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.

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

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

BRIEF OF *AMICUS CURIAE* THOMAS MORE SOCIETY SUPPORTING RESPONDENT-CROSS-PETITIONER

KENNETH W. STARR
5404 Point Wood Circle
Waco, Texas 76710
(254) 644-4970
Ken_Starr@baylor.edu

TIMOTHY J. NEWTON
Counsel of Record
MURPHY & GRANTLAND, P.A.
4406-B Forest Drive
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
tnewton@murphygrantland.com

Counsel for Amicus Curiae

December 27, 2019

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Thomas More Society, a non-profit, national public interest law firm dedicated to restoring respect in law for life, family, and religious liberty. Thomas More Society is committed to, among other things, defending laws that protect human life from conception to natural death and respecting family values. As such, Thomas More Society has a unique interest in this case, and it is uniquely positioned to speak for the many Americans who believe that life is a fundamental right, and who advocate its protection to all.

SUMMARY OF ARGUMENT

Petitioners June Medical Services, L.L.C. and its doctors lack Article III standing in this case. Although Petitioners have standing to advance their procedural due process claim, that claim is materially different from the issue before the Court. The injury at issue is the alleged undue burden on access to abortions, the right to which is held by third parties: June Medical's patients. Petitioners lack third-party standing to assert the constitutional rights of others in this case because they lack a close relationship with the patients

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus* certifies that Petitioners and Respondents have given blanket consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

who would have first-party standing. In fact, June Medical has a conflict of interest with its patients, whom the restrictions were enacted to protect, with respect to the safety measures at issue.

Petitioners' argument is essentially that it is too difficult to comply with the increased statutory safety standards for medical care; consequently, their patients should accept lower safety standards or have no care at all. The very fact that Petitioners are mounting this argument reveals a motivation adverse to the interests of its future patients, who naturally have an interest in safe medical care. The lackadaisical effort by abortion providers in Louisiana to comply with the requisite safety standards likewise supports this inference. Accordingly, Petitioners' cause of action asserting the constitutional rights of their anticipated future patients based upon third-party standing should be dismissed.

ARGUMENT

In the wake of the Kermit Gosnell scandal, many states enacted statutes aimed at prohibiting unsafe abortion practices. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2343 (2016) (Alito, J., concurring) (hereinafter "WWH"). Gosnell was convicted of first-degree murder of three infants who had been born alive and for the manslaughter of a patient. Id. In response, Texas enacted a statute designed to shut down similarly unsafe facilities operating in that state. Id. at 2344. This Court, however, held that the measure was unconstitutional because it unduly burdened the rights of women seeking abortions. Id. at 2318.

This case was brought by an abortion clinic and two of its doctors, who are identified as "Doe 1" and "Doe 2," (hereinafter collectively "June Medical") to challenge a recently-enacted Louisiana statute. The Louisiana statute in question seeks to promote women's health by ensuring a higher level of physician competence and by requiring continuity of care. June Med. Servs., L.L.C. v. Gee, 905 F.3d 787, 805 (5th Cir. 2018).

June Medical asserted two causes of action. The first, which asserted procedural due process violations of June Medical's own liberty and property rights, has not been pursued. (Conditional Cross-Petition, p. 7 (filed May 19, 2019).) The core challenge, in contrast, is based upon the second cause of action, which alleged violations of the substantive due process rights of June Medical's *patients*. Specifically, June Medical asserts that the statutory requirement that physicians performing abortions in Louisiana must have active admitting privileges at a local hospital unduly burdens the rights of abortion-seeking women. June Med. Servs. LLC v. Kliebert, 158 F. Supp. 3d 473, 486 (M.D. La. 2016).

Two other abortion clinics and doctors (Doe 5 and Doe 6) filed a separate action that has been dismissed. June Med., 905 F.3d at 792 n.5. Two additional abortion-performing physicians, Doe 3 and Doe 4, are not parties to this action. Doe 3 has admitting privileges that satisfy the statutory requirements. Id. at 800, 809. Doe 4 has retired and made a personal choice not to practice anymore. Id. at 795. Thus, the only doctors asserting claims in this action are Does 1 and 2.

