Case No. 18-6161

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

and

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,
Intervenor Plaintiff/Appellee

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

BRIEF OF THE STATES OF NEVADA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS/APPELLEES

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AMICI'S STATEMENT OF IDENTITY AND INTEREST

The States of Nevada, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia, submit this brief as *amici curiae* in support of Plaintiffs-Appellees. *Amici* have an interest in this case based on the Defendants-Appellants' (hereinafter Appellants) argument that this Court should consider the availability of abortion in neighboring states when applying the undue-burden standard. An analysis that considers abortion services in neighboring states is not only improper, but could have a detrimental impact on women already seeking abortion within *Amici* states and could limit the valid regulatory choices available to those states. Additionally, *Amici* have an interest in ensuring that the regulation of abortion services actually promotes women's health in the abortion context and does not create substantial obstacles to the availability of those services.

SUMMARY OF THE ARGUMENT

Kentucky's geographical features do not permit Kentucky to violate the constitutional rights of women within Kentucky's borders. In an analogous context, the Supreme Court has rejected the proposition—advanced here by Appellants—that states may satisfy the demands of the Constitution by relying on the present availability of services in neighboring states. *See Missouri ex rel. Gaines v. Canada*,

305 U.S. 337 (1938). And, contrary to Appellants' contentions, this Court did not adopt a "cross-border analysis" when applying the undue-burden standard in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006). Even if it had, the Supreme Court implicitly rejected this method of analysis in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). A woman's ability to exercise her right to terminate a previable pregnancy in a neighboring state is irrelevant to the question of whether Kentucky law imposes an undue burden on that right within its own borders.

Additionally, *Amici* disagree with the argument of Appellants' *Amici* states that this Court should adopt a rule requiring it to consider a law affecting abortion providers in all of its applications, rather than considering the law specifically in the abortion context. Notwithstanding the fact that the application of that principle is irrelevant to this case—the Kentucky law at issue specifically regulates abortion clinics—this Court rejected that argument in *Baird*, and it is undermined by the Supreme Court's articulation of the undue-burden standard in *Whole Woman's Health*. Drawing directly from its prior decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), the Supreme Court reaffirmed that a state's general interest in women's health must give way to a woman's choice to terminate a previable pregnancy. *Whole Woman's Health*, 136 S. Ct. at 2309. Under *Whole Woman's Health*, this is true even for regulations that

marginally benefit women's health but have the effect of placing a substantial obstacle in the way of a woman's right to elect an abortion. A state's interest in protecting women's health—both generally and in the context of abortion—must be validated with evidence establishing the need for the regulation. It must not serve as a mere pretext for suppressing women's constitutional rights.

ARGUMENT

I. Availability of Abortion Services in Neighboring States Is Not Relevant in Applying the Undue-Burden Standard.

The Fourteenth Amendment's Due Process Clause prohibits states from placing an undue burden on a woman's right to choose to terminate a previable pregnancy. *Casey*, 505 U.S. at 874–79. Appellants suggest that Kentucky does not need to abide by this binding precedent because Kentucky's "unique geographical situation" makes it easy for women in Kentucky—under present circumstances—to obtain an abortion in a neighboring state. ECF No. 32 at 51–54. Whether or not Kentucky's unique shape makes travel to other states to obtain an abortion feasible for some of Kentucky's female residents, that fact has no bearing on application of the undue-burden standard to Kentucky laws and regulations requiring written transfer and transportation agreements.

The uniqueness of Kentucky's geography is not grounds for Kentucky to violate the constitutional rights of women in Kentucky. Kentucky may not justify a

barrier that imposes an undue burden on a woman's right to have an abortion in Kentucky by relying on the fact that current circumstances make it possible for her to access the same services by traveling to a neighboring state. Appellants' position that this Court should consider the availability of abortion services in neighboring states finds no support in existing law, and principled reasons rooted in federalism support rejecting such a standard. Even Appellants' *Amici* states, which include Kentucky's neighbors Ohio, Indiana, Missouri, and West Virginia, do not join Appellants in advocating for such a rule.[1]

A. Kentucky May Not Adopt an Unconstitutional Legal Framework, Even if Women Can Vindicate Their Rights by Traveling to Another State.

