No. 18-

# In the Supreme Court of the United States

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

*v.*

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

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

## CONDITIONAL CROSS-PETITION


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## QUESTIONS PRESENTED

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

2. Are objections to prudential standing waivable (per the Fourth, Fifth, Seventh, Ninth, Tenth, and Federal Circuits) or non-waivable (per the D.C., Second, and Sixth Circuits)?

## PARTIES TO THE PROCEEDING

The Cross-Petitioner is Dr. Rebekah Gee, Secretary of the Louisiana Department of Health ("LDH"), sued in her official capacity. LDH was formerly referred to as the Louisiana Department of Health & Hospitals. Dr. Gee is Respondent in the underlying Petition, No. 18-1323. To avoid confusion, this Cross-Petition will refer to Dr. Gee as "Louisiana."

The Cross-Respondents are June Medical Services L.L.C., d/b/a Hope Medical Group for Women, and two pseudonymous abortion providers proceeding as Dr. John Doe 1 and Dr. John Doe 2. Cross-Respondents are Petitioners in the underlying Petition. To avoid confusion, this Cross-Petition will refer to Respondents as "Plaintiffs."

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## INTRODUCTION

Ever since the plurality in *Singleton* v. *Wulff* asserted that it would "generally [be] appropriate" for abortion providers to challenge abortion regulations on behalf of their patients, 428 U.S. 106, 118 (1976), this Court and lower courts have assumed abortion providers have standing to represent their patients' interests. Today, virtually all challenges to abortion laws are premised on that theory of "third party" or *jus tertii* standing — often with little, if any, analysis or factual support. But that pattern is increasingly at odds with legal developments in this Court and with the factual records of abortion cases, including this one. If this Court elects to grant Plaintiffs' Petition in No. 18-1323, it should simultaneously take the opportunity to resolve that conflict and clarify that abortion providers are subject to the same standing rules as everyone else.

This case vividly illustrates why unexamined assumptions about the third-party standing of abortion providers should be abandoned. Plaintiff abortion providers, nominally proceeding on behalf of their patients, challenge a law intended to provide patients with greater health and safety protections by ensuring abortion doctors are subjected to meaningful, ongoing credentialing review by their peers. Yet there is little evidence that their patients' interests actually align with Plaintiffs' position that the burdens of such protections exceed their value. On the contrary, undisputed record evidence (including of Plaintiffs' poor safety record, inadequate credentialing practices, and questionable efforts to undermine the law at issue) shows Plaintiffs are directly *adverse* to their patients'

interests. It is hard to imagine a worse case for third-party standing.

Under the ordinary rules for third-party standing, representative plaintiffs would have to provide evidence establishing that their interests are aligned with those they purport to represent and that there is some barrier preventing the actual rights-holders from asserting their own interests. There should be no assumed "abortion" exception to those ordinary jurisdictional rules, and if this Court accepts Plaintiffs' Petition, it should also grant the Conditional Cross-Petition to address that underlying issue.

This issue was controlled by Fifth Circuit precedent throughout the pendency of this case and so it was not addressed below. Third-party standing is an issue of prudential jurisdiction. Courts of appeals are divided regarding whether it can be waived or forfeited. Should the Court grant the Petition, that issue, too, warrants granting the Conditional Cross-Petition to address how these important standing questions should be decided

## OPINIONS BELOW

The opinion of the District Court is reported at 250 F. Supp. 3d 27 (M.D. La. 2017) and reprinted in the Appendix to the Petition ("App.") at 132a–279a. The Fifth Circuit panel decision is reported at 905 F.3d 787 (5th Cir. 2018) and reprinted at App. 1a–103a. The Fifth Circuit's denial of Plaintiffs' petition for rehearing *en banc* is reported at 913 F.3d 573 (5th Cir. 2019) and reprinted at App. 104a–131a.

