IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-6161

EMW WOMEN'S SURGICAL CENTER, P.S.C., *et al.*,
Plaintiffs/Appellees,
v.
ADAM MEIER, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services, *et al.*,
Defendants/Appellants.

On Appeal from the United States District Court for the Western District of Kentucky, No. 3:17-CV-00189-GNS,
The Honorable Greg N. Stivers, Judge

BRIEF OF KENTUCKY AS AMICUS CURIAE IN SUPPORT OF APPELLEES

ANDY BESHEAR
ATTORNEY GENERAL
J. Michael Brown
Deputy Attorney General
La Tasha Buckner
Assistant Deputy Attorney General
S. Travis Mayo
Executive Director,
Office of Civil and Environmental Law

Sarah Ellen Eads Adkins
Sarah.Adkins@ky.gov
Marc G. Farris
Marc.Farris@ky.gov
Assistant Attorneys General
Capitol Building, Suite 118
700 Capital Avenue
Frankfort, KY 40601
Telephone No. (502) 696-5300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

RULES

INTEREST OF AMICUS

The Commonwealth of Kentucky, by and through Andy Beshear, the Attorney General of Kentucky, submits this brief "without the consent of the parties or leave of court" pursuant to FRAP 29(a)(2), and in support of Appellees, EMW Women's Surgical Center and Planned Parenthood of Indiana and Kentucky. The Commonwealth asks this Court to find in favor of the Appellees and uphold the decision of the District Court that 902 KAR 20:360, Section 10 is unconstitutional according to the Fourteenth Amendment to the United States Constitution, both facially and as-applied, and enjoining the Defendants Governor Matthew G. Bevin and Secretary Adam Meier ("Bevin Administration") from further violating the constitutional rights of women in Kentucky.

Under KRS 15.020, the Attorney General is the chief law officer of the Commonwealth and exercises "all common law duties and authority pertaining to the office of the Attorney General under the common law." He is a constitutional officer, established by KY. CONST. § 91, whose "source of authority . . . is the people who establish the government, and his primary obligation is to the people." *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 363 (Ky. 2016). KRS 15.020 further requires that the Attorney General "enter his appearance in all cases, hearings, and proceedings in and before all other courts . . . and attend to all litigation and legal business in or

out of the state required of him by law, or in which the Commonwealth has an interest." *Id.* at 361.

"It is unquestioned that at common law, the Attorney General] [has] the power to institute, conduct and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights," *id.* at 362 (citations and quotations removed), because the Attorney General is charged with "the duty of protecting the interest of all the people." *Id.* at 363 (quoting *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973)). "Indeed, the Attorney General has not only the power to bring suit when he believes the public's legal or constitutional interests are under threat, but appears to have even the *duty* to do so." *Id.* at 362 (emphasis added). Because the regulation at issue in this action threatens Kentucky women's constitutional right to access to abortion, the Attorney General is permitted to file this amicus to protect the constitutional interests of the public.

Under the Kentucky Constitution, Kentucky statute, and common law, the Attorney General is sworn to uphold the Constitutions of the United States and Kentucky and to defend the laws of the Commonwealth, so long as those laws pass constitutional muster. He writes separately on behalf of the Commonwealth because this Court need not strike down KRS 216B.0435, a statute that has been in effect for 19 years, during which time the statute has not deprived women of their

constitutional rights. The District Court correctly held, however, that the Bevin Administration's activities to undermine the transfer agreement statute, including by promulgating a needless regulation with no basis in medical science on a purportedly emergency basis and threatening hospitals that participated in transfer agreements, reflect an unlawful effort to deprive women of their constitutional rights. For this reason, this Court should affirm the District Court's decision.

BACKGROUND

Before 2017, the regulation implementing KRS 216B.0435 was concise and straightforward: "(1) An abortion facility shall enter into written agreements with a licensed acute-care hospital and a local ambulance service for the transport and treatment of patients when hospitalization becomes necessary, as required by KRS 216B.0435. (2) These written agreements shall be filed with the cabinet." 902 KAR 20:360, Section 10.

