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.

STEPHEN RUSSO, INTERIM 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

REPLY BRIEF FOR THE RESPONDENT/CROSS-PETITIONER

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INTRODUCTION

The Plaintiffs seek to avoid a regulatory burden on their business. Yet they do not allege violations of their *own* substantive due process rights, which would be subject to highly deferential review. Instead, Plaintiffs seek to commandeer potential constitutional claims of women who may choose abortions—women who are not parties to this case, who did not testify in the proceedings below or before the Legislature, who are the intended *beneficiaries* of the health and safety laws Plaintiffs seek to enjoin, and who may not want to see those laws enjoined at all.

Plaintiffs fail to justify this extraordinary theory of third-party standing. Although they have retreated from some of their broader arguments, they now argue that the demanding test in *Kowalski* v. *Tesmer*, 543 U.S. 125, 129–130 (2004), should not apply here because Plaintiffs are "directly regulated" parties. But this Court has applied *Kowalski* even when a regulated party seeks to assert someone else's rights. See *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1688–1689 (2017). Regardless whether a party is "regulated," there is no basis to assume the party can properly represent another's rights, especially where—as here—there is a clear conflict of interest between the plaintiff and the purportedly represented third party. Under the ordinary test for third-party standing, Plaintiffs cannot establish either a close relationship or a hindrance—especially in light of Plaintiffs' lack of diligence in seeking admitting privileges, their long record of health and safety violations, their fleeting interactions with women seeking abortions,

and the fact that individual women can and do litigate their own abortion cases.

The defect in Plaintiffs' standing is also non-waivable. Especially when a plaintiff purports to speak for an absent non-party, federal courts should always have an independent obligation to confirm the absence of conflicts of interest. Furthermore, although this Court need not reach the question since third-party standing is properly before the Court here whether it is prudential or jurisdictional, the defects in Plaintiffs' standing go to the core of Article III. Absent a sufficiently close relationship to a person whose constitutional rights are actually at stake and who is hindered in pursuing those rights herself, this Court cannot be assured that the critical Article III requirements of concreteness, adversity, particularity, and causation are satisfied.

Regardless of whether third-party standing is waivable as a general matter, the Court can and should reach the question here. Plaintiffs' various waiver and forfeiture arguments posed no obstacle to granting Louisiana's cross-petition for certiorari, and they fare no better at the merits stage. The question of third-party standing was directly passed upon below and, in all events, would have been futile to raise before because the question was already controlled by Fifth Circuit precedent. This Court has ample authority to address Plaintiffs' standing—and should dismiss Plaintiffs' improper effort to challenge health regulations by appropriating the rights of Louisiana women

to challenge regulations designed to protect those very women.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO RAISE SUBSTANTIVE DUE PROCESS CLAIMS ON BEHALF OF NON-PARTY PATIENTS.

A. Plaintiffs Cannot Invoke Their Procedural Due Process Claim As The Basis For Standing To Represent Their Patients.

Plaintiffs argue that because they have standing to pursue their own procedural due process claims, they also have standing to raise *separate* claims of non-party patients under a different substantive due process theory. Pet. R&R 34–35. But Plaintiffs are mistaken to suggest that their business interest in being free from regulation is "inseparable" from their patients' claimed rights. *Id.* at 35.

Plaintiffs asserted two distinct claims based on different facts and legal theories. In "Claim 1," Plaintiffs asserted a *procedural* due process claim based on Does 1 and 2's alleged inability to obtain privileges within the time allowed and continue their abortion practices. JA 24. Plaintiffs have abandoned that claim. They did not bring a first-party *substantive* due process claim alleging interference with their business—presumably because this Court long ago clarified that such *Lochner*-style claims are disfavored. See *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct.

2361, 2382 (2018) (Breyer, J., dissenting) (collecting cases); *Conn* v. *Gabbert*, 526 U.S. 286, 291–292 (1999). By contrast, in "Claim 2"—the only claim at issue now—Plaintiffs assert a substantive due process claim exclusively *on their patients' behalf*. JA 24.

