No. 18-1460

In The
Supreme Court of the United States

DR. REBECCA 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 Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE FOR CONCERNED WOMEN FOR AMERICA & CHARLOTTE LOZIER INSTITUTE IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

TERESA STANTON COLLETT
Counsel of Record
UNIVERSITY OF ST. THOMAS PROLIFE CENTER
1000 LaSalle Avenue, MSL 400
Minneapolis, MN 55403-2015
651.271.2958
tscollett@stthomas.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States with members from all fifty states. Through our grassroots organization, CWA encourages policies that strengthen women and families, and advocates for the traditional virtues that are central to America's cultural health and welfare.

CWA has established Sanctity of Life as one of the seven core issues on which we focus our efforts. CWA believes abortion harms women, men, and their families, and we actively promote legislation and public education to address these harms. Our members are people whose voices are often overlooked – average, middle-class American women whose views are not represented by the powerful elite. We believe that ordinary women are capable of extraordinary things when, inspired by love of our families and our country, we work together. More to the point in this case, we believe that it is false paternalism that empowers abortion providers to speak for women as if women are incapable of asserting their rights when their rights are being violated. Women are the best proponents of

---

[1] As required by Rule 37.2(a), counsel of record for each party has consented to the filing of this *amici* brief. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

their own rights, and, absent compelling circumstances, this Court should not allow others to speak for them.

Charlotte Lozier Institute ("CLI") is the education and research arm of the Susan B. Anthony List. Named after a 19th century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn, the Institute studies federal and state policies and their impact on women's health and on child and family well-being.

Founded in 2011, CLI is committed to bringing the power of science, medicine, and research to law and public policy. It provides both original and interpretive research to policy makers, all branches of the state and federal government, the media, and the public documenting the impact of abortion and other practices on women, men, and families. CLI holds that public policy should promote and reinforce the complementary interest of mothers and children in preserving the dignity and value of every human life.

SUMMARY OF THE ARGUMENT

In *Singleton v. Wulff*, 428 U.S. 106, 119 (1976), a plurality of this Court allowed abortion providers to assert third party standing to demand public funding for medically-necessary abortions on the basis that women's privacy rights would be violated if they were required to assert those rights for themselves in court,

and that abortion providers and their putative patients have sufficient common interests that providers could effectively advocate on behalf of their patients.

Justice Blackmun, as author of the plurality opinion, expressed confidence that this exception to general standing requirements would prove manageable for the courts and allow fair assessment of abortion regulation. He also acknowledged, however, that his prediction was just that – a prediction – and that Justice Powell's concern that this exception for abortion providers might prove to be difficult to "cabin" and "might invite[] litigation by those who perhaps have the least legitimate ground." *Singleton*, 428 U.S. at 118, n.7.

Amici have surveyed all cases from 1973 to 2019 involving federal challenges to abortion laws in order to assist this Court in determining whether justice is better served by presuming third party representation by abortion providers "generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision," *id*. at 118, or by applying stringent case-by-case review to abortion providers claims of third party standing, while permitting women to proceed anonymously when challenging abortion-related laws.

Survey results reveal that women have consistently challenged abortion-related laws related to public funding and laws requiring parental, spousal, or judicial consent prior to performance of an abortion, while showing little or no appetite for attacking laws

aimed at providing women with more information on abortion and its alternatives; safer, cleaner abortion facilities; and ethical, competent providers.

These survey results, combined with current judicial practice of generously granting women the ability to proceed anonymously and make use of other procedural protections for sensitive information, supports Respondent/Cross-Petitioner's argument that third party standing should be presumptively denied, and that abortion providers be held to a strict burden of proof, requiring them to allege and show closeness in the relationship with the women they seek to represent, and a real, rather than imaginary, hinderance to women asserting their own interest.

ARGUMENT

I. Broad third party representation by abortion providers has invited litigation by those who "perhaps have the least legitimate ground for seeking to assert the rights" of women and girls.