Prior to the Bevin Administration, EMW "had no difficulties" in meeting its licensing requirements, including the transfer agreement. (Findings of Fact, Conclusions of Law, and Order ("Order"), Doc. 168, PageID ##: 6818-19.) However, when this Administration took power, it immediately sought to revoke EMW's license. Among other things, it claimed that the transfer agreement between EMW and the University of Louisville Hospital ("U of L Hospital") was deficient for reasons that were not based on the text of the statute or the regulation as it then existed, including who the signatory was and a transparently pretextual claim that the relevant department chair "may have" canceled the transfer agreement. (*Id.*, PageID #: 6819.) EMW's attempts to rectify these purported problems were thwarted when Governor Bevin sought to place in his budget "a provision excluding state funding for any 'affiliate' of abortion facilities, which caused [U of L Hospital's parent company] KentuckyOne to believe that its state

funding would be jeopardized by a transfer agreement between U of L Hospital and any abortion clinic." (*Id.*, PageID #: 6823 n.6.)

Planned Parenthood – which has been working to receive licensure since 2009 – similarly had a transfer agreement with U of L Hospital that took effect in 2014. (*Id.*, PageID #: 6820-21.) In 2016, when Cabinet for Health and Family Services ("CHFS") raised, for the first time, "concerns" about the agreement, Planned Parenthood entered a *new* agreement with U of L Hospital to satisfy CHFS' tightened requirements. (*Id.*, PageID ##: 6821-22.) The Bevin Administration then turned its attention to U of L Hospital where, in addition to the budget language threatening reimbursements to U of L's parent company, Governor Bevin's counsel – who is representing the Governor in this very case – met with the lobbyist for the Hospital's parent company and threatened U of L's funding. (*Id.*, PageID #: 6822; Trial Tr. Vol. 2B, Doc. 116, PageID ##: 4336-38.) The Administration's threats had the desired effect: U of L canceled the agreement, and both EMW and Planned Parenthood were unable to secure transfer partnerships with the major Louisville hospitals. (Order, Doc. 168, PageID ##: 6822-23.) As the District Court found, these roadblocks were the direct effect of the "perceived influence" of the Bevin Administration. (*Id.*, PageID #: 6823.) The lobbyist for one hospital, in an apparent effort to curry favor, even proactively reached out to another of the Bevin Administration's lawyers and promised it

would not enter any such agreements. (*Id.*, PageID #: 6824; Bilby Depo., Doc. 138-1, PageID #: 5055.)

When Planned Parenthood later entered transfer agreements with the University of Kentucky and Clark Memorial Hospital, the Bevin Administration claimed that the University of Kentucky was too far from Planned Parenthood in Louisville and that Clark Memorial Hospital would not suffice because it was not in Kentucky – *i.e.*, not amenable to pressure from the Bevin Administration. (Order, Doc. 168, PageID ##: 6822-23.)

Only after it invented these objections to the transfer agreements of EMW and Planned Parenthood, and only after EMW and Planned Parenthood brought suit, did the Bevin Administration seek to promulgate a regulation to justify its position. The Bevin Administration claimed the regulation was needed "on an emergency basis," Statement of Emergency, 902 KAR 20:360E, even though it could not identify any harm to patients that justified the need to interfere with the clinics' existing arrangements. In fact, the new regulation had no basis in medical need – as a Bevin Administration official admitted, it was promulgated *without consulting any physicians*. (Order, Doc. 168, PageID #: 6825.)

The result is the current implementing regulation for the statute, 902 KAR 20:360E, Section 10, which requires, among other things: that the transfer agreement be with a Kentucky-licensed hospital within a 20-minute drive of the

clinic; that the transport agreement be with a Kentucky-licensed ambulance service within five miles or ten minutes of the clinic; and that the ambulance service agree to transport the patient solely to the hospital with the transfer agreement, barring a request from the patient. *See* 902 KAR 20:360E, Section 10(1), (3), (4).

ARGUMENT

The Bevin Administration has improperly enforced the transfer and transport agreement requirements with the purpose and effect of depriving women in Kentucky the opportunity to exercise their constitutional Due Process right of access to abortion within Kentucky. Accordingly, this Court should affirm the District Court's decision, for the reasons set forth below.

