No. 17-1996

In the United States Court of Appeals for the Eighth Circuit

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, *ET AL.*,
Plaintiffs-Appellees,

v.

JOSHUA D. HAWLEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MISSOURI, *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, NO. 2:16-CV-04313-HFS, HON. HOWARD F. SACHS

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: July 25, 2017

Respectfully submitted,

/s/ Lawrence J. Joseph

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") files this brief with the consent of the parties.[1] Founded in 1981 by Phyllis Schlafly, EFELDF is a nonprofit corporation headquartered in Saint Louis. Under the leadership of Phyllis Schlafly for thirty-five years, EFELDF has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, EFELDF consistently has argued for judicial restraint under both Article III and separation-of-powers principles, and Phyllis Schlafly supported the type of law at issue in this case. For all the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court.

EFELDF is a nonprofit corporation founded in 1981 and headquartered in Saint Louis. For more than thirty-five years, EFELDF has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally,

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[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no party's counsel authored this brief in any respect; and no person or entity – other than *amicus* and its counsel – contributed monetarily to this brief's preparation or submission.

EFELDF consistently has argued for judicial restraint under both Article III and separation-of-powers principles. For all the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Following on the Supreme Court's rejection of similar Texas requirements in *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), three plaintiffs – Comprehensive Health of Planned Parenthood Great Plains, Reproductive Health Services of Planned Parenthood of the St. Louis Region ("RHS"), and an RHS physician (collectively, "PPFA") – sued state officials and prosecuting attorneys (collectively, "Missouri") to enjoin a hospital admitting-privileges requirement and an ambulatory surgical center ("ASC") requirement.

Constitutional Background

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, ... matters of local concern." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotations and alterations omitted). For their part, the federal Executive and Congress lack a corresponding police power: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison*, 529 U.S. 598, 618-19 (2000).

Notwithstanding this state dominance on public-health issues, the Supreme Court has found in the Fourteenth Amendment a woman's right to abort a non-viable fetus, first as an implicit right to privacy and subsequently as a substantive due-process right to liberty. *Roe v. Wade*, 410 U.S. 113 (1974); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992). Under *Casey*, 505 U.S. at 878, states retain the right to regulate abortions in the interest of maternal health and in the interest of the unborn child, provided that they do not impose an undue burden on a pregnant woman's *Roe-Casey* rights. Under *Casey* as modified by *Hellerstedt*, however, "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S.Ct. at 2309.

Within those bounds, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community," *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), because federal courts are not "'the country's *ex officio* medical board.'" *Id.* at 164 (*quoting Webster v. Reproductive Health Serv.*, 492 U.S. 490, 518-19 (1989) (plurality opinion)). In particular, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," which "provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales*, 550 U.S. at 164 (emphasis added).

Under Article III, federal courts cannot issue advisory opinions and instead

must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Similarly, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted).

"All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (internal quotations omitted). These limitations "assume[] particular importance in ensuring that the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations and internal quotations omitted). For a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing prudentially requires that the plaintiff have its own constitutional standing and a "close" relationship with absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own

interests. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Further, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for each form of relief that they request.

Legislative Background

Missouri's brief describes the contours of the state's admitting-privilege and ASC requirements, including the regulatory authorization for waivers from ASC requirements. *See* Appellants' Br. at 5-8. Unlike in the Texas laws in *Hellerstedt*, these laws are not recent enactments. Indeed, in 1989, this Court upheld the admitting-privilege law as "further[ing] important state health objectives" by "ensur[ing] both that a physician will have the authority to admit his patient into a hospital whose resources and facilities are familiar to him and that the patient will gain immediate access to secondary or tertiary care." *Women's Health Ctr. of West Cnty., Inc. v. Webster*, 871 F.2d 1377, 1381 (8th Cir. 1989).

Factual Background

EFELDF adopts the facts as stated in Missouri's brief, Appellants' Br. at 4-16, noting here in addition only that the district court misread *Hellerstedt* as stating "that 'full or partial waivers' are possible in Texas." Slip Op. at 3 n.1 (JA:1750) (*citing* 136 S.Ct. at 2308). In fact, *Hellerstedt* and Texas law provided the opposite: "Texas … neither grandfathers nor provides waivers for any of the facilities that

perform abortions." *Hellerstedt*, 136 S.Ct. at 2315.

