No. 17A328

IN THE SUPREME COURT OF THE UNITED STATES

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, *et al.*,
Applicants,

v.

JOSHUA D. HAWLEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MISSOURI, *et al.*,
Respondents.

On Application to Vacate the Temporary Stay of the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO APPLICATION TO VACATE TEMPORARY STAY OF INJUNCTION

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INTRODUCTION

The application is premature because the full Eighth Circuit has not yet decided whether to grant a stay of injunction pending appeal. Rather, the Eighth Circuit has entered a temporary stay to preserve the status quo while the en banc court considers the State's motion for stay of injunction pending appeal—as the court clarified yesterday. *See* September 27, 2017 Amended Order (attached as Exhibit A). Applicants can make no plausible showing that the Eighth Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue" a mere *temporary* stay pending the full court's consideration of the stay motion. *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

Even if the application were not premature, it would lack merit. Missouri's regulations of abortion facilities differ critically from the Texas regulations challenged in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Texas imposed inflexible requirements that "neither grandfather[ed] nor provide[d] waivers for any of the facilities that perform abortions." *Id.* at 2315. By contrast, Missouri's Department of Health and Senior Services ("Department") has broad authority to grant waivers or "deviations" from the ambulatory-surgical center ("ASC") requirements. *See* 19 CSR 30-30.070(1).[1] The record evidence shows that Missouri has never blocked an abortion facility from operating by denying a

[1] "CSR" refers to Missouri's Code of State Regulations, available at http://www.sos.mo.gov/cmsimages/adrules/csr/current/19csr/19c30-30.pdf.

requested deviation. In fact, one of Applicants' facilities that performs only medication abortions previously received a deviation that "entirely exempt[ed]" the facility from *all* the ASC requirements of 19 CSR § 30-30.070. A60, ¶ 15.[2]

After the district court issued its preliminary injunction, the State sought a stay of injunction pending appeal on two principal grounds. *First*, no plaintiff satisfied Article III standing or ripeness to challenge Missouri's requirements. Applicant Reproductive Health Services of Planned Parenthood of the St. Louis Region ("RHS"), which operates the Springfield and Joplin facilities, never applied for, or was denied, a deviation from the ASC requirements before filing suit. Thus, any injury from those requirements was entirely hypothetical and speculative, and RHS's challenge to those requirements was unripe. For the same reasons, RHS's challenge to the hospital-relationship requirement was not redressable. Applicant Comprehensive Health of Planned Parenthood Great Plains ("Comprehensive Health"), which operates the Kansas City and Columbia facilities, obtained significant deviations from the ASC requirements in 2010, as part of a comprehensive Settlement with a global release of claims against the State. If that Settlement is enforceable—which it is—it bars all claims by Comprehensive Health (and its affiliated physician, Dr. Yeomans) in this case. If it is not

[2] Citations of the format "A___" refer to the Appendix to the State's stay motion filed in the Eighth Circuit on May 18, 2017. Courtesy copies of all appendices to the stay briefing in the Eighth Circuit will be submitted with this brief.

enforceable, then Comprehensive Health was required, like RHS, to apply for a deviation before filing suit to establish Article III standing and ripen its claims.

Second, at Applicants' urging, the district court plainly erred and disregarded this Court's precedents by refusing even to consider the State's evidence on critical, disputed factual questions regarding the health benefits of Missouri's regulations. The district court held that it "would be impermissible judicial practice" to "accept new material" regarding the health benefits of Missouri's regulations, and that "[t]he disputed issues regarding safety and the alleged benefits of the ASC and hospital affiliation requirements . . . need not be dealt with, I conclude, because controlled by Hellerstedt." A779, A785 n.7. As a result, the district court made no factual findings on essential disputed questions. This holding—that no judicial factfinding is required to conduct an undue-burden analysis after *Hellerstedt*—contradicts both *Hellerstedt* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

The State has raised the same two grounds for reversal in its opening brief in the Eighth Circuit. *See Comprehensive Health v. Hawley*, No. 17-1996, Brief of Appellants, at 25-54 (8th Cir. July 14, 2017). Yet Applicants barely address these grounds. Applicants do not even mention the State's first ground for seeking a

stay—the lack of Article III standing and ripeness.[3] They discuss the second ground only in passing. And they fail almost entirely to discuss the governing standards for applications to vacate. They make no argument that this Court "very likely would" review a future decision of the Eighth Circuit in this appeal, and they make no showing that the Eighth Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U.S. at 1304. The application should be denied.

FACTUAL BACKGROUND

In 2014, Texas imposed rigid, inflexible ASC restrictions on all abortion facilities in the State, forcing numerous abortion facilities to close. *Hellerstedt*, 136 S. Ct. at 2306. By contrast, in 2007, Missouri imposed flexible, waivable ASC requirements on abortion facilities, which forced no clinics to close. Every time an abortion facility in Missouri has sought a deviation from the ASC requirements, it has received a deviation that permitted it to continue to perform abortions.

I. Missouri's ASC and Hospital-Relationship Requirements.

In 2007, the Missouri General Assembly amended its ambulatory surgical center law to include abortion facilities within the definition of "ambulatory

[3] If Applicants attempt to raise arguments regarding Article III standing and ripeness (or any other topic) for the first time in a reply brief, this Court should follow universal practice and decline to consider them. *See, e.g., Bearden v. Lemon*, 475 F.3d 926, 930-31 (8th Cir. 2007); *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1213 (9th Cir. 2017); *Nat'l R.R. Passenger Corp. v. Fraternal Order of Police, Lodge 189 Labor Comm.*, 855 F.3d 335, 339 n.9 (D.C. Cir. 2017).

surgical center." Mo. Rev. Stat. § 197.200(1); *see also Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Drummond*, No. 07-4164-cv-C-ODS, 2007 WL 2811407, at *1 (W.D. Mo. Sept. 24, 2007). The Department has promulgated regulations that address general ambulatory surgical centers, abortion facilities, and birthing centers, separately from each other. *See id.* at *1; 19 CSR §§ 30-30.050 to 30-30.070. The ASC regulations for abortion facilities are less strict than those for general ambulatory surgical centers. *Drummond*, 2007 WL 2811407, at *1. Missouri also requires abortion providers to have surgical privileges at a nearby hospital (the "hospital-relationship requirement"). Mo. Rev. Stat. §§ 188.027.1(1)(e), 188.080, 197.215.1(2); 19 CSR § 30-30.060(1)(C)(4).

