No. 22-5832

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA AND KENTUCKY, INC., *et al*.,
Plaintiffs-Appellees,

vs.

DANIEL CAMERON, in his official capacity as ATTORNEY GENERAL of the Commonwealth of Kentucky, *et al*.,
Defendant-Appellant,

and

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

On Appeal from the United States District Court
For the Western District of Kentucky, Louisville Division
Case No. 3:22-cv-00198, Hon. Rebecca Grady Jennings

BRIEF OF PLAINTIFF-APPELLEES PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, AND KENTUCKY, INC. AND PLAINTIFFS-INTERVENORS-APPELLEES EMW WOMEN'S SURGICAL CENTER, P.S.C. AND DR. ERNEST MARSHALL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-5832 Case Name: Planned Parenthood v. Cameron et al

Name of counsel: Jennifer S. Romano

Pursuant to 6th Cir. R. 26.1, Planned Parenthood Great Northwest, Hawai'i, AK, IN and KY
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on September 21, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jennifer S. Romano

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-5832 Case Name: Planned Parenthood v. Cameron, et al.

Name of counsel: Brigitte Amiri

Pursuant to 6th Cir. R. 26.1, EMW Women's Surgical Center and Dr. Ernest Marshall, M.D.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on September 30, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Brigitte Amiri

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF ORAL ARGUMENT

Appellees submit that this appeal should be decided without oral argument.

STATEMENT OF LACK OF JURISDICTION

This Court should dismiss this appeal for lack of jurisdiction. First, the issues on this appeal are now moot because, in light of recent events, Appellees now agree with the Attorney General that *the sole relief requested in this appeal*—that the preliminary injunction should be dissolved in its entirety—should be granted. Second, this Court never had jurisdiction because the Attorney General appeals an interlocutory order relating to a motion that the district court expressly kept under submission for further consideration. Nevertheless, the Attorney General refuses to stipulate to the exact relief it seeks and persists in pursuing this appeal.

This appeal arose from an injunction that was issued to prevent enforcement of House Bill 3 ("HB3") during the time that compliance was impossible because the Commonwealth-issued forms and regulations mandated under the law did not exist. In other words, the district court blocked the law until the means of compliance were provided by the Commonwealth.

In light of events that took place days before this brief is being filed, the issues on this appeal are now moot. On February 17, 2023, the Kentucky Cabinet notified Appellees for the first time that the forms and regulations necessary for

compliance with HB3 were completed and approved by the Kentucky legislature. The basis for the preliminary injunction on appeal was that the Cabinet had not yet created the forms and finalized the regulations to comply with HB3. The Cabinet's notice confirmed that the grounds supporting the preliminary injunction no longer exist.

In addition, on February 16, 2023, the Kentucky Supreme Court issued a decision in *EMW Women's Surgical Ctr., P.S.C., et al. v. Cameron*, No. 2022-SC-0329, 2023 WL 2033788 (Ky. 2023) (the "Kentucky Supreme Court Decision"), holding that Appellees lack third-party standing under Kentucky law to challenge Kentucky's Trigger Ban and Six-Week Ban (the "abortion bans") and remanded the case back to the circuit court. Previously, a decision was expected imminently to the open and critically important question of whether there is a right to abortion under the Kentucky Constitution. Now, the Kentucky Supreme Court Decision will have the result of allowing the abortion bans to continue indefinitely, meaning Appellees will be unable to resume abortion care as soon as anticipated while the challenge to the bans continues in the Kentucky state court.[1]

[1] Appellees reserve the right to resume services should the abortion bans be enjoined again in state court.

Based on the Cabinet's notification of completion of the forms and regulations and the Kentucky Supreme Court's Decision (both of which occurred within two business days of filing this responsive brief), Appellees agreed to stipulate to dissolve the injunction and dismiss the appeal. The Attorney General rejected that offer. Regardless, for the reasons explained in Argument Section I(A), *infra*, this Court should dismiss the appeal for lack of jurisdiction as the issues presented are moot. *Bruder v. Smith*, 215 F. App'x 412, 415 (6th Cir. 2007) ("[M]ootness is a threshold jurisdictional issue." (quoting *Brock v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 889 F.2d 685, 687 n.1 (6th Cir. 1989))).

In addition, even if the Court finds that the issues on appeal are not moot, the Court lacks jurisdiction under 28 U.S.C. § 1292 because the Attorney General has prematurely appealed from a non-final order on a motion that "remains submitted to the [district] court for consideration." Aug. 30 Order, R. 97, Page ID # 1598.

Because the Attorney General has not established this Court's jurisdiction, the Court should dismiss this appeal. *See, e.g.*, *Joy & Middlebelt Sunoco, Inc. v. Fusion Oil, Inc.*, 179 F. App'x 301, 303 (6th Cir. 2006) ("Defendant failed to meet its burden of establishing this Court's jurisdiction; therefore we hereby dismiss this suit."); *cf. United States v. Victoria-21*, 3 F.3d 571, 576 (2d Cir. 1993) ("Claimants-Appellants have failed to meet their burden of establishing this

Court's appellate jurisdiction, either pursuant to 28 U.S.C. § 1292(a)(1) or pursuant to 28 U.S.C. § 1651.").

STATEMENT OF ISSUES

The issues for the Court to decide are:

1. Whether the issues on this appeal are now moot because, based on recent events, Appellees now agree with the Attorney General that the preliminary injunction should be dissolved in its entirety?

2. If this Court finds that the issues presented on this appeal are not moot, whether this Court has jurisdiction under § 1292(a)(1) when the district court did not expressly or in practical effect refuse to dissolve the preliminary injunction but instead took the Attorney General's motion to dissolve the preliminary injunction under consideration to monitor the Cabinet's promulgation of regulations and forms necessary to comply with the challenged law?