This Court has long held that "'standing is not dispensed in gross.'" *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996)). To the contrary, "'a plaintiff must demonstrate standing for *each* claim he seeks to press' and 'for each form of relief that is sought.'" *Davis*, 554 U.S. at 734 (quoting *DaimlerChrysler* v. *Cuno*, 547 U.S. 332, 352 (2006)) (emphasis added). "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester, N.Y.* v. *Laroe Estates*, 137 S. Ct. 1645, 1650–1651 (2017). Plaintiffs thus cannot bootstrap their standing to bring a now-abandoned first-party procedural due process claim into standing to assert a substantive due process claim on behalf of absent parties—let alone a facial claim based on speculative future injuries that may never occur.

B. Plaintiffs Must Satisfy The Demanding *Kowalski* Test To Establish Third-Party Standing.

Without first-party standing of their own, Plaintiffs can pursue Claim 2's substantive due process theories only on their patients' behalf. But there is no *presumption* that abortion providers may assert the constitutional rights of absent third parties. Like any

other litigant, abortion providers must prove standing case-by-case and claim-by-claim. *Kowalski* permits one party to assert another's rights only in "limited" situations where the plaintiff demonstrates that: (1) he "has a 'close' relationship with the person who possesses the right," and (2) there is "a 'hindrance' to the possessor's ability to protect his own interests." 543 U.S. at 129–130.

Plaintiffs no longer deny that abortion providers must satisfy the requirements of third-party standing on the same terms as other litigants. They also appear to have abandoned their earlier stance that third-party standing applies to "categor[ies] of plaintiffs" who all have standing "as a matter of law" once one plaintiff of that type is found to have it. BIO 24 (No. 18-1460). Instead, Plaintiffs broadly assert that the usual test for third-party standing should not apply where a "plaintiff is directly targeted by the challenged law," and enforcement of the relevant restriction "would result indirectly in the violation of third parties' rights." Pet. R&R 44. That theory has no basis in this Court's precedent and again conflates Plaintiffs' two distinct constitutional claims.

1. Nothing in *Kowalski* suggested that the demanding two-part test for asserting someone else's rights is limited as Plaintiffs suggest. Rather, *Kowalski* observed that in a handful of older cases the Court failed to apply the closeness and hindrance requirements consistently or precisely. 543 U.S. at 130 (noting cases in which Court had been "forgiving" on third-party standing).

This Court's modern decisions make clear that the "closeness" and "hindrance" requirements apply even where the litigant asserting third-party standing is directly regulated. Most recently, in *Morales-Santana*, someone subject to a deportation order challenged the statute governing his citizenship, claiming that it deprived his deceased father of equal protection by preventing him from passing United States citizenship to his children. 137 S. Ct. at 1688–1689. The right the plaintiff sought to vindicate was ultimately *his own right* to stay in the country as a citizen, which plainly made him a "regulated" party. Yet the Court permitted him to assert his father's rights *only* after concluding that he "satisfie[d] the 'close relationship' requirement," and that "the 'hindrance' requirement [was] well met" because his father was deceased. *Id.* at 1689. This Court's analysis in *Morales-Santana* is inconsistent with Plaintiffs' suggestion of a *per se* rule permitting third-party standing solely because the litigant is regulated under the challenged law. See also *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring) (citing *Kowalski* to reiterate that "only" a showing of closeness and hindrance justifies departure from the prohibition on third-party standing).[1]

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[1] That accords with the traditional rule *forbidding* third-party standing even for directly regulated parties, including those defending against enforcement actions. See, *e.g.*, *Sprout* v. *City of South Bend*, 277 U.S. 163, 167 (1928); *Arkadelphia Milling* v. *St. Louis Sw. Ry.*, 249 U.S. 134, 149 (1919); *Jeffrey Mfg.* v.

Plaintiffs also misread the other cases on which they rely. In several, the Court *did* ask whether there was a hindrance or close relationship. See *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 954–958 (1984) (inquiry is whether "practical obstacles prevent a party from asserting rights on behalf of itself"); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965); *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953).