Missouri authorizes the Department to grant waivers or "deviations" from the ASC requirements for abortion facilities. 19 CSR § 30-30.070(1). The Department has never prevented any abortion facility from operating by denying an application for a deviation from the ASC requirements. Rather, in considering deviation applications, the Department has worked with facilities to elicit improvements for patient health and safety, while waiving potentially prohibitive requirements. For example, in exchange for other improvements, the Department "entirely exempt[ed]" Comprehensive Health's Kansas City facility from *all* the ASC requirements of 19 CSR § 30-30.070. Appx. A60, ¶ 15. Applicants identify no instance in which an abortion facility was denied a requested deviation.

II. The Prior Settlement with Comprehensive Health.

Missouri's ASC statute was amended in 2007. Comprehensive Health (then called "Planned Parenthood of Kansas and Mid-Missouri, Inc.") promptly sued to block the ASC requirements. *Drummond*, 2007 WL 2811407, at *2. On August 9, 2007, Comprehensive Health requested a deviation from the ASC requirements for its Columbia and Kansas City facilities. *Id.* at *2. Eleven days later—without waiting for a response to its request for deviation—Comprehensive Health filed suit, raising facial and as-applied challenges to the requirements. *Id.* at *5-6.

The *Drummond* court held hearings, at which the Department's official testified that the Department was "willing[] to consider deviations from the [ASC] regulations," and that "[t]he regulations expressly contemplate such deviations." *Id.* at *8. "Such waivers would be granted, he stated, so long as the request proposed an 'acceptable alternative just as safe for the patient.'" *Id.*

Based on this testimony, which the district court credited, the *Drummond* court concluded that "whether application of the [challenged] regulations is a violation of Plaintiffs' constitutional rights depends on what these regulations actually require. This, in turn, depends on whether and to what extent such deviations and/or waivers are permitted by [the Department]." *Id.* The court noted that the Department had "assured the Court" that "a meaningful opportunity" exists to pursue deviations from the regulations under 19 CSR 30-30.070(1). *Id.* at *8,

*10. The court temporarily enjoined enforcement of the new regulations against Comprehensive Health and ordered Comprehensive Health to participate in the Department's deviation process: "Plaintiffs are directed to seek specific deviations and/or waivers from specific requirements within the . . . regulations." *Id.* at *10.

This deviation process resulted in a comprehensive Settlement of Comprehensive Health's claims. A230-49. Pursuant to the Settlement, Comprehensive Health stipulated and agreed exactly how the ASC and hospital-relationship requirements would apply to it. *Id.* In exchange for a series of relatively minor adjustments, the Columbia facility received deviations from many more burdensome requirements of 19 CSR 30-30.070, including requirements that might have required costly renovations of the facility's physical plant. A244-47. Thus, through the deviation process, the Columbia facility continued operating without incurring prohibitive costs for major renovations, while agreeing to physical adjustments that materially advanced patient health and safety.

With regard to the Kansas City facility, the Department granted a deviation from all the physical-plant requirements of 19 CSR 30-30.070, based on Comprehensive Health's agreement that only medication abortions would be

performed there. A233-34, 248. Comprehensive Health agrees that the Settlement "entirely exempt[ed]" the Kansas City facility from ASC requirements. A60.[4]

In addition to receiving significant deviations for its facilities, Comprehensive Health also stipulated as to how the hospital-relationship requirement would apply to it. In the Settlement, Comprehensive Health "represent[ed] that medication abortion at the [Kansas City facility] is provided by a physician licensed to practice in Missouri who has privileges to perform surgery either at Menorah Medical Center or Research Medical Center. This will fulfill the physical presence requirements of 19 CSR 30-30.060 (3) and (3)(A) and (3)(D) and the staff privileges requirement of 19 CSR 30-30.060(1)(C)(4)." A248.

In the Settlement, Comprehensive Health executed a global release of all claims against the State, "whether or not now known or contemplated," "based on or arising out of the allegations in the Lawsuits relating to the licensure of the

[4] Aside from the significant deviations granted to Comprehensive Health in the Settlement, the Department has granted other deviations as well. For example, as Plaintiffs concede, "[d]uring the 2015 licensing process, PPKM requested a variance from the requirements of 19 CSR 30-30.070(2)(N). PPKM requested to be allowed to have three recliners in the recovery room, rather than four recliners. On July 15, 2015, DHSS approved PPKM's variance request." A223; *see also* A253 (July 15, 2015 letter approving Comprehensive Health's request for a deviation from 19 CSR 30-30.070(2)(N) to permit a smaller number of recliners). In contrast to these examples, the record contains no evidence that the Department ever refused any written request for deviation submitted by an abortion facility under 19 CSR 30-30.070(1). As the Department's witness attested, "[i]f Planned Parenthood submits a written request [for deviation] in accordance with 19 CSR 30-30.070(1), DHSS will consider it." A224.

