In the Supreme Court of Ohio

WOMEN'S MED CENTER OF DAYON,	:	Case No. 2019-0656
	:	
	:	On Appeal from the
Appellant,	:	Montgomery County
	:	Court of Appeals,
v.	:	Second Appellate District
	:	
STATE OF OHIO DEPARTMENT OF HEALTH,	:	Court of Appeals Case No. CA-028132
	:	
Appellee.	:	

APPELLEE STATE OF OHIO DEPARTMENT OF HEALTH'S MEMORANDUM OPPOSING JURISDICTION

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INTRODUCTION

The Court should not review this case, because it was rightly resolved on a threshold jurisdictional issue—one that the jurisdictional memorandum fails to address.

All outpatient surgical clinics must be licensed "ambulatory surgical facilit[ies]." To obtain a license, a clinic generally must have a written transfer agreement with a hospital. But the Director of the Department of Health may grant a "variance" from the transfer-agreement requirement. The transfer-agreement requirement and the variance options are decades old; they began in regulations, O.A.C. 3701-83-19(E), *id.* 3701-83-14(F), and they are now contained in statutes, R.C. 3702.303-.304.

The appellant—Women's Med Center of Dayton, which goes by "WMCD"—is an outpatient surgical clinic. It admits that it does not have a transfer agreement. But it says that the Director should have granted it a variance, and seeks to argue as much in this administrative appeal from its license revocation.

The Court should deny review. As an initial matter, WMCD's suit fails on a threshold issue that the lower courts relied on, but that WMCD's jurisdictional memorandum never addresses: the Director has complete discretion to grant or withhold variances, and his denial of a variance is not subject to judicial review. Parties may appeal an administrative decision only when some statute gives them a right to do so. The variance statute expressly states that "the director's determination is final." R.C. 3702.304(A)(1) & (C); see also O.A.C. 3701-83-14(F). The appeals court explained that

the "variance issue was governed by Ohio Adm. Code 3701-83-14 and R.C. 3702.304 and was not a judicially reviewable determination." *Women's Med Center of Dayton v. Ohio Dep't of Health*, 2019-Ohio-11456 ("App. Op."), ¶55. WMCD never explains how the lower courts erred, or why their decisions are worthy of review, on that point. Without that, the Court cannot even reach the other issues on which WMCD seeks review.

Those issues do not warrant review anyway. The first asks whether the Director violated state law by denying the variance without holding a hearing. The Court should not accept that issue, since the courts below are the only ones to have considered it. So even if WMCD's argument had merit, it would be worth letting the issue percolate a bit longer. And the argument lacks merit: under the Department's regulations, variance denials are "final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code." O.A.C. 3701-83-14(F).

WMCD also seeks review of the question whether the General Assembly passed R.C. 3702.304—the statute governing variances—in violation of the one-subject rule. *See* Ohio Const., Art. II, § 15(D). The Court should not review that issue either. Just last year, this Court declined to reach a similar one-subject attack on the transfer-agreement statute, explaining that when the Department acted based on both the statute and the earlier regulation, it was "not necessary to reach those constitutional issues" regarding the statute. *Capital Care Network of Toledo v. Ohio Dep't of Health*, 2018-Ohio-440, ¶34. The same is true here. Indeed, even the *possibility* that the regulation might moot the

statutory question would make this a bad vehicle for reviewing the question. Here, because both the variance denial and the license revocation are fully justified under the regulations alone, the Court should not reach the statute's constitutionality.

FACTS

1. Since 1996, Ohio law has required all ambulatory surgical facilities—regardless of the type of procedures they offer—to have a written transfer agreement with a hospital. *See* R.C. 3702.303(A), O.A.C. 3701-83-19(E). The requirement protects patient safety by ensuring that patients can be smoothly transferred to a hospital in case of an emergency at the clinic. For that reason, these requirements are common across medical contexts. For example, federal law requires Medicare-approved facilities to have a transfer agreement as a condition for coverage. 42 C.F.R. § 416.41(b).

