No. 18-6161

IN THE

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; ERNEST MARSHALL, M.D., on behalf of himself and his patients,
Plaintiffs-Appellees,

and

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., on behalf of itself, its staff, and its patients,
Intervenor Plaintiff-Appellee

v.

ADAM MEIER, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services; MATTHEW G. BEVIN, Governor of Kentucky, in his official capacity,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Kentucky
No. 3:17-cv-00189-GNS, Hon. Gregory N. Stivers

CORRECTED BRIEF OF PLAINTIFFS-APPELLEES EMW WOMEN'S SURGICAL CENTER, P.S.C. AND ERNEST MARSHALL, M.D.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Plaintiffs-Appellees EMW Women's Surgical Center, P.S.C., and Ernest Marshall, M.D., hereby make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

Answer: No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome of this litigation?

Answer: No.

Dated: April 8, 2019

/s/Brigitte Amiri
Brigitte Amiri

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument because they believe that oral argument would assist the Court in addressing the important question of constitutional law in this case.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

After a three-day bench trial, the district court made well-supported findings of fact that the challenged Kentucky law, which requires abortion facilities to have a transfer agreement with a hospital and a transport agreement with an ambulance company, had "virtually no health benefits" and, if enforced, would "effectively eliminate" access to abortion in the Commonwealth. The question presented for review is whether, given these findings that are not clearly erroneous, the district court properly held the requirements unconstitutional under the Supreme Court's controlling decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

STATEMENT OF THE CASE

Plaintiff-Appellee EMW Women's Surgical Center ("EMW") has been safely providing abortion in Louisville for decades, and is currently the only abortion facility in Kentucky. Order, R.168, Page ID # 6818. Kentucky law requires abortion facilities to have "a written [transfer] agreement with a licensed acute-care hospital capable of treating patients with unforeseen complications related to an abortion facility procedure by which agreement the hospital agrees to accept and treat these patients" where the patient must be transferred unless the patient chooses another hospital. KRS 216B.0435; *see also* 902 KAR 20:360. Abortion facilities also must have "a written agreement with a licensed local

ambulance service for the transport of any emergency patient" to the acute-care hospital named in the written transfer agreement. *Id*. EMW has been routinely re-licensed by Defendants-Appellants ("the Cabinet") after the Cabinet's inspections, including inspection of its written hospital transfer and transport agreements. Order, R.168, Page ID # 6818.

Despite having renewed EMW's license from June 1, 2016 through May 31, 2017, in March 2017, the Cabinet contacted EMW, out-of-the blue, and claimed that its most recent renewal of EMW's license was in error because it now considered EMW's long-standing hospital transfer and transport agreements deficient. *Id*., Page ID ## 6817-18. In particular, the Cabinet alleged that the hospital agreement was insufficient because it was signed by the Chair of the Department of Obstetrics, Gynecology, and Women's Health at the University of Louisville, rather than an "authorized representative" of the hospital, a requirement found nowhere in Kentucky law. *Id*., Page ID ## 6819, 6849. The Cabinet found EMW's transport agreement insufficient because it did not "mandate with reasonable certainty the transport of" EMW's patients to the hospital named in EMW's transfer agreement. *Id*., Page ID # 6819. The Cabinet notified EMW that unless those deficiencies were corrected in ten days, EMW's license would be revoked, and it would be forced to close. *Id*.

In response, EMW did not "sit on its hands," as the Cabinet claims. Brief of Appellants ("Cabinet Br.") at 29. Rather, EMW actively attempted to obtain transfer and transport agreements that would satisfy the Cabinet's new requirements. EMW first contacted University of Louisville Hospital, and asked an "authorized representative" to sign EMW's transfer agreement. Order, R.168, Page ID # 6850. Ken Marshall, the hospital's President/CEO, did so, but "promptly about-faced and canceled the transfer agreement on the same day because he was concerned he did not have the authority to sign the agreement." *Id*.

EMW subsequently contacted all the acute-care hospitals in Louisville, but none was willing to sign a transfer agreement that met the Cabinet's criteria. *Id*., Page ID # 6851; *see also* Trial Tr., R.112, Page ID ## 4085-90. However, they all agreed to care for EMW's patients in the rare event a patient needed to be transferred from EMW. Order, R.168, Page ID # 6851.

After a three-day trial, the district court made extensive findings of fact. In particular, the district court found that the Cabinet's claims that the transfer and transport agreements "streamline, expedite, and facilitate" the transfer and treatment of patients from abortion facility to a hospital, Cabinet Br. at 3, were "devoid of any credible proof," Order, R.168, Page ID # 6867. The court found that Defendants' expert, Dr. Hamilton, "failed to provide meaningful detail as to how the utilization of such agreements improved care in any tangible way." *Id*.,

Page ID # 6835. The district court also found that there was no medical study about such agreements that supported the Cabinet's claim. *Id*. Moreover, the Cabinet conceded that it was unaware of any woman in the Commonwealth who had received substandard care due to the lack of a transfer or transport agreement. *Id*., Page ID # 6863. Accordingly, the district court found that "transfer and transport agreements provide no quantifiable benefit to women's health." *Id.*, Page ID # 6847.

The district court also found that forcing the closure of the last abortion facility in the Commonwealth (and preventing Planned Parenthood from opening) would "effectively eliminate legal abortion in Kentucky," *id*., Page ID # 6863, thereby "pos[ing] a threat to the health and safety of women in Kentucky," *id*., Page ID # 6847.

After making these well-supported findings of fact, the district court properly held the challenged Kentucky law unconstitutional under controlling Supreme Court precedent, *Whole Woman's Health v. Hellerstedt*. In that case, the Supreme Court struck down two Texas abortion restrictions: a requirement that abortion providers have admitting privileges at a local hospital, and a requirement that abortion facilities meet requirements more stringent than ambulatory surgical centers. 136 S. Ct. 2292 (2016). The Court held that when considering abortion restrictions, courts must "consider the burdens a law imposes on abortion access

together with the benefits those laws confer." *Id*. at 2309. The Court held that the challenged Texas restrictions did not benefit women's health, and would burden abortion access by forcing the closure of numerous clinics in the state. Here, the district court applied the *Whole Woman's Health* framework, and held that transfer and transport agreements did not benefit women's health, and that the burden on women seeking abortion access was even more extreme than in *Whole Woman's Health*, namely that abortion would be effectively banned in the Commonwealth. Balancing the lack of benefits with the extreme burden, the district court properly invalidated the transfer and transport agreement requirements.

I. FACTUAL BACKGROUND

Dr. Ernest Marshall is the owner of EMW in Louisville, Kentucky, the last remaining abortion clinic in Kentucky. Order, R.168, Page ID # 6818. Dr. Marshall is a board-certified obstetrician-gynecologist who has practiced for more than forty years and has delivered thousands of babies during his career. *Id*. Throughout his career, he has trained and taught medical residents at the University of Louisville and the University of Kentucky. *Id*. He has admitting privileges at Norton Hospital, located less than a mile away from EMW. *Id*. The two other EMW physicians, Dr. Ashlee Bergin and Dr. Tanya Franklin, are professors at the University of Louisville and maintain admitting privileges at the hospital there, which is also less than a mile away from EMW. *Id*. Although such

privileges are unnecessary for providing safe outpatient abortion care, they allow doctors to admit, manage, and treat patients in the hospital. Trial Tr., R.108, Page ID # 3906.

Hospital transfer agreements and ambulance transport agreements are also unnecessary for proper patient care, but EMW had these agreements in place for years to comply with the challenged law. Order, R.168, Page ID # 6848. In the unlikely event that a patient needs to be transferred from EMW to the hospital, EMW follows its written emergency protocols. *Id*., Page ID # 6843. EMW staff will, in accordance with the standard of care, call 911, explain the emergency, and request that an ambulance transfer the patient to the University of Louisville hospital, or the nearest hospital accepting patients. *Id*.; Trial Tr., R.112, Page ID ## 4073-79; EMW-PX207A (A243).[1] The EMW physician will call the hospital to notify them that the patient is en route, and to provide the hospital with the patient's medical history. *Id*. EMW staff will also copy the patient's medical records, and send those records in the ambulance with the patient to the hospital. *Id*. If possible, an EMW physician will go with the patient to treat her at the hospital, and if that is not possible because other patients in the clinic need attending to, the physician will go to the hospital as soon as possible. *Id*.

[1] EMW-PX refers to EMW's trial exhibits; PPINK-PX refers to Planned Parenthood of Indiana and Kentucky's ("PPINK") trial exhibits; and DTX refers to the Cabinet's trial exhibits, all of which are in Appendix of Plaintiffs-Appellees (R. 55) (indicated by "AXXX").

Abortion is very safe, and complications necessitating hospitalization are rare, especially while the patient is still at the abortion facility rather than after she has returned home. Order, R.168, Page ID ## 6836-39. For example, from July 2015 to July 2017, only three patients – out of approximately 6,000 – were transferred from EMW to University of Louisville hospital, and all three of those patients were transported quickly and appropriately cared for at the hospital.[2] Order, R.168, Page ID ## 6845, 6818; Trial Tr., R.122, Page ID # 3967; *id*., Page ID ## 4009-10.