STANDARD OF REVIEW

"[A] party seeking a preliminary injunction of the implementation of a state statute must demonstrate … that the movant is likely to prevail on the merits." *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 731-32 (8th Cir. 2008) (*en banc*) (internal quotations omitted). "If the party with the burden of proof makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other *Dataphase* factors." *Rounds*, 530 F.3d at 732 (*citing Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981) (*en banc*)). Those additional factors are "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; … and [3] the public interest." *Dataphase*, 640 F.2d at 113.

Appellate courts review the grant or denial of preliminary relief for abuse of discretion, *Rounds*, 530 F.3d at 733, but a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Thus, this Court reviews legal issues *de novo*. Similarly, this Court reviews jurisdictional issues *de novo*. *Laclede Gas Co. v. St. Charles Cty.*, 713 F.3d 413, 417 (8th Cir. 2013).

SUMMARY OF ARGUMENT

Jurisdictionally, PPFA lacks a ripe challenge to the ASC requirement because PPFA failed to seek regulatory relief before racing to court, which is a premature resort to judicial authority sufficient to warrant dismissal of those claims (Section I.A). In addition, PPFA lacks the close relationship with its *future* patients required for third-party standing to assert women's *Roe-Casey* rights, which would be unavailable in any event because PPFA lacks an identity of interest with those patients due to the conflict inherent in seeking to enjoin public-health standards that protect patients from PPFA (Section I.B). Finally, neither PPFA nor the district court have demonstrated a clear enough risk of future enforcement to enjoin the public-prosecutor defendants, who thus should be dismissed from this action (Section I.C).

On the merits, the district court's failure to consider Missouri's evidence in support of its laws misapplies *stare decisis* as *res judicata*: the fact that Texas did not submit evidence to rebut the *Hellerstedt* plaintiffs' evidentiary arguments cannot estop Missouri from submitting evidence to rebut PPFA's arguments (Section II.A). Additionally with respect to PPFA's failure to seek regulatory relief before filing suit, even assuming *arguendo* that PPFA's claims are ripe enough to proceed, this Court nonetheless should find that PPFA failed to exhaust its administrative remedies and thus has waived issues that PPFA could have raised administratively, but failed to raise (Section II.B).

On the non-merits *Dataphase* factors, PPFA has no suffered irreparable harm, both because it lacks *Roe-Casey* rights and because of the hypothetical nature of the injuries that PPFA failed to exhaust administratively (Section III.A). With no irreparable injury, the balance of the equities necessarily favors Missouri – which the district court has enjoined from using its sovereign police power to protect public health – when compared with PPFA's lack of irreparable harm (Section III.B). The public-interest factor collapses into the merits, especially for litigation that could impair governmental functions and the public interest (Section III.C).

ARGUMENT

I. SEVERAL ASPECTS OF THIS LITIGATION DO NOT PRESENT A CASE OR CONTROVERSY APPROPRIATE FOR JUDICIAL RESOLUTION.

Under Article III of the U.S. Constitution, federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991). Parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404, 410 (8th Cir. 1985) ("subject matter jurisdiction cannot be waived or conferred by consent"), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and dismiss the action. *FW/PBS*, 493 U.S. at 231. Because several aspects of PPFA's case do not satisfy constitutional or prudential limits on

federal-court jurisdiction, the preliminary injunction must be reversed.

A. This litigation is not ripe.

As indicated, claims are unripe if they "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300; *accord KCCP Tr. v. City of N. Kan. City*, 432 F.3d 897, 899 (8th Cir. 2005). By analogy to property rights *expressly* within the Constitution, "challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19 (2001) (internal quotations omitted). Here, the district court acknowledged that ASC "exemptions have been granted in the past, but the future is unpredictable." Slip Op. at 11 (JA:1758). Insofar as PPFA bears the burden of proving justiciability, that is simply not good enough.