As a general rule, one may not claim standing to vindicate the constitutional rights of another. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). This rule is premised upon the fact that "courts should not adjudicate such rights unnecessarily, and 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."

Singleton, 428 U.S. at 113-14. In the present case, patients of Petitioners/Cross-Respondents June Medical Services and Drs. John Doe 1 and 2 "may not wish to assert" any constitutional infirmity in Louisiana's Act 620 requiring a physician to hold "active admitting privileges" at a hospital within 30 miles of the facility where an abortion is provided. Given the evidence presented below regarding the failure of Petitioner/Cross-Respondent June Medical to require background checks on doctors hired to perform abortions and the complete absence of relevant medical experience by at least some of those doctors, it is entirely reasonable to believe that Louisiana women support the law at issue in this case. JA 246-50.

A. The legal standards governing abortion providers' ability to represent the interests of their patients were approved by a deeply divided court and over the vigorous objection of four justices.

In *Singleton v. Wulff*, a plurality of this Court allowed two physicians who provided abortions to welfare patients to assert the patients' rights to Medicaid payments for "medically necessary" abortions. 428 U.S. at 109. The Court did so, in part, because a slim majority of the justices believed there were two obstacles to women asserting their rights to payment: first, a woman's assertion would threaten public revelation that she had or was seeking an abortion; and second, that delivery or spontaneous abortion of the child would render the woman's claim to payment moot.

The Court acknowledged "these obstacles are not insurmountable." *Id*. at 119. It noted that "suit may be brought under a pseudonym, as so frequently has been done," and termination of a plaintiff's pregnancy by delivery or spontaneous abortion would not moot the case under the Court's ruling in *Roe v. Wade*, 410 U.S. 113, 124-25 (1973). *Id*. Nonetheless, Justice Blackmun, writing for the Court, held that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Singleton*, 428 U.S. at 119.

Justice Powell, concurring in part and dissenting in part, objected that the obstacles identified by the plurality opinion were "chimerical" and largely without discernable standards. *Id*. He wrote, "Our docket regularly contains cases in which women, using pseudonyms, challenge statutes that allegedly infringe their right to exercise the abortion decision." *Id*. He predicted that "this case may well set a precedent that will prove difficult to cabin," arguing that "the Court's holding invites litigation by those who perhaps have the least legitimate ground for seeking to assert the rights of third parties." *Id*.

In response to Justice Powell's criticisms, Justice Blackmun wrote, "it is more difficult to predict the pattern of results in future cases when the Court elects to proceed, as it does today. . . . we simply decline to speculate on cases not before us." *Id.* at 118, n.7.

B. Abortion providers file more than five times as many lawsuits challenging abortion-related laws than women.

Today, the Court need not speculate as to the impact of *Singleton*. Justice Powell's criticism and prediction have proven accurate in the forty-six years since *Singleton* was decided.

Counsel for *amici* examined 637 federal cases decided after January 1, 1973 and before December 2019. In each case, plaintiffs challenged laws or regulations perceived to interfere with abortion rights. The study did not include state cases and federal cases involving tort or criminal charges brought against individual doctors for providing abortions, wrongful birth actions, immigration and/or asylum cases involving abortions that took place in another country, clinic protest cases, and general birth control access actions.

In the three years between 1973, when *Roe v. Wade* was decided, and 1976, when *Singleton v. Wulff* was decided, women were more likely than doctors, hospitals, or clinics to file challenges to abortion-related laws. Thirty-three federal cases were brought by women or minors alone, while only twenty-two cases were brought by providers. Appendix 1 – Summary of Abortion Cases by Year and Plaintiff, App. 1-3. Since 1976, there have been sixteen years in which there were no

cases filed by women alone,[2] and thirteen years in which they have brought only one.[3]

Since the *Singleton* opinion was handed down in 1976, year after year providers have filed more lawsuits challenging abortion-related laws than have the women purportedly affected. From 1973 to 2019, women or girls have filed an annual average of 2.1 cases per year. In contrast, providers have filed an average of 9.1 cases per year; women and providers have joined in the same lawsuit in only 1.6 cases per year.

