Nos. 18-1323 & 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES LLC, ET AL.,
Petitioners and Cross-Respondents,

v.

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

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FAMILY RESEARCH COUNCIL AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Family Research Council FRC is a nonprofit research and educational organization that seeks to advance faith, family, and freedom in public policy from a biblical worldview. Family Research Council recognizes and

1. All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus or its members or counsel financed the brief's preparation or submission.

respects the inherent dignity of every human life from conception until death, and believes that the life of every human being is an intrinsic good, not something whose value is conditional upon its usefulness to others or to the state. Family Research Council also recognizes the inherent dignity of every woman and thus supports proper medical ethics and standards aimed at protecting the health and well-being of women.

SUMMARY OF ARGUMENT

The Court need not resolve the constitutionality of Act 620 because the plaintiffs lack statutory standing to challenge it. The plaintiffs undoubtedly satisfy the current test for Article III standing, as Act 620 inflicts injury in fact on abortion providers who lack admitting privileges. And in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), this Court sharply criticized the doctrine of "prudential standing," which courts have used as an excuse to decline jurisdiction when a litigant sues to vindicate another person's legal rights. *See id.* at 125–26.

But the plaintiffs lack "standing" in a different sense of the word: They cannot identify a statutory cause of action that authorizes them to assert the constitutional rights of their patients. Even when litigants can establish Article III standing, they must *also* point to a law that gives them the right to sue. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42 ("No one can sue . . . unless authorized by law to do so"). Litigants in abortion cases are not an exception to this rule. Yet for decades the courts have been allowing abortion providers to assert the constitutional rights of their patients without

requiring them to identify a statute that authorizes third-party lawsuits of this sort.

There is no federal statute that authorizes abortion providers to sue state officials who violate the constitutional rights of their patients. The text of 42 U.S.C. § 1983 permits lawsuits only by the party who has suffered a violation of his *own* federally protected rights. *See* 42 U.S.C. § 1983; Currie, *supra* at 45. The Declaratory Judgment Act allows courts to declare the "rights" only of the "party seeking such declaration." *See* 28 U.S.C. § 2201; Currie, *supra* at 45–46. And the plaintiffs have failed to identify any other cause of action that authorizes abortion providers to sue state officials who violate the constitutional rights of their patients. The plaintiffs' claims should therefore be dismissed for lack of statutory standing, and the Court need not rule on the constitutionality of Act 620.

The plaintiffs have also failed to allege or establish third-party standing under this Court's "prudential standing" doctrine. *See Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (forbidding litigants to assert the rights of third parties unless: (1) the litigant has "a close relation" to the third party; and (2) some "hindrance" affects the third party's ability to protect his or her own interests.). An abortion patient who encounters an "undue burden" on account of Act 620 faces no "hindrance" to asserting her own rights, because *Roe v. Wade*, 410 U.S. 113, 125 (1973), allows her to sue under a pseudonym and ensures that her claims will *not* become moot at the conclusion of her pregnancy. *See id.* at 125 ("Pregnancy provides a classic justification for a conclusion of nonmootness."). More importantly, an abortion provider cannot assert the

constitutional rights of its patients when challenging health-and-safety regulations, because third-party standing is forbidden whenever the interests of the litigant and the third-party rights holder are even "*potentially* in conflict." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 15 (2004) (emphasis added). Finally, a ruling from this Court that allows abortion providers to assert the constitutional rights of abortion patients will overrule *Roe v. Wade*'s mootness holding, because Jane Roe's constitutional claims would *not* have "evaded review" if an abortion provider could have litigated those claims on her behalf. *See DeFunis v. Odegaard*, 416 U.S. 312, 318–19 (1974).

If this Court decides to resolve the constitutionality of Act 620, it should overrule *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)—or, at the very least, it should narrowly construe that decision and begin the process of removing this Court from the abortion-umpiring business. The Constitution does not allow this Court to invent or enforce rights that have no grounding in the Constitution's language, and it does not permit this Court to impose its preferred abortion policies over decisions made by the people and their elected representatives. The Court must obey the Constitution over its precedent, and *stare decisis* cannot be used to perpetuate this Court's usurpatious and unconstitutional abortion edicts. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

Finally, the Court should remind abortion providers that judicially disapproved abortion statutes continue to exist as laws—even if their *enforcement* has been enjoined by a federal court. And the penalties accumulated under these currently unenforced statutes will become enforceable if this Court decides to overrule *Whole Woman's Health* or *Roe v. Wade*. Abortion providers seem to think that abortion statutes are formally revoked or "struck down" whenever a court enjoins their enforcement, and that they can violate these statutes with impunity and without any fear of future prosecution or penalties. But the judiciary has no power to veto abortion statutes or block them from taking effect. It can only enjoin the *enforcement* of those statutes—and those injunctions will last only for as long as this Court adheres to the notion that abortion is a constitutional right. The injunction does not immunize lawbreakers from penalties or prosecution after the injunction is dissolved, and abortion providers should not be under the illusion that the Court's abortion pronouncements have "legalized" conduct that the legislature of their state has prohibited.

