Nos. 18-1323 and 18-1460

IN THE

Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., *et al.*,

Petitioners,

v.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,

Respondent.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,

Cross-Petitioner,

v.

JUNE MEDICAL SERVICES L.L.C., *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, ALPHA CENTER, HEARTBEAT INTERNATIONAL, INC., CARE NET, CARING TO LOVE MINISTRIES, AND LOUISIANA ALLIANCE FOR LIFE, IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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QUESTION PRESENTED

These *Amici Curiae* address only the first question presented in Respondent's Cross-Petition:

Can abortion providers be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a "close" relationship with their patients and a "hindrance" to their patients' ability to sue on their own behalf?

TABLE OF CONTENTS

Table of Contents

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Page

STATUTES

Cited Authorities

Cited Authorities

Page

INTEREST OF *AMICI CURIAE*[1]

Amici are non-profit entities which serve pregnant mothers by helping them to maintain their relationships with their children.[2] National Institute of Family and Life Advocates ("NIFLA"), Heartbeat International, Inc., and Care Net are the three largest and most influential pregnancy help center ("PHC") national affiliation organizations which provide administrative assistance and educational and training materials in support of local pregnancy centers. Amici, Caring to Love Ministries ("CTLM") and Louisiana Alliance for Life operate cooperative networks of Louisiana PHCs which provide counseling, educational programs, and practical assistance directly to women in need. The local pregnancy help centers affiliated with CTLM and Louisiana Alliance for Life represent the majority of all PHCs in Louisiana.

Amicus, Alpha Center, is a South Dakota Registered Pregnancy Help Center, which is statutorily authorized to provide counseling to pregnant mothers before an abortion doctor can take a consent for an abortion. That third-party counseling was mandated by a 2011 Anti-Coercion Abortion Statute which the legislature passed as a result of the South Dakota abortion provider's ongoing dereliction of its duty to the pregnant mothers. The state legislation was designed to protect a pregnant mother's

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1. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief.

2. DELETED

interest in her relationship with her child. Because of actual conflicts between the abortion provider and the mothers' interests, Alpha has litigated as an Intervenor in defense of statutes expressly designed to protect the pregnant mother's constitutionally protected interest in her relationship with her child.

All of the amici PHCs, and all of the PHCs associated with the amici umbrella organizations, provide pre-abortion counseling to pregnant mothers who are considering submitting to an abortion. The vast majority of amici PHCs and PHCs associated with the amici national organizations also provide post-abortion counseling to women who have suffered emotional trauma as a result of their prior abortions. All pre and post abortion counseling is provided completely free of charge.

Amici have decades of experience working with millions of pregnant mothers who are considering submitting to an abortion and women who have been psychologically traumatized by their prior abortions. Amici know that many pregnant mothers are pressured or coerced by others into having abortions which they do not want. Amici have also learned that many women have submitted to abortions after receiving inadequate pre-abortion counseling, or as a result of being provided with false or misleading information by the abortion provider.

Amicis' experience demonstrates that the financial and ideological interests of the abortion providers are frequently in direct and actual conflict with the true interests of the pregnant mothers they claim to serve. Amici's experience also proves that the policies and practices of abortion providers frequently impair

the pregnant mothers' ability to advance their actual interests in maintaining their constitutionally protected relationship with their children.

SUMMARY OF ARGUMENT

For more than four decades following this Court's decision in *Singleton v. Wulff*, 428 U.S. 106 (1976), courts have invariably, and without scrutiny, granted all abortion providers the legal standing to litigate what they purport to be the interests of all pregnant mothers.

This broad grant of authority and control ceded to abortion providers, concerning what interests of pregnant mothers are litigated in the courts, conflicts with both third-party standing jurisprudence and the rights and interests of the mothers themselves.

Third-party standing is the exception to the fundamental doctrine that a party cannot litigate the constitutional rights of another. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). A litigant must establish Article III jurisdiction by demonstrating a direct interest in the outcome of the litigation. That litigant must also satisfy certain "prudential considerations." See, *e.g.*, *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 624 n.3 (1989).

However, a court does not have Article III jurisdiction to decide the rights of pregnant mothers if those rights are in conflict with the interests the abortion providers seek to promote, because there is no "case or controversy" pertaining to the mothers' rights which have not been presented to the court.

The pregnant mother has a fundamental, intrinsic right to maintain her relationship with her child protected under the Fourteenth Amendment. *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

Louisiana protects the pregnant mother's interest in her relationship with her child in many ways. It is, for instance, a criminal homicide to intentionally kill an unborn child in utero at any age after conception. La. Rev. Stat. Ann. §§14:32.5 through 14-32.9; and La. Rev. Stat. Ann. §14:2A (7) & (11).

Abortion is the employment of a medical procedure to achieve a non-medical objective: the termination of the pregnant mother's constitutionally protected relationship with her child. An abortion terminates that protected relationship by terminating the life of a whole, separate, unique, living human being. *Planned Parenthood of Minn., N.D., S.D., et al. v. Rounds, Alpha Center, et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*) (*Rounds I*). Abortion, therefore, is a state-authorized method of waiving an intrinsic, fundamental right.

Because a physician who has a pregnant mother as a patient has two separate patients, the mother and the unborn child, and owes duties to both (ACOG Comm. On Ethics, AM. Coll. of Obstetrics and Gynecologists, *Patient Choice in the Maternal-Fetal Relationship*, in Ethics in Obstetrics and Gynecology, 34-6 (ACOG, 2nd ed. 2004); *Hughson v. St. Francis Hosp. of Port Jervis*, 459 N.Y.S.2d 814, 816 (N.Y. App. Div. 1983); *Draper v. Jasionowski*, 858 A.2d 1141, 1146 (N.J. App. Div. 2004)), a physician who

proposes to perform an abortion, proposes to terminate the life of one of his patients. The paper serving as a consent operates to immunize the physician from criminal prosecution for homicide.

