IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, et al.	)	
Plaintiffs,	)	Case No. 2:16-cv-04313-HFS
v.	)	
PETER LYSKOWSKI, et al.,	)	
Defendants.	)	

REPLY SUGGESTIONS IN SUPPORT OF THE STATE DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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There is no evidence indicating that DHSS has ever prevented an abortion facility from operating by failing to grant a reasonable deviation or variance from the physical-plant ASC requirements. Binding precedent requires Plaintiffs to have recourse to this reasonable deviation procedure before filing suit, but they have not done so. Plaintiffs' ASC claims are unripe, and their hospital-privileges claims are both unripe and non-redressable.

A. Plaintiffs' Challenges to the ASC Requirements Are Not Ripe Because No Plaintiff Has Applied for a Deviation Under 19 CSR § 30-30.070(1).

Plaintiffs argue that they were not required to seek a deviation from DHSS to ripen their equal protection claim because "the equal protection injury is the imposition of more onerous requirements for facilities that provide abortion as opposed to other procedures." Doc. 41, at 2. But the case which Plaintiffs cite addresses the "injury-in-fact" requirement of Article III standing, not ripeness; it holds that unequal treatment is itself an Article III injury, so a plaintiff alleging discrimination in the allocation of benefits need not demonstrate that she would have succeeded in obtaining benefits absent differential treatment. *See Northeastern Fla. Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993). This case did not address ripeness at all. The other case on which Plaintiff relies, *Meadows of West Memphis v. City of West Memphis*, 800 F.2d 212, 215 (8th Cir. 1986), did not involve a variance procedure in a regulatory regime. Rather, *Meadows* involved a challenge to an allegedly racially motivated ordinance of a city council that delayed a developer's access to public financing for a full year. *Id.* at 215. Because the injury asserted was delayed access to financing, the claim was ripe.

Neither of these cases undermines, or even addresses, the well-established rule that "where the regulatory regime offers the possibility of a variance from its facial requirements," a party challenging that regime "must . . . actually seek such a variance to ripen his claim." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736-37 (1997); *see also Williamson County*

Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985) (holding that "resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop [the property] in the manner respondent proposed"). In fact, the Eighth Circuit has applied this rule specifically to equal protection claims, holding that "the same kind of finality requirements" adopted in *Williamson County* govern "due process and *equal protection* claims." *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1273 (8th Cir. 1994) (emphasis added). Thus, there is no "equal protection" exception to this rule. *See also Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir. 1988) (holding that "the ripeness analysis used" in *Williamson County* and similar cases "applies as well to equal protection and due process claims").

Plaintiffs argue that *Hellerstedt* states that "piecemeal litigation" is not required in this context. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). But *Hellerstedt* did not address ripeness at all, let alone the lack of ripeness due to plaintiffs' failure to have recourse to a deviation procedure, because Texas's regime (unlike Missouri's) did not include a deviation procedure. Rather, the statement referred to the availability of a facial challenge in the face of an express severability clause. *See id.* And the State Defendants' position does not require "piecemeal litigation." *Id.* On the contrary, it calls for Plaintiffs to ripen their ASC claims, before bringing both sets of claims in a single suit.

Plaintiffs contend that *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738-39 (1997), supports their position on ripeness, Doc. 41, at 4-5, but they misapprehend the holding of that case. *Suitum* stated that a challenge to a land-use regulation is ripe when it becomes clear that "the agency has no discretion to exercise over [plaintiff's] *right to use her land*." *Id.* at 739. Here, the agency plainly has discretion over plaintiffs' "right to use [their] land," because

19 CSR § 30-30.070(1) provides for a flexible variance procedure. The agency has not yet exercised this discretion, because Plaintiffs have never applied for a deviation.