I. THE PLAINTIFFS LACK STATUTORY STANDING TO CHALLENGE ACT 620

The Court granted certiorari to resolve whether abortion providers can be "presumed" to have "third-party standing to challenge health and safety regulations." Cross-Pet. at i. The answer is no—but it has nothing to do with the third-party standing rules that this Court has created under the rubric of "prudential standing." *See Kowalski*, 543 U.S. at 127–34; *Singleton v. Wulff*, 428 U.S. 106, 113–18 (1976) (plurality opinion). There is a more

straightforward resolution of the third-party standing issue, a resolution consistent with this Court's recent pronouncement in *Lexmark*: The plaintiffs' lawsuit falters because there is no cause of action that authorizes abortion providers to sue state officials who violate the constitutional rights of their patients.

A. The Plaintiffs Must Identify A Cause Of Action That Authorizes Them To Sue State Officials Who Violate The Constitutional Rights Of Third Parties

Several decisions of this Court allow the judiciary to deny "standing" to litigants who assert the constitutional rights of others. *See, e.g.*, *Kowalski*, 543 U.S. at 129. The Court has held that such litigants must demonstrate a "a close relation to" the third party and identify a "hindrance" to the third party's ability to protect its own interests. *Id.* at 129. This court-created test is a component of "prudential standing," a doctrine that courts have used to deny "standing" to plaintiffs who assert generalized grievances, who fall outside a law's "zone of interests," or who assert the rights of third parties. *See Lexmark*, 572 U.S. at 126.

But this Court's recent—and unanimous—opinion in *Lexmark* criticized the very existence of "prudential standing" doctrine. *Id.* at 126–28. *Lexmark* held that courts have no authority to decline to resolve cases that fall within their jurisdiction, nor can they invent rules of standing that are not derived from a statute or constitutional provision. *Id.* at 126–27. And *Lexmark* shrunk the scope of "prudential standing" doctrine by clarifying that the prohibition on litigating "generalized grievances"

comes from Article III,[2] and that the "zone of interests" test turns on whether a legislatively conferred cause of action authorizes the plaintiff's lawsuit.[3] In a footnote, the Court punted on whether limits on third-party standing should be part of the cause-of-action inquiry or a component of "prudential standing." *See id.* at 127 n.3.

The reasoning in *Lexmark* is sound, and the Court should extend its rationale to third-party standing and eliminate this last remaining vestige of "prudential standing" doctrine. There are two — and only two — questions to ask when deciding whether a plaintiff has "standing." The first is whether the plaintiff satisfies the constitutional requirements of Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The second is whether the plaintiff has identified a law that allows him to sue. This second inquiry is sometimes referred to as "statutory standing,"[4] and it goes to whether the plaintiff has a cause of action. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). The "third-party standing" inquiry turns on whether the plaintiffs have a cause of action that authorizes them to assert the rights of third parties.

B. There Is No Cause Of Action That Authorizes Abortion Providers To Sue State Officials Who Violate The Rights Of Their Patients

The plaintiffs' amended complaint asserts only two causes of action: 42 U.S.C. § 1983 and the Declaratory

2. *See Lexmark*, 572 U.S. at 127 n.3.
3. *See id.* at 127.
4. *See Lexmark*, 572 U.S. at 128 n.3

Judgment Act.[5] But neither of these causes of action allows abortion providers to assert the rights of non-litigant third parties.

1. The Cause Of Action Established In 42 U.S.C. § 1983 Does Not Authorize Abortion Providers To Sue State Officials Who Violate The Rights Of Their Patients

Section 1983 provides that:

> Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured* in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (emphasis added). Section 1983 permits lawsuits only by "*the* party injured," not "*a* party injured," which refers back to the statute's earlier description of the "citizen" or "person" who has suffered the deprivation of his rights. In the words of Professor Currie, section 1983

> plainly authorizes suit by anyone alleging that he has been deprived of rights under the Constitution or federal law, *and by no one else*. It thus incorporates, *but without exceptions*, the

5. *See June Medical Services LLC v. Caldwell*, No. 3:14-cv-00525 (M.D. La.), Amended Complaint (ECF No. 14) at ¶ 1 ("This is an action for declaratory and injunctive relief brought under the United States Constitution and 42 U.S.C. § 1983"); *id.* at ¶ 8 ("Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202").

> Court's "prudential" principle that the plaintiff may not assert the rights of third parties.

David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45 (emphasis added). Only the rights-holder may sue under section 1983; the statute does not accommodate lawsuits brought by plaintiffs who seek to vindicate the constitutional rights of third parties.

