No. 18-1460

IN THE

Supreme Court of the United States

DR. REBEKAH GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,

Cross-Petitioner,

v.

JUNE MEDICAL SERVICES, L.L.C., ET AL.,

Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INDIANA, TEXAS, ALABAMA, IDAHO, KANSAS, MISSISSIPPI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED

1. Can abortion providers be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a "close" relationship with their patients and a "hindrance" to their patients' ability to sue on their own behalf?

2. Are objections to prudential standing waivable (per the Fourth, Fifth, Seventh, Ninth, Tenth, and Federal Circuits) or non-waivable (per the D.C., Second, and Sixth Circuits)?

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INTEREST OF *AMICI* STATES[1]

The States of Indiana, Texas, Alabama, Idaho, Kansas, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of the petitioners.

The decision below correctly upheld Louisiana's admitting-privileges law consistent with *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and requires no further review. But if the Court nevertheless grants the petition for certiorari, *Amici* States urge the Court also to grant the conditional cross-petition to elucidate an area of law that is "no model of clarity": third-party standing, particularly in the context of abortion. *Id.* at 2322 (Thomas, J., dissenting). The Court should reiterate that *all* plaintiffs, including abortion providers, must satisfy the same demanding requirements for third-party standing that bind everyone else. Lower courts should no longer give abortion providers a free pass, but should instead rigorously assess whether an abortion provider who seeks to sue on behalf of patients meets those standards.

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici* provided notice to the parties' attorneys more than ten days in advance of filing. No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

This Court has long "adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). But the Court has crafted an exception to this rule that "grant[s] a third party standing to assert the rights of another" in certain limited circumstances. *Id.* at 130. It has restricted this exception to litigants who meet the minimum constitutional requirements for standing and have made "two additional showings"—that they have "a close relationship with the person who possesses the right" and that there is "a hindrance to the possessor's ability to protect his own interests." *Id.* (internal quotation marks and citation omitted).

The Court has applied these same two third-party standing requirements in a wide variety of cases, including in the abortion context. *See* Part I.A *infra*. Lower federal courts, however, effectively apply two *different* third-party standing doctrines: one for abortion providers, and one for everyone else. They have relied on the plurality opinion in the single case directly addressing third-party standing in the abortion context—*Singleton v. Wulff*, 428 U.S. 106 (1976)—to create a categorical rule permitting abortion *providers* to challenge any regulation of abortion by asserting the purported "right of the *individual*

. . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion) (emphasis in original; internal quotation marks and citation omitted).[2] Yet neither *Singleton* nor this Court's subsequent decisions claim to create a unique abortion-specific third-party standing doctrine. *See* Part I.B *infra.*

In particular, lower courts have simply *assumed* that abortion providers meet the requirements set out in *Singleton*. Lower courts regularly permit abortion *providers* to challenge abortion laws as imposing undue burdens on a *woman's* right to choose whether to have an abortion. And they do so without requiring providers to adduce any evidence showing that they have a close relationship with any woman burdened by the law or that there is a hindrance to the woman's ability to assert her own interests. *See* Part I.B *infra*.

Even worse, lower courts have misinterpreted *Singleton* to allow abortion providers to assert third-party standing to challenge regulations of abortion that protect the very women the physicians claim to be representing. *See* Part I.C *infra*. This case exemplifies the problem. Petitioners challenged Louisiana's admitting privileges law, despite testifying themselves about how the law *benefits* their patients

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[2] All references to *Casey* are to the joint opinion authored by Justices O'Connor, Souter, and Kennedy.

(which the law does by ensuring physician competency and swift treatment when complications arise, which is especially necessary where, as here, the record shows that Louisiana abortion clinics have a history of safety violations). *See* Cross-Pet. 4, 11-13.

Because of lower courts' misinterpretation of *Singleton*, abortion providers have even started seeking facial invalidation of entire regulatory systems—systems designed to protect women against the horrors of unregulated abortion clinics, such as Kermit Gosnell's. *See* Part II *infra*. There is no plausible reason to believe that such claims represent the interests of actual patients. Yet lower courts do not require abortion providers to prove that any woman, much less a large fraction of women, agrees that invalidating a targeted health and safety law is in her interest.