The Supreme Court has rejected the argument that the government may impose unconstitutional restrictions as long as a neighboring jurisdiction provides an adequate forum for a person to vindicate the violation of their rights occasioned by the unconstitutional restrictions. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981) ("One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (internal citation and quotation marks omitted). The obligation to refrain from infringing

[1] Kentucky's neighbors Illinois and Virginia have joined this brief.

constitutional rights is the "separate responsibility of each State within its own sphere[.]" *Gaines*, 305 U.S. at 350.

In *Gaines*, the Supreme Court struck down as unconstitutional a Missouri law that precluded Lloyd Gaines from being admitted to the law school at the University of Missouri on account of his race. 305 U.S. at 342–52. The Supreme Court found the law unconstitutional despite the fact that state law required Missouri to pay for the cost of Gaines attending law school in a neighboring state. *Id*. at 348–52.

Contrary to Appellants' contentions, the district court's reliance on *Gaines* in this context is not misplaced. ECF No. 32 at 55-56 (arguing that *Gaines* is distinguishable because it involved "a state's refusal to perform its affirmative duty of providing equal protection at a public institution within its borders"). As noted by the Supreme Court, the state in *Gaines* had to refrain from denying some of its residents a privilege on account of their race. *Gaines*, 305 U.S. at 349–50; *cf.* ECF No. 32 at 55-56 (acknowledging that "[t]he Supreme Court's jurisprudence involving abortion . . . requires each state *to refrain* from engaging in certain conduct") (emphasis in original). Like Missouri in *Gaines*, Kentucky must refrain from creating conditions that unduly burden a woman's ability to access abortion services within its boundaries.

Gaines did not, as Appellants argue, center on the question of whether Missouri had an affirmative obligation to provide its residents with a legal education.

The *Gaines* Court grounded its holding on the premise that the availability of services outside a state does not validate that state's adoption of laws and regulations that result in a violation of the constitutional rights of persons within the state. 305 U.S. at 350 ("We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere."). A state may not justify infringement on rights guaranteed by the Constitution by suggesting that people can exercise their rights in a neighboring state. *Id.*; *see also Schad*, 452 U.S. at 76–77.

B. The Availability of Abortion in Neighboring States Is Not Relevant Under This Court's Precedent.

This Court's opinion in *Baird* does not support Appellants' contention that this Court must consider the availability of abortion in neighboring states when applying the undue-burden standard. *See* ECF No. 32 at 51–52 (suggesting that *Baird* makes availability of abortion in neighboring states a relevant consideration when applying the undue-burden standard). *Baird* does not discuss the availability of abortion in neighboring states at all, let alone announce a rule requiring consideration of out-of-state services when applying the undue-burden standard.

In *Baird*, this Court addressed an as-applied challenge to an Ohio regulatory decision requiring a Dayton abortion clinic to close because it did not have a written

transfer agreement with a local hospital. 438 F.3d at 598. After being unable to find a hospital that would enter a transfer agreement, the clinic requested a waiver of the requirement, and the clinic filed suit when the Ohio authorities declined that request. *Id*. at 599–601. Testimony at trial established that the Dayton clinic performed approximately 3,000 abortions per year and was the only place in southern Ohio conducting abortions in the later weeks of the second-trimester of a pregnancy (after 18 weeks). *Id*. at 599. *Baird* thus addressed women's ability to access abortion services in two contexts: (1) the approximately 3,000 women per year seeking services at other clinics generally; and (2) the group of women seeking an abortion after more than 18 weeks. This Court's analysis of the second context is at issue here.[2]