EMW's "transfer and transport agreements did not face any significant scrutiny and were accepted by" the Cabinet, until March 2017 when the Cabinet threatened to revoke EMW's license alleging that EMW's transfer and transport agreements were not in compliance with Kentucky law. *See supra* at 3. EMW attempted to cure the "deficiency" in its transfer agreement with the University of Louisville, including by obtaining the CEO of the University of Louisville Hospital's signature, but he rescinded the agreement later that day. Order, R.168, Page ID # 6850. The district court found that because of Governor Bevin's opposition to abortion, the hospital's management company believed that "its state

[2] The district court noted that Louisville Metro Emergency Medical Services (LMEMS) responded to 61 service calls for 51 incidents in that time period at EMW. Order, R.168, Page ID # 6845. Of these service calls, only four were EMW-related for medical service: three were patient complications, and one call was an incident on the sidewalk. Trial Tr., R.122, Page ID # 3991.

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

Facing revocation of their license, on March 29, 2017, EMW brought this instant action, and obtained a temporary restraining order on March 31, 2017. *Id*., Page ID # 6826. The temporary restraining order was later converted by agreement of the parties into a preliminary injunction. *Id*.

Even after the district court granted preliminary relief, EMW continued in vain to obtain a transfer agreement that met the Cabinet's approval. EMW sent letters to all of the acute-care hospitals in Louisville – Jewish, Baptist East, Norton and University of Louisville hospitals – requesting that the hospitals' CEOs sign transfer agreements. *Id*., Page ID # 6851; *see also* Trial Tr., R.112, Page ID # 4086-90. All of the hospitals declined to sign a written transfer agreement, but assured EMW that it would care for EMW's transferred patients. Order, R.168, Page ID # 6851. Furthermore, University of Louisville Hospital has said that a "transfer agreement was unnecessary, from the hospital's perspective, to ensure proper medical treatment for any patients presenting for care at the U of L hospital emergency room." *Id*., Page ID # 6822. The district court found that "it is clear that despite EMW and Planned Parenthood's best efforts, no Louisville hospital is currently willing to sign a transfer agreement with" an abortion facility. *Id*., Page ID # 6825; *see also id.* Page ID # 6851. The district court further found that "the

perceived influence of the Governor's Office has essentially eliminated the availability of transfer agreements between EMW and Planned Parenthood and any Louisville hospital." *Id.*

On June 15, 2017, during the pendency of this action, the Cabinet promulgated new "emergency" regulations, creating new requirements for the content of abortion facilities' (and no other type of facility) transfer and transport agreements. 902 KAR 20:360E. The district court found that the Cabinet "promulgated the relevant emergency regulation during the pendency of this action essentially adopting the stringent standards that the Inspector General applied when he informed EMW in March 2017 that its transfer and transport agreements were deficient." Order, R.168, Page ID # 6846. Indeed, the Cabinet's attorneys wrote the emergency regulations, and admitted that no doctors were involved or consulted. *Id.*; *see also id.*, Page ID # 6825.

The emergency regulations imposed a host of new criteria for abortion facilities' transfer and transport agreements. For example:

- The acute-care hospital that signs the agreement must be in Kentucky in the same county as the abortion facility, and located within a 20 minute drive of the abortion facility. 902 KAR 20:360E Sec. 10(3)(a).

- The transfer agreement must "be a legally binding contractual document" signed by "individuals authorized to execute the agreement on behalf of the abortion facility and hospital." *Id*. at (3)(b)-(c).

- The transfer agreement must include a host of responsibilities for both the hospital and the abortion facility, including that the abortion facility must notify the hospital of the transfer and send patient records, and that the hospital must provide prompt and appropriate evaluation and treatment of the patient. *Id*. at (3)(e)-(f).

- The transport agreement must require "all responding medical personnel to familiarize themselves with the floor plan" of the abortion facility. *Id*. at (4)(c)(3).

In addition, the new regulations give the Cabinet discretion to allow an abortion facility to continue to operate for 90 days without a transfer agreement if the abortion facility has made, and continues to make, a good faith effort to obtain a transfer agreement, as long as "the abortion facility or applicant can provide the same level of patient care and safety via alternative health services." *Id*. at (5). Any extension approved by the Cabinet can be rescinded at any time. *Id*. at 5(e).

Contrary to the Cabinet's claims, Cabinet Br. at 4, the Cabinet does not require all other health care facilities that perform procedures as safe as or less safe than abortions to have hospital transfer or ambulance transport agreements. Trial

Tr., R.108, Page ID ## 3897-88; *id*., R.115, Page ID # 4215. For example, physicians' offices are not required to have transfer or transport agreements, but they can provide abortions, as long as that is not the only medical care they provide (although there is no evidence that physicians' offices provide abortions in Kentucky). *Id*. Physicians may also treat miscarriages in their offices, including by performing procedures similar to abortion, and they can perform hysteroscopy, which involves introducing a small telescope into the uterus for operative procedures. Trial Tr., R.115, Page ID # 4215; *id*., R.108, Page ID ## 3897-98. Moreover, liposuction, a procedure with a higher complication rate than abortion, *see infra*, is performed in physicians' offices in Kentucky.

The Cabinet also does not require ambulatory surgical centers (ASCs), which provide higher risk procedures, to have hospital transfer or transport agreements if licensed prior to July 12, 2012. *See*, *e.g.*, 902 KAR 20:106; KRS 216B.061(8). But, even when required, they are less stringent on their face – none have the same requirements in the "emergency" regulation for abortion facilities – and the Cabinet assesses these agreements with more relaxed standards than those for abortion clinics. For example, the Inspector General's office has rejected transfer agreements submitted by abortion clinics because the agreements to accept emergency patients were conditioned on available bed space, but has accepted

similar agreements from other facilities. Trial Tr., R.116, Page ID ## 4227-30; PPINK-PX0252 (A203-07).

II. DISTRICT COURT PROCEEDINGS

The district court held a three-day bench trial in September 2017. Following that trial, the district court made numerous findings of fact, after "observ[ing] the demeanor and credibility of the witnesses who testified in court, and [] carefully weigh[ing] the evidence in determining the facts pertinent to the case and drawing conclusions therefrom." Order, R.168, Page ID # 6829. The district court was "impressed with the credibility of" EMW's retained expert, Dr. Paula J.A. Hillard. Dr. Hillard is a board-certified obstetrician and gynecologist, and is a professor of Obstetrics and Gynecology at Stanford University Medical Center, where she has served as the Chief of the Division of Gynecological Specialties and Associate Chair of the Medical Student Education. *Id*., Page ID # 6832. Previously, she practiced medicine for twenty-three years as a member of the faculty of the University of Cincinnati College of Medicine. *Id*. She is a fellow of the American College of Obstetricians and Gynecologists. *Id*. She is the editor-in-chief of the Journal of Pediatric and Adolescent Gynecology and has authored or co-authored more than 140 articles on obstetrics and gynecology in peer-reviewed journals. *Id*., Page ID ## 6832-33. Dr. Hillard has also performed abortions and teaches medical

students how to perform abortions. *Id*., Page ID # 6833. The district court accepted Dr. Hillard as an expert in obstetrics and abortion care. *Id*.

The district court also accepted Dr. Christine Cook as an expert in obstetrics and abortion care. *Id*. Dr. Cook supervises residents at the University of Louisville as they learn about and practice obstetrics and gynecology. *Id*. She was also the chair of the OBGYN Department at the University of Louisville Hospital from 2004-2011. *Id*. She is trained to provide abortions, and has cared for women who have attempted to terminate their pregnancies on their own. *Id*. The district court also accepted Plaintiff-Appellee Dr. Marshall as an expert in obstetrics and abortion care. *Id*., n.12.

On the Cabinet's side, several Cabinet employees testified, including Inspector General Robert Silverthorn. The Cabinet's only expert witness was Dr. Richard Hamilton, an emergency room doctor from Pennsylvania who never read the challenged Kentucky statute or regulations, or EMW's written transfer agreement or emergency transfer protocols. *Id*., Page ID # 6835. As a result, Dr. Hamilton conceded he could not offer any opinions as to the sufficiency of EMW's existing transfer agreement or EMW's emergency protocols. *Id*. He has also never performed an abortion, has treated only one patient suffering from an abortion-related complication in the past five years, and "was not aware of any case in which a woman obtaining an abortion in Kentucky received improper care" after

she was transferred to a hospital. *Id*., Page ID ## 6834-35. The district court also found that "his opinions have no bearing on the frequency of complications arising in an abortion-facility setting." *Id*., Page ID # 6835. Although the district court ultimately found that Dr. Hamilton's testimony had little bearing on the question at hand, the court accepted him as an expert in the field of emergency medicine, but not as an expert in the field of obstetrics or abortion. *Id*.

