposing of fetal remains, and fulfilling all the other reasonable requirements in HB 3. And so the law remains constitutional even if the Facilities are right that they cannot yet comply.

ii. The procedural-due-process claim fails too.

Finally, turn to procedural due process. The district court at first held that the Facilities are likely to succeed on their procedural-due-process claim because of their purported inability to comply with HB 3. But the court did not rely on

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their alleged inability to comply with one nonbinding district court decision. *Id.* at PageID#1414–15 (citing *Doe v. Snyder*, 101 F. Supp. 3d 722 (E.D. Mich. 2015)). That case held that it violated due process to hold a homeless person criminally liable for not complying with a requirement to provide his address as part of a sex-offender registry—that is, to do something impossible. *Snyder*, 101 F. Supp. 3d at 725. That court, however, did not apply rational-basis review (its reasoning reads more like statutory construction). Besides, the situation is not analogous. HB 3 does not require the Facilities to do anything that is impossible. The most the Facilities say is that the law effectively requires them to stop performing abortions until they can comply.

that holding to continue its preliminary injunction on remand. For good reason: it is foreclosed by this Court's precedent.

Procedural due process is about the process needed before or after a State deprives someone of a legally protected property interest. To have a valid claim, a plaintiff must show that he has a protected property interest, that he was deprived of that interest, and that he was not afforded the process due to him. *Women's Med. Pro. Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006). The Facilities cannot show the second or third elements.

1. Start with the third. Even if the Facilities are right that HB 3 deprives them of a protected property interest, the question is what process they are entitled to before that happens. In answering that question, the critical point is that the Facilities are not challenging an enforcement action by Kentucky. Rather, they have facially attacked HB 3, claiming that the law will effectively prevent them from continuing their business of performing abortions. So they are challenging the law itself, not simply whether the law was enforced with fair process.

This Court has squarely rejected that kind of procedural-due-process claim. When a State enacts a law, "'the legislative process provides all the process that is constitutionally due' when a plaintiff's alleged injury results from a legislative act 'of general applicability.'" *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197,

217 (6th Cir. 2011) (citation omitted); *see also 37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 619 (6th Cir. 1997).[13] And that makes sense. Procedural due process is about preventing arbitrary government action by ensuring sufficient process. Process cannot get more sufficient than when a legislature passes a law of general applicability.

HB 3 is such a law. It does not single out any individuals or businesses. It applies equally to everyone in the Commonwealth that provides abortions or otherwise engages in the kind of conduct (such as pharmacy or cremation services) that HB 3 regulates. That the Facilities are currently the only two abortion facilities in Kentucky in no way changes that, contrary to their suggestion below. *See* Resp., R.82, PageID#1412 n.4. If it were otherwise, Kentucky could never regulate or prohibit abortion or any other industry that has limited participants.

None of that changes even if it's true that the Facilities cannot immediately comply with HB 3. That is because nothing requires the Facilities to perform abortions, and nothing (post-*Dobbs*) guarantees them the right to do so either. A State is free to prohibit whole classes of business or industry so long as there is a

[13] One of the cases that the district court cited in its initial grant of a preliminary injunction even made that very point. Op., R.65, PageID#1273 (citing *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at *8 (S.D. Ohio Apr. 21, 2020)).

rational basis for doing so—even if that means once-legal businesses are no longer allowed.[14]

Any claim otherwise sounds in substantive, not procedural due process. The Facilities' argument in the first appeal illustrates the point well. As an example, the Facilities argued that a State could not enforce a statute requiring gun sellers to register in a database if the State had not yet set up the database. *See* Resp. Mot. Stay at 20, *Planned Parenthood*, No. 22-5451 (6th Cir. June 3, 2022), ECF No. 10. That would, the Facilities argued, effectively prevent the sale of firearms, which would have the collateral effect of infringing on the fundamental rights protected by the Second Amendment. And yet, that last point is exactly the problem for the Facilities here. The defect in such a law is not a lack of procedure but