The *Baird* court based its ruling on (1) the complete absence of evidence in the record addressing how many women seeking an abortion between weeks 19 and 24 of their pregnancy would be impacted by the closure of the Dayton clinic; and (2) the ability of a woman to obtain an abortion for a pregnancy between 19 and 24 weeks at "any other *duly licensed* clinics[.]" *Baird*, 438 F.3d at 606–07. Read in

[2] This Court rejected the proposition that closure of the Dayton clinic would generally create a "substantial obstacle for Dayton-area women seeking an abortion in light of the availability of another clinic less than fifty-five miles away from the Dayton clinic." *Id*. at 605-06.

context, the *Baird* court's reference to other "duly licensed" clinics was a clear nod to the possibility that other clinics *licensed in Ohio* would be able to conduct late second-trimester abortions. The evidence showed that nearby clinics would conduct an abortion up to 18 weeks; a clinic in Cleveland would conduct an abortion for pregnancies through 24 weeks; and Dr. Haskell, the owner of the Dayton clinic, testified that it would theoretically be possible, though difficult, for him to conduct abortions through 24-weeks at his Cincinnati clinic. *Id.* at 599, 605–06. The *Baird* court's conclusion on this point followed a discussion of Dr. Haskell's testimony that he would be able to conduct such procedures at his "duly licensed clinic" in nearby Cincinnati. *Id*. at 606.[3] The *Baird* court did not focus on or even consider the availability of such abortions outside Ohio. *Cf.* ECF No. 32 at 56–57 (misconstruing the *Baird* court's statements about traveling to other clinics as meaning the court was referring to out-of-state clinics with respect to late second trimester abortions).

C. The Supreme Court Declined to Consider Out-of-State Availability of Abortion in *Whole Woman's Health*.

Any analysis that requires consideration of out-of-state services cannot be squared with the Supreme Court's reversal of the Fifth Circuit in *Whole Woman's*

[3] The sole reference to an out-of-state clinic in *Baird* is that the company operating the Dayton clinic also operated clinics in Cincinnati and Indianapolis. 439 F.3d at 599. But, unlike the in-state Cincinnati clinic, the *Baird* court never considered the availability of the out-of-state Indianapolis clinic.

Health. When an intervening decision from the Supreme Court undermines the rationale of a decision of this Court, this Court is compelled to follow the intervening Supreme Court decision…." *The Northeast Ohio Coalition of the Homeless v. Husted*, 831 F.3d 686, 720–21 (6th Cir. 2016) (requiring this Court to follow the rationale of intervening Supreme Court precedents even where the case is "not precisely on point"). This Court is thus bound to follow the Supreme Court's reasoning in *Whole Woman's Health*, regardless of its interpretation of *Baird*.

Whole Woman's Health addressed an as-applied challenge to regulations on abortion services regarding a licensed abortion facility in El Paso, Texas. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 596–98 (5th Cir. 2015). The Fifth Circuit rested its decision upholding the regulation, in part, on the fact that many women were already choosing to obtain abortion services in the adjoining community of Santa Teresa, New Mexico.[4] *Id*. The Supreme Court declined to adopt this reasoning.

The majority opinion in *Whole Woman's Health* struck down the challenged regulations while focusing solely on the availability of abortion services inside Texas. 136 S. Ct. at 2309–18. In doing so, it rejected Texas's argument that women

[4] Notably, the Fifth Circuit distinguished its decision from *Jackson Women's Health Organization v. Currier*, 760 F.3d 448 (5th Cir. 2014), which struck down an admission privileges requirement because it would have resulted in closure of Mississippi's only abortion clinic.

in El Paso could travel "short distances across the state line to a Santa Teresa, New Mexico abortion facility[.]" Brief of Respondents, *Whole Woman's Health v. Hellerstedt*, No. 15–274, at 53-55 (Jan. 27, 2016).[5] The Supreme Court refused to accept the proposition that it should consider the availability of abortion services in neighboring states when applying the undue-burden test. The Court's analysis focused entirely on the effect of the challenged regulations on the availability of services within the State of Texas when determining undue burden.