3. If this Court finds it has jurisdiction, whether the district court abused its discretion in issuing the August 30 order when it progressively narrowed the preliminary injunction and kept the remainder under consideration while the Cabinet promulgated regulations and forms necessary to comply with the challenged law?

STATEMENT OF THE CASE

A. House Bill 3 ("HB3")

On April 13, 2022, the Kentucky legislature enacted House Bill 3 ("HB3"), which, *inter alia*: created an extensive regulatory scheme for medication abortion

to be devised and implemented by the Cabinet; required cremation or interment of fetal remains for the first time; and added significant new reporting requirements of abortion information to the Commonwealth, including the reporting of personally identifying, sensitive patient information. Failure to abide by certain provisions of HB3 are punishable with potential Class D felonies, fines up to $1 million, and the revocation of physician and facility licenses. HB3 provided that these massive changes would take effect immediately because the legislature declared an "emergency" to bypass the default rule that legislation takes effect ninety days after the adjournment of the session. Ky. Const. § 55.

Even though the law took effect immediately, there was no ability for Appellees to comply with its provisions. Appellees could only continue providing abortions at risk of criminal and civil enforcement. For example, HB3 immediately required Appellees to use certain forms that did not exist and permitted the Cabinet to take up to "sixty (60) days" to create these forms. *See* HB 3 §§ 1, 4, 8–9, 25–27, and 29. Other sections, specifically Sections 17 and 22, obligated the Cabinet to create forms but set no deadline at all. Indeed, Section 22 required the Cabinet to "design forms through administrative regulations," thus tying the creation of the forms to the time-consuming regulatory process. HB3 also tasked the Cabinet with promulgating administrative regulations to create an entirely new "certification program to oversee and regulate the distribution and dispensing of abortion

inducing drugs," including a registration process for physicians. HB 3 § 15(1). Failure to abide by the new requirements would subject a provider to criminal and civil penalties and potential loss of license. HB 3 §§ 3(12)(a), 39(a), 18(1)(e), 28(a), (b).

Finally, HB3 established a new requirement that the tissue resulting from an abortion or miscarriage may no longer be disposed of as medical waste, which had consistently been permitted under Kentucky law. HB 3 § 22(4). The requirement necessarily obligated Appellees to enter into one or more new contracts with a third-party vendor and to document the patient's choice of disposition on forms that did not exist but were to be created by the Cabinet through administrative regulations. HB 3 § 22(3). It was impossible for Appellees to continue to provide abortions because there was no means for them to comply with the new law.

B. Temporary Restraining Order

After HB3's enactment, Appellee Planned Parenthood sought assurances from the Attorney General that he would not enforce HB3 until compliance was possible. The Attorney General never provided those assurances. As a result, Appellee Planned Parenthood filed a lawsuit challenging HB3 as a violation of its and its patients' procedural and substantive due process rights and then moved for a temporary restraining order/preliminary injunction on April 14, 2022. Despite

opposition, the district court restrained operation of the law in its entirety "based on the impossibility of compliance." Order Granting TRO, R. 27, Page ID # 241.

Appellees EMW and Dr. Marshall successfully moved to intervene on April 25, 2022 (Motion to Intervene, R. 28, Page ID # 263), and joined the motion for preliminary injunction on April 29, 2022 (Intervenor Motion for Preliminary Injunction, R. 38, Page ID # 506).

C. Preliminary Injunction

The district court held a hearing on May 2, 2022, during which Appellees painstakingly addressed each section of HB3 to explain where compliance was impossible, and identified those sections where compliance was possible. *See* Order, R. 69, Page ID # 1315, 1317–1318. The district court requested post-hearing proposed findings of fact and conclusions of law, which the parties submitted. On May 19, 2022, the district court issued a preliminary injunction. Preliminary Injunction Order, R. 65, Page ID # 1289–90.

The injunction was precisely defined and narrowly tailored, enjoining only those sections where compliance was impossible. *Id.* The district court enjoined these provisions only "until the Cabinet creates a means for compliance," and the court explicitly stated that the injunction did not interfere with the state's efforts to create the necessary forms and promulgate the necessary regulations. *Id.* at 1290.

The Attorney General appealed the same day, and moved the following day, on May 20, 2022, for an emergency stay of the preliminary injunction order. Notice of Appeal, R. 66, Page ID # 1291; Emergency Motion for Stay, R. 67, Page ID # 1294. The district court denied the motion for a stay on May 26, 2022 in a lengthy opinion refuting all of the Attorney General's arguments. Order, R. 69 Page ID # 1330.

D. Post-*Dobbs* Rulings

On June 24, 2022, while the Attorney General's first appeal was pending, the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overruling *Roe v. Wade* and its progeny. This Court remanded the case to the district court for further proceedings consistent with *Dobbs* (*Planned Parenthood Great Nw., Hawaii, Alaska, Indiana & Kentucky, Inc. v. Cameron*, No. 22-5451, 2022 WL 3646092, at *1 (6th Cir. June 30, 2022)), and the Attorney General filed an emergency motion to dissolve the injunction. Motion to Dissolve, R. 80, Page ID # 1391.

In its motion, the Attorney General argued that "*Dobbs* d[id] away with any colorable substantive-due-process argument that the Clinics had[.]" *Id.* at 1392. However, the Attorney General acknowledged that the violation of procedural due

process underpinning the injunction[2] was "wholly independent from *Dobbs*." *Id.* at 1392–93. The Attorney General nevertheless asked the district court to reverse itself. *Id.* If the district court were inclined to stand on its prior ruling, the Attorney General continued, then "the Attorney General respectfully asks the Court to do so immediately so that the Attorney General's now-delayed appeal can resume." *Id.* at 1393. Appellees opposed the Attorney General's motion to lift the injunction because the merits of their procedural due process claim remained unchanged and because even under rational basis review, legislative action requiring compliance with forms and regulations that did not exist violates substantive due process rights. Response to Motion to Dissolve, R. 82, Page ID # 1408.