This is hardly a novel principle — even though it is routinely ignored when abortion providers sue under section 1983. In *Rizzo v. Goode*, 423 U.S. 362 (1976), for example, this Court emphasized that liability under section 1983 can attach only to conduct that violates the *plaintiff's* federally protected rights. *Id.* at 370–71 ("The plain words of [section 1983] impose liability whether in the form of payment of redressive damages or being placed under an injunction *only for* conduct which 'subjects, or causes to be subjected' *the complainant* to a deprivation of a right secured by the Constitution and laws." (emphasis added)). Numerous lower-court rulings have likewise recognized that section 1983 makes no allowance for lawsuits that seek to vindicate a third party's constitutional rights. *See, e.g.*, *Bates v. Sponberg*, 547 F.2d 325, 331 (6th Cir. 1976) ("42 U.S.C. § 1983 offers relief only to those persons whose federal statutory or federal constitutional rights have been violated."); *Garrett v. Clarke*, 147 F.3d 745, 746 (8th Cir. 1998) ("Garrett may not base his Section 1983 action on a violation of the rights of third parties."); *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990) (it is a "well-settled principle that a section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else").

The cause of action created by 42 U.S.C. § 1983 extends only to litigants who assert their *own* rights—and not the rights of third parties. The plaintiff abortion providers cannot use section 1983 to assert the constitutional rights of their patients, and the section 1983 claims that they have brought on behalf of their patients must be dismissed for lack of statutory standing.

2. The Cause Of Action Established In The Declaratory Judgment Act Does Not Authorize Abortion Providers To Sue State Officials Who Violate The Rights Of Their Patients

The plaintiffs' reliance on the Declaratory Judgment Act fares no better. The text of the statute provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations *of any interested party seeking such declaration.*

28 U.S.C. § 2201 (emphasis added). Like section 1983, the Declaratory Judgment Act establishes a cause of action that allows litigants to seek a declaration of their *own* rights and legal relations. By authorizing courts to declare the rights "of *any interested party seeking such declaration*," the Declaratory Judgment Act necessarily excludes actions brought to declare the rights of non-parties—or anyone other than the party "seeking such declaration" under the Act. *See* Currie, *supra* at 45 ("The court is empowered to declare only the 'rights' of the 'party seeking such declaration,' and he must be 'interested'; these terms seem both to forbid litigation of third-party rights

absolutely and to impose an additional and unfamiliar 'interest' requirement that goes beyond the constitutional minimum.").

C. *Stare Decisis* Presents No Obstacle To Dismissing The Third-Party Claims For Lack Of Statutory Standing

The plaintiffs may respond by citing cases that have allowed abortion providers to assert third-party claims under section 1983 or the Declaratory Judgment Act, without discussing whether those statutes would authorize third-party litigation of this sort. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1325 (E.D. Pa. 1990) (allowing plaintiff abortion providers to assert the third-party rights of abortion patients under 42 U.S.C. § 1983); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (allowing the abortion providers' challenge to proceed without discussing statutory standing). But uncontested assumptions do not establish precedential holdings, and when an issue is not raised or considered, the Court's ruling does not and cannot bind successor courts on the overlooked issue. *See, e.g.*, *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("[A]ssumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions."); *Brecht v. Abrahamson*, 507 U.S. 619, 630–31 (1993). *Singleton v. Wulff*, 428 U.S. 106 (1976), did not address this question either. The plurality analyzed the third-party standing issue entirely under the rubric of "prudential

standing," *see id.* at 113–18 (plurality opinion), and neither the plurality nor Justice Stevens made any attempt to explain how the abortion providers had a *cause of action* that authorized them to assert the rights of a non-litigant.

* * *

Plaintiffs in abortion cases are subject to the same rules that govern other litigants. One of the most basic requirements of federal practice is that a plaintiff must not only establish Article III standing, but must also identify a cause of action that authorizes its lawsuit. *See* Currie, *supra* at 42 ("No one can sue . . . unless authorized by law to do so"). Neither 42 U.S.C. § 1983 nor the Declaratory Judgment Act makes any allowance for abortion providers to sue state officials who violate the constitutional rights of their patients. The plaintiffs must identify a different cause of action that allow them to litigate these third-party claims, or face dismissal for lack of statutory standing.

II. IF THE COURT IS UNWILLING TO REPUDIATE THE REMAINDER OF ITS "PRUDENTIAL STANDING" DOCTRINE, THEN IT SHOULD HOLD THAT THE PLAINTIFFS LACK PRUDENTIAL STANDING TO CHALLENGE ACT 620

If the Court is unwilling to extend *Lexmark* to third-party standing and repudiate the last remaining bastion of its "prudential standing" doctrine, then it should hold that the plaintiffs have failed to allege or establish the requirements for third-party standing under this prudential test.

This Court has held that a litigant "generally must assert his own legal rights and interests, and cannot rest his

claim to relief on the legal rights or interests of third parties." *Kowalski*, 543 U.S. at 129 (citation omitted). But the Court allows litigants to assert the rights of third parties if: (1) the litigant has "a close relation" to the third party; and (2) some "hindrance" affects the third party's ability to protect his or her own interests." *Id.* at 130. The plaintiff abortion providers in this case flunk these requirements for third-party standing, and they cannot rely on *Singleton v. Wulff* to salvage their third-party claims.

