No. 18-1460

In the Supreme Court of the United States

DR. REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals,
CROSS-PETITIONER

v.

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, d/b/a HOPE MEDICAL GROUP FOR WOMEN; JOHN DOE 1; JOHN DOE 2

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

REPLY IN SUPPORT OF CONDITIONAL CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Louisiana maintains that the primary Petition, No. 18-1323, should be denied. Plaintiffs continually mischaracterize and overstate the holdings of *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), elevating case-specific conclusions into unchallengeable factual findings applicable to all future cases regardless of varying circumstances and factual records. Under a proper interpretation of the law, the facts of this case are squarely against Plaintiffs. That is likely why Plaintiffs persist in avoiding the lengthy record wherever possible, and distorting it everywhere else. Louisiana's Brief in Opposition, which Plaintiffs also repeatedly misread and mischaracterize, shows why the case should proceed no further.

Nonetheless, should this Court grant the primary Petition, it should also grant the Conditional Cross-Petition. As Louisiana showed in the Cross-Petition, this case presents an important, recurring issue of federal jurisdiction: The failure of lower courts to address the third-party standing of abortion providers under the proper standards. Plaintiffs' Opposition only confirms the point. And the record shows how the lower courts fell into the same error, despite facts showing that Plaintiffs cannot represent the interests of their patients.

Plaintiffs' Opposition thus corroborates that this case is an ideal vehicle to enforce the requirement that abortion providers cannot be presumed to represent their patients, but must *prove* their suitability to do so at every stage of the case.

ARGUMENT

I. PLAINTIFFS' ARGUMENTS CONFIRM THAT, SHOULD THIS COURT GRANT THE PETITION, IT SHOULD ALSO REVIEW PLAINTIFFS' STANDING.

The principal legal problem presented by the Cross-Petition is that courts routinely assume abortion providers have standing to represent their patients without making the fact-specific inquiry that standing normally demands. Plaintiffs agree that is exactly what courts do. They simply do not view it as a problem. In so doing, they confirm that if the Petition is granted, the Cross-Petition should be granted as well.

1. As Plaintiffs' Opposition makes clear, there is no dispute that lower courts commonly assume (or find with little or no case-specific analysis) that abortion providers have third-party standing to represent their patients. BIO at 18–19. That is just as Louisiana showed in the Cross-Petition. Compare Cross-Pet. at 18–21. Plaintiffs add that several of this Court's cases—mainly older ones—do the same. BIO at 17–18 & n.4. That is correct as well, and demonstrates how abortion cases have not kept pace with subsequent developments in this Court's standing jurisprudence. Plaintiffs therefore underscore a widening gap between the doctrine of third-party standing—which demands that plaintiffs provide factual proof meeting specific legal requirements—and its application in abortion cases, where courts consider proof to be un-

necessary.[1] This Court has never explained why abortion standing diverges so sharply from ordinary standing rules. Plaintiffs' account of the law does not counsel against this Court's review; it confirms why review would be warranted.

Plaintiffs stretch for support in this Court's cases. BIO at 17–18 & n.4, 21–22. But if anything, Plaintiffs' account substantiates Justice Thomas's observation that "[t]he Court's third-party standing jurisprudence is no model of clarity." *Hellerstedt*, 136 S. Ct. at 2322 (Thomas, J., dissenting). Older cases do not apply the modern standard for third-party standing: Some find third-party standing simply because the abortion provider "is subject to potential criminal liability for failure to comply with the requirements" of the challenged law, see *City of Akron* v. *Akron Ctr. for Reprod. Health*, 462 U.S. 416, 440 n.30 (1983), which goes to the doctor's Article III standing but not to the existence of a "close" relationship or a "hindrance" to a patient asserting her own rights. Other earlier cases do not clearly distinguish between a doctor's third-party standing and his first-party standing to seek prospective "relief" from future prosecution. *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 62 (1976); *Doe* v. *Bolton*, 410 U.S. 179, 186, 188 (1973).

