

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

COMPREHENSIVE HEALTH OF PLANNED )	)	
PARENTHOOD GREAT PLAINS, et al. )	)	
	)	
Plaintiffs, )	)	
	)	
v. )	)	Case No. 2:16-cv-04313-HFS
	)	
PETER LYSKOWSKI, in his official capacity )	)	
as Director of the Missouri Department of )	)	
Health and Senior Services, et al. )	)	
	)	
Defendants. )	)	

**PLAINTIFFS’ SUGGESTIONS IN OPPOSITION TO  
DEFENDANT PATTERSON’S MOTION TO DISMISS**

Defendant Patterson seeks to avoid the fact that the Supreme Court’s recent decision in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) renders unconstitutional Missouri’s requirements that facilities that provide abortion must be licensed as ambulatory surgical centers<sup>1</sup> (“ASC Restriction”) and physicians who provide abortion must have local hospital privileges and/or a transfer agreement with a local hospital<sup>2</sup> (“Hospital Relationship Restriction”) (together, the “Restrictions”), by arguing that Plaintiffs’ claims are not ripe. As is explained in detail below and in Plaintiffs’ Suggestions in Response to State Defendants’ Motion to Dismiss, ECF No. 41, (“Plaintiffs’ Response to State Defendants”), incorporated herein by reference, these arguments are meritless and should be rejected.

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<sup>1</sup> Mo. Ann. Stat. § 197.200.

<sup>2</sup> Mo. Ann. Stat. § 197.215, Mo. Code Regs. Ann. tit. 19 § 30-30.060(1)(C)(4), Mo. Ann. Stat. § 188.080, and Mo. Ann. Stat. § 188.027(1)(1)(e).

## ARGUMENT

### I. Plaintiffs' Claims are Ripe for Review

Defendant Patterson argues that Plaintiffs' challenges to the ASC Restriction and the Hospital Privileges Restriction are not ripe as to him, but his arguments fail. A case is ripe when (1) the issues are fit for review and (2) the Plaintiffs would suffer significant hardship if the court were to withhold consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

#### A. Plaintiffs' Challenge to the ASC Restriction is Fit For Review

In an attempt to dispute the fitness of Plaintiffs' challenge to the ASC Restriction, Defendant Patterson argues that “[u]ntil Plaintiffs actually apply for an abortion facility license in Springfield and DHSS denies the application and any requested variance and Patterson is called upon to take enforcement action, there is no actual controversy” as to him. Suggestions in Supp. of Def. Patterson’s Mot. to Dismiss, ECF No. 46 at 4 (“Def.’s Br.”). This argument misses the mark. As an initial matter, as is explained in detail in Plaintiffs’ Response to State Defendants, there can be no dispute that Plaintiffs’ equal protection challenge to the ASC Restriction is ripe whether or not Plaintiffs seek waivers or are subject to an enforcement action by Defendant Patterson. Pls.’ Resp. to St. Defs. at 2.

Furthermore, Plaintiffs’ substantive due process challenge to the ASC restriction is also ripe. Defendant Patterson is incorrect that the fact that Plaintiff Reproductive Health Services of Planned Parenthood of the St. Louis Region<sup>3</sup> (“RHS”) has not applied for an ASC license in

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<sup>3</sup> Defendant Patterson frames his Motion and Suggestions in terms of all Plaintiffs. However, while Plaintiff RHS seeks to operate an ASC in Springfield and Plaintiff Dr. Yeomans seeks to provide abortions in Springfield, Plaintiff Comprehensive Health of Planned Parenthood Great Plains does not seek to provide abortions in Springfield.

Springfield,<sup>4</sup> or sought waivers of the ASC Restriction's requirements, renders its claim "speculative." Def.'s Br. at 2, 5. As is explained in Plaintiffs' Response to State Defendants, RHS cannot meet certain requirements of the ASC Restriction that DHSS does not have authority to waive, and the law is clear that Plaintiffs are not required to apply for a license and/or seek waivers where it would be futile to do so.<sup>5</sup> Pls.' Resp. to St. Defs. at 2–5. Because the waiver process does not permit DHSS to grant RHS an ASC license, its injury is concrete and final, and therefore fit for review.

Defendant Patterson is also incorrect that Plaintiffs' challenge to the ASC Restriction is not ripe until they break the law and a criminal enforcement action is brought against them. Def.'s Br. at 4. The law is clear that

When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

*Babbitt v. United Farm Workers Nat'l. Union*, 442 U.S. 289, 298–99, (1979) (quoting *Doe v. Bolton*, 410 U.S. 179 (1973)). Indeed, the Eighth Circuit has explained that permitting pre-enforcement challenges breeds respect for the law and has stated "we 'encourage a person aggrieved by laws he considers unconstitutional to [challenge the laws], all the while complying

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<sup>4</sup> Defendant Patterson erroneously states that Plaintiffs "voluntarily surrendered their [Springfield ASC] license in 2005." Def.'s Br. at 2. In fact, Plaintiffs have never held an ASC license in Springfield. The abortion provider who held a license to operate an abortion facility in Springfield in 2005 was an entity entirely unrelated to Plaintiffs called Springfield Healthcare Center. Aff. of John Langston, ECF No. 28-1 at 15.

<sup>5</sup> Defendant Patterson argues that, since he "is not authorized to license a facility," Def.'s Br. at 3, he should not be required to defend against Plaintiffs' arguments that they are unable to obtain a license. However, Defendant Patterson is a proper Defendant in this action because, as Prosecuting Attorney for Greene County, Missouri, he is charged with enforcing the criminal penalties that attach to violations of both the ASC Restriction and the Hospital Relationship Restriction. See Compl., ECF No. 1 at ¶ 16. Thus, his presence in the case is necessary for the Court to be empowered to grant complete injunctive relief. See Compl. ¶ 58–62.

with the challenged law, rather than to deliberately break the law and take his chances in the ensuing [] prosecution.”” *St. Paul Area Chamber of Comm. v. Gaertner*, 439 F.3d 481, 488 (8th Cir. 2006) (quoting *Mobil Oil Corp. v. Att’y Gen.*, 940 F.2d 73, 75 (4th Cir.1991)).

Plaintiffs easily meet the *Babbitt* test, since they intend to engage in conduct that is affected with a constitutional interest and the operation of the ASC Restriction proscribes that conduct. As Plaintiffs have alleged, RHS and Dr. Yeomans desire to provide abortions at the Springfield health center, but the ASC Restriction prevents them from doing so,<sup>6</sup> in violation of their and their patients’ constitutional rights. Decl. of Mary M. Kogut in Supp. of Pls.’ Mot. for a Prelim. Inj., ECF No. 15-2 at ¶¶ 6–14 (“Kogut Decl.”). Moreover, there is a credible threat of prosecution under the ASC Restriction. Such a threat exists without explicit prosecutorial action or a threat of action; rather, a credible threat exists where a statute is “recent and not moribund,” *Doe v. Bolton*, 410 U.S. at 188–89, and the prosecutor has not disavowed the possibility of prosecution, *see 281 Care Committee. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011) (credible threat of prosecution existed where defendants did not “produce[] a clear statement by proper authorities that they do not intend to enforce the statute.”). Here, the ASC Restriction was amended to apply to facilities that provide five or more first trimester abortion or one or more second trimester abortions in 2007, *Planned Parenthood of Kan. v. Drummond*, No. 07-4164-CV-C-ODS, 2007 WL 2811407, at \*1 (W.D. Mo. Sept. 24, 2007), and is therefore recent and not

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<sup>6</sup> Defendant Patterson falsely claims that Plaintiffs have not alleged how the Springfield health center does not meet the requirements of the ASC Restriction and that Plaintiffs have not alleged that compliance would create financial hardship for RHS. Def.’s Br. at 2. On the contrary, Plaintiffs submitted an expert declaration from Georges Johannes, AIA, an architect who analyzed the Springfield facility. Mr. Johannes included information about which of the ASC Restriction’s requirements the Springfield facility does and does not meet, analyzed the cost to renovate the facility, and concluded that the only practical option is to build a new ASC at a cost of over \$2 million. Decl. of George W. Johannes in Supp. of Pls.’ Mot. for a Prelim. Inj., ECF No. 15-4 at ¶ 5. RHS’s President and Chief Executive Officer further provided testimony that this is not financially possible for RHS. Kogut Decl. at ¶ 9.

moribund. And Defendant Patterson has not even suggested that he would choose not to enforce the criminal penalties for violation of the ASC Restriction. Therefore, there is a credible threat of prosecution here, and Plaintiffs' challenge to the ASC Restriction is fit for review.

**B. Plaintiffs' Challenge to the Hospital Relationship Restriction is Fit For Review**

Defendant Patterson similarly argues that Plaintiffs' challenge to the Hospital Relationship Restriction is not fit for review because RHS's physicians have not applied for privileges in the Springfield area and therefore, he argues, it is "speculative" that they cannot obtain privileges. First, as with Plaintiffs' equal protection challenge to the ASC Restriction, their equal protection challenge to the Hospital Relationship Restriction is plainly ripe regardless of whether Plaintiffs' physicians apply for privileges at each qualifying hospital. Pls.' Resp. to St. Defs. at 5. Furthermore, Plaintiffs' substantive due process challenge to the Hospital Relationship Restriction is fit for review because, as is explained in detail in Plaintiffs' Response to State Defendants, Plaintiffs have provided uncontradicted evidence that RHS's physicians cannot obtain privileges at the two Springfield-area hospitals, and it would therefore be futile for them to apply. Pls.' Resp. to St. Defs.' at 5–8; Decl. of David L. Eisenberg in Supp. of Pls.' Mot. for a Prelim. Inj., ECF No. 15-3 at ¶¶ 54, 57–58; Rebuttal Decl. of David L. Eisenberg in Supp. of Pls.' Mot. for a Prelim. Inj., ECF No. 42-1 at ¶¶ 32, Ex. C; Kogut Decl. ¶ 13. And, furthermore, court after court in similar cases have held that physicians do not need to actually apply for privileges to ripen their claims, Pls.' Resp. to St. Defs. at 5–8.

Defendant Patterson also falsely states that Plaintiffs have not alleged that they are unable to hire a local Springfield doctor who already has privileges or that they cannot find a backup physician who already has local privileges. This is incorrect. RHS's President and CEO provided testimony that RHS is unable to locate a physician who already has privileges in the Springfield

area to provide abortions at the Springfield health center. Kogut Decl. ¶ 11. This is because RHS has extreme difficulty recruiting local physicians, even to provide family planning services, because of hostility to abortion in the Springfield community and physician's unwillingness to subject themselves, their families, and their private practices to harassment. *Id.*

For these reasons, far from being "speculative," it is clear that RHS cannot recruit local physicians with privileges to provide abortions, and RHS's out-of town physicians are unable to obtain privileges in the Springfield area. Therefore, Plaintiffs' injury is concrete and final, and their challenge to the Hospital Privileges Restriction is fit for review.

**C. Plaintiffs and their Patients Would Suffer Significant Hardship If the Court Withheld Consideration of Their Claims**

As is explained in detail in Plaintiffs' Response to State Defendants, Plaintiffs also fulfill the second ripeness prong, that they will suffer significant hardship if the Court were to withhold consideration of their claims, because Plaintiffs' patients, on whose behalf they bring this litigation, Compl. ¶¶ 8–9, are being irreparably harmed on an ongoing basis by the Restrictions, and any additional delay compounds this harm. Pls. Resp. to St. Defs. at 8–9. Furthermore, Plaintiffs are suffering ongoing harm because the Restrictions are preventing them from fulfilling their mission of providing comprehensive reproductive health care to Missouri women and pursuing their businesses and professions. *Id.* at 9.

Plaintiffs therefore satisfy both prongs of the ripeness inquiry as to each of their claims.

**CONCLUSION**

Therefore, for the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant Patterson's Motion to Dismiss.

Respectfully submitted,

ARTHUR BENSON & ASSOCIATES

*s/ Arthur A. Benson II*

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*s/ Melissa A. Cohen*

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2017 a copy of the foregoing has been served upon all counsel of record in this action by electronic service through the Court's CM/ECF system.

*/s/ Melissa A. Cohen*

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Melissa A. Cohen