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 & Hospitals
Respondent/Cross-Petitioner.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENT (NO. 18-1323) & PETITIONER (NO. 18-1460)

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QUESTION PRESENTED

1. Should claims brought by abortion physicians and clinics on behalf of unnamed women who *might* one day be their patients be dismissed when, as here, the economic interests of the physicians and clinics are in conflict with the health and safety interests of their potential patients?

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INTEREST OF AMICI CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the idea that the national government is one of limited powers, with the police power—the power to regulate and protect the health, safety, welfare, and morals of the people—reserved to the States. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of constitutional significance addressing core federalism issues such as those presented by this case, including *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016); *Horne v. Isaacson*, 134 S. Ct. 905 (2014); *Bond v. United States*, 134 S. Ct. 2077 (2014); *Sisney v. Reisch*, 131 S. Ct. 2149 (2011); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

SUMMARY OF ARGUMENT

Amicus agrees with Louisiana that the Louisiana statute at issue here exists in circumstances significantly different from those that existed in Texas as to require distinguishing this Court's decision in *Whole Women's Health*. Indeed, as *amicus* argued at the

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[1] Pursuant to this Court's Rule 37.3, this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief, and no person other than Amici Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

time, the arguments of petitioners in *that* case already pushed the "undue burden" test articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), beyond its moorings, and should not have been accepted by this Court.

But the merits of those claims here should not even be reached, for as Louisiana correctly argues, there is a jurisdictional bar to the abortionists and abortion clinics asserting third-party standing to press claims that purportedly would be raised by their prospective women patients. *Amicus* submits this brief to elaborate on that jurisdictional argument.

In contexts other than cases touching on abortion, this Court's test for a third-party exception to the normal requirement that one cannot litigate the claims of others is narrow, and can only be met if there is a close relationship between the litigant and the non-present third parties, and where there is a significant obstacle, bordering on impossibility, of the third parties litigating the claims on their own behalf. That test should be as applicable to abortion cases as to any other, and under it, the physicians and abortion clinics here clearly do not have standing to press claims of their hypothetical future patients.

This is particularly true with health and safety regulations designed to protect women against the very abortion physicians and clinics who seek to stand in the women's shoes. If prohibition of such an inherent conflict of interest is not already reasonably subsumed within the "close relationship" prong of this Court's third-party standing test, then this Court should make explicit that it is, or add the requirement as a separate element altogether.

ARGUMENT

I. Third Party Standing Should Not Be Granted Automatically in Abortion Cases.

The blanket acceptance of third-party standing by our courts in abortion cases has become a popular, but disturbing trend. This case is a perfect vehicle for this Court to remind the lower courts that proper, rigorous analysis of each element of this Court's third-party standing doctrine is not a mere *suggested* course of action, but is rather compelled by the Constitution's "case or controversy" requirement.

A. The development of third party standing in general.

The Constitution's "case or controversy" requirement, U.S. Const. art. III, § 2, makes standing a "threshold requirement" that a plaintiff must prove for every claim in every case. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). Generally, that means a party "must assert his own legal rights and interests, and cannot rest his claim on the legal rights of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The requirement that a party generally must assert his own rights helps guarantee that the challenging party has appropriate incentive to challenge with "the necessary zeal and appropriate presentation." *Kowalski*, 543 U.S. at 129. Without that, as Justice Thomas noted, "[i]t is doubtful whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others." *Id.* at 135 (Thomas, J., concurring). Indeed, "[t]his made sense [because] litigants who have no personal right at stake may have very

different interests from the individuals whose rights they are raising." *Id.* Justice Ginsburg, joined by Justices Stevens and Souter in dissent agreed: "The general prohibition against third-party standing frees the Court not only from unnecessary pronouncement on constitutional issues, but … assures the court that the issues before it will be concrete and sharply presented." *Id.* at 143 (Ginsburg, J., dissenting). The general rule for Article III standing was therefore founded on the principles that (1) courts should not adjudicate rights unnecessarily, and (2) a party is usually the best advocate for their own rights. *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (Blackmun, J., pluralition opinion).

Nevertheless, this Court has crafted an exception to allow some plaintiffs to assert the rights of others not before the court, but the exception is a narrow one, applicable in most cases *only* when there are "practical obstacles [that] prevent a party from asserting rights on behalf of itself." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *Kowalski*, 543 U.S. at 129-30.[2] And even then, the courts must also consider "whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal. *Munson*, 467 U.S. at

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[2] That rule has been relaxed only in specific narrow circumstances, such as in a First Amendment challenge to an overly broad restriction on speech, where "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Munson*, 467 U.S. at 957 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

956 (quoting *Craig v. Boren*, 429 U.S. 190, 193-94 (1976)).