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[1] A plaintiff must also *maintain* standing, and bears the burden of proving standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

This Court's more recent cases have brought more analytical rigor to the third-party standing inquiry. Compare, *e.g.*, *Kowalski* v. *Tesmer*, 543 U.S. 125, 129–130 (2004). As Plaintiffs' own cases show, that development has not yet reached the field of abortion.

Plaintiffs' other argument is that, when it comes to third-party standing, a court's ordinary obligation to ascertain standing plaintiff-by-plaintiff, case-by-case does not apply. BIO at 23–25. They fault Louisiana for failing to cite any "case suggesting that the prudential considerations underlying third-party standing must be replead [*sic*] and proven in every case." *Id.* at 23–24. Plaintiffs are mistaken.

In *Kowalski*, for example, the Court addressed several cases considering whether attorneys have third-party standing to raise challenges on behalf of their clients. 543 U.S. at 130–131. Sometimes attorneys do, see *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989); *Dep't of Labor* v. *Triplett*, 494 U.S. 715 (1990), and sometimes they do not, see *Conn* v. *Gabbert*, 526 U.S. 286, 292 (1999). Likewise, parents and guardians have sometimes been permitted to assert the First Amendment rights of their children. See, *e.g.*, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). But as Louisiana showed in the Cross-Petition, they may not do so when their interests conflict with those of their children. See *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 15 & n.7 (2004) (explaining that father who lacked next-friend status also lacked third-party standing); *id.* at 17 (noting that "prosecution of the lawsuit may have an adverse effect on the person

who is the source of the plaintiff's claimed standing"); Cross-Pet. at 21–22. Plaintiffs' theory that third-party standing typically covers *classes* of litigants—that "once the Court recognizes that a certain category of plaintiffs … has standing to assert the rights of third parties …, the Court traditionally has applied the same rule in subsequent cases as a matter of law," BIO at 24—is obviously false.

Plaintiffs draw an analogy to the third-party standing of criminal defendants to represent improperly excluded jurors, BIO at 24–25 (citing *Powers* v. *Ohio*, 499 U.S. 400 (1991), *Campbell* v. *Louisiana*, 523 U.S. 392 (1998), and *Edmonson* v. *Leesville Concrete*, 500 U.S. 614 (1991)), and to cases involving the third-party standing of vendors of goods and services to represent their customers, see BIO at 24 (citing *Carey* v. *Population Servs., Int'l*, 431 U.S. 678, 683 (1977)). Those cases stand in some tension with the more detailed, rigorous analysis in modern cases like *Kowalski*. Besides, the analogies only illustrate how outlandish Plaintiffs' position is here.

There is no comparison between the simple, consistent relationship between a convicted defendant and an excluded juror—both of whom "share a common interest in eradicating discrimination from the … jury selection process," *Campbell*, 523 U.S. at 400—and a doctor suing on behalf of his patients to invalidate a regulation designed to protect the patient *from the doctor*. Likewise, even if courts often do find third-party standing for vendors, the notion that *doctors* are merely vendors who dispense goods and services on

demand goes not only against basic canons of medical ethics, but the very foundations of abortion caselaw. See, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 153, 164 (1973); *Doe*, 410 U.S. at 192, 197; *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 883–884 (1992). If abortion providers are not professional counselors, but providers of service on demand, then the assumption that abortion providers apply special medical judgment according to special ethical standards—one of the core premises of abortion caselaw—needs to be abandoned as well. One way or another, Plaintiffs' arguments reveal the significance of the issue

2. Likewise, Plaintiffs' factual arguments confirm that this case is an excellent vehicle to consider the standing of abortion providers to challenge health regulations.

As for the "closeness" of the relationship between Plaintiffs and their patients, Plaintiffs do not disagree that the Plaintiff clinic is a for-profit business like any other. Nor do they dispute that the Plaintiff doctors "perform very brief procedures on drugged patients whom they never saw before and will never see again." Cross-Pet. at 29. In short, they make no effort to justify their supposedly close relationship with their patients in anything like the terms of a traditional doctor-patient relationship.[2]

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[2] By omission, they confirm that the traditional relationship does not exist. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 153–154 (1923) ("Silence is often evidence of the most persuasive character.").

