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,

Plaintiffs - Appellees

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

Intervenors - Appellees

v.

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

Defendant - Appellant

ERIC FRIEDLANDER, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services, *et al.*,

Defendants

OPPOSITION TO MOTION TO DISMISS APPEAL AND FOR THIRD EXTENSION

The Attorney General opposes Planned Parenthood and EMW's motion to dismiss the appeal and for a third extension of time to file their brief. According to the Facilities, they have an emergency. Their brief is due today, and they just found out last Friday that they think the appeal is moot. So instead of timely filing their brief today (under the deadline given by their second extension of time) and incorporating their

mootness arguments in it, they filed an emergency motion to dismiss the appeal over a holiday weekend, three days before their brief is due. And they request a third extension of time if the Court denies their motion (despite this Court making clear that it would not lightly grant another).

The Court should deny both the Facilities' motion to dismiss the appeal and their request for a third extension. Neither is warranted. The Facilities have not met their burdens. And they can raise their jurisdictional arguments in their brief—as they were already planning to do for one of them. *See* Mot. 6, ECF No. 35. Then the Attorney General will reply in the normal course.

1. This case challenges the constitutionality of Kentucky's 2022 House Bill 3, a law that overhauls much of how Kentucky regulates abortion.

2. The district court first granted a preliminary injunction on May 19, 2022, enjoining enforcement of most of HB 3. Op., R.65, PageID#1290.

3. The Attorney General appealed and filed a motion for a partial stay pending appeal. 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.

4. After the Supreme Court issued *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), 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. 26.

5. Rather than resolve the motion, a panel of this Court dismissed the appeal and remanded the case for the district court to first consider the effect of *Dobbs* on the case. Order, R.78, PageID#1386.

6. That same day, the Attorney General moved for emergency relief asking the district court to lift its preliminary injunction. Mot., R.80, PageID#1391.

7. The district court did not rule on the core of that motion until August 30th—a full two months after the emergency motion was filed. Op. & Order, R.97, PageID#1569. It refused to dissolve part of its preliminary injunction, relying on arguments that the Facilities never made and neither party briefed. *Id.* at PageID#1578.

8. The Attorney General then appealed for a second time to this Court. His brief was initially due on November 14th.

9. The Court granted the Attorney General a seven-day extension given the important issues at stake and "the press of other litigation matters," which included "preparing for an oral argument in the Supreme Court of Kentucky" the day after the brief was due. Mot. 2, ECF No. 18.

10. The Attorney General timely filed his brief on November 21st.

11. That made the Facilities' appellee brief due on December 21st.

12. On December 7th, the Facilities filed a motion for a 30-day extension, which the Attorney General did not oppose, so that their counsel could spend "additional time to research and prepare a thorough brief to this Court" given "the

holidays (including holiday travel) and competing litigation deadlines." Mot. 4, ECF No. 23.

13. The Court granted that motion, making the Facilities' brief due on January 20, 2023.

14. On January 10th, the Facilities moved to hold this case in abeyance or for an additional 70-day extension. Mot. 6, ECF No. 25.

15. The Court denied the motion to hold the case in abeyance and granted in part the motion for an extension. Order 2, ECF No. 29. It allowed the Facilities another 32 days (the extra two because of the holiday weekend), setting their deadline as February 21st (today). But the Court made clear that no "further briefing extensions will be considered absent a particularized showing of good cause." *Id.*

16. This past Friday afternoon, the Facilities' counsel emailed the Attorney General's counsel and said that the Facilities would agree that the injunction should be dissolved and the appeal dismissed as moot. *See* Mot. Ex. D, ECF No. 35. Their reason was because of the Supreme Court of Kentucky's decision in wholly separate state litigation issued the day before. *See id.* at Ex. C. Stated broadly, the Kentucky high court held that the Facilities did not have third-party standing to assert the Kentucky constitutional rights of pregnant women but did have first-party standing to assert some of their claims. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, --- S.W.3d ---, 2023 WL 2033788, at *19 (Ky. Feb. 16, 2023).

17. The Attorney General's counsel responded a couple of hours later that the Attorney General could not agree to such a decision before seeing the Facilities' brief and with no notice prior to a Friday afternoon before a holiday weekend. Mot. Ex. D, ECF No. 35.

18. Shortly before 10:00 pm that Friday night, the Facilities' counsel emailed again. This time, she said that the Facilities planned to file an emergency motion over the holiday weekend to dismiss the appeal as moot. *Id.* They had two reasons now: because they were willing to agree to dissolve the injunction and because they had just learned from the Cabinet for Health and Family Services that various forms and regulations were complete. *Id.* (The Cabinet had informed the Facilities that afternoon that the regulations had been effective since January 12th. *See id.* at Ex. E.)