Columbia and Brous [*i.e.*, Kansas City] Centers." A235. Comprehensive Health "specifically acknowledge[d] that it is forever barred from filing suit . . . based on any claim based on or arising out of the allegations in the Lawsuits relating to licensure of the Columbia and [Kansas City] Centers." *Id.*

As a result of the Settlement, both the Columbia and Kansas City facilities obtained licenses and continued operating. While this appeal was pending, the Kansas City facility came into compliance with the Settlement and again received an abortion license, though it does not comply with the ASC requirements.

III. Applicants Failed to Apply for a Deviation Before Filing Suit.

On August 24, 2016, Comprehensive Health's counsel wrote to the Department, arguing that Missouri's ASC and hospital-privileges requirements were unenforceable under *Hellerstedt*, and demanding that the Department confer abortion facility licenses upon the Columbia and Kansas City facilities "without delay." A76. The Department conducted routine licensing inspections of those facilities on October 11 and 19, 2016. A81-82, A83-85. The inspections determined that the facilities had failed to comply with the Settlement and with regulations explicitly left in place by the Settlement. A82, A83-85.

In response to these notices of deficiency, Comprehensive Health's counsel insisted that all requirements—including those to which Comprehensive Health had stipulated in the Settlement—were unenforceable under *Hellerstedt*. A87-89.

The letter notified the Department that Comprehensive Health would not make any attempt to address the deficiencies noted in the October 11 and 19 inspections, since "it seem[ed]" to Comprehensive Health "that trying to remedy these minor issues would be a waste of Planned Parenthood's resources as long as DHSS continues to enforce the physician privileges requirement." A88.

Regarding the Springfield and Joplin facilities, Applicant RHS did not contact the Department—either to apply for an abortion license or seek a deviation—before filing suit. A95. The Department received no communication from RHS regarding those facilities in Springfield and Joplin, and RHS submitted no application for licensure and no request for deviation relating to either the Springfield or Joplin facilities, before this lawsuit was filed. A214-15. Thus, neither Comprehensive Health (as to the Kansas City and Columbia facilities) nor RHS (as to the Springfield and Joplin facility) submitted any application for deviation—other than those granted to Comprehensive Health in the 2010 Settlement—before filing suit.

IV. Proceedings in the District Court.

On November 30, 2016, Applicants filed this lawsuit. A4. On December 12, 2016, Applicants filed a motion for preliminary injunction against the ASC and hospital-relationship requirements. A22-23. On January 10, 2017, the State filed both its opposition to the motion for preliminary injunction and a motion to dismiss

the complaint. A196, A172, A174. The State's motion to dismiss argued, *inter alia*, that the Plaintiffs lacked standing and their challenges to the ASC requirements were not ripe because no Plaintiff had applied for a variance under 19 CSR 30-30.070(1); that their challenges to the hospital-relationship requirement were not redressable because their challenges to the ASC requirements were not ripe; and that the Settlement barred Comprehensive Health from asserting any claims in this case. A181-89. The State incorporated these arguments into its opposition to the request for preliminary injunction. A201-02.

Thereafter, the parties submitted voluminous briefing and extensive written evidence, including numerous factual and expert declarations. These included extensive written evidence on critical disputed factual issues such as (1) the physical risks of abortion procedures in Missouri, (2) the manner in which Missouri's regulations advance patient health and safety, and (3) the putative burdens on women seeking abortions from the State's regulations. *See* A256, A289, A635, A682, A718, A725, A769, A772, A800, A806. The State's submissions included extensive, Missouri-specific evidence regarding the health benefits of the State's requirements, and extensive, Missouri-specific evidence demonstrating the regulations' minimal impact on access to abortion in Missouri. *See, e.g.*, A256-72, A682-93, A718-28, A769-71, A800-07.

On March 10, 2017, the district court denied the State's motion to dismiss on the basis of Article III standing. A729. On April 19, 2017, the district court issued a Memorandum and Order advising the parties that it would grant a preliminary injunction against enforcement of the ASC requirements and the hospital-relationship requirement. A775. On May 2, 2017, the district court entered its order granting a preliminary injunction. A792.

V. Proceedings in the Court of Appeals.

On May 18, 2017, the State applied for a stay of injunction pending appeal in the Eighth Circuit and requested a temporary stay pending the court's ruling on the stay motion. The State argued that the district court erred by holding that Applicants satisfied Article III's requirements of standing and ripeness, and by refusing even to consider the State's factual evidence on the health benefits of its regulations. 8th Cir. Stay App. (May 18, 2017), at 5-20. On July 14, 2017, a divided panel of the Eighth Circuit denied the stay application.

On July 24, 2017, the State submitted a request for en banc consideration of the stay motion, arguing that the district court erred by finding Article III standing and ripeness and by refusing to consider the State's evidence. The State again requested a temporary stay to preserve the status quo while the en banc Court considered the stay motion. State's En Banc Pet'n (July 24, 2017), at 7-17.

On September 8, 2017, the State filed a letter notifying the Eighth Circuit of an imminent change in the status quo as a result of the preliminary injunction. On September 12, 2017, the full Eighth Circuit granted the State's request for en banc consideration of the stay motion and vacated the panel's order denying a stay of injunction pending appeal. On September 15, 2017, faced with an imminent change in the status quo, the Eighth Circuit entered a temporary stay of the injunction pending the full court's consideration of the State's stay motion.

In their September 22 application to this Court, Applicants professed uncertainty whether the Eighth Circuit's September 15 order "*is* that Court's en banc order granting the stay of the preliminary injunction or whether it is an administrative stay pending its consideration of the stay denial en banc." Appl. 12 n.8. On September 27, the en banc Eighth Circuit issued an order clarifying that the September 15 order constitutes a temporary stay pending en banc consideration of the stay motion, not a stay of injunction pending appeal. That clarifying order states: "The request filed July 24, 2017, for a temporary stay of the district court's preliminary injunction pending en banc consideration of the motion for stay pending appeal has been considered by the court en banc and is granted." *See* Ex. A. As of today, the full Eighth Circuit has not yet ruled on the State's motion for stay of injunction pending appeal.