Women are most likely to file lawsuits seeking public funding for abortion or challenging laws that require parental, spousal, or judicial consent. *See* Appendix 2 – Summary of Abortion Cases by Subject and Plaintiff, App. 23-26. In contrast, there are almost no cases filed by women alone challenging conscience rights, informed consent requirements, fetal disposition laws, and provider regulations generally. *Id*. This pattern suggests that women either generally support or at least do not oppose laws like the one before this Court today that are aimed at providing them with more information, safer, cleaner facilities, and more skilled providers. *Cf. Singleton*, 428 U.S. at 113-14 (standing requirements avoid challenges to laws where "holders of those rights either do not wish to

---

[2] 1979, 1982, 1983, 1984, 1988, 1993, 1994, 1997, 1998, 1999, 2000, 2009, 2010, 2014, 2016, and 2017.

[3] 1985, 1987, 1989, 1995, 1996, 2003, 2005, 2006, 2008, 2011, 2013, 2015, and 2018.

assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.").

Justice Powell was correct when he predicted that the failure of courts to scrutinize abortion providers' representation of patients would result in a precedent "difficult to cabin," one that invited "litigation by those who perhaps have the least legitimate ground for seeking to assert the rights of third parties." The abortion industry has persistently claimed to represent the interests of patients while seeking to overturn sensible and necessary public health and safety measures. *See*, *e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997) (challenging law requiring that abortions be performed by physicians only); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992) (opposing requirement that woman be informed of the availability of information relating to fetal development and the assistance available); *id*. at 900-01 (seeking to overturn state recordkeeping and reporting requirements); and *Manning v. Hunt*, 119 F.3d 254, 273 (4th Cir. 1997) (attacking requirement that judges report sexual abuse of minors seeking judicial bypass of parental involvement in abortion decision). The *Manning* court characterized plaintiffs' position as "unconscionable" and "untenable," ultimately rejecting it on the basis that "Appellants' position prevent the judge from helping the victim seeking the abortion, [and] it would prevent the judge from helping other juveniles in the same household under the same threat of incest."

Amici urge this Court to adopt Respondent/Cross-Petitioner's argument that third party standing should

be presumptively denied, and that abortion providers be held to a strict burden of proof, requiring them to allege and show closeness in the relationship with the women they seek to represent, and a real, rather than imaginary, hinderance to women asserting their own interests.

II. Use of pseudonyms and other procedural devices provide adequate protection for the privacy interests of women seeking to challenge abortion-related laws.

As both Justices Blackmun and Powell noted in *Singleton*, women have often used pseudonyms when challenging abortion-related laws. *Singleton*, 428 U.S. at 119 (Blackmun, J.) (characterizing use of pseudonyms as "frequent"), and 428 U.S. at 127 (Powell, J., concurring and dissenting) ("docket regularly contains cases in which women, using pseudonyms, challenge statutes that allegedly infringe their right to exercise the abortion decision"). This practice has been said to originate in the 1970s as approved in this Court's rulings in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). Colleen Michuda, *Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable?*, 29 Loy. U. Chi. L.J. 141, 142 (1997). Nonetheless, the practice is outside the general rules governing federal litigation.

Federal Rule of Civil Procedure 10 requires that the caption of the Complaint include the names of all the parties, and Federal Rule of Civil Procedure 17

requires that all civil actions be prosecuted in the name of the real party in interest. *See* Fed. R. Civ. P. 10, 17. Neither rule contains any exception for a plaintiff to proceed anonymously. Requiring the names of all parties advances the ability of the public to understand and assess the effectiveness of the court system, discourages the filing of frivolous lawsuits and unsupportable claims or assertions, while encouraging truthfulness and candor by the parties. *E.g.*, *Doe v. Rostker*, 89 F.R.D. 158, 160 (D.C. Cal. 1981) (protects the public's legitimate interest in knowing all the facts and events surrounding court proceedings); *Roe v. Wade*, 410 U.S. 113, 124 (1973) ("no suggestion is made that Roe is a fictitious person"); and *Doe v. Bolton*, 410 U.S. 179, 187 (1973) ("despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state").