A. The Plurality Opinion In *Singleton* Attracted Only Four Votes, And Justice Stevens's Partial Concurrence Refused To Endorse Its Broad Notions Of Third-Party Standing In Abortion Cases

In *Singleton v. Wulff*, 428 U.S. 106 (1976), a four-justice plurality opined that "it 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 (opinion of Blackmun, J.). And many lower courts act as though this decision established a general prerogative for abortion providers to assert the rights of abortion patients at any time. *See, e.g.*, *Okpalobi v. Foster*, 190 F.3d 337, 350–53 (5th Cir. 1999), *vacated and reversed*, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc).

But the *Singleton* plurality opinion is not law. It received only four votes, and Justice Stevens's partial concurrence pointedly declined to join Justice Blackmun's analysis of the third-party standing issue:

> In this case (1) the plaintiff-physicians have a financial stake in the outcome of the litigation, and (2) they claim that the statute impairs their

> own constitutional rights. They therefore clearly have standing to bring this action. *Because these two facts are present*, I agree that the analysis in Part II-B of Mr. Justice Blackmun's opinion provides an adequate basis for considering the arguments based on the effect of the statute on the constitutional rights of their patients. *Because I am not sure whether the analysis in Part II-B would, or should, sustain the doctors' standing, apart from those two facts, I join only Parts I, II-A, and III of the Court's opinion.*

Id. at 121–22 (Stevens, J., concurring in part) (emphasis added). For Justice Stevens, the physicians had standing only because of their "financial stake" in the litigation (the state law in *Singleton* withheld Medicaid funding for abortions) and because the physicians had asserted their own constitutional rights against the statute. Justice Stevens refused to accept the plurality's willingness to allow abortion providers to assert the constitutional rights of patients outside that narrow category of cases, and he declined to join that portion of the plurality opinion.

This Court has never ratified the plurality opinion in *Singleton*, nor has it endorsed its analysis of third-party standing in the abortion context. Although this Court has cited *Singleton* 30 times in majority opinions, ten of those opinions cite *Singleton* only while describing components of the test for third-party standing.[6] Seven others cite

6. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017); *Kowalski v. Tesmer*, 543 U.S. 125, 136-137 (2004); *Campbell v.*

Singleton for the proposition that third-party standing is generally *disfavored*.[7] Five opinions cite *Singleton* while noting that federal appellate courts generally do not consider an issue not passed upon below.[8] One opinion cites *Singleton* to support the limited assertion that Justice Stevens proposed in his partial concurrence.[9] A few others cite *Singleton* for propositions unrelated to the third-

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Louisiana, 523 U.S. 392, 397 (1998); *Powers v. Ohio*, 499 U.S. 400, 414 (1991); *Whitmore v. Arkansas*, 495 U.S. 149, 156 (1990); *Holland v. Illinois*, 493 U.S. 474, 489 (1990); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 n.3 (1989); *Hodel v. Irving*, 481 U.S. 704, 711 (1987); *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 954-955 & n.5 (1984); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 n.2 (1976).

7. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006); *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *South Carolina v. Regan*, 465 U.S. 367, 380 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475, n.10 (1982); *Rakas v. Illinois*, 439 U.S. 128, 139 (1978); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

8. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 100 (1991); *C.I.R. v. McCoy*, 484 U.S. 3, 6 (1987); *United States v. Grace*, 461 U.S. 171, 175 & n.4 (1983); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 283 (1978).

9. *See Diamond v. Charles*, 476 U.S. 54, 65–66 (1986) ("[A] physician who demonstrates that abortion funding regulations *have a direct financial impact* on his practice may assert the constitutional rights of other individuals who are unable to assert those rights themselves." (emphasis added)).

party standing analysis in the plurality opinion.[10] Two opinions of the Court quote language from the plurality opinion but stop short of approving its analysis of third-party standing, and neither of those cases involved challenges to abortion regulations. *See Carey v. Population Services, International*, 431 U.S. 678, 684 n.4 (1977) (quoting *Singleton*, 428 U.S. at 117 (opinion of Blackmun, J.)); *Craig v. Boren*, 429 U.S. 190, 194 (1976).

The plurality opinion in *Singleton* is not a precedent of this Court, and it does not and cannot control this case. The plaintiff abortion providers can assert the constitutional rights of abortion patients only if they allege and prove that they satisfy each of the two requirements for third-party standing. They cannot establish third-party standing by incanting *Singleton*—or by citing its non-precedential plurality opinion.

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10. *See, e.g.*, *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (citing *Singleton* only to distinguish it); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 756 (1986) (citing *Singleton* to support the notion that federal courts need not abstain from addressing constitutional issues "when the unconstitutionality of the particular state action under challenge is clear"), overruled by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992); *Colautti v. Franklin*, 439 U.S. 379, 385 (1979) (citing *Singleton* only to explain that a case had been vacated and remanded after it was decided); *Beal v. Franklin*, 428 U.S. 901 (1976) (same); *Maher v. Roe*, 432 U.S. 464, 477 n.10 (1977) (mentioning *Singleton* only to point out that the dissenting opinion cited it).