Although some older cases did not review third-party standing with rigor—much like other jurisdictional questions to which modern cases have brought greater clarity and precision—the older cases do not support Plaintiffs' distinction. See *Miller* v. *Albright*, 523 U.S. 420, 447 (1998) (O'Connor, J., concurring in judgment) ("[S]ince this Court decided *Craig* [v. *Boren*, 429 U.S. 190 (1976)], we have articulated the

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Blagg, 235 U.S. 571, 576 (1915); *Erie R.R.* v. *Williams*, 233 U.S. 685, 705 (1914); see also *McGowan* v. *Md.*, 366 U.S. 420, 429 (1961). Courts of appeals likewise have prohibited plaintiffs—even directly regulated parties—from relying on a third party's rights if they fail to satisfy the *Kowalski* standard. See, *e.g.*, *King* v. *Governor of the State of N.J.*, 767 F.3d 216, 244 (3d Cir. 2014) (counselors challenging law prohibiting "sexual orientation change efforts" in counseling lacked standing to raise clients' claims), *abrogated on other grounds by Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (2018); *IMS Health* v. *Ayotte*, 550 F.3d 42, 49 (1st Cir. 2008) (data-miners challenging ban on sale of data lacked standing to raise pharmaceutical companies and physicians' rights), *abrogated on other grounds by Sorrell* v. *IMS Health*, 564 U.S. 552 (2011); *Hodak* v. *City of St. Peters*, 535 F.3d 899, 900 (8th Cir. 2008) (company stripped of liquor license lacked standing to allege retaliation in violation of owner's husband's First Amendment rights).

contours of the third-party standing inquiry in greater detail."). Other cases that Plaintiffs cite do not address standing at all or *validate* concerns regarding potentially conflicting interests, particularly in an area imbued with profound moral and ethical implications. See *Wash.* v. *Glucksberg*, 521 U.S. 702, 707–708, 730–732 (1997) (not ruling on third-party standing of doctors where patients originally were plaintiffs, but acknowledging concerns regarding divergent interests); *Vacco* v. *Quill*, 521 U.S. 793, 797–798 (1997) (not ruling on standing where both patients and doctors were originally plaintiffs).

In still other cases Plaintiffs cite, standing arose in an entirely different procedural context. For example, *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239 (1983), arose from a state court proceeding. Pet. R&R 29. A hospital sued a municipality in state court seeking to make the town pay medical bills for a man whom police brought to the hospital to treat injuries sustained when he was arrested. The state supreme court held the Eighth Amendment required the town to pay the bills. This Court bypassed objections to the hospital asserting Eighth Amendment rights on the man's behalf, reasoning that because the state supreme court was not bound by third-party standing limits that apply to federal courts, "[t]he consequence of holding that [the hospital] may not assert the rights of a third party … in this Court … would be to … leav[e] intact the state court's judgment in favor of … the purportedly improper representative of the third party's constitutional rights." 463 U.S. at 243. The

Court held that "in these circumstances, invoking prudential limitations on [the hospital's] assertion of *jus tertii* would 'serve no functional purpose.'" *Id.* (quoting *Craig*, 429 U.S. at 194).

Similarly, *Department of Labor* v. *Triplett*, 494 U.S. 715 (1990), came to this Court on petition by a state agency and the federal Department of Labor from a state court's interpretation of federal law. A lawyer representing clients seeking recovery from the Department of Labor under the Black Lung Benefits Act was subject to state bar discipline for entering a contingent-fee agreement that violated the Department's regulations. He claimed in the state proceeding that the restriction on his own contingent fee contract would infringe his clients' right to counsel, and the state court agreed. The Department of Labor and the state ethics commission then sought this Court's review of that decision. In that posture, for this Court to have refused to adjudicate the case on the ground that the lawyer lacked third-party standing would have insulated the fee arrangement from review, allowing the party who had relied on third-party rights below to effectively *prevail* despite questions about his third-party standing—a result at odds with the purposes of third-party standing doctrine. *Triplett* also expressly

distinguished state standing from federal standing requirements. *Id.* at 721 n.**.[2]

Thus, both *Revere* and *Triplett* support federal jurisdiction only where a party asserting its *own* rights seeks review of an adverse judgment from a state supreme court interpreting the federal Constitution in favor of another litigant asserting third-party rights. In that scenario, rigorously enforcing the third-party standing doctrine makes no sense because it would preserve a victory for the party who was alleged to be an improper representative of third-party rights. *Revere*, 462 U.S. at 243. That is a far cry from the situation here, where highly conflicted plaintiffs seek to invoke the power of the federal courts to strike down a state law based on alleged violations of the constitutional rights of a third party.

