Case No. 19-5516

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EMW WOMEN'S SURGICAL CENTER, P.S.C., on behalf of itself, its staff, and its patients, *et al.*

*Plaintiffs-Appellees*

v.

ERIC FRIEDLANDER, in his official capacity

*Defendant-Appellant*

ATTORNEY GENERAL DANIEL CAMERON, on behalf of the Commonwealth of Kentucky

*Intervenor-Appellant*

On Appeal from the United States District Court
for the Western District of Kentucky
Case No. 3:18-cv-224

## AMENDED PETITION FOR PANEL REHEARING AND REHEARING EN BANC BY ATTORNEY GENERAL DANIEL CAMERON

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## RULE 35 STATEMENT & INTRODUCTION

Rare is the panel decision as out of step with recent precedent as the one here. That is because Kentucky's Attorney General had to wait nearly two years to secure the right to petition for rehearing. Over that period, the Supreme Court's and this Court's abortion jurisprudence changed in meaningful ways. Rehearing is necessary to bring this case into step with that precedent and to resolve questions of exceptional importance. Fed. R. App. P. 35(b)(1)(A) & (B).

In June 2020, the panel majority affirmed a permanent injunction against Kentucky's law prohibiting abortions in which an unborn child is dismembered while still alive. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 790 (6th Cir. 2020) ("*EMW I*"). The panel majority balanced benefits and burdens while applying the undue-burden test. *Id.* at 795. It declined to defer to Kentucky's legislature on matters of medical and scientific uncertainty. *Id.* at 796–97. And it determined that EMW need not undertake a good-faith effort to comply with Kentucky's law. *Id.* at 804–05.

The panel did all this a few weeks before the Supreme Court decided *June Medical Services L. L. C. v. Russo*, 140 S. Ct. 2103 (2020). In the wake of *June Medical*, this Court held that the Chief Justice's separate opinion there is "controlling." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020)

("*EMW II*"). And a short time later, the full Court agreed. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 524–25 (6th Cir. 2021) (en banc); *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478, 483 n.1 (6th Cir. 2021) (en banc).

*June Medical* very much affects the state of play here. In applying *June Medical*, this Court has reached at least three legal conclusions that cannot be squared with the panel majority's decision. First, the Court has rejected several times over the contention that a balancing test is used to discern an undue burden. *EMW II*, 978 F.3d at 437; *Slatery*, 7 F.4th at 482–83. Second, the Court has applied the "traditional rule" that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *EMW II*, 978 F.3d at 438 (citation omitted). And third, the Court has held that an abortion provider must make a "clear showing" that it "attempted in good faith" to comply with a challenged law. *Id.* at 440 (citation omitted) (cleaned up). Any one of these legal conclusions, each of which contradicts the panel majority's decision, justifies rehearing.

It is not often that rehearing is so needed. Ordinarily, the time between a panel's decision and a rehearing petition is too short for the law to change so dramatically. But because of the delay here, it is plain that the panel majority's decision conflicts with binding precedent on issue after issue. Reading between

the lines, it seems the Court already recognizes that. Since the decision here, the Court has issued three key opinions about how to apply the undue-burden standard. Yet the majority in those cases did not cite the panel majority's published decision here even once. And that makes sense: the panel issued its decision just weeks before *June Medical*, in which the Supreme Court through the Chief Justice's binding opinion rejected several of the legal grounds on which the panel majority relied.

But the panel majority's decision is not a complete dead letter. It continues to matter in one "substantial" way: the Commonwealth of Kentucky is still enjoined from enforcing its dismemberment law. *See Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010–11 (2022). And on this point, there is now a circuit split. As Judge Thapar recognized, the en banc Fifth Circuit has split with the panel majority about "whether states may prohibit certain types of dilation & extraction procedures—namely, the dismemberment of a still-living unborn child." *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 453 (6th Cir.) (Thapar, J., concurring in judgment in part and dissenting in part), *vacated by* 18 F.4th 550 (6th Cir. 2021) (citing *Whole Woman's Health v. Paxton*, 10 F.4th 430 (5th Cir. 2021) (en banc)). A circuit split of this consequence is yet another reason to revisit the panel majority's decision.

