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

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

Plaintiffs,

v.

ERIC FRIEDLANDER, in his official capacity as Acting Secretary of Kentucky's Cabinet for Health and Human Services,

Defendant,

and

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

Defendant-Intervenor.

CIVIL ACTION

Case No. 3:19-cv-00178-DJH

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR EXPEDITED MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT

INTRODUCTION[1]

To promote the interests of judicial economy, and to obtain complete relief for Plaintiffs and their patients without the burden of commencing a new, related litigation, Plaintiffs move to supplement their complaint under Federal Rule of Civil Procedure 15(d) to challenge as unconstitutional Kentucky House Bill 3 ("the Act"), which took effect yesterday pursuant to its emergency clause. The Act bans abortion at 15-weeks in pregnancy, a pre-viability point in pregnancy. The Act is also tantamount to a complete ban on abortion because it imposes new requirements on abortion providers immediately while at the same time it requires the Cabinet

[1] Unless otherwise noted, all emphasis is added and all internal quotations are omitted.

for Health and Family Services ("the Cabinet") to create new forms and regulations for these requirements that are not yet available. This means it is impossible for Plaintiffs to comply with the Act. House Bill 3, like the Bans that Plaintiffs challenged in the operative complaint, is unconstitutional as a matter of law under almost a half-century of Supreme Court precedent.

Courts have broad discretion under Federal Rule of Civil Procedure 15(d) to grant leave for a party to file a supplemental pleading. As detailed below, such leave is warranted here, because a supplemental complaint would promote the economic and speedy disposition of the parties' disputes and not prejudice Defendants or unduly delay proceedings.

BACKGROUND

The Two Challenged 2019 Acts in The Operative Complaint

In March 2019, Plaintiffs brought this action challenging two newly enacted laws obstructing patients' constitutionally protected access to the abortion care. *See* Doc. No. 5. Senate Bill 9 (hereinafter the "6-Week Ban") criminalized abortion after a fetal heartbeat could be detected, which generally occurs around six weeks into pregnancy—before the fetus is viable and before many people are aware they are pregnant. House Bill 5 (hereinafter the "Reason Ban") criminalized the provision of abortion to if the abortion provider knew the patient's abortion decision was based on a diagnosis or the potential diagnosis of a fetal disability or by the sex, race, color, or national origin of the embryo or fetus.

As the complaint explained, both bans violated the Fourteenth Amendment to the United States Constitution and would inflict irreparable harm on Kentuckians if allowed to take effect. In asserting that the 6-Week Ban and Reason Ban were unconstitutional, Plaintiffs' operative complaint alleged facts relating to the (i) abortion procedures typically provided in Kentucky and their safety compared to other medical procedures, (ii) importance of abortion as an element of people's health care, and (iii) risks to a patient's health and well-being that arise when access to

abortion care is delayed or denied altogether. *See* Doc. No. 5, ¶¶ 25–52. By prohibiting abortion before viability, both bans violated the right to privacy guaranteed by the Fourteenth Amendment. *See id.* ¶¶ 53–54. Plaintiffs also alleged that the Reason Ban was unconstitutionally vague because it failed to give Plaintiffs fair notice of how to comply with the Ban's mandates. *See id.* ¶¶ 55–56.

The Court issued temporary restraining orders enjoining enforcement of both Acts. *See* Doc. 14, 21. In granting the injunction, the Court held that Plaintiffs had "shown a strong likelihood of success on the merits of their Fourteenth Amendment Due Process challenge to" the 6-Week Ban because "[t]he Supreme Court has stated in no uncertain terms that '[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'" Doc. 14, at 2. Similarly, the Court held that Plaintiffs were likely to prevail on their constitutional challenge to the Reason Ban because it prohibited abortion before viability, in direct contravention of Supreme Court precedent. Doc. 21, at 3–4.

The parties agreed to extend the Court's temporary restraining orders "through the date of final ruling in this case." *See* Doc. 32. Plaintiffs subsequently moved for summary judgment, *see* Doc. 36, which Defendant opposed, *see* Doc. 42. On March 9, 2020, the Court administratively remanded Plaintiffs' motion for summary judgment pending the Sixth Circuit's en banc decision in *Preterm-Cleveland v. Hines*, No. 18-3329. *See* Doc. 59; 994 F.3d 512 (6th Cir. 2021).

On May 17, 2021, the U.S. Supreme Court agreed to hear *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. In that case, the Fifth Circuit had ruled that Mississippi's 15-week abortion ban was patently unconstitutional under decades of Supreme Court precedent.

