

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

PLANNED PARENTHOOD GREAT  
NORTHWEST, HAWAII, ALASKA,  
INDIANA and KENTUCKY, INC., *et al.*,

Plaintiffs,

v.

DANIEL CAMERON, in his official capacity as  
Attorney General of the Commonwealth of  
Kentucky, *et al.*,

Defendants.

Case No.: 3:22-cv-00198-RGJ

**PLAINTIFFS' OPPOSITION TO  
EMERGENCY MOTION TO LIFT PRELIMINARY INJUNCTION**

Plaintiffs respectfully request that the Court deny Defendants' motion and maintain the preliminary injunction preventing enforcement of certain sections of HB3.<sup>1</sup> Nothing about the *Dobbs v. Jackson Women's Health Organization* decision changes Plaintiffs' entitlement to the preliminary injunction. Plaintiffs are providing abortions pursuant to a restraining order issued by the Jefferson Circuit Court. And compliance with HB3 remains impossible because the Cabinet has yet to implement the necessary forms and regulations. Accordingly, the preliminary injunction remains necessary to protect Plaintiffs from the threat of serious criminal and civil consequences arising out of their provision of legal healthcare services until compliance with HB3 becomes possible.

---

<sup>1</sup> Plaintiff EMW does not contest the lifting of the preliminary injunction with respect to HB3 §§ 27, 32-35, the ban on abortions at 15 weeks.

## **I. RECENT BACKGROUND**

### **A. The AG's Efforts After this Court's Injunction**

The AG's Motion is yet another in a series brought by the AG based on little more than disagreement with this Court's conclusion that enforcement of HB3 must be blocked until compliance is possible. Following the Court's PI Order [Dkt. No. 65], the AG filed multiple motions to stay the injunction both in this court and in the Sixth Circuit. On May 26, 2022, this Court denied the AG's motion to stay the preliminary injunction pending appeal. [Dkt. No. 69]

On May 27, 2022, the AG filed an interlocutory appeal in the Sixth Circuit and also sought to stay the preliminary injunction in that court. [COA Dkt. No. 7-1] That motion was narrower than its current plea before this court, arguing only that Plaintiffs should be required to comply immediately with HB3's informed consent and fetal remains requirements. Plaintiffs opposed the AG's motion. [COA Dkt. No. 10].

On June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, \_ S. Ct. \_\_, 2022 WL 2276808.

Subsequent to that ruling, the AG renewed its emergency motion to stay the preliminary injunction in the Sixth Circuit, this time seeking a stay of the entire injunction.

Effectively denying the AG's two motions, the Sixth Circuit remanded the case to this Court in light of the decision in *Dobbs*. [Dkt. No. 78, PageID#: 1386] The Sixth Circuit stated that "the district court is better positioned to reconsider its injunction in the first instance." *Id.* Attorney General Daniel Cameron now asks this Court to dissolve its preliminary injunction due

to the Supreme Court’s decision in *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022). [Dkt. No. 80 (the “Motion”)].<sup>2</sup>

## **B. Plaintiffs’ State Court Litigation**

Following the *Dobbs* decision overturning *Roe v. Wade*, Plaintiffs filed a challenge under the Kentucky Constitution in Jefferson Circuit Court against two Kentucky bans on abortion: KRS 311.772 (the “trigger ban”) and KRS 311.7701-11 (the “six-week ban”) (the “bans” collectively). Except in limited medical emergencies, the trigger ban prohibits all abortion services in Kentucky by making it a Class D felony to perform an abortion at all, and the six-week ban prohibits abortion after a “fetal heartbeat” is detected. KRS 311.772(3)(b); KRS 311.990(21)-(22); KRS 532.060(2)(d). *See* Declaration of Miranda H. Turner (“Turner Decl.”), Exhibit 1, at ¶¶ 26-36.

On June 30, 2022, the state court granted a restraining order,<sup>3</sup> which allowed abortion care to resume in Kentucky pending a temporary injunction hearing, which took place on July 6, 2022. At the conclusion of the July 6 hearing, the state court issued post-hearing briefing due on July 18, 2022, and denied the AG’s oral motion to dissolve the restraining order in the meantime. Accordingly, abortion care will continue in the Commonwealth for the foreseeable future.

## **II. ARGUMENT**

Plaintiffs remain entitled to the preliminary injunction blocking certain provisions of HB 3, even after the *Dobbs* case. In fact, as the AG concedes, this Court’s preliminary injunction

---

<sup>2</sup> In yet another attempt to air his grievance with this Court’s preliminary injunction order, the AG sued the Cabinet in Franklin Circuit Court, arguing that the Cabinet is not fulfilling its obligations under HB3. *See Commonwealth of Kentucky v. Eric Friedlander*, No. 22-CI-00473 (Jun. 14, 2022).