19. The next evening (this past Saturday), the Facilities filed their motion asking for emergency relief and a third extension of time. They make two and a half arguments for why the appeal should be dismissed. The half first: the Facilities say that the Court never had jurisdiction over this appeal under 28 U.S.C. § 1292. *Id.* at 6. But they never explain why, offering at best two sentences of argument that contain no details. *Id.* And the lack of detail seems deliberate. The Facilities note that they will explain their argument "further in their principal brief." *Id.*

20. Now the other two: they argue that the appeal became moot for two reasons. First, the Facilities say that they now "cannot imminently resume" performing abortions given the Supreme Court of Kentucky's decision. *Id.* And second, they claim

that the basis for the preliminary injunction is gone because the Cabinet has finished with the applicable forms and regulations. *Id.* at 7. But again, the Facilities fail to elaborate on either reason. Critically, they never lay out why the Cabinet finishing up the forms and regulations moots the various issues on appeal. Nor do they go through the many provisions still enjoined and show how the Cabinet's action affects the district court's holdings as to them.

21. Finally, the Facilities never explain why they could not raise each of those arguments in their response brief.[1] They never say why an emergency jurisdictional motion is needed three days before their brief is due—and over a holiday weekend no less. The only reasonable explanation is that the Facilities do not want to file a brief defending the injunction that they secured.

22. At every turn, the Attorney General has tried to have this Court correct the district court's errant course, and at every turn the Facilities have resisted. They have consistently tried to avoid filing a brief in defense of their own injunction.

23. The Attorney General appealed the initial preliminary injunction, filed two motions for a stay pending appeal, and filed a motion for the district court to lift the injunction the same day the case was remanded. Then after two more months, he was able to appeal again. He asked for a short seven-day extension out of necessity and

[1] Parties often raise jurisdictional arguments in their briefs rather than in motions to dismiss. *See, e.g.*, Appellee Br. at 18, *Ohio v. EPA*, 969 F.3d 306 (6th Cir. 2020) (No. 19-3500) (arguing to dismiss the appeal as moot).

consented to the Facilities' first extension motion in good faith that the Facilities required the extra time given the holidays. Then, over the Attorney General's objection, the Facilities moved to hold the case in abeyance or for a second 70-day extension. The Court gave them 32 days and was clear that another extension would not easily be forthcoming.

24. Yet the Facilities did not get the hint. Rather than file their brief and include any jurisdictional or mootness arguments they might have in it, they filed this emergency motion—where the only emergency is that they may have to file a brief.

25. The Court should deny their motion out of hand. Motions practice should not become a tool to delay briefing. If the Facilities wanted to move to dismiss, they should have done so well before now. Then the Attorney General could have responded in the ordinary course. Indeed, according to Facilities, the basis for one of their mootness arguments occurred on January 12th. *See* Mot. Exs. D–E, ECF No. 35. That they failed to exercise due diligence to check that until February 17th—five days before their brief was due under a second extension—is no excuse. And the Kentucky high court's decision last Thursday is not one either. Nothing changed legally here as a result of that decision—only seemingly the Facilities' incentive to defend their injunction. But they can easily make any argument about that in their brief.

26. At bottom, the Facilities are doing everything they can to avoid filing a brief in defense of the own injunction. The Court should summarily deny their motion and order them to file their brief by the current deadline.

27. Even so, if the Court considers the Facilities' jurisdictional arguments, none justify dismissing the appeal or granting a third extension. Start with the half argument: that there is no jurisdiction under 28 U.S.C. § 1292. It's unclear if the Facilities are even pressing that argument here. They lead with it in their motion. But then off the bat say that they will explain it further in their brief. *Id.* at 6. And then at best, they give two sentences of argument with no detail. *Id.* But that is not enough.

28. Arguments "adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation," are forfeited. *Buetenmiller v. Macomb Cnty. Jail*, 53 F.4th 939, 946 (6th Cir. 2022) (citation omitted). The Facilities make no effort to develop their 28 U.S.C. § 1292 argument now. And if they raise that argument in their brief, as they say they will, then the Attorney General will respond in his reply after seeing it actually developed.

29. Besides, the Attorney General has already addressed the Court's jurisdiction under 28 U.S.C. § 1292. *See* Appellant Br. 1–2, ECF 20. Whether characterized as express or in practical effect, the district court refused to dissolve the injunction. Op. & Order, R.97, PageID#1582. 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 v. Johnson*, 228 F.3d 662, 668 (6th Cir. 2000). And it did so after ruling against the Attorney General on every element of the preliminary-injunction standard. That's express. Or at the very least, it's in practical effect. And in the latter case, the two additional requirements are easily 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. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). This Court has jurisdiction under 28 U.S.C. § 1292.