Nowhere is there a greater need to ensure that a consent is truly informed and voluntary, and nowhere is there a greater risk of the violation of a mother's fundamental right to her relationship with her child.

There are two separate lines of cases which courts are duty bound to follow: that of *Lehr v. Robertson*, *Santosky v. Kramer*, *Smith v. Organization of Foster Families*, and 12 other decisions of this Court (See II A above), which hold that a mother has an intrinsic right to maintain her relationship with her child; and that of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny, which required states to permit terminating the mother's fundamental right to her relationship with her child by an abortion. For most mothers, many of whom find themselves at an abortion clinic, it is the protection provided by this first line of cases which they want and seek. Often they seek protection from having the "right" or "interest" created by the second line of cases imposed upon them.

Women report that they have lost children they wanted because abortion providers claim they represent the rights and interests of the pregnant mothers – when their interests conflict with those of the pregnant mothers – and obtain court orders that destroy the mothers' rights which they want protected. Declaration of B.H., Appendix B, App., *infra*, 5a–17a; Declaration of Brittany Weston, at ¶¶20-44, *PP v. Daugaard*, ECF No. 40-8 ("Weston").

This Court must direct lower courts to require abortion providers to establish that their interests are not in conflict with the rights of the pregnant mothers they claim to represent, including the mothers' right in maintaining their relationship with their children.

ARGUMENT

Since this Court's decision in *Singleton v. Wulff*, 428 U.S. 106 (1976), federal courts have invariably and uncritically granted all abortion clinics and their physicians the legal standing to litigate what they purport to be the constitutional rights and interests of all pregnant mothers. Standing is presumed although the abortion providers have no relationship with the pregnant mothers, have never met them, and do not know their experiences, circumstances, or desires. Standing is presumed even when the interests of the pregnant mothers are in conflict with those of the abortion provider, including pregnant mothers who do not want an abortion. As a result, the rights and interests of many pregnant mothers go unprotected and are even defeated. To protect the rights of pregnant mothers, this Court must insist upon adherence to the established principles of third-party standing followed in other contexts.

I. Third-Party Standing is the Narrow and Generally Disfavored Exception to the Rule Prohibiting Litigants from Claiming What They Assert to be the Constitutional Rights of a Non-Party

Third-party standing is the exception to the general rule that a litigant may not claim standing "to vindicate the constitutional rights of some third-party." *Barrows v.*

Jackson, 346 U.S. 249, 255 (1953). Ordinarily, "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal interests and rights of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

A litigant must establish that he has suffered a "concrete," "particularized," and "fairly traceable" injury-in-fact sufficient to satisfy Article III's case or controversy requirement. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-1548, __ U.S. __, (2016).

It is necessary to distinguish between cases in which a litigant seeks to advance the *constitutional* rights of a third-party from those cases in which a litigant seeks to assert a third-party's *statutory* rights. When a court permits a litigant to advance the constitutional rights of others, the court is making an exception – based on its inherent jurisdictional authority – to the general prohibition against raising another person's legal rights. In the context of a litigant asserting the statutory claims of third persons, in contrast, the court is merely determining "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). Because a court's indulgence of a litigant's effort to advance the constitutional rights of a third-party are not legislatively derived, courts should be especially wary of granting an exception to the general prohibition against doing so. See *Warth*, 422 U.S. at 509 (noting that "Congress may remove [the prudential standing rule of self-governance] by statute.")

When a litigant seeks to advance the constitutional rights of a third-party, the court must ask "whether the party asserting the right has a 'close' relationship with the person who possesses the right ... [and] whether there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Stated more particularly, the court must analyze "three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 624 n. 3 (1989).

Of particular significance here, there must be a "congruence of interests" between the litigant and the third-party. *Powers*, 499 U.S. at 414. Where the litigant has an interest he seeks to promote which is not aligned, or is in outright conflict, with the interests of the third-party, the litigant does not have cognizable third-party standing.

While a court has a "virtually unflagging" obligation (*Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)) (citation omitted) to address federal questions properly brought before it, a court has an equally unflagging obligation to evaluate the standing of parties to ensure that the litigant "is fully, or very nearly, as effective a proponent of the right" (*Singleton*, 428 U.S. at 115) as the third-party whose interests he purports to represent. Even where third-party standing has not been challenged in the trial courts, this Court has deemed it necessary to determine the effectiveness of the advocacy by the third party. See *Craig v. Boren*, 429 U.S. 190, 194 (1976); see also *Singleton*, 428 U.S. at 115.

Accordingly, any third-party standing analysis must begin with an identification and evaluation of the nature of the rights and interests being asserted by the litigant and the rights and interests of the third parties who that litigant claims to represent. If the prudential considerations cannot be satisfied, then the court has no jurisdiction over that issue because the mother's rights are not being presented, and, therefore, there is no "case or controversy" concerning those issues.

