

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION**

MARY SCOTT DOE, <i>et al.</i> ,)	
)	
Plaintiffs,)	09-CV-02197 (AW)
)	
v.)	
)	
KATHLEEN SEBELIUS, <i>et al.</i> ,)	
)	
Defendants.)	
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REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The plaintiffs' Opposition and Request for a Hearing demonstrate what has never been in question in this litigation—the plaintiffs' strong opposition to the administration's policy on human embryonic stem cell ("hESC") research. However, hyperbole and vitriol do not establish either standing for the plaintiffs to sue or the merit of claims that ignore the jurisprudential history of this debate.

The defendants will not engage the unfortunate rhetoric contained in the plaintiffs' Opposition and will not dignify the plaintiffs' baseless accusations with a response. In light of this Court's ruling in Doe et al. v. Obama et al., Civ. No. 09-755 (AW) ("Doe I") (Dkt. No. 18) and the ruling of the federal court for the District of Columbia in Sherley et al. v. Sebelius et al., Civ. No. 09-1575 (Dkt. No. 36), very little remains for argument here. Those decisions analyzed and rejected allegations of injury substantially similar, if not identical, to those presented in the present case. As coherently and consistently explained in the decisions, the plaintiffs' allegations of injury from the purported causal connection between the final guidelines and the pool of embryos available for "adoption" is entirely speculative, relying on the decisions of third parties as to whether their embryos will be destroyed, stored indefinitely, donated for research, or donated for "adoption."

The present case does not contain any distinguishing characteristic that would undermine the determinative effect of these decisions. Even if this Court were to entertain the notion that Nightlight is still a party to this litigation despite its expressed desire to be removed from Doe I and ignore the court's decision in Sherley to which Nightlight was a party, this Court's analysis of the standing of the plaintiffs in Doe I applies with equal force to foreclose the standing of Nightlight.

Accordingly, the defendants respectfully request that this Court grant the defendants' Motion to

Dismiss. As the grounds for dismissal have already been supplied by this Court and the district court for the District of Columbia, the defendants respectfully assert that no hearing would be helpful, let alone necessary, for the resolution of this matter.

ARGUMENT

On November 24, 2009, this Court granted the government's motion to dismiss the plaintiffs' Complaint in Doe et al. v. Obama et al., Civ. No. 09-755 (AW) ("Doe I") (Dkt. No. 18). As the Court recognized in its Memorandum Opinion, the plaintiffs' speculative allegations of injury, wholly dependent on the actions of third parties not before the Court, do not establish standing to present their generalized grievance against the administration's policy on hESC research. Id.

The defendants respectfully assert that the Court's Memorandum Opinion in Doe I is dispositive of the dispute presently before the Court. With the apparent exception of Nightlight, the plaintiffs in both cases are identical, as are their allegations of injury. Compare Doe I, Am. Compl. with Doe II, Compl. The only substantive difference between the Complaints is the change in focus from Executive Order No. 13505 to the final guidelines promulgated by NIH on July 7, 2009, including an additional challenge pursuant to the Administrative Procedure Act. See Doe II, Compl. at 35-55. However, as this Court recognized in the Memorandum Opinion in Doe I, "when considering whether a party has standing to bring an action, the focus for the Court is on the party asserting the claim and 'not on the issue the party wishes to have adjudicated.'" Mem. Op. at 5 (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)). Accordingly, the addition of an APA challenge to the plaintiffs' existing constitutional claims does not cure allegations of injury that the Court has already conclusively determined to be insufficient to establish Article III standing.

Thus, the only question for this Court in deciding the present Motion to Dismiss is whether the uncertain status of an additional party to the Complaint, Nightlight, changes the standing analysis. In dismissing the plaintiffs' Complaint in Doe I, the Court granted the plaintiffs' Motion to Amend their Complaint to drop Nightlight as a party. See Mem. Op. at 1 n.5. As the defendants noted in their Response to the plaintiffs' Motion to Amend, however, it was the defendants' understanding that Nightlight would be withdrawn, at its own request, from both lawsuits pending before this Court. See Doe I, Defs.' Response at 1 (Dkt. No. 16). After all, Nightlight's apparent "desire to be dropped as a party" from Doe I would seem inconsistent with its continued participation in the substantively similar litigation presently before the Court. See Doe I, Pls.' Mem in Supp. of Mot. to Amend Compl. at 2. However, counsel for the plaintiffs has not yet made a formal request to dismiss Nightlight from the present litigation.