Plaintiffs argue that, because they have brought a *facial* challenge to the ASC requirement, they are "not required to show on an individual basis that they cannot obtain a waiver for each and every one of the statute's implementing regulations." Doc. 41, at 2-3. But numerous cases hold that ripeness requirements apply equally to facial challenges and as-applied challenges. *See, e.g., McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1037 (8th Cir. 2004) (holding that facial challenges to regulations implementing a religious and philosophical exemption to an immunization requirement were unripe because the plaintiffs' "claims are speculative and involve no concrete injury—no [plaintiffs] have applied for or been denied exemption under the new statute"); *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 531, 538 (3d Cir. 1988) (holding that a facial First Amendment challenge to attorney advertising regulation was unripe because plaintiffs had not submitted a request for advisory opinion on their proposed advertisements before suing to challenge the regulation). "Judicial review is premature when an agency has yet to complete its work by arriving at a definite decision." *Id.* at 535.

Indeed, the "basic rationale" of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967); *Felmeister*, 856 F.2d at 537 ("It may be that plaintiffs' proposed advertisements will meet with the Committee's approval, and if that were the outcome of the agency action, there would indeed be no case or controversy to adjudicate because the concrete effects of the agency action would be favorable to

plaintiffs."); *McCarthy*, 359 F.3d at 1037 ("Were [the court] to address the newly enacted exemption statute and regulations before first giving the Department of Health the opportunity to work with the [plaintiffs], we would inappropriately and prematurely entangle the court in an abstract disagreement."). This basic rationale applies equally to facial and as-applied challenges.

Plaintiffs' arguments regarding futility fare no better. Plaintiffs' principal argument is that, because they cannot meet the (independently challenged) hospital-privileges requirement, they cannot obtain a waiver of the physical facilities. Doc. 41, at 4. But this argument confuses the requirement of obtaining an actual abortion-facility *license* with the possibility of obtaining a *deviation* from the physical-plant requirements. Needless to say, Defendants do not contend that Plaintiffs must actually obtain an abortion-facility license to ripen their challenge to the ASC requirements. Rather, Defendants argue, and numerous cases directly instruct, that Plaintiffs must apply for a *deviation* of the physical-plant requirements before their challenge to those particular requirements is ripe. Plaintiffs cite no evidence that DHSS requires the hospital-privileges requirement to be satisfied before it will consider a deviation application for the ASC requirements. The evidence in the record states the opposite. *See* Langston Decl. ¶ 44 (noting that DHSS conducted inspections of the Columbia facility to assess compliance with physical-plant requirements even though "Planned Parenthood did not have a transfer agreement or working agreement with a hospital"); *id.* ¶ 37 & Att. E (approving request for variance as to the number of recliners at the Columbia facility); *id.* ¶ 41 ("If Planned Parenthood submits a written request in accordance with 19 CSR § 30-30.070(1), DHSS will consider it.").

Plaintiffs contend that the deviation procedure is futile because "[w]hen Planned Parenthood sought waivers of the ASC requirements for the Kansas City and Columbia health centers in 2007, DHSS refused to even respond to their correspondence." Reply 4 (citing

Planned Parenthood of Kansas v. Drummond, No. 07-4164-cv-C-ODS, 2007 WL 2811407, at *2 (W.D. Mo. Sept. 24, 2007)). This is plainly misleading. In *Drummond*, the plaintiffs submitted written requests for deviations on August 9, 2007, and then filed suit on August 20, participating in a TRO hearing challenging the law on August 31, 2007. *See id.* In other words, Plaintiffs filed suit against DHSS without waiting for DHSS's response to their requests for deviation. Moreover, in the very same order that Plaintiffs cite, the Court noted that "DHSS has assured the Court that such an opportunity exists" for plaintiffs "to pursue waivers and/or deviations from some of the requirements," and the Court specifically *ordered the plaintiffs to participate in the deviation process*. *Id.* at *10 ("Plaintiffs are directed to seek specific deviations and/or waivers from specific requirements within the New Construction regulations."). This deviation process ultimately led to the 2010 Settlement that Comprehensive Health now seeks to evade. *See id.* Notably, the *Drummond* court never addressed ripeness, as the parties did not raise it. *See id.*

In fact, far from demonstrating futility, Plaintiffs have failed to identify a single instance in which DHSS prevented an abortion facility from operating by refusing to grant a deviation from the physical-plant ASC requirements. On the contrary, the record establishes DHSS's reasonable approach to granting deviations. *See* Langston Decl. ¶¶ 37, 41, 44 & Att. E.

