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 AND HOSPITALS,

Respondent-Cross-Petitioner.

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

RESPONSE AND REPLY BRIEF FOR PETITIONERS-CROSS-RESPONDENTS

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QUESTIONS PRESENTED

The question presented in Case No. 18-1323 is recounted at Petrs. Br. i. Case No. 18-1460 presents the following questions:

1. Should the Court overrule *Craig v. Boren*, 429 U.S. 190 (1976), in relevant part and hold that challenges to third-party standing cannot be waived?

2. Should the Court overrule *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), and *Doe v. Bolton*, 410 U.S. 179 (1973), in relevant part and hold that abortion providers lack standing to assert the rights of their patients when challenging abortion restrictions that operate directly on the providers?

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JURISDICTION

Petitioners-Cross-Respondents (hereafter "Hope") incorporate their previous jurisdictional statement. Petrs. Br. 1.

INTRODUCTION

The State disregards *stare decisis* at every turn. To begin, the State asks the Court to do something it has never done before: Uphold a state law identical to one that the Court recently invalidated by distinguishing the prior case on its "facts" and "regulatory context." Br. for Resp./Cross-Petr. ("Resp. Br.") 1-2. Perhaps recognizing the implausibility of this request—particularly given the record here—the State falls back to asking the Court to "overrule[]" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Resp. Br. 67.

The State next urges the Court to ignore its holding in *Craig v. Boren*, 429 U.S. 190 (1976), that objections to third-party standing can be waived. Furthermore, the State contends that several cases holding that third-party standing rules are prudential, not jurisdictional, should be overruled. And if all of that were not enough, the State asks the Court to relegate to the dustbin three cases holding that third-party standing exists under the precise circumstances here.

The Court should reject these invitations to upend settled law. The State scarcely even argues that the numerous holdings it challenges are so wrong, unworkable, or outdated that they should be abrogated. And the State's factual allegations regarding the effects of Act 620, including its tired attacks on Hope's

safety and professionalism, ignore the reality that there was a trial in this case, and the district court made numerous and detailed findings against the State.

There accordingly is every reason to adhere to the Court's sound constitutional analysis in *Whole Woman's Health* and to its longstanding rules governing third-party standing. On the merits, the district court correctly found that Act 620 confers no benefit and imposes burdens on access to abortion that are just as severe as—if not greater than—those imposed by H.B.2. With respect to standing, the State is wrong that recent case law has undermined the Court's holdings that govern this case. To the contrary, it remains as clear as ever that the State's objection to third-party standing is nonjurisdictional and thus waivable, and that providers like Hope have standing to raise their patients' constitutional rights to abortion.

STATEMENT OF THE CASE

Hope incorporates its previous statement of the case. Petrs. Br. 3-16.

REPLY IN NO. 18-1323

I. THE STATE'S ARGUMENTS ARE FRAMED IN TERMS THAT THIS COURT HAS ALREADY REJECTED.

Even when refraining from directly asking the Court to overrule *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the State and the Solicitor General proceed from a framework that is incompatible with this Court's precedent. The Court

should reject this framing and analyze the constitutionality of Act 620 under the same standards it applied in *Whole Woman's Health*.

A. The State's merits argument begins with the proposition that the health benefits of abortion regulations should be examined "under a rational basis standard." Resp. Br. 67. That is the legal standard this Court rejected in *Whole Woman's Health*.

In *Whole Woman's Health*, the Fifth Circuit had held that a court should accept a state's rationale for an abortion restriction if "it is reasonably related to (or designed to further) a legitimate state interest." 136 S. Ct. at 2309 (quotation marks omitted). This Court rejected that "articulation of the relevant standard [as] incorrect." *Id.* Specifically, the Court concluded that it "is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review"—i.e., rational-basis review—"applicable where, for example, economic legislation is at issue." *Id.*

For this reason, the Court in *Whole Woman's Health* also rejected Texas's argument—pressed again by Louisiana, Resp. Br. 67-69—"that legislatures, and not courts, must resolve questions of medical uncertainty." *Whole Woman's Health*, 136 S. Ct. at 2310. "Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings." *Id.*

Implicitly conceding that *Whole Woman's Health* forecloses its position here, the State argues that the

case's rejection of rational-basis review is "not an accurate statement of the law." Resp. Br. 68. Not so. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), the Court declined to accept the state's asserted benefit so long as it was rational. *Casey* instead "relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional." *Whole Woman's Health*, 136 S. Ct. at 2310 (citing *Casey*, 505 U.S. at 888-94); *accord Gonzales v. Carhart*, 550 U.S. 124, 165-66 (2007). *Whole Woman's Health*, therefore, did nothing more than explain that rational-basis review is "inconsistent with this Court's case law." 136 S. Ct. at 2310. That standard "does not match the standard that this Court laid out in *Casey*." *Id.*

B. The State next attempts to train this Court's attention on "*the Fifth Circuit's* application of law to the facts"—going so far as to contend that reviewing the Fifth Circuit's spin on the record would not be "a proper use of this Court's resources." Resp. Br. 25, 72 (emphasis added). Again, this suggestion flies in the face of *Whole Woman's Health*.

As with any appeal following a bench trial and extensive fact-finding by the district court, the question the Court asked in *Whole Woman's Health* was whether "there [was] adequate legal and factual support for *the District Court's* conclusion[s]." 136 S. Ct. at 2311 (emphasis added); *see also id.* at 2313 (asking whether "the record contain[ed] sufficient evidence" to support district court's findings regarding clinic closures); *id.* at 2316 (asking whether "the record provide[d] adequate evidentiary support for the District

Court's conclusion"); *see also* Petrs. Br. 31-32 (collecting authority on clearly erroneous standard in general). This is because an "appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction[] [or] resolve the ambiguities differently." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857 (1982) (quotation marks omitted).

The same is true here: The question for this Court is whether there is adequate support for the district court's findings, not the Fifth Circuit's second-guessing.

C. Finally, the State makes two related arguments concerning the nature of Hope's constitutional challenge to Act 620. Each argument is meritless.

First, the State (but not the Solicitor General) suggests an abortion regulation cannot be facially invalidated unless it has "*no* constitutional application[s]." Resp. Br. 69 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But *Whole Woman's Health* affirmed *Casey*'s rejection of that standard, holding that an abortion restriction is facially unconstitutional if it imposes an undue burden in "'a large fraction of cases in which [the provision at issue] is *relevant*,' a class narrower than 'all women,' 'pregnant women,' or even 'the class of *women seeking abortions* identified by the State.'" 136 S. Ct. at 2320 (alteration in original) (quoting *Casey*, 505 U.S. at 894-95). The State asserts that the question "remains open," Resp. Br. 70, but the State's citation to the *Whole Woman's Health* dissent for that proposition gives the game away.

Second, the State suggests that the alleged "pre-enforcement" setting of this case makes some difference to the legal standard that governs here. Resp. Br. 54-55; *see also* U.S. Br. 22. According to the State, a law's "concrete existence" is critical to "establishing the unconstitutional burdens" of that law. Resp. Br. 55. This Court, however, has routinely entertained pre-enforcement challenges when the applicable legal standard involved factual development, including in abortion cases. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 416 (2012) (adjudicating state law's constitutionality in this context); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit."); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973) (pre-enforcement challenge to abortion restriction). In fact, *Whole Woman's Health* addressed a pre-enforcement challenge to Texas's ambulatory surgical center ("ASC") law in addition to the challenge to the state's admitting-privileges requirement, and the Court applied the same standard to both. 136 S. Ct. at 2310-18.

Regardless, this action is not a "pre-enforcement" challenge in any relevant sense. The State's defense of Act 620 turns almost entirely on whether admitting privileges are difficult to obtain. Resp. Br. 72-80. Yet instead of fully enjoining Act 620 at the outset of the case, the district court enjoined only its penalties. The court required Louisiana's abortion providers to attempt to obtain admitting privileges for a year and a half. Pet. 13; Pet. App. 146a-47a, 160a n.20. The district court, therefore, had an especially

solid evidentiary basis for its findings regarding Act 620's burdens.

II. ACT 620 UNDULY BURDENS A WOMAN'S RIGHT TO ABORTION AND IS THEREFORE INVALID.

A. The Burdens And (Absence Of) Benefits Are the Same As In *Whole Woman's Health*.

The undue burden test requires courts to "consider the burdens a law imposes on abortion access *together with* the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309 (emphasis added). Indeed, the Court's constitutional analysis of Texas's admitting-privileges law *started* with an assessment of its benefits. And because Act 620's benefits and burdens mirror those of H.B.2, there is no need to go further.