Even if one were to assume that Nightlight's express desire to be removed as a party from Doe I did not apply to the substantively similar litigation in Doe II, Nightlight would still be bound by the district court's recent decision in Sherley et al. v. Sebelius et al., Civ. No. 09-1575 (D.D.C.) (Dkt. No. 36). As this Court is no doubt aware, Nightlight was also named as a party to that lawsuit, which raises, *inter alia*, identical APA claims to those asserted in the Complaint presently before the Court. See id. On October 27, 2009, the federal district court for the District of Columbia decided that Nightlight's allegations of injury from the alleged effect of the final guidelines on the pool of embryos available for "adoption" were wholly insufficient to establish standing pursuant to Article III. Using the same reasoning provided by this Court in its Opinion in Doe I, the Court held that Nightlight's allegations of injury depended entirely on the decisions of third parties not before the Court.

Nightlight contends that it will suffer injury because the guidelines will cause a decrease in the number of embryos available for adoption. (Compl. ¶ 8.) This alleged injury does not satisfy the “injury in fact” requirement of standing because it is speculative and dependent upon third party conduct. See Nat’l Wrestling Coaches Ass’n, 366 F.3d at 938. The guidelines do not mandate a decrease in the number of embryos available for adoption. Rather, the guidelines allow funding for hESC research on embryos that were “donated by individuals who sought reproductive treatment . . . and *who gave voluntary written consent* for the human embryos to be used for research purposes.” 74 Fed. Reg. at 32174 (emphasis added). Thus, for Nightlight to suffer an injury, potential embryo donors have to choose to donate their embryos for research, and not for adoption.

The choice, however, is not simply whether to donate embryos for research or for adoption. The donors must choose between continuing to store the embryos, discarding them, donating them for research, or giving them to an adoption agency involved in embryonic adoption. This choice is solely within the discretion of individuals in possession of embryos that are no longer needed for reproductive purposes. By allowing funding for hESC research, the guidelines do not interfere with the discretion of potential donors.

Accordingly, the Court finds that Nightlight lacks standing because its alleged injury is “mere ‘unadorned speculation’ as to the existence of a relationship between the [guidelines] and the third-party conduct.” Nat’l Wrestling Coaches Ass’n, 366 F.3d at 938 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 44 (1976)). Indeed, if Nightlight suffers any injury at all, it will be because of the choices of third parties not before this court, and not because of the guidelines.

Id. at 5-6.

It has been “long recognized that ‘[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues.’” Underwriters Nat’l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass’n, 455 U.S. 691, 706 (1982) (quoting Am. Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932)); Catholic Soc. of Religious and Literary Educ., 74 F.2d 848, 850 (4th Cir. 1935). Nightlight chose to pursue its objection to the administration’s policy on hESC research in the federal district court for the District of Columbia, and it is now bound by the decision resulting from that choice. Nightlight is not permitted to relitigate its standing to sue based on allegations already rejected

by a federal district court.¹ See, e.g., Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1248 (D.C. Cir. 1999); Acree v. Air Line Pilots Ass'n, 390 F.2d 199, 203 (5th Cir. 1968).

The district court's decision in Sherley is, in any event, in accord with this Court's reasoning regarding the speculative nature of standing allegations that rely on the independent discretion of third parties. As this Court recognized in evaluating similar allegations of injury by the "adoptive" parent plaintiffs in Doe I, "it is the donor's choice which could potentially reduce the number of human embryos for adoption and not the Defendants' conduct which 'causes' Plaintiffs' alleged injury. Accordingly, the Court concludes that the adoptive parent Plaintiffs lack Article III standing to assert any claim alleged in the complaint." Doe I, Mem. Op. at 10. As the allegations of injury by the "adoptive" parent plaintiffs and Nightlight both rely on the speculative assumption that third parties will alter their conduct in response to the final guidelines such that the number of embryos available for "adoption" will