A recent New York federal district court opinion provides a list of factors that federal courts have relied upon in deciding whether to allow a plaintiff to proceed anonymously. These factors include:

> (1) whether litigation involves matters that are highly sensitive and of personal nature, (2) whether identification poses risk of retaliatory physical or mental harm to party seeking to proceed anonymously, (3) whether identification presents other harms and likely severity of those harms, (4) whether plaintiff is particularly vulnerable to possible harms of disclosure particularly in light of age, (5) whether suit is challenging actions of government or private parties, (6) whether

> defendant is prejudiced by allowing plaintiff to press claims anonymously, whether nature of prejudice differs at any stage of litigation, and whether it can be mitigated by court, (7) whether plaintiff's identify has thus far been kept confidential, (8) whether public's interest in litigation is furthered by requiring plaintiff to disclose identity, (9) whether, because of purely legal nature of issues presented or otherwise, there is an atypically weak public interest in knowing litigants' identities, and (10) whether there are alternative mechanisms for protecting confidentiality of plaintiff.

Doe v. Skyline Automobiles Inc., 375 F.Supp.3d 401 (S.D.N.Y. 2019). While lower courts vary as to which, if any, of these ten factors are included in their analysis, all courts to have considered the question require a showing that the anticipated harm to the plaintiff from revealing her identity exceeds the likely harm to other parties and the public from concealment. *Fictional or anonymous plaintiffs*, 27 Fed. Proc., L. Ed. § 62:108.

Women and minors challenging abortion-related laws generally are recognized as sufficiently harmed by revelation of their identities to outweigh the public interest in transparency. Therefore, after due consideration, courts routinely grant permission for women to file anonymously. *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2322 & n.1 (2016) (Thomas, J. dissenting). *See also Doe v. Megless*, 654 F.3d 404, 408 (3rd Cir. 2011); *Doe v. Mundy*, 514 F.2d 1179 (7th Cir. 1975); *Southern Methodist Univ. Ass'n of Women Law*

Students v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979); and Francis M. Dougherty, *Propriety and Effect of Use of Fictitious Name of Plaintiff in Federal Court*, 97 A.L.R. Fed. 369 (originally published in 1990) (collecting early cases). *But see M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998) (upholding denial of motion to proceed anonymously in case seeking public funding of abortion).

The decision to allow individuals to proceed anonymously implicates important public and private interests and is the proper method to accommodate the public interest in regulating abortion, while ensuring the constitutionality of such regulation. Unlike empowering abortion providers to assert the interests of patients through third party standing, allowing women and girls to proceed anonymously ensures that their interests, and not the commercial or ideological interests of the providers, are the basis of any claim. This approach also guarantees that women's interests are asserted at the time and in the manner that women wish to assert them, and with women's input into the remedies crafted by the courts when relief is warranted. *Cf. Singleton*, 428 U.S. at 114-15.

Amici urge this Court to continue its case-by-case analysis of the facts supporting a woman or girl's motion to proceed anonymously when challenging an abortion-related law, while subjecting an abortion provider's claim to be representing the interests of patients to stringent case-by-case review, allowing third party standing only when the interests of providers and women do not conflict and such litigation by the

patients themselves "is in all practicable terms impossible." *Cf. Singleton v. Wulff*, 428 U.S. 106, 127 (1976) (Powell, J., concurring and dissenting).

CONCLUSION

For the reasons set forth above, we urge this Court to establish that the rule that an abortion provider may assert third party standing only when the interests of providers and women do not conflict and when such litigation by women themselves "is in all practicable terms impossible."

Respectfully submitted,

TERESA STANTON COLLETT
Counsel of Record
UNIVERSITY OF ST. THOMAS PROLIFE CENTER
1000 LaSalle Avenue, MSL 400
Minneapolis, MN 55403-2015
651.271.2958
tscollett@stthomas.edu

Counsel for Amici Curiae