Plaintiffs argue not that such a relationship exists, but that it is unnecessary because this Court has never expected the relationship between abortion providers and their patients to be any deeper than the purely transactional relationship here. BIO at 26. As noted above, that is nonsense. If abortion providers merely provide services on demand, rather than exercising professional judgment, then abortion cases have always rested on a crucial misunderstanding of fact.

Plaintiffs do not disagree that a conflict of interest can vitiate third-party standing, BIO at 23 n.5, but claim that their interests align with their patients' because abortion is "safe." *Id.* at 26–27. That is a non sequitur, and it contradicts the Fifth Circuit's identification of "horrifying" health and safety violations. App. 38a. Nor can Plaintiffs explain how their challenge to a doctor credentialing requirement, in light of the Plaintiff clinic's failure to perform any credentialing at all, can possibly align with their patients' interests. App. 35a–36a.

Finally, Plaintiffs argue that their patients face a "hindrance" to pursuing their own rights. BIO at 27–28. They point to the fact that abortion is disfavored in Louisiana—a fact that did not stop Plaintiffs from obtaining counsel and suing, and which women have historically addressed by proceeding anonymously. *Id.* Other burdens they point to (like driving distances) have no obvious logical connection to a woman's ability to file a lawsuit. *Id.* Plaintiffs flail about, in short, to explain the absence of any abortion patient as a

party or witness in this case. It may well be that there is *no* woman in Louisiana who, knowing all the facts, would rather obtain an abortion without the security that Act 620 provides.

The record, in short, shows that Plaintiffs lack standing to represent their patients' interests. This case would thus be a perfect vehicle to establish that ordinary standing rules apply to abortion providers like everyone else.

II. IF THIS COURT GRANTS REVIEW, IT MAY DISREGARD QUESTIONS OF WAIVER OR RESOLVE AN ACKNOWLEDGED CIRCUIT SPLIT.

1. At the threshold, Plaintiffs' Opposition shows that this Court can reach Plaintiffs' third-party standing *without* addressing questions of preservation, waiver and forfeiture at all—thus bypassing resolution of the circuit split on that point. Plaintiffs concede that appellate courts regularly address third-party standing *sua sponte*, regardless of preservation, as part of ascertaining jurisdiction before reaching the merits. BIO at 13–14 & n.3. If the Court grants the underlying Petition, it can do so here

Plaintiffs themselves identify a number of cases permitting courts to follow this approach. See, *e.g.*, *Am. Immigration Lawyers Ass'n* v. *Reno*, 199 F.3d 1352, 1358–1359 (D.C. Cir. 2000); *MainStreet Org. of Realtors* v. *Calumet City, Ill.*, 505 F.3d 742, 749 (7th Cir. 2007); *Bd. of Miss. Levee Comm'rs* v. *E.P.A.*, 674 F.3d 409, 417–418 (5th Cir. 2012). Other cases are in accord. *E.g.*, *Keepers, Inc.* v. *City of Milford*, 807 F.3d

24, 39, 40–42 (2d Cir. 2015); *Adams ex rel. D.J.W.* v. *Astrue*, 659 F.3d 1297, 1299 (10th Cir. 2011). That practice follows the rule that "a court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief" and have therefore forfeited. *United States Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am.*, 508 U.S. 439, 447 (1993). This Court may reach the jurisdictional question on that basis alone.

2. Although Plaintiffs claim that "there is no circuit split to be resolved," their efforts to "harmonize[]" the lower court opinions prove otherwise. BIO 13–14. Plaintiffs agree that third-party standing has been treated as a "prudential" doctrine. *E.g.*, *id.* at 10–11. They also agree that at least the Fifth, Seventh, and Ninth Circuits have held that prudential standing arguments (including objections to third-party standing) can be waived or forfeited. *Id.* at 13. And they cannot disagree that the D.C. Circuit takes the directly contrary position that "prudential standing [is] 'a jurisdictional issue which cannot be waived or conceded.'" *Ass'n of Battery Recyclers* v. *E.P.A.*, 716 F.3d 667, 674 (D.C. Cir. 2013). That is the essence of a circuit split.