Based on the testimony of the witnesses, and the other evidence presented at trial, the district court made numerous findings, as detailed below.

A. Types of Abortion and Abortion Safety

EMW provides two types of abortion: medication abortion and aspiration (or surgical) abortion. Medication abortion involves the use of medication – mifepristone, taken in the abortion facility, and misoprostol, which is later taken at home – that essentially cause pregnant women to experience a miscarriage at home. *Id*., Page ID ## 6836-37. Aspiration (or surgical) abortion is performed in the first and second trimester and involves removing the pregnancy through a cannula and/or with instruments. *Id*., Page ID # 6838.

The district court found that both types of abortion "involve minimal health risks to women." *Id*., Page ID ## 6837-38. Indeed, the district court found that "the risk of death from abortion is less than that posed by childbirth" and other procedures. *Id*., Page ID # 6836. For example, the mortality rate based on the

number of deaths per 100,000 procedures is 0.7 for legal abortions, 8.8 for childbirth, 2.9 for colonoscopies, 0.0-1.7 for dental procedures, and 0.8 to 1.7 for plastic surgery. *Id*., n.13. When a rare complication does occur, such as excessive bleeding or infection, the district court found that they usually occur after the woman has returned home following a medication or aspiration abortion. *Id*., Page ID ## 6837-39. Given this, the district court found that the number of ambulance transfers from an abortion facility to a hospital is extremely low. *Id*., Page ID # 6836. Indeed, in one study of 54,911 abortion procedures in California, 0.03 percent involved a transfer from the abortion facility to a hospital. *Id*.

B. Transfer and Transport Agreements Are Medically Unnecessary

After hearing testimony, the district court found that neither a written transfer agreement with a hospital nor a transport agreement with an ambulance company "improves the safety of abortion procedures in Kentucky." *Id*., Page ID # 6839. The district court found that transfer and transport agreements are "meaningless" in situations where the patient has returned home, which is where complications generally occur. *Id*. The district court further found that in the rare case of a transfer from the abortion facility to the hospital, transfer agreements "have no impact on the care patients receive in the emergency room, are not regularly consulted when patients are received, and are not necessary to protect the health of the patient." *Id*., Page ID # 6840. For example, the district court credited

Dr. Cook's testimony that in "all her years at the University of Louisville, she could not recall one instance in which U of L Hospital failed to properly care for a patient suffering from an abortion complication – regardless of the existence of a transfer agreement with the hospital." *Id*., Page ID # 6842. Instead of relying on written transfer agreements when caring for a patient, "hospitals follow internal protocols . . . when receiving and caring for a transferee patient, and the presence of a hospital transfer agreement does not affect a patient's clinical care." *Id*.

The district court furthermore found that there was no need for such agreements. As the court explained, "the explicit function of" Kentucky's transfer agreement requirement is to ensure that abortion facilities have an agreement "'by which . . . the hospital agrees to accept and treat[] patients'" *Id*., Page ID # 6842 (citing KRS 216B.0435(1)). Yet, under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, all hospitals with emergency departments that have Medicare agreements – which is virtually all acute-care hospitals – must provide emergency care to a patient that comes to the hospital. *Id*., Page ID # 6842-43.

The district court also found that the Cabinet failed to cite "any medical evidence which supports" its proposition that transfer and transport agreements "have the benefit of optimizing patient outcomes." *Id*., Page ID # 6840. The only

expert testimony presented by the Cabinet on this score was from Dr. Hamilton.[3] But the district court found his testimony failed to support the Cabinet's argument for numerous reasons. As an initial matter, Dr. Hamilton, "essentially conceded that transfer agreements are unnecessary in the real-world because abortion complications typically first present after the patient has returned home." *Id*., Page ID # 6835. Moreover, although Dr. Hamilton theorized that transfer agreements would help achieve optimal patient care he "failed to provide meaningful detail as to how the utilization of such agreements improved care in any tangible way." *Id*. In fact, Dr. Hamilton conceded that he was "unaware of any studies demonstrating how patient care might improve if outpatient abortion facilities entered into transfer agreements with hospitals." *Id*., Page ID ## 6845-46.

Aside from Dr. Hamilton's testimony, the Cabinet proffered two additional pieces of evidence in an attempt to support its argument that the agreements are necessary to protect patients' health, both of which the district court rejected as "unpersuasive." *Id*., Page ID # 6841. The Cabinet seized upon Guidelines issued by the National Abortion Federation that require abortion facilities to adopt written emergency protocols (as EMW has done) and "merely recommend" that abortion providers "consider" adopting a transfer agreement with a hospital. *Id*.; DTX01 (A244-307). Similarly, the Cabinet relied upon a Kentucky Board of Medical

[3] Dr. Hamilton's testimony was limited to transfer agreements and "he was not proffering any opinions about transport agreements." *Id*., Page ID ## 6834-35.

Licensure opinion that noted that outpatient facilities ordinarily have a "transfer protocol" in effect with a hospital within reasonable proximity. Order, R.168, Page ID # 6841. But "protocols" and "written transfer agreements" are two different things. As the Cabinet's expert, Dr. Hamilton, explained, facilities can have internal transfer protocols without entering into a written agreement with a hospital. *Id*. In fact, Dr. Hamilton "testified that, in the context of providing emergency care to a transferring patient, a facility's emergency transfer *protocols* are more important than the existence of an interfacility transfer *agreement*." *Id*., Page ID # 6840. He also conceded that protocols, even without a written transfer agreement, are efficacious. Trial Tr., R.128, Page ID ## 4605-06.

The district court similarly found that ambulance transport agreements did not further patient safety. As an initial matter, the district court found that at the time the emergency regulations were promulgated, Kentucky law prohibited ambulance service providers from refusing "a request for emergency service if a unit is available in the service area," and requests for emergency service shall be dispatched or notified within two minutes. Order, R.168, Page ID # 6844. Therefore, the district court found that "similar to EMTALA's mandate that hospitals treat emergency patients, this regulation requires emergency transport by ambulance services regardless of the absence of any transport agreement." *Id*. Planned Parenthood's Vice President of Patient Services, Lynne Bunch, testified

that "local ambulance services are responsive to emergency calls regardless of a transport agreement and that such agreements do not increase the quality of care received by patients." *Id*., Page ID # 6840. Furthermore, although Kentucky law requires abortion facilities to maintain a written transport agreement with an ambulance company, the law does not require the abortion facility to call the ambulance company named in the agreement. Instead, doctors and medical providers familiar with emergency care, including the Cabinet's expert witness, Dr. Hamilton, confirm that the standard of care in the face of an emergency requiring hospitalization is to call 911. Trial Tr., R.108, Page ID # 3900; *id*., R.112, Page ID ## 4070-71; *id*., R.126, Page ID # 4581. That is precisely what EMW does because, as Dr. Marshall testified, Louisville Metro EMS (LMEMS), which is the closest emergency responder at two blocks away from EMW, is "'so much faster and their trucks are better equipped and their drivers are much better trained'" than the private ambulance companies. Order, R.168, Page ID # 6843; Trial Tr., R.112, Page ID # 4071.[4]

Testimony from Douglas Hamilton, the Chief of Public Services for Louisville Metro Government who oversees LMEMS, confirmed the lack of medical necessity of transport agreements. Chief Hamilton testified that LMEMS

[4] LMEMS is renowned for its well-trained staff, fast response times, and outstanding level of care. Trial Tr., R.108, Page ID # 3941; *id*., R.110, Page ID # 4001.

is a Ground 1 ambulance service providing the "highest level of service," and that transport agreements are unnecessary for patient safety or timely care. Order, R.168, Page ID ## 6844-45. As he explained, when a 911 call is received, the dispatcher does not inquire whether the caller has a transport agreement, and "neither the existence nor the absence of such agreements affects the nature of LMEMS's response or response time." *Id.*, Page ID # 6845. Indeed, Chief Hamilton testified that a transport agreement is one of the "silliest things" he has ever seen, *id.*, and he had never even heard of a transport agreement until PPINK asked LMEMS to sign one, Trial Tr., R.110, Page ID ## 3995, 3998.

With respect to both transfer and transport agreements, the Cabinet effectively conceded that that its overzealous enforcement of the transfer and transport agreement requirements was not based on any concern about patient safety. Then-Inspector General of the Cabinet, Robert Silverthorn, testified that he was unaware of any time where a patient did not receive proper care due to a deficiency with a hospital transfer or ambulance transport agreement. Order, R.168, Page ID # 6846. He also testified that he, an attorney, did not consult with any physicians when drafting the emergency regulations. *Id.*; Trial Tr., R.115, Page ID # 4159.

Based on all of EMW's and PPINK's evidence, and the lack of evidence submitted by the Cabinet, the district court found that "transfer and transport

agreements have no significant impact on the quality and timeliness of emergency medical care received by abortion patients who experience complications." Order, R.168, Page ID # 6845.