If the Court chooses to review the fact-bound decision below—which fairly applied *Hellerstedt* to the unique factual landscape in Louisiana—it should also decide whether these abortion doctors and clinics have third-party standing to bring these claims at all. The Court should resolve the "doctrinal confusion," *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2322 (2016) (Thomas, J., dissenting), in the lower courts and confirm that abortion plaintiffs must meet the same requirements as everyone else. Where, as here, abortion providers assert interests contrary to those of their patients, they lack standing to assert their patients' rights.

I. Lower Courts Have Created Two Third-Party-Standing Doctrines: One for Abortion Providers, and One for Everyone Else

A. *Singleton* did not establish an exception to third-party-standing doctrine for abortion providers

A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (citation omitted). That has been the case for most of our Nation's history. *Id.* at 135-36 (Thomas, J., concurring). The exception to that general rule is *jus tertii*—the third-party-standing doctrine. Under that limited exception, litigants may assert the rights of third parties *only* when: (1) the litigant has a "close relationship" to the third party; and (2) some "hindrance" affects the third party's ability to protect his or her own interests. *See id.* at 130 (citations omitted); *see also Am. Legion v. Am. Humanist Ass'n*, 2019 WL 2527471, *27 (U.S. June 20, 2019) (Gorsuch, J., concurring in judgment) (noting that the Court departs from normal standing rules "only where the party seeking to invoke the judicial power 'has a 'close' relationship with the person who possesses the right' and 'there is a 'hindrance' to the possessor's ability to protect his own interests.'") (quoting *Kowalski*, 543 U.S. at 130).

Shortly after the Court in *Roe* found a right to abortion grounded in substantive due process, a plurality of the Court concluded that, at least at the motion-to-dismiss stage, two physicians had third-party standing to challenge, on behalf of their patients, a state law excluding from the State's Medicaid program abortions not justified by medical necessity. *Singleton v. Wulff*, 428 U.S. 106 (1976).[3] The plurality opinion noted at least two reasons "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Id.* at 113. "First, . . . the holders of those rights either [may] not wish to assert them, or will be able to enjoy them regardless . . . . Second, third parties themselves usually will be the best proponents of their own rights." *Id.* at 113-14.

For these reasons, the plurality opinion explained, the Court's previous third-party-standing cases—none of which involved abortion—"looked primarily to two factual elements to determine whether the rule should apply in a particular case." *Id.* at 114.

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[3] Justice Stevens did not join the plurality as to third-party standing, concluding that because the doctors had alleged facts sufficient to support their standing to raise their *own* rights at the motion-to-dismiss stage, it was unnecessary to reach the question of third-party standing. *Singleton v. Wulff*, 428 U.S. 106, 121-22 (1976).

In particular: (1) "the relationship between the litigant and the third party . . . [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter" and (2) "Even where the relationship is close, . . . there is some genuine obstacle to" the right-holder's assertion of the right. *Id.* at 115-16.

Critically, the plurality assumed that "the constitutionally protected abortion decision is one in which the physician is intimately involved." *Id.* at 117. It therefore reasoned that because the law forbade both doctor and patient from engaging in the same mutually preferred action, the physician could assert the rights at issue in that case. Discussing the "genuine obstacle" inquiry, the plurality acknowledged ways for women to avoid possible obstacles to asserting their own rights, such as by filing a class action, but concluded that "if the assertion of the right is to be 'representative' to such an extent anyway, there seems to be little loss in terms of effective advocacy from allowing its assertion by a physician." *Id.* at 116-18.

The Court's subsequent third-party-standing cases have cited *Singleton* when applying the third-party-standing doctrine in other contexts. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991); *Kowalski*, 543 U.S. at 129-30; *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998).

Notably, the Court has been clear that *potential* relationships do not confer third-party standing. In *Kowalski*, it held that attorneys lacked third-party standing to bring claims on behalf of future clients who will request, but be denied, the appointment of appellate counsel under state law. 543 U.S. at 131. The Court concluded that the attorneys lacked the requisite "close relationship" with the clients: An "*existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here . . . . The attorneys before us do not have a 'close relationship' with their alleged 'clients'; indeed, they have no relationship at all." *Id.*

The Court has also been clear that the third-party-standing doctrine should be applied on a case-by-case basis: Litigants are generally limited to asserting their own rights, and the third-party-standing doctrine's exceptions to this rule are not categorical. *See Singleton*, 428 U.S. at 114 ("[T]he Court has looked primarily to two factual elements to determine whether the rule should apply *in a particular case*." (emphasis added)).