There must also be a close relationship between the litigant and the non-party whose rights he would assert. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). The "close relationship" element requires that the "enjoyment" of the challenged right be "inextricably bound up" with the litigant's desired activity such that the litigant is "fully, or very nearly, as effective a proponent" as the third party who possesses the right. *Singleton*, 428 U.S. at 114 (Blackmun, J., plurality opinion). That element, like the others, should be strictly construed. In *Kowalski*, for example, this Court did not allow an attorney to assert the rights of clients because the requisite close relationship did not exist. But as Justice Thomas noted in his concurrence, the Court of Appeals "understandably could have thought otherwise, given how generously our precedents have awarded third-party standing." *Kowalski*, 543 U.S. at 135 (Thomas, J., concurring). The use of the exception has become particularly generous in cases touching on the abortion issue, to the point that standing doctrine in abortion cases now appears to be a law unto itself, but it did not begin that way.

B. Third party standing in abortion cases began narrowly, but has come to be applied rather "generously."

The general restrictions on third-party standing were followed at the outset of this Court's abortion jurisprudence. In *Roe v. Wade*, plaintiff Roe had first person standing as an individual who sought an abortion; the plaintiff doctor was held not have standing,

first person or otherwise.[3] *Roe v. Wade*, 410 U.S. 113, 125-27 (1973). *Doe v. Bolton*, decided the same day as *Roe*, contains only a cursory mention of standing, stating that "[i]nasmuch as Doe and her class are recognized, the question whether … physicians, nurses, clergymen, social workers, and corporations … have standing is perhaps a matter of no great consequence." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). The Court did not address third-party standing, holding only that the physicians who were also parties to the suit had standing in their own right because they "assert[ed] a sufficiently direct threat of personal detriment" from a criminal prosecution should they perform an abortion and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* Similarly, standing was referenced in *Bellotti v. Baird* a few years later, but only by way of acknowledging the lower court's recognition of standing for a minor pregnant girl and a doctor and clinic that performed abortions. Third party standing was not addressed. *Bellotti v. Baird*, 428 U.S. 132, 139 (1976).

In *Singleton*, this Court finally addressed directly the third-party standing issue in the abortion context. In a portion of his opinion joined only by three other Justices, Justice Blackmun erroneously claimed at the outset that *Doe v. Bolton* had "permitted

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[3] The doctor entered the case as an intervenor who had two concurrent criminal charges pending against him for performing illegal abortions. Although he sought to assert standing only on his position as a potential future defendant, the Court held that "a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him." *Roe*, 410 U.S. at 126.

physicians to assert the rights of their patients." *Id.* at 115.[4] Justice Blackmun then proceeded to analyze the elements of third-party standing as they had purportedly been applied previously. The closeness of the relationship between the doctor and patient in a challenge to a state statute excluding from Medicaid coverage abortions that were not medically indicated was "patent," he asserted. And privacy interests as well as the likelihood that claims would be rendered moot, though not insurmountable, were nevertheless deemed by the plurality to be sufficient-enough obstacles to the women patients asserting rights on their own behalf to allow abortion providers to assert their rights instead. *Id.* at 117-18. Justice Blackmun then 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." *Id.* at 118.

Justice Stevens, concurring in part, agreed that the physicians had standing only because they had a financial stake in the outcome of the litigation and because they had claimed that the statute impairs their own constitutional rights. He therefore declined to join Justice Blackmun's third-party standing analysis. Justice Powell, joined by Chief Justice Burger and Justices Stewart and Rehnquist, likewise disagreed with Justice Blackmun's third-party standing analysis, noting that it deviated from prior precedent on both the "obstacle" and "close relationship" elements. The prior test for the "obstacle" element was

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[4] As noted above, the issue of physician standing in *Doe v. Bolton* only involved the physicians' direct standing to challenge the state law's threat to their own rights, not whether they had third-party standing to raise the rights of their patients.

"not when there is merely some 'obstacle' to the rightholder's own litigation," Justice Powell noted, "but when such litigation is in all practicable terms impossible." *Id.* at 125-26 (Powell, J., concurring in part and dissenting in part, citing *Shelley v. Kraemer*, 334 U.S. 1, 257 (1948); *NAACP v. Alabama*, 357 U.S. 449 (1958); and *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972)). "[T]he 'obstacles' identified by the [Blackmun] plurality as justifying departure from the general rule simply are not significant," Justice Powell found. *Id.* As for the "close relationship" element, the prior cases allowing third-party physician standing had all involved state laws that "directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures," something that was not present with the Missouri statute at issue. *Id.* at 128.