I. Abortion providers cannot manufacture their standing by their own misconduct.

The facts of this case reveal the tension between the broad language in Singleton v. Wulff, 428 U.S. 106, 118 (1976), which seemingly grants *carte blanche* standing to abortion providers to assert the rights of women seeking abortions, and the balancing test set forth in WWH. This Court in WWH required courts to weigh the benefits of statutes providing for patient safety against the burdens imposed on abortion access. 136 S. Ct. at 2309-10.

When abortion providers challenge laws that burden their practice, it is questionable whether they are acting on behalf of their patients, or merely acting in their own self-interest. The combination of Singleton and WWH gives abortion providers the ability to control their own destiny by removing any meaningful incentive for them to comply with safety standards. Abortion providers are able to claim undue burden by merely feigning attempts to comply and then arguing their predictable failure demonstrates undue burden. Courts are then called upon to police the diligence of the attempted compliance before they can properly balance the benefits of the law against its burdens. The facts of this case are illustrative of this incongruity.

The Fifth Circuit found that only one abortion doctor, Doe 1, made a good-faith effort to obtain hospital admitting privileges. June Med., 905 F.3d at 810. However, Doe 1 is neither an obstetrician nor a gynecologist. He has a practice in addiction medicine, and he has never completed a residency. Id. at 798.

The Court of Appeals found that Doe 2 failed to make a good-faith effort to comply with the statute. June Med., 905 F.3d at 808. Doe 2 failed to follow through with his application for privileges at one hospital and failed to apply for privileges at others. Id.

Doe 2 has acquired limited privileges at Tulane Medical Center in New Orleans. June Med., 905 F.3d at 794. Louisiana's Secretary of its Department of Health and Hospitals submitted a signed declaration averring that the privileges Doe 2 obtained qualified under the statute. Id. n.18. However, Doe 2 argued that these privileges do not qualify. Id. The Fifth Circuit agreed. But it is noteworthy that Doe 2's position undercuts his attempted compliance. Even when the State of Louisiana was willing to waive strict compliance with the law, Doe 2 refused to accept that act of regulatory grace.

The Fifth Circuit found that Doe 5 and Doe 6 both failed to make a good-faith effort to comply with the statute. June Med., 905 F.3d at 809-10. Does 5 and 6 dismissed their lawsuit without prejudice, so the possibility exists that their claims could be re-filed.

Doe 5 qualifies for privileges at one hospital if he can identify a covering doctor. Id. at 797. After one doctor refused to cover for him, Doe 5 has not reached out to any other physician. Id. Doe 4 admitted that it is not overly burdensome for a hospital to require a covering doctor. Id. at 795. Doe 5 has not followed up with his applications for privileges at any other hospitals in the area. Id. at 797. The Fifth Circuit therefore found that Doe 5 "has contrived a situation in which it is impossible for him to obtain privileges." Id.

at 798. The appellate court further found that Doe 5 appears to be "waiting for the outcome of this litigation to put forth an actual good-faith effort." Id. at 809. The court held that Doe 5's "lackluster approach" could not be used to demonstrate undue burden. Id.

Doe 6 only applied to one of nine qualifying hospitals in the area. June Med., 905 F.3d at 810. The court below found that Doe 6's "lack of effort" was insufficient to demonstrate a good-faith effort to comply with the law. Id. at 809-10.

The Fifth Circuit was correct in its analysis. The court was also correct in finding that an undue burden could not be demonstrated because most of the abortion doctors did not make good-faith efforts toward compliance. Importantly, the Fifth Circuit's conclusions uncovered yet another problem with June Medical's claim. Failure to make a good-faith effort at compliance undermines its standing to challenge the statute at issue.

A party cannot manufacture his own standing merely by inflicting harm upon himself. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416 (2013). Adverse consequences stemming from personal choices fail to establish standing because the constitutionally-mandated causal chain between the challenged statute and the alleged harm is broken. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 228 (2003), overruled on other grounds by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). Nor are abortion providers permitted to "rely on speculation about the unfettered choices made by independent actors not before the court." Clapper, 568 U.S. at 414 n.5 (quoting

Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)). Under settled law, June Medical cannot manufacture its standing.