Ohio regulatory and statutory law allow ambulatory surgical facilities to seek a waiver or "variance" from the Director of the Department of Health. See O.A.C. 3701-83-14; R.C. 3702.303(C)(2). The regulation provides that "[t]he refusal of the director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code." O.A.C. 3701-83-14(F). The statute says that the "director's determination is final." R.C. 3702.304(A)(1); *id.* 3702.304(C). This Court recently recognized that "the General Assembly codified the rule" when it enacted the transfer-agreement statute, so both the 1996 rules and 2013 statutes are good law. *See Capital Care*, 2018-Ohio-440, ¶¶3, 27, 33.

2. WMCD is an outpatient surgical clinic. It did not have a transfer agreement with a hospital, so it asked the Director for a variance. *See* WMCD Hearing Ex. 8.

The Director first denied the variance request in a June 2015 letter. WMCD Hearing Ex. 10. That denial explained, over several paragraphs, the Director's reasons why he did not think that a variance would protect patient health and safety.

WMCD responded by updating and renewing its variance request. The Director denied the renewed request too, this time in a letter dated September 25, 2015. *See* WMCD Hearing Ex. 11. Again, the Director detailed why he did not think that a variance would protect patient health and safety. He also explained, citing the statute and regulation, that WMCD had no right to appeal his variance denial.

Separately, on the same date, the Director notified WMCD that he proposed to revoke and not renew WMCD's health care facility license. *See* WMCD Hearing Ex. 12. WMCD timely requested a hearing on that notice, and by agreement, the Department held a hearing before an appointed independent hearing examiner on April 26, 2016. The hearing officer allowed WMCD to enter evidence regarding the variance denial. He found that the variance issue was not before him, but allowed the evidence anyway. His report and recommendation said that the Department should revoke WMCD's license for its admitted failure to have a transfer agreement. *See* R&R (Apr. 26, 2016).

The Director revoked WMCD's license in an Adjudication Order on November 30, 2016. Jur. Mem. Apx. 3. The four-page order reviewed the facts and law, explaining

that the Department was revoking the license based on WMCD's failure to obtain a written transfer agreement. The order expressly noted that WMCD's "statements regarding the rejection of its variance request [were] not the subject of this Adjudication Order." Order at 2. It also noted that variance denials are final and not appealable. *Id.*

3. WMCD, which is located in Montgomery County, appealed the Adjudication Order in December 2016 to the Montgomery County Common Pleas. Soon thereafter, the common pleas court granted a stay pending appeal of the Department's Adjudication Order. *See* Order (Dec. 12, 2016); *see* Com. Pl. Op. (May 13, 2019), Jur. Mem. Apx. 2, 4–5. Under R.C. 119.12, that stay remains in effect until final resolution of the appeal at all levels. It thus remains in place today—and will throughout this Court's consideration of the case—meaning that WMCD remains open, even though both lower courts affirmed the Department's Adjudication Order revoking WMCD's license.

The common pleas court affirmed the Department's Adjudication Order. It explained that it had no jurisdiction to review the variance denial, that a variance did not implicate hearing rights anyway, and that the regulations alone justified the license revocation, so the statutory issues should be avoided. Com. Pl. Op. at 13–16, 18.

The appeals court affirmed. It, too, found it had no jurisdiction over the variance denial, and that it should not reach constitutional challenges to the statute in light of the Department's reliance upon the parallel regulations. App. Op. ¶¶54–56.

THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST AND DOES NOT INVOLVES A SUBSTANTIAL QUESTION

This case does not warrant review. Indeed, neither issue that WMCD asks this Court to review is even properly before the Court because variance denials are unreviewable. WMCD never argues otherwise.

I. Variance denials are not appealable, and WMCD's failure to address or overcome that barrier ends the case.

WMCD's case does not warrant review because it cannot clear the threshold hurdle of non-reviewability; indeed, it does not even try. That ought to end this case.