<sup>3</sup> The AG brought emergency motions to lift the restraining order to the Kentucky Court of Appeals and the Kentucky Supreme Court, but both courts denied his motion. *See Daniel Cameron v. Mitchell Perry, et al.*, No. 2022-CA-0780 (June 30, 2022) (denying motion for immediate relief on July 2, 2022); *Daniel Cameron v. Mitchell Perry, et al.*, No. 2022-SC-0266 (July 5, 2022) (denying emergency motion for immediate relief on July 5, 2022).

order found Plaintiffs were likely to succeed on grounds separate and apart from those impacted by the *Dobbs* decision. Specifically, this Court found that Plaintiffs have a “strong likelihood of success on the merits of their procedural due process claims.” In addition, the Supreme Court in *Dobbs* made plain that a restriction on abortion may still violate Plaintiffs’ substantive due process rights if the restriction fails rational basis review. Here, a law requiring compliance with nonexistent forms under pain of criminal prosecution cannot pass muster under the rational basis test. Finally, Plaintiffs continue to satisfy the remaining factors for a preliminary injunction.

**A. The Preliminary Injunction Should Remain in Effect Because The Merits of Their Procedural Due Process Claim Are Unchanged.**

In granting Plaintiffs’ request for preliminary injunction, this Court confirmed that “Plaintiffs have a strong likelihood of success on the merits of their procedural due process claims.” [Dkt. No. 65, PageID#: 1272] Nothing about the *Dobbs* decision impacts Plaintiffs’ procedural due process claims. The AG concedes as much, stating that the Court’s holding regarding Plaintiffs’ likelihood of success on their procedural due process claim is based “on grounds *wholly independent* from *Dobbs*.” [Dkt. 80, PageID# 1392-93 (emphasis added)] The AG presents no evidence or argument that HB3 is any more possible to comply with now than it was when the preliminary injunction issued on May 19, 2022. On that basis alone, the injunction should remain in place.

The AG’s only response is to reargue grounds already asserted and lost before this Court, contending once again that the Court “gets procedural due process all wrong,” [Dkt. No. 80, PageID#: 1399] based on the assertion that procedural due process “is about the process needed *before or after* a state deprives an entity of a legally protected property interest.” [*Id.* (emphasis added)] But the AG focuses solely on the “before” procedural due process found in the legislative process and ignores the “*or after*” portion of this test. The legislative process before

HB3 was enacted is not at issue in Plaintiffs' procedural due process claim; the AG's focus on the legislative process is a red herring that the Court has already rejected.<sup>4</sup> [Dkt. No. 69, PageID#: 1326]

*Dobbs* also has no impact on the procedural due process precedent in *Women's Medical Professional Corporation v. Baird*, 438 F.3d 595 (6th Cir. 2006). *Baird* confirms that an abortion clinic operator has a protected property interest in the continued operation of his business. *Id.* at 611-12. Other Sixth Circuit courts have granted preliminary injunctions based on the procedural due process rights articulated in *Baird*. See, e.g., *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948 (S.D. Ohio 2015). In *Hodges*, the district court issued a preliminary injunction because plaintiff showed a likelihood of success on the merits of its procedural due process claim under *Baird*. *Id.* at 954. The facts were "striking similar to those in *Baird*" and plaintiff "demonstrated a likelihood of success in showing that its strong interest in the continued operation of its business outweighs any undue burden." *Id.* at 957-58. *Baird*'s due process standard, as applied in *Hodges*, is undisturbed by *Dobbs* and controls this case.

The decision in *Campbell v. Bennett*, 212 F. Supp. 2d 1339 (M.D. Ala. 2002), is also instructive. In *Campbell*, the district court issued a preliminary injunction ordering that plaintiff's name be placed on the ballot for a seat in the Alabama House of Representatives. See *id.* at 1341.