## BACKGROUND

This lawsuit challenges Kentucky's House Bill 454, which regulates the abortion procedure known as dilation and evacuation, or D&E for short. A D&E abortion involves using "grasping forceps" to "grab," "tear apart," and remove an unborn child "piece by piece." *See Gonzales v. Carhart*, 550 U.S. 124, 135–36 (2007). The Supreme Court has recognized that "[n]o one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life." *Id.* at 158. That is because "the more developed the child, the more likely an abortion will involve dismembering it." *See Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring).

HB 454 lessens one particularly dehumanizing aspect of a D&E abortion. Some abortion providers, EMW included, perform D&E abortions while the unborn child is still alive.[1] HB 454 prohibits performing a D&E abortion this way after a certain stage in pregnancy except if a medical emergency arises. Ky. Rev. Stat. § 311.787(1)–(2). In doing so, HB 454 allows providers to keep performing these abortions as long as a provider causes fetal death before "dismember[ing]" the unborn child. *See* Ky. Rev. Stat. § 311.787(1)(a).

[1] Other abortion providers perform a fetal-death procedure before dismembering an unborn child. *Paxton*, 10 F.4th at 448–53.

EMW and two of its abortion providers sued to enjoin HB 454. The five-day trial of this matter was an expert-intensive one, with a "wealth of testimonial and documentary evidence." *EMW I*, 960 F.3d at 793. The Secretary called nine expert witnesses; EMW seven. Relevant here, the Secretary's experts testified about three safe and effective ways to accomplish fetal death before dismembering an unborn child to comply with HB 454: a digoxin injection, a potassium-chloride injection, and umbilical cord transection. 6thCir.Dkt.17 at 11–15, 33–54. EMW's experts testified mostly to the contrary.[2] The district court viewed its job as picking sides in this battle of experts. The district court sided with EMW and entered a permanent injunction against the enforcement of HB 454. *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807, 826 (W.D. Ky. 2019) ("*Meier*"). In doing so, the court "balance[d] the state's interests underlying [the] law against the obstacles imposed by the law to women's access to abortion." *Id.* at 822.

This Court affirmed by a divided vote. Like the district court, the panel majority balanced benefits and burdens. *EMW I*, 960 F.3d at 795. This conclusion is inescapable: Part I.A of its opinion is labeled "Burdens"; Part I.B is "Benefits";

[2] This even though the Supreme Court has twice acknowledged that some abortion providers use two of the fetal-death procedures allowed by HB 454. *Gonzales*, 550 U.S. at 136, 164; *Stenberg v. Carhart*, 530 U.S. 914, 925 (2000).

and Part I.C is "Balancing." *Id.* at 797, 806–807. The panel majority also rejected the Secretary's argument that Kentucky's legislature was due deference on matters about which there is scientific and medical uncertainty. *Id.* at 796–97. Instead, the panel majority simply decided whether the district court clearly erred in choosing to credit EMW's experts over the Secretary's. *Id.* at 799 ("In essence, the Secretary takes issue with the district court's decision to credit Plaintiffs' experts and cited studies over his own."), 803 ("[T]he Secretary again quibbles with the district court's decision to credit Plaintiffs' expert testimony over his own."). The panel majority also concluded that "Supreme Court precedent does not support" requiring EMW to make a good-faith effort to comply with HB 454. *Id.* at 804–05.

After receiving the panel's decision, Secretary Eric Friedlander decided not to seek rehearing or petition for certiorari. Two days later, Attorney General Daniel Cameron, on behalf of the Commonwealth, moved to intervene. 6thCir.Dkt.56. He also tendered a timely petition for rehearing. 6thCir.Dkt.60. Over Judge Bush's dissent, the panel majority denied the Attorney General's motion to intervene and dismissed his tendered petition. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 831 F. App'x 748, 753 (6th Cir. 2020). The Supreme

Court, however, reversed this Court's judgment and remanded for further proceedings. *Cameron*, 142 S. Ct. at 1014.