The district court partially granted the Attorney General's motion on July 14, 2022, dissolving the injunction as to certain sections of HB3 that the court determined could then be complied with. July 14 Order, R. 87, Page ID # 1512. The order explained that the Attorney General's motion "remain[ed] submitted to the court for consideration as it applies to all other enjoined sections of HB3" and ordered the Cabinet and Appellees to submit "status reports and/or additional briefing" describing progress made towards compliance. *Id.*

[2] Prior to *Dobbs*, Appellees also challenged HB3's 15-week abortion ban. After *Dobbs*, Appellees did not contest dissolving the injunction as to HB3's 15-week ban. Response to Motion to Dissolve, R. 82, Page ID # 1408 n.1.

On August 30, 2022, the district court issued a second order, again partially granting the Attorney General's motion, further dissolving the preliminary injunction, and stating again that the Attorney General's motion "remain[ed] submitted to the court for consideration as it applies to all enjoined sections of HB3" and ordered "status reports and/or additional briefing" on progress towards compliance. Aug. 30 Order, R. 97, Page ID # 1597–98. The parties timely submitted status reports as ordered on September 16, 2022. Cabinet Status Report, R. 99, Page ID # 1603–07; Plaintiffs' Status Report, R. 100, Page ID # 1631–33. Soon after, the Attorney General appealed, filing a notice of appeal of the August 30, 2022 order on September 20, 2022. Notice of Appeal, R. 101, Page ID # 1648.

On October 5, 2022, the district court issued an order stating that it was "unclear" whether the Attorney General's appeal divested the lower court of jurisdiction over the injunction. Nevertheless, the district court stated that, but for the "unanswered question of law" regarding jurisdiction, the court otherwise "would immediately release" from the injunction provisions where the Cabinet had created new means of compliance. Oct. 5 Order, R. 103, Page ID # 1657–58.

On February 17, 2023, the Cabinet notified Appellees that the forms are complete, the Kentucky General Assembly completed its review of the final HB 3 regulations, and the forms and regulations are effective. *See* Dkt. 35 at 213.

E. State Court Litigation

While the underlying controversy was pending, and after the *Dobbs* ruling, a state court proceeding raised challenges under the Kentucky Constitution to the abortion bans, which prohibit abortion at an early stage of pregnancy with very limited exceptions. *See EMW Women's Surgical Center, P.S.C., et al. v. Cameron*, No. 2022-SC-0329. There, the circuit court issued a temporary injunction of the abortion bans, which a Court of Appeals judge subsequently stayed. The Kentucky Supreme Court then took the appeal and request to reinstate the temporary injunction.

The Kentucky Supreme Court Decision issued on February 16, 2023, holding that Appellees lacked third-party standing under Kentucky law to challenge the abortion bans, but the Supreme Court reserved the question of whether the abortion bans violate the Kentucky Constitution. *EMW Women's Surgical Ctr., P.S.C., et al. v. Cameron*, 2023 WL 2033788 (Ky. 2023). The Kentucky Supreme Court declined to reinstate the injunction of the abortion bans and remanded the matter to the circuit court. *Id*.

Because the Kentucky Supreme Court Decision has the effective result of allowing the abortion bans to continue at present, Appellees will be unable to perform abortion services while the challenge to the bans continues in state court.

Based on the Kentucky Supreme Court Decision, Appellees notified the Attorney General that Appellees were willing to dissolve the injunction and requested that the Attorney General dismiss this appeal. The Attorney General denied the request. Appellees contacted the Attorney General again after they received notice from the Cabinet that the forms and regulations were complete, once again seeking to dissolve the injunction. The Attorney General did not respond. Appellees filed an Emergency Motion to Dismiss this appeal for lack of jurisdiction, to which the Attorney General filed an opposition. This Court did not rule on the Motion to Dismiss before this brief was due.

SUMMARY OF ARGUMENT

The Attorney General asks this Court to resolve issues that already have been resolved on their own. Appellees now agree with the Attorney General that the preliminary injunction should be dissolved in full. The Attorney General's refusal to stipulate to dissolution of the preliminary injunction and dismissal of this appeal not only unnecessarily burdens this Court, but would require this Court to exceed the scope of its jurisdiction under statute and the federal Constitution.

If this Court determines that the issues on appeal are not moot, this Court still lacks jurisdiction over this matter because the Attorney General's motion to lift the injunction, which is the basis for this appeal, remains submitted for consideration to the trial court, which has already said it would dissolve the

injunction if it believed it still had jurisdiction to do so. The Attorney General improperly and prematurely filed its notice of appeal when the district court had not fully decided the motion. Accordingly, the Attorney General's appeal should be dismissed for lack of jurisdiction.

Should the Court decide to proceed despite the fact that it does not have jurisdiction over this interlocutory appeal, it should affirm the district court's decision because the district court did not abuse its discretion in its August 30 order. Appellees demonstrated a substantial likelihood of success on the merits for both their claims for violation of procedural due process rights and substantive due process rights on the grounds that compliance with the law was impossible.

First, Appellees satisfied the simple proposition that HB3 imposed standards of conduct that were impossible to meet. This is not a question of whether the Commonwealth is now permitted to ban abortion in the wake of *Dobbs*. This case concerns whether the Commonwealth can require the submission of reports on forms that the Cabinet had not yet created, and compliance with regulations that the Cabinet had not yet promulgated, under pain of criminal prosecution and substantial fines. Legislation of this nature, if enforcement were permitted, is illogical and fundamentally contrary to procedural due process.