II. June Medical cannot demonstrate Article III standing for the claim before this Court.

Although June Medical has standing to prosecute its procedural due process claim, the issue in this case does not concern the rights of June Medical to practice its profession. The question upon which June Medical sought *certiorari* is whether the court below's decision to uphold the admitting privileges requirement in the Louisiana statute violates WWH. (June Med. Pet. for a Writ of Cert. filed April 17, 2019.) June Medical's merits brief is wholly devoted to its WWH challenge. (Br. of Petitioners filed Nov. 25, 2019.) The WWH standard derives from the constitutional rights of June Medical's hypothetical future patients. By prosecuting this case based upon the rights of its patients, June Medical seeks to obtain the benefits of heightened judicial scrutiny.

The right to practice a profession is not a fundamental right. Kirkpatrick v. Shaw, 70 F.3d 100, 103 (11th Cir. 1995); Locke v. Shore, 634 F.3d 1185, 1195 (11th Cir. 2011). Thus, rational basis review applies to statutes regulating professions. Williamson v. Lee Optical of Okla., 348 U.S. 483, 488-91 (1955). Under that standard, safety regulations are strongly presumed to be constitutional, and they will not be invalidated unless there is no reasonably conceivable state of facts that could provide a rational basis for them. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993); Locke, 634 F.3d at 1194. Statutes

regulating professions survive rational basis review even if they seem unwise or their rationale seems tenuous. Id. at 1196 (citing Romer v. Evans, 517 U.S. 620, 632 (1996)). Under familiar principles, the party challenging a medical safety regulation bears the burden of proving the statute lacks a rational basis. Fresenius Med. Care Holdings, Inc. v. Tucker, 704 F.3d 935, 945 (11th Cir. 2013).

June Medical claims that Louisiana's statute violates this Court's holding in WWH, 136 S. Ct. 2292. The WWH standard superimposes a requirement that any burden imposed upon a woman's access to abortions must not be undue, and this consideration must be balanced against the benefits the law confers. Id. at 2309-10. But June Medical must prove it has standing to take advantage of this stricter scrutiny, because the WWH standard is premised upon the rights of women seeking abortions.

Standing is a constitutionally-demanded requirement for justiciability. Warth v. Seldin, 422 U.S. 490, 499 (1975). "The Article III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." Id. at 499. A plaintiff generally must assert his own legal rights and interests and cannot ground his claim on the rights and interests of others. Id. The Federal Rules of Civil Procedure also require that actions be prosecuted in the name of the real party in interest. Fed. R. Civ. P. 17(a).

This personal-stake requirement is no mere formality. Lujan, 504 U.S. at 581 (Kennedy, J.,

concurring). To the contrary, this constitutionally-grounded limitation prevents courts from being "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Warth, 422 U.S. at 500. The requirement that a litigant must have a personal stake in the outcome of the controversy before the court is necessary "[t]o ensure that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society." Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)). The requirement of a concrete injury not only "confines the Judicial Branch to its proper, limited role in the constitutional framework of Government," it also allows the public to know and understand who is invoking the judicial power, and their reasons for doing so. Lujan, 504 U.S. at 581 (Kennedy, J., concurring).

The minimum requirements for demonstrating Article III standing are well-known. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest." Lujan, 504 U.S. at 560. This invasion must be both (a) concrete and particularized, and (b) actual and imminent, as opposed to being conjectural or hypothetical. Id. "Second, there must be a causal connection between the injury and the conduct complained of." Id. The injury must be "fairly traceable to the challenged action." Id. Additionally, the injury cannot be the result of the independent action of a third party that is not before the court. Id. Third, it must be likely (not merely

speculative) that the injury will be redressed by a favorable decision. Id. at 561.