While the stay proceedings were pending, on August 18, 2017, Applicants sought an indefinite stay of merits briefing in the Eighth Circuit, over the State's objection, and after the State's opening brief was filed. A divided panel of the Eighth Circuit granted this request to stay of merits briefing on September 9, 2017.

ARGUMENT

This Court will vacate a stay entered by the Court of Appeals only when three criteria are satisfied: (1) the case "could and very likely would be reviewed here upon final disposition in the court of appeals"; (2) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay"; and (3) "the rights of the parties to [the] case pending in the court of appeals . . . may be seriously and irreparably injured by the stay." *Coleman*, 424 U.S. at 1304; *see also Western Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (same).

"A stay granted by a court of appeals is entitled to great deference from this Court because the court of appeals ordinarily has a greater familiarity with the facts and issues in a given case." *Garcia-Mir* v. *Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers). "Only the weightiest considerations . . . would warrant" an order "to set aside the stay issued by the Court of Appeals." *Bonura* v. *CBS, Inc.*, 459 U.S. 1313, 1313 (1983) (White, J., in chambers).

This deference is maximal when the court of appeals has acted en banc. The power to "dissolve the stay entered by the Court of Appeals" is "to be exercised with the greatest of caution and should be reserved for exceptional circumstances," and "such deference is especially appropriate when the Court of Appeals has acted en banc." *O'Connor v. Board of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1304 (1980) (Stevens, J., in chambers) (quotation marks omitted).

I. This Court Is Very Unlikely to Review a Future Decision of the Eighth Circuit Reversing the District Court's Injunction.

First, this Court has no jurisdiction to vacate a stay of injunction pending appeal unless the case "could and very likely would be reviewed here upon final disposition in the court of appeals." *Coleman*, 424 U.S. at 1304. This requirement is jurisdictional because the Court "may issue writs only in aid of its jurisdiction." *Id.* at 1303 (citing 28 U.S.C. § 1651). Yet Applicants make no argument that this Court "very likely would" review the Eighth Circuit's future decision in this appeal. The application should therefore be rejected.

Moreover, no showing is possible that this Court "very likely would" review a future decision of the Eighth Circuit reversing the district court's injunction. In its stay motion to the Eighth Circuit, the State argued that the district court's injunction was likely to be reversed for two reasons: (1) Plaintiffs lacked Article III standing and their claims were unripe because no Plaintiff applied for or was denied an available variance or "deviation" before filing suit, and Comprehensive

Health's claims were barred by the 2010 Settlement, 8th Cir. Stay App., at 5-13; and (2) the district court erred by refusing even to consider the State's evidence on the critical, disputed factual questions of the health benefits advanced by Missouri's unique regulations. 8th Cir. Stay App., at 13-20. The State raised the same arguments in its opening brief. 8th Cir. Br. of Appellants, at 25-54.

Neither of these issues presents a question that this Court "very likely would" review if the Eighth Circuit decides these questions in the State's favor. First, the district court's reasoning on both questions contradicts clear guidance from this Court. Second, neither question involves a split of authority or question of exceptional importance that would warrant this Court's intervention.

A. Applicants lack standing and their claims are unripe because they failed to have recourse to the State's flexible deviation procedure, and the Settlement bars all of Comprehensive Health's claims.

Standing requires "that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). Article III standing is lacking where "the dispute is purely hypothetical and the injury is speculative." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1137 (9th Cir. 2000) (en banc). Further, "in measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Id.* at 1139 (quotation omitted).

The ripeness doctrine "prevent[s] courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also . . . protect[s] 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), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "The ripeness doctrine is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003) (quotation omitted).

Where a regulatory regime provides for variances, a constitutional challenge to those restrictions is not ripe until the challenger has sought—and been denied—a variance. "[W]here 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). By having recourse to a deviation process in advance of litigation, "a mutually acceptable solution might well be reached . . . thereby obviating any need to address the constitutional questions." *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297 (1981). This principle has been applied in many contexts, including in facial challenges to

regulations. *See, e.g.*, *McCarthy* v. *Ozark Sch. Dist.*, 359 F.3d 1029, 1037 (8th Cir. 2004); *State of Mo. ex rel. Mo. Highway & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1338 (8th Cir. 1997); *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1273 (8th Cir. 1994).

As noted above, Missouri's regulations explicitly authorize variances or "deviations" from the ASC requirements. 19 CSR § 30-30.070(1). Yet no plaintiff applied for a deviation before filing this federal lawsuit. *See* A87-88; A214-15; A224. In fact, RHS had never applied for an abortion license for its facilities in Springfield and Joplin, let alone requested a deviation. A214-15, A254-55. RHS simply filed suit without having any recourse to the Department's regulatory procedures. And though Comprehensive Health had applied for abortion licenses for the Columbia facility, it did not request any new deviation for those facilities in connection with those applications. A244. Rather, it simply insisted that the ASC requirements do not apply to it at all. A76-79, A87-88. Because no Applicant applied for a deviation before filing suit, any alleged injuries from the ASC requirements were hypothetical and speculative, and all claims against the ASC requirements were unripe.