II. The Pregnant Mother Has a Fundamental, Intrinsic, Natural Right to Maintain Her Relationship With Her Child Protected Under the Fourteenth Amendment Throughout Pregnancy and Under Louisiana Law

A. The Pregnant Mother has a Fundamental Intrinsic Right to Continue and Maintain Her Relationship with Her Child

The relationship between parents and their children has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). This liberty interest has as its source the individual's intrinsic natural rights which derive from the existence of the individual, not rights conferred by government in the first instance, but reaffirmed by the Fourteenth Amendment. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore*, 431 U.S. at 503; Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment*, 221 (1951). This is an interest in the "companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley*

v. Illinois, 405 U.S. 645, 651 (1972). The entitlement to protection of this right is self-evident. *Lehr*, 463 U.S. 248 (1983); *Meyer v. Nebraska*, 262 U.S. 390 (1923). It is perhaps the oldest recognized fundamental liberty. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Since the interest protected is the interest in the relationship itself, the mother's interest is always protected as fundamental during pregnancy. The majority in *Lehr*, adopting the reasoning of Justice Stevens' dissent in *Caban v. Mohammed*, 441 U.S. 380, 398-99 (1979), emphasized the difference between the father's relationship and that of the mother: "[t]he mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr*, 463 U.S. at 260 n.16. *Lehr* thus recognized the mother's protected interest based upon the scientific reality that the mother has an actual relationship with her child during pregnancy. It is the "biological" relationship which controls, not the "legal" status accorded by a state. *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968).

In contrast to the pregnant mother, the mere fact that a man is genetically related to a child does not give rise to a liberty interest under the Fourteenth Amendment. See and compare, Stanley, 405 U.S. 645; *Caban*, 441 U.S. 380; *Quilloin v. Alcott*, 434 U.S. 246 (1978); *Lehr*, 463 U.S. 248. The difference in the reproductive roles of the mother who carries the child and the man who "fathers" the child not only distinguishes how their parental rights can be established, but justifies different treatment under the Fourteenth Amendment. See, *e.g., Tuan Anh Nguyen v. Immigration and Naturalization Services*, 523 U.S. 53, 62-73 (2001) (citing *Lehr*).

A state court cannot enter an order terminating the mother's right to her relationship with her child unless the basis for such termination is proven by clear and convincing evidence. *Santosky*. That standard applies even when the state is not a party to the action. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

This Court has proclaimed "that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503 (see also, cases cited therein at 499).

No relationship is more central to the family than that of mother and child. The South Dakota legislature observed:

> "...the cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty; that the intrinsic beauty of motherhood is inseparable from the beauty of womanhood; and that this relationship, its unselfish nature and its role in the survival of the race is the touchstone and core of all civilized society. Its denigration is the denigration of the human race."

State of South Dakota Concurrent Resolution No. 1004 (2015) at 8, found at: https://sdlegislature.gov/Legislative_Session/Bill.aspx?File=HCR1004ENR.htm&Session=2015&Version=Enrolled&Bill=HCR1004.[3]

3. The Concurrent Resolution, which outlines how litigation by abortion providers frustrates the state's efforts to protect the rights of mothers and their children, is reproduced in its entirety as Appendix C to this brief. App., *infra*, 18a–47a.

South Dakota's Task Force to Study Abortion noted that "[o]ur laws are based upon the premise that the mother's intrinsic natural right [to that relationship] is fundamental, and its termination is a great loss to the mother." See Report of the South Dakota Task Force to Study Abortion at 55 (2005), Task Force created by H.B. 1233,85thSess.:http://sdlegislature.gov/ sessions/2005/ bills/HB1233SST.htm.

That relationship is most worthy of protection and it enjoys protection throughout pregnancy under the Fourteenth Amendment.[4]

B. Louisiana Has Uniformly Acted to Protect a Pregnant Mother Against Involuntary or Uninformed Termination of Her Relationship With Her Child

Louisiana protects the pregnant mother's relationship with her child during pregnancy by deterring conduct which terminates the relationship through criminal prohibitions and civil causes of action. Louisiana also provides safeguards against involuntary or uninformed termination in the context of adoption.

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4. Related to the pregnant mother's right to maintain her relationship with her child is her fundamental right to procreate. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). While her right to procreate may be satisfied upon conception, that right, being "one of the basic rights of man" (*id.*), is rendered meaningless if the mother's resulting relationship with her child is left unprotected. It is the mother's right to procreate in the first instance, and the constitutional protection of the pregnant mother's relationship with her child thereafter, which prohibits a state to demand that a mother abort her child, not this Court's decision in *Roe v. Wade* as suggested in dicta in *Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992).

(1) Protection by the Fetal Homicide Statute

Louisiana makes it a criminal homicide to intentionally kill a mother's unborn child at any age after conception. La. Rev. Stat. §§14:32.5 through 14-32.9; and La. Rev. Stat. §14:2A (7)&(11). Thirty-eight states and the federal government make it a criminal homicide to kill an unborn child. In 31 of these jurisdictions, killing an unborn child at any age after conception is a homicide.[5] Consequently,