C. The Challenged Statute Would Effectively Ban Abortion in Kentucky, Thereby Harming Women's Health

As discussed *supra* at 8-9, the district court found that despite their best efforts, and repeated attempts to get a hospital transfer agreement that met the Cabinet's ever-shifting criteria, "it is impossible for EMW Plaintiffs or Planned Parenthood to comply with the requirements of" the hospital transfer and transport agreement requirements. *Id*., Page ID # 6824.

Furthermore, the district court properly rejected the Cabinet's argument that EMW should simply apply for a waiver under the emergency rules to maintain its license. Under the waiver provision, an abortion facility may seek "an extension[] of time" to comply with the transfer and transport agreement requirements. 902 KAR 20:360(10)(5). But EMW does not simply need more time. As the district court found, all of the relevant hospitals declined EMW's request to enter into the agreement. *See supra* at 8-9. The district court found – based on Dr. Marshall's and PPINK's undisputed testimony – that "facilities would not likely be able to hire and keep staff without knowing whether they could continue to operate beyond ninety days, and no prudent organization would risk millions of dollars

investing in such a facility whose temporary license would be based on the administrative whim of the Inspector General." *Id*., Page ID ## 6852-53.

Accordingly, the district court found that if the transfer and transport agreement requirement was not struck down, "there would be no abortion facilities within the Commonwealth." *Id*. This would deprive Kentucky women of their ability to obtain an abortion in a medical facility in the Commonwealth. *Id*. The district court found that "the result would be that many women would either have to travel hundreds of miles to receive a clinical abortion or bear the risks of self-terminating their pregnancies without professional assistance." *Id*., Page ID ## 6846-47. The district court found that the impact would be most harshly felt by women who are low-income, younger, women of color. *Id*., Page ID # 6830 & n.11. In fact, a "large portion" of EMW's patients have limited financial resources. *Id*., Page ID # 6847. The district court found that "[w]ith limited means, these women will have difficulty affording travel to obtain an abortion." *Id*., Page ID # 6847. This finding is support by Dr. Hillard's unrebutted testimony that it is more difficult for people with low incomes to travel far distances. Many do not own cars or struggle to pay for gas or lack childcare. Trial Tr., R.108, Page ID ## 3908, 3923-24. As Dr. Hillard testified, "distance is not always what is measured in miles. It can be measured in amount of money it takes to buy gas . . . It can be measured as a psychological barrier." *Id*., Page ID # 3923.

Women without the resources to travel out of state with "two options: (1) carr[y] their pregnancy to term, or (2) attempt[] to perform the abortion themselves or outside of a professional medical setting." Order, R.168, Page ID # 6847. The district court found that neither option is "particularly safe." *Id.* Indeed, as Dr. Hillard testified, the risks associated with carrying a pregnancy to term are greater than terminating a pregnancy, and some women may try to induce abortion on their own. *Id*. Furthermore, the district court credited Dr. Cook's testimony about the medical care she provided to women who self-induced abortion or obtained an illegal abortion prior to *Roe v. Wade*, 410 U.S. 113 (1973). *Id.* Dr. Cook testified that these women were "often very sick, and had to be x-rayed to ensure that they did not have some metal object inside of their abdomen." *Id.* Accordingly, the district court found that these "challenges pose a substantial burden on Kentucky women." *Id.*, Page ID # 6853.

* * *

After hearing all of the evidence, the district court found:

(1) transfer and transport agreements provide no quantifiable benefit to women's health;

(2) enforcing the challenged statute and regulations would effectively eliminate legal abortion in Kentucky; and

(3) enforcing the challenged statute and regulationswould pose a threat to the health and safety of women in Kentucky.

Id., Page ID ## 6847, 6863, 6867.

SUMMARY OF ARGUMENT

This case is very straightforward. As the district court properly held, recent and binding Supreme Court precedent, *Whole Woman's Health v. Hellerstedt*, is squarely on point. In considering the constitutionality of an abortion restriction under the Fourteenth Amendment right to privacy, courts evaluate whether the restriction creates an "undue burden" on women seeking abortion care, which is shorthand for whether the restriction has the *purpose* or *effect* of placing a substantial obstacle in the path of women who have decided to have an abortion. Order, R.168, Page ID ## 6858-59 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). The Supreme Court recently clarified that the undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer[,]" and a law may not be upheld unless the benefits outweigh the burdens it imposes. *Id*. (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016)).

In *Whole Woman's Health*, the Court struck down a Texas law purportedly designed to "ensure that women have easy access to a hospital should complications arise during an abortion procedure." *Id*. at 2311. The Court found

that while there was a "virtual absence of any health benefit" from the law, its enforcement would lead to closure of approximately half the clinics in the state. *Id.* at 2313. The Court held that the law "provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an 'undue burden' on their constitutional right to do so." *Id*. at 2318.

Here, after a three-day trial, the district court made numerous findings of fact, which are well-supported by the evidence, that transfer and transport agreements serve no medical purpose. The district court also properly found that the law will impose a burden far greater than that imposed in Texas by effectively banning abortion in the Commonwealth. Based on these findings, the district court properly held that the enormous burden imposed by the laws "far outweighed" the "scant medical benefits" the laws provide and that the laws were therefore unconstitutional. Order, R.168, Page ID # 6816.

None of the Cabinet's arguments about why this Court should overrule the district court has merit. On the benefit side of the ledger, it is undisputed that abortion provision is very safe, transfers from the clinic to the hospital happen very rarely, and when those transfers do happen, they have gone smoothly in Kentucky. Indeed, the Cabinet and its sole expert conceded that they are unaware of any woman in Kentucky who did not obtain proper care because of the lack of a transfer or transport agreement. The Cabinet's expert also conceded that protocols

alone are efficacious for proper patient care. The only argument the Cabinet musters in response is that the district court's findings are erroneous because the district court did not credit Dr. Hamilton's testimony. But as the district court properly found, Dr. Hamilton's testimony was unsupported by any medical study or objective medical evidence.

On the burden side of the ledger, the Cabinet primarily claims that the challenged law will not "cause" EMW to close, which ignores the district court's well-supported finding that, despite EMW's "best efforts, no Louisville hospital is currently willing to sign a transfer agreement with" an abortion facility. Order, R.168, Page ID # 6824. The Cabinet instead suggests that EMW might be able to keep its doors open by asking the Cabinet for successive 90-day waivers of the transfer and transport agreement requirement. But, as the Cabinet itself recognized, "there is no way to know" if EMW's waiver would be granted. Cabinet Br. at 25, 26. As the district court found, EMW would not be able to retain staff and stay open, never knowing if the Cabinet would exercise its discretion and grant EMW a 90-day waiver. Order, R.168, Page ID # 6852.

The Cabinet also argues that even if the transfer and transport requirement forces EMW to close, and prevents PPINK from opening, there is no impact on abortion access because hypothetical new providers may suddenly appear to fill in the gap. But the Cabinet presented no evidence to support its argument, and the

Commonwealth's vital statistics show that EMW provides virtually all of the abortions in Kentucky.

Furthermore, the Cabinet argues that even if the law does "eliminate entirely the availability of legal abortions in Kentucky," Kentucky women can travel to other states for abortion care. In essence, Kentucky argues that it is entitled to ban abortion in the state because care may be available elsewhere. Every court that has considered a similar argument has rejected it: States may not justify constitutional violations by pointing to the ability of their citizens to exercise their constitutional rights in other states.

The Cabinet also argues that even if the district court was correct in its conclusion that the burdens of the law vastly outweigh its benefits, the court erred in striking the law down on its face because, the Cabinet alleges, Plaintiffs did not show the law unduly burdens a large fraction of women. This is demonstrably wrong: As the district court found, the law effectively bans legal abortion in the state. Thus, the law imposes an unconstitutional burden not just on some women but on all those who seek abortion just as surely as an outright ban would.

The Cabinet also argues that EMW lacks standing to challenge this law on behalf of its patients, but that argument is squarely foreclosed by numerous decisions of the Supreme Court, including, most recently *Whole Woman's Health*.

For all of these reasons, the Cabinet's arguments should be rejected, and the district court's decision should be upheld.

ARGUMENT

I. STANDARD OF REVIEW

Conspicuously absent from the Cabinet's brief – and in violation of Federal Rules of Appellate Procedure Rule 28(a)(7) – is any mention of the standard of review that governs this appeal. Indeed, the Cabinet pretends that this case comes to the Court on a blank slate. To the contrary, the district court made numerous factual findings after a bench trial, which can only be disturbed by this Court if those findings are "clearly erroneous." *McLaughlin v. Holt Public Schools Bd. of Educ.*, 320 F.3d 663, 669 (6th Cir. 2003). "Clear error will lie only when the reviewing court is left with the definite, firm conviction that a mistake has been made." *Dunlap v. Tenn. Valley Auth.*, 519 F.3d 626, 629 (6th Cir. 2008); *see also In re Mitan*, 573 F.3d 237, 241 (6th Cir. 2009). "If there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id*. Furthermore, "[t]he issue is not whether the district court reached the best conclusion, but whether the evidence before the court supported the district court's findings." *Dunlap*, 519 F.3d at 629. "Also, the district court's findings based on the credibility of the witnesses before it are entitled to great deference on appeal."