Moreover, all Comprehensive Health's claims are independently barred by the global release of claims it executed in the 2010 Settlement. A230-49. Through the Settlement, Comprehensive Health applied for and obtained

significant deviations for its Columbia and Kansas City facilities, in exchange for a global release of claims against the State. A244-45. Comprehensive Health may now wish to evade the Settlement, but "[t]he universal rule in this country is that a favorable change in the law does not afford a settling party a chance to repudiate an otherwise binding settlement to which it is contractually bound." *Kinder v. Northwestern Bank*, No. 1:10-cv-405, 2013 WL 1914519, at *2 (W.D. Mich. April 15, 2013); *see also SEC v. Conradt*, 309 F.R.D. 186, 188 (S.D.N.Y. 2015) (holding that the federal rules are "not intended to allow one side of a settlement agreement to obtain the benefits of finality while placing the other side at risk that future judicial decisions will deprive them of the benefit of their bargain"). Because the Settlement is enforceable—a question on which Applicants have taken shifting positions throughout this case—Comprehensive Health is not proper party to this lawsuit at all. But if the Settlement were not enforceable, Comprehensive Health, like RHS, should have applied for a new deviation to ripen its claims.

In rejecting the State's arguments on standing, the district court described its role as providing "broad guidance to the parties" on disputed constitutional questions *before* the deviation process: "Giving broad guidance to the parties but not detailed review of specific issues is best suited for the courts." A732. The district court reasoned that "prospects [for the deviation process] would be better with general guidance than by forcing plaintiffs now into making formal

applications for deviations and into negotiations without mutual understanding of the applicable law." A733 n.3. "Advising the parties promptly whether or not the ASC package of regulations applies in Missouri would give them necessary guidance [for the deviation process]." A732. This understanding of the judicial role—as one of "advising" the parties on the law *before* they undergo a regulatory process that could obviate some or all of their constitutional dispute—turns Article III on its head. "[I]t is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give *advisory* opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (emphasis added).

Further, because Applicants lacked standing and their challenges to the ASC requirements were unripe, their challenges to the hospital-relationship requirements were not redressable. "The irreducible constitutional minimum of standing" includes "redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (quotation marks omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A fatal "obstacle to establishing traceability and redressability" arises "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). Therefore, when two distinct regulations prohibit a party from engaging in

particular conduct, that party must assert a valid challenge to both regulations to establish redressability. *Id.* "[W]here an unchallenged regulation would prevent a plaintiff from [exercising her asserted rights] even if we struck down the challenged regulation, we have found redressability lacking." *Doe*, 713 F.3d at 756. *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, 736, 740 (D.C. Cir. 2008); *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421, 430 (4th Cir. 2007); *Nuclear Information Resource Service v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 955 (9th Cir. 2006).

In the district court, Applicants repeatedly asserted that they were unable to satisfy either the ASC requirements or the hospital-relationship requirement at any of their facilities, and they make the same allegation as to the Springfield and Joplin facilities in their application. Appl. 14. Thus, each of the two requirements poses "an adequate and independent" obstacle to the Applicants' ability to perform abortions at those facilities. *Iota Xi Chapter*, 566 F.3d at 148. But Applicants lacked standing and ripeness to challenge to the ASC requirements, because they did not apply for deviations under 19 CSR § 30-30.070(1). For the same reason, their challenge to the hospital-relationship requirement was not redressable.

Applicants have argued that the State's deviation process is "futile," but these arguments have no merit. First, Applicants have contended that, "[w]hen

faced with waiver applications for the Kansas City and Columbia health centers in 2007, DHSS refused even to respond." 8th Cir. Stay Opp. (May 26, 2017), at 15-16 (citing *Drummond*, 2007 WL 2811407, at *2). This statement is incorrect. In *Drummond*, Comprehensive Health filed suit and sought a TRO without waiting for a response to its deviation applications from the Department—it sued eleven days after submitting the written requests. *Drummond*, 2007 WL 2811407, at *2. Then, after hearing testimony, the *Drummond* court concluded that the Department did in fact offer a meaningful deviation process, and it ordered Comprehensive Health to pursue that deviation process. *Id.* at *8, *10. This deviation process resulted in the 2010 Settlement, which afforded Comprehensive Health much of the same relief granted by the preliminary injunction that they are now seeking to reinstate. *See* Appl. 4 n.2, 25. Far from showing the futility of the Department's deviation process, *Drummond* demonstrates its efficacy.

Second, Applicants have contended that it would be "futile" to pursue the deviation process because the hospital-relationship requirement presents an independent bar to licensure. 8th Cir. Stay Opp. at 16. This argument has no merit. When there exist two independent legal obstacles to obtaining a license, Article III requires Plaintiffs to bring valid challenges against *both* of them to obtain relief. *See Doe*, 713 F.3d at 756. "[A] plaintiff must establish that he has standing to challenge each provision of an ordinance by showing that he was

injured by application of those provisions." *Covenant Media*, 493 F.3d at 430 (citing cases). Applicants must demonstrate that they suffered a separate injury-in-fact from *both* the ASC requirements *and* the hospital-relationship requirement. *Id.* They cannot rely on alleged injury-in-fact from the hospital-relationship requirement to bootstrap standing to challenge the ASC requirements. Applicants' alleged injury-in-fact from the hospital-relationship requirement "does not provide [them] a passport to explore the constitutionality of every provision" of Missouri's abortion-facility regulations. *Id.*

Finally, Applicants argue that *Hellerstedt* rejected the notion that plaintiffs must "proceed in piecemeal fashion" in challenging abortion regulations, Appl. 21 (quoting 136 S. Ct. at 2319). But this statement referred to Texas's arguments on *severability*, not to Article III standing. *See* 136 S. Ct. at 2319. Nothing in *Hellerstedt* purported to alter the requirements of Article III standing.

B. The district court clearly erred by refusing to consider the State's evidence on critical, disputed factual issues.

In granting the preliminary injunction, the district court ruled that it would not consider the State's evidence regarding the health risks from abortion in Missouri and the manner in which the State's regulations promote women's health and safety, because it believed *Hellerstedt* dictated the outcome of such factual questions. *See* A778-80. The district court noted that "[f]ilings of the parties have added voluminous material to the record, largely directed toward the issue of the

dangerousness of abortions," as well as whether "[s]urgery center requirements are needed for safety." A778. But the court categorically refused to consider this evidence: "For me to accept 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." A779. "The disputed issues regarding safety and the alleged benefits of the ASC and hospital affiliation requirements . . . ***need not be dealt with***, I conclude, because controlled by Hellerstedt." A785 n.7 (emphasis added). The district court made no factual findings on these disputed issues.