2. That leaves Plaintiffs' reliance on three distinguishable abortion cases: *City of Akron* v. *Akron Center for Reproductive Health*, 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, 188 (1973). See Pet. R&R 45. In *Doe*, the plaintiffs included an individual woman as a co-plaintiff, so the Court viewed the physicians' standing as "perhaps a matter of no great consequence." 410 U.S. at 188.

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[2] *Kowalski* further distinguished *Triplett* because the lawyer had a relationship with existing clients that implicated both attorney *and* client in receiving "benefits that the Government was seeking to recover as erroneously paid." See *Kowalski*, 543 U.S. at 131; *Triplett*, 494 U.S. at 721.

Moreover, the presence of an individual woman as a plaintiff ensured that women's separate interests would be represented in the litigation in the event a conflict of interest developed. No such safeguards are present here, where the *sole* plaintiffs are providers seeking less regulation of their businesses.

Danforth offered little analysis of the relevant issues and merely relied on *Doe*. See 428 U.S. at 62. *Danforth* addressed a law that banned certain types of abortion procedures. That case thus involved less risk of a conflict of interest because the law prevented doctors from offering certain procedures *at all*, even if women requested them. Moreover, in discussing physicians' standing, both *Doe* and *Danforth* relied on the possibility of criminal penalties as a reason to allow pre-enforcement review of the challenged statutes. See *Doe*, 410 U.S. at 188; *Danforth*, 428 U.S. at 62. Contrary to Plaintiffs' suggestion, see Pet. R&R 34, 47, the law challenged here does not provide for criminal penalties.[3]

To be sure, a *footnote* in *City of Akron* stated that a plaintiff physician had "standing to raise the claims

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[3] Act 620 provides exclusively for a fine, assessed by LDH against the facility pursuant to its licensing authority under La. Rev. Stat. 40:2175.1 *et seq*. Although Louisiana's abortion clinic licensing rules have a general criminal penalty, see La. Rev. Stat. 40:1061.29(A), that provision is displaced by 40:1061.10(A)(2)(c)'s specific penalties. Under state rules of statutory interpretation, "the statute that is more specific must prevail as an exception to the general statute." See *Medine* v. *Roniger*, 2003-3436 at 12 (La. 7/2/04), 879 So.2d 706, 714.

of his minor patients." 462 U.S. at 440 n.30. But *Akron*'s sole support was a citation to *Doe*, *Danforth*, and *Bellotti* v. *Baird*, 443 U.S. 622, 627 n.5 (1979) (plurality opinion). But *Bellotti* involved a class of "all pregnant minors who might be affected by" the law, which was further refined as minors "who have adequate capacity to give a valid and informed consent to abortion, and who do not wish to involve their parents." 443 U.S. at 626–627 & n.5 (alteration and quotes omitted). And footnote 39 in *Akron* adds a significant caveat, stating "[t]he Court's consistent recognition of the critical role of the physician in the abortion procedure has been based on the model of the *competent, conscientious, and ethical physician.* We have no occasion in this case to consider conduct by physicians that may depart from this model." 462 U.S. at 448 n.39 (emphasis added; citation omitted). This case clearly does not permit that assumption. See La. Br. 8–11, 42–44, 81–87; *infra* at 13–17.

C. Plaintiffs Do Not Satisfy The Prerequisites For Third-Party Standing.

At bottom, *any* professional or personal relationship (such as doctor/patient, attorney/client, parent/child, or husband/wife) only suggests a potential "opportunity" for a "close relationship. See *Hodgson* v. *Minn.*, 497 U.S. 417, 446 (1990) (opinion of Stevens, J., joined by O'Connor, J.) (parent does not always have close relationship with child); *id.* at 484 (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ.); see also, *e.g.*, *Glucksberg*, 521 U.S. at 730–

732 (terminally ill patients may not share same interests as family, physicians, or hospitals). Thus, this Court has never embraced any relationship as *categorically* "close" for purposes of standing.

Here, Plaintiffs not only lack a close relationship with their patients as a matter of *fact*, but there is a glaring conflict of interest as a matter of *law*. And Plaintiffs never alleged, much less proved, that their patients face any hindrance that would prevent women from bringing their own cases.