In short, because Justice Blackmun's statement that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision" did not command a majority of the Court, *Singleton* did not *hold* that abortion providers had standing to assert the rights of their patients. Justice Powell's opinion rejecting that position is *at least* as much a plurality decision as was Justice Blackmun's. Nevertheless, ever since *Singleton*, lower courts have routinely treated Justice Blackmun's plurality opinion as a "holding" of the Court. *See* Stephen J. Wallace, *Why Third-Party Standing in Abortion Suits Deserves A Closer Look*, 84 Notre Dame L. Rev. 1369, 1393 (2009) (citing *Okpalobi v. Foster*, 190 F.3d 337, 350-53 (5th Cir. 1999) (granting third-party standing rights to abortion provider because in *Griswold* and *Singleton* "[t]he Supreme Court ... has carved out an exception

to [the general third-party standing] rule in the context of physicians claiming to assert their patients' rights to a pre-viability abortion"); *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 223 (6th Cir. 1991) ("We rested our analysis in *Planned Parenthood* largely on [*Singleton*], where the Supreme Court held that, given the nature of the right involved, 'it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." (citation omitted)); *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1347-48 (2nd Cir. 1989) (citing *Singleton* with no discussion of third-party standing test); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394, 1396 (6th Cir. 1987) (following *Singleton*'s "holding" to allow operator of abortion clinic to assert the rights of its patients against a city fetal disposal ordinance); *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 512 F. Supp. 316, 319 (D.R.I. 1981) (summary citation allowing *jus tertii* standing)).

These lower court decisions are all at odds with this Court's subsequent decision in *Kowalski*, which reiterated that third-party standing is not looked upon favorably and which assessed the two elements with much greater scrutiny than the plurality in *Singleton* had done. *Kowalski*, 543 U.S. at 130. This Court rejected the claim that plaintiff-lawyers in the case had a "close relationship" with hypothetical future clients. *Id.* at 131. And it gave more teeth to the "obstacles" test than the Blackmun plurality in *Singleton* had given. *Id.* at 132-33.

Kowalski was not an abortion case, of course, but unless there is some truth to the oft-stated claim that

there is an abortion distortion in the law, the analysis provided there should be as applicable in cases dealing with abortion as in other cases. Moreover, even if the plurality decision in *Singleton* had been a holding of the Court, and even were it a holding that would survive *Kowalski*, the general language of the plurality's conclusion in that case has become unmoored from the plurality's own analysis, particularly its discussion of the "close relationship" requirement. Third-party standing might exist "if the enjoyment of the [third-party's] right is *inextricably* bound up with the activity the litigation wishes to pursue" and "the relationship between the litigant and the third party [is] such that the former is *fully, or very nearly, as effective* a proponent of the right as the latter." 428 U.S. at 114-15 (Blackmun plurality, emphasis added). While Justice Blackmun's application of that language did not have as much teeth as Justice Powell, in his separate plurality opinion, thought warranted by prior precedent, it nevertheless had teeth enough to require a more searching analysis than has become customary in the lower courts, and certainly more than the *sub silentio* presumption of standing employed by the courts below.

The requirement that abortion doctors obtain hospital admitting privileges, the crux of the matter in this case, is not necessarily or "inextricably" tied to a woman's decision to have an abortion. Indeed, absent proof—not present here—that abortion doctors would be unable to obtain the required privileges, and that abortion clinics across the state would thereby close, the requirement of hospital privileges is not tied to the woman's putative constitutional right to an abortion at all. But the requirement does place the doctor's interest in opposing the requirement in direct conflict

with the woman's interest, for whose health and safety the requirement was adopted. It can therefore hardly be the case that "the relationship between the litigant and the third party [is] such that the former is *fully, or very nearly, as effective* a proponent of the right as the latter." 428 U.S. at 114-15 (Blackmun plurality, emphasis added).

This case thus exemplifies how "our third-party standing cases have gone far astray," *Kowalski*, 543 U.S. at 130 (Thomas, J., concurring), particularly in the abortion context.

C. In the present case, third party standing was merely assumed *sub silentio*, not analyzed by either the District Court or the Court of Appeal.