In short, Plaintiffs do not think they should have to expend any effort to ripen their claims before receiving a declaration of their rights from the Court. *See* Doc. 41, at 12 n.8; McQuade Supp. Decl. ¶ 8. Their approach puts the cart before the horse. They are not entitled to an advisory opinion from the Court before incurring minimal inconvenience to ripen their claims.

B. Because Plaintiffs' Challenge to the ASC Requirement Is Not Ripe, Their Challenge to the Hospital-Privileges Requirement Is Not Redressable.

Because no plaintiff has applied for a deviation or variance from the ASC requirements, no plaintiff has brought a ripe challenge to those requirements. Because there is no valid

challenge to the ASC requirements, no plaintiff's challenge to the hospital-privileges requirement is currently redressable. Plaintiffs' only response regarding this point is to argue that their ASC challenges are ripe. *See* Doc. 41, at 10. This argument is incorrect for the reasons stated above. Plaintiffs' hospital-privileges claims are plainly barred by the "obstacle to establishing traceability and redressability when there exists an unchallenged, independent rule, policy, or decision that would prevent relief even if the court were to render a favorable decision." *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 756 (4th Cir. 2013); *see also Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 148-49 (4th Cir. 2009); *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 740 (D.C. Cir. 2008); *Covenant Media of S.C., LLC v. City of N. Charleston*, 439 F.3d 421, 430 (4th Cir. 2007); *Nuclear Information and Resource Service v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 955 (9th Cir. 2006).

Moreover, Plaintiffs offer no effective rebuttal to the observation that their facilities suffer from various deficiencies that independently prevent licensing under 19 CSR § 30-30.060, apart from the physical-plant requirements of 19 CSR § 30-30.070. Plaintiffs now appear to argue that this Court should enjoin wholly non-burdensome and non-controversial regulations in §30-30.060, aside from the physical-plant ASC requirements—such as the requirement that abortion facilities (like all other medical facilities in the State) must have basic infection-control procedures. *See* Doc. 41, at 11-12. This argument should be rejected. None of those requirements poses any undue burden on abortion access, and enjoining them would unnecessarily risk women's (and minors') health. *See* 19 CSR § 30-30.060(1)(B)(2) (requiring that abortion facilities report suspected child abuse); 19 CSR § 30-30.060(1)(B)(3) (requiring that abortion facilities have fire-evacuation plans); 19 CSR § 30-30.060(1)(B)(8) (requiring that abortion facilities have infection-control programs).

C. Plaintiffs' Challenges to the Hospital-Privileges Requirements Are Also Unripe.

Plaintiffs contend that their equal protection challenge to the hospital-privileges requirement is ripe because the injury which they claim is differential treatment. Doc. 41, at 5. Again, this argument fails because it confuses Article III injury-in-fact with ripeness. Even if Plaintiffs are injured by differential treatment, regardless of whether they qualify for a license, they must take reasonable steps to attempt to procure a license before their claims are ripe. They do not need to demonstrate that they would have received a license but for the challenged differential treatment. *See Northeastern Florida*, 508 U.S. at 666.

Plaintiffs also contend that their doctors are "categorically disqualified" from obtaining privileges at certain hospitals, and that rejected applications might hurt those doctors' future careers. Doc. 41, at 6-7. This argument runs contrary to their motion for preliminary injunction, in which they argue that denials of hospital privileges are "frequently" not merit-based. *See* Doc. 42, at 5 (noting that "physicians who provide abortion frequently cannot obtain privileges for reasons unrelated to their clinical competence").