The statute at issue moved the deadline for independent candidate registration "from six days

---

<sup>4</sup> The AG's assertion that Plaintiffs' procedural due process rights are not violated because HB3 is a law of general applicability does not pass muster. Plaintiffs are the only two abortion providers in Kentucky. HB3 automatically targets them unlike the laws at issue in *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197 (6th Cir. 2011) and *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614 (6th Cir. 1997). Cf. *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896 (S.D. Ohio Apr. 21, 2020) ("Plaintiff's constitutional right to procedural due process was not violated" "because the Director's order applied to all non-essential businesses and was not a decision targeting Plaintiff's business individually[.]") Unlike the stay-at-home orders at issue in *Hartman* that implicate all non-essential businesses and their property interests in continued operation, HB3 unconstitutionally singles out abortion clinics for closure.

after the second primary election . . . to the date of the first primary election[.]” *Id.* By the time the statute was discussed on the local news, the new deadline was only two days away. The plaintiff (an independent candidate) “was unable to find sufficient volunteers or to organize sufficient promotional events” and therefore lacked the requisite signatures to qualify by the new deadline. *Id.* at 1343. The district court stated that relief was warranted because “*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.*” *Id.* (emphasis added). Just as the statute in *Campbell* unfairly shortened the period of time for independent candidates to register for the ballot, HB3 unfairly requires compliance with forms and regulations that do not yet exist.

Because *Dobbs* does not impact Plaintiffs’ procedural due process claim—which the AG concedes—the AG’s Motion to dissolve the injunction should be denied.

**B. Plaintiffs’ Substantive Due Process Claim Persists Post-*Dobbs*.**

Because the continued preliminary injunction is warranted based on Plaintiffs’ likelihood of success on their procedural due process claim alone, this Court does not need to revisit Plaintiffs’ substantive due process claim. As this Court stated, a party seeking a preliminary injunction “need only show a likelihood of success on the merits of one claim where there are multiple claims at issue in a complaint.” [Dkt. No. 65, PageID#: 1256 (collecting cases)]

But Plaintiffs do not concede that HB3’s wholly irrational requirement of compliance with provisions that remain impossible to comply with can satisfy rational basis muster after *Dobbs*, as the AG’s Motion contends.<sup>5</sup> Supreme Court jurisprudence contains multiple examples of irrational legislative action being overturned under rational basis review. *See, e.g., U.S. Dept.*

---

<sup>5</sup> As noted above, Plaintiff EMW does not contest the AG’s request to dissolve the preliminary injunction with respect to the 15-week ban.

*of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (striking down food stamp regulations barring eligibility for people who share households with unrelated persons as violative of due process because it was “wholly without any rational basis”); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (reversing a ruling that the state employment commission lacked jurisdiction to hear claims scheduled beyond the statutory timeline because “[t]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement”). The AG’s assumption that HB3 would survive rational basis review should not be accepted. Due process does not tolerate laws that punish lack of compliance where compliance is impossible.

Indeed, courts within the Sixth Circuit have found a deprivation of due process rights under circumstances where the law makes compliance impossible. *See Doe v. Snyder*, 101 F. Supp. 3d 722, 723 (E.D. Mich. 2015); *Doe v. Haslam*, No. 3:16-CV-02862, 2017 WL 5187117, at \*19 (M.D. Tenn. Nov. 9, 2017) (denying motion to dismiss where plaintiff argued that it was impossible to comply with Tennessee sex offender law that prohibited registered offenders from standing or sitting within an Exclusion Zone where the boundaries and extent of such zones were unclear); *Doe v. Lee*, No. 3:21-CV-010, 2022 WL 452454, at \*6 (E.D. Tenn. Feb. 14, 2022) (same).

In *Snyder*, for example, Michigan passed a law requiring sex offenders to register and maintain a valid state identification card reflecting the registrant’s current address. 101 F. Supp. 3d at 724. Failing to comply with the law resulted in a misdemeanor, imprisonment for up to two years, and a \$2,000 fine. *Id.* A homeless would-be registrant challenged the statute as violating his substantive due process rights because, due to being homeless, he had no current address and could not obtain a state identification card, making compliance with the statute impossible. The

*Snyder* court agreed, explaining that “[h]olding an individual criminally liable for failing to comply with a duty imposed by statute, with which it is legally impossible to comply, deprives that person of his due process rights.” *Id.* So too, here.

Because Plaintiffs’ substantive due process rights are violated by HB3, the preliminary injunction should not be dissolved.

**C. The Remaining Preliminary Injunction Factors Are Unchanged Since This Court’s PI Order.**

The AG’s Motion focuses almost entirely on whether Plaintiffs can still satisfy the first factor of the preliminary injunction test, whether the movant has a strong likelihood of success on the merits. *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012). In so doing, the AG skirts Plaintiffs’ showing of irreparable harm, as he has done throughout this case. [*Compare* Dkt. No. 80, PageID# 1401-02 with Dkt. No. 21, PageID#: 213-14 with Dkt. No. 69, PageID#: 1327-30] This Court correctly ruled that “irreparable harm may be present where engaging in the prohibited conduct would result in the realistic possibility of felony prosecution.” [Dkt. No. 65, PageID#: 1277-78] The facts underlying that finding are unchanged, in addition to the other harms identified by the Court. Plaintiffs will suffer “unquantifiable damages to their businesses and reputations if they are unable to perform services.” [*Id.* at PageID#: 1279] The AG does not dispute these irreparable harm findings.