I. Defendants May Not Rely On Another State To Protect Women's Fourteenth Amendment Right To An Abortion.

The Bevin Administration misinterprets the protection the Fourteenth Amendment grants women to obtain an abortion. Kentucky is individually responsible for protecting the rights of women pursuant to the Fourteenth Amendment and may not pass that burden onto another state. A woman has a constitutional right under the Fourteenth Amendment to obtain an abortion before viability without undue interference from the State. *See Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000). Her constitutional right to decide "to terminate her pregnancy derives from

the Due Process Clause of the Fourteenth Amendment," *Casey*, 505 U.S. at 846, which holds that no State shall "deprive any person of life, liberty, or property, without due process of law," U.S. CONST. AMEND. XIV.

The Supreme Court of the United States has interpreted the protection of the Due Process clause in this context "a promise of the Constitution that there is a realm of personal liberty which the government may not enter;" specifically, "a person's most basic decisions about family and parenthood." *Casey,* 505 U.S. at 846. Abortion is positioned uniquely in the scope of medical procedures, "because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Id.* at 833.

The Supreme Court has made clear that a state may not violate the Fourteenth Amendment by asserting that other states will not do so. In a different context, though cited in multiple abortion cases, including the District Court here, Missouri made a similar argument that the Court refuted in *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); (Order, Doc. 168, PageID #: 6865.) In *Gaines*, the University of Missouri law school denied admission to students of color and argued that instead of admitting them, students of color could instead attend "law schools of the adjacent States, Kansas, Nebraska, Iowa and Illinois." *Gaines*, 305 U.S. at 348. The Supreme Court rejected that argument, holding that,

"[t]he basic consideration is not as to what sort of opportunities[] other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes" to students of color *Id.* at 337. Missouri was required to individually protect the Equal Protection rights of those within its borders. *Id.* ("[T]he State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race . . . "). The obligation to the protection of equal laws "is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. . . . That separate responsibility of each State within its own sphere is of the essence of statehood." *Id.*

Although *Gaines* applied the Equal Protection clause, the reasoning is just as applicable to the Due Process rights at issue here. The Supreme Court has explained that the Fourteenth Amendment as a whole "was designed to afford its protection to all within the boundaries of a State." *Plyler v. Doe*, 457 U.S. 202, 212 (1982). "[E]ach aspect of the Fourteenth Amendment" – both the Due Process and the Equal Protection clauses – "reflects an elementary limitation on state power." *Id.* at 212.

The Bevin Administration's argument ignores this limitation. Its assertion that women can merely go to another state to procure an abortion demonstrates a

fundamental misunderstanding of the Fourteenth Amendment and its scope in protecting a woman's right to make her own reproductive choices. The Bevin Administration spends significant time in its brief arguing about distances between Kentucky cities and major cities outside of Kentucky, but it is Kentucky's own responsibility to protect the women within its geographical borders. (*See* Brief of Appellants' ("Cabinet Br.") 43-50.) By its own wording, the Fourteenth Amendment does not list general rights that must be allowed somewhere in the United States, but mandates that each individual State shall not "deprive any [individual] person of life, liberty, or property, without due process of law," U.S. CONST. AMEND. XIV. The Commonwealth has the responsibility to ensure that each woman in the Kentucky is able to obtain an abortion without undue burden. Enacting regulations with the sole purpose to close the only abortion clinic in Kentucky certainly does not meet the mandate of the Fourteenth Amendment.

Courts have specifically applied *Gaines* in the abortion context to refute the exact argument the Bevin Administration makes here. *See, e.g., Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014); *Planned Parenthood Arkansas & E. Oklahoma v. Jegley*, No. 4:15-CV-00784-KGB, 2018 WL 3816925, at *50 (E.D. Ark. July 2, 2018); *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015); *W. Alabama Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1261 (M.D. Ala. 2017), *aff'd sub nom. W. Alabama Women's Ctr.*

v. Williamson, 900 F.3d 1310 (11th Cir. 2018); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1360 (M.D. Ala.), *as corrected* (Oct. 24, 2014), *supplemented*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014), and *amended*, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014). In *Jackson Women's Health*, the Fifth Circuit held, "[t]o be sure, there are distinctions between *Gaines* and the instant case, which the State points out. . . . Although cognizant of these serious distinctions, and although decided in a different context, we think the principle of *Gaines* resolves this appeal." *Jackson Women's Health*, 760 F.3d at 457. Quoting *Gaines*, the court in *Jackson Women's Health* stated, "[i]t is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do." *Id.*