## JURISDICTION

Plaintiffs timely filed a petition for certiorari on April 17, 2019, No. 18-1323, which was docketed on April 20, 2019. See 28 U.S.C. § 2101(c); 28 U.S.C. § 1254(1). This Cross-Petition is timely under Supreme Court Rule 12.5. Louisiana denies that this Court or lower courts had jurisdiction to address the merits of Plaintiffs' substantive due process claims because Plaintiffs lack third-party standing to raise those claims.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The underlying Petition, No. 18-1323, involves U.S. Const. amend. XIV, § 1, as well as La. Rev. Stat. § 40:1061.10 ("Act 620") and its implementing regulations. Relevant portions of these provisions are reproduced at App. 285a–290a.

## STATEMENT OF THE CASE

Although Louisiana does not adopt the statement of the case presented by the Petition in No. 18-1323, the Petition contains much of the background necessary to understand this Cross-Petition. Louisiana's forthcoming brief in opposition will respond to Plaintiffs' statement more fully. Louisiana provides this abbreviated Statement to underscore aspects of the record that are relevant to the Cross-Petition.

### A. Factual Background

1. Louisiana Act 620 requires that physicians performing abortions must "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." Act 620, § 1(A)(2)(a). That rule brings standards for Louisiana's abortion providers into conformity with pre-existing regulations governing all of the State's ambulatory surgical centers. La. Admin. Code § 48:4535(E)(1); ROA.10154–10155 (clarifying the equivalence of the requirements).

The Louisiana Legislature passed Act 620 after hearing extensive testimony that (1) Louisiana abortion clinics have a history of serious health and safety problems, as well as other serious legal compliance issues; (2) abortion carries known risks of serious complications that may require intervention in a hospital; (3) the process for obtaining admitting privileges serves to vet physician competency; (4) abortion providers would be able to obtain privileges; and (5) the Act would bring abortion practice into conformity with the privileges requirements for doctors performing other outpatient surgeries. ROA.11221–11223, ROA.11225–11228, ROA.11256–11260, ROA.11262–11263, ROA.11266–11269. The district court agreed that a "purpose of [Act 620] is to improve the health and safety of women undergoing an abortion." App. 202a.

2. Plaintiffs are a Louisiana abortion clinic and two of its doctors, proceeding pseudonymously. The record identifies six Louisiana abortion providers, Drs. John Doe 1–6.[1] Dr. Doe 1, Dr. Doe 2, and Dr. Doe 3 are associated with the Plaintiff clinic. ROA.310, 353–354, ROA.4172. Doe 3 has maintained hospital admitting privileges throughout this case and so was not a Plaintiff.

There is no dispute that the Plaintiff clinic is a for-profit business that exchanges medical services for a fee, nor that the abortion providers associated with the clinic are paid on a per-procedure basis. ROA.7687, ROA.7890–7891. Other Louisiana abortion clinics follow a similar model. ROA.14030 (75:10–76:19), ROA.14032 (83:24–84:1), ROA.14172 (59:2–59:22).

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[1] The doctors' names are in the record under seal. ROA.13153. Although some of the doctors are women, Louisiana will employ male pronouns. App. 5a n.4. The district court permitted the providers to participate anonymously despite the fact that their identities are (in the panel majority's words) "well known." *Id.*

Dr. John Doe 4 retired while the case was pending, App. 11a, leaving five active providers at Louisiana abortion clinics. Dr. Doe 5 and Dr. Doe 6 provide abortions at other Louisiana clinics. Louisiana has three active abortion clinics: the Plaintiff clinic in Shreveport, Women's Health Care Center in New Orleans, and Delta Clinic in Baton Rouge. Two other Louisiana abortion clinics — Bossier City Medical Suite and Causeway Medical Clinic — closed while this case was pending and Act 620 was enjoined. Plaintiffs concede those closures were unrelated to Act 620. Pet. at 6 n.4.

Plaintiffs' testimony shows that the doctors' interactions with patients are limited. The Plaintiff doctors may see as many as thirty patients per day for only a few minutes each.[2] The required pre-abortion counseling is often not provided by the doctor who performs the abortion, but by different doctors hired solely for that separate purpose. ROA.8228–8229. When the doctor performs a surgical abortion, the patient is under the influence of medications that can affect her consciousness. ROA.7667, ROA.7730–7731. The Plaintiff clinic schedules patients for follow-up appointments after the procedure, but Plaintiffs concede many patients do not return.[3] Apart from the brief procedure itself, an abortion provider may not interact with a given patient at all. ROA.14146–14147 (80:23–81:1) (Doe 4 deposition).