1. Plaintiffs have not established a close relationship with absent third-party patients.

a. Plaintiffs have *no* ongoing relationship with their patients and have a "horrifying" safety record, Pet. App. 38a n.56, which inevitably conflicts with their patients' medical interests. *E.g.*, JA 154:3–8 (improper administration of intravenous medications and gas), JA 155–156 (administration of anesthesia by unqualified employees), JA 170:3–6, JA 116–117; see also ROA.11437, ROA.11447, ROA.11468, ROA.11474, ROA.11511. Plaintiffs' failures in physician credentialing also are not in dispute. JA 246–250; see also, *e.g.*, ROA.14155 (116:14–25), ROA.14156 (117–119).

Plaintiffs respond that Louisiana's showing of a conflict is "grounded in the premise that Act 620's admitting-privileges requirement confers health and safety benefits," and that "this Court already has held that admitting-privilege requirements have *no* health

or safety benefit[.]" Pet. R&R 51. Those arguments fail at every level.

Plaintiffs erroneously conflate a *merits* question about Act 620's effects with the "threshold" question of third-party standing. *Kowalski*, 543 U.S. at 129. In that threshold inquiry, even a "potential[] … conflict" is enough to deprive a litigant of standing to represent a third party. *Elk Grove Unif. Sch. Dist.* v. *Newdow*, 542 U.S. 1, 15 & n.7 (2004). The prohibition on a potentially conflicted party representing the interests of others is deeply ingrained in the law. See, *e.g.*, *Hansberry* v. *Lee*, 311 U.S. 32, 44 (1940) ("potentially conflicting interests" foreclose common class membership); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Louisiana is unaware of any other setting where litigants subject to health and safety regulations can assert their customers' interest in being *unprotected* by those regulations. Yet Plaintiffs assert that a law enacted to protect the health and safety of women seeking abortions actually violates the rights of those women, even though none of those women has challenged the law as a violation of her rights or contrary to her interests. The potential divergence of interests between Plaintiffs and their patients makes third-party standing impossible regardless of the merits.

Plaintiffs are also wrong about the purported safety of their procedures. For reasons explained in Louisiana's principal brief, no reliable data exist on the true rates of complications from Louisiana abortions, JA 130–131, JA 135–136, JA 447–448,

ROA.14034 (92:7–22), JA 1342–1343 (80:3–82:12), and the rate of direct hospital transfers understates the importance of physician competency for abortion safety. La. Br. 87. The complication rate would no doubt be higher but for the State's vigilance, which identifies incompetent or unethical providers and compels abortion clinics to correct violations of health standards promptly. Louisiana has also shown why nothing precludes this Court from recognizing the health benefits of Act 620 on this case's record. La. Br. 54–66.

b. Plaintiffs also fail to address other conflicts that further undermine their assertion of their patients' rights. *First*, as to Plaintiffs' position that Doe 2's courtesy privileges do not satisfy Act 620, Plaintiffs rely solely on the merits of their interpretation of the statute. Pet. R&R 52–53.[4] But that misses the point: If Doe 2 had taken LDH's "yes" for an answer, he *could* perform abortions without fear because he had LDH's legally binding approval. JA 587–589; ROA.10800–10802.[5] Either way, Plaintiffs' litigation position—which, bizarrely, would limit Doe 2's ability to perform

[4] There is no dispute that Doe 5's courtesy privileges—which were granted after Act 620's enactment notwithstanding Plaintiffs' repeated assertions that hospitals would not extend admitting privileges to abortion providers—do satisfy Act 620.

[5] The Secretary's declaration (and testimony under oath) were binding on the State. See La. Rev. Stat. 36:253; 36:254(A)(2), (B)(8).

abortions in compliance with the law—is directly at odds with the alleged interests of their patients.

Second, the abortion providers' lack of diligence in pursuing privileges underscores not only the lack of causation on the merits, but also the conflict with their patients. Although the district court concluded Louisiana abortion providers sought privileges "in good faith," it misunderstood the legal standard: The facts reveal that doctors elected not to apply at numerous qualifying facilities and failed to follow basic instructions. La. Br. 75–78. The district court cannot gloss over facts by labeling patently inadequate efforts "good faith." Whatever label one applies, failure to make reasonable efforts to meet Act 620's requirements implies that abortion providers were motivated not by meeting patient demand for abortions, but by minimizing their own compliance efforts.