Second, there was no rational basis for passing and enforcing a law with which it was impossible to comply. Further, as the parties are subject to sanction for failure to comply with HB3, Appellees have standing to challenge the law.

Third, the district court did not abuse its discretion in finding—at that time—that the other three preliminary injunction factors favored maintenance of the injunction: Appellees continued to demonstrate irreparable harm at the time of the district court order, the balance of equities favored Appellees, and a preliminary injunction served the public interest. This Court should dismiss the appeal, or reject it on the merits, and return the case to the district court.

STANDARD OF REVIEW

"The standard of review on the issue of subject matter jurisdiction is de novo review." *Greater Detroit Res. Recovery Auth. v. U.S. E.P.A.*, 916 F.2d 317, 319 (6th Cir. 1990); *Davis v. Colerain Twp., Ohio*, 51 F.4th 164, 175 (6th Cir. 2022) ("[A] mootness finding deprives a court of subject-matter jurisdiction.").

If the Court determines that it has jurisdiction, it should review the district court's August 30 order for an abuse of discretion. *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018) (citing *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011)); *see LNB Bancorp, Inc. v. Osborne*, 432 F. App'x 489, 489 (6th Cir. 2011) ("We review a district court's denial of a motion to

dissolve a preliminary injunction for an abuse of discretion." (citing *Reese v. City of Columbus*, 71 F.3d 619, 622 (6th Cir. 1995))).

Under this standard, the Court "review[s] the district court's legal conclusions de novo and its factual findings for clear error." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007) (quoting *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003)). The standard is deferential, but this Court may reverse if the district court improperly applied the governing law, used an erroneous legal standard, or relied upon clearly erroneous findings of fact. *McGirr*, 891 F.3d at 610 (quoting *Hunter*, 635 F.3d at 233). In addition, "[t]his Court is free to affirm the judgment of a district court on any basis presented by the record." *Beydoun v. Sessions*, 871 F.3d 459, 466 (6th Cir. 2017) (citing *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002)).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION.

A. The Court Lacks Jurisdiction Because the Issues Presented on Appeal Are Moot.

The recent Kentucky Supreme Court Decision means that the Kentucky Supreme Court will not be deciding the right to abortion imminently, and Appellees will not be able to resume abortion services pending the challenge to the bans in Kentucky state court. In addition, the Cabinet's completion of the forms

and regulations needed for compliance with HB3 means that the district court's basis for the preliminary injunction—the unavailability of forms and regulations to comply with HB3—no longer exists. As a result, all parties agree that the injunction should be dissolved in full, which makes this appeal moot.

"[M]ootness is a threshold jurisdictional issue." *Bruder v. Smith*, 215 F. App'x 412, 415 (6th Cir. 2007) (quoting *Brock v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 889 F.2d 685, 687 n.1 (6th Cir. 1989)). Where a preliminary injunction is separately challenged, the issue of whether a preliminary injunction is moot is a distinct issue from the issue of whether the case as a whole is moot. *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 393 (1981). As a matter of course, an appeal should be dismissed for lack of jurisdiction when the issues presented are moot. *Radiant Glob. Logistics, Inc. v. Furstenau*, 951 F.3d 393, 397 (6th Cir. 2020) (dismissing appeal for lack of jurisdiction where a preliminary injunction was mooted); *Stradley v. Glenn*, 193 F.2d 522, 522 (6th Cir. 1951) (when a moot question is presented, the appellate court has no jurisdiction to decide, the appeal should be dismissed).

The Court should dismiss this appeal due to mootness because, like in *Bruder*, "the only matter before this Court is an interlocutory appeal from a preliminary injunction" and "the case is moot unless some aspect of the *preliminary* relief would, if granted, make a difference to the legal interests of the

parties." 215 F. App'x at 416 (emphasis in original) (quoting, *inter alia*, *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997)). Here, because Appellees are subject to the abortion bans following the Kentucky Supreme Court Decision and because the Cabinet has now created the forms and regulations to comply with HB3, "affirming or reversing the preliminary injunction would not affect the legal interests of the parties." *Bruder*, 215 F. App'x at 416. And, most fundamentally, based on these recent events, Appellees now *agree* with the Attorney General's position on appeal that the preliminary injunction should be dissolved.

In his opposition to Appellees' Motion to Dismiss, the Attorney General argues that the voluntary cessation exception to the mootness doctrine applies. Dkt. 36 at 9–12. This doctrine does not square with the events in this case. None of the enjoined conduct was Appellees'. At no point did Appellees voluntarily cease providing abortions as a result of the preliminary injunction—they did so under the Kentucky legislature's abortion bans. In the state court action, the circuit court first enjoined the abortion bans, making it permissible for Appellees to provide abortion services. The Court of Appeals subsequently stayed that order, and the Kentucky Supreme Court then took the request to reinstate the temporary injunction. Because the Kentucky Supreme Court was considering reinstatement of the injunction and whether there is a right to abortion under the Kentucky Constitution, Appellees

were faced with the imminent situation that they would be required to comply with HB3 to provide abortions. That did not happen. Even more, Appellees' ability to comply with HB3 hinged on *the Cabinet's* promulgation and finalization of the relevant forms and regulations, not Appellees' own voluntary conduct.