30. Now turn to the mootness arguments. An appeal of a preliminary injunction is moot if the Court's decision would lack any practical effect. *Resurrection Sch. v. Hertel*, 35 F.4th 524, 528 (6th Cir. 2022) (en banc). But if the decision could still "make a difference to the legal interests of the parties," then it is not moot. *United States v. City of Detroit*, 401 F.3d 448, 451 (6th Cir. 2005) (citation omitted). Indeed, an appeal remains live so long "as the parties have a concrete interest, however small," in the outcome. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (citation omitted).

31. The party asserting mootness bears a "heavy burden" to show it. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 558 (6th Cir. 2021). And that is especially so when the mootness claim rests on the voluntary cessation of one of the parties. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). Then the asserting party must show that something has "completely and irrevocably eradicated" the controversy, *id.*, and that it is "absolutely clear" that the conduct is not reasonably "expected to recur," *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). The reason for the rule is obvious: "to protect a party from an opponent who seeks to defeat judicial review by temporarily altering its behavior." *City of Detroit*, 401 F.3d at 451 n.1.

32. Neither of the Facilities' reasons carry their burden to show that the appeal is moot. First, they say that the state-court decision issued last Thursday somehow

moots the appeal because they "cannot imminently resume" performing abortions. Mot. 6, ECF No. 35. But the Facilities have been unable to perform elective abortions since August 1st when the Kentucky Court of Appeals stayed a state trial court's injunction against two state laws (wholly separate from HB 3) largely prohibiting abortions. *See id.* at Ex. C. And the Supreme Court of Kentucky simply held last Thursday that the Facilities lacked third-party standing to assert most of their claims (but had first-party standing to assert some of them). The court did not hold that the Kentucky Constitution does not protect a right to abortion. And the Facilities will keep trying to have the separate laws enjoined, one way or another. They even expressly "reserve the right to resume abortion services should the abortion bans be enjoined in state court." *Id.* at 4 n.1.

33. On top of that, HB 3's regulations on abortions continue to apply even with the other laws in place. Those laws are distinct from HB 3, and HB 3 continues to operate whether or not they are in force.[2] In short, the state case has no legal bearing here. Any ultimate resolution there rests on state law grounds, as opposed to federal grounds here. There, the Facilities brought claims exclusively under the state

[2] For example, as the district court expressly found, several of HB 3's regulations apply to nonelective abortions, which the other abortion laws still allow. *See* Op. & Order, R.97, PageID#1577. In fact, that was the basis for its latest substantive-due-process holding. *Id.* So the Facilities' claims against HB 3 at least would seem necessarily to still be live as to nonelective abortions. Or are the Facilities admitting that they don't perform such abortions and lack standing as to any claim based on them? *See* Appellant Br. 24, ECF No. 20. If so, then there goes the basis of the district court's main holding.

Constitution; here, they brought them exclusively under the federal Constitution. *Compare* Compl. at 22–28, *EMW Women's Surgical Ctr., P.S.C. v. Cameron*, No. 2022-SC-0329 (Ky. June 27, 2022), *with* Compl., R.1, PageID#21–23. HB 3 and the challenge to it are wholly independent of the state litigation.

34. So what the Facilities are really saying is they no longer want to defend their injunction because their incentive to do so has lessened. Their favored resolution in the state case is at best delayed, at worst less likely. So because the Facilities think elective abortions are potentially not going to be legal soon, they no longer want to defend their injunction and the district court's erroneous ruling. But they cannot walk away so easily.

35. What the Facilities are trying to do is directly analogous to the voluntary cessation of conduct. They are voluntarily electing to no longer defend their injunction. That means they need to show both that the state litigation (or their response to it) has "completely and irrevocably eradicated" the controversy and that it is absolutely clear that their challenge is not reasonably expected to recur. *Speech First*, 939 F.3d at 767; *see also West Virginia*, 142 S. Ct. at 2607.

36. They have not come anywhere close to doing so. The state ligation did nothing to eradicate the controversy over HB 3. Nor does the Facilities' suggested response. Saying that they no longer want to pursue the injunction but "reserve the right to resume abortion services" is anything but irrevocable. Mot. 4 n.1, ECF No. 35. Given the Facilities' disclaimer, it is not "absolutely clear" that their resuming

performing abortions is not reasonably expected to recur. *West Virginia*, 142 S. Ct. at 2607. They cannot "defeat judicial review by temporarily altering [their] behavior." *City of Detroit*, 401 F.3d at 451 n.1.

37. And the Court should not overlook the audacity of what the Facilities are trying to do. They secured a preliminary injunction against HB 3 on May 19, 2022. Op., R.65, PageID#1290. They have benefited from that favorable injunction for nine months and now want to do an about-face so this Court cannot review it. The Attorney General of course cares about promptly dissolving the injunction and stopping the irreparable harm to the Commonwealth from its inability to enforce its law. But he also cares about the rule of law and correcting the district court's many errors.