## ARGUMENT

The panel majority's decision conflicts with Supreme Court and circuit precedent on issues of exceptional importance. These binding decisions establish that the panel majority made at least three fundamental errors. It wrongly applied a balancing test. It failed to give deference to the Commonwealth on issues about which there is medical and scientific uncertainty. And it impermissibly gave EMW a pass on showing a good-faith attempt to comply with HB 454.

### I. A balancing test does not apply.

There can be no argument that the panel majority applied anything but a balancing test to determine whether HB 454 constitutes an undue burden. It "answer[ed]" whether HB 454 imposes an undue burden "by weighing 'the burdens a law imposes on abortion access together with the benefits those laws confer.'" *EMW I*, 960 F.3d at 795. And the panel majority devoted more than 10 pages of the Federal Reporter to applying this balancing test, with separate sections for "Burdens," "Benefits," and "Balancing." *Id.* at 797–808. Almost

everything the panel majority did flowed from its decision to apply a balancing test. It was the framing point for its decision.

The panel majority went very wrong in this regard. Applying *June Medical*, this Court has since held that "the undue burden test is not a balancing test" and that a court "err[s] in attempting to weigh the benefits of [a statute] against [its] burdens."[3] *EMW II*, 978 F.3d at 437; *accord Slatery*, 7 F.4th at 482–83, 489 (reversing a decision that "balanced the law's benefits against its alleged burdens"). Because of this holding, there is simply no defending the panel's decision to apply a balancing test—other than to note that it did not "hav[e] the benefit" of *June Medical*. *See EMW II*, 978 F.3d at 439–40. This threshold error, which set the stage for the rest of the panel majority's flawed analysis, justifies rehearing.

EMW perhaps will respond that the district court's factfinding suffices to find an undue burden even under *June Medical*. That is not true. *See, e.g.*, *infra* Part II. Even so, that is a merits argument, not a reason to oppose rehearing. How can we know how HB 454 fares under *June Medical* and this Court's follow-on

[3] The Fifth Circuit reached an analogous conclusion in upholding Texas's dismemberment law. *Paxton*, 10 F.4th at 442 ("[T]he district court erred by balancing [the law's] benefits against its burdens. That is reason enough to reject the district court's findings.").

decisions without the Court engaging the correct standard? Maybe the Court will follow the Fifth Circuit's lead and uphold HB 454. Or maybe not. Either way, rehearing is needed to sort this out.

In any event, on rehearing, the clear-error standard would no longer be the "particularly high hurdle" that the panel majority thought it was. *See EMW I*, 960 F.3d at 793. That is because clear-error review "does not inhibit an appellate court's power to correct errors of law, including those that may infect a finding of fact that is predicated on a misunderstanding of the governing rule of law." *EMW II*, 978 F.3d at 429 (cleaned up) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984)). Put another way, "when a finding of fact" is based on an error of law, "the finding cannot stand." *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018). And applying a balancing test rather than the test from *June Medical* is an error of law that undercuts a district court's factfinding. *See EMW II*, 978 F.3d at 437–40; *accord Paxton*, 10 F.4th at 442.

## II. The panel majority failed to recognize Kentucky's wide discretion to legislate on issues of medical and scientific uncertainty.