In *Bruder*, this Court previously rejected an argument similar to the one the Attorney General now mounts. There, the county defendant argued that its appeal of a preliminary injunction in favor of a plaintiff was not mooted where it had initially fired an employee without procedural due process but, while the appeal was pending, terminated the plaintiff again, this time providing all the due process she agreed was due. 215 Fed. App'x at 415–16. The defendant argued the appeal of the preliminary injunction was not moot because the termination was "capable of repetition yet evading review." *Id.* at 416. As this Court rightly concluded, "this exception to the mootness doctrine only applies where there is a reasonable expectation of the recurrence of the wrong with respect to the same complaining party," which is the plaintiff who complained of procedural due process violations, not the defendant who defended them. *Id.* There was no "'demonstrated probability' or 'reasonable expectation' that Plaintiff [would] again be terminated without being afforded the constitutional procedure she was due," so this Court found the preliminary injunction moot. *Id.*

So too here, as the Attorney General has made no attempt at such a showing. The preliminary injunction concerned Appellees' procedural and substantive due process rights, not the Attorney General's, so there is no reasonable argument that the Attorney General was the "complaining party." As the Attorney General admits, whether the preliminary injunction persists or not, Appellees cannot provide abortions in Kentucky as a result of Kentucky's abortion bans. And because HB3's forms and regulations are now complete, the grounds for the injunction no longer exist. Any other arguments as to HB3's deficiencies are not at issue in this preliminary injunction on appeal. As a result, neither the Attorney General nor Appellees can identify "any legal outcome that hinges on the preliminary injunction," so the appeal of the injunction is moot. *Id.*

B. The Court Also Lacks Jurisdiction Under § 1292.

This appeal also should be dismissed for the simple reason that the August 30 order is not appealable. The district court did not deny the Attorney General's motion to dissolve the injunction. Instead, the district court granted part of the motion and kept the rest under submission for consideration, and to date has reconsidered the ruling twice as the Cabinet implemented means of compliance. Section 1292 does not confer appellate jurisdiction under these circumstances.

Courts "construe[] [§ 1292(a)(1)] narrowly," as it "was intended to carve out only a limited exception to the final-judgment rule." *Carson v. Am. Brands, Inc.*,

450 U.S. 79, 84 (1981). Here, the district court's August 30 order did not deny the injunction, either expressly or in practical effect. Section 1292(a)(1) therefore cannot confer jurisdiction, and this Court should dismiss.[3]

1. The District Court's August 30 Order Was Not a Refusal to Dissolve the Injunction Under § 1292.

The Attorney General moved to lift the preliminary injunction on June 30, after this Court remanded the case to the district court for further consideration in light of *Dobbs*. Motion to Dissolve, R. 80, Page ID # 1391. On both July 14 and August 30, 2022, the district court granted the Attorney General's motion in part, and lifted the injunction as to certain provisions of HB3 for which compliance had become possible, while holding the motion under consideration while the Cabinet worked to promulgate the rest of the forms and regulations. July 14 Order, R. 87,

[3] The Attorney General does not argue that the August 30 order "continue[d]" the injunction as that term is used in § 1292, nor could he. That provision only applies when an order extends an injunction that otherwise would have expired by its own terms. *See Public Serv. Co. v. Batt*, 67 F.3d 234, 236–37 (9th Cir. 1995) ("If, however, the 1993 injunction is still in effect by force of its own terms, then the district court's May 1995 order did not modify or continue it, and we lack jurisdiction over this appeal."); *Sierra Club v. Marsh*, 907 F.2d 210, 213 (1st Cir. 1990) ("[T]o be classified as an 'order continuing' an injunction, a ruling must have a direct and demonstrable effect on the duration of a previously-issued injunction.") (alterations incorporated); *see also Entegris, Inc. v. Pall Corp.*, 490 F.3d 1340, 1345 (Fed. Cir. 2007) (adopting reasoning of First and Ninth Circuits). The August 30 order did not change the injunction's timeframe, which continues "until the Cabinet creates a means for compliance." Aug. 30 Order, R. 97, Page ID # 1290.

Page ID # 1512 ("The Attorney General's Motion to Lift Preliminary Injunction [DE 80] is GRANTED IN PART as it applies to HB3 §§ 27, 33(2), (4), and (6), and 34 and REMAINS SUBMITTED TO THE COURT FOR CONSIDERATION as it applies to all other enjoined sections of HB 3"); Aug. 30 Order, R. 97, Page ID # 1598 ("The Cabinet and Plaintiffs shall file status reports and/or additional briefing by close of business on September 16, 2022, describing any progress made towards compliance with the remaining enjoined portions of HB 3, the applicability of any new forms or regulations, specifically those still in the finalization process, the promulgation of any new regulations . . . .").

Even though the Attorney General won much of his motion and the district court continued its work on what remains, the Attorney General appealed the August 30 order, claiming the August 30 order was a "refus[al] to dissolve" the preliminary injunction. Dkt. 20 at 1.

That is wrong. In fact, the district court subsequently reiterated that the remainder of the Attorney General's motion to dissolve the injunction was still under consideration as the Cabinet continued to promulgate rules and regulations, stating:

> [T]he legal landscape surrounding HB3 has changed and will continue to change as the Cabinet's promulgation of rules and regulations pertaining to HB3 continues, **which is the reason that the Court stated that portions of the Attorney General's Motion remained under submission** while those rules and regulations become final.

Oct. 5 Order, R. 103, Page ID # 1657 (citations omitted, emphasis added). "It is well settled that an order . . . that merely continues a case and does not reach the merits of parties' opposing claims is merely a step in the processing of a case" and is not immediately appealable under § 1292(a)(1). *Frutiger v. Hamilton Cent. School Dist.*, 928 F.2d 68, 72 (2d Cir. 1992) (citing cases, including *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966)). Accordingly, the district court's August 30 order is not, on its face, an interlocutory order that is immediately appealable under § 1292.

2. The District Court's Order Did Not Have the Practical Effect of Refusing to Dissolve the Injunction, Nor Does the Order Cause Irreparable Harm.

Implicitly recognizing that the district court's order on its face is not a refusal to dissolve an injunction, the Attorney General claims that the August 30 order is appealable under § 1292(a)(1) because it was "a refusal in practical effect" that creates irreparable harm, and can be "effectively challenged only by an immediate appeal." Dkt. 20 at 1 (citing *Hadix v. Johnson*, 228 F.3d 662, 668 (6th Cir. 2000)). *See Carson*, 450 U.S. at 84; *see Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018). This conclusion is incorrect for three reasons.