[14] In first granting the injunction, the district court cited no case that says otherwise. *See* Op., R.65, PageID#1274; *see also, e.g.*, *Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786, 791 (7th Cir. 2013) (basing its holding on substantive due process); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (considering retroactive legislation). In fact, the closest case the district court referenced is an unpublished, district court decision with completely off-point facts not sounding in procedural due process. *See Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1345–46 (M.D. Ala. 2002). Even still, the statement that "any law that requires you to do something by a certain date must give you adequate time to do it; otherwise, the law would be irrational and arbitrary for compliance with it would be impossible" does not apply here. *Id.* at 1343. HB 3 requires nothing that is impossible. At most, it requires the Facilities to temporarily stop performing abortions.

an encroachment on fundamental rights. Because no such fundamental right to abortion exists after *Dobbs*, no such defect exists in HB 3.

2. Now consider the second element of a procedural-due-process claim. The only way the Facilities could have a viable procedural-due-process claim related to HB 3 would be if a state agency acted to deprive the Facilities of a legally protected right as part of enforcing the law. But the Facilities have not been deprived of anything yet. HB 3 imposes requirements that they must follow, but no government agency or actor has acted to deprive the Facilities of anything.

If the Facilities elect to disobey HB 3's requirements and a government actor levies a penalty against them, then perhaps they would be deprived of something. And *that* could require a process of some kind. But even then, the claim would be only that there was not adequate process in the enforcement.

That is exactly what occurred in *Baird*, the case that the Facilities and the district court relied on below. *See* 438 F.3d at 612. There, the state agency issued a cease-and-desist order requiring an abortion facility to close, which prevented it from obtaining a pre-deprivation hearing as required under state law. *Id.* at 613. It was not the state law itself that gave rise to the procedural-due-process claim; it was the lack of adequate process given by the state agency in enforcing the law.

But nothing of the sort has happened under HB 3. No government actor has deprived or threatened to deprive the Facilities of anything. And if a state agency does take enforcement action against the Facilities, the Attorney General agrees that they would be entitled to some process on whatever charge is brought. But as of now, there is no deprivation for the Court to even analyze whether the Facilities received sufficient process. All that is present is a facial challenge to a generally applicable law. And passage of that law through both legislative chambers necessarily provides all the process constitutionally due.

II. The remaining factors favor lifting the preliminary injunction.

The remaining factors require little elaboration. Because HB 3 is constitutional, each favors lifting the injunction. *See Online Merchs. Guild*, 995 F.3d at 560. The Facilities are not harmed by the enforcement of a constitutional law—especially not irreparably. *See id.* But the Attorney General on behalf of Kentucky is irreparably harmed by the district court's enjoining enforcement of constitutional provisions of a validly enacted law. *Id.* Whenever "a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (citation omitted). Kentucky has suffered that injury for months—since the district court first granted a temporary restraining order on April 21, 2021. *See* Op.

& TRO, R.27, PageID#261. Each day since then, it has been enjoined from enforcing a constitutional law enacted by its people's representatives. And so each day it has been irreparably harmed. The balance of equities overwhelmingly favors lifting the injunction.

In the same way, the public interest also favors lifting the injunction: "It's in the public interest that [courts] give effect to the will of the people 'by enforcing the laws they and their representatives enact.'" *Thompson*, 976 F.3d at 619 (citation omitted); *see also Online Merchs. Guild*, 995 F.3d at 560 ("As for the public interest, this factor favors the state when a challenged law is likely constitutional."). And the public has an interest in enforcement of each of HB 3's requirements. It has an interest in fetal remains being disposed of with dignity, in abortion-inducing drugs being provided safely, and in each of the other requirements being followed.