As in *Gaines*, the Bevin Administration cannot excuse its violation of the Due Process clause by relying on adjacent states to protect a woman in Kentucky's right to abortion without undue burden. Each woman in Kentucky has a personal right to abortion without undue burden and Kentucky is responsible under the Fourteenth Amendment as a state to protect that right.

II. The Emergency Regulation And The Bevin Administration's Conduct Had The Purpose And Effect Of Depriving Women Of Their Constitutional Right.

Government conduct restricting access to a constitutionally protected right to seek abortion is improper, and must be struck down, if it had either the purpose or the effect of interfering with the exercise of that right. *Casey*, 505 U.S. at 877; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2296 (2016). As this Court has explained, a state may not take action "simply to make it more difficult for [a woman] to obtain an abortion." *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 461 (6th Cir. 1999).

The facts found by the District Court show that this is precisely what the Bevin Administration did here. While the Bevin Administration claims that its enforcement actions were designed to protect women's health (*see generally* Cabinet Br. 31-37), the evidence shows otherwise. The Bevin Administration did not base its actions in medical science – indeed, it did not even consult a physician before promulgating its regulation – and can point to no instances of harm to women that justified that purportedly "emergency" basis on which they acted. To the contrary, the Bevin Administration has made no secret that its intent has been to end the rights of women in Kentucky to access abortion within the State. (*See* Trial Tr. Vol. 2B, Doc. 116, PageID##: 4338-39.) Thus, the regulation and the

Bevin Administration's actions demonstrate the purpose, and had the effect, of impeding women from exercising their rights.

A. The Bevin Administration Unduly Burdened Women Seeking to Exercise Their Constitutional Rights.

The evidence in the underlying action convincingly revealed that the Bevin Administration's conduct in enforcing the statute had both the purpose and effect of burdening women's exercise of their Fourteenth Amendment right to seek safe and legal abortions. (*See generally* Order, Doc. 168, PageID ##: 6839-47.) If the Bevin Administration's regulation and enforcement conduct continue unabated, it will require the only abortion clinic in Kentucky to close, entirely depriving the women of Kentucky from exercising their constitutional right to safe and legal abortions. (*Id.*, PageID ##: 6846-47.)

The Bevin Administration responds that this will impose a limited burden because other states may continue to respect women's constitutional right. (*See* Cabinet Br. 45-56.) Contrary to the Bevin Administration's argument, it is simply insufficient to claim that women's constitutional rights may be infringed within Kentucky because they may be able to access abortions in neighboring states. First, as set forth above, women have a constitutional right to access abortion within their home state. (*See* Argument, I., *supra.*) The Due Process clause cannot cease to apply at the Ohio River. Therefore, it is irrelevant that Ohio or Indiana may respect the Due Process clause while the Bevin Administration chooses to

trample it. Second, requiring women to cross state lines to obtain an abortion *in and of itself* represents an undue burden on their exercise of Fourteenth Amendment rights. As the District Court found, requiring women to travel to other states would cause women to spend more time and money traveling to facilities and, for some women, would practically prevent them from exercising this right. (Order, Doc. 168, PageID #: 6853.)

Notably, the Bevin Administration speaks out of both sides of its mouth regarding to facilities in Kentucky: it claims that the existence of abortion clinics in other states is sufficient to protect women's rights, (Cabinet Br. 46-47), but also asserts that clinics within Kentucky may not enter into transfer agreements with out-of-state hospitals because CHFS does not regulate those hospitals (Order, Doc. 168, PageID ##: 6822-23). The Bevin Administration cannot have it both ways – it cannot both be true that the availability of facilities in other states are adequate for abortions, but inadequate for transfer. This inconsistency reveals the broader strategy at work here: the Bevin Administration is seizing any argument it can find to end women's constitutional right to access to abortion within Kentucky. That is precisely what the Due Process clause prohibits. *Hellerstedt*, 136 S. Ct. at 2296.