First, the district court's order did not have the practical effect of denying the Attorney General's motion to lift the preliminary injunction because the Attorney General's motion "remain[ed] submitted to the Court for consideration."

July 14 Order, R. 87, Page ID # 1512; Aug. 30 Order, R. 97, Page ID # 1598. In *Hadix v. Johnson*, this Court ruled that, where a district court "**defer[s]** a decision on the merits of motions to terminate consent decrees," the appeals court lacks jurisdiction. 228 F.3d 662, 668 (6th Cir. 2000) (citing *United States v. Michigan*, 134 F.3d 745, 749 (6th Cir. 1998)) (emphasis added).

Second, the Attorney General suffers no harm—and certainly no irreparable harm—from being temporarily unable to enforce the enjoined provisions of HB3. The Attorney General's actions corroborate that no serious, irreparable harm exists: The district court's August 30 order was nearly identical to its July 14 order, yet Appellant did not appeal the July 14 order. If the Attorney General genuinely believed that these orders were final and were causing it serious, irreparable harm, it would have appealed the July 14 order.

Third, the Attorney General's immediate appeal is not the "only" effective means of challenging the order. *See Carson*, 450 U.S. at 84. To the contrary, the Attorney General's premature appeal actually stalled the district court's ability to monitor the developing facts and lift the preliminary injunction based on those facts. Although the district court determined on October 5 that additional portions of the injunction should be lifted, it held that this appeal prevented it from doing so. Oct. 5 Order, R. 103, Page ID # 1658 ("Out of an abundance of caution and due to the unsettled jurisdiction of the Court to dissolve portions of the injunction while

on interlocutory appeal, the Court does not believe it has the jurisdiction to dissolve these portions of the Preliminary Injunction at this time.").

Because the Attorney General fails to satisfy any of the requirements under *Carson* to establish appellate jurisdiction over this interlocutory appeal, "the general congressional policy against piecemeal review will preclude interlocutory appeal." *Carson*, 450 U.S. at 84.

Alternatively, this Court could construe the district court's October 5, 2022 order as an "indicative ruling" confirming that it would award "relief that it lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. App. P. 12.1(a). This Court could then, in its discretion (1) "remand for further proceedings" while retaining jurisdiction or (2) "expressly dismiss[] the appeal" in light of this ruling. Fed. R. App. P. 12.1(b). Either way, the result would be the same: the district court would dissolve the injunction, and there would be nothing to appeal.

The Court should dismiss the appeal for lack of jurisdiction.

II. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S ORDER BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION.

Because Appellees consent to dissolution of the injunction, this appeal should be dismissed. However, should the Sixth Circuit be inclined to proceed to the merits of the appeal, notwithstanding its mootness, then Appellees urge the

Court to affirm the district court's order. *S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 n.3 (6th Cir. 1991); *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1059 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997). Appellees were likely to succeed on the merits of their causes of action based on procedural and substantive due process because the legislature and the Cabinet still had not created the means to comply with multiple provisions of HB3.[4]

A. Appellees Were Likely to Prevail on Their Claim for Violation of Procedural Due Process Rights.

In a reasoned and factually supported opinion granting Appellees' initial motion for preliminary injunction, the district court held that Appellees were likely to succeed on their claim for violation of procedural due process rights because the Commonwealth cannot enact a statute without the means to comply. Specifically, the district court found that "Plaintiffs and their providers would likely be able to prove that they have a right to engage in their professions and earn a living doing the same" and that "they have a right to a reasonable time to comply with a change

[4] The Attorney General is correct that the parties did not brief the legal issues on which the district court based its substantive due process analysis in the August 30 Order. However, the parties did brief both Appellees' procedural due process claim and their substantive due process claim based on a rational basis test in the papers filed with the district court, and the district court granted a preliminary injunction in part on the procedural due process claim in its May 19, 2022 order (Preliminary Injunction Order, R. 65, Page ID # 1277). Both are proper grounds to affirm the district court's decision.

in the law, or that enforcement of a law in which compliance is impossible is arbitrary." *See* May 19 Order, R. 65, Page ID # 1273–74 (citing *Women's Med. Pro. Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006), and *Campbell v. Bennett*, 212 F. Supp. 2d 1339 (M.D. Ala. 2002)).

"Procedural due process protects those life, liberty, or property interests that fall within the Due Process Clause of the Fourteenth Amendment," including "an interest in the continued operation of an existing business." *Baird*, 438 F.3d at 611. "[A]ny 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." *Campbell*, 212 F. Supp. 2d at 1343; *see Planned Parenthood of Tennessee & N. Mississippi v. Slatery*, No. 3:20-cv-00740, 2020 WL 5797984, at *5 (M.D. Tenn. Sept. 29, 2020) (temporarily enjoining abortion restriction where state had up to 90 days after law's effective date to make required materials available and had not done so when law took effect). Courts should scrutinize any such law with which compliance is impossible. *See Landgraf v. USl Film Products*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013) ("The impossibility of compliance with the statute . .

. is a compelling reason for the preliminary injunction . . . ."); *United States v. Dumas*, 94 F.3d 286, 291 n.3 (7th Cir. 1996) ("[T]he validity of a law with which it is impossible to comply may be questioned.").