1. *Benefits*

Whole Woman's Health held that the Texas admitting-privileges law, on which Louisiana's law was modeled, provides no health or safety benefits to women seeking abortions. 136 S. Ct. at 2310-13. *Amicus* filings in this case confirm that the overwhelming consensus of leading medical authorities, including the American Medical Association ("AMA") and the American College of Obstetricians and Gynecologists ("ACOG"), remains that admitting-privileges laws have *no* health or safety benefits and in fact endanger women's health. *See* Br. of *Amici Curiae* ACOG, et al. ("ACOG/AMA Br.") 6, 22-23 & n.53 (discussing study showing increase in second-trimester abortions, which have higher complication

rates, after Texas's admitting-privileges law took effect). Although the Solicitor General buries the point in a footnote, U.S. Br. 32 n.2, the federal Centers for Medicare & Medicaid Services in 2019 accordingly removed its admitting-privileges requirement from its regulations of ASCs, having concluded that the enactment of the Emergency Medical Treatment and Labor Act ("EMTALA") and modern procedures for handling medical emergencies have made "admitting privileges obsolete and unnecessary." 84 Fed. Reg. 51,732, 51,790-91 (Sept. 30, 2019).

Against this weight of authority, the State's defense of the Fifth Circuit's suggestion that Act 620 has "minimal" benefits that are particular to Louisiana, Resp. Br. 80 (quoting Pet. App. 39a), is unavailing. The consensus that admitting-privilege laws lack benefits "is not state-dependent," ACOG/AMA Br. 4, and the district court's finding to that effect, Pet. App. 219a-20a, is not clearly erroneous.

a. *Credentialing.* As Hope explained in its opening brief, the Court in *Whole Woman's Health* rejected the argument that admitting-privileges requirements afford credentialing benefits. *See* Petrs. Br. 27-28, 33. Based on nationwide data, the Court concluded that Texas's law did not serve a relevant credentialing function because abortion providers are often denied privileges for reasons other than competency. *See Whole Woman's Health*, 136 S. Ct. at 2312-13. The district court made the same express finding in this case. Pet. App. 272a; *see also id.* at 172a.

The State nevertheless protests that there is "no competent, non-hearsay evidence in the record" that

Louisiana hospitals have denied privileges for reasons other than competency. Resp. Br. 84. But the district court rejected the State's admissibility objections. Pet. App. 175a n.29, 221a n.41, 227a n.43, 246a n.48. It found based on an extensive record that, just as in Texas, Louisiana abortion providers are routinely denied privileges for non-competency reasons. *Id.* at 220a-54a. Indeed, such evidence exists for each of the physicians who did not receive privileges. *See, e.g.*, JA 709, 1436, 1472 (Doe 1); JA 383-84, 1435 (Doe 2); JA 1135-36 (Doe 5); JA 1310 (Doe 6). And the hospital bylaws in the record all cite non-competency reasons why privileges would be denied to physicians who specialize in outpatient services. *See* Petrs. Br. 38-39 & n.5, 42 n.8; *see also* Br. of *Amici Curiae* Med. Staff Prof'ls ("Med. Staff Prof'ls Br.") 14-16, 18, 21 (summarizing bylaws of Louisiana hospitals).[1]

The district court also properly rejected the State's claim, which it renews here, that Hope does not vet physicians' credentials. Resp. Br. 9. Hope confirms that all physician applicants are licensed by the Louisiana State Board of Medical Examiners, which the district court found "ensures physician

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[1] Contrary to the State's suggestion, many denials or de facto denials do not trigger due process appeal rights. Med. Staff Prof'ls Br. 23. Even if they did, it would not matter. In *Whole Woman's Health*, the Fifth Circuit held that the reduction in access to abortion should not be attributed to H.B.2 because providers could litigate denials of privileges for invalid reasons. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 596 n.44 (5th Cir. 2015). This Court rejected that argument, finding that H.B.2 caused clinics to close. *Whole Woman's Health*, 136 S. Ct. at 2312-13.

competency." Pet. App. 272a. Hope's medical director personally oversees physicians' proficiency in abortion care. JA 206, 229-34. And far from lacking credentials, physicians at Hope have trained and taught at Louisiana's flagship universities. Pet. App. 220a-21a, 226a (Doe 1 graduated medical residency from LSU Shreveport, and Doe 2 was an assistant clinical professor at LSU for 18 years).

Unable to escape the evidence, the State mischaracterizes Hope's opening brief as conceding that hospitals review physicians' competency. *See* Resp. Br. 81. What Hope actually said is that, insofar as hospitals review competency, they do so for inpatient procedures that physicians might need to perform in the hospital. Petrs. Br. 33. That is on its face irrelevant to physicians' competency to perform *outpatient* abortion care. Med. Staff Prof'ls Br. 25.

In the end, the State itself acknowledges that admitting-privileges requirements may be an "imperfect answer" for vetting the competency of outpatient abortion providers and that Act 620's 30-mile limitation does not make sense if credentialing is the law's goal. Resp. Br. 82; *see also* Med. Staff Prof'ls Br. 10 ("admitting privileges requirement underscores a fundamental mismatch between a hospital's business practices and the nature of outpatient abortion care"). But the State asserts that this is good enough because the Court should accept its assertion of benefits so long as it is rational. Resp. Br. 82-83. But rational-basis review does not apply here. *See supra* at 3-4. And the district court properly scrutinized the record and concluded that Act 620 furthers no relevant credentialing benefit, just as was true of Texas's

identical statute in *Whole Woman's Health*. The State offers no basis to disturb that conclusion.[2]

b. *Safety*. The State next claims that "Act 620 improves safety" because "patients are better off when the doctor is prepared to admit and treat [the patient] himself." Resp. Br. 85-86. But *Whole Woman's Health* rejected this precise argument, citing contradictory, nationwide data. 136 S. Ct. at 2311. The district court below rejected this argument, too, and found that Act 620 actually will "increase the risk of harm to women's health." Pet. App. 219a, 270a. Indeed, even the Fifth Circuit "found no proof that patient outcomes improve when the doctor is able to admit them to a hospital personally." Resp. Br. 87.

These conclusions are consistent with the findings of every district court to have held a trial on admitting-privileges laws. Petrs. Br. 3. Leading medical groups confirm that no credible medical evidence supports any health or safety benefit. *See*

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[2] The Solicitor General suggests another alleged benefit for Act 620: the "effects on the medical community and on its reputation." U.S. Br. 33 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)). To the extent this alleged benefit is different from credentialing, the State has never asserted it, and it should not be considered now, given that "*post hoc* justifications" for laws affecting constitutional rights are not permitted. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). In any event, this argument is just a restatement of what Texas argued and this Court rejected in *Whole Woman's Health*, explaining that additional (and medically unnecessary) regulations will not deter determined wrongdoers who ignore existing law. 136 S. Ct. at 2313-14.

ACOG/AMA Br. 17-19; Br. of *Amici Curiae* Soc. Sci. Researchers 9-10.

There is good reason why courts and medical organizations have consistently disagreed with the claim the State makes. The "overwhelming weight of the evidence demonstrates that, in the decades before the Act's passage, abortion in Louisiana ha[d] been extremely safe." Pet. App. 218a-19a. With respect to Hope in particular, the district court found that the clinic has had only four patients in 23 years who required transfer to a hospital—each of whom received appropriate medical care regardless of her provider's admitting privileges. *Id.* at 212a-13a.

All the State is left with is its argument that Doe 3, who has admitting privileges because of his OB/GYN practice, has used those privileges on two occasions in the last several decades to admit and treat the complications of his patients. Resp. Br. 86. But, as the district found—and as the Fifth Circuit affirmed—there is no evidence these patients would have been worse off if they had been treated by a hospital-based physician. Pet. App. 38a n.56, 212a, 215a.

c. *Conformity*. Nor does Act 620 promote conformity with other state regulation. As Hope has shown, ASCs are not apt comparators to abortion clinics; if abortion were regulated in conformity with Louisiana's existing laws for comparable procedures and facilities, abortion providers would *not* each be required to have local admitting privileges. Petrs. Br. 35-36; *see also* JA 865, 884. The State insists that Louisiana, unlike Texas, "require[s] its ASC medical staff to have privileges." Resp. Br. 88. But the State's

asserted interest in making abortion clinics follow ASC rules is arbitrary in light of this Court's holding that there is no valid state interest in requiring abortion facilities to comply with ASC requirements. *Whole Woman's Health*, 136 S. Ct. at 2315-16. Equally important, the State never explains how this change in the law benefits *women's health*—because there is no such benefit.[3]

2. *Burdens*

The State's attempts to distinguish Act 620's burdens from those in *Whole Woman's Health* likewise fail.

The State does not directly dispute the district court's finding that if Act 620 were enforced, only one physician at one clinic would provide services, down from five physicians at three clinics. Petrs. Br. 12-13. Nor does it dispute that, as a result of the loss of these providers, women would experience burdens at least as severe as those in *Whole Woman's Health*.

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[3] These alleged interests are entirely arbitrary when it comes to medication abortions, which are currently more than a third of abortions in Louisiana. ACOG/AMA Br. 16 & n.36; *see also Induced Termination of Pregnancy by Weeks of Gestation and Type of Procedure Reported Occurring in Louisiana, 2013*, La. Ctr. for Records & Statistics, *available at* http://ldh.la.gov/assets/oph/Center-RS/healthstats/New_Website/ITOP/Ap13_T22.pdf. No credentialing benefit exists because, as the State's expert testified, a hospital would have no business reason to give privileges to a physician who only prescribes medication. JA 884. Concerns related to hospital transfers are irrelevant because medication abortions are never completed at the clinic. *See Whole Woman's Health*, 136 S. Ct. at 2315. And conformity with ASCs makes no sense given that medication abortion is not surgery.