Applying the third-party-standing doctrine on a categorical basis would contradict the doctrine's purpose of confirming identity of interests. It would allow a litigant to assert another's rights even when doing so undermines the rights-holder's interests. The Court has stressed the caveat that "it may be that in fact the holders of those rights either do not

wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Id.* at 113-14.

The Court has therefore emphasized that the "close relationship" inquiry of the third-party-standing test is not satisfied where a conflict of interest could potentially arise between the party asserting the claim and the party whose rights are at stake. *See Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 14-15 & n.7 (2004) (distinguishing *Singleton* on the basis that, in *Newdow*, the father and child's interests were "potentially in conflict").

The label "doctor-patient relationship" does not create an automatic and categorical exception to standing doctrine. Rather, particular attributes of a doctor-patient relationship—such as an alignment of interests—determine whether third-party standing is appropriate. Whether or not *Singleton* correctly assumed alignment of interests in the context of that case, third-party standing "should not apply where its assumptions do not hold." *Amato v. Wilentz*, 952 F.2d 742, 752 (3d Cir. 1991).

At an absolute minimum, an abortion provider purporting to challenge a law on behalf of his patients must prove—with evidence—that he is actually representing the interests of his patients. Such a showing is essential where, as here, abortion providers seek to strike down laws designed to protect their patients' safety.

B. Lower courts have misread *Singleton* to obliterate third-party-standing doctrine in abortion cases

Because abortion providers have no constitutional rights to perform abortions or to operate abortion clinics, third-party-standing doctrine is the only mechanism by which they can litigate undue-burden challenges against state abortion laws. *See, e.g., Harris v. McRae*, 448 U.S. 297, 314 (1980); *Casey*, 505 U.S. 833, 846, 884 (1992). Abortion providers should be able to assert such undue-burden claims *only* if they demonstrate the close relationship and hindrance that the Court requires in *all* third-party standing cases.

Singleton never purported to allow third-party standing for every physician or clinic in the abortion context. Yet, many lower courts have misinterpreted *Singleton* to create such a categorical exception and routinely assume, without verification, that abortion doctors meet the close-relationship and hindrance requirements in all challenges to abortion regulations.[4]

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[4] *See, e.g.*, *McCormack v. Herzog*, 788 F.3d 1017, 1027-28 (9th Cir. 2015); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 917-18 (9th Cir. 2004); O*kpalobi v. Foster*, 190 F.3d 337,350-51 (5th Cir. 1999); *Planned Parenthood Minnesota v. Rounds*, 467 F.3d

Lower courts have even assumed that abortion *clinics* have standing to challenge laws on behalf of their patients. *See, e.g., Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016). But clinics, as corporate entities, have an even less intimate relationship with patients than abortion doctors do. Planned Parenthood Federation of America, for example, is a two-billion-dollar company with over 50 affiliates nationwide. *See Planned Parenthood Federation of Am.,* Annual Report 2017-2018 26, 28 n.[a], https://www.plannedparenthood.org/uploads/filer_public/4a/0f/4a0f3969-cf71-4ec3-8a90-733c01ee8148/190124-annualreport18-p03.pdf. Yet courts have assumed that it has a "close relationship" with its individual abortion patients sufficient to confer third-party standing. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124 (2007).

During the stay proceeding in this case, the Fifth Circuit accepted the plaintiffs' third-party standing to assert claims on behalf of unidentifiable prospective patients, acknowledging the plurality decision in *Singleton. See June Med. Servs. LLC v. Gee*, 814 F.3d 319, 322-23 (5th Cir. 2016). The Fifth Circuit has

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716, 726 (8th Cir. 2006), *reh'g en banc granted, opinion vacated* (Jan. 9, 2007); *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014); *June Med. Servs., L.L.C. v. Gee*, 814 F.3d 319, 322-23 (5th Cir. 2014), *vacated*, 136 S. Ct. 1354 (2016).

even applied this sweeping exception to building developers who were merely associated with a physician. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 334 (5th Cir. 1981). And in light of the sheer number of courts using *Singleton* as a categorical exception, some courts have abandoned any semblance of standing analysis, instead referring summarily to the many cases that have applied lax third-party-standing rules in abortion cases. *See, e.g.*, *Wasden*, 376 F.3d at 917-18; *Mahoning Women's Ctr. v. Hunter*, 610 F.2d 456, 458 n.2 (6th Cir. 1979), *vacated*, 447 U.S. 918 (1980); *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 911 (7th Cir. 2015).

Lower courts thus often skip the requirements—stated in *Singleton* itself—that a litigant seeking third-party standing demonstrate a "close relationship" with the rights-holder and a hindrance keeping that rights-holder from bringing the suit. Instead, they simply assume that abortion providers are permitted to represent the purported interests of their patients, even where evidence shows the patients' interests are different, and where there is a lack of evidence the providers even know what their patients' interests are.

Recent cases—including this one—demonstrate as much. The record shows that doctors spend as little as 2-10 minutes with their patients before a procedure. Cross-Pet. 6 & n.2. In Louisiana, abortion providers may not interact with a patient at all other

than performing the procedure. Cross-Pet. 6. No evidence in this record shows that Louisiana women would see no benefit to admitting privileges for abortion doctors—or the peer-review that comes with those privileges. Such patient attitudes would be particularly unlikely, given Petitioners' repeated violations of existing safety standards, which the Fifth Circuit described as "horrifying." Pet. App. 38a n.56; *see also* Cross-Pet. at 11-13. Yet the Fifth Circuit assumed Petitioners were representing their patients' interests. *See June Med. Servs.* 814 F.3d at 322-23.

The same is true in other recent cases:

- A district court enjoined Texas's law banning procedures that dismember a living unborn child despite evidence that women overwhelmingly prefer that doctors induce fetal demise before dismemberment, with no contrary testimony from any patient. *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017); 11/7/17 Tr. Trans. at 51, *Whole Woman's Health v. Paxton*, No. 3:17-cv-00690-LY (W.D. Tex.) (study finding 92% of patients preferred fetal demise prior to the abortion). Courts in Arkansas and Alabama permanently enjoined similar laws without testimony from patients. *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (8th Cir. 2018); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017).

- A district court enjoined Texas's fetal-remains-disposition law, even though the abortion providers admitted they had no idea how the law would impact their patients. *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018).[5]

These examples demonstrate that courts regularly assume that abortion providers know what their patients want and will best represent those interests in court, even in the face of evidence to the contrary.

C. Failing to analyze the close-relationship prong in abortion cases overlooks deep conflicts of interest

1. Lower courts' misapplication of the third-party-standing doctrine runs so deep that courts allow standing even when the physician's interests are manifestly *contrary* to women's interests—in spite of this Court's holding that third-party standing is inappropriate if the interests of the litigant and the

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[5] 7/16/18 Tr. Trans. at 147, *Whole Woman's Health v. Smith*, No. 1:16-cv-1300-DAE (W.D. Tex.) (plaintiff-clinic president "do[es]n't have any idea" how many patients would be offended by the law); *id.* at 105, 151-52 (plaintiff-physician admitting that he has never spoken with a patient about burying or cremating fetal remains and no patient ever expressed a preference for how to handle fetal remains).

rights-holder are even "*potentially* in conflict." *Newdow*, 542 U.S. at 15 (emphasis added).

In *Okpalobi v. Foster*, for example, a Fifth Circuit panel allowed abortion doctors to challenge a law that *gave women a cause of action against them for botching abortions*. 190 F.3d 337 (5th Cir. 1999), *superseded on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001). The panel justified this conclusion on the assumption that "The Supreme Court . . . has carved out an exception to [third-party standing rules] in the context of physicians claiming third party standing to assert their patients' rights to a pre-viability abortion." *Id*. at 351. Directly contrary to *Singleton*, the panel asserted, "We will not deny standing to the Plaintiffs on the speculation that some women might not want to assert their constitutional rights" and "prefer to retain the cause of action granted." *Id*. at 353. *Compare Singleton*, 428 U.S. at 113-14 ("it may be that in fact the holders of those rights . . . do not wish to assert them").

2. A new wave of post-*Hellerstedt* abortion litigation illustrates the need for lower courts to apply the third-party standing requirements properly. These new lawsuits often challenge nearly every state abortion law, regardless whether the interests of the abortion providers and their patients conflict.

- **Indiana and Texas:** Plaintiffs have challenged nearly every health-and-safety regulation, in-

formed-consent law, parental-consent law, judicial-bypass procedure, and criminal penalty pertaining to abortion. Complaint, *Whole Woman's Health All. v. Hill*, No. 1:18-CV-1904 (S.D. Ind., filed June 21, 2018), Doc. 1 ("Ind. Compl."); Complaint, *Whole Woman's Health All. v. Paxton*, No. 1:18-CV-00500 (W.D. Tex., filed June 14, 2018), Doc. 1 ("Tex. Compl.").

- **Louisiana, Mississippi, and Virginia:** Plaintiffs have challenged nearly every health-and-safety regulation, informed-consent law, and criminal penalty pertaining to abortion. Amended Complaint, *June Med. Servs., LLC v. Gee*, No. 3:17-CV-00404-BAJ-RLB (M.D. La., filed June 11, 2018), Doc. 87 ("La. Compl."); Amended Complaint, *Jackson Women's Health Org. v. Currier*, No. 3:18-CV-00171-CWR-FKB (S.D. Miss., filed Apr. 9, 2018), Doc. 23 ("Miss. Compl."); Amended Complaint, *Falls Church Med. Ctr., LLC v. Oliver*, No. 3:18-CV-428-HEH (E.D. Va., filed Sept., 4, 2018), Doc. 41 ("Va. Compl.").

No patient is a plaintiff in any of these suits. These suits are instead brought by abortion clinics and doctors purportedly "on behalf of" their patients. Ind. Compl. ¶¶ 18, 23; La. Compl. ¶¶ 15-17; Miss. Compl. ¶¶ 16-17; Tex. Compl. ¶¶ 9, 15; Va. Compl. ¶¶ 19-23. And in Texas and Indiana, additional organizations—entities that do not perform abortions but provide funding for women seeking abortion—

have joined as plaintiffs "on behalf of" their clients. Ind. Compl. ¶¶ 19-22; Tex. Compl. ¶¶ 10-14.

The assumption of a close relationship and aligned interests is farcical in this context. Despite this Court's recognition that States may enact health-and-safety measures in order to "insure maximum safety for the patient," *Roe v. Wade*, 410 U.S. 113, 150, 163 (1973); *Casey*, 505 U.S. at 878, abortion providers in these new lawsuits have challenged nearly every health-and-safety regulation applicable to them supposedly on behalf of their patients. These providers do not claim that they are in danger of having to close, nor, with the exception of a single clinic in Indiana having difficulty meeting Indiana's "reputable and responsible character" licensing requirement, Ind. Compl. ¶¶ 17, do they identify a clinic that cannot open because of health-and-safety requirements. Instead, they express a desire to create a new business model for the abortion industry and allege that these laws stand in their way. Ind. Compl. ¶¶ 187-95; Tex. Compl. ¶¶ 188-96.

The business interests of the doctors and clinics clearly conflict with the women's interests. Abortion-provider plaintiffs seek to strike laws requiring abortion facilities to be licensed and submit to periodic inspections. Ind. Compl. ¶ 82(b); La. Compl. ¶¶ 59(a)-(b), 187(a)-(b); Miss. Compl. ¶¶ 69, 148-51; Tex. Compl. ¶ 78(b); Va. Compl. ¶¶ 124-25, 255. They also challenge the regulatory health-and-safety measures that they would have to meet in order to be licensed