Id. Only questions of law are reviewed under a *de novo* standard. *McLaughlin*, 320 F.3d at 669.

II. THE DISTRICT COURT PROPERLY HELD THE TRANSFER AND TRANSPORT AGREEMENTS UNCONSTITUTIONAL

A. The District Court Properly Held that the Transfer and Transport Agreements Do Not Further the Cabinet's Interest in Women's Health

Under *Whole Woman's Health*, courts must consider whether the state has shown that there are actual medical benefits and weigh those benefits against the burdens imposed on women to determine if they are "undue." 136 S. Ct. at 2309-10. In *Whole Woman's Health*, the Court found that there was "nothing in Texas' record evidence that shows that . . . [the requirement] advanced Texas' legitimate interest in protecting women's health." *Id*. at 2311. Here, the district court properly found the Cabinet presented no "credible proof that the challenged regulations have any tangible benefits to women's health." Order, R.168, Page ID # 6867. Under *Whole Woman's Health*, this finding – coupled with the significant evidence of burden discussed below – dooms the law.

Indeed, the district court's findings closely parallel those in *Whole Woman's Health*. For example, just like the Court in *Whole Woman's Health*, the district court found that abortion procedures performed in Kentucky are very safe, and

transfer and transport agreements "purport to address situations that arise only very rarely." Order, R.168, Page ID ## 6839, 6862. Indeed, the district concluded that in the rare situations where complications arise after an abortion, it is almost always after the woman has left the facility. Order, R.168, Page ID# 6862 (characterizing it as an "exceptional case" in which a complication requiring hospitalization arises when a woman is at the abortion facility). As the district court found, the Cabinet's expert "essentially conceded that transfer agreements are unnecessary in the real-world because abortion complications typically first present after the patient has returned home." Order, R.168, Page ID # 6840; *id.*, Page ID # 6862. The *Whole Woman's Health* Court held the same.[5] 136 S. Ct. at 2312 (citing evidence presented in the district court about the very low complication rate of abortion, and very low transfer rate from abortion clinics to hospitals).

[5] Seeking to avoid the significance of these findings, the Cabinet makes the counterintuitive argument that the rarity of complications increases (rather than decreases) the propriety of eliminating abortion access in the Commonwealth for lack of a transfer agreement. Yet, as noted above, the Supreme Court relied on precisely these facts in finding that Texas's admitting privileges law had no medical benefit. *See* 136 S. Ct. at 2311-12. Moreover, the Cabinet allows physicians' offices to provide a wide range of services, including abortions, and does not require them to have transfer and transport agreements. *See supra* at 16-18. Statistically speaking, it would be even rarer for that hypothetical doctor's office to need to transfer an abortion patient to a hospital due to a complication, because it would be providing fewer abortions than an abortion facility. The State cannot have it both ways: Either the rarity of the complication increases the need for these agreements or it does not.

Furthermore, the Cabinet and its expert conceded that they are unaware of "any complications from abortions performed in Kentucky [that] have been treated improperly in even one instance or that negative outcomes would have been avoided if an abortion facility had a transfer or transport agreement in place." Order, R.168, Page ID ## 6862-63. As the district court recognized, the same was true in *Whole Woman's Health*: "[W]hen directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case." 136 S. Ct. at 2311-12. The Court in *Whole Woman's Health* noted that "'there was no significant health-related problem that the new law helped to cure,'" 136 S. Ct. at 2311, and here the district court held that "[t]his statement is equally applicable to the Kentucky laws at issue here." Order, R.168, Page ID # 6863.[6]

Furthermore, as the Supreme Court recognized in *Whole Woman's Health*, the fact that the Cabinet has targeted abortion facilities for more stringent treatment undermines the Cabinet's claim that transfer and transport agreements are

[6] The Cabinet responds by arguing that the legislature should be able to enact laws before patients are harmed. Cabinet Br. at 36. But the Cabinet misses the point. When an abortion restriction is challenged as unconstitutional, a state must provide *actual evidence* that the law furthers the state's interest. *Whole Woman's Health*, 136 S. Ct. at 2310 (rejecting argument that courts should defer to legislatures, and holding that courts must place "considerable weight upon evidence" presented in judicial proceedings).

necessary to protect patient health. In *Whole Woman's Health*, the Supreme Court noted that the mortality rate for liposuction is 28 times higher than the mortality rate for abortion. 136 S. Ct. at 2315. But in Kentucky, liposuction can be performed in a physician's office, which is not required to have a transfer or transport agreement with a hospital. *See supra* at 11-13. Even for those health care facilities that are required to have hospital transfer or linkage agreements, there is no equivalent "emergency regulation" that applies to them specifying the detailed content required in the agreements. *See id.* As the Supreme Court found, this singling out of abortion facilities for different treatment "simply is not based on differences between abortion and other surgical procedures that are reasonably related to preserving women's health." *Whole Woman's Health*, 136 S. Ct. at 2315 (internal citations and quotations omitted).

In addition, as the district court found, federal law requires all hospitals that operate emergency rooms that accept federal funding to stabilize any patient that comes to the hospital in need of emergency care. *See supra* at 17. The Cabinet tries to downplay this law saying that hospitals "might be obligated by law to treat patients under certain scenarios." Cabinet Br. at 34. That is blatant misrepresentation of the law. EMTALA is obligatory – it mandates that patients be provided emergency care by hospitals.

Furthermore, the amicus brief led by the State of Indiana relies on a Medicare regulation that currently requires ambulatory surgical centers to have either transfer agreements or to employ doctors with admitting privileges. Brief of Indiana, Ohio, et al., at 2 (citing 42 C.F.R. § 416.41(b)). But that brief fails to disclose that the Centers for Medicaid and Medicare Services ("CMS") have proposed to eliminate that requirement because it pre-dated EMTALA and is now obsolete given EMTALA's mandates. CMS also recognized that there is "no evidence of negative patient outcomes due to a lack of such transfer agreements and admitting privileges." 83 Fed. Reg. 47,686, 47,693 (Sept. 20, 2018). Therefore, contrary to the Cabinet's claims, Cabinet Br. at 34-35, EMTALA is sufficient to ensure patients receive proper care in an emergency, as confirmed by CMS, and in line with the district court's findings.

In the face of the district court's holdings that are in lockstep with *Whole Woman's Health*, and are based on well-supported factual findings, and often undisputed evidence, the Cabinet can point to very little support for their argument that transfer and transport agreements further patient safety. The Cabinet's primary argument is that the district court erred in discrediting Dr. Hamilton's testimony. But, as discussed above, although Dr. Hamilton *theorized* that transfer agreements would help achieve optimal patient care, he "failed to provide meaningful detail as to how the utilization of such agreements improved care in

any tangible way." *See supra* at 18. Indeed, he provided no objective medical support for the Cabinet's position that transfer and transport agreements improve patient health. The district court's finding that Dr. Hamilton's testimony was unhelpful – at best – is not clearly erroneous. Nor was the district court clearly wrong in finding that the National Abortion Federation Guidelines were not entitled to weight given that it did no more than "merely recommend" that abortion facilities "consider" entering into transfer agreements with a hospital.[7] Order, R.168, Page ID # 6841. In any event, EMW has a transfer agreement, and had one in place for years, but the Cabinet said it failed to meet its newly concocted criteria.

The Cabinet's arguments about transport agreements also ignore that EMW has a transport agreement. But the Cabinet will not approve a transport agreement without a "proper" transfer agreement, because the transport agreement must name the hospital with which the abortion facility has a transfer agreement. *See* Trial Tr., R.115, Page ID # 4194. The Cabinet also takes Chief Hamilton's testimony out of context in arguing that emergency response times could be enhanced if

[7] Nor can the Cabinet find support in the fact that Dr. Marshall had a written transfer agreement for EMW's Lexington location with the University of Kentucky. Cabinet Br. at 33. At trial, Dr. Marshall was explicitly asked by the Cabinet's attorney if he had this agreement to "enhance[] patient safety," and he said no, explaining that he obtained the agreement in an attempt to develop a working relationship with the doctors at the University of Kentucky. Trial Tr., R.112, Page ID # 4104. In any event, as discussed *infra*, the Cabinet also rejected this transfer agreement as insufficient.

LMEMS or another ambulance company is familiar with the floor plan of the medical facility. Cabinet Br. at 35-36. Chief Hamilton testified that there is no medical need for a transport agreement. *See supra* at 25-26. Moreover, EMW's information about patient hand-off is in the LMEMS's computer system, which indicates that when they arrive at EMW they should go through the back alley at the rear of the clinic entrance. Trial Tr., R.110, Page ID # 3993. At this rear entrance, EMW will greet the emergency responders, and will have the patient, along with her medical records, ready to go to the hospital, and the patient hand-off goes smoothly.[8] EMW-PX207A (A243). Therefore, the Cabinet's reliance on Chief Hamilton's out-of-context testimony about the possible utility of reviewing an outpatient facility's floor plan, Cabinet Br. at 35, is a red herring.