This Court's holding in *Baird* is directly on point. There, an abortion clinic was ordered to cease providing abortion services due to an alleged licensing problem. This Court recognized the clinic operator's interest in the continued operation of its business, and it held that a cease and desist order requiring an immediate shut down without a hearing did not provide adequate procedural protections. *Baird*, 438 F.3d at 613. As a result, it found that there was a due process violation and affirmed the district court. *Id*. at 616. The holding in *Baird* did not rest on the fact that the plaintiff was an abortion provider. Rather, *Baird* held that "due process protects an interest **in the continued operation of an existing business**," regardless of the nature of the business. *Id.* at 611 (emphasis added). In attempting to distinguish *Baird*, the Attorney General ignores that Appellees have a due process right to operate their businesses, regardless of whether abortion is constitutionally protected. *See Johnson v. Morales*, 946 F.3d 911, 921, 937 (6th Cir. 2020); *Jackson v. Heh*, 215 F.3d 1326 (Table), 2000 WL 761807, at *6 (6th Cir. 2000) (stating a party's liberty interest is infringed "where the defendant's action effectively precludes the plaintiff from practicing his trade with all employers or customers"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S.

532, 543 (1985) (recognizing "the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.").

The Attorney General also argues that HB3 is a law of general applicability, and therefore, Appellees' procedural due process rights are not violated. Dkt. 20 at 40–41 (citing *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197 (6th Cir. 2011) (upholding statute impacting budgetary concerns for schools) and *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614 (6th Cir. 1997) (upholding liquor license referendum)). In contrast to the general laws at issue in *Smith* and *37712,* HB3 unconstitutionally targets Appellees specifically. They were the only two clinics that provided abortions in Kentucky. *Cf. Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at *10 (S.D. Ohio Apr. 21, 2020) ("[B]ecause the Director's order applied to all non-essential businesses and was not a decision targeting Plaintiff's business individually, Plaintiff's constitutional right to procedural due process was not violated."). In any event, no such targeting is required to show a violation of procedural due process given that the unconstitutional statute in *Baird* applied broadly to all Ohio ambulatory surgical centers. *Baird*, 438 F.3d 611–12.

The Attorney General also suggests that there could only be a procedural due process violation if Appellees were deprived of due process after they violate

the law. Dkt. 20 at 43–44. But due process does not require that one suffer the actual deprivation before rights are protected. *Landgraf*, 511 U.S. at 265. Courts specifically have held that procedural due process rights are violated when the legislature changes a law with inadequate time to comply. *See Campbell*, 212 F. Supp. 2d at 1343; *see also Van Hollen*, 738 F.3d at 789 ("The impossibility of compliance with the statute" by abortion providers "is a compelling reason for the preliminary injunction."); *Dumas*, 94 F.3d at 291 n.3 (7th Cir. 1996) ("[T]he validity of a law with which it is impossible to comply may be questioned.").

The district court found *Campbell* instructive. There, a district court in Alabama issued a preliminary injunction ordering that plaintiff's name be placed on the ballot for a seat in the Alabama House of Representatives. *Campbell*, 212 F. Supp. at 1341. The statute at issue—which went through the legislative process like HB3 did here—moved the deadline for independent candidate registration "from six days 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 held that the plaintiff was likely to prevail on a claim for violation of procedural due process, and injunctive relief was warranted, because

the plaintiff had not been given adequate time to comply with the new law. *Id*. at 1348.

Much like (or even worse than) the statute in *Campbell*, HB3 unfairly required compliance immediately, without adequate—or any—time for the Cabinet to create the forms and regulations necessary for compliance. Appellees demonstrated, and the district court agreed, that Appellees simply were unable to comply. The Attorney General made no argument to the contrary, and essentially concedes that point. Appellees should not have had to face steep fines and/or criminal prosecution for violating a law when there was no means to comply, nor incur those fines and penalties before bringing a challenge. Accordingly, the district court had alternate grounds to grant the August 30 order.

B. Appellees Were Substantially Likely to Prevail on their Substantive Due Process Claim.

Contrary to the Attorney General's conclusory arguments, *Dobbs* does not foreclose Appellees' substantive due process claim. Appellees have standing on their own behalf to challenge a statute that threatens them with criminal penalties. And, HB3 does not survive the rational-basis test because enacting a statute that imposes criminal penalties with no means to comply has no rational basis.

1. Appellees Have Standing to Challenge a Statute That Poses Risk of Criminal Prosecution to Them.

In his opening brief, the Attorney General misses the point by relying on third-party standing doctrine when Appellees' concern was with their *own* inability to comply with HB3's provisions. To have standing, Appellees must show they have suffered an injury in fact, their injury is traceable to defendants' conduct, and the injury must be redressable. *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 710 (6th Cir. 2015). Fear of prosecution alone provides standing where plaintiffs "would be subject to application of the statute." *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 345 (6th Cir. 2009). Here, Appellees had sound reasons to fear prosecution, fines, and other sanctions under HB3 for providing abortions. *See, e.g.*, HB3 § 3(12)(a), 28(6)(a), (b). That alone is sufficient under *Holder*. The majority in *Dobbs* did not address standing for entities like Appellees who are threatened with criminal prosecution for violating a law with no means to comply; indeed, such a claim belongs to the abortion providers and clinics, not to their patients, and thus third-party standing is not at issue. *Dobbs* therefore has no application to Appellees' standing to raise their own constitutional claims. *Dobbs*, 142 S. Ct. at 2275 & n.61.

2. A Law That Is Impossible To Comply With Has No Rational Basis.

Post-*Dobbs*, Appellees' sole substantive due process claim is based on the inability to comply with HB3, not, as the Attorney General argues, on an underlying constitutional right to abortion. Dkt. 20 at 36–38. There is no rational basis for passing a law that is impossible to comply with, and thus the preliminary injunction was proper because the law violated substantive due process. Opposition to Motion to Lift Preliminary Injunction, R. 82, 82-1, 82-2, Page ID #1412–1415 (arguing that HB3 failed the rational basis test due to Appellees' inability to comply). Under the Fourteenth Amendment of the Constitution, "[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." *Doe v. Snyder*, 101 F. Supp. 3d 722, 723 (E.D. Mich. 2015). The Attorney General's arguments regarding the Commonwealth's interests in regulating (or eliminating) abortion thus are beside the point. Dkt. 20 at 36–38. Rather, the Attorney General must put forward a rational basis for passing a law that subjects persons and entities to criminal liability knowing no one can comply.