The Supreme Court's decision in *Whole Woman's Health* undermines any suggestion that current availability of out-of-state facilities is relevant in determining what constitutes an undue burden. This Court must focus only on the effect of the challenged statutes and regulations on the availability of abortion services within the Commonwealth of Kentucky. To the extent *Baird* conflicts, this Court must treat the intervening Supreme Court decision as effectively overruling *Baird* on that point. The availability of abortion services in states neighboring Kentucky has no place in the application of the undue-burden standard to the Kentucky laws and regulations at issue.

[5] *Available at* https://www.scotusblog.com/wp-content/uploads/2016/02/15-274_resp.authcheckdam.pdf.

D. Requiring a Court to Consider the Availability of Abortion in Neighboring States Would Adversely Affect Women Seeking Abortions in Neighboring States.

Permitting a state to impose substantial, unconstitutional obstacles to abortion access within its borders, and then rely on the availability of abortion in neighboring states to excuse that burden, also improperly burdens women in neighboring states by straining the neighboring states' health-care systems. Additionally, accepting Appellants' proffered analysis could impair the neighboring states' regulatory authority as conditions change over time.

A significant increase in the number of women entering neighboring states to exercise their constitutional right to terminate a pregnancy could strain the health-care systems of those neighbors. Such a strain on the health-care systems of neighboring states would in turn have repercussions for the women of those states because it would interfere with their ability to access to abortion services within their own home state. Moreover, funding abortions for indigent women from out of state could divert scant health-care resources away from services for state residents.

In *Gaines*, the Supreme Court concluded that each State is "responsible for its own laws establishing the rights and duties of persons within its borders." 305 U.S. at 350. This precedent must apply here. Allowing the conditions in and regulations of one state to affect the constitutionality of another state's laws is a recipe for chaos

and confusion. Each state's regulations must be allowed to stand or fall based on their effects within the state's borders alone.

Adopting Appellants' proposed cross-border analysis could perversely encourage states to create substantial, unconstitutional obstacles to abortion. This is because it would cause the costs of providing abortion services to flow one way, from states that have enacted restrictions that create substantial obstacles to abortion access within their borders to states that regulate within constitutional bounds. Basic principles of federalism, and basic respect for women's constitutional right to choose to access abortion services, forbid that result.

II. States May Not Use General Health Regulations to Impose an Undue Burden on a Woman's Right to Abortion.

This Court should reject the assertion of the Appellants' *Amici* that the undue-burden standard requires consideration of all of the general benefits of a law that affects abortion providers, among others. As an initial matter, Appellants' *Amici* acknowledge that the Kentucky law at issue targets abortion clinics specifically. ECF No. 35 at 12. Nevertheless, this Court has already found that the undue-burden standard does apply to general laws, regardless of whether they target abortion providers in particular. The Supreme Court's articulation and application of the undue-burden standard in *Whole Woman's Health* supports that conclusion.

A. The Undue-Burden Standard Applies to Neutral Laws of General Applicability.

In *Baird*, Ohio argued that the undue-burden standard did not apply because the relevant regulation was "neutral towards abortion." 437 F.3d at 603. But this Court rejected that argument, concluding that the general nature of a health-care regulation does not relieve that regulation from scrutiny under *Casey*'s undue-burden standard. *Id*.