Id. at 29-30. As the district court held, the effect of Act 620 would be to prevent thousands of Louisiana women from obtaining an abortion, while others would face "longer wait times for appointments, increased crowding and increased associated health risks." Pet. App. 255a-56a, 258a. The State nevertheless claims that this case is distinguishable from *Whole Woman's Health* because any reduction in abortion access here would not be attributable to the State's admitting-privileges law. *See* Resp. Br. 75-78. That argument contradicts the record in general and with regard to the particular doctors in this case.

a. *General obstacles to admitting privileges in Louisiana.* Consistent with the findings of every other district court to hold a trial on a similar law, *see* Br. of *Amici Curiae* Am. Civil Liberties Union, et al. ("ACLU Br.") 4-5, the district court here found that Act 620 was designed to and would make it "more difficult" for physicians to legally provide abortions. Indeed, it was modeled on Texas's H.B.2 on account of that law's "tremendous success" in closing clinics. Pet. App. 195a, 202a-03a, 275a.

The State asserts that, unlike in Texas, abortion providers in Louisiana "*can* and *do*" obtain admitting privileges. Resp. Br. 13. But the same was true in Texas. *See Whole Woman's Health* JA 229-30, 392, 727-28. And the district court here found that such physicians in Louisiana are the exception because hospitals condition privileges on requirements that most outpatient providers cannot meet. Pet. App. 172a-82a, 220a-48a. Indeed, before the district court, the State acknowledged that it is "not remotely plausible" that hospitals would grant privileges to all

abortion providers in Louisiana. JA 44. And the State's expert conceded that hospitals have no incentive to do so. JA 864-65.

The State next denies that Louisiana hospitals condition privileges on patient minimums. Resp. Br. 74. But the district court documented numerous instances when patient minimums stymied providers in Louisiana, Pet. App. 172a, 178a-79a, 180a, 246a, and bylaws of the relevant hospitals confirm that nearly all enforce patient minimums of one type or another, Petrs. Br. 38-39 & n.5; *see also* Med. Staff Prof'ls Br. 19-22, 28-30 (cataloguing requirements in Louisiana hospital bylaws that disqualify physicians with few or no admissions). The State's claim that courtesy privileges solve this problem ignores that the district court (and the Fifth Circuit) found that Doe 2's courtesy privileges do not satisfy Act 620. Pet. App. 43a-44a n.58, 231a-41a.[4]

In any event, the State ignores the district court's findings that, in addition to patient minimums, Louisiana hospitals condition privileges on a host of other

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[4] These courts explained that Act 620 requires doctors to be allowed to treat patients upon admission, which Doe 2's courtesy privileges do not permit. The State's response—that Act 620 does not require doctors to be able to treat patients themselves—contradicts the statute's plain language. The State's response also bolsters the district court's conclusion that Act 620 has no medical benefits. Although the State claims that Act 620 improves patient safety because "patients are better off when the doctor is prepared to admit and treat [them] himself," Resp. Br. 86, it simultaneously contends that doctors can satisfy Act 620 by obtaining privileges that do not allow them to treat patients in the hospital. *Id.* at 77.

requirements that disqualify most abortion providers. Petrs. Br. 39; Pet. App. 172a-80a. Those findings are not only supported by the record here, but also consistent with the findings of courts throughout the country. *See* ACLU Br. 7-10 (summarizing judicial findings in Texas, Wisconsin, and Alabama). Furthermore, even if an abortion provider obtains privileges, the district court explained that requirements for *maintaining* privileges are no less onerous. Pet. App. 172a-82a.

b. *Specific physicians' efforts to obtain privileges*. Given the often-insurmountable barriers to admitting privileges in Louisiana, it is not surprising the district court found that—for reasons "directly attributable" to the "rules and practices for getting admitting privileges in Louisiana"—all but one of the providers were unable to obtain privileges for reasons having nothing to do with competency. Pet. App. 254a. The State's attempts to defend the Fifth Circuit's rejection of those findings are unsuccessful.

i. *Does 1 and 3*. The State does not dispute that Doe 1, who is the primary provider at Hope, is unable to obtain admitting privileges. Resp. Br. 75, 79. The State nevertheless argues that the loss of Doe 1 would impose "no practical burden[]" on women seeking an abortion because Doe 1's practice could be absorbed by Does 2 and 3. *Id.* at 80.

That is incorrect. *Whole Woman's Health* was clear that "[h]ealthcare facilities and medical professionals are not fungible commodities," and that forcing more patients to seek treatment from fewer physicians "would be harmful to, not supportive of,

women's health." 136 S. Ct. at 2318. The record makes clear that is particularly true here.

Doe 2 cannot bridge the gap because he does not actually have admitting privileges within 30 miles of Hope. Pet. App. 252a-53a. As for Doe 3, the State ignores the district court's finding that if Hope loses Doe 1, Doe 3 would be forced to cease performing abortions. Petrs. Br. 43 (detailing this finding and evidence). The State's supposition that Doe 3 could "choose[] to do" otherwise, Resp. Br. 79, contradicts this finding.

At any rate, the State's assertion that Doe 3 could compensate for Doe 1 while maintaining his current workload is demonstrably wrong. The State notes that Doe 3 once treated 64 patients in one week. Resp. Br. 47-48. But Doe 3 stated that, given his active OB/GYN private practice, he already works a total of 70 to 80 hours per week and can see "on the average" only "about 20 to 30 [abortion] patients a week." JA 236, 207. Doe 3 explicitly testified that he cannot increase that workload. JA 236, 265. The single week the State points to was when Doe 1 was on vacation and Doe 3 deviated from his regular schedule, JA 207—obviously not a sustainable point of reference.

ii. *Does 2, 5, and 6.* The State's contention that the Court should set aside the district court's findings that Does 2, 5, and 6 expended sufficient effort to obtain privileges, Resp. Br. 75-78, ignores substantial evidence that supports those findings:

- *Doe 2*. Doe 2 sought privileges from three hospitals where he had the highest chance of success. Pet. App. 226a-41a; JA 454. He received privileges at one hospital that did not satisfy Act 620, and he was refused by the others. Pet. App. 226a-41a. The State claims that one of those denials was Doe 2's fault for not providing certain information. Resp. Br. 17, 74. But Doe 2 provided what information he could and notified the hospital that other records (of recent in-hospital patient treatment) did not exist. Pet. App. 228a-29a. Doe 2 also explained his reasons for not applying to two more hospitals that the State claims he should have, JA 453-54, and he would have been ineligible in any event. Both hospitals' bylaws contain disqualifying requirements, Petrs. Br. 38 n.5, and Doe 1's applications to those hospitals were denied for reasons that equally apply to Doe 2, Pet. App. 222a-24a; JA 453-54.

- *Doe 5*. Although Doe 5 obtained privileges in New Orleans, he could not obtain them where he primarily worked, in Baton Rouge. Pet. App. 244a; JA 1135-37. He applied to three Baton Rouge hospitals, but they refused to act upon his applications because he could not secure a covering physician. Pet. App. 244a-45a. The State claims that finding a covering physician is "not difficult." Resp. Br. 78. But the district court found that "opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician." Pet. App. 177a; *see*

also Med. Staff Prof'ls Br. 14-15. The State is also wrong (Resp. Br. 78) that a covering physician was Doe 5's "only" impediment; the bylaws for all three hospitals contain residency and other requirements that Doe 5 cannot satisfy. Petrs. Br. 42 & n.8.[5]

- *Doe 6*. Doe 6 provides only medication abortion. Pet. App. 165a. The State's own expert conceded that hospitals are unlikely to grant privileges to such a physician. JA 866, 884. Sure enough, the hospital where Doe 6 applied refused to process his application, and a second told Doe 6 not even to bother applying. Pet. App. 246a-47a.

Unable to discredit the district court's burden findings, the State follows the Fifth Circuit's lead and tries to recast its attacks on Doe 2, 5, and 6's efforts in terms of legal causation. Resp. Br. 75-76. But no member of the Court in *Whole Woman's Health* suggested that proof of each individual abortion provider's efforts to comply with H.B.2 was required to conclude that that law burdened access to abortion. The Court held that the plaintiffs there proved causation by introducing evidence indistinguishable from Hope's showing here. *See Whole Woman's Health*, 136 S. Ct. at 2313; Petrs. Br. 40 (discussing

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[5] Although the State seeks to manufacture a discrepancy between the bylaws and Doe 5's deposition testimony, the district court correctly found no contradiction. Doe 5's statement that he otherwise meets the "qualifications" for privileges, JA 1334, was nothing more than an affirmation of his own competence and cannot change what the bylaws say or undermine the district court's ruling on this issue.

direct testimony and timing evidence that supports causation).