The ripeness doctrine seeks "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders*, 430 U.S. 99, 105 (1977). Like standing, "[t]he ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitation and also from prudential considerations for refusing to exercise jurisdiction." *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d

1032, 1037 (8th Cir. 2000); *Johnson v. Missouri*, 142 F.3d 1087, 1090 n.4 (8th Cir. 1998) ("standing and ripeness are technically different doctrines, [but] they are closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention") (internal quotations omitted). Indeed, standing and ripeness can "perhaps overlap entirely." *Johnson*, 142 F.3d at 1090 n.4. Moreover, as with standing, lack of ripeness is a jurisdictional defect, *Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005), which courts must evaluate *sua sponte*. *Thomas v. Basham*, 931 F.2d 521, 522-24 (8th Cir. 1991); *James Neff Kramper Family Farm Partnership v. IBP, Inc.*, 393 F.3d 828, 830 (8th Cir. 2005). Before adjudicating these constitutional questions against a non-consenting sovereign state, the district court should have dismissed the ASC claims to allow PPFA first to seek regulatory relief from Missouri.

B. Notwithstanding *Hellerstedt*, PPFA lacks third-party standing to raise the *Roe-Casey* rights of prospective patients.

Litigants generally must seek to protect their own rights, not the rights of absent third parties. *Glickert v. Loop Trolley Transp. Dev. Dist.*, 792 F.3d 876, 880-82 (8th Cir. 2015). Here, this Court should hold that PPFA lacks third-party standing to assert *future* patients' *Roe-Casey* rights and thus must sue under their own rights, which implicate a lower standard of review. Although a *Hellerstedt* dissent raised the issue of third-party standing, 136 S.Ct. at 2321-23 (Thomas, J., dissenting), the majority was silent on the issue, which is non-precedential: "drive-by jurisdictional

rulings of this sort … have no precedential effect." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998). Supreme Court and Circuit precedent make clear that PPFA lacks third-party standing to assert future patients' *Roe-Casey* rights.

1. Current third-party standing law does not support PPFA's right to raise future patients' *Roe-Casey* rights.

While EFELDF does not dispute that physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between PPFA and *future* patients who may seek abortions at PPFA's clinics. An "*existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Kowalski*, 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, PPFA lacks third-party standing to assert *Roe-Casey* rights. PPFA's invocation of third-party standing also fails for two reasons beyond the limits that *Kowalski* put on using hypothetical future relationships to prove third-party standing.

First, PPFA's lawsuit seeks to enjoin legislation that Missouri enacted to protect women from abortion-industry practices, a conflict of interest that strains the closeness of the relationship. Third-party standing is even less appropriate when – far from the required "identity of interests"[2] – the putative third-party plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (rejecting third-party standing where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow*, 542 U.S. at 15 n.7. Under *Newdow*, abortion providers cannot ground their standing on the third-party rights of their hypothetical future potential women patients, when the goal of PPFA's lawsuit is to enjoin Missouri from protecting those very same women from abortion providers' substandard care.

Second, the instances where federal courts have found standing for abortion doctors involve laws that apply equally to *all abortions* and to *all abortion doctors*,

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[2] *See*, *e.g.*, *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party … shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 810 (11th Cir. 1993) ("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions. Here, by contrast, Missouri regulates in the interest of pregnant women who contemplate abortions and imposes no pertinent restrictions either on hospital-based and ASC-based abortions or on abortion doctors who already have (or are willing to obtain) admitting privileges. When a state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating all abortions, doctors and patients potentially may have sufficiently aligned interests. Here, by contrast, all abortion doctors do not share the same interests as future abortion patients. Indeed, PPFA does not share the same interests as all abortion doctors. Without an identity of interests between PPFA and future abortion patients, the doctor-patient relationship is not close enough for third-party standing.[3]

2. Whether or not Missouri's failure to raise third-party standing constitutes waiver, this Court can raise the issue *sua sponte*.