This refusal to consider the State's evidence contradicted both *Hellerstedt* and *Casey*. First, in *Hellerstedt*, this Court repeatedly instructed the lower courts to consider "the record evidence" in ascertaining whether health-and-safety regulations of abortion facilities impose an undue burden on the right to abortion. *Hellerstedt*, 136 S. Ct. at 2311, 2312, 2313, 2316. *Hellerstedt* made clear that such challenges necessarily require a fact-intensive inquiry. *See id.* at 2301-03 (relying on the detailed factual findings of the district court about the geographic availability and safety of abortion procedures in Texas). *Hellerstedt* emphasized that, "when determining the constitutionality of laws regulating abortion procedures," this Court "has placed considerable weight upon evidence and argument presented in judicial proceedings." *Id.* at 2310. And *Hellerstedt* stated that the district court had "applied the correct legal standard" by "consider[ing]

evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony," in order to "weigh[] the asserted benefits against the burdens." *Id.* at 2310; *see also id.* at 2311, 2312, 2313, 2316 (repeatedly relying on "the record evidence"). Thus, by concluding that *Hellerstedt* foreclosed it from considering "the record evidence," *id.*, the district court drew precisely the wrong conclusion. *Hellerstedt* does not foreclose such consideration; it mandates it.

Similarly, in the aftermath of *Casey*, this Court made clear that the lower courts are required to consider factual evidence and make specific factual findings when applying the undue-burden analysis to abortion regulations. For example, after *Casey*, the Seventh Circuit addressed a challenge to Wisconsin's 24-hour waiting period prior to abortions. *Karlin v. Foust*, 188 F.3d 446, 483-85 (7th Cir. 1999). Wisconsin argued that, because *Casey* had upheld "a virtually identical twenty-four hour waiting period requirement in Pennsylvania's abortion statute," the plaintiffs' factual evidence must be disregarded. *Id.* at 483-84.

The Seventh Circuit disagreed, holding that "plaintiffs are not precluded from challenging a waiting period provision nearly identical in all respects to the one upheld in *Casey*." *Id.* The Seventh Circuit reasoned that *Casey* (just like *Hellerstedt*) emphasized that its decision was based on the specific factual record before it, and thus *Casey* instructed the lower courts to consider the specific factual records before them in considering such future challenges: "*Casey* emphasized that

its conclusion that the waiting period did not constitute an undue burden was based 'on the record before us, and in the context of this facial challenge.'" *Karlin*, 188 F.3d at 484 (quoting *Casey*, 505 U.S. at 887).

Karlin noted that both the principal dissents in *Casey* had also stated that future challenges to similar provisions would require specific consideration of future factual records. *See id.* The Seventh Circuit also observed that two Justices of the *Casey* plurality—Justices O'Connor and Souter—had explicitly stated that *Casey* required lower courts to consider the specific factual record before them in deciding future challenges to similar provisions. *Id.* at 484-85. Citing *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013 (1993), the Seventh Circuit observed that "Justice O'Connor, joined by Justice Souter, wrote separately to point out that a lower court must undertake an individualized factual inquiry based on the record before it in determining whether the challenged abortion restriction imposes an undue burden." *Karlin*, 188 F.3d at 484. Justice O'Connor had stated: "[T]he joint opinion [in *Casey*] specifically examined the record developed in the district court in determining that Pennsylvania's informed-consent provision did not create an undue burden. . . . I believe the lower courts should have undertaken the same analysis." *Schafer*, 507 U.S. at 485 (citation omitted).

Karlin thus correctly concluded that *Casey* called for the consideration of the specific factual record in future cases—even for provisions facially similar to those

addressed in *Casey*. *Karlin*, 188 F.3d at 485. *Karlin* held that "*Casey* does not foreclose plaintiffs from bringing facial challenges to abortion regulations in other states that are similar to those found constitutional in *Casey*," *id.*, and that the court was therefore required to consider "whether plaintiffs have proved that the factual circumstances in Wisconsin are such that the waiting period operates to impose an undue burden on women seeking abortions in Wisconsin." *Id.* "Indeed our conclusion here is the only one which affords Wisconsin women a fair shake because . . . not all states are like Pennsylvania." *Id.*

Because the district court erroneously refused to consider the State's evidence, the injunction must be reversed and the case remanded. When a district court erroneously fails to consider entire categories of relevant evidence, the case should be sent back to the district court for proper fact-finding. *See, e.g.*, *Burlington Northern R. Co. v. Bair*, 957 F.2d 599 (8th Cir. 1992); *see also Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1329 (Fed. Cir. 2014); *Local P-9, United Food & Commercial Workers Int'l Union, AFL-CIO v. George A. Hormel & Co.*, 776 F.2d 1393, 1396 (8th Cir. 1985).

C. A future Eighth Circuit decision reversing the district court on these grounds would not warrant this Court's review.

If the Eighth Circuit rules in the State's favor on either of the two grounds for reversal raised in the State's stay motion and on appeal, it is not "very likely" that this Court would review the decision. First, for the reasons stated above, the

district court plainly erred and disregarded this Court's precedent on both issues. Second, neither holding would create a split of authority or present a question of exceptional importance. *See* Sup. Ct. R. 10.