The party invoking federal jurisdiction bears the burden of establishing the requisite elements of standing. Lujan, 504 U.S. at 561. Furthermore, each element of Article III standing must be demonstrated at each stage of the litigation. Id. To retain standing, a litigant must meaningfully pursue his or her allegations of individualized harm. Gill, 138 S. Ct. at 1932. Thus, June Medical bears the burden of demonstrating the elements of Article III standing based upon the evidence required in the current posture of the case.

"[A] plaintiff must demonstrate standing for each claim he seeks to press." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006). "The standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the *particular claims* asserted." Id. (quoting Allen, 468 U.S. at 752). Even when different claims arise from the same common nucleus of operative fact, standing must be established separately for each claim. DaimlerChrysler, 547 U.S. at 352-53.

Generally, a plaintiff may join as many claims as he or she has against the opposing party in a civil action. Fed. R. Civ. P. 18(a). However, claims based upon the rights of women seeking abortions are not necessarily driven by the same facts or law as procedural due process claims brought by abortion providers. They are separate claims with different real parties in interest, and a different standard of review applies. Because the

rights of women seeking abortions are separate and independent of the liberty and property interests of medical professionals who perform abortions, Article III standing must be established independently for each claim. Lujan, 504 U.S. at 561 (holding that Article III standing requirements are "an indispensable part of the plaintiff's case," and that each element must be pled and adequately supported by evidence).

Doe 1 has not presented evidence that his own interests will be harmed in any way by Louisiana's statute. Doe 1 maintains a private practice and is board certified in Family Medicine and Addiction Medicine. June Med., 905 F.3d at 798. No evidence has been adduced that his inability to perform abortions under the new statute will harm his practice—such injury has not even been alleged. (See J.A. pp. 20-24.) Most importantly, Doe 1 does not claim that Louisiana's statute burdens his access to abortions. Accordingly, Doe 1 cannot demonstrate an injury-in-fact caused by the statute that is redressable by a ruling of unconstitutionality.

Doe 2 is a board-certified OB/GYN. June Med., 905 F.3d at 793. There is no evidence that the Louisiana statute could burden his ability to practice as an OB/GYN. Moreover, the Fifth Circuit found that Doe 2 failed to meaningfully pursue his applications for admitting privileges. Id. at 808, 810. A litigant cannot manufacture a case or controversy by overreacting to a newly-enacted statute. Rodos v. Michaelson, 527 F.2d 582, 585 (1st Cir. 1975) (finding that "the doctors have engaged in an unwarranted boycott, rather than a legitimate strike against the statute").

In short, June Medical has failed entirely to demonstrate Article III standing to assert its separate and independent claim based upon the substantive due process rights of its patients. June Medical lacks first-party standing to assert this WWH challenge.

However, in the alternative that this Court finds that the token assertion of violation of one's own rights carries with it the power to assert the rights of another, Doe 2 has failed to demonstrate causation. As previously stated, Doe 2 failed to make a good-faith effort to comply with the statute. June Med., 905 F.3d at 808. "[S]tanding cannot be conferred by a self-inflicted injury." Zimmerman v. City of Austin, Tex., 881 F.3d 378, 389 (5th Cir.), cert. denied, 139 S. Ct. 639 (2018). Article III requires proof of a substantial likelihood that the defendant's conduct caused the plaintiff's injury in fact. Nova Health Sys. v. Gandy, 416 F.3d 1149, 1156 (10th Cir. 2005).

When a claim is based upon assertion of the rights of others, Article III standing is substantially more difficult to establish. Lujan, 504 U.S. at 562. When the rights of others are asserted, causation and redressability often, as in this case, hinge on the rights of third parties who are not before the court. Id. The party seeking to establish standing has "the burden . . . to adduce facts showing that [the choices of third parties] have been or will be made in such [a] manner as to produce causation and permit redressability of injury." Id. at 562. The independent choices of third parties who are not before the court break the requisite chain of causation. ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989).

The hospitals to which applications for admitting privileges must be directed are not before the Court. June Medical did not present any testimony from any hospital witnesses as to the status of the applications for privileges. (Conditional Cross-Petition, p. 8.) Doe 2 has failed to meet his heightened burden of establishing a causal connection between the statute and his injuries.