To be sure, the dissent in *Whole Woman's Health* would have found defects in causation. 136 S. Ct. at 2344-45 & n.18 (Alito, J., dissenting). But each cause that it claimed could have led to clinic closures in Texas (e.g., changes to Medicaid funding) was "unrelated" to H.B.2 and physicians' efforts to comply. Here, by contrast, the efforts of Does 2, 5, and 6 to obtain admitting privileges are directly related—indeed coerced by—the law itself. *See* Br. of *Amici Curiae* Tort Law Scholars 10-18.

That difference is critical. A superseding cause—i.e., a later cause "of independent origin" that is unforeseeable—can sever the chain of causation. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (quotation marks omitted). But intervening causes—including third parties' actions—generally *do not* break the chain of causation. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 419-21 (2011); Restatement (Second) of Torts § 442B ("[T]he fact that the harm is brought about through the intervention of another force does not relieve the [original] actor of liability . . . ."). The State points only to alleged intervening causes—and factually baseless ones at that.

* * *

In sum, each legal argument the State and the Solicitor General make about Act 620's benefits and burdens was made and rejected in *Whole Woman's Health*, and each factual argument was made and rejected by the district court based on extensive record evidence. If the rule of law is to be honored, the Fifth

Circuit's decision must be reversed. *See* Br. of *Amicus Curiae* Am. Bar Ass'n 10, 12, 18, 22; Br. of *Amici Curiae* Former Federal Judges, et al., 9-16.

B. Even If The Burdens Here Were Less Than In *Whole Woman's Health*, Act 620 Is Unconstitutional.

Even if the State were correct that Act 620's burdens are less extreme than those in *Whole Woman's Health*, the law would still be invalid. Under any fair reading of the record, Act 620's purported benefits are not enough to justify the meaningful burdens the law imposes on women seeking abortions.

1. As Hope has explained, Act 620 is unconstitutional for the simple reason that it burdens access to pre-viability abortion but provides *no* offsetting benefit. *See* Petrs. Br. 45-48.

The State and Solicitor General respond that if Act 620's burdens are less severe than those in *Whole Woman's Health*, the Court "need not review" whether Act 620 has any benefits. U.S. Br. 31; *see also* Resp. Br. 60-66, 80. It is understandable why the State and Solicitor General would like to wall off any consideration of Act 620's purported benefits, because it has none. *See* Petrs. Br. 5-6, 12, 24-29.

But the approach the State and Solicitor General propose is not permissible. In *Whole Woman's Health*, the Court rejected as "incorrect" any analysis that does "not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden." 136 S. Ct. at 2309. As the Court explained, that approach does "not match the standard . . . laid out in

Casey." *Id*. at 2310. In other words, "[i]t is not possible to decide whether a burden is excessive or unwarranted without knowing what benefits accompany the burden." U.S. Br. 24, *Whole Woman's Health*, 136 S. Ct. 2292; *see also* Br. of *Amici Curiae* Constitutional Law Scholars 16.

Neither the State nor the Solicitor General can cite a case holding that a state may burden a constitutional right for no valid reason. *See* Resp. Br. 60-66; U.S. Br. 17-21. Such cases do not exist because upholding a law that abridged a constitutional right while providing no benefit "would be inconsistent with the very existence of" such a right. Petrs. Br. 47; *see also SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc) (holding law unconstitutional because "the First Amendment cannot be encroached upon for naught" and "something . . . outweighs nothing every time" (citation omitted) (alteration in original)). The State suggests that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), enables constitutional rights to be burdened even if there are no actual benefits. Resp. Br. 63. To the contrary, *Crawford* reaffirmed that burdens on the right to vote, "[h]owever slight," "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." 553 U.S. at 191 (quotation marks omitted). It considered the law's benefits and, based on the district court's factfinding, concluded that it would not impose excessively burdensome requirements. *Id.* at 202.

It is unsurprising, then, that the Court has never upheld an abortion restriction—even a restriction the

Court viewed as imposing modest burdens—without confirming that it furthers a state interest. *See, e.g., Casey*, 505 U.S. at 900-01 (finding that record-keeping requirement contributed "vital" information to medical research, "so it cannot be said that [it] serve[s] no purpose other than to make abortions more difficult"); *Gonzales v. Carhart*, 550 U.S. 124, 156-60 (2007) (confirming law furthered valid purpose). Doing so would allow the government to impose pretextual abortion restrictions to hinder abortion access, contrary to *Casey*. 505 U.S. at 901 (only by evaluating whether restriction serves stated purpose can court ensure state's rationale does not disguise effort "to make abortions more difficult").

2. Even if—contrary to the overwhelming record evidence and this Court's precedent—Act 620 conferred some "minimal" benefit, Pet. App. 39a, the law would still be unconstitutional because it imposes burdens that outweigh those minimal benefits.

Faced with that straightforward logic, the State and the Solicitor General argue that the Court cannot invalidate an abortion restriction unless it first concludes that the burdens alone pose a "substantial obstacle." *See* Resp. Br. 60-66, 80; U.S. Br. 17-20, 31. This argument is largely academic in this case because the burdens of Act 620 are substantial by any measure. *See supra* at 13-21. But even accepting *arguendo* the premise that the burdens here are less than in *Whole Woman's Health*, the State and Solicitor General are wrong.

The State and the Solicitor General misunderstand the "substantial obstacle" concept. In *Whole Woman's Health*, the Court rejected the notion that

whether an "obstacle" is "substantial" can be decided without ever considering a law's benefits. 136 S. Ct. at 2309-10 (rejecting the Fifth Circuit's two-part legal test that separated evaluation of benefits from evaluation of whether law imposes "a substantial obstacle in the path of a woman seeking an abortion"); *see also Casey,* 505 U.S. at 875 (explaining that constitutionally protected right is right "'to be free from *unwarranted* governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child'" (emphasis added) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972))).

The State and the Solicitor General say that requiring some benefits to justify less-than-severe burdens is "irreconcilable" with *Mazurek v. Armstrong*, 520 U.S. 968 (1997). U.S. Br. 20; *see also* Resp. Br. 61-62. But *Mazurek* simply held there was no undue burden where the Court found the law had no effect of burdening access at all. Indeed, it was "uncontested" that the law at issue in *Mazurek* would have *no* impact on access, including that no woman would have to travel to a different clinic. 520 U.S. at 974.

Regardless, the overarching test remains whether a law imposes an undue burden. And neither the State nor the Solicitor General disputes that the plain meaning of an "undue burden" is a burden that outweighs its benefits. Petrs. Br. 49. What is more, the State cites no case—in the abortion context or elsewhere—holding that a State may burden a constitutional right to pursue benefits that do not outweigh the burdens. For good reason: the very nature

of heightened scrutiny, across a wide range of constitutional rights, demands that a regulation confer sufficient benefits to justify the burdens it imposes. *See* Petrs. Br. 49; *see also* Br. of *Amici Curiae* Constitutional Law Scholars 20-21.

In this case, the burdens certainly far outweigh whatever minimal benefits, if any, flow from Act 620. Under any reading of the record, therefore, the law is invalid.

RESPONSE IN NO. 18-1460

SUMMARY OF THE ARGUMENT

I. The Court should refuse to entertain the State's objection to third-party standing.

This Court squarely held in *Craig v. Boren*, 429 U.S. 190 (1976), that objections to third-party standing are waivable. There is no basis for overruling that decision. To the contrary, the Court has explained time and again that third-party standing is a "prudential" doctrine, not a jurisdictional rule. And nonjurisdictional rules—even important ones that relate to the Court's institutional role—are waivable.

Even if third-party standing doctrine were reconceptualized as an aspect of Article III, moreover, it would not change the outcome here. Hope has suffered an injury traceable to Act 620 because Act 620 directly regulates and imposes burdens on Hope as well as its patients. Furthermore, a judgment in Hope's favor would invalidate Act 620 and redress Hope's and its patients' injuries.

The Solicitor General agrees that third-party standing is waivable but nonetheless urges the Court

to excuse the State's waiver. Both the arguments the Solicitor General makes fall outside the question presented, which asks simply whether objections to third-party standing are waivable.

At any rate, the Solicitor General's contentions are meritless. First, the Fifth Circuit did not "pass upon" the standing issue. Even if it had, it would make no difference because the State did not merely fail to raise—but affirmatively and intentionally waived—any objection to Hope's standing. Second, the particular facts of this case do not justify overlooking the State's waiver. Again, the State expressly agreed below that Hope had third-party standing; considering a contrary argument after a full trial and years of appellate proceedings would be profoundly unfair and wasteful of judicial resources.

II. Hope has standing to assert the rights of its patients. This Court has thrice held that abortion providers have third-party standing where, as here, the challenged law directly regulates their conduct. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 (1983), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973). That rule is embedded within a large body of jurisprudence allowing plaintiffs to argue that a law injuring them is unconstitutional because it violates the rights of others. The rule also applies with full force even when the defendants contend that the plaintiffs have some sort of potential conflict with the third parties whose rights they assert.