Neither court below even mentioned, much less comprehensively analyzed, whether the plaintiff clinics and doctors performing abortions had standing to challenge Louisiana's Act 620, which imposed on abortion doctors a requirement to have admitting privileges at a nearby hospital. Such an assumption is clearly contrary to this Court's decision in *Kowalski*, and it is even contrary to Justice Blackmun's plurality opinion in *Singleton*. Indeed, failure to independently analyze third party standing claims leads to a distortion of the doctrine that increasingly appears to apply only in the context of laws touching on the sacrosanct issue of abortion.

Such an abortion "distortion" has been remarked upon repeatedly by individual members of this Court. Justice O'Conner noted back in 1986, for example, that "This Court's abortion decisions have already worked a major distortion in the Court's

constitutional jurisprudence." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). Elaborating, she noted that:

> The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but – *except when it comes to abortion* – the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrine to cases that come before it."

Id. (emphasis added). In the same case, Justice White decried the Court's reasoning in the case, pointing out that "the Court's reading is obviously based on an entirely different principle: that *in cases involving abortion*, a permissible reading of a statue is to be avoided at all costs." *Id.* at 812 (J. White, dissenting) (emphasis added).

Criticism of this same flavor has been voiced more recently voiced as well. In his dissent in *Hill v. Colorado*, Justice Scalia, joined by Justice Thomas, noted that "[t]here is apparently no end to the distortion … that the Court is willing to endure" when called upon to address speech outside abortion clinics. *Hill v. Colorado*, 530 U.S. 703, 753 (2000) (Scalia, J., dissenting). In *Stenberg v. Carhart*, he spoke of "the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting). In *Whole Women's Health*, Justice Alito, joined by Chief Justice Roberts and Justice Thomas, criticized the majority for ignoring basic rules on *res judicata* and severability, noting that "in

this abortion case, ordinary rules of law—and fairness—are suspended." 136 S.Ct. at 2324 (2016) (Alito, J., dissenting). And Justice Thomas's dissent in the same case was a broadside criticism of "the Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion." *Id.* at 2321 (Thomas, J., dissenting).

The reason the abortion physicians and clinics in this case attempt to couch their litigation in terms of the putative right to abortion of the non-present women who might become patients at some point in the future is self-evident. A challenge to the health and safety regulations based on the doctors/clinics own rights would be subject to mere rational basis review and would undoubtedly fail were that test faithfully applied. *See*, *e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). But if *their claims* can be shoehorned into an abortion-rights claim on behalf of women, they get the benefit of a much higher level of scrutiny, which they hope to use to convince a majority of this Court to overturn the Fifth Circuit's rejection of the claim.

A proper application of this Court's third-party standing jurisprudence would bar these claims and, as noted above, even the watered-down version applied by Justice Blackmun in *Singleton* would as well. Indeed, if third-party standing is upheld here, the prediction voiced by Justice Powell in his *Singleton* plurality decision, that the Court will "set a precedent that will prove difficult to cabin," seems all but inevitable. *Singleton*, 482 U.S. at 129 (Powell, J., concurring in part and dissenting in part). And such a result is particularly troubling in the context here, where there is a patent conflict between the interests of the

actual litigants and the third parties they purport to represent.

D. At minimum, third party standing should be allowed only when the plaintiff has no interests adverse to the third party he purports to represent.

The abortion physicians in the present case want minimal regulation of their profession. The women seeking abortions want to know their health and safety is adequately protected, by the same type of health and safety regulations that apply to all other out-patient surgical centers. By attempting to have declared unconstitutional the Louisiana health and safety regulation at issue here, the doctors have necessarily placed their own interests above the safety of their potential patients, creating a direct conflict of interest.

To properly stand in the shoes of a party for the purpose of litigation on his or her behalf, the litigant should have no interests adverse to the third party. Such a requirement should be self-evident. Yet the evolution of third-party standing – in abortion cases in particular – necessitates a return to basics.

Whether a "no-conflict-of-interest" rule should be a basic part of the "close relationship" prong of this Court's third-party standing test, or whether it should be articled as a separate prong altogether, some such rule needs to be explicitly adopted. Otherwise, it will simply not be the case that the litigating party "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Munson*, 467 U.S. at 956. Such a litigant will, almost by definition, not be "fully, or very nearly, as

effective a proponent" as the third party who possesses the right. *Singleton*, 428 U.S. at 114 (Blackmun, J., plurality opinion).

CONCLUSION

For the reasons noted above, the abortion physicians and clinics claims based on third-party standing for unnamed, potential future women patients should be dismissed and the Fifth Circuit's decision upholding Louisiana's reasonable efforts to protect the health and safety of women seeking abortions in the State against the physicians and clinics own claims should be affirmed.

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