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[2] ROA.7650–7651 (Doe 3 performs up to thirty abortions per day when at the clinic), ROA.7687 (up to six abortion procedures an hour). Doe 1 performs 2,100 procedures per year, plus consultations, working only three days per week. App. 51a, ROA.8213, ROA.8230. See also ROA.10162 (Plaintiffs' expert opining that a surgical abortion "typically lasts two to ten minutes"), ROA.14144 (70:9–70:10).

[3] See, *e.g.*, ROA.7574–7575 (Plaintiff clinic's administrator testifying that "a pretty high number of [the clinic's] patients don't follow-up at all"), ROA.7891–7894 (discussing Doe 2's deposition testimony that "that about 20 to 30 percent at most, return[ed] for their post-abortion checkup"). There is a similar lack of follow-up at other clinics. See ROA.14034 (90:1–92:6), ROA.14146–14147 (80:4–81:1), ROA.14177 (80:3–80:16).

### B. Proceedings Below

1. Plaintiffs sued to enjoin Act 620 before it took effect in 2014. Plaintiffs' primary claim is that Act 620 is facially invalid because it imposes an "undue burden" on their patients' substantive due process right to choose an abortion.[4] Although Plaintiffs do not include any past or prospective abortion patients, Plaintiffs claim that they are suing "on behalf of [their] patients." *E.g.*, ROA.351 (Amended Complaint). Plaintiffs also alleged that Act 620 violates their own *procedural* due process rights, ROA.359, but did not pursue that claim and lower courts did not reach it.

2. The district court held a six-day bench trial.[5] Not a single abortion patient testified against Act 620. There was no evidence that any particular Louisiana woman who has obtained or is considering an abortion would *personally* (1) prefer to obtain an abortion from a doctor *without* admitting privileges, (2) prefer to

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[4] *E.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007) (explaining that an "undue burden" arises from regulations whose "'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'") (quoting *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 878 (1992) (joint opinion)).

[5] The district court adopted several measures to protect the confidentiality of individuals at trial, including anonymization of certain third parties, ROA.1651, and a screen shielding Doe 1, Doe 2, and Doe 3 from view when they testified, ROA.7640, ROA.7814, ROA.8185.

forego the protections Act 620 was intended to provide, or (3) consider her decision to obtain an abortion to be burdened by Act 620.

Instead, Plaintiffs sought to prove the alleged burdens of Act 620 on Louisiana women in two ways. *First*, Plaintiffs sought to prove the four Louisiana abortion doctors who currently lack admitting privileges would be unable to obtain them and so would be forbidden to perform abortions under Act 620. Dr. Doe 3 already has qualifying admitting privileges — at Christus, a Catholic hospital in the Shreveport-Bossier City area — and Dr. Doe 4 retired while the case was pending. ROA.7653, ROA.7715–7716; App. 11a. The privileges of Drs. Doe 1, 2, 5, and 6 remained at issue.

Plaintiffs presented no testimony from any hospital about why any doctor's privileges application was not granted. Instead, Plaintiffs presented deposition designations, trial testimony, and documents from the doctors themselves. But as the Fifth Circuit panel majority later found, the abortion providers' testimony and documents showed that three Louisiana abortion doctors (Dr. Doe 2, Dr. Doe 5, and Dr. Doe 6) failed to seek admitting privileges in good faith. App. 49a. Those doctors submitted privilege applications too narrowly: They declined to apply to nearby hospitals where they had held privileges before, or where other abortion providers had obtained privileges. When they did apply for privileges, in some cases the abortion providers simply did not comply with the required

application procedures or refused to cooperate with hospitals during the application process.[6]

The district court record suggested that only Dr. Doe 1 may have made a good-faith, though unsuccessful, effort to obtain privileges. Doe 1, a graduate of Saba University medical school in the Dutch Caribbean, ROA.8114, is not an obstetrician or gynecologist. Instead he is a specialist in "Family Medicine and Addiction Medicine" — and he has never actually *practiced* family medicine. ROA.8115, ROA.8204. Doe 1 conceded he had no training in abortion practice during his medical school or residency; instead he was principally taught on-the-job by Doe 3. ROA.7673–7678, ROA.8140. Again, even if Doe 1 failed to obtain privileges, Plaintiffs presented no testimony from any hospital about why any privileges application was not granted.