The panel majority also applied the wrong legal standard to the district court's findings of fact, which were themselves based on an error of law. The district court treated this case like an ordinary battle of the experts, in which its role was to make factual findings about the safety and efficacy of fetal-death

procedures. The panel majority agreed, and so it reviewed those findings only for clear error. *See, e.g.*, *EMW I*, 960 F.3d at 799, 803, 805. But that approach conflicts with *June Medical* and this Court's recent application of the undue-burden test. States have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *EMW II*, 978 F.3d at 438 (citation omitted). And so rather than "making [their] own scientific and medical findings," courts must defer to the State's judgment in exercising its wide discretion to legislate in such circumstances. *See id.*; *accord Paxton*, 10 F.4th at 451–53; *Hopkins v. Jegley*, 968 F.3d 912, 915–16 (8th Cir. 2020) (per curiam).

The district court here did exactly what *June Medical* and *EMW II* prohibit. *See Meier*, 373 F. Supp. 3d at 818–22. The district court did not determine that the scientific and medical issues here were beyond reasonable debate. In fact, at no point did the district court discuss the role that medical uncertainty plays in these kinds of cases when "both sides have medical support for their position." *See Gonzales*, 550 U.S. at 161. Instead, the court took stock of the evidence and—as the panel majority explained—decided "to credit Plaintiffs' experts and cited studies over [the Secretary's]" to make its own scientific and medical findings. *EMW I*, 960 F.3d at 799. But doing so directly contradicts *June Medical* and this Court's application of the Chief Justice's opinion.

On top of that error, the panel majority then exacerbated things by applying clear-error review to factual findings that the district court should not have made in the first place. The panel majority emphasized that the district court's medical and scientific judgments were "permissible" based on the evidence. *Id.* at 799. It then criticized the Secretary for "attempt[ing] to relitigate factual issues," *id.*, and "quibbl[ing] with the district court's decision to credit Plaintiffs' expert testimony over his own," *id.* at 803. In doing so, the panel majority—like the district court—failed to ask the right question: Did the Secretary introduce reasonable medical and scientific evidence to support Kentucky's legislative judgment to require that abortion providers cause fetal death before dismembering an unborn child? *See Gonzales*, 550 U.S. at 161–64. The answer is plainly "yes." That the panel majority rejected the medical-uncertainty holding from *Gonzales*, *see EMW I*, 960 F.3d at 796–97, and instead viewed this case as requiring deference to the district court's medical and scientific factfinding, are obvious grounds for rehearing.

*Gonzales* shows how the panel majority should have conducted the undue-burden inquiry given the medical and scientific evidence presented below. At issue in *Gonzales* was whether a law banning partial-birth abortions amounted to an undue burden. *Gonzales*, 550 U.S. at 147. In applying the undue-burden standard, the Supreme Court determined that it implicated a "contested factual question"

in which "both sides have medical support for their position." *Id.* at 161. Because of this factual dispute, the Court asked "whether the Act can stand when this medical uncertainty persists." *Id.* at 163.

*Gonzales*'s next step was key. Unlike the panel majority here, the Supreme Court did not approach this "contested factual question" by reviewing the lower courts' factual findings for clear error. Instead, *Gonzales* recognized that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* For this proposition, the Court mainly cited cases from outside the abortion context. *Id.* And the Court explained why: "Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.* at 164. The Court's bottom line was that "medical uncertainty over whether the Act's prohibition creates significant health risks provides *a sufficient basis* to conclude in this facial attack that the Act does not impose an undue burden." *Id.* (emphasis added).

Consider just a preview of how this case would have looked had the panel majority applied this analysis. As an example, the Secretary presented evidence at trial that:

- A digoxin injection is within the standard of care for an OB/GYN and is a safe and effective way to accomplish fetal death before a

D&E abortion. Thorp, R.102, PageID#3736–37, 3739–44, 3750–58; Berry, R.103, PageID#3910–11, 3915–18; Davis, R.106, PageID#4391, 4460, 4471–72, 4496–97; NAF Guidelines, Trial Ex. 131 at 32.

- A potassium-chloride injection is also a safe and effective method of causing fetal death before a D&E abortion. Thorp, R.102, PageID#3759–61, 3764–66; Berry, R.103, PageID#3896–97, 3905–06, 3909; Simpson, R.106, PagID#4597–4601, 4612.