The burden imposed by the regulation distinguishes this case from this Court's prior decision on transfer agreements, *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006). There, the effects of the Ohio regulation were

far more limited than the effects in this case. *Id.* at 605. The regulation in that case imperiled one abortion facility in Dayton, but, as this Court observed, the closure of the Dayton clinic did not constitute a substantial obstacle to women seeking abortions because they could travel to abortion clinics in other Ohio cities – *e.g.*, Cincinnati, Columbus, Cleveland, and Akron. *See id.* at 605. "Thus, potential patients of the Dayton clinic could still obtain an abortion *in Ohio* . . . ." *Id.* (Emphasis added).

Here, the evidence overwhelmingly shows that unless this Court upholds the District Court's order enjoining the Bevin Administration from engaging in its unconstitutional conduct, women's right to access safe and legal abortions in Kentucky will be entirely eliminated.

B. The Emergency Regulation Provides No Benefit to Clinic Patients.

As the District Court found, the Bevin Administration entirely failed to prove that the emergency regulation provides *any* benefit to patients seeking to exercise their right to abortion. (Order, Doc. 168, PageID #: 6863.) In this case, the circumstances surrounding the enactment of the regulation demonstrate that it was intended not to protect women, but instead to prevent women from exercising their constitutional right. This Court can and should affirm the District Court's injunctive relief because the facts it found show the Bevin Administration acted with the unlawful purpose of impeding access to abortion. *See Planned*

Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042, 1049 (8th Cir. 1997) ("In this case, although the district court did not expressly find that the defendant acted in bad faith, the record, the stipulated facts, and the additional findings of the court suggest that subjecting the plaintiff to review had the intended effect of impeding or preventing access to abortions.").

First, even before the unlawful regulation was promulgated, the Bevin Administration was attempting to use the transfer and transport agreement statute to restrict access to abortions. (*See generally* Order, Doc. 168, PageID ##: 6818-23 (describing the Bevin Administration's rejection of longstanding transfer agreements).) Indeed, the evidence shows that from the first day of the Bevin Administration, high-level officials – including Governor Bevin's General Counsel – inserted themselves in a review of abortion clinic compliance and applications. (*Id.*, PageID ##: 6822-23; Bilby Depo., Doc. 138-1, PageID #: 5046; Trial Tr. Vol. 3B, Doc. 128, PageID ##: 4678-80.) At the start, CHFS singled out EMW's agreements for examination, despite the fact that EMW's license had already been renewed for the year. (Order, Doc. 168, PageID #: 6849.) A Bevin Administration appointee then instructed the Inspector General to sign a letter that identified purported shortcomings in EMW's existing agreements, but, as the District Court found, these purported problems did not violate "either the statute or regulation in existence at the time." (*Id.*, PageID #: 6849.)

Meanwhile, the Bevin Administration – again, including Governor Bevin's General Counsel – pressured the hospitals to end their existing transfer agreements by threatening their funding. (Trial Tr. Vol. 2B, Doc. 116, PageID ##: 4335-39.) That pressure worked: U of L Hospital canceled its transfer agreements after its lobbyist met with the Governor's General Counsel, while the lobbyist for another hospital proactively sought the Bevin Administration's favor by promising never to enter such an agreement. (Order, Doc. 168, PageID ##: 6822-24; Bilby Depo., Doc. 138-1, PageID #: 5055.)

Only after this lawsuit was filed did the Bevin Administration attempt to manufacture a legal justification for its actions, by promulgating an "emergency" regulation that substantially increased the requirements for abortion clinics' transfer agreements. (Order, Doc. 168, PageID ##: 6824-25.) As the Bevin Administration admits, however, it promulgated this regulation without seeking the input of physicians and based on no medical studies. (*Id.*, PageID #: 6825.) Indeed, there is no evidence in the record that the health of any patient in Kentucky was compromised by the regulation that was in place before the Bevin Administration began to interfere with the transfer agreements between the clinics and hospitals. (*Id.*, PageID ##: 6862-63.) *See Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 790–91 (7th Cir. 2013) (observing that a statute

that "lack[s] any demonstrable medical benefit" suggests that the law was intended to impede access to abortions).