Like Texas in *Hellerstedt*, Missouri has not questioned PPFA's third-party

[3] The abortion industry sometimes cites Richard H. Fallon, Jr., *"As-Applied and Facial Challenges and Third-Party Standing,"* 113 HARV. L. REV. 1321 (2000) to support third-party standing. To the contrary, the law review article recognizes that its exceptions to third-party standing arise in First Amendment "overbreadth" cases and instances when *state-court appeals* reach the U.S. Supreme Court. *Id.* at 1359-60 & n.196; *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). Those circumstances are obviously not present in an abortion case initiated in federal court.

standing to raise future patients' *Roe-Casey* rights. The circuits are split on whether prudential limits on justiciability – such as third-party standing – are waivable, *compare Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) *with Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994), and it is not clear that *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386-88 (2014), resolved that split. *Lexmark* concerned the jurisdictional versus prudential status of the zone-of-interest test applied to whether a party had a statutory cause of action, *id.*, but that does not answer the question whether third-party (or *jus tertii*) standing is jurisdictional and thus non-waivable.

Even if waiver applied to *the parties*, however, that would not limit *this Court's* authority to raise prudential limits *sua sponte*: "even in a case raising only prudential concerns, the question … may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003). On questions of *judicial* restraint, the parties obviously cannot bind the judiciary: "To the extent that questions … involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). Indeed, simple logic dictates that judges can enforce *judge-made* prudential limits on justiciability, regardless of the parties' positions. Otherwise, judges could never adopt a new prudential limit without simultaneously

rejecting it as having been waived.

3. PPFA cannot assert *Roe-Casey* rights, even if PPFA has economic standing to challenge Missouri's regulation of PPFA's business.

When a party – like PPFA here – does not possess an absentee's right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, the party potentially may assert its own rights, albeit without the elevated scrutiny that applies to the absent third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, [Metropolitan Housing Development Corporation] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 438 (1983) ("lines drawn … must be reasonable"). For example, this Circuit has held that economic and aesthetic injuries do not authorize nonresidents to raise the equal-protection and due-process rights of residents to vote for a trolley district. *Glickert*, 792 F.3d at 880-82. Like the development corporation in *Arlington Heights*

and the nonresidents in *Glickert*, PPFA would need to proceed under the rational-basis test (*i.e.*, without the elevated scrutiny afforded to third-party rights holders), if they were to proceed with this litigation. Thus, depending on the resolution of the third-party standing issue, this Court might not need to apply *Hellerstedt* at all.

C. The prosecuting attorneys should be dismissed as defendants because PPFA has not established a sufficient likelihood of prosecution.

Even if this Court upholds other aspects of the preliminary injunction, it must release the prosecuting attorneys from the injunction. Such injunctions require a "credible threat" of enforcement, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), which is absent here.

The only purported immediacy here appears to be the district court's judicial notice that "abortion clinic activity is controversial" and that "opponents of abortion may well urge prosecutors to enforce the law." Slip Op. at 16 (JA:1763). Under Circuit law, the "mere possibility of being named a defendant … does not constitute the actual controversy which is required." *Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1050 (8th Cir. 1996); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974) (dismissing a claim for lack of ripeness, holding that "if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged"). In *Gopher Oil*, the plaintiff brought its lawsuit "in expectation that it would be named

a defendant" in another lawsuit, which this Court held did not meet Article III's minimal jurisdictional requirements.

II. PPFA HAS NOT ESTABLISHED A LIKELIHOOD OF PREVAILING ON THE MERITS.

A plaintiff's likelihood of prevailing on the merits is the most important issue for a preliminary injunction, and plaintiffs bear the burden of proof. *Rounds*, 530 F.3d at 731-32. PPFA has not met that burden.

A. The district court impermissibly failed to consider – much less *weigh* – Missouri's evidence in the balancing that *Hellerstedt* requires.

In a misguided effort to follow *Hellerstedt*, the district court refused to consider Missouri's evidence on the undue-burden test: "accept[ing] new material, copies of studies and expert opinions, and to find a greater safety problem than was found in *Hellerstedt*, would be impermissible judicial practice." Slip Op. at 5 (JA:1752). In doing so, the district court deviated from *permissible* judicial practice by applying not only the *Hellerstedt* holding (*i.e.*, *stare decisis*), but also the *Hellerstedt* result (*i.e.*, *res judicata*) against Missouri when Missouri was not a party in *Hellerstedt*. There, the Supreme Court simply held that the undue-burden test requires a balancing to determine whether abortion regulations comport with *Roe-Casey* rights. *Hellerstedt*, 136 S.Ct. at 2309. Texas's failure to submit any relevant evidence to support *Texas* law cannot estop Missouri from submitting relevant evidence to support *Missouri* law.