5. Alabama, Ala. Code 1975 §13A-6-1 (2001) (conception); Alaska, AS. §11.41.150 (2006) (conception); Arizona, Ariz. Rev. Stat §13-1103 (A)(5); Arkansas, ARST §5-1-102(13)(B)(i)(ii)(iii) (2013) (conception); California, Cal. Penal Code §187(a) (1970) (fetal stage); Federal, 18 U.S.C. §1841(C) (2004) (conception); Florida, F.S.A. §782.09 (2005) (quickening); Georgia, Ga. Code Ann. §16-5-80 (2006) (conception); Idaho §§11-4001; 18-4006 (2006) (conception); Illinois, 720 ILCS 5/9-1.2 (2010) (conception); Indiana, IC 35-42-1-3 *et seq.* (1997) (viability); Kansas, K.S.A. §21-5419 (2011) (conception); Kentucky, KRS §§507A.010, 507A.020 (2004) (conception); Louisiana, LSA-RS Ann §14:32.5 *et seq.* (2006) (conception); Maryland, Md. Crim. Cd. §2-103 (2005) (viability); Massachusetts, *Comm. v. Crawford*, 722 NE.2d 960 (Mass. 2000) (viability); Michigan, M.C.L.A. §750.322 (1970) (quickening); Minnesota, M.S.A. §609.266 *et seq.* (2007) (conception); Mississippi, Miss. Code. Ann. §97-3-37 (2011) (conception); Missouri, V.A.M.S. 1.205 (Mo. 1988) (conception) and *State v. Rollen*, 133 SW.3d 57 (2003); Montana, M.C.A. §45-5-102 (2013) (8 weeks); Nebraska, Neb. Rev. St. §28-388 *et seq.* (2002) (conception); New Hampshire, N.H. Rev. Stat. §630L1-a (2018) (20 weeks post conception); Nevada, N.R.S. 200.210 (1995) (quickening); North Carolina, N.C.G.S.A. §14-23.1 *et seq.* (2011) (conception); North Dakota NDCC 12.1-17.1-02 *et seq.* (1987) (conception); Ohio, R.C. §2903.01 *et seq.* (1996) (conception); Oklahoma, 21 Okl. St. Ann §691 (2006) (conception); Pennsylvania, 18 Pa. C.S.A. §106 (1997) (conception); Rhode Island, Gen. Laws 1956 §11-23-5 (1975) (quickening); South Carolina, Code 1977 §16-3-1083 (2006) (conception); South Dakota, SDCL §22-16-1.1 (1995) (conception); Tennessee, T.C.A. §39-13-214 (2011) (conception);

failure to obtain a written consent for an abortion in these states exposes a physician to conviction for homicide.

(2) Protection by the Wrongful Death Statute

Louisiana protects a pregnant mother's relationship with her child through its wrongful death statute. La. Civ. Code Ann. art. 2315.2 creates a cause of action for the wrongful death of a mother's child at any time after conception. See La. Civ. Code Ann. art. 26; *Danos v. St. Pierre*, 402 So.2d 633 (La. 1981). The damages recoverable in such wrongful death claims is for the loss of the relationship. *Wilson v. Town of Mamou*, 972 So.2d 461, 470 (La. 2007).

(3) Protections Under the State's Adoption Statute

Louisiana will not recognize or enforce a pregnant mother's relinquishment of her parental rights if it is signed prior to five days after she has given birth. La Child Code Ann. art. 1122. The nine months of pregnancy and the period following birth gives the mother the opportunity to reflect upon her circumstances, secure any needed emotional or material support, and to hold her child. The mother cannot sign that relinquishment, however, unless she has first participated in at least two separate counseling sessions with a licensed professional.

Texas, V.T.C.A. Penal Code §1.07, 19.01-19.06 (2011) (conception); Utah, U.C.A. 1953 §76-5-201 *et seq.* (2010) (conception); Virginia, VA Code Ann. §18-2-32.2 (2004) (fetal stage); Washington, Wash Rev. Code Ann. §9A.32.060 (2004) (quickening); West Virginia, W. Va. Code §61-2-30, 61-2-1, 61-2-4, 61-2-7 (2005) (conception); Wisconsin, W.S.A. 940.04 *et seq.* (2012) (quickening).

Id. at art. 120. A court must review the affidavits of those counselors and approve the proposed termination of parental rights. If the mother waives her right to appear in open court to affirm her consent to termination of her rights, she is given an additional 90 days in which she can revoke her relinquishment. Id. at art. 1195, 1148.

(4) State Efforts to Protect the Rights of Pregnant Mothers in the Abortion Context are Routinely Stymied by Courts Presuming that Abortion Providers have Standing to Advance What They Purport to be the Rights and Interests of All Unidentified Pregnant Mothers

Since none of the safeguards provided in the context of adoption can be provided in the context of an abortion, the states face challenges in their efforts to protect pregnant mothers against involuntary or uninformed termination by abortion.

Louisiana has made repeated efforts to ensure that a pregnant mother's decision to terminate her relationship with her child through an abortion is informed and voluntary. See, *e.g.*, LSA-R.S. 40:1061.16&17. However, in many instances, the State's efforts are met with court challenges initiated by abortion providers who are presumed to have standing to litigate what they claim to be the rights and interests of all pregnant mothers frustrating the State's efforts to provide reasonable and necessary protections of pregnant mothers' true rights and interests.

The experience of South Dakota, which has undertaken expressly-stated and sustained efforts to protect the pregnant mother's right to her relationship with her child is illustrative of the barriers all states face when trying to protect the interests of pregnant mothers in the abortion context.

In 2005, South Dakota passed an Abortion Informed Consent Statute, which was designed to ensure that the pregnant mother's decision to terminate her relationship with her child by an abortion was fully informed. S.D. Codified Laws §§34-23A-1.2 through 34-23-1.7; S.D. Codified Laws §§34-23A-10.1(1), (2) & (3). In doing so, South Dakota reaffirmed its existing reasonable patient standard for medical disclosures. *Id.* at §34-23A-1.7. Because of the extraordinary nature of the abortion procedure, the state imposed additional requirements to protect the pregnant mother's Fourteenth Amendment liberty interest in her relationship with her child. §§34-23A-1.2 through 34-23A-1.7; §34-23A-10.1(1), (2) & (3).

Before the statute went into effect, however, abortion providers filed a lawsuit which claimed that the required disclosures violated the physicians' First Amendment rights and what they claimed were the interests of the pregnant mothers. That litigation lasted over seven years, and the litigation required the State and Alpha Center, one of the *amici* on this brief, to win four different Eight Circuit decisions, including decisions by two separate en banc panels. See *Planned Parenthood of Minn, N.D., S.D., et al. v. Rounds, Alpha Center, et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*) ("*Rounds I*"); *Planned Parenthood, et al. v. Rounds, Alpha Center, et al.*, 650 F. Supp. 2d 972 (Dist. SD, 2009); *Planned Parenthood, et al. v. Rounds, Alpha*

Center, et al., 653 F.3d 662 (8th Cir. 2011) (*"Rounds II"*); *Planned Parenthood, et al. v. Rounds, Alpha Center et al.*, 686 F.3d 889 (8th Cir. 2012) (*en banc*) (*"Rounds III"*). During the pendency of that litigation, because of the entry of a preliminary injunction, South Dakota women were denied the protections of the statute.