Furthermore, the Cabinet makes the unsupported argument that transfer and transport agreements can improve patient outcomes because "they can help ensure that the necessary medical records are transferred with a patient." Cabinet Br. at 35. Notably, prior to the emergency regulations, the challenged Kentucky law did not mention medical records, and indeed, the requirements for transfer agreements for other medical facilities do not include transferring medical records. *See supra* at 11-13. In any event, copying and sending the patient records with the patient is

[8] Even if LMEMS were responding to a location for the first time, the person who called 911 would give information to the dispatcher sufficient to ensure LMEMS could find the location and person in need of transport. Trial Tr., R.110, Page ID # 3993.

the responsibility of the transferee facility and is precisely what EMW does under its emergency protocols. *See supra* at 12.

In sum, the district court finding that transfer and transport agreements provide "scant medical benefits" is not clearly erroneous and the Cabinet's contrary argument should be rejected.

B. The District Court Properly Held That the Challenged Statute and Regulation Impose a Substantial Obstacle in the Path of Women Seeking Abortion

The district court found that if not blocked, the laws would "effectively eliminate legal abortion in Kentucky by closing the only operating abortion facility" and would "prevent virtually all Kentucky women from obtaining abortions within this state." Order, R.168, Page ID ## 6863-64. Furthermore, the district court rejected the Cabinet's argument that they can abdicate their constitutional duty by pointing to the availability of abortion in other states. Even if the Cabinet could do so, *arguendo*, the district court properly held that women with the fewest resources would be unable to travel to obtain an abortion, and would be forced to carry to term or may even try to self-induce abortion.

1. The Challenged Statute and Regulation Will Cause EMW to Close

The district court properly found that "despite its best efforts" EMW was unable to obtain a written transfer agreement that met the Cabinet's ever-shifting criteria. *See supra* at 8-10. The Cabinet ignores these well-supported findings of

fact, and makes the bald claim that there is "no proof whatsoever that any purported burden is actually caused by the challenged statute and regulation." Cabinet Br. at 23. In making this argument, the Cabinet is trying to shoehorn the facts of this case into *June Medical Services, L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018). In that case, the Fifth Circuit upheld Louisiana's law that requires abortion providers to have admitting privileges at a local hospital. The Fifth Circuit essentially held that the doctor plaintiffs did not try hard enough to obtain privileges, and therefore the law would not "cause" the clinics to close because the doctors "sat on their hands." *Id*. at 807. The Fifth Circuit's decision is irrelevant here: Not only is it contrary to *Whole Woman's Health*, and has been stayed by the Supreme Court, 139 S. Ct. 663 (2019), it is factually distinguishable. Far from sitting on their hands, the district court here found that, despite EMW's "best efforts," EMW was unable to obtain a written transfer agreement. *See supra* at 14-15.

Forced to effectively concede as much, the Cabinet resorts to arguing that EMW could stay open by applying for a 90-day waiver of the transfer and transport agreement requirement, which is a provision in the emergency regulations. The Cabinet claims that it is "inexplicabl[e]" that EMW has never attempted to "take advantage" of the waiver. Cabinet Br. at 7 n.1. But it is the Cabinet's claim that is inexplicable. The transfer and transport agreement

requirements were preliminarily enjoined when the Cabinet issued the emergency regulation – in the middle of discovery. The district court subsequently permanently enjoined the transfer and transport agreement requirement. In other words, there was never a time when the emergency regulations were in effect, and there was never a reason for EMW to apply for a waiver given the district court's injunctions.

Moreover, the Cabinet's suggestion that EMW could stay open because the Cabinet "may" grant the clinic 90-day successive waivers is farcical. The Cabinet has spent the last two years doing everything it can to shut down EMW (and to prevent Planned Parenthood from providing abortions). It is beyond the pale to suggest that it would now turn around and grant EMW an indefinite series of 90-day waivers.[9] Furthermore, the Cabinet could revoke the litigation-inspired emergency regulation – including the waiver provision – at any time. In similar circumstances, this Court has rejected the argument that a governmental official's interpretation of an abortion restriction should affect this Court's analysis. *See Northland Family Planning Clinic v. Cox*, 487 F.3d 323, 342, 346-47 (6th Cir.

[9] By arguing that the Cabinet may give EMW indefinite 90-day waivers, the Cabinet is undermining its argument that transfer and transport agreements are necessary for patient health. The Cabinet cannot have it both ways. Either transfer agreements are important for patient safety, or it is willing to indefinitely waive the requirement. Dr. Hamilton's testimony does not help the Cabinet on this point. Indeed, he testified that "in the long run" an agreement would be needed. Cabinet Br. at 16.

2006) (declining to credit interpretation of abortion restriction proffered in an Attorney General opinion that could be changed whenever the Attorney General saw fit). In that case, this Court was particularly wary of the government's position given that it was inspired by litigation, "which shows a greater likelihood that" the defendants' conduct will change after the litigation is over. *Id*. at 343. The same is true here. The emergency regulations could be revoked as quickly as they were promulgated, especially because they were promulgated solely to align with the Cabinet's litigation strategy. *See supra* at 10.

Finally, even if there was a possibility that EMW could obtain indefinite, successive waivers from the Cabinet – which there is not – the district court found, based on Dr. Marshall's unrebutted testimony, "that the uncertainty of a discretionary waiver would make it exceedingly difficult for an abortion facility to survive." Order, R.168, Page ID # 6852. Furthermore, far from being "illogical," Cabinet Br. 28, no one would stake their profession on the chance that a state agency would give them permission to do so in 90-day increments.

2. There Is No Other Abortion Provider In Kentucky

It is undisputed that EMW is the only licensed abortion facility in the Commonwealth, and the Cabinet's own vital statistic shows that EMW provides all but a handful of the abortions in the state. Trial Tr., R.115 Page ID # 4227; PPINK-PX0052 (A66) (vital statistics show that in 2016 EMW provided 3,289 of

the 3,312 abortions in Kentucky, or 99% of them). The Cabinet presented no evidence that any entity would suddenly begin providing abortions if EMW closed. Indeed, its suggestion that others would is ironic given its unrelenting hostility to those that provide abortion. The Cabinet forced EMW to close its Lexington location, and is preventing PPINK from providing abortion care. *See infra*. Moreover, it is complete fantasy to claim that hospitals will all of a sudden provide abortion (putting aside the high expense of hospital-based abortion provision) in greater number when those same hospitals will not sign a transfer agreement with an abortion provider.

Similarly, the Cabinet's claim that EMW could simply move to Lexington strains credulity. Contrary to the Cabinet's claim, Cabinet Br. 42, EMW did not "voluntarily close[]" in Lexington. Rather, the Cabinet sued EMW to require them to stop providing abortions as a physician's office, and required them to obtain an abortion facility license. When EMW applied for that license, the Cabinet rejected Dr. Marshall's proposed hospital transfer agreement for his now-closed Lexington location. Trial Tr., R.112, Page ID ## 4100-01. As Dr. Marshall testified aptly, "[t]here is a big difference between getting [a transfer agreement] and getting one that the State will approve of." *Id*., Page ID # 4110. Dr. Marshall made multiple changes to correct the purported "deficiencies" pointed out by the Cabinet, but each time the Cabinet rejected the document. *Id*., Page ID # 4113. Even if Dr.

Marshall could obtain a hospital transfer agreement in Lexington that met the Cabinet's satisfaction, Dr. Marshall also testified that to move to Lexington he would have to sell his current building, find new office space and equip it, and find new staff, which would be "impossible." *Id*., Page ID # 4090.

Moreover, the Cabinet's argument is contrary to *Whole Woman's Health*. Indeed, in that case, the Court did not analyze the constitutionality of the admitting privilege requirement by considering whether abortion clinics could move to different parts of the state where privileges could be obtained. 136 S. Ct. at 2312-13. For example, the lead plaintiff, Whole Woman's Health, had several sites in Texas. Its doctors were able to obtain privileges in some cities, but not McAllen. The Court did not suggest that Whole Woman's Health should simply consolidate their operations in cities where its physicians could obtain privileges. That is simply not how the undue burden analysis works.

3. The Undue Burden Analysis Must Be Confined to Kentucky

Unable to seriously dispute that enforcement of the law would effectively ban abortion in the state, the Cabinet asks this Court to look to the availability of abortions in other states. The district court, like every other court to have been presented with a similar argument, properly rejected this suggestion. Order, R.168, Page ID # 6865; *see, e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 455-58 (5th Cir. 2014) (striking down Mississippi's admitting privileges law

because it would have closed the state's only abortion facility, and refusing to look at the availability of out-of-state abortion providers); *Planned Parenthood Ark. & E. Okla. v. Jegley*, No. 4:15-civ-00784, 2018 WL 3029104, at *23 (E.D. Ark. June 18, 2018); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1360-61 (M.D. Ala. 2014).