¹ The plaintiffs confusingly assert in their Memorandum in Opposition that the decision in Sherley is distinguishable from the present case for three reasons. The first is that the plaintiffs here have added the allegation that the final guidelines "skew the decisions of potential donors" by failing to inform them about the option of "adoption" and the effect of derivation on embryos. Pls.' Opp. at 46. Putting aside the fact that these allegations are belied by the substance of the final guidelines, they are identical to those made by the Sherley plaintiffs in their APA challenge and rejected by the district court. See Sherley, Civ. No. 09-1575, Pls.' Opp. to Defs.' Mot. to Dismiss at 41 (Dkt. No. 31) ("In order to have donors' truly informed consent, Defendants should require IVF facilities to inform donors that research destroys a living, human life, and that adoption is an alternative to having the embryo destroyed for research purposes."). The second purported distinction is the "proffer" by the plaintiffs in the present case of an article showing the number of "excess" embryos available that are not being held for family building purposes. Pls.' Opp. at 47. However, that "proffer" in no way demonstrates that the choice of whether these embryos are destroyed, donated for research, kept in storage, or donated for "adoption," is anyone's other than the donors'. Finally, plaintiffs argue that the Court in Sherley erred in refusing to presume standing on the basis of the plaintiffs' general allegations. Id. However, the presumption to which the plaintiffs refer is inapplicable both to legal conclusions, Doe I, Mem. Op. at 4, 7, as well as speculative standing allegations that rely on the actions of third parties not before the Court, Doe I, Defs.' Reply in Supp. of Mot. to Dismiss at 2-3 (Dkt. No. 13).

decrease, they suffer from the same Article III deficiencies previously identified by this Court.²

In fact, the reasoning of this Court in its opinion in Doe I applies with perhaps even more force to the standing of Nightlight, as Nightlight is several steps removed from injury even if a reduction in the availability of embryos for “adoption” is assumed from the passage of the guidelines (ignoring this Court’s, and the Sherley Court’s, reasoned decisions to the contrary). Even assuming the existence of such a causal relationship, there is still no way to determine whether Nightlight has *itself* suffered injury, as there is no indication whether the pool of available embryos would be reduced by such a factor that Nightlight would have clients but no embryos, whether Nightlight would have the resources to serve as the “adoption” agency for every available embryo, or whether competition would in fact benefit Nightlight by increasing the demand for its services as a purportedly qualified and expert “adoption” provider (thereby harming only its embryonic “adoption” competitors). See Doe I, Defs.’ Mem. in Supp. of Mot. to Dismiss at 23-24 (Dkt. No. 10-2); see also Doe I, Defs.’ Reply in Supp. at 6-7 (Dkt. No. 13). These causal omissions demonstrate that the injury would remain entirely speculative.

This Court’s prior opinion in Doe I and the district court’s decision in Sherley conclusively demonstrate that the plaintiffs lack standing to assert their generalized grievance against the administration’s policy on hESC research. For that reason, the defendants will not reassert their arguments on the merits that have been extensively briefed in Doe I and in the Memorandum in Support

² It is apparent that the plaintiffs disagree with the defendants’ decision in the final guidelines not to require that clinics provide the option of donation for “adoption” to potential donors, just as the final guidelines do not require that the option of donation for “research” be provided. 74 Fed. Reg. 32170, 32173 (July 7, 2009). However, the plaintiffs do not, and cannot, contest the fact that NIH does not exercise direct regulatory authority over clinics, which are free to choose what options they provide to donors. If, as the plaintiffs claim, “only a limited number of IVF clinics offer the service of human embryo adoption,” Pls.’ Opp. at 41, then their allegation of injury is again directed at yet another third party—these IVF clinics—rather than the defendants.

of the Motion to Dismiss the Complaint in Doe II. Rather, the defendants respectfully refer the Court to those arguments for the purpose of preserving them.

CONCLUSION

For the foregoing reasons, the defendants respectfully request dismissal of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2009, I caused a true and correct copy of the foregoing Reply to be served on plaintiffs' counsel electronically by means of the Court's ECF system.

/s/ Eric Womack
ERIC R. WOMACK