Courts regularly hold that laws with no means of compliance are unconstitutional. For example, in *Snyder*, the State of 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 would-be registrant challenged the statute as violating his substantive due process rights because, having no home, he had no current address and could not obtain a state identification card, making compliance with the statute impossible. *Id.* at 725. The *Snyder* court agreed. *Id.* Other courts similarly conclude that a law imposing criminal penalties is unconstitutional, if there is no way for an individual to comply. *See, e.g., 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); *cf. Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972) ("[W]e assume that man is free to steer between lawful and unlawful conduct, [and, therefore,] we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."). The Attorney General protests (in a footnote) that *Snyder* is not a rational basis decision and "reads more like statutory construction." Dkt. 20 at 38 n.12. To the contrary, *Snyder* squarely

concerns a substantive due process claim. 101 F. Supp. 3d at 724. The Attorney General has nothing to say about the numerous other cases with similar holdings.

The Attorney General also asserts that if the Commonwealth has the power to prohibit abortions, it can pass laws that seemingly permit them but ultimately prevent compliance. Dkt. 20 at 38 n.12. Adopting the Attorney General's argument would amount to sanctioning legislative deception. M.H. Redish & C.R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 Nw. U. L. Rev. 437, 453 (2006) ("When legislative deception occurs, the legislators purport to make a political commitment by voting for or against proposed substantive legislation" but through subsequent acts alter "the essence" of "that underlying substantive law."). If the Kentucky legislature's wish was to ban abortions, the United States Constitution does not bar it from doing so post-*Dobbs*. But it would be "undemocratic" to allow legislators to "escap[e] . . . accountability" by effectively doing so but claiming they have not. J.H. Ely, *Democracy and Distrust* 131–32 (1980) (explaining that while "on most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted," they must be made to do so).

There is no rational basis for a legislature to claim it permits an act when it does not. Appellees remained likely to succeed on their substantive due process claim at the time of the August 30 order.

III. THE REMAINING PRELIMINARY INJUNCTION FACTORS FAVORED APPELLEES AT THE TIME OF THE AUGUST 30 ORDER.

The district court appropriately evaluated the remaining preliminary injunction factors. "[B]ecause Appellees have demonstrated a likelihood of succeeding on the merits of their [Due Process] claim[s], the other three preliminary factors follow in favor of granting the injunction." *Am. C.L. Union of Ky. v. McCreary Cnty.*, 354 F.3d 438, 462 (6th Cir. 2003) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)), *aff'd sub nom McCreary Cnty. v. Am. C.L. Union of Ky.*, 545 U.S. 844 (2005).

A. Appellees Would Have Suffered Irreparable Harm Absent the Preliminary Injunction.

As the Sixth Circuit has long made clear, "when reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is ***mandated***." *McCreary Cnty.*, 354 F.3d at 445 (emphasis added) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *accord Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("[W]hen constitutional rights are threatened or impaired, irreparable

injury is presumed." (citation omitted)); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (same).

B. The Balance of Equities Tipped Decidedly In Appellees' Favor.

Appellees would have faced greater injury from the absence of an injunction than Appellants would face from an injunction. Appellants could not demonstrate harm because if a challenged law "is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001); *Connection Distrib. Co.*, 154 F.3d at 288 (noting that "although the government presumably would be substantially harmed if enforcement of a *constitutional* law . . . were enjoined," that presumption is not true if the law is likely unconstitutional). *See also Planned Parenthood Ass'n of Cincinnati Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (finding no substantial harm in preventing City from enforcing duly enacted ordinance that is likely unconstitutional). In contrast, Appellees' constitutional rights were threatened by Defendants' enforcement of HB3 before the Commonwealth provided the means of compliance.

C. The Preliminary Injunction Served The Public Interest.

As the Sixth Circuit has made clear, "[w]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights."

Am. C.L. Union Fund of Mich. v. Livingston Cnty., 796 F.3d 636, 649 (6th Cir. 2015) (alteration in original) (quoting *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010)). *See also Mich. State A. Philip Randolph Inst.*, 833 F.3d at 669 (affirming district court's finding that protecting right to vote serves the public interest); *Am. Freedom Def. Initiative. Suburban Mobility Auth. for Reg'l Transp. (SMART)*, 698 F.3d 885, 896 (6th Cir. 2012) ("[T]he public interest is promoted by the robust enforcement of constitutional rights."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). The preliminary injunction served the public interest by preventing the violation of Appellees' procedural due process and substantive due process rights.

Additionally, while the Attorney General claims that "the public has an interest in enforcement of each of HB3's requirements," Dkt. 20 at 45, any such public interest was not served by enforcement of those requirements prior to the Commonwealth's provision of the means to comply. Rather, the public interest is served by a preliminary injunction that allows the appropriate rulemaking process to occur.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court dismiss this Appeal as lacking jurisdiction or, in the alternative, affirm the district court's August 30, 2022 order and remand for further proceedings.

Dated: February 21, 2023

/s/ Jennifer S. Romano

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitation contained in Fed. R.App. P. 27(d)(2)(A) because, excluding the portions exempted by Rule 32(f), this response contains 8,757 words.

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/s/ Jennifer S. Romano
Jennifer S. Romano

CERTIFICATE OF SERVICE

I certify that on February 21, 2023, I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit through the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jennifer Romano
Jennifer Romano

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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97	Aug. 30 Order	1569-1598
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100	Plaintiff's Status Report	1631-1635
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