Mississippi asked the Court to review that decision, and the Court accepted for review the question "whether all pre-viability prohibitions on elective abortions are unconstitutional." *See Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021). Oral argument was held December 1, 2021.

Plaintiffs filed a motion to stay proceedings pending resolution of several pending cases—including *Dobbs*—that could affect the disposition of this case. *See* Doc. 68. The Court then granted Plaintiffs' motion to stay proceedings as to the 6-Week Ban but denied the motion to stay as to the Reason Ban. *See* Doc. 79, at 17. The Court also ordered Plaintiffs to respond to the State's motion to dissolve the temporary restraining order of the Reason Ban by April 15, 2022.

House Bill 3

House Bill 3 is an omnibus abortion restriction that took effect yesterday after a legislative override of Governor Beshear's veto. The Act bans abortion starting at 15 weeks in pregnancy, a pre-viability point in pregnancy. Furthermore, the other restrictions in the Act—including restrictions on medication abortion, parental consent for minors, and the disposition of fetal tissue—require the Cabinet to create forms and/or promulgate regulations that Plaintiffs must use and rely on to comply with the Act. But those forms and regulations are not available. Accordingly, HB 3 is also tantamount to an abortion ban because Plaintiffs cannot comply with its many provisions and thus cannot currently provide abortions. The Act also jeopardizes patient's privacy by requiring new reporting requirements about each patient's demographic data and health information, all of which will be public record.

The Act's 15-Week Ban

The Act bans abortion at 15 weeks in pregnancy as measured from a patient's last menstrual

period ("lmp"). The Board of Medical Licensure shall revoke the medical license if a physician violates the law. KRS 311.782(4). In addition, the Attorney General has the authority to bring an action in law or in equity to enforce the 15-week ban. Section 35, House Bill 3. There is a very limited exception to the 15-week ban, namely that the abortion must be necessary to prevent the death of the pregnant woman or to avoid serious risk of the substantial and irreversible impairment of a major bodily function of the woman, KRS 311.783, and there are other limited affirmative defenses, KRS 311.782(2)(b).

The Act Requires Plaintiffs to Use Cabinet-Created Forms That Are Not Yet Available and Follow Regulations That Are Not Promulgated

Among many other changes, the Act amends the regulation of abortion in Kentucky in multiple significant ways, including by creating an extensive regulatory scheme for medication abortions; requiring cremation of fetal remains for the first time; adding significant new reporting requirements that entail disclosure of identifying patient information; and imposing criminal and civil penalties for violations of its provisions. Throughout the Act, there are myriad new reporting requirements to be completed on Cabinet-created forms that either do not exist or have not been updated to allow the newly required information to be reported. Under Section 13(1), the Act mandates that the Cabinet create the following forms within 60 days:

- a new form for providers to document provision of emergency medical abortion services to minors without consent, required by Section 1;
- a new form through which abortion providers report *every* abortion they perform within the Commonwealth (this form will require reporting very detailed patient information that is public record, which means that patient identities and their sensitive health information will be exposed), required by Section 4;
- a new form through which abortion providers obtain the informed consent of a patient before providing medication abortion, required by Section 8;
- a new form through which abortion providers report each provision of medication abortion and any complications or adverse events, as well as any resulting treatment, related to medication abortion, required by Section 9;

- a new form through which abortion providers report any complications or adverse events related to abortion, required by Section 25;
- a new form through which abortion providers report each abortion medication prescription issued, each abortion performed, and all adverse events, required by Section 26;
- a new form to report the results of inquiries of the patient as to gestational age and any medical exams or tests performed, required by Section 27; and
- a new form to report of each prescription dispensed by a pharmacy for abortion medication, required by Section 29.

Furthermore, Section 22(3) requires the Cabinet to "design forms through administrative regulations" to document among other information the age of the "parent or parents," information pertaining to any abortion patient who is an unemancipated minor, and a designation of how the fetal remains shall be disposed of and who shall be responsible for final disposition. The Act also creates a new "Abortion-Inducing Drug Certification Program" to govern access to medication abortions under which drugs used for medication abortion can now only be provided by "qualified physicians" and "certified" abortion facilities, pharmacies, manufacturers, and distributors. Act § 15. The Act expressly tasks the Cabinet with promulgating administrative regulations that will create "a certification program to oversee and regulate the distribution and dispensing of abortion inducing drugs." To provide medication abortion, "qualified physicians" must now be "registered as nonsurgical abortion providers." Act § 15(2). But no such registration process exists. Moreover, to be "qualified," prior to providing any abortion medication, physicians must sign an annual "Dispensing Agreement Form" to be developed and provided by the Kentucky Board of Pharmacy; again, the form does not yet exist. Act § 1.