In any event, Hope easily satisfies the test for third-party standing that applies when the challenged law does not directly regulate the plaintiff. As the Court held in *Singleton v. Wulff*, 428 U.S. 106 (1976), abortion providers have a close relationship with their patients. And there is no conflict of interest where, as here, plaintiffs allege (and have proven) that the challenged regulation confers no genuine health or safety benefit. Women also face serious hindrances to bringing suit themselves to challenge abortion restrictions.

ARGUMENT

I. THE COURT SHOULD REFUSE TO ENTERTAIN THE STATE'S ELEVENTH-HOUR THIRD-PARTY STANDING OBJECTION.

From the outset of this case, Hope has claimed that Act 620 impermissibly imposes requirements upon abortion providers that violate the Fourteenth Amendment rights of their patients—Louisiana women seeking an abortion who would be unduly burdened if Act 620 is allowed to go into effect. *See* JA 18-19, 23-25. Faced with this suit, the State conceded Hope's standing and actively encouraged the lower courts to reach the merits of Hope's constitutional claims. After Hope filed its petition for certiorari, however, the State for the first time objected to Hope's standing to assert its patients' interests and—because the objection came so late in the day—argued that its objection was not "waivable." Cross-Pet. i. The Court should decline to entertain the State's untimely objection.

A. This Court Has Squarely Held That Objections To Third-Party Standing Are Waivable.

The State's argument that objections to third-party standing may never be waived is foreclosed by precedent. In *Craig v. Boren*, 429 U.S. 190 (1976), a beer vendor claimed that a state law restricting the sale of certain beer to women violated the equal protection rights of her male customers. The state officials who were defendants "never raised before the District Court any objection" to the plaintiff's ability to assert the constitutional rights of third parties. *Id.* at 193. And the parties continued vigorously to litigate the merits in this Court. *Id.* Writing only for himself, however, Chief Justice Burger maintained that the vendor lacked standing to assert the rights of her customers. *Id.* at 215-16 (Burger, C.J., dissenting).

The Court held that the state officials had waived any such contention. The Court explained that it is "settled" that limitations on third-party standing "are not constitutionally mandated," but rather are "prudential" in nature. *Id.* at 193. That being so, the State's "concession" was "controlling." *Id.* Even if it were not, the Court explained that "forego[ing] consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." *Id.* at 193-94.

Faced with this precedent, the State argued at the certiorari stage that this portion of *Craig* was "dicta" because the Court went on to hold in the alternative

that the plaintiff had third-party standing. *See* Cross-Pet. 32; *Craig*, 429 U.S. at 194-95. Hope pointed out in response, however, that when this Court resolves an issue on two independent bases, neither holding is dicta. BIO to Cross-Pet. 11 (citing *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949)); *see also O'Gilvie v. United States,* 519 U.S. 79, 84 (1996). Accordingly, the State has abandoned that argument.

The State now says instead that *Craig* merely "*implied* that an objection to third-party standing *might* be waivable." Resp. Br. 51 (emphases added). This argument fares no better than the State's previous one. *Craig* squarely held that it would be "impermissibl[e]" to consider a belated objection to third-party standing. 429 U.S. at 193. There is no wiggle room in that holding. Indeed, the Court reaffirmed it several years later, declining in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243 (1983), to address another forfeited third-party standing objection.

B. There Is No Basis For Overruling That Precedent.

The State offers no sound basis for disregarding *Craig*. In fact, *Craig*'s holding is more firmly grounded than ever in the Court's overall jurisprudence regarding litigation management.

1. The Court in recent years has taken pains to clarify the distinction between "truly jurisdictional rules," *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012), and other rules that "should not be given the jurisdictional brand," *Henderson ex rel. Henderson v.*

Shinseki, 562 U.S. 428, 435 (2011). A jurisdictional defect "deprives a court of adjudicatory authority over the case," necessitating immediate dismissal, *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) (quotation marks omitted). Objections to subject-matter jurisdiction therefore cannot be waived or forfeited, and must even be raised by federal courts "on their own initiative." *Id.*; *see Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019).

Nonjurisdictional rules, by contrast, do not circumscribe the court's adjudicatory power. *Fort Bend Cty.*, 139 S. Ct. at 1849. A nonjurisdictional rule, therefore, "can be waived or forfeited by an opposing party." *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019). This is so even when a nonjurisdictional rule is "important and mandatory," *Henderson*, 562 U.S. at 435, or implicates "values beyond the concerns of the parties," such as judicial efficiency or conservation of judicial resources, *Day v. McDonough*, 547 U.S. 198, 205-06 (2006). Rules deemed nonjurisdictional include: (i) limitations periods and related statutory claim-processing rules, *see Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010); *Day*, 547 U.S. at 209; and (ii) "other preconditions to relief," such as exhaustion requirements, *Fort Bend Cty.*, 139 S. Ct. at 1849; *see Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010). All of these rules further important institutional objectives; all are also waivable. *See Lambert*, 139 S. Ct. at 714; *see also, e.g.*, *Day*, 547 U.S. at 202-09; *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004).

So too here. Third-party standing may be "important" and relate to the "institutional role" of federal courts. Resp. Br. 50. But, as the State conceded at the certiorari stage, third-party standing is a "prudential" doctrine, "not one going to a federal court's Article III jurisdiction." Cross-Pet. 32; *see also id.* at i, 2, 15, 33. Consequently, *Craig*'s holding that objections to third-party standing can be waived because they are "prudential" is obviously analytically correct. 429 U.S. at 193.

2. Perhaps recognizing it has no chance of success on the waiver question on the terms it presented to this Court, the State tries to change the terms. In its merits brief, the State argues—for the first time, and in direct conflict with its prior representations to this Court and the lower courts—that third-party standing is a component of Article III standing. Resp. Br. 26-30. In other words, after asking the Court to grant certiorari to resolve whether a belatedly raised, nonjurisdictional objection is waivable—the State now argues even more belatedly that the objection is actually jurisdictional. There is no reason, particularly under these circumstances, for the Court to transform third-party standing into an Article III doctrine.

a. The State's attempt to "refram[e]" third-party standing as an additional Article III prerequisite, Resp. Br. 29-30, runs up against not only *Craig* but a volume of precedent. This precedent stretches back nearly one hundred years and has been repeatedly reaffirmed in modern times. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (treating third-party standing as an "alternative threshold question"

separate from Article III standing); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) ("[W]e have recognized [third-party standing] as a prudential doctrine and not one mandated by Article III of the Constitution."); *see also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 (1983); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976); *Warth v. Seldin*, 422 U.S. 490, 509-10 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 443-44 (1972); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (describing prudential standing as "a complementary rule of self-restraint" developed "[a]part from the jurisdictional requirement" of Article III standing); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.").

b. After the briefest of nods to this line of cases, the State asserts this Court's "more recent precedents"—specifically, *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)—cut the other way. Resp. Br. 29. Not so. *Lexmark* dealt with the zone-of-interests test, which had previously been described as a prudential standing limitation. The Court concluded that the label was inapt, because the test is not about the "prudence" of the Court hearing the case but asks "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark*, 134 S. Ct. at 1387. That inquiry requires applying

"traditional principles of statutory interpretation" to determine whether the plaintiff has a valid claim. *Id.* at 1388.

Lexmark held nothing with respect to third-party standing. In a footnote, it reserved "consideration of that doctrine's proper place in the standing firmament" for "another day." *Id.* at 1387 n.3. But if anything, *Lexmark* reinforces that third-party standing, just like the zone-of-interests test, is a nonjurisdictional doctrine. The zone-of-interests doctrine asks "whether a person in the litigant's position will have a right of action on the claim." *Id.* at 1387 n.3 (quoting *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 n.** (1990)). The third-party standing doctrine asks a "closely related" question, *id.*: whether a plaintiff who has been injured by governmental action has a right to assert a particular statutory or constitutional claim to redress that injury. *See* Ernest A. Young, *Prudential Standing After* Lexmark International, Inc. v. Static Control Components, Inc., 10 Duke J. Const. L. & Pub. Pol'y 149, 155 (2014). Both inquiries, in short, speak to the rights of the individual plaintiff, not to the power of the court to adjudicate the case.

The State protests that the third-party standing doctrine should be deemed jurisdictional because it protects against adjudicating generalized grievances. Resp. Br. 29-30. But generalized grievances fail to satisfy Article III's case-or-controversy requirement not because the plaintiff seeks to "represent non-parties," *id.*, but because the harm complained of is too undifferentiated to amount to a "concrete and particularized" injury appropriate for judicial remediation,

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). Here, as even the Solicitor General recognizes, U.S. Br. 7, Act 620 directly inflicts a particularized injury on Hope—one that is not remotely shared by the general population, against whom the Act does not operate. The only question is whether Hope can validly assert the constitutional interests of its patients as grounds for invalidating the law. The answer to that question does not affect the federal courts' subject-matter jurisdiction over this case, only whether Hope has stated a valid claim.

c. Even if third-party standing were reconceptualized as an aspect of Article III, it would not matter in this case. Article III requires a plaintiff to allege a particularized injury-in-fact that is traceable to the defendant's actions and that may be redressed by a judgment in the plaintiff's favor. *See Lujan*, 504 U.S. at 560. Those requirements are easily satisfied here. Hope and its physicians are directly injured by Act 620's admitting-privileges requirement and its very real threat of criminal sanctions. Petrs. Br. 9. "The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art[icle] III." *Diamond v. Charles*, 476 U.S. 54, 64 (1986); *see also Lujan*, 504 U.S. at 561-62 (noting that "there is ordinarily little question" that a plaintiff has Article III standing when "the plaintiff is himself an object" of the government's action).

The State's response, Resp. Br. 27-28, that Hope's injury is a "different injury" than the one suffered by its patients thus misses the mark. Hope's core injury

is being subjected to an unconstitutional law—an injury that is inseparable from its patients' injury. Indeed, if it were necessary, it would be easy to conceive of this case as not involving third-party standing at all: "[E]veryone has a personal right, independent of third-party standing, to challenge the enforcement of a constitutionally invalid statute against her." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1327 (2000); *see also* Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 299-300 (1984) ("[A] litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction."); Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 431 (1974); Br. of *Amici Curiae* Federal Courts Scholars 16-18. As this Court put it in the context of *Griswold v. Connecticut*, 381 U.S. 479 (1965): "Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime." *Id.* at 481.

By contrast, all of the cases the State cites involved situations where the plaintiff attempted to raise claims that would redress another's injury but *not* his own. *See Lewis v. Casey*, 518 U.S. 343, 358 & n.6 (1996) (finding that English-speaking inmate not in lockdown could not argue that regulation violated the rights of non-English speakers or those in lockdown); *Heald v. Dist. of Columbia*, 259 U.S. 114, 123 (1922) (holding that residents of the District could

not challenge a tax on the ground that it unconstitutionally applied to nonresidents); *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160-62 (1907) (refusing to consider the argument that a tax law was unconstitutional in circumstances that did not apply to the plaintiffs). Here, the law operates on Hope directly, causing an injury both to Hope and its patients that will be redressed by Hope's requested relief.

C. Arguments Outside This Question Presented Are Unavailing.

The Solicitor General agrees that objections to third-party standing are nonjurisdictional and thus waivable. U.S. Br. 15. But, raising two arguments outside the question presented, the Solicitor General urges this Court nevertheless to address the question of Hope's standing. The State joins in both of these arguments. Neither, however, is properly presented or, in any event, meritorious.

1. In its cross-petition, the State explained that the question of waiver was pivotal because "[t]he question of third-party standing was not addressed below by the parties *or the lower courts*." Cross-Pet. 32 (emphasis added). The Solicitor General and the State now argue the opposite—that, even though the State never objected to third-party standing at any point below, the propriety of Hope's standing is properly before this Court because the Fifth Circuit "passed upon" the issue. U.S. Br. 13-14; *see also* Resp. Br. 49.

The State was right the first time. The Solicitor General and State note that the Fifth Circuit briefly

discussed third-party standing in *June Medical Services, L.L.C. v. Gee*, 814 F.3d 319, 322 (5th Cir. 2016), its opinion granting a stay of the district court's preliminary injunction. But the Fifth Circuit discussed the standing of only one of the plaintiffs, Doe 1. *See id.* It never passed upon the third-party standing of the other plaintiffs.

Even as to Doe 1, the Fifth Circuit did not "pass upon" his standing in the sense that this Court's doctrine contemplates—that is, in the sense of a resolution of the issue in a manner that constitutes the law of the case and therefore merges into the judgment on review. After the Fifth Circuit issued its decision staying the district court's preliminary injunction, this Court immediately vacated that decision. 136 S. Ct. 1354 (2016). A vacated decision is a legal nullity; it "ceases to be the law of the case." Charles A. Wright & Arthur R. Miller, 18B Fed. Prac. & Proc. Juris. § 4478 (2d ed.); *see also Johnson v. Bd. of Educ.*, 457 U.S. 52, 53-54 (1982) (per curiam); *O'Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case."); *Brown v. Bryan Cty.*, 219 F.3d 450, 453 n.1 (5th Cir. 2000) ("With [the Supreme Court's] vacatur, our previous opinion is no longer the law of the case."). The Fifth Circuit's previous discussion of standing, therefore, cannot provide a platform for this Court to address the issue. If, after that decision was vacated, the State had wanted to preserve the issue for appeal, it should have raised the argument below.

Finally, the "passed upon" rule applies only where a party merely failed to press, but did not affirmatively waive, an argument. *United States v. Williams*, 504 U.S. 36, 43-44 & n.4 (1992); *see Hamer*, 138 S. Ct. at 17 n.1 (distinguishing failing to raise an issue from waiving it). Here, the State affirmatively agreed below that Hope "had third-party standing to assert [its] patients' rights." JA 43-44; *see also* JA 57 ¶ 7 (conceding that the district court had subject-matter jurisdiction). The State, in fact, *encouraged* the district court to reach the merits of Hope's undue burden claim. JA 43-45. The State asserted its "keen interest in removing any cloud upon the validity of its law," agreed that this "challenge [was] the proper vehicle to do so," and argued that "delaying resolution of the constitutional issues . . . will not serve judicial efficiency." JA 45.

This constituted a classic waiver—an "intentional relinquishment or abandonment" of any objection to Hope's third-party standing. *Hamer*, 138 S. Ct. at 17 n.1 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). The State argues in this Court that "[w]aiting for a first-party, post-enforcement challenge would be an appropriate exercise of prudence." Resp. Br. 51. But it made a tactical choice to argue the opposite below. "[A]fter expressing its clear and accurate understanding" of the third-party standing issue, the State "deliberately steered the District Court away from the question and towards the merits." *Wood v. Milyard*, 566 U.S. 463, 474 (2012). The State cannot now switch gears.

2. The Solicitor General and State also argue that the Court should forgive the State's waiver under the circumstances here. U.S. Br. 14-16; Resp. Br. 52. This argument is not properly before the Court either. The State's cross-petition raises the purely legal question whether objections to third-party standing are "waivable" or "non-waivable." Cross-Pet. i. The question whether the State's waiver should be forgiven is not only beyond the scope of the question presented, it is highly fact-bound and never would have warranted certiorari in the first place. *See* Supreme Court Rule 14.1(a); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009); *West v. Gibson*, 527 U.S. 212, 223 (1999); *Am. Nat'l Bank & Tr. Co. of Chi. v. Haroco, Inc.*, 473 U.S. 606, 608 (1985).

Regardless, none of the arguments that the Solicitor General and State raise warrants forgiving the State's waiver. Most important, the Court cannot override a party's affirmative waiver of a nonjurisdictional rule. *Williams*, 504 U.S. at 43-44 & n.4; *see Day*, 547 U.S. at 202; *see also Wood*, 566 U.S. at 471 n.5. And neither the Solicitor General nor the State comes to grips with the fact that the State did not merely forfeit its third-party standing objection; it affirmatively waived it. *See supra* at 38.

Even if the State had merely forfeited its objection, it would not change the outcome. A party must demonstrate "special circumstances" to justify excusing a forfeiture. *City of Springfield v. Kibbe*, 480 U.S. 257, 258-60 (1987) (per curiam). As then-Judge Gorsuch has explained, where a party "did not raise prudential standing as a defense in the district court,"

the district court proceeded to the merits of the constitutional claim, and the party again failed to raise the issue in its appellate briefing, the "more prudent and more just" course is for the appellate court to bypass the "eleventh-hour" objection and proceed to the merits of the plaintiff's constitutional claim. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154-55 (10th Cir. 2013) (Gorsuch, J., concurring), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

That is precisely the case here. This lawsuit commenced over five years ago. Before the State raised this objection, the case proceeded through preliminary injunction and interlocutory appeal, summary judgment briefing, a six-day trial, panel and en banc briefing in the Fifth Circuit, and two requests for—and grants of—emergency relief in this Court. *See* Petrs. Br. 10-16; *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (2016). Permitting dismissal based on a forfeited nonjurisdictional objection after "an entire round of appeals all the way to the Supreme Court" would be contrary to this Court's established practice. *Fort Bend Cty.*, 139 S. Ct. at 1848 (quotation marks omitted).

It would be especially inappropriate to consider the State's objection given that the State proposes a "case-by-case," fact-intensive inquiry, *see* Resp. Br. 31-34, yet the State's own dilatory conduct has deprived the Court and the parties of the benefit of a record tailored to the issues the State now wishes to litigate. The State never previously alleged any supposed "conflict of interest" between Hope and its patients; nor did the State ever assert that Louisiana

women face no meaningful hindrance to bringing claims like this on their own. If the State had made any of these arguments, Hope could have proffered additional evidence regarding the doctor-patient relationship and the many impediments women face to bringing their own lawsuit. *See, e.g.*, Br. of *Amici Curiae* Holly Alvarado, et al., 30-35; Br. of *Amici Curiae* Michele Coleman Mayes, et al., 25-32; Br. of *Amici Curiae* Whole Woman's Health, et al., 16-28; Br. of *Amici Curiae* Planned Parenthood Fed'n of Am., et al., 5-21.[6]

The Solicitor General attempts to excuse the State's default on the basis of the purported conflict of interest between Hope and its patients, asserting that "there was no apparent or asserted conflict of interest in *Craig*," where the defendants' waiver was enforced. U.S. Br. 8, 16. This case presents no such conflict, *see infra* at 51-53, but even if it did, the same would have been true in *Craig*. Oklahoma defended the law in *Craig* on the ground that it protected "public health and safety"—in particular, that it protected young men from being "killed or injured in traffic accidents." 429 U.S. at 199-200. The case therefore

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[6] Even more remarkably, the State asked to supplement the record in this Court with not one but three additional appendices of extra-record material—most of which could have been developed in the trial court if the State had raised its arguments in the appropriate forum. Even though this Court turned away these last-minute requests, such belated attempts to reopen the record years after trial could proliferate in appellate courts should the Court rule that objections to third-party standing are not waivable.

presented the exact same supposed "*potential* conflict" the Solicitor General says is present here.

The Solicitor General also notes that, unlike *Craig*, no litigant asserting her own constitutional rights was involved at an earlier stage of this litigation. U.S. Br. 16. But that cannot be enough to excuse a defendant's failure to object to third-party standing. The whole point of rules requiring timely assertion of defenses is that plaintiffs should be given opportunities in district court to amend their complaints or add additional parties. If the Solicitor General is right that there is no genuine hindrance to Hope's patients bringing lawsuits such as this, then the State should have asserted as much years ago.

For its part, the State attempts to excuse its default by arguing that contrary circuit precedent rendered any attempt to object to Hope's third-party standing futile. Resp. Br. 52. Yet it is well-established that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotation marks omitted). In any event, the State's position that existing Fifth Circuit precedent addressed the "essentially identical" issue, Resp. Br. 52, is completely inconsistent with its argument that third-party standing is a fact-intensive analysis that must be conducted afresh in every case. If the inquiry is so case-dependent, then the State had every incentive to raise its arguments for distinguishing those existing precedents before the district court and court of appeals.

II. HOPE HAS STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS OF ITS PATIENTS.

Even if the Court were to reach the substance of the State's third-party standing objection, Hope has standing to assert the constitutional rights of its patients under numerous longstanding precedents of this Court decided in a wide range of contexts, including the specific context presented here.

This Court has described two classes of cases in which litigants may raise arguments that rely on the legal rights of others. The first is when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement)." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). In a second "class of cases," the Court has found third-party standing even where the challenged restriction does not operate directly against the litigant, if "the party asserting the right has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130-31 (2004) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). On-point precedent establishes that Hope may raise the constitutional rights of its patients under either framework.

A. Plaintiffs May Challenge A Law That Regulates Their Conduct On The Ground That It Infringes The Constitutional Rights Of Others.

1. The first category of cases covers situations in which "enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)). If the plaintiff is directly targeted by the challenged law, the plaintiff "is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force"; in such situations the interests of the litigant and the third party are "mutually interdependent" and the litigant may act as an "advocate[] of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S. 190, 195 & n.4 (1976). In other words, where "the government has directly interfered with the litigant's ability to engage in conduct together with the third party" and "the Constitution grants the third party a right to engage in that conduct with the litigant," the litigant has "standing to challenge the government's interference by invoking the third party's rights." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 808 (D.C. Cir. 1987) (Bork, J.).

This Court has consistently applied that principle to grant third-party standing in a wide range of contexts. Most important, the Court has specifically held on three occasions—without dissent from a single Justice on the issue—that abortion providers may

sue to challenge abortion restrictions that operate directly on the providers in a manner that burdens their patients' constitutional rights. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 (1983), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *see also Singleton*, 428 U.S. at 128 (Powell, J., dissenting) ("I agree that one party to the relationship should be permitted to assert the constitutional rights of the other," because "a judicial rule of self-restraint should not preclude an attack on a State's proscription of constitutionally protected activity."). As the Court explained in one of those cases, "the physician plaintiff, who is subject to potential criminal liability for failure to comply with the requirements of [the challenged law], has standing to raise the claims of his . . . patients." *City of Akron*, 462 U.S. at 440.

The Court has consistently and repeatedly applied this principle in non-abortion cases as well. For example, the Court has held in other medical contexts that doctors may challenge laws that regulate them directly in a way that interferes with the constitutional rights of their patients, such as the right to use contraceptives. *See Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). It has done the same with bans on physician-assisted suicide. *See Washington v. Glucksberg*, 521 U.S. 702, 707-08 (1997); *Vacco v. Quill*, 521 U.S. 793, 797-98 (1997).

The same principles have also been applied outside the field of medicine. *See Triplett*, 494 U.S. at

720 (attorney could challenge a statute under which he was disciplined by invoking the constitutional rights of his clients); *Craig*, 429 U.S. at 194 (beer vendor prohibited from selling her product to men between the ages of 18 and 21 had the right to raise the equal protection rights of such men because the "legal duties created by the statutory sections under challenge are addressed directly to vendors"); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 (1977) (seller of mail-order contraceptives could invoke the rights of prospective customers to challenge a criminal law restricting its activities); *Barrows v. Jackson*, 346 U.S. 249, 257-58 (1953) (white seller of a home charged with violating a racially restrictive covenant could invoke the constitutional rights of black buyers).

2. These cases control here. In particular, as in the three abortion cases, Hope "clearly" has third-party standing because Act 620 "directly operate[s]" against the clinic and its physicians in a manner that causes constitutional injury to its patients. *Danforth*, 428 U.S. at 62 (second quotation quoting *Doe*, 410 U.S. at 188). Indeed, the State does not dispute that *City of Akron*, *Danforth*, and *Doe* dictate that Hope has standing—and it acknowledges that, for decades, the courts of appeals have "routinely confer[ed] third-party standing on abortions providers" in this context. Resp. Br. 35.

The State's sole retort is that *City of Akron*, *Danforth*, and *Doe* "do not reflect current doctrine." Resp. Br. 36. That is incorrect. Virtually every post-*Roe* decision of this Court about abortion—right up through *Whole Woman's Health v. Hellerstedt*, 136 S.

Ct. 2292 (2016)—was a case brought by abortion providers on behalf of their patients. *See id.* at 2301; *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 324 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845 (1992). Furthermore, this Court's 2004 decision in *Kowalski* specifically cited *Doe* (along with many other cases) as a proper application of the general principle allowing litigants targeted by a challenged law to invoke the interdependent rights of third parties. 543 U.S. at 130.

The Solicitor General tries a different tack. He argues that the Court has never applied the "direct application" principle where "the regulated third party's interests potentially diverge[d] from the interests of the rights-holders." U.S. Br. 8; *see also id.* at 12-13. This characterization of the Court's precedent is also manifestly incorrect. *Doe* involved a Georgia requirement that abortions be performed only in certain accredited hospitals—a requirement that surely presented the same dynamics that the Solicitor General alleges exist here. *See* 410 U.S. at 193-94. To be sure, one of the plaintiffs there was a woman seeking an abortion. But the Court held independently that the physician-plaintiffs had standing because they were "the one[s] against whom [the challenged] criminal statutes directly operate[d]." *Id.* at 188.

City of Akron and *Danforth* similarly involved purported "health regulations." *City of Akron*, 462 U.S. at 440 n.30 (permitting physicians to challenge, *inter alia*, a "health regulation" that required second

trimester abortions be performed in hospitals); *Danforth*, 428 U.S. at 62, 75-76 (permitting physicians to challenge, *inter alia*, a ban on an abortion method that the state asserted was "deleterious to maternal health"). Yet the Court in each of those cases did not hesitate to conclude that abortion providers had third-party standing to challenge those restrictions. So, too, in non-abortion cases. The law in *Craig* was purportedly aimed at protecting the health and safety of beer purchasers, *see supra* at 41, and the attorney's fees restriction in *Triplett* was aimed at protecting clients against improvident attorney's fees arrangements, 494 U.S. at 722. Again, the Court held the assertions of third-party standing fell "squarely" within the precedent allowing a directly regulated party to assert the rights of others. *Id.*; *accord Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 954-58 (1984).

Instead of engaging with any of this precedent, the Solicitor General asserts that *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), declined to apply the "direct application" principle in circumstances analogous to this case. U.S. Br. 8. But *Newdow* did nothing of the sort. The policy that Newdow challenged—the requirement that schoolchildren recite the pledge of allegiance—did not apply to him at all. *Newdow*, 542 U.S. at 15. Instead, his alleged "standing derive[d] entirely from his relationship with his daughter." *Id.*[7]

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[7] At any rate, the Court rejected Newdow's asserted standing on the ground that he lacked any *legal* authority to control the upbringing of his daughter. *See* 542 U.S. at 15-16.

In short, the cases finding third-party standing based on an interdependent relationship between the litigant targeted by a law and the third party do not *also* ask whether the third party shared a close relationship with the litigant in some other respect or was hindered in advancing its own rights. That is so because the litigant in those cases is raising *its own* right to be free of unconstitutional restrictions that operate directly on the litigant.