Another anomaly in the abortion providers' efforts to obtain privileges is that while the case was pending, Dr. Doe 2 — who at the time performed abortions at the Causeway abortion clinic in the New Orleans area — received "courtesy" privileges at the Tulane Univer-

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[6] Doe 2 failed to apply for privileges at two local hospitals. ROA.7849–7850; App. 42a–43a. He also refused to provide documentation requested by the hospital to which he did apply. ROA.13061–13064. Doe 5 failed to make good-faith efforts to arrange a doctor to cover for him at a hospital willing to grant privileges. ROA.9925, ROA.14169–14170 (39:20– 41:1). And Doe 6, who provides abortions in the New Orleans area, applied to only *one* hospital. ROA.10787, ROA.14057 (247:7–248:5)

sity hospital. ROA.7835–7837. Doe 2's own understanding of his privileges is that he may admit patients to Tulane, provided he turns direct patient care over to other physicians on staff. ROA.7861–7862. Doe 2's professed understanding, consistent with communications admitted into evidence under seal, was that Tulane identified a doctor who would handle the patient-care transition. ROA.7863; see also ROA.17032, ROA.17037. Kathy Kliebert, then-Secretary of the Louisiana Department of Health, submitted a sworn declaration stating the Department's position that Dr. Doe 2's privileges satisfied the requirements of Act 620 and would allow him to continue performing abortions in the New Orleans area. ROA.10800–10802. She also testified to that effect at trial. ROA.8031–8033.

Plaintiffs, however, argued that Doe 2's privileges would *not* meet the requirements of Act 620. ROA.7841. Doe 2's expressed worry was that Secretary Kliebert or a future LDH secretary eventually "may change their view" about the meaning of Act 620. ROA.7868. The district court agreed Doe 2's privileges did not qualify, App. 238a, and the Fifth Circuit affirmed on that point, App. 43a–44a n.58.[7]

*Second*, Plaintiffs relied on the testimony of a sociologist, Dr. Sheila Katz. Dr. Katz assumed that Act 620 would force abortion clinics to close and opined

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[7] Louisiana maintains that the Fifth Circuit erred in that respect, and intends to address the issue in its forthcoming brief in opposition.

about the consequences of clinic closures. But she repeatedly testified she could offer no opinion about the percentage of Louisiana women who would be deprived of abortion access by Act 620 and she did not make any study of Louisiana women. See ROA.7979–7983, ROA.7985–7992.[8] She did not even rely on the work of others who performed Louisiana-specific studies. ROA.7978–7979.

3. The district court also received evidence about the benefits of Act 620.

The Plaintiff clinic in this case has a history of serious regulatory violations which the panel characterized as "horrifying." App. 38a n.56.[9] It was undisputed at trial that the Plaintiff clinic has been cited for improper administration of intravenous medications and gas, ROA.7598, failure to document patients' physical

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[8] ROA.7979–7981 (Dr. Katz confirming that her testimony was not based on "any qualitative or ethnographic research regarding women and poverty in the State of Louisiana"), ROA.7982–7983 (confirming her testimony relied on no data concerning relative income level of Louisiana women who had abortions), ROA.7986 (confirming she offered no opinion on "any specific percentage of Louisiana women [who] will be prevented by their poverty from obtaining an abortion"), ROA.7991–7992 (confirming she could not tell the court "what specific percentage of Louisiana women would have their access to abortion impeded by Act 620 because of their poverty").

[9] The panel considered those violations unrelated to the merits, App. 38a n.56, a conclusion Louisiana disputes. But they are certainly relevant to the alignment of interests between doctors and prospective patients for purposes of third-party standing.

examinations, ROA.7599, administration of anesthesia by employees who were not qualified, ROA.7600, inaccurate reporting of abortion procedures to the State, ROA.7609–7611, and miscalculation of medication dosages, ROA.7614, among other violations. In 2012, LDH revoked the Plaintiff clinic's license for failure to comply with health and safety regulations. ROA.7602–7605. The underlying documents related to the Plaintiff clinic, which were admitted into evidence under seal, contain even more violations.