Both of the lower courts refused to award WMCD relief on the ground that variance denials are not appealable. WMCD's jurisdictional memorandum does not even address the issue: It does not explain why the lower courts erred, or why this Court ought to grant review to decide whether variance denials are non-reviewable; it does not grapple with R.C. 3702.304 language making variance denials "final"; and it does not even argue that it has a right to appeal under R.C. 119.12, the statute authorizing administrative appeals of decisions governed by Chapter 119. Instead, it argues that the Department denied it a right to a hearing over its entitlement to a variance. *See* Jur. Mem. at 5–8. But this Court cannot reach that question without jurisdiction to do so.

Even if WMCD had argued for review of the question whether variance denials are appealable, there would be no need to take up the issue. The lower courts are neither divided nor confused on the question. Indeed, no other District Court of Appeals,

aside from the one below, has even considered it. And the only common pleas court to take up the issue reached the same conclusion as both lower courts here: variance denials are not appealable. *See* Com. Pl. Op., citing *Lebanon Road Surgery Center v. Ohio Dep't of Health*, Hamilton Cty. Com. Pl. Case No. A1400502 (Aug. 14, 2014). (That case involved the same owner as here, then operating another clinic in Hamilton County. It appealed to the First District but dismissed the appeal before briefing.)

The absence of confusion indicates the straightforward nature of the question. No one has a right to an administrative appeal unless a statute creates that right. *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St. 3d 174, 177 (2001). The statute here expressly says that when the Director denies a variance, "the director's determination is final." R.C. 3702.304(C). As this Court has explained, when a statute calls an agency decisions "final," an appeal is allowed only with a "specific, statutory grant of jurisdiction to the trial court to review the decisions of the administrative body pursuant to R.C. 119.12." *Brookwood Presbyterian Church v. Ohio Department of Education*, 127 Ohio St. 3d 469, 2010-Ohio-5710, ¶15. As *Brookwood* noted, the Tenth District—where most administrative appeals are heard, because many are can be brought only in Franklin County—has repeatedly held that judicial review under R.C. 119.12 is not available when a statute says that an agency decision is "final" and the statute does not invoke R.C. 119.12. *Heartland Jockey Club v. Ohio State Racing Comm.*, 1999 Ohio App. Lexis 3530 (10th Dist.); *State ex rel. Shumway v. State Teachers Retirement Bd.*, 114 Ohio

App. 3d 280, 286 (10th Dist. 1996); *Carney v. School Emps. Retirement Sys. Bd.*, 39 Ohio App.3d 71, 72 (10th Dist. 1987). (Those cases allow for mandamus review instead, but that is not at issue here.) Here, nothing in the relevant statute authorizes appeal.

WMCD's attempt to appeal the variance decision suffers yet another problem: it has nothing to do with this case. *Both* lower courts explained that the current appeal grew out of the Adjudication Order, which revoked WMCD's license. The variance denial is both analytically and factually distinct, and it occurred over a year earlier. App. Op. ¶55. Thus, even if the variance denial were *not* exempt from judicial review by statute, WMCD failed to appeal it in 2015 when it happened.

Moreover, if the variance denial were independently appealable, then not only should WMCD have been appealed a year earlier, but it should have filed its appeal in Franklin County, not Montgomery County. Why? Because, under R.C. 119.12(A)(1), appeals go to a licensee's or applicant's home county *only if* the order denies a license, or admission to an exam, or allows payment of certain forfeitures under liquor laws. Even WMCD does not dispute that the variance denial alone was not a *license* denial, as the license denial involved the review of all the elements and occurred only after a hearing a year later. Under R.C. 119.12(B), litigants must file all other orders—even if they are "adjudication" orders—in Franklin County. So even if one generously exported WMCD's analysis under its R.C. 119.06 hearing-rights argument to cover appealability, *this* appeal would be improper.

II. WMCD's demand for a separate hearing before a variance denial does not warrant review.

Even if the Court could somehow overlook WMCD's failure on the threshold issue, WMCD's demand for a hearing before a variance denial would not warrant review.

For starters, WMCD does not show, nor could it, that this is a recurring issue affecting many litigants. It affects almost no one. As noted above, no one has ever litigated a variance denial at all, except WMCD's sister clinic in the Cincinnati area, and that case ended as a result of the issue's non-appealability.