B. The Plaintiffs Have Not Alleged Or Shown That Abortion Patients Face A "Hindrance" To Protecting Their Interests

The plaintiffs have not demonstrated that abortion patients face a "hindrance" to bringing their own lawsuits against Act 620. And no such claim would be credible. Any abortion patient who encounters an "undue burden" on account of the Act can sue using a pseudonym, and her claims will avoid mootness under the "capable of repetition yet evading review" doctrine. *See Roe v. Wade*, 410 U.S. 113, 124–25 (1973). Countless numbers of post-*Roe* abortion cases have been brought by women seeking abortions,[11] and there is no shortage of public-interest organizations and law firms who will line up to provide *pro bono* representation to any litigant seeking to advance the cause of abortion rights.

The plurality opinion in *Singleton*, however, asserts that abortion patients face "several obstacles" to asserting their constitutional rights in litigation:

> For one thing, she may be chilled from such assertion by a desire to protect the very privacy of

11. *See, e.g.*, *Williams v. Zbaraz*, 448 U.S. 358 (1980) (Jane Doe, an indigent pregnant woman); *Poelker v. Doe*, 432 U.S. 519 (1977) (same); *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008) (pregnant inmates seeking transportation for off-site abortions); *Doe v. United States*, 372 F.3d 1308 (Fed. Cir. 2004), *sub nom.* 419 F.3d 1058 (9th Cir. 2005) (pregnant wife of armed-services member sought abortion funding); *Coe v. Melahn*, 958 F.2d 223 (8th Cir. 1992) (abortion patient challenged statute regulating insurance coverage for elective abortions); *Rodos v. Michaelson*, 527 F.2d 582 (1st Cir. 1975) (pregnant woman challenged the constitutionality of an abortion statute).

> her decision from the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim. Only a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost, assuming, as it seems fair to assume, that unless the impecunious woman can establish Medicaid eligibility she must forgo abortion.

Singleton, 428 U.S. at 117 (plurality opinion). Each of these supposed "obstacles" is illusory. *Roe v. Wade* shows that an abortion patient may sue using a pseudonym. *See* Lior Strahilevitz, *Pseudonymous Litigation*, 77 U. Chi. L. Rev. 1239 (2010). And "imminent mootness" presents no obstacle to abortion patients, as *Roe* holds that *all* "pregnancy litigation" will avoid mootness under the capable-of-repetition-yet-evading-review doctrine. *See Roe*, 410 U.S. at 125 ("Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'"). *Singleton*'s analysis of the "hindrance" issue is not persuasive, and it should be repudiated by this Court. *See generally* Stephen J. Wallace, *Why Third-Party Standing in Abortion Suits Deserves a Closer Look*, 84 Notre Dame L. Rev. 1369, 1397 (2009) (noting that the plurality opinion in *Singleton* was "unable to articulate a hindrance or obstacle for which the Court itself had not already provided a solution").

Finally, this Court cannot endorse or follow the *Singleton* plurality opinion without overruling *Roe v. Wade*'s mootness analysis. *Roe* holds that a pregnant woman's challenge to an anti-abortion law cannot become moot

after pregnancy because her claims are "capable of repetition, *yet evading review*." 410 U.S. at 125 (emphasis added). But if abortion providers can sue to enforce the constitutional rights of their patients at any time, as the *Singleton* plurality opinion claims, then challenges to abortion statutes brought by pregnant women will *never* "evad[e] review" if dismissed as moot, because those claims can be litigated by abortion providers rather than pregnant women. A claim does not "evade review" when someone else remains capable of litigating the claim to its conclusion. *See DeFunis v. Odegaard*, 416 U.S. 312, 318–19 (1974); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 163.

C. The Plaintiffs Have Failed To Allege Or Show A "Close Relation" With Abortion Patients

The plaintiffs also cannot satisfy the "close relation" test because they are challenging laws that were enacted to protect the health and safety of those patients. This presents a conflict of interest between providers and patients, and third-party standing is forbidden if the interests of the litigant and the third-party rights-holder are even "potentially in conflict." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004); *see also Kowalski*, 543 U.S. at 135 (Thomas, J., concurring) (third-party standing is disallowed when the litigants "may have very different interests from the individuals whose rights they are raising"); *Canfield Aviation, Inc. v. Nat'l Transp. Safety Board*, 854 F.2d 745, 748 (5th Cir. 1988) ("[C]ourts must be sure that the litigant and the person whose rights he asserts have interests which are aligned.").

When a state enacts regulations to protect the health and safety of abortion patients, the interests of providers and patients diverge. Abortion providers will oppose any law that limits their freedom to practice their trade. But an abortion provider cannot claim to act on behalf of its patients when it seeks to thwart the enforcement of a law designed to protect patients at the provider's expense. To hold otherwise would be akin to allowing merchants to challenge consumer-protection laws by invoking the constitutional rights of their customers, or allowing employers to challenge workplace-safety laws by invoking the constitutional rights of their employees.