Third, Plaintiffs cite no case where a plaintiff claims to assert the health and safety interests of third parties while simultaneously obstructing investigations of harm to those parties. Roneal Martin, owner of Bossier City Medical Suite, where Doe 2 was the only doctor, directed all Bossier's patient records to be shredded.[6] The State sought to bring other information to the attention of relevant authorities but Plaintiffs continue to fight those efforts. *In re Gee*, No. 19-30953 at 6–7 (5th Cir. Nov. 27, 2019) (Elrod, J.,

[6] Dec. of Roneal Martin at ¶ 9, *Gee* v. *Bossier City Med. Suite*, No. 4:18-cv-00369 (E.D. Tex.) (ECF 11-2).

concurring). Plaintiffs' actions are inconsistent with their patients' interest in health and safety.

c. Although Plaintiffs dispute the details, they also cannot avoid evidence that their relationship with their patients is not close. Plaintiffs do not dispute that Hope, as a for-profit corporate entity, lacks any doctor-patient relationships. La. Br. 47. The record is also plain that abortion doctors, both parties and non-parties, have limited patient contact, which is largely anonymous and exceedingly brief. See Pet. App. 52a (noting that Doe 3 can perform six abortions per hour). Although Plaintiffs emphasize exceptions to the rule, that sole interaction is often between an abortion doctor and a sedated woman, and patients generally do not return. JA 130–131, JA 207, JA 223, JA 286–287, JA 447–450, JA 784–785, ROA.10162, ROA.11481–11486. Tellingly, Hope and Doe 1 are contemporaneously with this case *challenging* laws requiring a doctor-patient relationship for abortions. La. Br. 83–84.

If, in short, it is *ever* possible for abortion providers to have the type of doctor-patient relationship that would allow them to challenge health and safety regulations on behalf of patients, it should require proof of a real (*i.e.*, actually existing), conflict-free alignment of interests—proof Plaintiffs cannot possibly provide in this case.

2. Plaintiffs' patients are not hindered from suing on their own behalf.

As for the "hindrance" prong, Louisiana women (and women for decades), *have* challenged abortion

regulations themselves. Pet. R&R 54 (citing La. Br. 39–40). Even a minor who was an indigent, undocumented alien in federal custody brought her own claim through a legal guardian, *Azar* v. *Garza*, 138 S. Ct. 1790 (2018), with no shortage of counsel willing to represent her. That should be the end of the matter. If women seeking abortions have proven able to litigate on their own behalf—even under the difficult circumstances presented in *Garza*—then surely no hindrance exists here. *Kowalski*, 543 U.S. at 131–132; see also *Hodak*, 535 F.3d at 904 (collecting cases).

Plaintiffs posit a hypothetical threat to the anonymity of women litigating on their own behalf. Yet women have litigated abortion cases anonymously for decades. Aside from a vague, unexplained reference to "modern technology," Pet. R&R 53, Plaintiffs point to no reason why they cannot do so now. Plaintiffs insinuate Louisiana might disclose the identities of women, Pet. R&R 53 n.9, because it challenged the anonymity of *doctors* who have sued Louisiana previously in their own names and testified in other cases as experts. These doctors do not dispute that they are publicly "well-known." Pet. App. 5a n.4. But Louisiana has never challenged any individual woman's request to proceed under a pseudonym in an abortion case, and has no intention of ever doing so.

Plaintiffs next raise "the 'imminent mootness, at least in the technical sense, of any individual woman's claim,'" Pet. R&R 54, but cite only *Singleton* v. *Wulff*, which acknowledged the threat is insubstantial in light of *Roe*'s holding on this point. 428 U.S. 106, 117

(1976) (plurality); La. Br. 37–38. Plaintiffs suggest personal litigation might force a woman to "delay time-sensitive medical care in order to file suit," Pet. R&R 54, a concern that is entirely speculative and which posed no obstacle in *Roe*, *Garza*, and other cases brought by individuals.