WMCD's argument fails on the merits regardless. Its jurisdictional memorandum focuses largely on R.C. 119.06, which *generally* confers a right to a hearing across a range of contexts. But WMCD never mentions the *specific* provision that governs this case. That provision is O.A.C. 3701-83-14(F), which the statutory scheme complements and codifies, *Capital Care*, 2018-Ohio-440, ¶¶3, 27, 33. That regulation states that variance denials do not trigger hearing rights: "The refusal of the director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119. of the Revised Code." O.A.C. 3701-83-14(F).

Moreover, variance denials would not trigger R.C. 119.06 even if O.A.C. 3701-83-14(F) did not exist. Section 119.06 requires a hearing for an "adjudication," which is something that determines a party's "rights, duties, privileges, benefits, or legal relationships." R.C. 119.01(D). A variance denial does not determine rights; rather, it involves an alternative path to licensure. It has meaning only as a part of the overall li-

censure decision, which turns on reviewing all of the requirements, including many not at issue here. If every ingredient on a licensing-requirement list got its own hearing (and appeal), then the process would never end. The appeals court rightly found that the variance denial is not itself an adjudication. App. Op. ¶¶53–55.

Regardless, this would be an especially odd case for reviewing a claimed entitlement to a hearing on variance requirements, because WMCD *received one*. Recall that the hearing officer, despite finding that variance issues were not before him, nevertheless allowed WMCD to submit variance-related evidence. Indeed, because WMCD could not and did not dispute its lack of a transfer agreement, the *only* evidence at the hearing was aimed at WMCD's alternative argument in favor of a variance. To be sure, the hearing officer declined to consider variance issues, but the evidentiary submission was available to the Director when he reviewed the ultimate issue. While the Director's Adjudication Order specified that he was *not* reconsidering his variance denial, he could have if he wished. Thus, WMCD received a hearing on the variance request—the Department just (once again) refused to grant the request.

III. WMCD's one-subject challenge to the variance statute does not warrant review.

WMCD's second proposition, attacking the variance statute as an alleged violation of the one-subject rule, is likewise not worthy of review. Indeed, even if the Court grants review in this case, it should exclude this proposition.

This Court refused to address a similar challenge in *Capital Care,* citing the prin-

ciple of constitutional avoidance. *Capital Care*, 2018-Ohio-440, ¶31, citing *State v. Talty*, 103 Ohio St. 3d 177, 2004-Ohio-4888, ¶9. That principle came into play after the Court determined that the transfer-agreement statute, R.C. 3702.303, codified and clarified the pre-existing regulations without supplanting them; the regulations remained in place. And while the challenger disputed whether R.C. 3702.303 violated the one-subject rule, it did not (and could not) raise any such challenge to the pre-existing regulations, which required exactly the same thing as the statute. Therefore, the Court had no reason to address the statute's legality, since the challenger would have been obligated to obtain a written transfer agreement even if the statute were unconstitutional.

The same is true here. Just as the transfer-agreement statute did not supplant the regulations, so, too, the variance statute does not replace the regulations, and the Order here was justified under the regulations, as the appeals court found. App. Op. ¶56.

* * *

One final note: this case does not raise any abortion-specific issues. WMCD, an abortion clinic, does not argue otherwise. Thus, to the extent such issues were potentially raised in *Capital Care*, they are not present here, and thus do not raise any issue of public interest in that respect. *See Capital Care*, 2018-Ohio-440, ¶¶90-127 (O'Connor, C.J., dissenting). WMCD is currently litigating against the Director in *federal* court, raising claims of "undue burden," and a due-process claim that the transfer-agreement requirement is an unconstitutional "delegation" of state power to private hospitals. App.

Op. ¶5; *Planned Parenthood Southwest Ohio Region, et al. v. Richard Hodges, et al.*, S.D.Ohio No. 1:15-cv-568. The federal court hearing those claims has power to issue injunctive relief based on such claims—though none is warranted, in the Department's view. Indeed, the federal court has already enjoined one part of the statute, and will review the rest when the issues become ripe.