Parties associated with other Louisiana abortion clinics admitted to their own poor compliance records. See ROA.14023–14025 (36:6–41:2), ROA.14049–14056 (161:7–191:1). And Louisiana abortion doctors have a long history of professional discipline.[10]

The Plaintiff clinic also has a record of indifference to the background, qualifications, and training of the individuals it hires to provide patient care. LDH had faulted the clinic in the past for relying on its administrator — an individual with no medical training — to instruct nurses how to dispense narcotics. ROA.7614, ROA.7563. Doe 3, the Plaintiff clinic's medical director, admitted he hired a radiologist and

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[10] See ROA.15066–15078 (sealed exhibit collecting Louisiana State Board of Medical Examiners disciplinary records for two Louisiana abortion doctors); see also, *e.g.*, *In the Matter of: Kevin Govan Work*, No. 2019-A-011 (La. Bd. Med. Exam'rs Apr. 15, 2019) (prohibiting doctor from performing abortions); *In the Matter of: Victor Brown*, No. 06-A-021 (La. Bd. Med. Exam'rs Sept. 17, 2007); *In the Matter of: A. James Whitmore*, No. 00-A-021 (La. Bd. Med. Exam'rs Jan. 22, 2002).

an ophthalmologist to perform abortions there, ROA.7690–7691, and when hiring doctors he performs *no* background check and makes *no* inquiry into their previous training. ROA.7692–7694. Again, such poor hiring and credentialing practices are common among other Louisiana abortion clinics, which "beyond ensuring that the provider has a current medical license, do not appear to undertake *any* review of a provider's competency." App. 35a–36a (emphasis added); ROA.7692–7694; see also, *e.g.*, ROA.14155 (116:14–25), ROA.14156 (117–119).

The Plaintiff clinic's lack of concern for basic standards of patient care extends deeper. Doe 1, who performs abortions at the Plaintiff clinic, testified that he had not even read the clinic's policies and procedures for patient safety. ROA.8224–8225. Although the Plaintiff clinic provides a phone number for after-hours emergencies, it is answered by the clinic's administrator, who is not a medical professional. ROA.7560–7561, ROA.7563. Thus, someone with no medical training is deciding, over the phone, whether a patient's symptoms are normal or abnormal, how the patient should handle her medical issues, and whether to refer the patient to a doctor or hospital. ROA.7560–7561.

4. Plaintiffs' proposed findings of fact and conclusions of law, submitted after trial, contained no findings or conclusions on standing or jurisdiction. ROA.1712, ROA.4086. Neither did the district court opinions granting preliminary or final relief, or the opinions of the Fifth Circuit.

## SUMMARY OF ARGUMENT

A plaintiff's standing to sue is never assumed; it must be proven case-by-case, claim-by-claim, and with the evidence necessary to carry the party's burden at each successive stage of a case. *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Yet lower courts rarely apply that principle to one class of litigants: abortion providers purporting to sue on behalf of their patients. The result is a yawning inconsistency in legal standards, creating a favored class of litigants excused from the same standing rules that apply in every other proceeding.

To establish third party standing, (1) "the party asserting the right [must have] a 'close' relationship with the person who possesses the right," and (2) there must be a "'hindrance' to the possessor's ability to protect his own interests." *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004). Courts have typically assumed that abortion providers meet those criteria. *Wulff*, 428 U.S. at 118 (plurality) (stating that third-party standing would "generally [be] appropriate" for abortion providers). But as pointed out by Justice Thomas' dissent in *Whole Woman's Health* v. *Hellerstedt*, when it comes to abortion litigation, that assumption rests on fictions that are increasingly divorced from factual reality and from the rest of this Court's jurisdictional caselaw. 136 S. Ct. 2292, 2321–2323 (2016) (Thomas, J., dissenting); *id.* at 2322 ("Above all, the Court has

been especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn child.").