The only outlier, *Whole Woman's Health v. Cole*, 790 F.3d 563, 597-98 (5th Cir. 2015), was reversed by the Supreme Court on this point. In *Whole Woman's Health*, the Supreme Court confined its analysis of the effect of the Texas laws on women's access to abortion by looking solely at access within Texas's state borders. In that case, the Court held that the challenged law would more than quadruple the "number of women of reproductive age living in a county more than 150 miles from a provider" – raising the number from 86,000 to 400,000. 136 S. Ct. at 2313 (internal alterations and citation omitted). But roughly 175,000 of those 400,000 women did live within 150 miles of an abortion provider – the provider in Santa Teresa, New Mexico, just across the Texas-New Mexico border. *Id*. at 2349 n.33 (Alito, J., dissenting). Yet the Court considered those 175,000 women to be "more than 150 miles from a provider" because they were 150 miles away from a provider within Texas's borders and refused to consider the existence of out-of-state providers in conducting its burden analysis. *Id*. at 2313. This is so

despite the fact that more than half the women who received abortions at the New Mexico facility were from Texas. *Cole*, 790 F.3d at 596.

The district court also properly relied on *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), in which the Supreme Court held that Missouri's refusal to admit African-American students to a state law school could not be justified by pointing to the presence of law schools in adjacent states. The Cabinet contends that principle in *Gaines* is inapplicable to a case about abortion, but the district court properly rejected that argument.[10] As noted above, the Supreme Court and every other court to have considered the issue have held that the determination of the burden imposed by the law must be confined by looking at the effects it has on access in state. That makes sense, particularly given the ever-shifting landscape of abortion access across the country. For example, the Cabinet points to the presence of out-of-state clinics, but it does not account for myriad factors, such as

[10] The Cabinet is also wrong to attempt to confine *Gaines* to situations in which the state has "an affirmative duty" to act. Cabinet Br. at 47. Indeed, in addition to the right to abortion, courts have applied the crux of the Supreme Court's holding in *Gaines* – that states may not shunt their obligations onto neighboring states – in a number of other contexts. "[I]n areas ranging from First Amendment free speech to Fourteenth Amendment equal protection to Second Amendment firearm rights, courts have refused to allow out-of-jurisdiction access to cure within-jurisdiction restrictions." *Planned Parenthood Se., Inc.*, 33 F. Supp. 3d at 1360. For instance, a state does not have an affirmative duty to provide a place of worship, or a place to exercise one's right to possess firearms, yet courts have held that unreasonable state regulations restricting access to such places cannot stand – even if citizens of a state may cross state lines to access another place of worship or firearm training center. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 689-90, 697 (7th Cir. 2011); *Islamic Ctr. of Miss., Inc. v. Starkville*, 840 F.2d 293 (5th Cir. 1988).

whether those clinics remain open solely by virtue of a preliminary injunction; how long the wait-time is for an appointment at those clinics; the limited hours of operation; and/or mandatory two-trip state law requirements, which force women to wait 24, 48, or 72 hours between a counseling appointment and the abortion. Trial Tr., R.116, Page ID ## 4249-4253. And, as discussed *supra*, many clinics in surrounding states do not provide abortions up to 21 weeks and 6 days dated from the last menstrual period ("lmp"), which is why they travel to EMW for care. Order, R.168, Page ID # 6831; Trial Tr., R.112, Page ID ## 4067-68. Furthermore, the Indiana-led amicus brief makes clear that states surrounding Kentucky support the Cabinet's quest to eliminate abortion access in the state because they would like to do so as well. Br. of Indiana, et al., (amicus brief signed by attorneys general from Ohio, Tennessee, Indiana, and West Virginia). Indeed, many of the states that signed the amicus brief also have bills pending that would ban abortion starting at 6-weeks in pregnancy, or measures that would otherwise limit abortion access. *See, e.g.*, Ohio S.B. 23, H.B. 68; Tenn. H.B. 77, S.B. 1236.

Faced with this uniform precedent, the Cabinet argues that this Court charted a different course in *Women's Medical Professional Corporation v. Baird*, 438 F.3d 595 (6th Cir. 2006). *See* Cabinet Br. at 51-55. But, the Cabinet's discussion is short on facts and wrong in its application to the instant case. Contrary to the Cabinet's assertions, the *Baird* court repeatedly noted that, should the clinic at

issue in that case close, women would still be able to access later second trimester abortion care *in Ohio*. *See, e.g.*, *Baird*, 438 F.3d. at 606 ("women seeking a late second trimester abortion could travel to Cleveland to obtain such an abortion"); *id*. at 606-7 ("[the regulation] would not prevent women seeking late second trimester abortions from traveling to a clinic in Cleveland to obtain these services"); *id*. at 607 ("women could still obtain this type of abortion in Cleveland"). The *Baird* court never once referred to or relied upon abortion access outside Ohio in reaching its decision. Moreover, in considering the effect of a written transfer agreement requirement that would force the closure of a Dayton abortion clinic, this Court noted that because women could travel to other clinics *in the state*, the written transfer agreement requirement was different than another abortion restriction struck down in *Women's Medical Professional Corporation v. Voinovich*, 130 F.3d 187 (6th Cir. 1997). The *Baird* court noted that the *Voinovich* court struck down a ban on the most commonly used method of abortion in the second trimester, noting that ban applied "*statewide*," rendering it "nearly impossible for women to choose to have an abortion" in the second trimester in Ohio. *Baird*, 438 F.3d. at 606 (emphasis added).

Even if courts could consider the availability of out of state clinics in the undue burden analysis, which they cannot, the challenged laws here would still impose a substantial obstacle. The Cabinet relies heavily on *Baird*'s holding that

travel distances (all of which were intra-state) did not create an undue burden in that case, Cabinet Br. at 52, but since that decision, the Supreme Court has made clear that increased driving distances (even intra-state), must be considered. 136 S. Ct. at 2313. Here, the district court found that women who experience unintended pregnancy and seek abortion are disproportionately low-income, younger, women of color, and many will not have the resources to travel out of state. Order, R.168, Page ID # 6830 & n.11.; *id*., Page ID # 6847. Moreover, as the district court found, EMW provides abortion up to 21 weeks and 6 days lmp, and many states surrounding Kentucky lack an abortion provider that provides abortion up to that stage of pregnancy, so there would no place for some patients to go in surrounding states. *Id*., Page ID # 6831.

C. Balance of the Medical Benefits and Burdens

At the outset, the Cabinet blatantly misquotes *Whole Woman's Health* and claims that the burden imposed by an abortion restriction must be "substantially outweigh[ed]" by the benefits of the law. Cabinet Br. at 23. Instead, the Court held that *Casey* requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309. The district court recognized that this was the proper test, and also recognized that this Court has held that, although states may impose abortion restrictions that serve a valid state interest, a "'state may not erect procedural

hurdles in the path of a woman seeking an abortion simply to make it more difficult for her to obtain an abortion.'" Order, R.168, Page ID # 6867 (quoting *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 461 (6th Cir. 1999)); *accord, e.g.*, *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) ("[W]e must weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests."). As the Seventh Circuit held, "The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous." *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013).

After weighing the burdens of the Kentucky law with its purported medical benefits, the district court held that "the record is devoid of any credible proof that the challenged regulations have any tangible benefit to women's health. On the other hand, the regulations effectively eliminate women's rights to abortions in the state." Order, R.168, Page ID # 6867. The district court further noted that even if the challenged law "furthered women's health to a minimal degree, the burdens would still outweigh any such feeble benefit and constitute an undue burden to women's access to abortions in Kentucky." *Id.*

The district court also properly rejected the Cabinet's argument that the Sixth Circuit in *Baird* already sanctioned state laws requiring transfer agreements

for abortion providers for all purposes and all time. *Id*., Page ID # 6869. There are fundamental differences between *Baird* and the instant action. For example, the district court properly recognized that *Baird* was decided prior to *Whole Woman's Health*, and the district court was obligated to consider *Baird*'s holding in light of *Whole Woman's Health*. *Id*. Although the *Baird* court noted that "[e]xpert witnesses agreed that written transfer agreements do not ensure optimum patient care," 438 F.3d at 601, the *Baird* court did not weigh the lack of medical benefit with the burdens, as *Whole Woman's Health* demands.

On the burden side of the ledger, the district court found that the impact of Kentucky's transfer and transport agreement requirement was even greater than the impact of the admitting privileges requirement in *Whole Woman's Health*. *Id*. As the district court recognized, the transfer agreements at issue in *Baird* left a dozen other abortion clinics open in the state of Ohio. *Baird*, 438 F.3d at 604. No court – including the Sixth Circuit – has ever sanctioned an abortion restriction that would shut down all the abortion facilities in a state. *See, e.g*., *Jackson Women's Health Org. v. Currier*, 760 F.3d at 457 (holding unconstitutional Mississippi admitting privilege law because "[p]re-viability, a woman has the constitutional right to end her pregnancy by abortion. H.B. 1390 effectively extinguishes that right within Mississippi's borders").