Assuming this Court allows Doe 1 to prosecute his patients' claims, he may have standing to assert the WWH challenge because the courts below found that he put forth a good-faith effort to obtain admitting privileges. June Med. Servs., 905 F.3d at 810. However, he may have difficulty proving his claim on the merits if he is the only physician who can demonstrate Article III standing. He is, after all, an addiction medicine practitioner who has never completed a residency. Id. at 798. The safety benefits of the Louisiana law may outweigh the burdens if only one doctor can prove he is affected, and that effect relates to his medical qualifications.

For the reasons discussed above, June Medical cannot demonstrate Article III standing to assert the particular claim before this Court. Although June Medical enjoys Article III standing to assert its procedural due process claim, that is a much different injury, and one that June Medical has not pursued or supported by evidence. Consequently, June Medical lacks first-party standing, and must therefore comply with the requirements of third-party standing to prosecute this claim.

III. This Court should hold that June Medical lacks third-party standing to assert the claim before the Court in this case.

The question presented is really based upon third-party standing, not first-party standing. Under current precedent, parties seeking to assert the rights of third parties must demonstrate: (a) a close relationship with the person who possesses the right, and (b) a hindrance to the possessor's ability to protect his own interests. Kowalski v. Tesmer, 543 U.S. 125, 130 (2004).

Third-party standing is often referred to as a mere "prudential rule" self-imposed by the judiciary. Warth, 422 U.S. at 500; Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004), abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014). This implies that third-party standing rules are more lenient because they are not jurisdictional.

However, the cases treating third-party standing as a mere prudential requirement all assume that the jurisdictional requirements of Article III are otherwise satisfied. See, e.g., Singleton, 428 U.S. at 113 (finding a "classically adverse" relationship between the parties that satisfied the constitutional case or controversy requirement); Kowalski, 543 U.S. at 129 (proceeding on the assumption that Article III standing requirements were met). These cases do not stand for the proposition that third-party standing, in and of itself, independently satisfies Article III's requirements. See Warth, 422 U.S. at 517-18 (holding that both Article III case-or-controversy requirements and prudential

considerations are "threshold determinants of the propriety of judicial intervention.")

Article III requires a party asserting third-party standing to have a qualifying injury separate and apart from, yet sufficiently similar to, the injuries of the third parties whose rights the party seeks to assert. "[T]he standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Warth, 422 U.S. at 500. In effect, the question is whether the plaintiff has a right of action based upon a distinct and palpable injury to himself. Id. at 501; see also Cohens v. Virginia, 19 U.S. 264, 405 (1821) ("If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article.").

June Medical should not be found to have standing merely by satisfying the prudential standing requirements. Instead, its standing must be based upon proof it can satisfy both Article III standing requirements *and* prudential standing requirements as well. But if June Medical is found to have Article III standing, this Court should hold that June Medical lacks third-party standing to assert this claim. There are two reasons for this. First, June Medical has a conflict of interest vis-à-vis its patients with respect to the issues before this Court. Second, nothing is hindering women seeking abortions from bringing their own challenges to Louisiana's statute.

A. June Medical lacks a close relationship with the patients whose rights it seeks to assert.

A party claiming third-party standing must demonstrate a "close" relationship with the party holding the right. Kowalski, 543 U.S. at 130. June Medical cannot demonstrate a sufficiently close relationship in this case because it has a conflict of interest with its patients.

Generally, a party cannot challenge the constitutionality of a statute unless he can show that he is within the class whose constitutional rights are allegedly infringed. Barrows v. Jackson, 346 U.S. 249, 256 (1953). This rule has been relaxed in certain unique circumstances. In Barrows, the court held it would be "difficult if not impossible" for the injured parties to bring their grievance before the court. Id. at 257. In Griswold v. Connecticut, 381 U.S. 479 (1965), and its progeny, the party asserting third-party standing faced criminal conviction if the statute at issue was enforced. Id. at 481. Courts have allowed standing "when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of the third parties' rights." Kowalski, 543 U.S. at 130 (quoting Warth, 422 U.S. at 510).