* * *

It's been a long road getting to this Court—one filled with irregularity after irregularity. Just the latest is the district court finding a fundamental right to non-elective abortions when the Facilities did not make that claim or even show standing to do so. The district court simply held that the right exists—without applying the appropriate historical analysis—and then used it to keep parts of HB 3 enjoined for *all* abortions. The district court should have decided this case based on

the claims the Facilities made. But it didn't, likely recognizing that neither has any merit—not after *Dobbs*. No matter whether the Facilities can yet comply with all its requirements, HB 3 is constitutional.

CONCLUSION

The Court should reverse and lift the preliminary injunction.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 10,340 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, Garamond, in 15-point font using Microsoft Word.

s/ Matthew F. Kuhn

CERTIFICATE OF SERVICE

I certify that on November 21, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew F. Kuhn

ADDENDUM

The Attorney General designates the following district court documents as relevant:

1. Planned Parenthood's complaint and attached exhibits. R.1, 1-1, 1-2, 1-3, PageID#1–106.
2. Planned Parenthood's motion for a temporary restraining order and preliminary injunction and attached exhibits. R.3, 3-1, 3-2, PageID#108–37.
3. The Attorney General's response to Planned Parenthood's motion for temporary restraining order. R.21, PageID#193–215.
4. Planned Parenthood's reply in support of a temporary restraining order. R.22, PageID#216–23.
5. Opinion granting the temporary restraining order. R.27, PageID#241–61.
6. EMW's motion to intervene and attached exhibits. R.28, 28-1, 28-2, PageID#262–375.
7. Opinion and order granting the motion to intervene. R.32, PageID#386–93.
8. EMW's complaint. R.33, PageID#394–416.
9. EMW's motion for a preliminary injunction. R.38, PageID#506–14.

10. The Attorney General's response to Planned Parenthood's motion for a preliminary injunction and attached exhibit. R.39, 39-1, PageID#517–54.

11. The Attorney General's response to EMW's motion for a preliminary injunction and attached exhibit. R.41, 41-1, PageID#557–85.

12. The Facilities' reply in support of a preliminary injunction and attached exhibits. R.42, 42-1, 42-2, 42-3, 42-4, PageID#586–632.

13. EMW's reply in support of a preliminary injunction. R.43, PageID#633–35.

14. Opinion and order extending the temporary restraining order. R.49, PageID#643–50.

15. Transcript of preliminary-injunction hearing. R.51, PageID#654–791.

16. The Facilities' proposed findings of fact and conclusions of law. R.54, PageID#799–883.

17. The Facilities' declarations. R.55, 56, 57, PageID#1023–74.

18. The Attorney General's post-hearing brief and attached exhibit. R.63, 63-1, PageID#1146–96.

19. The Facilities' reply. R.64, PageID#1210–50.

20. Opinion granting the preliminary injunction. R.65, PageID#1251–90.

21. The Attorney General's notice of appeal. R.66, PageID#1291–93.

22. The Attorney General's motion to stay injunction pending appeal. R.67, PageID#1294–99.

23. Opinion and order denying motion to stay. R.69, PageID#1304–30.

24. Order from Sixth Circuit remanding. R.78, PageID#1385–86.

25. The Attorney General's emergency motion to lift the injunction. R.80, PageID#1391–1403.

26. The Facilities' notice of intent to respond. R.81, PageID#1405–07.

27. The Facilities' response to emergency motion to lift the injunction and attached exhibits. R.82, 82-1, 82-2, PageID#1408–69.

28. The Attorney General's reply in support of lifting the injunction and attached exhibits. R.83, 83-1, 83-2, PageID#1470–82.

29. Order for sur-reply. R.84, PageID#1483–85.

30. The Facilities' sur-reply. R.86, PageID#1491–1506.

31. Order lifting the injunction as to the 15-week provisions. R.87, PageID#1507–12.

32. Opinion and order as to lifting preliminary injunction. R.97, PageID#1569–98.

33. The Attorney General's notice of appeal. R.101, PageID#1647–49.

34. Opinion and order. R.103, PageID#1653–62.