All that remains is the concern that a woman litigating on her own behalf must participate in litigation "for years," "redirect resources" to the case, and "devote time away from family, work, school, and other commitments." Pet. R&R 54. Those obligations, by definition, are only "normal burdens of litigation" that as a matter of law do not amount to true "hindrances." *Am. Immigration Lawyers Ass'n* v. *Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000); see also *Kowalski*, 543 U.S. 131–132 (indigence and incarceration not a "hindrance"); *Freilich* v. *Upper Chesapeake Health*, 313 F.3d 205, 215 (4th Cir. 2002). And in any event, they do not supersede this Court's recognition that an individual is the best proponent of her own rights.

Alternatively, Plaintiffs appear to argue all that matters is who is "best positioned to litigate" an issue, Pet. R&R 55, or that the third-party standing inquiry should be recharacterized as a multifactor balancing test where not all the elements established in *Kowalski* need to be met, Pet. R&R 55 n.10 (citing *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623 n.3 (1989)). These abstract approaches serve no purpose but to turn standing in abortion cases into "ingenious exercise[s] in the conceivable." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 566 (1992); *ASARCO*

v. *Kadish*, 490 U.S. 605, 615 (1989). This Court's modern third-party standing cases rightly adopt clear requirements and maintain the long-established rule against litigants asserting an absent non-party's rights. Plaintiffs' last-ditch effort to drain third-party standing of meaningful content confirms they cannot satisfy the applicable test.

II. THE COURT CAN AND SHOULD ADDRESS WHETHER PLAINTIFFS HAVE THIRD-PARTY STANDING.

A. Limitations On Third-Party Standing Are Non-Waivable.

Just as federal courts have an "independent obligation" to determine their jurisdiction, *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006), they also must ensure that one party meets the conditions to speak on behalf of another. That obligation carries additional weight when a party litigates someone else's rights notwithstanding a conflict of interest, which could severely prejudice the rights of the absent third party and distort the manner in which the claim is presented to the court. The court always has an independent obligation—and ultimate responsibility—to ensure that the absent party's rights and interests are protected. See *Amchem Prods.* v. *Windsor*, 521 U.S. 591, 625 (1997) (addressing a court's obligation in class actions to identify conflicts between class representatives and class members). A court's obligation cannot be waived or forfeited by the parties.

Moreover—although this Court need not reach the issue because third-party standing is properly before the Court whether it is prudential or jurisdictional—limitations on third-party standing should be treated as a component of Article III. Whether a party has third-party standing is irrevocably intertwined with Article III's irreducible constitutional minimums of standing, including the requirements of a particularized and concrete injury, "fairly traceable" to the state action. See, *e.g.*, *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547–1548 (2016). When a party makes the extraordinary request for a federal court to adjudicate *someone else's* rights, the plaintiff's relationship with the third party is *always* relevant to whether Article III's irreducible minimums are satisfied with respect to each party and each claim—both when the case is filed and for the duration of the litigation. See, *e.g.*, *Newdow*, 542 U.S. at 13–14 (third-party standing challenged on the basis of facts developed and introduced after initial appellate decision). Limitations on third-party standing are rooted in the same structural limits on judicial power inherent in the separation of powers. *Lujan*, 504 U.S. at 559–560. The relationship and hindrance factors *should* find a home as components of Article III.

Plaintiffs dispute this conclusion (at 31–34) but they make no meaningful attempt to explain why third-party standing is *better* treated as merely prudential. Nor can they. The same concerns that underlie the third-party standing doctrine are inherently intertwined with core aspects of Article III standing—

adversity, concreteness, particularity, and limits on the airing of "generalized grievances." See, *e.g.*, *Spokeo*, 136 S. Ct. at 1548 (whether a litigant alleges a violation of "*his* … rights" versus "the … rights of other people … concern[s] particularization," a requirement of Article III standing); *ASARCO*, 490 U.S. at 615 (standing "not a kind of gaming device that can be surmounted merely by aggregating the allegations of different kinds of plaintiffs, each of whom may have claims that are remote or speculative taken by themselves"); *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State*, 454 U.S. 464, 473 (1982) ("The Article III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.").