Applicants make no showing—in fact, they make no argument—that this Court "very likely would" review a future decision of the Eighth Circuit in this case. If the Eighth Circuit decides that Applicants lacked Article III standing and ripeness because they failed to apply for an available deviation before filing suit, this holding will constitute a straightforward application of this Court's decisions in *Suitum* and *Hodel*. If the Eighth Circuit holds that Comprehensive Health's claims are barred by the global release in the Settlement, that holding will constitute a routine application of contract law. If the Eighth Circuit decides that Applicants' challenges to the hospital-relationship requirement were not redressable because they failed to mount a valid challenge to the ASC requirements, that decision will comport with decisions of the Fourth, Ninth, and D.C. Circuits endorsing the same principle—and Applicants have never cited any case law to the contrary. If the Eighth Circuit decides that the injunction must be reversed and the case remanded to consider the State's evidence, the judgment will follow clear guidance provided by this Court in the specific context of undue-burden challenges to abortion regulations. No such future decision will warrant this Court's review.

II. Applicants Make No Showing that the Eighth Circuit Was "Demonstrably Wrong in its Application of Accepted Standards."

Though the precise standards are unclear, the Eighth Circuit and other federal appellate courts have granted temporary stays when there are important issues at stake and a significant change to the status quo is likely before the court can address the underlying stay motion in an orderly fashion. *See, e.g.*, *Brady v. Nat'l Football League*, 638 F.3d 1004, 1005 (8th Cir. 2011) (citing *In re Grand Jury Proceedings*, 841 F.2d 230, 232 (8th Cir. 1988)); *Cobell v. Norton*, No. 03-5262, 2004 WL 603456, at *1 (D.C. Cir. 2004); *Arnold v. Garlock, Inc.*, 278 F.3d 426, 433 (5th Cir. 2001); and *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1137 (D.C. Cir. 1988)). The Eighth Circuit has rejected the position, urged by Applicants below, that such temporary stays are reserved solely for "emergency situations." *Compare Brady*, 638 F.3d at 1005 (holding that the administrative stay was entered "to give the court sufficient opportunity to consider the merits of the motion for a stay pending appeal"); *with id.* at 1005-06 (Bye, J., dissenting) (urging that a temporary stay should be granted only in "emergency situations").

Applicants can make no showing that the Eighth Circuit was somehow "demonstrably wrong in its application of accepted standards" in granting the temporary stay pending the full court's consideration of the stay motion. *Coleman*, 424 U.S. at 1304. Because a significant change in the status quo was imminent,

the Eighth Circuit did not err in granting a temporary stay to allow it to consider the underlying stay motion in an orderly fashion.

Moreover, to the extent that Applicants may argue that a request for temporary stay should be governed by a preview of the four equitable factors that govern stays pending appeal, Applicants cannot show that the temporary stay was "demonstrably wrong" under those factors. In addressing the stay motion, the Eighth Circuit will consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). "The first two factors of the traditional standard are the most critical." *Id.*

Here, Applicants make no showing—again, they make no argument—that the Eighth Circuit will be "demonstrably wrong" in its application of these standards if it grants a stay pending appeal. *Coleman*, 424 U.S. at 1304. For the reasons stated above, the Eighth Circuit can reasonably conclude that the State has made a strong showing of likelihood of success on the merits, because Article III standing and ripeness were absent, Comprehensive Health's claims were barred by the Settlement, and the district court erred by refusing to consider the State's evidence on key factual issues. Similarly, the Eighth Circuit can readily determine

that the State had made a showing of irreparable injury, because "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Because the State made a compelling showing on the "most critical" factors, there will be no "demonstrabl[e]" error if the Eighth Circuit decides to grant a stay.

III. Applicants Fail to Establish that Their Rights "May Be Seriously and Irreparably Injured by the Stay."

Applicants also fail to establish that their rights "may be seriously and irreparably injured by the stay." *Coleman*, 424 U.S. at 1304. First, because the stay is merely a temporary stay pending en banc consideration of the State's stay motion, it is necessarily of limited duration. Considering that Applicants delayed five months after *Hellerstedt* before filing suit, any claim of "serious and irreparable injury" from this temporary stay is implausible.

Moreover, Applicants will be unable to make the requisite showing if the Eighth Circuit stays the injunction pending appeal. First, it is axiomatic that the State will suffer irreparable harm if the stay is vacated. As noted, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (2012) (Roberts, C.J., in chambers). "[I]t is clear that a state suffers irreparable injury

whenever an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).

Applicants' claim of irreparable injury hinges on their argument that Missouri's regulations supposedly have prevented abortions in three additional health centers—Columbia, Springfield, and Joplin. Appl. 22. This is incorrect. It is entirely unclear whether or to what extent the ASC requirements will apply to the Springfield and Joplin facilities, because RHS has never applied for a deviation for those facilities. And the Columbia facility is governed by the binding Settlement to which Comprehensive Health voluntarily stipulated in 2010. Further, even if the Settlement were not enforceable, Comprehensive Health would have been required to apply for a deviation before filing suit.

Applicants claim that there is no medical benefit to the State's regulations. Appl. 19-22. But Applicants themselves urged the district court to disregard the extensive factual record and make no factual findings on these questions. Applicants commit the same legal error in their application to this Court, urging the Court to presume as a matter of law that the State cannot establish health benefits from Missouri's unique regulations, rather than requiring the district court to consider the evidence and make factual findings on the disputed issues. *Id.*

Applicants assert that "the record below is entirely consistent with the record before the Court in *Whole Women's Health*," Appl. 19, but this claim is almost

entirely *ipse dixit*. In fact, the State submitted voluminous evidence that was not presented in *Hellerstedt*, including unique and deeply troubling facts about the provision of abortion services in Missouri in particular.[5] At Applicants' urging, the district court refused even to consider this evidence. Moreover, the factual record in *Hellerstedt* was notably one-sided, because both the district court and this Court found that "Texas provided no credible experts to rebut" the plaintiffs' experts. *Hellerstedt*, 136 S. Ct. at 2317 (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 680 n.3 (W.D. Tex. 2014)). No such lopsidedness is present here.