However, the Griswold line of cases is not applicable because this case involves a request for declaratory relief. Griswold, 381 U.S. at 481 (holding that the requirements of Article III standing should be applied strictly when declaratory relief is requested). Courts have held that when the only constitutional attack is the request for a declaration based upon the alleged

deprivation of the life or liberty of another, standing does not exist. Tileston v. Ulman, 318 U.S. 44, 46 (1943). Here, June Medical is not affected in the same way by this statute as its patients; June Medical's constitutional challenge should not be allowed.

Nevertheless, courts have shown a "troubling tendency to bend the rules" when abortion is at issue. WWH, 136 S. Ct. at 2321 (Thomas, J., dissenting). In particular, third-party rules have been relaxed in cases involving "the purported substantive due process right of a woman to abort her unborn child." Id. at 2322.

In Singleton, the plurality opinion concluded that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." 428 U.S. at 118. This broad statement is not a majority holding because Justice Stevens did not join Part II-B of the opinion. Id. at 122 (Stevens, J., concurring in part). In any event, the Singleton plurality is distinguishable because the Louisiana statute at issue does not directly interfere with the abortion decision. The statute at issue in Singleton excluded Medicaid funding for abortions that were not "medically indicated." Id. at 108. Questions as to what is medically indicated concern the doctor-patient relationship in a way that statutes regulating the qualifications of physicians who perform abortions do not. Moreover, Singleton involved access to abortions, not safety standards.

Furthermore, Singleton has been limited by this Court's subsequent holdings. In Kowalski, the dissent's attempt to apply the Singleton standard was rejected. See Kowalski, 543 U.S. at 138 (Ginsburg, J.,

dissenting). Additionally, this Court has refused special treatment of abortion cases in the context of facial overbreadth challenges. Gonzales v. Carhart, 550 U.S. 124, 167-68 (2007). Accordingly, reliance on Singleton is misplaced.

This Court has held that the requisite close relationship does not exist when the party seeking third-party standing has a conflict of interest with the real party in interest. Elk Grove, 542 U.S. at 15. The lack of a close relationship between June Medical and its prospective patients, as pertaining to the issues in this case, is readily apparent. Patients and medical providers will almost always have differing interests when it comes to regulations that impose safety standards upon providers.

The WWH standard requires a court to weigh the benefits conferred by the law against the burdens on access to abortions imposed by the law. 136 S. Ct at 2309-10. The burdens imposed on abortion providers are obviously not the same as the burdens imposed on women seeking abortions. The burden imposed on abortion providers, under the facts of this case, is that they must apply for admitting privileges. See June Med., 905 F.3d at 7990-91. The burden on abortion-seeking women is that enforcement of the law may have a concomitant effect of restricting access to abortion doctors. June Med. v. Kliebert, 158 F. Supp. 3d at 522. Although the burdens are different, it is conceivable that a common interest might be found between the interests of abortion providers and those of women seeking abortions with respect to this prong of the WWH test.

However, the interests of abortion providers cannot be reconciled with the interests of their patients when assessing the benefits conferred by the law. The District Court found that one purpose of the law is "to improve the health and safety of women undergoing an abortion." June Med. v. Kliebert, 158 F. Supp. 3d at 505. The State of Louisiana enacted its statute upon findings of a history of serious health and safety violations at abortion clinics and to protect women from known risks of serious legal complications. (Br. in Opposition filed July 19, 2019.) June Medical argues the burdens of the law outweigh its benefits because abortions are so safe that the improved safety standards conferred by the law are unnecessary. (J.A. p. 20-21.) But what right has June Medical to advocate *on behalf of its patients* that safety standards are unnecessary? June Medical cannot effectively represent the interests of its patients with respect to laws designed to protect its patients from June Medical's misconduct. The interests of a medical provider are not in common with, and may often oppose those of, the interests of the provider's patients when assessing the benefits of safety standards designed to protect the patients.