Moreover, the regulation was improperly promulgated on an emergency basis without any explanation, further showing that the Bevin Administration's current explanation of the regulation was pure pretext. Specifically, under Kentucky law, emergency regulations may only be issued in exceptional circumstances of "imminent threat to public health, safety, or welfare." KRS 13A.190(1)(a)1. Each emergency regulation must include a statement setting forth, among other things, "[t]he nature of the emergency [and] [t]he reasons why an ordinary administrative regulation is not sufficient." KRS 13A.190(6)(a)-(b). The heightened requirements exist for such rulemaking because the public is deprived of the opportunity for notice and comment about proposed rules when there is an emergency. *See* KRS 13A.190(2) (providing that emergency regulations take effect immediately upon filing).

Here, the Bevin Administration could not justify the use of an emergency regulation – indeed, it did not even try to do so. Instead, the emergency regulation merely recited the statutory requirement – that it was needed "to avoid an imminent threat to public health and safety" – without providing a single reason why that was true. As the District Court noted, the parties did not seek to invalidate the emergency regulation for failure to comply with KRS Chapter 13A.

The fact that the regulation states no justification, however, is powerful circumstantial evidence that the purported emergent need to protect health and safety was merely pretext.

The Bevin Administration and Amici States of Indiana, *et al.*, incorrectly contend that this Court should not confine its analysis of the regulation to the benefits it purportedly provides to abortion clinic patient. Instead, they would have the Court focus on whether transfer agreements at outpatient facilities are *generally* beneficial. (Cabinet Br. 31; Indiana Amicus Br. 15-18.)

That argument is wrong because it proceeds from the inaccurate premise that Kentucky has enacted similar transfer agreements for all outpatient facilities, and that all outpatient facilities face the same risk of complications. As the District Court's thorough Opinion reveals, the rule at issue is directed solely at abortion facilities. (Order, Doc. 168, PageID ##: 6824-26, 6845-46.) Not only does that rule not apply to other outpatient facilities, but it is significantly less strict than the regulatory requirements that apply at other facilities. (*Compare* 902 KAR 20:360, Section 10 (listing dozens of requirements for abortion facilities' transfer agreements) *with* 902 KAR 20:106, Section 2(1)(b)10. (requiring only that ambulatory surgical centers create policies including "Arrangement for transportation of patients who require hospital care"); *see also* Trial Tr. Vol. 2B, Doc. 116, PageID ##: 4227-29 (describing differential treatment of abortion

facilities).) Indeed, the abortion facilities face exceedingly low risk of complications, and most complications that happen occur after the patient has gone home – rendering transfer agreements useless for protecting abortion patients. (Order, Doc. 168, PageID #: 6845.)

In addition, the Bevin Administration has strictly enforced the abortion facilities' transfer requirements, while ignoring other facilities' transfer requirements until after the underlying action was filed. Specifically, the evidence showed that the Bevin Administration required abortion facilities to provide copies of the transfer agreements to CHFS, but only asked ambulatory surgical centers – which face a much higher and more frequent risk of life-threatening complications – to file their transfer agreements after this case was proceeding to trial. (*See* Ex. X, Doc. 94-25, Page ID#: 1832; *see also* Trial Tr. Vol. 2B, Doc. 116, PageID ##: 4227-29.) Such differential treatment shows that the Bevin Administration acted with an improper purpose to impede access to a constitutional right. *See Atchison*, 226 F.3d at 1049 (holding that regulatory scheme demonstrated an improper purpose based in part on differential treatment of abortion facilities compared to other healthcare facilities).

These facts distinguish this case from this Court's prior decision on transfer agreements in *Baird*. There, this Court applied *Casey*'s undue burden test to an Ohio regulation requiring ambulatory surgical centers to enter into transfer

agreements. *Baird*, 438 F.3d at 603. While *Baird*'s applicability is questionable in light of the intervening Supreme Court decision in *Whole Women's Health*, it is clear that even under *Baird*, the regulation and conduct at issue here violate the Due Process clause.