- Umbilical cord transection is likewise a safe and effective way to cause fetal death before a D&E abortion. Thorp, R.102, PageID#3769–71.

Yet neither the district court nor the panel majority assessed why this evidence (and the other evidence presented below) does not give rise to the same kind of "medical uncertainty" that "provides a sufficient basis to conclude" that HB 454 "does not impose an undue burden" in a facial challenge. *Gonzales*, 550 U.S. at 163–64. Just as in *Gonzales*, "both sides have medical support for their position." *Id.* at 161. And so just as in *Gonzales*, the panel majority should have deferred to Kentucky's "wide discretion" in the face of such competing medical and scientific evidence. *See id.* at 163–64.

Put simply, there is no way to square the panel majority's analysis with *Gonzales*. That is why the panel majority determined that the medical-uncertainty holding from *Gonzales* has been "clarified." *EMW I*, 960 F.3d at 796. That conclusion was wrong when the panel majority reached it, and the intervening

decisions in *June Medical* and *EMW II* make that clear. *See EMW II*, 978 F.3d at 438 (citing *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment); *Gonzales*, 550 U.S. at 163)). Rehearing is necessary so that the Court can apply the correct legal standard in reviewing the district court's impermissible findings of fact.

## III. EMW had to make a good-faith effort to comply with HB 454.

The panel majority also held that "Supreme Court precedent does not support" requiring EMW to make a good-faith effort to comply with HB 454. *EMW I*, 960 F.3d at 804–05. But based on *June Medical*, this Court has held that an abortion provider "must make a clear showing" that it "attempted in good faith" to comply with the challenged law. *See EMW II*, 978 F.3d at 440 (citation omitted) (cleaned up). More to the point, "good-faith efforts to comply with the law matter," and "record evidence must support a physician's assertion of futility." *Id.* at 445.

EMW never made a good-faith effort to comply with HB 454. As Judge Bush summarized in his panel dissent: "EMW's physicians do not want to receive the training needed to give the injections, even though the evidence at trial was that injections are not difficult to administer, training to perform the procedure is

available, and such injections are within the reasonable medical scope of care." *EMW I*, 960 F.3d at 817 (Bush, J., dissenting).

The record here bears out EMW's lack of effort to comply with HB 454. EMW never tried to hire new staff who could perform fetal-death procedures or even to train its current staff to perform them. Franklin, R.107, PageID#4717–18, 4733–34, 4760; Bergin, Trial Ex. 420 at 113–14. EMW's doctors, however, did not dispute that they could learn to perform digoxin injections. Franklin, R.107, PageID#4715–16; Bergin, Trial Ex. 420 at 117. And one of EMW's experts admitted that if EMW simply hired a doctor with her skill set, that practitioner could "feasibly perform potassium chloride injections." Simpson, R.106, PageID#4612. In fact, ten such physicians work across the river from Kentucky in Cincinnati. Brady, R.112-1, PageID#5193.

All EMW offered in response was its belief that "it's not that easy to find an abortion provider." Franklin, R.107, PageID#4733. But that subjective belief will not do. *EMW II*, 978 F.3d at 444 ("[A] finding of futility requires more than an abortion provider's subjective belief that efforts at compliance would be futile."). Here as well, the panel majority's analysis rests on a demonstrable error of law.

## CONCLUSION

The panel or the full Court should rehear this case.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this petition for panel rehearing and rehearing en banc complies with the type-volume requirements for such a petition, as it contains 3,454 words. *See* Fed. R. App. P. 35(b)(2)(A) & 40(b)(1).

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

*s/ Matthew F. Kuhn*

## CERTIFICATE OF SERVICE

I certify that on April 4, 2022 the foregoing was electronically filed with the Court via the Court's appellate CM/ECF system, and a copy of the same was automatically served on all parties registered with the CM/ECF system on the same date.

*s/ Matthew F. Kuhn*