Further, the facts underlying the Court’s findings regarding harm to others also remains unchanged: Plaintiffs are still the only two remaining clinics in the Commonwealth that can perform abortion services and, without the continued injunction, they will be unable to do so until the Cabinet provides a means to comply. [*Id.* at PageID#: 1280] Third parties would still be unable to obtain medical procedures that are currently legal. [*Id.*] The AG offers no rebuttal to the Court’s finding in the PI Order that “[e]njoining these provisions will not harm the



Commonwealth because it argues they were already unenforceable.” [Id.] Because the injunction on enforcement would not cause substantial harm to others, the injunction should stay in effect.

Finally, the Court held that the public interest would be served via the injunction because a constitutional violation was likely. [*Id.* at PageID#: 1280-81]. Since the AG concedes that a Plaintiffs’ procedural due process claim is unchanged, the Court’s finding on this point remains valid.

### **CONCLUSION**

For the foregoing reason, Plaintiffs respectfully request that the Court deny the AG’s request to dissolve the HB3 preliminary injunction except as the 15-week ban.

[SIGNATURES ON FOLLOWING PAGE]

Dated: July 7, 2022

/s/ Miranda Turner

Michael Abate  
Casey L. Hinkle  
KAPLAN JOHNSON ABATE & BIRD LLP  
[mabate@kaplanjohnsonlaw.com](mailto:mabate@kaplanjohnsonlaw.com)  
[chinkle@kaplanjohnsonlaw.com](mailto:chinkle@kaplanjohnsonlaw.com)  
710 West Main Street, 4th Floor  
Louisville, KY 40202  
(502) 416-1630

Jennifer S. Romano (*pro hac vice*)  
Marlee Santos (*pro hac vice*)  
CROWELL & MORING LLP  
[JRomano@crowell.com](mailto:JRomano@crowell.com)  
[MSantos@crowell.com](mailto:MSantos@crowell.com)  
515 South Flower Street, 40th Floor  
Los Angeles, CA 90071  
(213) 622-4750

Miranda Turner (*pro hac vice*)  
Gloria Martinez Trattles (*pro hac vice*)  
CROWELL & MORING LLP  
[MTurner@crowell.com](mailto:MTurner@crowell.com)  
[GTrattles@crowell.com](mailto:GTrattles@crowell.com)  
1001 Pennsylvania Avenue NW  
Washington, DC 20004  
(202) 624-2500

Julie Murray (*pro hac vice*)  
Carrie Y. Flaxman (*pro hac vice*)  
PLANNED PARENTHOOD FEDERATION OF  
AMERICA  
[julie.murray@ppfa.org](mailto:julie.murray@ppfa.org)  
[carrie.flaxman@ppfa.org](mailto:carrie.flaxman@ppfa.org)  
1110 Vermont Avenue, NW, Suite 300  
Washington, D.C. 20005  
(202) 973-4830

ATTORNEYS FOR PLAINTIFF

### CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2022, I filed the foregoing with the Court through the Court's CM/ECF system. I further served a copy of this Notice on counsel for Defendants by email at the following addresses:

Victor Maddox, [victor.maddox@ky.gov](mailto:victor.maddox@ky.gov)

Carmine G. Iaccarino, [carmine.iaccarino@ky.gov](mailto:carmine.iaccarino@ky.gov)

Christopher L. Thacker, [Christopher.Thacker@ky.gov](mailto:Christopher.Thacker@ky.gov)

Lindsey R. Keiser, [Lindsey.Keiser@ky.gov](mailto:Lindsey.Keiser@ky.gov)

Wesley W. Duke, [WesleyW.Duke@ky.gov](mailto:WesleyW.Duke@ky.gov)

Michael S. Rodman, [kbml@ky.gov](mailto:kbml@ky.gov)

Leanne Diakov, [Leanne.diakov@ky.gov](mailto:Leanne.diakov@ky.gov)

Thomas Wine, [tbwine@louisvilleprosecutor.com](mailto:tbwine@louisvilleprosecutor.com)

*/s/ Miranda Turner* \_\_\_\_\_

Miranda Turner

*Counsel for Plaintiff*