In 2011, South Dakota passed an Anti-Coercion Abortion Statute designed to protect pregnant mothers from being coerced or pressured into an abortion they didn't want. S.D. Codified Laws §§34-23A-53 through 34-23A- 62 (2011). In passing the statute, the legislature found: "[i]t is a necessary and proper exercise of the state's authority to give precedence to the mother's fundamental interest in her relationship with her child over the irrevocable method of termination of that relationship by induced abortion." *Id.* at §34-23A-54(5). The statute was remedial legislation to protect the pregnant mother's rights against the harmful practices of the abortion providers. *Id.* at §34-23A-54(1-4). The statute, among other things, provided the mothers the opportunity to obtain help and counseling at a registered pregnancy help center if she really wanted to keep her child before an abortion doctor could take her consent to perform an abortion. The Registered PHCs are highly regulated by statute and mandatory policies and procedures.

The counseling includes an assessment to determine if the woman is being subjected to coercion or pressure to have an abortion she does not want, and to receive information about resources and support that are available to her if she prefers to keep her child. *Id.* at §34-23A-59.

Again, before the statute took effect, the state's sole abortion provider instituted a lawsuit challenging virtually every provision of the statute claiming that the law violated the constitutional rights of the pregnant mothers – including the provisions of the statute intended to protect those mothers against the negligence and derelictions of the abortion providers. Based solely upon the "interests" which the abortion providers attributed to the pregnant mothers, the court enjoined the entire statute, including the civil causes of action given to the pregnant mothers for the negligence of the abortion providers. *Planned Parenthood of Minn., N.D., S.D., et al. v. Daugaard, et al.*, 799 F.Supp.2d 1048 (D.S.D.2011). Alpha Center then intervened. However, pregnant mothers who wanted their children lost their children by an abortion because of the injunction. See *e.g.,* Declaration of B.H., Appendix B, App., *infra*, 5a–17a.

In 2018, the South Dakota legislature was again forced to pass remedial legislation as a result of the abortion provider's ongoing dereliction of its duty to protect the mother's relationship with her child. Despite over a decade of litigation and four Eighth Circuit decisions, including two en banc panels, the abortion provider steadfastly refused to make the disclosures required by statute, upheld by the courts, and specifically directed by court order. See S.D. Codified Laws §34-23A-59(1)(d)&(e); Findings *Id.* at §§34-23A-75 through 88.

As demonstrated by South Dakota's history, the courts routinely assume that abortion providers have the standing to identify, limit, describe, and promote only those interests which they attribute to the pregnant mothers, to the detriment of those mothers.

III. Abortion is the Employment of a Medical Procedure to Achieve a Non-Medical Objective: The Termination of the Pregnant Mother's Constitutionally Protected Relationship with Her Child

A. A Doctor Treating a Pregnant Mother Has Two Patients

It is well established that a physician who has a pregnant woman as a patient has two separate patients, the mother and her unborn child, and that the physician has a professional and legal duty to both. ACOG Comm. On Ethics, Am. Coll. Of Obstetrics and Gynecologists, *Patient Choice in the Maternal-Fetal Relationship*, in Ethics in Obstetrics and Gynecology 34-6 (ACOG, 2nd ed. 2004) ("The maternal-fetal relationship is unique in medicine ... because both the fetus and the woman are regarded as patients of the obstetrician"); Harrison, M.R., Golbus, M.S., Filly, R.A. (Eds); The Unborn Patient: Prenatal Diagnosis and Treatment (Michael R. Harrison, MD et al. eds. 2nd ed. 1991). Numerous courts have recognized that the doctor has a duty to the unborn child to disclose the risks and consequences of the procedure to the child by informing the mother of those risks; the mother makes the decision for her child.[6]

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6. The lead case is *Hughson v. St. Francis Hospital*, 92 A.D.2d 131, 459 N.Y.S.2d 814 (1983) Hughson v. St. Francis Hosp. of Port Jervis, 459 N.Y.S.2d 814, 816 (N.Y. App. Div. 1983) ("both the mother and child *in utero* may each be directly injured and are each owed a duty, independent of the other"). Courts have specifically recognized this concept in the informed consent context, stating that the doctor has a duty to provide the mother – as surrogate for the child – the information regarding the consequences and risks the proposed

B. The Primary Decision of a Pregnant Mother Faced With the Prospect of an Abortion is Non-Medical: Can and Should She Maintain Her Relationship with Her Child?

The first and most important question the pregnant mother faces is the primary and central question of whether she should keep her relationship with her child. Having adequate counseling as the mother contemplates that question is essential to her needs, interests, and rights. Only if the pregnant mother decides for herself that she should give up her relationship does she then need to determine which method of termination she should employ.