Before considering Missouri's plight here, it is worth considering how fate conspired against Texas. In *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F. 3d 583 (5th Cir. 2014), the Fifth Circuit rejected the very balancing that *Hellerstedt* later required: "In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Whole Woman's Health v. Lakey*, 769 F.3d 285, 297 (5th Cir. 2014) (*citing Abbott*, 748 F.3d at 593-94, 597). Indeed, in *Abbott*, it was Texas that submitted evidence "that the admitting-privileges requirement will reduce the delay in treatment and decrease health risk for abortion patients with critical complications" and the abortion industry that "had not provided sufficient evidence that abortion practitioners will likely be unable to comply with the privileges requirement." *Hellerstedt*, 136 S.Ct. at 2301 (interior quotations omitted). In the follow-on *Hellerstedt* litigation over the same Texas law, however, it was Texas that failed to submit undue-burden evidence that *Abbott* had already found irrelevant.[4]

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[4] *Hellerstedt* repeatedly finds that Texas failed to submit evidence on key issues under the undue-burden test as modified by *Hellerstedt*. 136 S.Ct. at 2311-12 ("We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health," and "when 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"); *id*. at 2313 ("dissent's speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's

While Texas's evidentiary position in *Hellerstedt* is perhaps understandable, it is by no means preclusive on Missouri in separate litigation. The failure by Texas to submit evidence in *Hellerstedt* – for whatever reason – cannot possibly have a preclusive effect on Missouri in this separate litigation. Indeed, in extricating the abortion industry from the preclusive effects of *Abbott*, the *Hellerstedt* majority issues a paean to due process. *See* 136 S.Ct. at 2304-09. Under due process, "[i]n no event … can issue preclusion be invoked against one who did not participate in the prior adjudication." *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998). *Hellerstedt* itself acknowledged the weakness of *stare decisis* for holdings reached by a party's waiver of an issue. 136 S.Ct. at 2320. Moreover, even *stare decisis* can be applied so conclusively as to violate due process. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999).[5] Quite simply, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S.

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factual finding on that issue"); *id.* at 2316 (the "upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion").

[5] *See also Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules"); *Hartmarx Corp.*, 496 U.S. at 405 ("Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise") (interior quotation omitted); *Buford v. U.S.*, 532 U.S. 59, 65-66 (2001) ("the fact-bound nature of [a] decision limits the value of appellate court precedent, which may provide only minimal help when other courts consider other procedural circumstances").

661, 678 (1994). The courts here must contend with the evidence that Missouri proffers to support its laws.

In a borderline *ad hominem* attack on anyone with the temerity to question *Roe-Casey* rights, the district court analogizes Missouri's position to wanting to undo *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and revert instead to separate-but-equal under *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Slip Op. at 5 (JA:1752). Again, that confuses the holding with the result. *Brown* does not guarantee that all future equal-protection cases will resolve as *Brown* did. *See*, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 503-05 (1975) (dismissal for lack of standing); *compare*, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003) *with Grutter v. Bollinger*, 539 U.S. 306 (2003) (University of Michigan's undergraduate-admission process violated equal protection, but its law-school admission did not). As the divergent results in the two contemporaneous Michigan cases demonstrate, facts matter. Even under the same holding as to the law, different facts can yield different results.

B. PPFA failed to exhaust its administrative remedies and cannot establish that exhaustion would have been futile.

The district court did not fault PPFA for its failure to exhaust administrative remedies to ameliorate the perceived burdens of the ASC requirements, instead relying on Missouri's opposition to PPFA's premature suit to "belie the prospect of [Missouri's] granting relief voluntarily." Slip Op. at 3 (JA:1750). While plaintiffs need not exhaust administrative remedies that are futile, when that course would be

futile, futility has not – and cannot – be established here because Missouri's practice is to waive requirements that warrant waiver. *See* Slip Op. at 11 (JA:1758) (ASC "is one area of abortion regulation where exemptions have been granted in the past"); *Chorosevic v. MetLife Choices*, 600 F.3d 934, 946 (8th Cir. 2010) ("[i]f a litigation position is enough to show futility, … then the futility exception would swallow the exhaustion doctrine"). Under the circumstances, this Court could reject PPFA's challenge under issue exhaustion principles, *Etchu-Njang v. Gonzales*, 403 F.3d 577, 583 (8th Cir. 2005), even if PPFA's challenge were prudentially ripe. *Cf.* Section I.A, *supra*. If common-law issue exhaustion applies, PPFA cannot raise issues in court that it could have raised in the regulatory waiver process.

Significantly, in *Hellerstedt*, Texas enacted its admitting-privilege legislation to replace an existing regulation, which required "that the physicians who practice at the facility have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." 25 Tex. Admin. Code §139.56(a) (emphasis added); *accord* 42 C.F.R. §416.41(b) (mandating either a written transfer agreement or admitting privileges with a local hospital for ASCs under Medicare); 47 Fed. Reg. 34,082, 34,086 (1982) (mandate "ensure[s] that patients have immediate access to needed emergency or medical treatment in a hospital"). Thus, in *Hellerstedt*, the undue-burden test evaluated the *marginal* impact of the new law

over the regulatory baseline: "there was no significant health-related problem that the *new* law helped to cure." *Hellerstedt*, 136 S.Ct. at 2311 (emphasis added). The Court assumed the regulation's benefit as a baseline against which to evaluate the admission-privilege law. Thus, the Court did not reject admission-privileges *per se*, but rather only the incremental regulatory burden vis-à-vis the resulting incremental health benefit. In the absence of analogous recent data for Missouri, that type of public-health issue would be one best handled by public-health officials, not a federal court serving as "the country's *ex officio* medical board." *Gonzales*, 550 U.S. at 163.

III. THE OTHER *DATAPHASE* FACTORS FAVOR MISSOURI.

PPFA has not made the required showing on the other *Dataphase* factors.

A. PPFA does not face irreparable harm.

Under *Dataphase*, "the absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction." 640 F.2d at 114, n.9; *accord Mid-America Real Estate Co. v. Iowa Realty Co.*, 406 F.3d 969, 972 (8th Cir. 2005) (concluding that a preliminary injunction "must be dissolved if the district court's findings of fact do not support the conclusion that there is a threat of irreparable harm"). Because PPFA does not enjoy *Roe-Casey* rights, it cannot suffer irreparable harm from the allegedly unlawful denial of those rights. *See* Section I.B, *supra*. Even if PPFA's ASC claims were constitutionally and prudentially ripe, *cf.*

Section I.A, *supra*, PPFA cannot establish irreparable injury from the hypothetical injury that it poses here.

"In suits such as this one, which the plaintiff intends as a 'first strike' to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury." *Morales v. TWA*, 504 U.S. 374, 382 (1992). Mere "conjectural injury cannot warrant equitable relief," *id.*, "the injunction must be vacated insofar as it restrains the operation of state laws with respect to … matters" that Missouri has not "threatened to enforce." *Id.* at 383. Federal courts cannot address mere hypotheticals:

> Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to *determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable*.

Id. at 382-83 (emphasis added). And yet that it precisely what the district court did.

B. The balance of harms favors Missouri.

As indicated in the prior section, PPFA does not face irreparable harm. By contrast, the district court has displaced Missouri's sovereign authority to regulate public health and safety. As such, the balance of harms tips decidedly to Missouri.

C. The public interest favors vacating the injunction.

The public-interest criterion favors Missouri because the district court failed to evaluate the merits properly, *see* Section II, *supra*, and because the requested relief intrudes upon governmental authority.

In litigation challenging government action, this last criterion collapses into the merits, 11A WRIGHT & MILLER, FED. PRAC. & PROC. Civ.2d §2948.4 (2d ed. 1995 & Supp.), because there is a "greater public interest in having governmental agencies abide by [applicable] laws that govern their … operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). In such public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Accordingly, the public-interest component can deny plaintiffs relief that otherwise might issue in purely private litigation.

CONCLUSION

This Court should vacate the injunction.

Dated: July 25, 2017

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1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 5,837 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

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I hereby certify that, on July 25, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit via the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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