Standing doctrine must also give abortion patients autonomy to decide whether to invoke their constitutional rights against a statute that was enacted for their benefit and protection. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978) (one "reason[] for th[e] prudential limitation on standing when rights of third parties are implicated" is "the avoidance of the adjudication of rights which those not before the Court may not wish to assert"). Abortion patients may decide that the assurance of knowing that their doctor will hold admitting privileges at a nearby hospital in case of emergency is more valuable than any legal claims they could assert against Act 620. Criminal defendants, for example, have a constitutional right to a jury trial, yet they often waive that right in exchange for some nonconstitutional entitlement that they value more. *See* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289 (1983). Abortion patients should

have the same prerogative—without being told by abortion providers which set of rights they should prefer.

III. IF THE COURT DECIDES TO REACH THE MERITS, THEN IT SHOULD OVERRULE WHOLE WOMAN'S HEALTH

There is no need for this Court to resolve the constitutionality of Act 620 because the plaintiffs lack standing. But if the Court decides to reach the merits, then it should overrule *Whole Woman's Health*, as the respondent and its amici have urged. *See* Br. of Respondent at 67; Br. of Texas as Amicus Curiae.

It is of course possible to distinguish *Whole Woman's Health* from this case—as the Fifth Circuit did, and as the respondent has done throughout its brief. *See* Pet. App. 26a–59a; Br. of Respondent at 72–89. But the Court's decision in *Whole Woman's Health* is a travesty, and it deserves a swift and emphatic repudiation.

The dissents in *Whole Woman's Health* have already exposed the Court's disregard of res judicata and its refusal to enforce an explicit statutory severability clause. *See Whole Woman's Health*, 136 S. Ct. at 2330–43 (Alito, J., dissenting); *id.* at 2350–53 (Alito, J., dissenting); *id.* at 2321 (Thomas, J., dissenting). But even worse than that was the Court's mischaracterizations of the record and the district court's factual findings. The Court's opinion, for example, claims that the admitting-privileges requirement "led to the closure of half of Texas' clinics, or thereabouts," and says that the district court made a "factual finding" that the admitting-privileges law "led to the clinic closures." *Id.* at 2313. The district court made no such finding. Its opinion states only that the number of licensed

abortion clinics in Texas "dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014). That describes only *correlation*—not causation—and many of those clinics closed before the date on which the admitting-privileges law took effect, and other closures occurred after that date. The plaintiffs in *Whole Woman's Health* failed to introduce any evidence showing that these pre-enforcement and post-enforcement closures were caused by the admitting-privileges law rather than other factors, and there was evidence showing that many of these clinics closed for reasons unrelated to the admitting-privileges requirement. The abortion clinics in Abilene and Sugar Land, for example, had closed before House Bill 2 was even enacted, and the plaintiffs had admitted in previous litigation that the closure of the Lubbock abortion clinic had nothing to do with the admitting-privileges law. *See* Emergency Application to Vacate Stay at 7 n.3, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 4, 2013). Other abortion clinics—including those in College Station, Midland, San Angelo, Stafford, and the All Women's Medical Center in San Antonio—closed before the admitting-privileges law took effect, and the plaintiffs produced no evidence (and the district court made no finding) that these closures were caused by the admitting-privileges requirement. And none of these clinics have reopened in the three-and-a-half years since this Court's ruling in *Whole Woman's Health*, which supports the dissenting opinion's claim that these closures occurred for reasons

unrelated to the admitting-privileges law. *See Whole Woman's Health*, 136 S. Ct. at 2343–46 (Alito, J., dissenting); Ashley Lopez, *Three Years After Supreme Court Strikes Down Abortion Law, Half Of Texas' Clinics Are Still Closed* (June 27, 2019), available at https://bit.ly/2SiM4Ux.

Rulings such as *Whole Woman's Health* do not deserve any weight on account of *stare decisis*, and the Court should not hesitate to overrule a decision marked by mischaracterizations of the record and disregard of basic legal doctrines such as res judicata and severability. Stare decisis is not an inexorable command, *see Payne v. Tennessee*, 501 U.S. 808, 828 (1991), and the amount of deference accorded to a judicial precedent depends on the quality of its reasoning. *See Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) ("[W]e must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*."); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2460 (2018). *Whole Woman's Health* should be overruled—without hesitation and without apology.

In recent months some members of this Court have loudly protested decisions that overrule precedent, insisting that there must be a "special justification" to overrule an earlier decision that goes beyond a mere belief that the decision was wrongly decided. *See Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2189–90 (2019) (Kagan, J., dissenting, joined by

Ginsburg, Breyer, and Sotomayor, JJ.). But none of those justices had any qualms about overruling *Baker v. Nelson*, 409 U.S. 810 (1972), and the opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), did not claim any "special justification" for overruling *Baker* apart from a desire to impose same-sex marriage on all 50 states.[12] Indeed, *Obergefell* did not even claim that *Baker* was wrong at the time it was decided. The dissenters in *Hyatt* and *Knick* have also called for the overruling of *Citizens United v. FEC*, 558 U.S. 310 (2010),[13] and *Geduldig v. Aiello*, 417 U.S. 484 (1974),[14] and they have done so without offering any "special justification" apart from their strongly held conviction that the cases were decided incorrectly. And one can be absolutely certain that those justices will vote to overrule not only *Citizens United* and *Geduldig*, but other precedents of this Court, if they obtain a fifth vote to do so. The recent efforts by these justices to wrap themselves in the mantle of precedent while accusing their colleagues of subverting norms of *stare decisis* are not credible, and they should not deter this Court from overruling *Whole Woman's Health* or any other abortion-related pronouncement of this Court. *See Smith v. Allwright*, 321

12. The majority opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), is likewise bereft of any "special justification" for overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See* 539 U.S. at 577–79.