Applicants argue that Missouri's regulations burden access to abortion services by increasing driving distances for women seeking abortions. Appl. 5-6, 18-19. This argument is unpersuasive because any delays in licensing these facilities are attributable to other factors. The Springfield and Joplin facilities have

[5] For example, the State's evidence showed that: (1) the hospitalization rate for major complications at RHS's St. Louis facility from 2012-16 was six times greater than nationwide figures provided by Applicants' expert in this case, A719-A720, A800-A805; (2) the failure rate for medication abortions at the St. Louis facility was almost three times greater than Applicants' expert predicted for medication abortions nationwide, A720, A800-A805; (3) for at least fifteen years, Applicants have systematically ignored their statutory obligation under Mo. Rev. Stat. § 188.052.2 to file complication reports with the State when a patient suffers post-abortion complications, and Applicants have *never* filed such a report, resulting in systematic underreporting of abortion complications in Missouri, A769-A771; (4) review of Applicants' literature also reveals systematic underreporting of abortion complications and methodological flaws in the principal studies relied on, A638-A655; and (5) studies published after *Hellerstedt* have confirmed that state health-and-safety regulations of abortion facilities have no discernible impact on access to abortion, A684-A686; among many other examples. The record in *Hellerstedt* contains no analogues to this evidence.

not received licenses because RHS failed to have recourse to the State's flexible deviation procedure, or even apply for a license, before filing suit. The Columbia facility's licensure is governed by a separate Settlement that provides detailed criteria unique to that facility, and includes a global release preventing Comprehensive Health from participating in this lawsuit. The Kansas City facility's licensure is also governed by the Settlement, and that facility received its license while this appeal was pending. Moreover, the State submitted empirical evidence to the district court demonstrating that Applicants had overstated the impact on abortion access if the disputed facilities were operating, including post-*Hellerstedt* studies indicating that Applicants' opening of new clinics would have no significant impact on access to abortion. *See, e.g.*, A268-72, A684-86.

Applicants also contend that the State's interest in enforcing the challenged requirements is attenuated because "[t]he injunction's narrow scope mirrors the oversight DHSS agreed to in a previous settlement agreement." Appl. 11. This argument misconstrues the State's interest in enforcing the requirements of 19 CSR § 30-30.070. Those provisions impose a flexible baseline against which the Department can ensure that abortions are provided in the safest possible physical facilities, without unduly hampering those facilities' ability to operate. The injunction would replace that flexible baseline with no baseline at all.

For example, if Plaintiff RHS's facilities in Springfield and Joplin were to apply for deviations from certain ASC requirements—which RHS has never done—the flexible baseline provided by 19 CSR § 30-30.070(1) would allow the Department to work with those facilities to ensure that all feasible improvements were made to the physical plants, to render those facilities as safe as possible for patients, while waiving requirements that might be unnecessary and prohibitive. This is exactly what happened in the prior negotiations with Comprehensive Health that resulted in the Settlement—the deviation process produced a negotiated compromise that elicited feasible improvements rendering the Kansas City and Columbia facilities substantially safer for patients, while waiving prohibitive requirements. *See* A244-45. The injunction would deprive the Department of authority to seek even modest physical improvements from facilities requesting licenses, and it would eviscerate the Department's oversight of the physical safety of abortion facilities. In the process, the injunction would impose a regulatory blackout on *all* abortion providers in Missouri—including those whom Applicants' own expert has described as "the shoddiest operators." A643.[6]

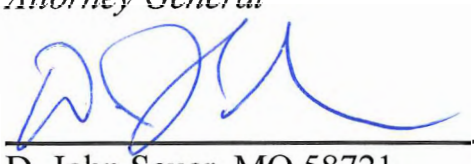
[6] Further undercutting the Applicants' claim of irreparable harm is the fact that they obtained an indefinite stay of the merits briefing in the Eighth Circuit, over the State's objection. *See* 8th Cir. Order (September 5, 2017). "Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe* v. *Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers). Here, by contrast, Applicants have caused an indefinite *delay* of "adjudication on the merits." *Id.*

CONCLUSION

This Court should deny the application to vacate the temporary stay of injunction entered by the Eighth Circuit.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General



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September 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2017, I served a true and correct electronic copy of the forgoing by electronic mail on the Clerk of the Court and counsel for Applicants. In addition, on September 28, 2017, I caused to be submitted the original and two hard copies of the foregoing to the Clerk of the Court and one hard copy of the foregoing to counsel for Applicants by overnight delivery of commercial carrier. Service on counsel for Applicants was effected on:

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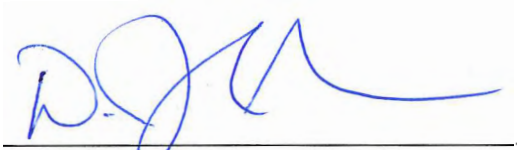

D. John Sauer

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1996

Comprehensive Health of Planned Parenthood Great Plains, on behalf of itself, its patients, physicians and staff, et al.

Appellees

v.

Josh Hawley, in his official capacity as Attorney General of the State of Missouri and Dr. Randall Williams, in his official capacity as Director of Department of Health and Senior Services

Appellants

Daniel Knight, in his official capacity as Boone County Prosecutor, et al.

Foundation for Moral Law and Eagle Forum Education and Legal Defense Fund

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:16-cv-04313-FJG)

ORDER

This order amends and corrects the previous order in this case, dated September 15, 2017.

The request filed July 24, 2017, for a temporary stay of the district court's preliminary injunction pending en banc consideration of the motion for stay pending appeal has been considered by the court en banc and is granted.

September 27, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans