Nos. 18-1323, 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., ET AL.,
Petitioners/Cross-Respondents,

v.

DR. REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent/Cross-Petitioner.

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

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are federal courts scholars who teach and write about third-party standing doctrine, as well as related doctrines addressing justiciability, federal-court jurisdiction, and remedies. *Amici* have an interest in ensuring that the third-party standing doctrine is coherent and consistently applied. *Amici* also believe that their expertise would be of use to this Court in considering the scope of third-party standing, the *stare decisis* concerns that counsel against overruling this Court's existing precedents applying that doctrine, and the possible adverse consequences of denying third-party standing in this case.

Amici are the following scholars:[1]

Helen Hershkoff, Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, New York University School of Law;

Gillian E. Metzger, Stanley H. Fuld Professor of Law, Columbia Law School;

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[1] *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only. Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Jonathan R. Siegel, Professor of Law and Davis Research Professor, George Washington University Law School;

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SUMMARY OF ARGUMENT

I. Third-party standing provides redress for plaintiffs who have been injured in fact and whose injury is closely tied to the violation of the rights of another party who faces hindrances in asserting those rights in court. That doctrine has deep historical roots, and it has been recognized and applied by this Court for a century. This Court's third-party standing decisions have arisen in a wide variety of contexts—commercial, educational, legal, and medical—and have resulted in substantive rulings that have shaped numerous areas of the law, including due-process law. This Court should be loath to disturb or discard basic third-party standing principles.

II. In a long line of decisions dating back almost fifty years, this Court has applied the principles of third-party standing law to hold that physicians have standing to bring claims challenging restrictions on abortion as violative of the constitutional rights of patients. Third-party standing is, in fact, peculiarly appropriate in that context. The rights of the physician subject to direct regulation by the State and the rights of the patient are entirely interdependent; if the physician is prevented from providing services, then the patient's rights are likewise diminished, and there is no possibility of considering the patient's rights later or separately.

Moreover, those cases can be justified in terms of the physician's own right to be subject only to a valid rule of law. In advancing a challenge on behalf of a patient, the physician is also asserting his or her own right not to be subject to penalties based on an unconstitutional provision.

It is therefore unsurprising that physicians in cases like this one satisfy the test for third-party

standing laid out in this Court's decisions. They suffer an injury in fact. They have close—indeed, "confidential" and highly personal—relationships with their patients. And the patients themselves suffer a variety of hindrances to bringing suit, including a justified fear of publicity, stigma, and even danger.

Any suggestion that third-party standing is inappropriate because abortion restrictions are intended to protect women from misconduct by their physicians, thus setting up a conflict between the interests of the physicians and the patients, is deeply flawed. That argument assumes that petitioners are wrong on the merits, which is unwarranted when making a standing determination. It also flies in the face of this Court's decisions—not only in the abortion context, but also in other contexts in which the plaintiffs could have been said to have had certain interests distinct from or even in tension with the persons whose rights the plaintiffs were asserting.

III. Finally, *stare decisis* strongly counsels that this Court abide by its long-standing precedents permitting physicians to bring suit on behalf of their patients in the abortion context. All of the powerful justifications for abiding by precedent, which is a foundational value in the Nation's legal system, are fully applicable here. None of the special circumstances under which precedent may be discarded are present, since there has been heavy reliance on that well-reasoned precedent and it is neither recent nor unworkable. And rejecting third-party standing here would have broad and perhaps unintended ripple effects throughout this Court's standing jurisprudence.

ARGUMENT

I. This Court Has Long Recognized Third-Party Standing In A Variety Of Contexts, Including Medical Contexts

Third-party standing in its current form is deeply engrained in American law, and this Court should not disturb or discard that basic doctrine. If the Court were to do so, that decision would work a fundamental change in the ability of injured parties to obtain redress—one that would reverberate through many parts of American life and many substantive areas of the law.

1. As the Court has explained, 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." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). But the Court "ha[s] not treated this rule as absolute." *Kowalski* v. *Tesmer*, 543 U.S. 125, 129-130 (2004). Rather, it has "recogniz[ed] that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." *Ibid.*

Such third-party standing is appropriate if a litigant makes three showings. First, "[t]he litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991) (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 112 (1976)). Second, "the litigant must have a close relation to the third party." *Ibid*. (citing *Singleton*, 428 U.S. at 113-114). Finally, "there must exist some hindrance to the third party's ability to protect his or her own interests." *Ibid.* (citing *Singleton*, 428 U.S. at 115-116).

2. The principle that a litigant may be the appropriate party to advance a claim of violation of another person's legal rights has deep historical antecedents. At the time of the Founding, English law authorized "strangers" to seek a writ of prohibition from the King's Bench commanding the dismissal of a case from the lower courts for lack of jurisdiction. Agreement exists that this procedure was available at least to a stranger who could demonstrate some particular interest in the outcome of the lower-court proceeding. See Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 Brook. L. Rev. 1001, 1009-1020 (1997). And *qui tam* actions in eighteenth-century England were justified on the ground that a relator can assert the rights of the sovereign in litigation because the relator has an inchoate property interest in the litigation's outcome. See *id.* at 1041-1043. Those traditions were carried over to American law, as this Court has recognized. See *Vermont Agency of Natural Resources* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 774-778 (2000); see also, *e.g.*, Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 702-703 (2004) (discussing public nuisance actions).

3. The principle of third-party standing has also long been recognized by this Court. Many decisions by this Court over more than a hundred years, arising in a variety of contexts, have recognized or permitted third parties to assert and protect the rights of others, subject to the limits discussed above. Where the Court has approved third-party standing, it has necessarily determined that the plaintiff has suffered injury in fact and that the "irreducible constitutional minimum of standing," *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992), has been satisfied.

a. In numerous commercial settings, the Court has allowed sellers to litigate the rights of purchasers. For instance, the Court has allowed white sellers of real property to assert the rights of non-whites in resisting enforcement of racially restrictive covenants. See *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953) (the "rule of practice" under which the Court typically does not permit a litigant to assert another's rights can be "outweighed by the need to protect * * * fundamental rights which would [otherwise] be denied" because it "would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court"); see also *Buchanan* v. *Warley*, 245 U.S. 60, 72-73, 81 (1917) (permitting white property owner to challenge racially discriminatory city ordinance restricting sale of property to black purchasers).[2]

In the leading third-party standing decision, *Craig* v. *Boren*, 429 U.S. 190 (1976), the Court permitted a beer vendor to rely on the equal protection rights of prospective male customers in the vendor's challenge to a gender-based restriction on the sale of "non-intoxicating" beer. See *id.* at 191-193; see also *ibid.* (restriction permitted women ages 18 and over to buy the beer at issue but did not permit men to buy the beer before they turned 21). The Court explained that the vendor had suffered an injury in fact because she had

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[2] The Court has applied similar third-party standing principles to challenges to racially discriminatory practices in the criminal context, ruling that a criminal defendant has third-party standing to assert the constitutional rights of jurors who have suffered discrimination. See, *e.g.*, *Powers*, 499 U.S. at 410-414 (holding that a criminal defendant has standing to raise an equal protection claim on behalf of jurors); see also, *e.g.*, *Flowers* v. *Mississippi*, 139 S. Ct. 2228 (2019); *Foster* v. *Chatman*, 136 S. Ct. 1737 (2016).

the choice of obeying the statute and suffering "constriction of her buyers' market" or violating the statute and suffering "sanctions and perhaps loss of license." *Id.* at 194 (citation and internal quotation marks omitted). The Court reasoned that she was "entitled to assert those concomitant rights of third parties that would be diluted or adversely affected should her constitutional challenge fail and the statutes remain in force." *Id.* at 195 (citation and internal quotation marks omitted). And the Court stated that because the restriction regulated "the sale rather than use" of beer, the vendor was "the least awkward challenger." *Id.* at 196-197.[3]

Relying on *Craig*, this Court held that a corporation selling contraceptives by mail order had third-party standing to assert the rights of its potential customers in challenging a New York law that prohibited the sale of contraceptives by nonpharmacists or to anyone under the age of sixteen. See *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 683-684 (1977). Similarly, the federal courts of appeals have permitted vendors and retailers to litigate the rights of their customers in a wide range of circumstances. See *Craig*, 429 U.S. at 195 ("[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function."). Relevant recent decisions include a

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[3] The Court also has permitted an employee to litigate his employer's constitutional rights. See *Truax* v. *Raich*, 239 U.S. 33, 35, 43 (1915) (allowing employee to assert his employer's freedom to hire in challenging an Arizona statute that required a certain percentage of an employer's employees to be U.S.-born and punished the employer for any violations); see also *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965) (discussing *Truax*).

challenge by a would-be gun store, asserting the rights of potential customers, to a gun-store zoning ordinance, see *Teixeira* v. *Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017); see also, *e.g.*, *Ezell* v. *City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011) (supplier of firing-range facilities had standing to challenge city ordinance banning firing ranges on behalf of potential customers); a challenge by a "wedding 'vendor,'" on behalf of potential clients, to a zoning restriction on land the vendor hoped to rent for wedding ceremonies, see *Epona* v. *Cty. of Ventura*, 876 F.3d 1214, 1219-1220 (9th Cir. 2017); and a challenge by an importer of gloves, on behalf of prospective glove purchasers, to allegedly discriminatory tariffs, see *Totes-Isotoner Corp.* v. *United States*, 594 F.3d 1346, 1352 (Fed. Cir. 2010).

b. Ranging far beyond a purely commercial context, the Court also has permitted schools and educators, acting *in loco parentis*, to challenge laws as violating the due process rights of their students' families. In *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), the Court permitted a teacher to challenge a Nebraska statute, enacted in the wake of World War I, that forbade teaching any language other than English to students up through eighth grade. *Id.* at 400-401. In striking down the Nebraska law at the teacher's behest, the Court recognized that the law violated not only the teacher's right to provide instruction but also the "right of parents to engage him so to instruct their children," and found both sets of rights to be "within the liberty of" the Fourteenth Amendment. *Id.* at 400.

Two years later, the Court allowed private schools to raise the due process rights of their students' parents in a challenge to an Oregon compulsory public education act. See *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-536

(1925). In *Pierce*, the Court recognized that the law inflicted an injury in fact on the schools, because "[t]he inevitable practical result of enforcing the act * * * would be [their] destruction." *Id.* at 534. And the Court reasoned that, while the schools could not "claim for themselves the liberty which the Fourteenth Amendment guarantees," they could come to court to challenge the "compulsion" that the State was "exercising over present and prospective patrons," which "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control," *id.* at 535; see *Barrows*, 346 U.S. at 257 (discussing *Pierce*).[4]

c. This Court's third-party standing cases also extend to the relationships between professionals and their clients. Over thirty years ago, in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), this Court held that an attorney has standing to advance the rights of the attorney's client. The plaintiff in *Caplin* was a law firm that had represented a criminal defendant in a drug trial. *Id.* at 620. The law firm challenged a drug forfeiture statute on the grounds that it violated the defendant's Fifth and Sixth Amendment rights because it did not include an exception that allowed the payment of attorneys' fees out of forfeited assets. *Id.* at 623-624. The Court ruled that the law firm had third-party standing because the firm suffered an injury from nonpayment of the forfeited assets, the attorney-client relationship was of "special consequence," and the drug forfeiture statute could "materially impair the ability of" criminal defendants to exercise their constitutional rights. *Id.* at 623 n.3.

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[4] This Court has repeatedly reaffirmed both *Meyer* and *Pierce*. See, *e.g.*, *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2600 (2015).

A year later, in *U.S. Department of Labor* v. *Triplett*, 494 U.S. 715 (1990), Justice Scalia authored an opinion for the Court reaching a similar conclusion. In that case, an attorney challenged on due process grounds provisions that restricted him from collecting fees from clients bringing claims under a particular statute, and he invoked "not his own legal rights and interests * * * but those of the * * * claimants who hired him." *Id.* at 720. The Court reasoned that third-party standing exists when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement)." *Ibid.* And the Court concluded that "[a] restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation falls squarely within this principle." *Ibid.*[5]

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[5] To be sure, the Court has not found third-party standing to exist in every attorney-client context—but it has never undermined the basic principles set forth in *Caplin* and *Triplett*. In *Kowalski* v. *Tesmer*, 543 U.S. 125 (2004), the Court distinguished those cases and ruled that plaintiff attorneys lacked third-party standing to sue on behalf of potential, but unspecified, indigent clients. *Id.* at 132-134. Because the attorneys in *Kowalski* had no contact with their potential clients or even knowledge of those clients' identity, the Court found the relationship insufficiently "close" for standing to exist. *Id.* at 130-131 (noting that the attorneys and clients had "no relationship at all"); see *id.* at 131-132 (stating that no hindrance sufficient for third-party standing existed because the indigent persons were able to advance their own rights through the courts). And, significantly, *Kowalski* noted that the Court had "allowed standing to litigate the rights of third parties when enforcement of the restriction *against the litigant* would result indirectly in the violation of third parties'

d. Most pertinent to this case, the Court has recognized the relationship between a physician and his or her patients as typically sufficient to confer standing on the physician to assert the patients' rights. See *Caplin*, 491 U.S. at 623 n.3 ("[T]he doctor-patient relationship * * * is one of special consequence.").

For example, the Court long ago ruled that a physician's relationship with a patient could give rise to standing to assert the patient's right to privacy. In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), the Court held that a professor of medicine who served as medical director of a clinic that dispensed advice about contraception, and who was subject to criminal sanctions for doing so, had "standing to raise the constitutional rights of the married people with whom [he] had a professional relationship." *Id.* at 480-481; see *Eisenstadt* v. *Baird*, 405 U.S. 438, 444-446 (1972) (ruling that an "advocate of the rights of persons to obtain contraceptives," who had described and distributed a contraceptive to an unmarried person, had standing to raise claims of unmarried people denied access to contraceptives). Likewise, in upholding two state bans on assisted suicide, this Court permitted doctors to raise the substantive due process and equal protection claims of their terminally ill patients, even after patients had succumbed to their illnesses. See *Washington* v. *Glucksberg*, 521 U.S. 702, 707-708 (1997); *Vacco* v. *Quill*, 521 U.S. 793, 797-798 (1997).

The courts of appeals have followed suit, allowing medical providers to advance the rights of their patients in a variety of contexts, many of which have

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rights." *Id.* at 130 (quoting *Warth*, 422 U.S. at 510, and citing *Doe* v. *Bolton*, 410 U.S. 179 (1973)) (emphasis in original) (internal quotation marks omitted).

nothing to do with abortion. Those courts have typically permitted third-party standing so long as there is some hindrance to the patients' ability to protect their own interests. See, *e.g.*, *Aid for Women* v. *Foulston*, 441 F.3d 1101, 1113-1114 (10th Cir. 2006) (health-care providers had standing to assert privacy rights of their minor patients because, *inter alia*, patients may have a desire to protect their privacy and, as minors, "are generally not legally sophisticated and are often unable even to maintain suits without a representative or guardian"); *Pennsylvania Psychiatric Soc'y* v. *Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002) (psychiatrists had standing to assert rights of patients because, *inter alia*, "the stigma associated with receiving mental health services presents a considerable deterrent to litigation"). But see *Freilich* v. *Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002) (doctor lacked standing to raise patients' statutory claims because there was "no evidence" that the patients were "hindered from presenting their own claims").

II. As This Court Has Repeatedly Held In Applying The Principles Set Forth In Those Decisions, Physicians Have Third-Party Standing To Assert The Constitutional Rights Of Their Patients In Challenging Abortion Restrictions

1. As in other medical contexts, this Court has repeatedly held in the abortion context that physicians have standing to challenge state regulation on behalf of their patients. The Court recently reaffirmed that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden

on the [woman's] right[s]" and therefore are unconstitutional. *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (citation omitted). The Court also implicitly recognized that medical providers can raise the third-party claims of their patients in challenging those restrictions. See *id.* at 2301; see also *id.* at 2342 (Alito, J., dissenting) (stating that "[u]nder our abortion cases," providers of care "are permitted to rely on the right of the abortion patients they serve"); *id.* at 2321-2322 (Thomas, J., dissenting) (referring to the same standing precedents).

That acceptance is in keeping with a long string of this Court's decisions recognizing that particular form of third-party standing and dating back to when the Court first recognized a woman's right to access an abortion. See *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 62 (1976) (stating that physicians "clearly have standing" to assert their patients' constitutional rights in challenging abortion restrictions); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973); *Singleton* v. *Wulff*, 428 U.S. 106, 117-118 (1976) (plurality opinion). Although the principle that physicians generally have third-party standing to raise the rights of their patients was posited by a plurality in *Singleton* v. *Wulff*, see 428 U.S. at 118 (plurality opinion), subsequent decisions by this Court have repeatedly reaffirmed that principle. See, *e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124, 133 (2007); *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 324 (2006); *Stenberg* v. *Carhart*, 530 U.S. 914, 922 (2000); *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 845 (1992) (plurality opinion). Indeed, a majority of the Court took it as a matter of course in *Whole*

Woman's Health that health-care providers could challenge to abortion restrictions based on the constitutional rights of the providers' patients. See p. 14, *supra*.

2. As is evident from this Court's consistent and long-standing rulings, third-party standing for physicians who are subject to direct regulation (and, often, direct sanctions or even criminal liability) in the abortion context is particularly appropriate and consistent with the underpinnings of third-party standing doctrine, for several reasons.[6]

Importantly, in the context of abortion regulation the rights of the physician and the patient are "interdependent." *Craig*, 429 U.S. at 195 n.4; see *id.* at 196. The regulation applies to the physician and the patient at exactly the same time; if the physician is prevented from providing services, then the patient's rights are diminished at that very moment, especially in light of the fact that there is no other feasible avenue for the patient to obtain those services. There is thus no question that enforcement of the regulation against the physician who is challenging it "will materially impair the ability" of women to obtain abortion-related medical care. *Id.* at 196 (citation omitted). And there is no way to consider the application of the regulation to the women's rights separately from its application to the physician, or at some later time.

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[6] Here, failure to comply with the Louisiana restrictions can subject a physician to a fine of $4,000 per violation, as well as license revocation, civil liability, and even imprisonment. See, *e.g.*, Pet. App. 190a, 287a; see also *id.* at 190a (discussing penalties for outpatient abortion facilities that do not comply with the statute).

That makes the physician "uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, [the abortion] decision" on behalf of the patients whose rights are tied up with his or her freedom of action. *Singleton*, 428 U.S. at 117 (plurality opinion); see *Bolton*, 410 U.S. at 188; *Danforth*, 428 U.S. at 62.[7]

Indeed, it is hard to imagine greater interdependence of the rights of the plaintiff and the rights of the third party whose rights are being asserted than exists in abortion cases. That is exactly why States wishing to restrict abortion may target physicians performing abortions for regulations that—as this Court found in *Whole Woman's Health*—cannot be justified on the basis of women's health and safety. See *Whole Woman's Health*, 136 S. Ct. at 2311-2312, 2315-2316. Restricting physicians is an extremely effective way of curtailing women's exercise of their own rights. See *id.* at 2316 (discussing closure of clinics that would have resulted from enforcement of Texas restrictions at issue in that case).

3. Equally important, although the Court has traditionally analyzed those cases as instances of third-party standing, they are also appropriately understood in first-party standing terms. Physicians challenging abortion restrictions as violative of patients' constitutional rights are also asserting their own rights not to be subject to penalties based on an unconstitutional

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[7] In other contexts where such interdependence is lacking, the Court has generally rejected third-party standing. See, *e.g.*, Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 384 (1998); Robert Allen Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 602 (1962).

provision of law. As scholars have observed, "a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction." Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 299 (1984).

If a regulation of physicians has the purpose or effect of placing an undue burden in the path of a woman seeking an abortion, it is unconstitutional. And if a statute violates women's due process rights, then it is not a valid rule of law and physicians should not be subject to penalties pursuant to it. Physicians thus have standing to raise that undue-burden claim. See, *e.g.*, Kermit Roosevelt III, *Valid Rule Due Process Challenges:* Bond *v.* United States *and* Erie*'s Constitutional Source*, 54 Wm. & Mary L. Rev. 987, 1007-1008 (2013); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1332-1333, 1359 (2000) (discussing principle that "a defendant cannot be sanctioned without the authority of a valid law"); Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 423-424 (1974).

Where the valid-rule principle is in play, recognition of a plaintiff's standing under the third-party standing doctrine is not subject to the criticism that third party plaintiffs will not be "effective advocate[s]," *Duke Power Co.* v. *Carolina Envtl. Study Grp.*, 438 U.S. 59, 80 (1978), because they have no rights of their own to vindicate. Rather, the connection between the physician plaintiff's own status and the constitutional rights of his or her patients is an especially tight one. That gives the case the "concrete adverseness" that

"sharpens the presentation of [the] issues." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

4. In light of those principles, it is not surprising that this Court's decisions finding third-party standing in the abortion context are fully consistent with all of the other third-party standing precedents discussed above and with the three-factor test this Court has developed to assess the existence of such standing. See pp. 5-13, *supra*.

First, physicians who are directly subject to the kinds of regulations Louisiana has imposed, or similar regulations, plainly suffer an injury in fact and meet the constitutional requirements for standing. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). Those physicians must alter their practices, or their facilities, or both. And, in many cases, compliance will subject them to considerable monetary expense or loss as well as to other difficulties; the potential consequences of noncompliance are even more serious. See note 6, *supra*. Enjoining the regulations redresses those injuries. See *Steel Co.*, 523 U.S. at 103.

Second, the relationship between a patient seeking an abortion and her medical-care provider is necessarily a close one within the meaning of this Court's third-party standing precedent. See Pet. App. 286a; pp. 15-16, *supra*. That is true because, as discussed above, the physician's freedom to act and the patient's rights are inextricably intertwined. See *Warth*, 422 U.S. at 510. But it is also true because of the "confidential" nature of the relationship. *Planned Parenthood of Wisc., Inc.* v. *Schimel*, 806 F.3d 908, 910 (7th Cir. 2015) (citation omitted). A woman's decision

to end her pregnancy is deeply personal and "inherently * * * a medical decision" made by a woman in consultation with her medical provider. *Roe* v. *Wade*, 410 U.S. 113, 166 (1973). And when the State regulates that relationship by, for example, requiring the medical provider to maintain certain admitting privileges or certain types of facilities, the State may well be "prevent[ing] a [woman] from entering into," or otherwise interfering with, "a relationship" with the medical provider to which she "has a legal entitlement." *Triplett*, 494 U.S. at 720.

Third, women unquestionably face hindrances to personally vindicating their constitutional right to an abortion as a plaintiff in court. Among other things, few issues in our society are as divisive and controversial as abortion, see *Stenberg*, 530 U.S. at 947 (O'Connor, J., concurring), and women seeking to challenge abortion restrictions in court would rightly fear a loss of privacy, see *Singleton*, 428 U.S. at 117-118; *Carey*, 431 U.S. at 684 n.4, a stigma, or even a backlash. After all, "abortion providers, the clinics where they work[,] and the staff of these clinics[] are subjected to violence, threats of violence, harassment[,] and danger." Pet. App. 183a.[8] And people who are only loosely affiliated with abortion providers and their staff have been subject to harassment as well. See *id.* at 188a (picketing of homes of physicians' neighbors); *id.* at

[8] At petitioner June Medical's clinic, for instance, there have been three violent attacks: "once by a man wielding a sledgehammer, once by an arsonist who threw a Molotov cocktail at the clinic, and once by having a hole drilled through the wall and butyric acid poured through it." *Id.* at 185a-186a; see *id.* at 259a (discussing fear experienced by physicians).

186a (picketing of the school of the children of a physician formerly affiliated with a medical clinic providing abortions).

In this case, the district court took measures to protect the identities of the physician plaintiffs and even of the entities with which they were associated. In addition to allowing the physicians to proceed pseudonymously, the district court allowed them to testify at trial behind a screen. See Pet. App. 184a; *id.* at 185a. Of course, such measures cannot be guaranteed to be successful.

If physicians required those kinds of precautions before proceeding with this lawsuit, it is unreasonable to expect a woman to subject herself to a similar ordeal—especially given how deeply personal an event an abortion is in a woman's life. In the face of such hindrances, many women likely would avoid drawing any attention to themselves by bringing suit. And many other hindrances to such a suit exist in abortion cases as well, including "the imminent mootness, at least in the technical sense, of any individual woman's claim," *Singleton*, 428 U.S. at 117 (plurality opinion), the lack of a direct "financial stake" in the form of money damages for a patient plaintiff, and "the economic burdens of litigation," *Powers*, 499 U.S. at 415, including time away from families and jobs.

5. Any suggestion that a conflict of interest precludes third-party standing when physicians challenge restrictions that purportedly protect patients' health and safety, see Cross-Pet. 21-22, is fatally flawed.

First, the argument improperly collapses the standing question with the merits question. It is a

matter of dispute in this case whether the Louisiana regulations are any different from the virtually identical Texas regulations that the Court recently found to serve no protective purpose whatsoever. See *Whole Woman's Health*, 136 S. Ct. at 2311-2312, 2315-2316. The outcome of the standing inquiry cannot depend on accepting the defendant's view of what the facts show and what the ultimate outcome of the case will be. If that were the law, then a court could not resolve standing without resolving the merits of the case as well—thus defeating part of the purpose of the standing doctrine, which is to require a determination at the threshold of the case of whether a court should exercise its judicial power in the first instance. Cf. *Steel Co.*, 523 U.S. at 89 (stating that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case"); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted * * * must be decided after and not before the court has assumed jurisdiction over the controversy.").

Second, that argument simply cannot be reconciled with this Court's well-reasoned decisions. Many of the regulations at issue in the cases in which this Court has expressly found or assumed third-party standing for physicians to challenge abortion restrictions also could have been characterized as regulations that served to protect the woman—by limiting certain types of procedures, requiring physicians to provide mandated information at mandated times, and the like. See pp. 14-15, *supra*. But this Court has never suggested that some hypothesized conflict could make

any difference to a physician's ability to assert the rights of the women who want his services and who would prefer to receive those services without the challenged restrictions in place.[9] And any such suggestion would be irreconcilable with standing decisions from outside the abortion context. For instance, the interests of the attorney who had third-party standing in *Triplett* and the client whose rights the attorney was asserting could have been thought to be in some conflict with each other—after all, the statute that the attorney challenged protected the client from having to pay money to the attorney except under certain limited circumstances. See p. 11, *supra*; *Triplett*, 494 U.S. at 718, 720-721. But the Court understood that any such conflict was conjectural and that interests of the attorney and the client were, in the end, fundamentally aligned with each other. That understanding is equally applicable to abortion providers and the patients who want abortion-related services.

[9] Cf. *Casey*, 505 U.S. at 894 (stating that for purposes of a merits analysis "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant"); see *id.* at 894-895; see also *id.* at 887 (plurality opinion) (asking whether a substantial obstacle existed for the "particular group" on whom the "particular burden" of a law fell).

III. *Stare Decisis* Strongly Counsels Adherence To This Court's Precedents Ruling That Physicians Have Third-Party Standing To Assert The Rights Of Patients In The Abortion Context, And Rejection Of Those Precedents Could Have Broad Consequences In Other Areas Of The Law

Denying third-party standing here is tantamount to overruling this Court's numerous decisions upholding such standing in the abortion context.[10] Moreover, rejecting third-party standing doctrine based on general conflict-of-interest principles would cut across numerous third-party standing contexts and have ripple effects throughout many areas of the law. Indeed, rejecting standing here risks calling third-party standing doctrine as a whole into question. Such results fly in the face of the doctrine of *stare decisis*. Not only are the Court's decisions upholding third-party standing in the abortion context and elsewhere correctly decided, but deviating from such well-entrenched precedent would be wholly unjustified.

1. As this Court has frequently explained, "[a]dherence to precedent is 'a foundation stone of the rule of law.' * * * '[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2422 (2019) (plurality opinion) (quoting *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 798 (2014), and *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)); see, *e.g.*, *Gamble* v.

[10] Indeed, respondent Dr. Rebekah Gee so acknowledges. See Cross-Pet. 26 n.16 ("[I]f *Wulff* conflicts with the correct standards of third-party standing, it should be overruled.").

United States, 139 S. Ct. 1960, 1969 (2019); *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015). Of course, that is not to claim that this Court can never overrule its precedent. "But any departure from the doctrine [of *stare decisis*] demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" *Kisor*, 139 S. Ct. at 2422 (plurality opinion) (quoting *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). That is true "even in constitutional cases." *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne*, 501 U.S. at 842) (alterations omitted). And it is particularly true where, as here, a decision overruling the principle at issue would affect "not a single case, but a 'long line of precedents'—each one reaffirming the rest and going back" many decades. *Kisor*, 139 S. Ct. at 2422 (quoting *Bay Mills*, 572 U.S. at 798); see pp. 13-16, *supra* (discussing those precedents in the abortion context).

No such special justification even remotely exists here. In "deciding whether to overrule a past decision," this Court has looked to the quality of the decision's reasoning, along with "the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus* v. *American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478-2479 (2018); see *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (departing from existing law may be appropriate if it "would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings.").