Accordingly, the district court properly held that, just like the abortion restrictions challenged in *Whole Woman's Health*, the Kentucky transfer and transport agreement requirement "impose substantial obstacles to abortion access and result in no benefit. Therefore the challenged Kentucky statute and regulation are unconstitutional." Order, R.168, Page ID # 6869.

III. THE DISTRICT COURT PROPERLY INVALIDATED THE TRANSFER AND TRANSPORT REQUIREMENTS

The Cabinet argues that the challenged law should not be invalidated in its entirety because the district court failed to use the term "large fraction" in elaborating on its finding that the laws would eliminate abortion in Kentucky. Cabinet Br. at 55. This argument is meritless.

As both the Supreme Court and this Court have made clear, abortion restrictions must be facially invalidated if "in a large fraction of cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S. at 895; *see Whole Woman's Health*, 136 S. Ct. at 2320; *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 369 (6th Cir. 2006) (quoting *Casey*).[11] Contrary to the Cabinet's claim, Cabinet Br. at 55-56, the district court made well-supported factual findings that amply justify the grant of

[11] Any suggestion that the *Salerno* "no set of circumstances" test might apply here can be easily rejected as the Sixth Circuit has "join[ed] the majority of courts that have considered this issue and conclude[d] that *Salerno* is not applicable to facial challenges to abortion regulations." *Voinovich*, 130 F.3d at 195-196.

facial relief under this standard. Namely, it found that the challenged restrictions "will effectively eliminate legal abortion in Kentucky by closing the only operating abortion facility – EMW – and make it unlikely that a new abortion facility will open in Kentucky." Order, R.168, Page ID ## 6863-64. In other words, "the closure of EMW and Planned Parenthood's inability to obtain licensure for its new Louisville facility would prevent *virtually all Kentucky women* from obtaining abortions within this state."[12] *Id.*, Page ID # 6864 (emphasis added). Thus, the challenged laws do not just constitute an undue burden for a large fraction of women seeking abortion care in the state; they are an undue burden for virtually all women seeking abortion care within the state. *See Isaacson v. Horne*, 716 F.3d 1213, 1230-31 (9th Cir. 2013) ("[G]iven the one hundred percent correlation, there is no doubt the [large fraction test] is . . . met.").

The Cabinet attempts to sidestep this finding by asking the Court to include the possibility of women going out of state for abortion care in determining

[12] The Cabinet argues that because the district court's grant of facial relief is not adequately supported by findings of fact, its analysis under *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), is flawed. Cabinet Br. at 59. As the above analysis shows, the district court's grant of facial relief is adequately supported by findings of fact. Further, in limiting its ruling to only those sections of the law relating to transport and transfer agreements, refraining from rewriting the statute, and respecting the intent of the legislature and the request for relief from the parties, the district court correctly applied the *Ayotte* factors in concluding that facial relief is appropriate. Order, R.168, Page ID ## 6870-73; *Ayotte*, 546 U.S. at 328-31.

whether a large fraction of women are unduly burdened by the restrictions. However, as described above, *supra* at 42-45, relying on the potential availability of out-of-state clinics is inappropriate and inconsistent with Supreme Court precedent. *Whole Woman's Health*, 136 S. Ct. at 2316-20 (conducting undue burden analysis solely within Texas borders). Indeed, if looking to the availability of out-of-state providers were permitted, a state could argue that a state law banning abortion should not be facially invalidated because some women might be able to get an abortion in another jurisdiction.[13]

Nor can the Cabinet find support in *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017). Indeed, if anything it supports EMW. In *Jegley*, the Eighth Circuit considered the effect of a law that would force two providers of medication abortion in Arkansas to cease providing abortions, but would still leave another provider open and able to provide aspiration and surgical abortions. The Eighth Circuit held that the district court had not made the required findings as to how requiring women to go to the other clinic *in the state* that could still provide certain abortions would affect women's access to care and therefore remanded to the district court for further findings. *Id*. at 959 ("[T]he record did not demonstrate whether [the other clinic in Arkansas] would be able to absorb such an

[13] Even if it were appropriate to look outside a state's borders when applying the large fraction test, the findings of the district court support the conclusion that a large fraction of women would still face substantial obstacles to obtaining abortion. *See supra* at 23-24.

increase in the number of procedures or whether [it] would be able to cover the needs of women who might have sought care at Planned Parenthood.") (internal quotation marks and alterations omitted); *id.* (finding that it was not clear that women "traveling to [the remaining clinic] would face fewer doctors, longer waiting times, and increased crowding") (internal quotation marks omitted). At no point did the Eighth Circuit suggest that the relevant analysis would take into consideration the availability of abortions in other states. Thus, even looking to *Jegley*,[14] Kentucky's law is facially invalid as it prevents all women from seeking abortion care the state.

Because the district court granted facial relief based on well-supported factual findings that virtually all women seeking abortion in the Commonwealth will be unable to obtain it if the Act is enforced, this Court should not disturb the district court's ruling.

IV. THE DISTRICT COURT PROPERLY HELD THAT EMW HAS STANDING

The district court properly held that abortion providers who challenge abortion restrictions "'have uniformly been permitted to assert the rights of the affected third parties.'" Order, R.168, Page ID # 6857 (quoting *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987)). The

[14] The Eighth Circuit's decision in *Jegley* has been severely criticized and EMW contends that it was wrongly decided. It is, of course, not binding on this Court. But, as discussed above, in any event, it supports Plaintiffs, not Defendants.

Cabinet's contrary argument, Cabinet Br. 64-65, has no merit. Under a long-established rule, it is "appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Singleton v. Wulff*, 428 U.S. 106, 118 (1976); *see also Planned Parenthood of Greater Ohio v. Himes*, 888 F.3d 224, 230 (6th Cir. 2018) ("[P]recedent clearly holds that abortion providers have standing to enforce their patients' abortion rights"), *rev'd on other grounds*, 917 F.3d 908 (6th Cir. 2019). Unsurprisingly, every court to consider the Cabinet's argument has rejected it, including in the context of abortion restrictions purportedly designed to benefit women's health. *See, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) (holding requirements for third-party standing met by physicians seeking prospective injunctive and declaratory relief against abortion restrictions); *Van Hollen*, 738 F.3d at 793-94 (holding "cases are legion that allow an abortion provider" to assert "third-party standing" on behalf of patients), *cert. denied*, 134 S. Ct. 2841 (2014).

CONCLUSION

For the reasons set forth above, this Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 32(g) of the Fed. R. App. P. and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(C) because it contains 12,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7) and 6th Cir. R. 32(b)(1).

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 Times New Roman 14-point font using Microsoft Word 2010.

/s/Brigitte Amiri
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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I caused a true and correct copy of Plaintiffs-Appellees' Corrected Brief to be served on all counsel of record in this matter by operation of this Court's electronic filing system.

/s/Brigitte Amiri
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ADDENDUM

The following are hereby designated as relevant documents from the lower court record:

Document No.	Description	Page ID ##/ Appendix Reference
1	Verified Complaint of EMW Women's Surgical Center P.S.C. and attached exhibits	1-29
3	Plaintiffs' Motion for TRO and/or Preliminary Injunction	31-59
43	Stipulations of the Parties (EMW and Defendants)	399-404
108	Transcript of Bench Trial Volume 1A	3836-3954
110	Transcript of Bench Trial Volume 1C	3958-4038
112	Transcript of Bench Trial Volume 1B	4042-4125
115	Transcript of Bench Trial Volume 2A	4130-4217
116	Transcript of Bench Trial Volume 2B	4218-4364
126	Transcript of Bench Trial Volume 3A	4470-4592
128	Transcript of Bench Trial Volume 3B	4596-4709
134	Exhibit Inventory	4749-4751
136	Deposition Transcript of Kenneth Marshall (6/22/17)	4838-4841
137	Deposition Transcript of Kenneth Marshall (8/10/17)	4972-4974
154	EMW's Proposed Findings of Fact and Conclusions of Law	6521-6555
168	Findings of Fact Conclusions of Law and Order	6815-6874
PPINK-PX0052	Number of Induced Termination of Pregnancy Cases in Kentucky by Facility	A66
EMW-PX005	8/2/17 Letter from Baptist Hospital to EMW	A208
EMW-PX006	8/9/17 Letter from Jewish Hospital to EMW	A209
EMW-PX007	8/8/17 Letter from Norton Hospital to EMW	A210
EMW-PX180	7/27/17 EMW Letter to Baptist Hospital re Transfer Agreement	A211-18

Document No.	Description	Page ID ##/ Appendix Reference
EMW-PX181	7/27/17 EMW Letter to University of Louisville Hospital re Transfer Agreement	A219-26
EMW-PX182	7/27/17 EMW Letter to Norton Hospital re Transfer Agreement	A227-34
EMW-PX183	7/27/17 EMW Letter to Jewish Hospital re Transfer Agreement	A235-42
EMW-PX207A	EMW Emergency Protocols	A243
DTX01	2016 National Abortion Federation Clinical Policy Guidelines	A244-307