At the very least, threshold inquiries regarding third-party standing—no less than those that govern Article III standing—should require courts to assume the truth of the *plaintiff's* allegations, not the defendant's. Br. of *Amici Curiae* Federal Courts Scholars 21; *see, e.g.*, *Warth*, 422 U.S. at 500 ("[S]tanding in no way depends on the merits of the plaintiff's contention[s]."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction."). And here, Hope argued and submitted evidence that—just as this Court held in *Whole Woman's Health*—the State's admitting-privilege law delivers no health benefit whatsoever. So there can be no conflict—potential or otherwise—for purposes of standing to assert the claim Hope is asserting.

B. Hope Also Satisfies the Separate Third-Party Standing Framework for Plaintiffs Not Directly Regulated by the Challenged Law.

Even if standing hinged here on whether "the party asserting the right has a 'close' relationship with the person who possesses the right" and "there

is a 'hindrance' to the possessor's ability to protect his own interests," *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)), Hope satisfies that test. In *Singleton v. Wulff*, 428 U.S. 106 (1976), a plurality of Justices concluded as a categorical matter that abortion providers have standing under those criteria to challenge laws regulating abortion. There is no good reason—especially under the facts of this case—to abrogate that holding.

1. *Closeness.* The Court has repeatedly held that the "doctor-patient" relationship is sufficiently "close" to allow medical providers to act as "advocates of the rights of persons to obtain" their medical services at issue. *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972); *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 n.3 (1989) ("[T]he doctor-patient relationship . . . is one of special consequence."). As the plurality in *Singleton* explained, the closeness of the relationship between a woman and her physician in the context of abortion "is patent," not least because a "woman cannot safely" exercise her right to secure an abortion "without the aid of a physician." 428 U.S. at 117. Given that interdependence, "the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, [the abortion] decision." *Id.*

The State argues that Hope and its patients do not have the requisite "close" relationship because their interactions are "brief" and patients are "sedated." Resp. Br. 47-48. Contrary to the State's con-

tentions, physicians consult with their patients *before* the physical examination begins, JA 685-91, and patients receive minimal or no sedation during an abortion, JA 223, 286-87, 792-93. But more importantly, this Court's case law has never addressed the "closeness" inquiry in terms of the number or length of meetings between the parties. Rather, the question is whether the relationship is sufficiently close to make the litigant an "effective . . . proponent" of the third party's rights. *Powers*, 499 U.S. at 413. Hope presented ample evidence at trial (and could have provided even more, if the State had raised the issue) showing that its patients entrust Hope with confidential medical and personal information, and thus that its providers are effective advocates for their patients' rights to access needed health care. *See, e.g.*, JA 106-10, 182-84, 377-78, 688-91, 697-98, 967-98, 1338; *see also* Br. of *Amici Curiae* Whole Woman's Health, et al., 10-15, 28-33; Br. of *Amici Curiae* Planned Parenthood Fed'n of Am., et al., 11-21.

The State also argues that Hope lacks the requisite close relationship with its patients because of various purported "conflicts of interests." Resp. Br. 42-47. All of these claims, however, are grounded in the premise that Act 620's admitting-privileges requirement confers health and safety benefits. As noted above, however, this Court already has held that admitting-privilege requirements have *no* health or safety benefit, *Whole Woman's Health*, 136 S. Ct. at 2311-12, and the district court specifically and correctly found that they are not the standard of care, Pet. App. 212a, 216a; *see also supra* at 7-13. The

State's argument improperly assumes those holdings and Hope's position on the merits can be set aside.

In any event, the record emphatically refutes the State's attempt to portray Hope as a profit-driven enterprise with little interest in patient safety. The State, for example, points to evidence of alleged safety deficiencies, but it fails to note that the district court *rejected* that evidence and found that Hope and its physicians had strong safety records. Pet. App. 212a-14a; *see also id.* at 210a, 218-19a, 271a & n.54. Hope also presented significant evidence that its doctors are driven by a desire to help women and that its patients respond with gratitude and positive feedback about their experiences. *See, e.g.*, JA 105-10, 697-99.

The State further argues that Hope's litigation positions and the Does' purportedly lackluster efforts at obtaining admitting privileges show that a conflict of interest exists. But, again, the district court concluded—after supervising physicians' attempts to obtain privileges for a year and a half—that all the Does made good-faith efforts to obtain privileges. Pet. App. 249a-51a; *supra* at 7. And the only litigation position that the State takes issue with is Hope's contention that Doe 2's courtesy privileges at Tulane do not meet the plain requirements of the statute—a position both the district court and the Fifth Circuit concluded was correct based on the testimony of the

State's own expert witness. Pet. App. 43a-44a n.58, 237-40a.[8]

2. *Hindrance.* There are also "several obstacles" to a woman's assertion of her own constitutional right to obtain an abortion. *Singleton*, 428 U.S. at 117-18 (plurality opinion). Women are undoubtedly "chilled" from asserting their own rights by a desire to protect "the very privacy of [their] decision from the publicity of a court suit." *Id.* at 117. Indeed, the district court here found that "in Louisiana, abortion providers, the clinics where they work and the staff of these clinics, are subjected to violence, threats of violence, harassment and danger." Pet. App. 183a. Contrary to the State's arguments, the possibility of proceeding pseudonymously is not a cure-all for these concerns—now more than ever, in light of modern technology.[9]

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[8] The State's other arguments on this score rely entirely on its own misrepresentations of materials that the Court has already ruled are not properly before it. *See* Resp. Br. 46-47. Hope has already explained why the Court should ignore these arguments. *See generally* Resp. to Mot. to Supp. the Record.

[9] The State's own litigation conduct undermines its assurances that women will not be deterred from asserting their own claims because they can proceed pseudonymously. In this case and others, the State has repeatedly challenged orders granting abortion providers pseudonym protection, even after courts have found that public disclosure of their names would put them and their families at risk of violence and harassment. *See, e.g.,* Appellant's Opposed Mot. to Unseal, *June Med. Servs., L.L.C. v. Gee*, 905 F.3d 787 (No. 17-30397) (5th Cir. 2018); Sealed Mot. to File Under Seal Mot. to De-Designate Portions of Dr. Does's Testimony, *June Med. Servs., LLC v. Gee*, No. 3:16-cv-444 (M.D. La. Aug. 16, 2019), ECF 270.

Women also face other hindrances to suit, most notably the "imminent mootness, at least in the technical sense, of any individual woman's claim." *Singleton*, 428 U.S. at 117 (plurality opinion). A woman wishing to challenge an abortion restriction must file her claim while pregnant. Yet such litigation will almost certainly far outlast the pregnancy, requiring her to proceed for years in a "representative capacity." *Id.* This dynamic is doubly onerous. It forces a pregnant woman to redirect resources and possibly delay time-sensitive medical care in order to file suit. Then, after the patient's pregnancy terminates, it requires her to devote time away from family, work, school, and other commitments. *Id.*; *see also* Br. of *Amici Curiae* Whole Woman's Health, et al., 26. Such sustained commitment to litigation, potentially extending years beyond pregnancy, would be a hindrance for any woman, but especially those who are low income and already raising children (i.e., most women who seek abortions in Louisiana). Pet. App. 261a-62a; *see also* Br. of *Amici Curiae* Lawyers' Comm. for Civil Rights Under Law, et al., 15-26.

There is no serious dispute that the hindrances facing women are meaningful, but the State notes that some women have on occasion been able to overcome these obstacles. Resp. Br. 39-40. The State again ignores the actual standard applied by this Court's case law. The Court has held that the obstacles need only be "genuine." *Singleton*, 428 U.S. at 116, 118 & n.6 (plurality opinion) (describing that whatever hindrances existed in multiple prior cases were not insurmountable); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (requiring "some" hindrance "to the

third party's ability to protect his or her own interests").[10] The *Singleton* plurality thus plainly applied the correct standard in concluding that third-party standing was appropriate in the context of abortion regulations.

All the more so in this particular case. The chief concern underlying limits on third-party standing is that the party before the court should be an effective advocate for the right at issue, and that the issues should be "concrete and sharply presented." *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 (1984). Unlike patients, physicians have a personal stake throughout litigation. What's more, the pivotal question regarding the constitutionality of Act 620 is whether the law confers medical benefits sufficient to justify the burdens on patients' abortion access resulting from the law's impact on physicians and their ability to provide abortions. The parties best positioned to litigate these issues are undoubtedly the doctors themselves. That being so, "there seems little loss in terms of effective advocacy" by allowing third-party standing here. *Singleton*, 428 U.S. at 118.

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[10] When *Singleton* was decided, women had already shouldered the burden of suing pseudonymously to protect their own rights in *Roe v. Wade*, 410 U.S. 113 (1973), and in *Doe v. Bolton* itself, but that fact was not dispositive then and it is not now. In addition, this Court permitted an attorney to raise the rights of his clients in *Caplin & Drysdale* despite concluding that the clients faced no hindrance to asserting their own rights. 491 U.S. at 623 n.3.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Hope's opening brief, the decision below should be reversed.

Respectfully submitted,

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