Moreover, although Plaintiffs try to reconcile the conflicting circuits, they ignore the other circuits that have *acknowledged* the split. See Cross-Pet. at 34 (citing *Pharm. Research & Mfrs. of Am.* v. *Concannon,* 249 F.3d 66, 73 & n.3 (1st Cir. 2001); *UPS Worldwide Forwarding* v. *United States Postal Serv.*, 66 F.3d 621, 626 n.6 (3d Cir. 1995); *Lucas* v. *Jerusalem Cafe*, 721

F.3d 927, 938–939 (8th Cir. 2013)). Plaintiffs' denial of a split, in contradiction to the courts recognizing one, confirms the doctrinal confusion that only this Court can resolve.

Plaintiffs' other tack is to argue that this Court's decision in *Lexmark International* v. *Static Control Components*, 572 U.S. 118 (2014), which held that statutory standing should not be treated as a prudential standing doctrine, resolves any conflict. BIO at 14–15. That does not follow, for *Lexmark* expressly reserved the question of third-party standing as a prudential doctrine. See 572 U.S. at 127 n.3. Third-party standing is thus still covered by the acknowledged split over whether prudential standing can be waived or forfeited. Nor does *Lexmark* address the situation in this case, where the record evidence proves that third-party standing does not exist. If anything, *Lexmark* heightens the need for clarity about how third-party standing should be treated.

In short, Plaintiffs' Opposition leaves (1) a plain circuit split, (2) disagreement between Plaintiffs and several courts about the existence and nature of the split, and (3) continued uncertainty over the significance of *Lexmark*. If this Court grants the underlying Petition, the standard for preservation of third-party standing objections thus deserves review as well. If *Craig* v. *Boren*, 429 U.S. 190 (1976)—or any other case—needs to be clarified or overruled in part in order to settle the doctrine, the Court may do so at the merits stage.

3. Plaintiffs also exaggerate Louisiana's supposed "waiver." In fact, neither side addressed third-party standing. Plaintiffs' pleadings alleged the existence of a federal question, but not their standing. ROA.353. Louisiana's admission that the case presents a federal question, see ROA.627, thus could not have extended to standing. Plaintiffs' proposed findings of fact and conclusions of law did not mention standing either. ROA.1712, ROA.4086. Neither the district court nor the court of appeals reached standing at all. Nothing in the record involves the "plain" waiver Plaintiffs now claim.

At most, Plaintiffs point out that Louisiana did not actively *contest* standing below. But as Plaintiffs admit, this case was litigated against a backdrop of binding Fifth Circuit precedent that settled Plaintiffs' standing. BIO at 9; see *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 748 F.3d 583, 589 & n.9 (5th Cir. 2014). Raising the issue below would have been futile and a waste of judicial resources. Louisiana was not required to present a futile issue in order to present it to this Court. *Cf. MedImmune* v. *Genentech*, 549 U.S. 118, 125 (2007) ("That petitioner limited its contract argument to a few pages of its appellate brief does not suggest a waiver; it merely reflects counsel's sound assessment that the argument would be futile."); *Johnson* v. *United States*, 520 U.S. 461, 467–468 (1997) (no obligation to "mak[e] a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent"). Given the irrationally permissive case

law based upon disproven factual predicates allowing such broadly unexamined third party standing in this context, the Supreme Court is the *only* body that can sort it out. And if this Court is concerned whether the lower court record is sufficient to examine standing, it may remand to lower courts to address the question in the first instance, after articulating the correct standard.

CONCLUSION

For the foregoing reasons and those set forth in the Conditional Cross-Petition, if this Court grants the Petition in No. 18-1323, it should grant the Conditional Cross-Petition.

Respectfully submitted,

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