The Proposed Supplemental Complaint

The Proposed Supplemental Complaint challenges the 15-week ban and the other aspects of House Bill 3 that are tantamount to a ban because they are impossible to comply with given

the immediate effective date. Accordingly, the Supplemental Complaint is substantially related to the operative complaint. Both Plaintiffs are the same, as are all the Defendants.[2] Plaintiffs will include in their Supplemental Complaint the prior Defendants from the original challenge who were dismissed without prejudice (Doc. 29, 30), and who have enforcement authority over the Act. As with the Bans challenged in the original complaint, Plaintiffs allege in the Proposed Supplemental Complaint that the 15-week ban and the operative ban imposed by the Act violates Kentuckians' constitutional right to access abortion care under the Fourteenth Amendment.[3] Similarly, the Proposed Supplemental Complaint—just like the operative complaint—pleads facts relating to the (i) abortion procedures typically provided in Kentucky and their safety compared to other medical procedures, (ii) importance of abortion as an element of people's health care, and (iii) risks to patient health and well-being that arise when access to abortion care is delayed or denied altogether.[4] Given the related nature of the constitutional challenges reflected in the operative complaint and the Proposed Supplemental Complaint, and the early stage of the existing litigation, Plaintiffs seek leave to file a supplemental pleading in this action, rather than burden the judicial system and parties with filing a wholly new complaint in a newly initiated case where duplication of discovery, motion practice, and hearings would be virtually certain.

ARGUMENT

I. THE COURT SHOULD PERMIT PLAINTIFFS TO FILE A SUPPLEMENTAL PLEADING RELATING TO HOUSE BILL 3.

Federal Rule of Civil Procedure 15(d) empowers the Court to "permit a party to serve a

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[2] Ex. 1 (Proposed Supplemental Complaint).

[3] *Compare* Doc. 5 and Ex. 1 (Proposed Supplemental Complaint).

[4] *Compare* Doc. 5 and Ex. 1 (Proposed Supplemental Complaint).

supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. Proc. 15(d); *see Arizona v. California*, 530 U.S. 392, 409 & n.4 (2000). Like other courts, the Sixth Circuit understands Rule 15 to "set[] a liberal policy" in favor of supplemental pleadings. *Mattox v. Edelman*, 851 F.3d 583, 592 (6th Cir. 2017). This preference for supplementation under Rule 15(d) serves judicial economy by avoiding unnecessarily numerous proceedings against similar parties on similar issues. *See, e.g.*, *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 227 (1964) ("Such amendments [under Rule 15(d)] are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice.").

Because "[t]he courts give [Rule 15(d)] a liberal construction," "applications for leave to serve a supplemental complaint are normally granted." *McHenry v. Ford Motor Co.*, 269 F.2d 18, 25 (6th Cir. 1959). In particular, "[a]n application for leave to file a supplemental pleading…should be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." 6A Charles Alan Wright, et al., Federal Prac. & Proc. Civil § 1504 (Apr. 2021 update) (footnotes omitted). Supplementation is entirely proper to add "new claims, defenses, and parties to the lawsuit." *Mattox*, 851 F.3d at 592; *see also Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 227 (1964) ("Rule 15(d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit, and it follows, of course, that persons participating in these new events may be added if necessary."). "[A] party should be given every opportunity to join in one lawsuit all grievances against another party regardless of when they arose." 6A Wright § 1506.

A. Supplementation Promotes Judicial Economy.

Because the Proposed Supplemental Complaint relates to the operative pleading, permitting Plaintiffs to file would further the economic disposition of the case.

First, there is substantial legal and factual overlap between the claims asserted in the operative complaint and the proposed supplemental complaint and, because of earlier proceedings in this case, the Court is familiar with the relevant subject matter. In particular, both pleadings focus on the "central principle" in *Roe v. Wade*, 410 U.S. 113 (1973), that "[b]efore viability, the State's interests are not strong enough to support a prohibition on abortion," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 871 (1992). As this Court recognized in enjoining enforcement of the 6-Week Ban, the "State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Doc. 14, at 2 (quoting *Casey*, 505 U.S. at 879). That conclusion applies with equal force to the 15-week ban and the Act's operative ban, which—like the 6-Week Ban—prohibit abortion at a pre-viability point in pregnancy. Because "the 'focal points' of both complaints are the same," leave to file a supplemental complaint is warranted. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 625 (6th Cir. 2016).