None of the factors supporting overruling is met in this case. The Court's precedents upholding third-party standing for physicians in the abortion context are well reasoned; they are also completely "consisten[t] with other related decisions" and "developments since the decision was handed down." *Janus*, 138 S. Ct. at 2478-2479. Departing from those precedents would "upset expectations," *Pearson*, 555 U.S. at 233, and "reliance," *Janus*, 138 S. Ct. at 2479, since several generations of American women and their medical providers have relied on the principle that physicians can bring claims of unconstitutional interference with reproductive rights. And no practical experience has "pointed up the precedent[s'] shortcomings," *Pearson*, 555 U.S. at 233, demonstrated their "[un]workability," *Janus*, 138 S. Ct. at 2478, or in any way undermined their bases. Any departure from existing third-party standing precedents that would leave women seeking to exercise their constitutionally protected reproductive rights worse off than the customers, employers, parents, jurors, or clients who are entitled under this Court's precedents to have their rights advanced by other parties would be especially difficult to justify in light of *stare decisis* concerns.

2. A decision rejecting third-party standing here would significantly curtail women's ability to vindicate the constitutional right to access reproductive health services. Such a holding also would almost certainly spread to other medical contexts, limiting rights that the Court has recognized as "essential to the orderly pursuit of happiness by free men" and women. *Meyer*, 262 U.S. at 399. If medical providers and physicians lack third-party standing to vindicate their patients' constitutional right to an abortion free of an undue burden, there is little doctrinal basis to continue to allow physicians and medical providers to assert

their patients' rights respecting other medical procedures, treatments, or information such as contraceptives, end-of-life drugs, or mental-health therapy—particularly where a governmental authority asserts that a challenged restriction is protective of patients' safety.

In the non-medical context, too, overruling, or significantly narrowing, this Court's third-party standing rulings in abortion cases could have broad and unintended consequences. For example, if a medical provider is not permitted to raise the constitutional rights of patients because some patients may favor the challenged abortion regulation, see Cross-Pet. 21, then sellers in a commercial context would not have third-party standing to assert the rights of their buyers, because some of their buyers may favor the contested restriction. As a result, the ongoing validity of the Court's precedents in *Barrows* v. *Jackson*, 346 U.S. 249 (1953), and *Buchanan* v. *Warley*, 245 U.S. 60 (1917), would be thrown into question. Indeed, the plaintiffs in *Barrows* were other property owners who sued defendant for breaching the racially restrictive covenant by selling her property to a black buyer. *Barrows* v. *Jackson*, 247 P.2d 99, 101 (Cal. App. 1952), *aff'd*, *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

Likewise, if the Court adopts the argument that a litigant's pecuniary interest in the targeted relationship is sufficient to create a disqualifying conflict of interest, see Cross-Pet. 26, then nearly all of the plaintiffs to which the Court has granted third-party standing in the past would be disqualified. Virtually all of those plaintiffs had some pecuniary interest (whether via wages or sales) in the underlying relationship that a challenged regulation was targeting—which is ex-

actly why they satisfied the "injury in fact" requirement of third-party standing. See, *e.g.*, *Truax*, 239 U.S. at 36 (employee of restaurant); *Meyer*, 262 U.S. at 396 (parochial school teacher); *Pierce*, 268 U.S. at 531-533 (private school); *Barrows*, 346 U.S. at 252 (seller of real estate); *Griswold*, 381 U.S. at 480 (medical provider); *Craig*, 429 U.S. at 192 (beer vendor); *Triplett*, 494 U.S. at 718 (private attorney); *Glucksberg*, 521 U.S. at 707 (private physicians). Given those authorities, it cannot be true that a pecuniary interest alone can preclude a litigant from effectively representing the rights of an absent third party—and if the Court were to hold otherwise, that holding would throw a century of precedent into complete disarray.

In short, a decision rejecting third-party standing here could not be cabined to the abortion context, but would threaten third-party standing in its entirety. Moreover, if the Court were to overturn third-party standing doctrine, it would then be forced to confront the fact that in many instances of third-party standing, the litigants are asserting first-party rights to be regulated only by valid and constitutional rules. And as this Court has emphasized, there is "ordinarily little question" that individuals have standing to challenge regulations that directly apply to them. See *Lujan*, 504 U.S. at 561-562.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed insofar as it recognized third-party standing for the plaintiffs, but should otherwise be reversed.

Respectfully submitted,

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