38. The Facilities do not get to just walk away from their own suit after securing and benefiting from an injunction for months—especially when it is so clear that the Attorney General is right after *Dobbs* and after he has put in significant work pursuing the appeal. He has appealed twice, filed two emergency motions for a stay pending appeal, filed a principal brief, and now two responses to the Facilities' motions.

39. Analogously, at the trial level a plaintiff may have to continue to judgment after the defendant has put in significant work in response—and especially when it has become clear that the defendant is going to win. *See Grover ex rel. Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718–19 (6th Cir. 1994). Likewise, merely offering to give a party the relief it seeks is not usually enough to moot a case. *See Campbell-Ewald Co.*, 577 U.S. at

161–62. And it's not here. The Facilities are trying to game the system: benefit from a favorable injunction and then skirt appellate review when their incentives change.

40. Second, the Facilities argue that regulatory action by the Cabinet mooted this case as of January 12th. Mot. 7, ECF No. 35. But all they say on this point is that "the basis for the preliminary injunction . . . no longer exists." *Id.* They nowhere elaborate nor explain how the Cabinet's action does away with the various issues on appeal. And they never go through the many provisions still enjoined to show how the Cabinet's action mooted the challenge as to them. For example, the district court first enjoined and later kept enjoined parts of Section 4 on the ground that its required information violated the Facilities' patients' right to privacy—not based on the Facilities' alleged inability to comply with any forms or regulations from the Cabinet. *See* Op. & Order, R.97, PageID#1591–92. The Facilities cannot just vaguely assert that the whole appeal is now moot because of action by the Cabinet.

41. Perhaps after the Facilities fully flesh out their argument the Attorney General will agree that some issues on appeal are moot in whole or in part, to some or to all of HB 3's provisions. But he cannot determine that yet without more than the cursory assertions given by the Facilities (especially not on the emergency timeline initiated by them). Those assertions cannot carry their "heavy burden" of showing the appeal is moot. *Memphis A. Philip Randolph Inst.*, 2 F.4th at 558. The Facilities have failed to show that there is no "concrete interest, however small," in the outcome of the appeal. *Campbell-Ewald Co.*, 577 U.S. at 161.

42. That means the Court should deny their motion to dismiss the appeal. There are no grounds to dismiss here, and the Facilities can try their arguments again in their brief (and hopefully do a better job at it). Then the Attorney General will reply. And the Court can resolve the whole appeal in one go in the normal course. That is how these issues should have been raised and how they should be resolved—not in a so-called emergency motion filed three days before the Facilities' brief is due after two extensions already.

43. And the Court should deny their request for a third extension. There is no good cause to grant the Facilities another five days to file their brief after the denial of their motion. The Court was clear that only a particularized showing of good cause would be enough for a third extension. Order 2, ECF No. 29. The Facilities' delaying filing their brief to make arguments they could include in it is not good cause. Indeed, according to the Facilities, they were already in the process of "finalizing their brief" on Friday. Mot. 5, ECF No. 35. They could—and should—have already added in the mootness arguments that they now raise. Whether they've failed to do that is on them. No further extension is warranted.

44. For all these reasons, the Court should deny the Facilities' motion. If, however, it decides to dismiss the appeal, then it should also vacate the district court's orders. *See Resurrection Sch.*, 35 F.4th at 530 ("We also vacate the district court's order denying the plaintiffs' motion for a preliminary injunction, given that they lost their chance to appeal its merits through no fault of their own." (citing *United States v.*

Munsingwear, 340 U.S. 36, 39 (1950))). If the Court were to dismiss this appeal as moot, then the Attorney General would have been unable to secure an appellate decision through no fault of his own.

45. And that goes for both the district court's order refusing to dissolve the injunction, Op. & Order, R.97, PageID#1569, and its initial grant of the injunction, Op., R.65, PageID#1251. The Attorney General has not had the chance to get an appellate decision on either. He appealed the first, but a panel of this Court dismissed it for the district court to first consider *Dobbs*'s effect on the preliminary injunction. So despite the Attorney General's best efforts, he has been unable to get a decision on appeal as to either opinion. Equity suggests, at the very least, that both should be vacated. Both are egregiously wrong and should not be left on the books without the chance for this Court's review.

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The Court should deny both the Facilities' motion to dismiss the appeal and their request for a third extension.

Respectfully submitted,

s/ Daniel J. Grabowski
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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 response complies with the type-volume limitation in Fed. R. App. P. 27(d)(2)(A) because it contains 3,872 words.

This response 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 14-point Garamond font using Microsoft Word.

s/Daniel J. Grabowski

CERTIFICATE OF SERVICE

I certify that on February 21, 2023, the foregoing was electronically filed with the Court via the Court's appellate CM/ECF system, and a copy of the same was automatically served on all parties registered with the CM/ECF system on the same date.

s/ Daniel J. Grabowski