ARGUMENT

The Court should deny review.

Appellee Department of Health's Proposition of Law No. 1:

> *When the Health Department's Director denies a request for a variance from the transfer-agreement requirement, such a denial is "final" under R.C. 3702.304, and courts have no jurisdiction to review such a denial.*

No one has any right to an administrative appeal unless the General Assembly creates one by statute. *Midwest Fireworks,* 91 Ohio St. 3d at 177. A statute describing an agency decision as "final" does not allow an administrative appeal when no appeal is otherwise authorized, at least in cases where the statute expressly makes other similar appealable. *Brookwood Presbyterian Church*, 2010-Ohio-5710, ¶15. So it is here. The statutory scheme says that when the Director denies a variance, "the director's determination is final." R.C. 3702.304(C). But the General Assembly did not confer any right to appeal. That is telling, because it *did* confer a right to appeal other similar decisions. For example, the General Assembly expressly allows for appeals of "license" decisions (such as license revocations). *See* R.C. 3702.30(D), (E)(1); R.C. 119.12(A)(1).

Even if the statutes *did not* confer a right to appeal other similar actions, the variance denial would still be unappealable. WMCD claims a right to appeal under R.C. 119.12. But that general statute does not confer any right to judicial review when the specific statute says that an agency decision is "final." *Heartland Jockey Club*, 1999 Ohio App. Lexis 3530; *Shumway*, 114 Ohio App. 3d at 286; *Carney*, 39 Ohio App. 3d at 72. Variance decisions are "final" under R.C. 3702.304, so they are unappealable.

Appellee Department of Health's Proposition of Law No. 2:

> *When the Health Department's Director considers granting a variance from the transfer-agreement requirement or any licensing requirement, the decision is left to his discretion and he need not offer a hearing before deciding.*

Even if the courts below had jurisdiction over this appeal, WMCD's claim fails on the merits: it had no right to a hearing on the variance issue. The governing regulation specifically says that variance requests do not trigger hearing rights. O.A.C. 3701-83-14(F). The variance statute does not supplant the regulation. *See Capital Care,* 2018-Ohio-440, ¶¶3, 27, 33. Indeed, the statute bolsters the regulation. WMCD would not have been entitled to a hearing even under R.C. 119.06's general standards governing hearing rights. That statute requires hearings only with respect to decisions that determine rights. R.C. 119.01(D). Variance denials alone do not determine rights or deny them either: there *is no* right to a variance until the Director chooses to issue one. All the variance denial does is refuse to extend an exception that would permit the applicant to obtain a license without the statutorily required written transfer agreement.

Appellee Department of Health's Proposition of Law No. 3:

The General Assembly did not enact the variance requirement, R.C. 3702.304, in violation of the one-subject clause, as it concerns the operations of a state agency in how it efficiently reaches variance decisions.

The General Assembly did not violate the one-subject rule when it passed R.C. 3702.304. First, constitutional avoidance counsels against reviewing this issue. When "it is not necessary to decide" a constitutional issue, "it is necessary not to decide it." *Capital Care*, 2018-Ohio-440, ¶31 (internal quotation marks omitted). Here, the regulations alone justify the Order, so the attack on the statute never arises.

Even if this Court were disinclined to revisit its one-subject clause cases, *but see id.* at ¶¶37–49 (French, J., concurring, joined by DeWine and Kennedy, JJ.), the General Assembly did not violate this Court's case law. It passed R.C. 3702.304 as part of a budget bill. A budget bill's "subject" including the *operations* of state government. *State ex rel. Ohio Civil Serv. Emples. Ass'n v. State*, 146 Ohio St. 3d 315, 2016-Ohio-478, ¶¶27–34. A law that tells agencies how to operate shares this overarching purpose. R.C. 3702.304 is one such law: the variance statute does not directly govern citizens, but rather instructs the director how to process variance requests, giving him specific criteria to use in applying his discretion. R.C. 3702.304.

CONCLUSION

The Court should deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Opposing Jurisdiction was served by regular U.S. mail and e-mail this 12th day of June 2019, upon the following counsel:

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