and pass inspection. Ind. Compl. ¶ 78; La. Compl. ¶¶ 59-187; Miss. Compl. ¶¶ 69, 148-51; Tex. Compl. ¶ 78(b); Va. Compl. ¶¶ 113-116, 255. It is in their business interests—not any women's interests—to throw off laws that require them to "[e]mploy[] qualified staff," or to "[e]nsur[e] that sufficient staff [are] present to provide quality patient care" with properly sterilized equipment, Ind. Compl. ¶¶ 82(b) (410 Ind. Admin. Code §§ 26-5-1, 26-11-2); to have functioning toilets and walls free from holes, La. Compl. ¶ 59(k) (La. Admin. Code tit. 48, § 4445(A)); to have a doctor and nurse present when procedures are being performed and to test clinic employees for communicable diseases, Miss. Compl. ¶ 69 (Miss. Admin. Code §§ 15-16-1:44.10, 15-16-1:44.11.2); to submit to a cap on the ultrasound fee, provide individual counseling and a "private opportunity to ask questions," Tex. Compl. ¶¶ 107, 116(e) (Tex. Health & Safety Code § 171.012(a-1); 25 Tex. Admin. Code § 139.51(4)); and to "ensure the . . . life safety of [a clinic's] patients, employees, and the public," and to have "infection prevention" policies, Va. Compl. ¶ 68 (Va. Code § 32.1-127(B)(1)).[6]

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[6] It is no answer to say that abortion providers will still, for example, sterilize their instruments in the absence of these laws. If, as abortion providers contend, a legal requirement that they sterilize their instruments imposes an undue burden on their patients, the only way to alleviate that burden is to stop complying with the law—to stop sterilizing instruments.

Doctors and clinics also challenge laws designed to protect women from individual doctors who are not adequately screened and credentialed. Here, for example, Petitioners have admitted that hospitals provide more "rigorous and intense background checks than do the clinics." Pet. App. 35a. Not only do the clinics not "undertake any review of a provider's competency," Pet. App. 35a-36a, the clinics do not even run criminal background checks on their physicians, Pet. App. 36a. Yet Petitioners seek third-party standing to challenge laws that ensure abortion providers have undergone criminal background checks and have been credentialed by their peers. Invalidating these laws may be in the interests of the providers, but it is not in the interests of women seeking abortions.

Abortion providers' opposition to licensing, inspections, and health-and-safety standards can have severe consequences for their patients. As *Hellerstedt* observed, Kermit Gosnell had "unlicensed and indifferent workers," "[d]irty facilities," "unsanitary instruments," "cheap, but dangerous, drugs," and "inadequate emergency access . . . ." 136 S. Ct. at 2313 (internal quotation marks omitted). The conditions at Gosnell's clinic persisted because his facility was not inspected for 15 years. *Id.* at 2314. The abortion providers in these new lawsuits seek to mandate—as a matter of constitutional law—the type of lax regu-

lation and non-existent oversight that allowed Gosnell to commit his crimes.[7] To claim that they are doing this "on behalf of" their patients is nonsensical.

3. Similar conflicts arise in abortion providers' challenges to States' informed-consent laws. *Casey* recognized the necessity of informed-consent to "reduc[e] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." 505 U.S. at 882. And in *Gonzales*, the Court noted that some women may come to "regret their choice" leading to "[s]evere depression," "loss of esteem," "grief," and "sorrow." 550 U.S. at 159. The Court noted that many abortion doctors will "prefer not to disclose precise details" about abortion procedures. *Id.* And in Indiana and Mississippi, the abortion providers admit that women seek abortion for a variety of reasons—including finance and logistics. Ind. Compl. ¶ 29; Miss. Compl. ¶ 140.

Nevertheless, abortion providers seek, under the guise of asserting their patients' own rights, to with-

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[7] These injunctions are a realistic possibility. A district court recently enjoined Indiana's licensing requirement as applied to a clinic in South Bend. *Whole Woman's Health All. v. Hill*, No. 1:18-CV-1904-SEB-MJD, 2019 WL 2329381 (S.D. Ind. May 31, 2019). The State recently moved to stay that injunction. *Whole Woman's Health All. v. Hill*, No. 19-2051 (7th Cir.).

hold relevant information—such as government assistance, child support, and adoption alternatives—that *Casey* said could be required, 505 U.S. at 881-85. Many of these claims defy common sense. Abortion providers contend that they can assert women's interests in challenging laws that require clinics to inform their patients of: (1) the physician's name, (2) an emergency number to call if the woman experiences complications, (3) the right to withdraw consent prior to the procedure, and (4) the FDA label of the drug the physician is prescribing. *See* Ind. Compl. ¶ 130(a) (Ind. Code § 16-34-2-1.1(a)(1)(A)); Va. Compl. ¶¶ 217, 262 (Va. Code § 18.2-76(D)); Tex. Compl. ¶ 91(c) (Tex. Health & Safety Code § 171.063(d)(1)).

Finally, abortion providers challenge parental-consent and judicial-bypass laws in Indiana and Texas. But the Court has already stated that "[i]t seems unlikely that [a minor] will obtain adequate counsel and support from the attending physician at an abortion clinic." *H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (upholding a parental-notification law) (quoting *Bellotti v. Baird*, 443 U.S. 622, 657 (1979)). But abortion providers in Indiana and Texas, as well as groups that fund abortions, are asking courts to strike down many of the parental-consent and judicial-bypass laws that are designed to ensure that a minor is supported, adequately counseled, and sufficiently mature when making her decision. Ind. Compl. ¶ 148; Tex. Compl. ¶ 145. Striking several of

the laws challenged—such as the Indiana law requiring abortion clinics to notify parents when a court has granted permission for an abortion, Ind. Code § 16-34-2-4, or the Texas law requiring a minor to appear in court in person, Tex. Fam. Code Ann. § 33.003(g-1)—would enable abortion providers to isolate minors from influences other than those at the clinic. An abortion clinic cannot adequately represent the interests of the very minors the law protects from the overwhelming influence of the clinic.

The result of mangled third-party standing doctrine is that abortion providers challenge regulations they find onerous, relying on their patients' constitutional rights, by bringing claims ostensibly on their behalf under the third-party-standing doctrine. But this practice has permitted doctors and clinics to litigate claims on behalf of women despite a clear conflict of interest. And "when the wrong party litigates a case, [the Court] end[s] up resolving disputes that make for bad law." *Hellerstedt*, 136 S. Ct. at 2322 (Thomas, J., dissenting). If the Court were to grant the petition, it should take this opportunity to make clear that the third-party-standing doctrine does not countenance such actions.

II. Distortion of Third-Party Standing Has Produced Uncertainty Among Courts Applying the Undue-Burden Doctrine

Lower courts' distortion of the third-party-standing doctrine has not only allowed abortion providers

to assert claims to the detriment of their patients, but has also produced confusion in the application of this Court's substantive abortion doctrines. Applied properly, the *Casey* substantial-obstacle test provides at least some hurdles, as providers must prove that the law imposes an actual obstacle to a woman's ability to obtain a pre-viability abortion. *Planned Parenthood of Se. Pa.*, 505 U.S. 833, 878 (1992). Courts can then look for appropriate objective evidence to determine whether the law is a substantial obstacle. Determining whether a burden rises to the level of "substantial" is difficult as-is, but abortion-provider plaintiffs have made the undue burden test even more convoluted.

1. For example, the assumption inherent in third-party standing—that abortion providers are representing their patients' best interests—impacts the merits analysis, as physicians and clinic personnel are permitted to testify about what their patients want and believe. This has the effect of improperly shifting the burden to the State to prove the providers are wrong, a problem compounded by the pure-balancing test urged by Petitioners. With no actual abortion patients in the picture, the State has no place to turn to confirm or refute the clinics' claims.

2. In addition, relaxing the third-party-standing doctrine in the abortion context blurs the dividing line between burdens on the *woman's* choice and burdens on the *clinic's* business model. It allows abortion providers to claim that the constitution is violated

any time an abortion regulation leads a *clinic* to incur additional costs or change its business model. Such cases ask courts to determine whether the Constitution freezes in place a particular economic status quo. *See, e.g.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 896 F.3d 809, 820 (7th Cir. 2018), *petition for cert. filed*, No. 18-1019 (U.S. Feb. 4, 2019). The resulting doctrine sweeps women's interests under the rug.

3. Furthermore, the loose application of third-party standing combines with *Casey*'s large-fraction test to make it far too easy for a single clinic to obtain facial invalidation of a state law. *See* 505 U.S. at 895 (holding that facial invalidation of an abortion law requires showing that the law "will operate as a substantial obstacle to a woman's choice to undergo an abortion" in a "large fraction of the cases in which [it] is relevant"). In contrast, the Court's usually admonishes that enforcement of a law should be prohibited only where it is unconstitutional as applied to *the individual whose rights are at stake*. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). Because *abortion providers'* rights are not at stake at all, it is nonsensical to consider challenges to abortion laws *as-applied to the providers themselves*.

In particular, lower courts applying the large-fraction test have been working to construct some method of determining whether an undue burden ex-

ists for a "large fraction" of women to whom the statute is relevant. But their efforts have been muddled by abortion doctors and clinics bringing suit to challenge a law *as applied to them* but *as a burden on some other party's rights*. Abortion providers claim that a law cannot be applied to them at all, but invariably fail to show that the law would constitute an undue burden for *all* their patients. Courts are thus left to wonder whether these challenges are properly characterized as "facial" or as "as applied," and whether the large-fraction test applies in such circumstances. In *Planned Parenthood of Wisconsin, Inc. v. Schimel*, for example, the Seventh Circuit struck down an admitting privileges requirement because it might have resulted in the closure of a clinic near Milwaukee, 806 F.3d 908, 917 (7th Cir. 2015)—even though "98% of women seeking abortions in Milwaukee will not be impacted," *id.* at 932 n.7 (Manion, J., dissenting). Burdens on abortion clinics are not the same as burdens on women seeking abortion, but lax third-party standing rules blurs the distinction.

Where courts do apply the large-fraction test, the math is often incoherent because the providers have unlimited discretion to define the denominator narrowly, ensuring a result in their favor. A district court in a recent case aptly demonstrated this problem when it oscillated between considering the denominator as all women throughout the entire state, then large regions of the state, and later only the city where the contested clinic was set to open. *Whole Woman's Health All. v. Hill*, No. 1:18-cv-01904-SEB-

MJD, 2019 WL 2329381 at *31-32 (S.D. Ind. May 31, 2019). Because the analysis focused on the *provider's* efforts to establish a clinic in a particular city rather than the burdens any actual women would suffer without the clinic, defining the denominator in any meaningful way was impossible.

With this confusion, lower courts have understandably varied in their approaches to defining the denominator. Some circuits define the denominator narrowly to include only those women whose decisions are affected by the law. *See, e.g.*, *Box*, 896 F.3d at 818-19; *Planned Parenthood Ariz. Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014). Other circuits have defined the denominator more broadly to include all of those for whom the regulation is relevant. *See, e.g.*, *June Med. Servs. LLC v. Gee*, 905 F.3d 787, 802, 813 (5th Cir. 2018), *petition for cert. filed*, No. 18-1460 (U.S. May 23, 2019); *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017); *Planned Parenthood Sw. Ohio Region v. Dewine*, 696 F.3d 490, 514 (6th Cir. 2012); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 196 (6th Cir. 1997).

Defining the denominator too narrowly, as the Seventh and Ninth Circuits have done, creates a one over one fraction: only those women who are burdened are burdened. Nearly every abortion regulation will fail the undue-burden test under this definition, a result not contemplated or required by *Casey*. Determining whether a constitutional violation exists for a large fraction of women should require, at a

minimum, "identifying how many women [are burdened]; their proximity to open clinics; or their preferences as to where they obtain abortions, and from whom." *Hellerstedt*, 136 S Ct. at 2323 (Thomas, J., dissenting). Permitting abortion providers to assert their patients' rights interferes with the proper assessment of these factors. And failing to test abortion providers' claims regarding third-party standing cedes control of abortion doctrine to the providers, often at the expense of their patients.

* * *

As Justice Thomas has observed, the Court's precedents "encourage abortion providers to sue—and [its] cases then relieve them of any obligation to prove what burdens women actually face." *Id.* When lax third-party standing doctrine is combined with the pure balancing test urged by Petitioners and the large-fraction test used in *Casey* and *Hellerstedt*, the result bears little resemblance to traditional constitutional litigation. If the Court grants the petition, it should also grant the cross-petition and eliminate the abortion exception to third-party standing rules.

CONCLUSION

The petition for a writ of certiorari should be denied. But if the petition is granted, the conditional cross-petition should also be granted.

Respectfully submitted,

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