D. Plaintiffs' Delay Before Filing Suit Undermines Their Claims of Hardship.

Plaintiffs must demonstrate *both* fitness for judicial review and hardship to establish ripeness. *Abbott Labs*, 387 U.S. at 149. For the reasons stated above, they cannot satisfy the fitness prong, and their claims are unripe. Moreover, they also cannot show hardship. Plaintiffs contend that their six-month delay before filing suit should not count against them in assessing the balance of hardships, because it is "entirely proper for litigants to engage in good faith investigation and negotiation prior to filing a lawsuit." Doc. 41, at 9. But the record simply does not reflect "good faith investigation and negotiation prior to filing a lawsuit." *Id.* Rather, it reflects Plaintiffs' peremptory demand letters asserting that DHSS should not enforce duly

enacted Missouri laws, their refusal to participate in the flexible deviation process provided by Missouri regulations, and their failure to address several independent obstacles to licensure.

E. The 2010 Settlement Bars Comprehensive Health's Claims.

Comprehensive Health argues that the 2010 Settlement Agreement has no effect on its claims in this case. This argument lacks merit. First, Comprehensive Health asserts that it never received the benefit of the bargain of the Settlement Agreement, because the Agreement required DHSS to grant licenses to the Columbia and Kansas City clinics. Doc. 41, at 14. But DHSS ***did*** grant licenses to each facility after the execution of the Settlement Agreement. *See* Langston Aff., Doc. 28-1, ¶¶ 7-8 (Kansas City facility), 26-27 (Columbia facility).

Second, Comprehensive Health's contention that DHSS has adopted shifting interpretations of the Settlement Agreement—especially with regard to the number of recliners required in the recovery area—misstates the relevant facts. *See* Doc. 41, at 14. In 2015, DHSS approved certain aspects of the Columbia facility, including the number of recliners in the recovery area. However, at the time of this approval, the Columbia facility was performing only medication abortions, and not surgical abortions. Langston Aff., Doc. 28-1, ¶ 37. The variance-approval letter expressly stated that the variance would only "remain in effect until there is a change in procedure type performed at" the facility. Att. E to Langston Aff., Doc. 28-1, at 40. Comprehensive Health expressly acknowledged that it would "only be approved for medical abortion procedures at this time. We understand that BAC will need to revisit the facility prior to our offering surgical procedures." Att. D to Langston Aff., Doc. 28-1 at 38.

Because the Columbia facility announced its intent to perform surgical abortions in connection with its 2016 application for licensure, DHSS required the facility to submit a new variance request. *See* Doc. 15-1, at 31 (explaining that the Columbia facility would need to

"submit a revised variance request" because "[i]t is now the facility's intent to also perform surgical procedures"). Thus, what has changed is not DHSS's interpretation of the Settlement, but rather the nature of the procedures performed at the Columbia facility. *See id.* Comprehensive Health expressly recognized in 2015 that a change in procedures may affect what requirements would apply. *See* Att. D to Langston Aff., Doc. 28-1 at 38.

Third, the Settlement plainly covers the ASC-requirement challenge brought by Comprehensive Health in this case. Comprehensive Health asserts that the Settlement Agreement only released the "pre-enforcement, as-applied" claims that it raised in the 2007 case, while this case involve "a post-enforcement," facial challenge. Doc. 41, at 14. But the Settlement Agreement did not merely release the claims that Comprehensive Health actually advanced in 2007. Rather, the Agreement waived "any and all . . . claims, actions, causes of action, demands, [and] rights . . . based on or arising out of the allegations in the Lawsuits." Att. B to Langston Aff., ¶ 10, Doc. 28-1, at 22. The laws at issue in this case were in effect at the time of the cases covered by the Settlement Agreement, and because Plaintiffs insist that this is a *facial* challenge to those laws, no specific facts regarding the facilities at issue here that arose after 2010 can be relevant to Plaintiffs' claims. *See St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999) (explaining that where a plaintiff "asserted a facial constitutional challenge, . . . the specific facts were not relevant"). Further, the Settlement also included a contractually binding agreement regarding how Comprehensive Health will satisfy the hospital-privileges requirement for the Kansas City facility. Doc. 28-1, at 35. For these reasons, the 2010 Settlement Agreement bars Comprehensive Health from bringing its claims in this case.

CONCLUSION

For these reasons, the Court should dismiss the Complaint for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification to the following:

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