The Court of Appeals found that only one of the abortion doctors in Louisiana made a good-faith effort to comply with the statute. June Med., 905 F.3d at 810. One of the doctors was found to have "contrived a situation in which it is impossible for him to obtain privileges." Id. at 798. Doe 2 obtained credentials, but then argued those credentials were insufficient. (See Conditional Cross-Pet. at pp. 9-10 (filed May 19, 2019).) These findings reveal an antipathy on the part of

abortion providers to the safety standard imposed by the law. They have an incentive to fail to comply with the law in order to support their constitutional challenge. This "lackluster approach" is inconsistent with the interests of patients in ensuring their maximum safety. See WWH, 136 S. Ct. at 2309 (quoting Roe v. Wade, 410 U.S. 113, 150 (1973)) (holding that states have a legitimate interest in "seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.").

This Court should therefore hold that the Singleton blanket rule affording third-party standing to abortion practitioners does not apply when the benefits of health and safety standards are at issue. A contrary rule would allow the fox to guard the henhouse. See WWH, 136 S. Ct. at 2323 (Thomas, J., dissenting) (arguing that this Court's permissive approach to standing encourages abortion providers to file suit and cedes enforcement of women's privacy rights to others).

It is also noteworthy that this Court has held that reliance on future relationships is insufficient to demonstrate a close relationship for purposes of third-party standing. Kowalski, 543 U.S. at 130-31. June Medical has not identified any particular patients it purports to represent. Its mere allegation of injury in the abstract to patients with whom it currently has no relationship at all fails to satisfy the requirements of third-party standing. See id. at 131.

Finally, the interests of abortion providers will always be adverse to the interests of the unborn child. This Court has held that the state has a legitimate

interest in protecting "the life of the fetus that may become a child." Gonzales v. Carhart, 550 U.S. 124, 145 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992)). In fact, Louisiana has a longstanding policy favoring the right to life. June Med., 905 F.3d at 792. This Court held that the state's interests are not strong enough to outweigh the rights of a mother seeking an abortion. Planned Parenthood, 505 U.S. at 846. But the interests of the state are not nearly as compelling as the interests of the child in his or her own life. One of the problems with abortion jurisprudence is that no one seemingly has standing to assert the interests of the unborn child—the one party to the transaction who lacks any ability to defend himself or herself. This Court should not stretch the rules of third-party standing on behalf of those seeking to end a life without providing a concomitant suitable advocate for the unborn.

B. There is nothing hindering June Medical's patients from prosecuting their own claims.

Third-party standing also requires a showing of a hindrance inhibiting the real party in interest from asserting his or her own interests. Kowalski, 543 U.S. at 130. The Singleton plurality acknowledged that there are no real hindrances preventing women seeking abortions from asserting their own rights. Cases can be filed under pseudonyms, as the abortion providers did in this case. Singleton, 428 U.S. at 117. The mootness doctrine can be avoided under the exception for "capable of repetition, yet evading review." Id. No special hindrances have been identified in this case.

C. June Medical cannot fairly and adequately represent the interests of its patients in this case.

The Singleton plurality reasoned that abortion providers could effectively advocate for their patients under the facts of that case. However, the interests of abortion providers conflict with the interests of their patients with respect to regulations that impose safety standards, as discussed above. The rights of patients cannot be fairly "represented" by abortion providers in this situation. See Singleton, 428 U.S. at 117-18. (noting that the assertion of the right is "representative"). June Medical cannot represent its patients' interests either in the context of a class action or via third-party standing. Abortion providers are not similarly situated with their patients with respect to laws designed to protect patients from misconduct by abortion providers. See Barrows, 346 U.S. at 256 (holding that generally a party must be within the class of persons whose rights are allegedly infringed in order to challenge the constitutionality of a statute).

CONCLUSION

June Medical has failed to demonstrate either first-party standing or third-party standing. Accordingly, its substantive due process cause of action should be dismissed.

Respectfully submitted,

Kenneth W. Starr
5404 Point Wood Circle
Waco, Texas 76710
(254) 644-4970
Ken_Starr@baylor.edu

TIMOTHY J. NEWTON
Counsel of Record
MURPHY & GRANTLAND, P.A.
4406-B Forest Drive
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
tnewton@murphygrantland.com

Counsel for Amicus Curiae

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