Plaintiffs cite various cases referring to limits on third-party standing as separate from Article III, Pet. R&R 31–32, but this Court has been willing, upon closer examination, to recharacterize jurisdictional elements once thought to be "prudential" as grounded in Article III. See *Lexmark Int'l* v. *Static Control Components*, 572 U.S. 118 (2014). *Craig* v. *Boren* is not to the contrary. In *Craig*, the purported "third party" was originally a *first-party* plaintiff who litigated his own claim. 429 U.S. at 192. And the other examples of non-jurisdictional rules Plaintiffs cite involve *procedural* requirements such as "claim-processing rules," none of which is analogous to the power to adjudicate an absent party's *substantive* rights. Pet. R&R 29–30.

B. Regardless Of Whether It May Be Waived, The Issue Of Third-Party Standing Is Fully Preserved For This Court's Review.

This Court can and should address third-party standing regardless whether it is ultimately deemed to be jurisdictional or prudential.

Plaintiffs attempt to escape this conclusion by contending Louisiana "affirmatively agreed below that Hope 'had third-party standing to assert [its] patients' rights.'" Pet. R&R 58 (quoting JA 43–44) (alteration in original). But Plaintiffs' brackets veil an egregious misquotation. What Louisiana *actually* wrote in the cited document was that when the *Texas* admitting privileges requirement was challenged in *Planned Parenthood of Greater Texas Surgical Health Services* v. *Abbott*, 748 F.3d 583 (5th Cir. 2014), "the Fifth Circuit found the physicians in *Abbott* had third-party standing to assert their patients' rights." JA 44. That is, Louisiana merely noted that binding Fifth Circuit precedent resolved a similar question of third-party standing against Texas. That cannot possibly be characterized as "affirmative agree[ment]" that the holding was *correct* or that third-party standing is proper for abortion doctors in this case. Pet. R&R 38.[7]

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[7] Similarly, Plaintiffs' pleadings alleged the existence of a *federal question*, *not* their standing. JA 18. Plaintiffs are therefore mistaken that Louisiana's answer conceded or admitted standing. See Pet. R&R 38 (citing JA 57 ¶ 7).

Plaintiffs also cannot dispute that *Abbott* foreclosed Louisiana's arguments against third-party standing. The futility of raising the argument below is enough to excuse any technical forfeiture. *Henderson* v. *United States*, 568 U.S. 266, 284 (2013) (Scalia, J., dissenting) ("When the law is settled against a defendant at trial he is not remiss for failing to bring his claim of error to the court's attention. It would be futile."). Plaintiffs instead cite cases addressing procedural default in habeas corpus, a doctrine that is not remotely analogous. Pet. R&R 42.

In any event, this Court may reach Plaintiffs' third-party standing because it was passed on below by a previous panel which squarely held that "[a]t least one of the physicians here—Doe 1—has third-party standing[.]" *June Med. Servs.* v. *Gee*, 814 F.3d 319, 322 (5th Cir.), *vacated*, 136 S. Ct. 1354 (2016). Plaintiffs object that the panel did not discuss the standing of *other* Plaintiffs, Pet. R&R 37, but do not explain why those Plaintiffs are differently situated. In light of *Abbott*, the result would clearly be the same.

Plaintiffs also claim the prior panel's decision does did not constitute "law of the case" because this Court later "vacated that decision." Pet. R&R 37. But preservation of *issues* for this Court's review and law of the case are separate doctrines. See *United States* v. *Wells*, 519 U.S. 482, 488 (1997). Moreover, this Court's order vacated only the *remedy* entered by the Fifth Circuit—*i.e.*, its "*stay* of the district court's injunction." 136 S. Ct. 1354 (emphasis added). This Court

did not address the Fifth Circuit's finding of third-party standing. Regardless, even if this Court's order rendered the Fifth Circuit's earlier order a nullity, none of this would change the fact that *Abbott* was controlling precedent below when the case was being litigated.

Lastly, Plaintiffs argue "[t]he question whether the State's waiver should be forgiven is … beyond the scope of the question presented." Pet. R&R 39. But this Court granted the cross-petition on *two* questions: (1) whether abortion providers can be presumed to have third-party standing; and (2) whether objections to prudential standing are waivable. Even if objections to third-party standard are potentially waivable, the fact that third-party standing was passed upon below (and was controlled by circuit precedent at the time) show that this Court can still reach and decide the first question presented, regardless of how it answers the second.

CONCLUSION

Plaintiffs' complaint should be dismissed for lack of standing. Alternatively, the decision below should be affirmed.

Respectfully submitted.

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