Whole Woman's Health is in accord, stating that the recognized purpose of the undue-burden test is to "consider the burdens a law imposes on abortion access together with the benefits those laws confer," for purposes of determining "whether any burden imposed on abortion access is 'undue.'" 136 S. Ct. at 2309–10. In articulating the relevant standard, the Court reiterated that state laws or regulations intended to further valid state interests—*e.g.* women's health—but having "'the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.'" *Id*. at 2309 (quoting *Casey*, 505 U.S. at 877). Additionally, the Court acknowledged that "'[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.'" *Id*. (quoting *Casey*, 505 U.S. at 878) (brackets in original). Finally, the Court reiterated its independent constitutional obligation to evaluate the evidence before it to determine

the legitimacy of asserted state interests. This obligation requires the Court to ensure that, even if not specifically intended, any challenged regulations do not have the *effect* of unduly burden a woman's freedom to choose whether to carry a pregnancy to term. *Id*. at 2310 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007)); *see also Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.").

Applying the analysis propounded by Appellants' *Amici*—looking at the benefits of a law or regulation in an unrelated context, rather than as they relate to the abortion context specifically—would contradict the Supreme Court's statements in *Whole Woman's Health* and would make little sense as a practical matter. Determining whether the burden a regulation creates is "undue" in the context of abortion access requires examining it in that context.

B. Any General Health Benefit Here Is Outweighed by the Burden of Forcing Closure of the Only Abortion Clinic in Kentucky.

The burden imposed by an abortion regulation purportedly enacted to promote health must be proportional to the benefit that the regulation is expected to provide. *See Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015); *see also Casey,* 505 U.S. at 873–74 (comparing, in the plurality opinion, the

undue-burden standard to the standards applied in ballot-access cases that "grant substantial flexibility" to the states to set rules for elections). Even statutory and regulatory requirements that provide some marginal benefit to women's health must give way to a woman's interest in accessing abortion services. *Whole Woman's Health*, 136 S. Ct. at 2309-10 (noting that statutes that further valid state interest are unconstitutional if, in effect, they construct a substantial obstacle in the path of a woman's right to terminate her pregnancy); *see also Casey*, 505 U.S. at 846 (noting that relevant state "interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure").

Here, Appellants essentially acknowledge that the benefit of the Kentucky law at issue—in the abortion services context—is minimal to non-existent. *See* ECF No. 32 at 42 (suggesting that testimony on the rarity of emergencies in providing abortion services makes the need for transfer- and transportation-agreements more important). A state's interest in regulating a procedure is not strengthened by decreases in the potential risks associated with the procedure. If it were, states could impose unnecessary regulations as a pretext for banning or limiting the availability

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of abortion services. They cannot. *Whole Woman's Health* is clear: unnecessary health regulations are an undue burden if they establish a substantial obstacle to a woman's right to seek an abortion. 136 S. Ct. at 2309.

Any reliance on the purported general health benefits stemming from the regulatory framework itself are similarly unavailing. Even statutes that further legitimate state interest are impermissible if they have the effect of establishing a substantial obstacle to a woman's right to have an abortion. *Id*.

The ultimate burden in this case—the elimination of the only abortion services provider in the state of Kentucky—amounts to an insurmountable obstacle for the women of Kentucky to access constitutional healthcare. Any health benefit conferred by the law generally, as well as any minimal benefit of the law in the abortion services context, does not justify the resulting burden on a woman's right to an abortion. Women in Kentucky should not be forced to travel out of state in order to obtain constitutionally protected abortion services, particularly with no corresponding benefit. The Kentucky law at issue here imposes a disproportionate burden on women's constitutional rights under any analysis.

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CONCLUSION

Amici states respectfully request that this Court affirm the decision of the district court, finding the Kentucky law at issue unconstitutional because it violates Plaintiffs' and Intervenor-Plaintiff's rights under the Fourteenth Amendment of the U.S. Constitution.

DATED this 4th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 32(g)(1), the attached AMICUS CURIAE BRIEF is proportionately spaced, has a typeface of 14 points or more and contains 3,688 words.

RESPECTFULLY SUBMITTED this 4th day of April.

AARON D. FORD
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By: /s/ Heidi Parry Stern
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on April 4, 2019, I served a copy of the foregoing AMICUS CURIAE BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Traci Plotnick
An Employee of the Office of the Attorney General