Second, as a result of the earlier proceedings in this case, the Court has significant familiarity with many of the facts that are relevant to the claims in Plaintiffs' proposed Supplemental Complaint. These facts include facts about the provision of abortion in Kentucky, the safety of abortion, the reasons patients seek abortion, and the harms caused by denying or delaying abortion care. Because "[t]he Court is familiar with the subject matter of the proposed supplemental complaint," they "contain overlapping factual and legal issues," and "they involve overlapping parties and counsel," supplementation will serve the interests of judicial economy.

Adams & Boyle, P.C. v. Slatery, 455 F. Supp. 3d 619, 625–26 (M.D. Tenn. 2020).

Third, supplementation will prevent unnecessary duplication of efforts and conserve judicial resources by consolidating claims by the same plaintiffs against the same defendants addressing many of the same facts, issues, and claims in a single lawsuit. The 15-week ban and the Act's operative ban impose the same substantial obstacle in the path of people seeking abortion as the Bans challenged in the operative complaint. And if the Court does not grant leave to supplement, then Plaintiffs will file a new complaint challenging the 15-week ban and the Act's operative ban, which "would then [be] transferred to" this Court "under the related case doctrine," and could be "consolidated with the current case, leaving the matter in nearly the same posture as will be upon the granting" of this motion for leave to file a supplemental complaint. *Wilson v. U.S. Air Force*, 2009 WL 10676029, at *1 (E.D. Ky. Nov. 12, 2009). As the Sixth Circuit has recognized, supplementation under Rule 15(d) exists to avoid precisely this sort of inefficiency: "[A]llowing supplemental pleadings before a court already up to speed is often the most efficient course." *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 625; *see also, e.g.*, *Brian A. v. Bredesen*, 2009 WL 4730352, at *3 (M.D. Tenn. Dec. 4, 2009) ("If the Court does not allow the Supplemental Complaint in this action, Plaintiffs could simply file a new lawsuit. Granting leave to file the Supplemental Complaint promotes judicial economy and convenience, rather than requiring the expense, delay and waste of a separate action tried separately in this or another Court.").

B. Supplementation Will Not Prejudice Defendants.

Allowing supplementation will not prejudice defendants. "In determining what constitutes prejudice, the court considers whether the assertion of the new claim or defense would: require the opponent to expend significant additional resources to conduct discovery and

prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction." *Phelps v. McClellan*, 30 F.3d 658, 662–63 (6th Cir. 1994). None of these factors indicates prejudice here: No discovery requests have been served; no depositions have been taken; and Plaintiffs have asked this Court to withdraw their dispositive motions. *See, e.g.*, *Scotts Co., LLC v. Cent. Garden & Pet Co.*, 2021 WL 1572287, at *3 (S.D. Ohio Apr. 22, 2021) (citing fact that "Defendants themselves have not yet finished with discovery" as evidence that defendants would not be prejudiced by granting plaintiffs leave to supplement their complaint). There is no risk of duplicating efforts or wasting resources. And in any event, "the gains in terms of judicial economy outweigh any possible prejudice to" Defendants here. *Adams & Boyle*, 455 F. Supp. 3d at 626.

Plaintiffs have also endeavored to minimize any prejudice to Defendants by making their "application to file a Supplemental Complaint in a reasonably timely manner, the new law having just recently gone into effect." *Brian A.*, 2009 WL 4730352, at *3; *see Scotts Co.*, 2021 WL 1572287, at *2 (similar). And Plaintiffs bring this motion in good faith: The filing of the proposed Supplemental Complaint is not futile, as it is not designed to correct any deficiencies in the operative Complaint but instead to add new claims based on Defendants' more recent efforts to restrict abortion access for Plaintiffs' patients. *See, e.g.*, *Ne. Ohio Coal. For the Homeless v. Husted*, 2015 WL 13034990, at *11–13 (S.D. Ohio Aug. 7, 2015) (rejecting suggestion that plaintiffs sought leave to supplement in bad faith where the "case concerns timely supplementation based on the recent passage of related laws"). Thus, there is no reason why the formality and expense of starting a new action should be required.

CONCLUSION

For all of the reasons stated above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Leave to File Their Proposed Supplemental Complaint.

Dated: April 14, 2022

Respectfully submitted,

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**pro hac vice motions granted*

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed with the Court using the CM/ECF system on April 14, 2022, which will generate an electronic notice of filing to all counsel registered with that service.

/s/ Brigitte Amiri
Brigitte Amiri