13. *See American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516, 517–18 (2012) (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.)) (refusing to "accept" *Citizens United*).

14. *See Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 57 (2012) (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.) (denouncing *Geduldig v. Aiello*, 417 U.S. 484 (1974), as "egregiously wrong").

U.S. 649, 665–66 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent.").

IV. IF THE COURT IS UNWILLING TO OVERRULE WHOLE WOMAN'S HEALTH, THEN IT SHOULD CONSTRUE THE DECISION NARROWLY

If the Court is unwilling to overrule *Whole Woman's Health*, then it should do the next best thing and limit the holding to the facts of that case. Supreme Court precedent in derogation of the Constitution should be narrowly construed, and this maxim is especially appropriate when dealing with this Court's abortion pronouncements. The right to abortion cannot be found in the Constitution's language, and the Constitution makes no allowance for abortion policy to be dictated by federal judges rather than the people's elected representatives. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973). The Court is violating the Constitution and usurping the power of the political branches when it invents constitutional rights that have no textual grounding in the Constitution, and any precedent that enforces these court-created rights should be interpreted as narrowly as possible.

The Fifth Circuit acted appropriately by limiting the holding of *Whole Woman's Health* and distinguishing it from the situation presented in this case. This Court has recognized that the judiciary "comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or

design of the Constitution."[15] A conscientious lower-court judge should interpret this Court's abortion pronouncements in a manner the minimizes the judiciary's unconstitutional intrusions on the states' lawmaking prerogatives, without going so far as to defy a directly-on-point holding of the Supreme Court. That is exactly what the Fifth Circuit did below—and it is how all judges should treat the abortions precedents of this Court until they are overruled.

The admitting-privileges requirement of Act 620 is a legitimate and sensible health-and-safety regulation that falls squarely within the State's police powers. This Court has long recognized that the State has a significant role to play in regulating the medical profession, and that abortion providers do not have a constitutional exemption from health-and-safety regulations. *See Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession.").[16] And the National Abortion Federation's own guidelines tell women seeking abortions to:

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15. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003).

16. *See Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) ("There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" (citation omitted)); *Barsky v. Board of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954) (indicating that the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine).

> Make sure the person performing the abortion has these qualifications:
>
> - She or he should be a physician who is licensed by the state. In a few states, other medical professionals may perform abortions legally.
> - In the case of emergency, *the doctor should be able to admit patients to a nearby hospital* (no more than 20 minutes away).

National Abortion Federation, *Having an Abortion? Your Guide to Good Care* (2000) (emphasis added), available at https://bit.ly/2MEhqS4. This is not an idea that was concocted by abortion opponents, and the need for hospital-admitting privileges has been recognized even by pro-abortion groups as a necessary patient-safety measure.

It is also common knowledge that the abortion industry has attracted unsavory practitioners who have inflicted grievous harms on their patients. The atrocities committed by Kermit Gosnell are well known,[17] but Gosnell is merely the worst on the list of substandard abortion practitioners who have killed or wounded their patients and unborn children. Dr. David Benajmin was convicted of second-degree murder after he botched an abortion and allowed the patient to bleed to death while he performed an abortion on a second woman.[18] Benjamin was allowed to perform abortions in New York even though his license had been previously suspended based on 38 counts of

17. *See* Gosnell Grand Jury Report, available at https://bit.ly/39nlYpr
18. *See* Lynette Holloway, Abortion Doctor Guilty of Murder, N.Y. Times, Aug. 9, 1995, available at http://nyti.ms/1P3Y9Ub.

negligence and incompetence, and even though the authorities had revoked his license for "gross incompetence and negligence" in five other cases. *Id.* Nevertheless, New York allowed Benjamin to continue practicing medicine as he appealed the revocation. *Id.*

Dr. Abu Hayat cut off the arm of a fetus that he was trying to abort, who was later born alive and healthy (apart from her missing right arm).[19] Hayat had been previously accused of botching eight abortions at his clinic, but was never held accountable until one of his patients died after an infection.[20]

The deaths and injuries that occurred at the hands of these practitioners were entirely preventable—and they would not have occurred in a state that requires abortionists to hold hospital-admitting privileges. Hospital committees perform background checks on physicians who seek admitting privileges, and they will not grant admitting privileges to disreputable physicians. Act 620's requirements are designed to prevent—and will prevent—substandard and incompetent practitioners from offering services. It is unacceptable for a State to simply wait until a patient suffers harm and then prosecute the derelict abortion provider after the fact. And it is untenable to

19. *See* Richard Perez-Pena, Prison Term for Doctor Convicted in Abortions, N.Y. Times, June 15, 1993, available at http://nyti.ms/1QYCoaF.