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treatment would have for the child. *Id;* see also *Harrison v. United States*, 284 F.3d 293 (1st Cir. 2002)Harrison v. United States, 284 F.3d 293, 301 (1st Cir. 2002) (Massachusetts law); *Roberts v. Patel*, 620 F.Supp. 323 (N.D. Ill. 1985)Roberts v. Patel, 620 F.Supp. 323, 326 (N.D. Ill. 1985); *Walker v. Mart*, 164 Ariz. 37, 790 P.2d 735 (1990)Walker v. Pizano v. Mart, 790 P.2d 735, 739 (Ariz. 1990); *In re A.C.*, 573 A.2d 1235 (D.C. 1990)In re A.C., 573 A.2d 1235, 1246 n.13 (D.C. 1990); *Nold v. Pinyon*, 272 Kan. 87, 31 P.3d 274 (2001) Nold ex rel. Nold v. Binyon, 31 P.3d 274, 289 (Kan. 2001); *Draper v. Jasionowski*, 372 N.J.Super. 368, 858 A.2d 1141 (App. Div. 2004) Draper v. Jasionowski, 858 A.2d 1141, 1146 (N.J. App. Div. 2004); *Ledford v. Martin*, 87 N.C.App. 88, 359 S.E.2d 505 (1987)Ledford v. Martin, 359 S.E.2d 505, 507 (N.C. Ct. App. 1987). Other cases have recognized this two-patient concept in other malpractice contexts. *See, e.g., Burgess v. the Superior Court of Los Angeles*, 2 Cal.4th 1064, 831 P.2d 1197, 9 Cal.Rptr.2d 615 (1992)Burgess v. the Superior Court of Los Angeles, 831 P.2d 1197, 1203, (Cal. 1992); *Ob-Gyn Associates of Albany v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989)Ob-Gyn Associates of Albany v. Littleton, 386 S.E.2d 146, 147 (Ga.1989); see also *In re Certification of Question of Law from U.S. District Court (Farley)*, 387 N.W.2d 42 (S.D. 1986)In re Cert. of Question of Law from U.S. District Court v. Mt. Marty Hospital Assoc., 387 N.W.2d 42 (S.D. 1986).

In the context of adoption, as regulated in the State of Louisiana, termination of the mother's rights is treated as the last option, and every effort is made to ensure that the mother has every opportunity to avoid termination of her constitutional right to keep her child. See II B (3) above.

Abortion is the other method by which the pregnant mother can terminate her relationship with her child. Properly understood, therefore, abortion is a medical procedure employed to achieve a non-medical objective.

The PHCs assist the mother to keep her relationship with her child by providing protection against pressure and coercion, and information about financial and other assistance available to her if she prefers to keep her child.

By contrast, the abortion providers exist solely to terminate the mother's relationship by terminating the life of the child. Unlike promising to give up her rights in an adoption, the abortion is totally irrevocable. This decision – which may be the most important decision she makes in her entire life – is made in a single day without her receiving any meaningful counseling.

C An Abortion Terminates the Life of a Whole, Separate, Unique, Living Human Being; a Consent for an Abortion Immunizes the Abortion Physician from Criminal Prosecution for Homicide

An abortion terminates the life of a whole, separate, unique, living human being regardless of the age of the unborn human being. *Planned Parenthood of Minn., N.D., S.D., et al. v. Rounds, Alpha Center, et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*) ("*Rounds I*").

That fact has been established in litigation challenging South Dakota's Informed Consent Abortion Law which requires a physician to disclose to a pregnant mother "[t]hat the abortion will terminate the life of a whole separate, unique, living human being." S.D. Codified Laws §34-23A-10.1(1)(b). The South Dakota Planned Parenthood affiliate sued the state alleging that the compelled disclosure violated the physician's Fourteenth Amendment right of free speech and violated constitutional rights of pregnant mothers. An *en banc* court of the Eighth Circuit held that the disclosure was a statement of scientific fact – not a statement of ideology as maintained by Planned Parenthood – and that it was truthful, non-misleading, and relevant to the pregnant mother's decision of whether or not to consent to an abortion. All of the scientific proofs overwhelmingly support that fact. See *e.g.*, the following from *Planned Parenthood of Minn., N.D., S.D., et al. v. Rounds, et al.*, No. 4:05-cv-4077-KES (D.S.D.): Declarations of Bruce Carlson, M.D., Ph.D., ECF Nos. 24 and 186; Report of Dr. Carlson, ECF No. 82-6; Declarations of David Fu-Chi Marks, Ph.D., ECF Nos. 25, 82-2, and 196; Declaration of Marie Peeters-Ney, Ph.D., ECF No. 27; Reports of Dr. Peeters-Ney, ECF Nos. 82-3 and 85-3; Declarations of Ola Didrik Saugstad, M.D., ECF Nos. 26 and 82-5; Report of T. Murphy Goodwin, M.D., ECF No. 101-2; Declarations of Dr. Goodwin, ECF Nos. 122-1 and 185; Report of Jacob Langer, M.D., ECF No. 82-4; and Intervenors' Amended Rule 56.1(a) Statement of Material Facts, ECF No. 296 ¶¶87 through 104 ("Statement of Material Facts").

Thus, when a physician proposes to perform an abortion, he is proposing to terminate the life of a separate human being, who is one of the physician's patients. The

paper that acts as the consent operates to immunize the physician from what is otherwise a criminal homicide.

Nowhere is there a greater need to ensure that a mother's consent to a medical procedure is truly informed and voluntary.