For instance, the regulation at issue in *Baird* – unlike the statute and regulation at issue here – was a "generally applicable and neutral regulation." *Id.* Specifically, an Ohio state court had held that, for purposes of Ohio's laws, abortion clinics qualified as ambulatory surgical facilities, and were therefore subject to the same general regulatory requirements as those facilities, including the requirement of a transfer agreement with a local hospital. *Id.* at 599. Here, by contrast, the regulation at issue, and related enforcement activities, single out abortion clinics and place vastly more onerous obligations on the facilities.

Ultimately, the Bevin Administration's post hoc rationalization of the regulation simply did not hold up in the District Court. The District Court persuasively described the ways in which the Bevin Administration's "expert" proved unqualified to opine about the regulation: he performed no review of the transport agreements; he did not review the statute or the regulation; he was unfamiliar with protocols at abortion facilities to ensure patient safety; he was unaware of any study showing impact on patient care resulting from a transfer agreement; in past five years, he had only seen one abortion related complication;

and he spoke only abstractly, not concretely, about the benefits that a transfer agreement could provide. (Order, Doc. 168, PageID ##: 6834-35.) Neither could the Bevin Administration point to any study that suggested the transfer agreements conferred a benefit. (*Id.*, PageID #: 6846.) As a result, the Bevin Administration completely failed to support their claim that the transfer agreements provided a benefit to patients seeking an abortion.

In contrast, Plaintiffs' evidence – including expert testimony from witnesses with relevant experience – conclusively showed that there was no benefit provided by the onerous regulation. Among other things, EMW's experience showed that calling 911 was the fastest way to ensure service, undermining the regulation's unduly specific requirements for transfer by a specific ambulance service to a specific hospital. (*Id.*, PageID ##: 6843-45.) Moreover, Plaintiffs' experts demonstrated that transfer agreements provide no benefit to the very few patients who suffer complications during their procedures. (*Id.*, PageID ##: 6839-40.)

The Bevin Administration and Amici States of Indiana, *et al.*, also place heavy emphasis on the claim from legislative history that Kentucky's statute was intended to place a "lower" regulatory standard on abortion clinics than other outpatient facilities. (Cabinet Br. 43-50; Indiana Amicus Br. 6.) The accuracy of this one statement of legislative history in this highly contested and politicized issue is, at best, questionable. *See e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 99

(1989) (Scalia, J., concurring) (describing the risk that legislative history can be manipulated "to influence judicial construction"). Most importantly, whatever the General Assembly's intent in crafting the statute, the Bevin Administration *thwarted* that intent by enacting the regulation, which raised the requirements above those of other facilities and by using its influence to obstruct access to abortion.

The facts of this case as found by the District Court thus showed that the regulation, and the Administration's conduct in enforcing the statute and the regulation, had both the purpose *and* the effect of placing substantial obstacles before women seeking to exercise their Due Process right to an abortion, while providing no benefit.

CONCLUSION

For the reasons set forth above, the Attorney General of Kentucky urges the Court to affirm the decision of the District Court to strike down 902 KAR 20:360, Section 10 and enjoin the Bevin Administration from taking further unconstitutional action.

Respectfully submitted,

Dated: April 3, 2019

/s La Tasha Buckner
ANDY BESHEAR
ATTORNEY GENERAL

J. Michael Brown
Deputy Attorney General
La Tasha Buckner
Assistant Deputy Attorney General
S. Travis Mayo
Executive Director,
Office of Civil and Environmental Law
Travis.Mayo@ky.gov
Sarah Ellen Eads Adkins
Sarah.Adkins@ky.gov
Marc G. Farris
Marc.Farris@ky.gov
Assistant Attorneys General
Capitol Building, Suite 118
700 Capital Avenue
Frankfort, KY 40601-3449
Telephone No. (502) 696-5300

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7)(A) AND 6TH CIRCUIT RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P 32(a)(7)(B) because it contains 5,149 words.

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 this brief has been prepared in proportionally spaced typeface using Microsoft Office 2016 in 14 point Times New Roman Font.

/s La Tasha Buckner
La Tasha Bucker

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2019, a true and correct copy of this Amicus Brief was served on all counsel of record in this matter through the Court's electronic filing system.

/s La Tasha Buckner
La Tasha Bucker