20. *See* Steven Lee Myers, Doctor Describes Death of a Girl Who Suffered Botched Abortion, N.Y. Times, December 5, 1991, available at http://nyti.ms/1QYD67O; *see also* Denise Lavoie, Doctor Gets 6 Months in Abortion Patient Death, Associated Press, Sept. 14, 2010 (reporting Dr. Rapin Osathanondh's guilty plea to involuntary manslaughter of a patient who died after her abortion).

argue that the Constitution requires a State to adopt this wait-and-see approach—rather than take preemptive action to thwart substandard practitioners in a field that has seen its fill of them.

Whole Woman's Health did not hold that admitting-privileges laws are unconstitutional *per se*, nor did it hold that admitting-privileges laws do nothing to improve patient safety. *Whole Woman's Health* held only that Texas had failed to introduce evidence showing that its admitting-privileges requirement would improve safety, 136 S. Ct. at 2311–12, and that the burdens that would be imposed by enforcing an admitting-privileges requirement *in Texas* were "undue" because it would close half the state's abortion clinics without any evidence that the admitting-privileges requirement would improve patient safety, *id.* at 2313–14. In this case, by contrast, Louisiana has introduced evidence showing Act 620 will improve patient safety. Pet. App. 2a ("Unlike the record in Louisiana, the record in Texas reflected no benefits from the legislation."). And the plaintiffs in this case have failed to produce evidence showing that Act 620's admitting-privileges requirement will cause *any* abortion clinic to close. *Id.* ("[T]here is no evidence that any of the clinics will close as a result of the Act."). That is all that is needed to distinguish *Whole Woman's Health* and uphold Act 620.

V. THE COURT SHOULD MAKE CLEAR THAT ABORTION STATUTES WHOSE ENFORCEMENT HAS BEEN ENJOINED CONTINUE TO EXIST AS LAWS AND WILL BECOME FULLY ENFORCEABLE IF WHOLE WOMAN'S HEALTH OR ROE V. WADE IS OVERRULED

The Court should also make clear that state abortion statutes continue to exist as laws even after their enforcement is enjoined by a federal court—and that abortion providers who choose to violate these statutes do so at their peril.

There is a tendency for people to believe that the courts formally revoke abortion statutes when they declare them unconstitutional—and that abortion providers can flout these statutes without any fear of future prosecution or penalties.[21] But the federal judiciary does not have a veto power over legislation; its powers extend only to resolving cases or controversies between litigants. In the course of resolving a case or controversy, a court might opine that a statute violates the Constitution and enjoin officials from enforcing it. But the injunction does not "strike down" the law, and it does not "block" the law from taking effect. The statute continues to exist and remains in effect; all the injunction does is prevent the named defendants from *enforcing* that law while the court's injunction remains in place. *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) ("When a court

21. *See, e.g.*, Brief for Petitioners at 24 (claiming, incorrectly, that *Whole Woman's Health* "invalidated" Texas's admitting-privileges law); *see id.* at i (claiming, incorrectly, that *Whole Woman's Health* "struck down" Texas's admitting-privileges law).

declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it").

But if the injunction is ever dissolved in response to a Supreme Court decision that overrules *Whole Woman's Health* or *Roe v. Wade*, then the law becomes fully enforceable again—both against those who violate the statute in the future and against those who violated it in the past. Of course, an abortion provider might have a statute-of-limitations defense for violations that occurred long ago. But this Court has no power to confer immunity or preemptive pardons on those who violate an abortion statute at a time when this Court was blocking the executive from initiating enforcement actions. Abortion providers who choose to defy state law because they expect this Court to forever adhere to *Whole Woman's Health* or *Roe v. Wade* will find themselves in legal jeopardy if the Court disappoints those expectations. Alabama's recently enacted abortion statute, for example, exposes abortion doctors to a minimum of ten years' imprisonment for each abortion performed. That law is in effect notwithstanding the injunction that currently thwarts the state from enforcing it—and the doctors who violate this statute are racking up penalties that can be imposed as soon as *Roe v. Wade* is overruled.

Until recently this issue was largely academic because there did not seem to be any prospect of this Court overruling any of its abortion precedents. But recent developments have made it possible to imagine that some or all of the Court's abortion precedents might be narrowed or overruled, and it is never too early to begin thinking of the implications that would follow from a pronouncement that

overrules *Whole Woman's Health* or *Roe v. Wade*. However the Court chooses to resolve this case, it should make clear that judicially disapproved abortion statutes continue to exist as laws, and that abortion providers would be well advised to comply with those statutes given the uncertain future of this Court's abortion jurisprudence.

CONCLUSION

The plaintiffs' complaint should be dismissed for lack of standing. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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December 30, 2019