IV. In the Majority of Cases, Abortion Providers Cannot Satisfy the Prudential Considerations for Third-Party Standing to Litigate the Rights and Interests of Pregnant Mothers

A. There is No True Doctor-Patient Relationship in the Abortion Context

Abortion doctors do not have any doctor-patient relationship with the pregnant mothers on whom they perform abortions. The South Dakota litigation in which Alpha Center has participated has uncovered a nearly uniform national model utilized by the nation's abortion providers. In that national model, the abortion doctor is not involved in conducting pre-abortion counseling. Patricia Giebink, M.D., the last South Dakota physician who performed abortions at the state's only abortion facility, explained the process used by the abortion providers.[7]

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7. The procedures used at Planned Parenthood's Sioux Falls, S.D. facility which are described in the following paragraphs are detailed in Dr. Giebink's declaration filed in the current South Dakota litigation. Declaration of Patricia Giebink, M.D. at ¶¶14-15, *Planned Parenthood of Minn., N.D., S.D., et al. v. Daugaard, et al.*, No. 4:11-cv-04071-KES (D.S.D. Jul 1, 2011) (hereafter, "*PP v. Daugaard*"), ECF No. 40-5 ("Giebink"). Planned Parenthood's practices are also documented by Brittany Weston, who was pressured to have an abortion she didn't want at their clinic on

If someone calls the abortion facility to ask about an abortion, the clerk answering the phone schedules surgery, even if the person making the call is someone other than the pregnant mother (sometimes a person coercing the abortion), and even without speaking with the pregnant mother. Once the pregnant mother arrives at the abortion facility, she is required to sign a consent at the reception desk and pay for the procedure. The pregnant mother then meets a "patient educator," whose primary responsibility is to ensure that she has signed consent forms. These "education" sessions are extremely brief. The pregnant mother sees the abortion doctor for the first – and last – time, stripped from the waist down in the procedure room. Statement of Material Facts, ¶¶49 through 72.

The pregnant mother's interaction with the abortion doctor is limited to the amount of time it takes to perform the abortion. Giebink at ¶25; Weston at ¶¶39-44. The abortion doctor does not engage the pregnant mother in an informed consent process, having entrusted that responsibility to untrained and uneducated "educators." Giebink at ¶¶16-30; Weston at ¶¶28-38. Statement of Material Facts, ¶¶18 through 45. In fact, at Planned Parenthood Sioux Falls, the abortion doctor did not conduct pre-abortion counseling. Giebink at ¶24.

Dr. Giebink concluded: "Planned Parenthood did not follow normal accepted standards of medical practice, and

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September 23, 2005. Declaration of Brittany Weston at ¶¶20-44, *PP v. Daugaard*, ECF No. 40-8 ("Weston"). Those procedures were also verified by Planned Parenthood in the prior litigation. Statement of Material Facts, ¶¶49 through 72.

there was no true doctor-patient relationship." Giebink at ¶28.

In South Dakota and other parts of the country, the out-of-state physicians fly into the state in the morning and out later the same day, never to see the mother again Statement of Material Facts, ¶¶18-19. The South Dakota legislature concluded that there is usually no doctor-patient relationship, and that the abortions performed in its state "are among the worst form of itinerant surgery, the kind of surgery which mainstream medicine considers unethical." "Concurrent Resolution"; see also S.D. Codified Laws §34-23A-54(1) through §34-23A-54(3).

These policies and practices are not unique to South Dakota. Abby Johnson ran a Planned Parenthood abortion clinic in Texas and testified that the abortion doctors do not conduct the pre-abortion counseling or provide the disclosures which should be used during the consent process. Declaration of Abby Johnson at ¶6; *PP v. Daugaard*, ECF No. 40-6 ("Johnson"). Dr. Giebink also testifies that the policies and practices described by Abby Johnson were the same as those used at the South Dakota abortion clinic. Giebink at ¶13.

Ms. Johnson further reports that the model for pre-abortion counseling and the informed consent process which was used at her Texas clinic and in South Dakota, was a uniform model employed across the country. Johnson at ¶¶6, 21.

The Louisiana legislature found that most of the mothers at Louisiana's abortion facility "do not have any relationship with the physician who performs the abortion,

before or after the procedure." La. Rev. Stat. §40:1061.10 (2014).

B. Many Pregnant Mothers are Pressured or Coerced into Having Abortions That They Do Not Want, Abortion Providers Do Not Assess for Coercion and Pressure, and Fail to Properly Counsel Pregnant Mothers Before Taking a Consent

1.

Forced abortions are so common that several organizations have emerged to assist pregnant mothers who are being subjected to coercion or pressure to have abortions against their will. The largest such organization is The Justice Foundation's Center Against Forced Abortions ("CAFA"), which provides direct legal help to pregnant mothers and collaborates with attorneys across the country to provide free legal assistance to pregnant mothers who are being unduly pressured or coerced into unwanted abortions. See https://thejusticefoundation.org/cafa (last visited December 30, 2019). CAFA estimates that since its founding in 2009, they have helped save about 20,000 pregnant mothers from coerced abortions.

The South Dakota litigation demonstrates many examples of pregnant mothers being pressured or coerced into having abortions they didn't want. Declaration of Leslee Unruh at ¶21, *PP v. Daugaard*, ECF No. 40-2 ("Unruh"). Declaration of Kimberly Martinez at ¶¶11, 14, 22, 26, *PP v. Daugaard*, ECF No. 40-1 (Martinez). Sometimes, a young college student is pressured by a parent into submitting to an abortion. Declaration of

Alexandra Szameit at ¶¶2-3, *PP v. Daugaard*, ECF No. 40-9. Sometimes a woman is pressured by an older boyfriend to have an abortion that she does not want. Weston at ¶¶8-19. Other times, the pregnant mother is subjected to violence or threats of violence by the child's father. Declaration of Vixie Miller at ¶¶3-10, *PP v. Daugaard*, ECF No. 40-10 ("Miller").

Homicide is the number one cause of death among pregnant mothers. Diana Cheng & Isabelle L. Horon, *Intimate-Partner Homicide Among Pregnant and Postpartum Women*, 115:6 Obstetrics & Gynecology 1181 (2010).[8]

2.

Abortion providers assume that every pregnant mother who enters an abortion clinic has already decided to have an abortion. See Statement of Material Facts at ¶61; Unruh at ¶20; Johnson at ¶15. As a result, abortion providers do not engage in any informed consent process where the pregnant mother's decision-making is explored or evaluated. Giebink at ¶23; Johnson at ¶15, 19. Neither do they perform any assessment to determine if the pregnant mother is being subjected to coercion or pressure to have an abortion that she doesn't want. Giebink at ¶¶29-30; Johnson at ¶6; Weston at ¶¶31-32.

Abortions are performed even when it is clear that the mother is ambivalent, conflicted, or being subjected

8. An expert in the South Dakota litigation has documented over 100 cases of pregnant mothers who were murdered because they refused to have an abortion.

to coercion or pressure. For example, some women cry during the "counseling" session, but the abortions are performed anyway. Johnson at ¶16. Brittany Weston was openly "bawling" during the pre-abortion "counseling" session, but still no assessment for pressure or coercion was conducted. Weston at ¶¶32-33.

A large percentage of pregnant mothers considering abortion would actually prefer to keep their children, but feel constrained to have an abortion because of a lack of material resources or emotional support. Unruh at ¶16. Many other women are forced to the abortion clinic against their will.

3.

In addition to coercion from others, many pregnant mothers are also subjected to improper persuasion or manipulation by the abortion provider. Unruh at ¶24. Since upon their arrival at the abortion clinic, many pregnant mothers have not made a final decision whether to keep their relationship with their child or to terminate that relationship. The vast majority of women (95%) want to be informed of all possible complications associated with elective medical treatments, including abortion. See Priscilla Coleman, David C. Reardon, Max C. Lee, *Women's Preferences for Information and Ratings of the Seriousness of Complications Related to Elective Medical Procedures*, 32 J. Med. Ethics 435 (2006).

However, any reliance on the abortion clinic is misplaced. Abby Johnson testifies that Planned Parenthood's "counselors" "routinely took the job of convincing women to have abortions." Johnson at 20.

She relates that many of the answers provided by their "counselors" are "designed to steer the woman to an abortion" and are "scripted" by Planned Parenthood Federation of America. Johnson at ¶21. Ms. Johnson also relates that abortion clinic staff were trained to overcome the pregnant mothers' concerns that abortion was inconsistent with their own moral or religious values. Johnson at ¶23. Ms. Johnson testifies that the abortion clinics had to meet quotas for the number of abortions, and that they relied on the performance of abortions for needed revenue. Johnson at ¶18. Similarly, Dr. Giebink testifies that there "was constant pressure to 'sell' surgery." Giebink at ¶22.

C. The Lack of Any True Physician-Patient Relationship and the Conflicts Between the Interests of the Abortion Providers and Those of the Pregnant Mother Precludes Recognition of Standing in the Abortion Providers

There are two separate lines of cases which courts are duty bound to follow: that of *Lehr*, *Santosky*, *Smith v. Organization of Foster Families*, and 12 other decisions of this Court (See II A above), which hold that a mother has an intrinsic right to maintain her relationship with her child; and that of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny, which required states to permit termination of the mother's fundamental right to her relationship with her child by an abortion. For most mothers, many of whom find themselves at an abortion clinic, it is the protection provided by this first line of cases which they want and seek. Often they seek protection from having the "right" or "interest" created by the second line of cases imposed upon them.

Ms. Weston concludes that the abortion provider was not the proper party to represent her interests in court and that her rights, and the rights of pregnant mothers similarly situated, are better represented by PHCs like Alpha Center. Weston at ¶¶6(c-d).

The essential difference between the PHC and the abortion provider is that the PHC provides help that increases the mother's ability to exercise her right to maintain her relationship with her child, while the abortion provider irrevocably terminates her relationship, usually in a single day and without adequate counsel.

The experience of B.H., who was forced to have an abortion, illustrates how the interests of the abortion providers are in direct conflict with the true interests of the pregnant mothers. Declaration of B.H. attached as Appendix B to this brief, App., *infra*, 5a-17a.

B.H. was forced to have an abortion in March of 2012 at Planned Parenthood Sioux Falls, South Dakota. B.H.'s father scheduled the abortion, drove her to the clinic, and paid for the abortion. Planned Parenthood Sioux Falls did not perform any assessment to determine whether she was being coerced, and did not explore whether she even wanted an abortion.

In fact, Planned Parenthood had filed a lawsuit in 2011 to prevent pregnant mothers like B.H. from obtaining the help they want. Planned Parenthood had claimed that it had the standing to litigate B.H.'s rights in court and those of other pregnant mothers like her, and that the third-party counseling enacted by the 2011 South Dakota Anti-Coercion Abortion Statute violated the

rights of mothers like B.H. Planned Parenthood obtained a preliminary injunction which prevented the third-party counseling from going into effect. As a result, B.H. was enjoined from receiving the assistance she needed, and she lost the child she wanted.

In her sworn Declaration, B.H. concludes:

> "It is especially heartbreaking to realize that if that injunction had not been in place, I would have received the counseling that I so desperately needed, and I know that if I had been given a chance to go to Alpha Center, I would have my child today."
>
> ...
>
> "What is especially upsetting and offensive to me, is that I now understand that Planned Parenthood claimed that they had the right to go to court to litigate *my rights*, or what *they* claimed were my rights. I don't understand how they can claim that it was unconstitutional for me to get the help I needed to protect my right to keep my child. That was the right I wanted protected and Planned Parenthood prevented it. Planned Parenthood didn't represent me and my interests, and they do not represent the interests of other women like me."

B.H. Declaration, Appendix B, App., *infra*, 5a-17a.

CONCLUSION

This Court must direct all lower courts to require abortion providers to establish that their interests are aligned with, and not in conflict with, the interests of the pregnant mothers they claim to represent, including the mothers' interest in maintaining their relationship with their children.

Respectfully submitted,

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