The record in this case makes clear that the doctor-patient relationship between Plaintiffs and their patients is not "close." Instead, it is shallow, transitory, and, as to the issues in this case, rife with conflicts of interest. Plaintiffs oppose a health regulation intended to provide patients with a protection that Plaintiffs would not otherwise provide, against a factual backdrop showing that such protections matter. That conflict should disqualify Plaintiffs from asserting third-party standing as a matter of law. And the whole history of constitutional litigation over abortion shows that women *can* and *do* assert their own alleged rights in court. Those legal and factual developments show why Plaintiffs lack standing. Should this Court grant the underlying petition, presumptions about Plaintiffs' standing are ripe for reassessment.

Separate from whether Plaintiffs have third-party standing, this Cross-Petition presents the question whether this Court can reach that issue. Plaintiffs' third-party standing was not addressed below. And this Court has never resolved whether objections to third-party standing — which go to *prudential* limits on a federal court's jurisdiction — can be waived or forfeited. There is an acknowledged circuit split on the question, which at least nine circuits have divided on. Resolving that split — if, again, this Court elects to

review the merits — independently justifies this Court's review as well.

## ARGUMENT

### I. IF THIS COURT GRANTS REVIEW, IT SHOULD RESOLVE A CONFLICT BETWEEN THIS COURT'S GENERAL THIRD-PARTY STANDING DOCTRINE AND THE LOWER COURTS' NEARLY UNIFORM REFUSAL TO APPLY IT IN THE ABORTION CONTEXT.

The lower courts in this case implicitly assumed that Plaintiffs have "a 'close' relationship with" their patients and that there is a "'hindrance' to [Plaintiffs' patients'] ability to protect [their] own interests." *Kowalski*, 543 U.S. at 130. But that approach conflicts with third-party standing decisions of this Court in other contexts. Accordingly, if the Court grants the underlying Petition, the first question presented merits this Court's review. This case is an excellent vehicle to resolve that issue.

### A. Lower courts, including the courts below, routinely and improperly ignore this Court's general doctrine on third-party standing in abortion cases, effectively creating an "abortion exception" to that doctrine.

Standing is a "threshold requirement"[11] that a plaintiff must prove in every case. "[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561; see also *Lewis*, 518 U.S. at 358 n.6 ("[S]tanding is not dispensed in gross."). Even when a plaintiff *pleads* standing, he still must *prove* it at trial. *Whitford*, 138 S. Ct. at 1931–1933. Most importantly for this case, a party generally "must assert his own legal rights and interests, and cannot rest his claim on the legal rights of third parties." *Kowalski*, 543 U.S. at 129. Exceptions to that general rule are limited to situations where the plaintiff proves a "close" relationship with the third-party who is somehow "hinder[ed]" from asserting her own rights. *Id.*

Yet in the abortion context, lower courts typically assume — often without any analysis whatsoever — that abortion providers may challenge *any* abortion

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[11] See, *e.g.*, *Gill* v. *Whitford*, 138 S. Ct. 1916, 1923 (2018); *Kowalski*, 543 U.S. at 129 (addressing "threshold question whether [Plaintiffs] have standing to raise the rights of others").

regulation on behalf of their clients, including laws designed to ensure that women do not receive substandard care *from* their abortion providers. There is no sound basis for any presumption that abortion providers have the requisite "close" relationship with their patients, or that patients are generally "hindered" from asserting their own rights.

1. When it comes to abortion, even when courts pay lip service to the third-party standing doctrine, they rarely engage in the sort of individualized, case-by-case analysis required by this Court's precedent. Instead, they appear to believe that *Singleton* v. *Wulff* created a blanket abortion exception to *jus tertii* and granted abortion providers standing to assert their prospective clients' rights to challenge *any* abortion regulation in *any* context.

As Judge Posner put it for the Seventh Circuit in *Planned Parenthood of Wisconsin* v. *Schimel*, "[t]he cases are legion that allow an abortion provider . . . to sue to enjoin as violations of federal law . . . state laws that restrict abortion." 806 F.3d 908, 910 (7th Cir. 2015). The rationale of these decisions is simple: "A suit by clinics and doctors seeking injunctive relief . . . *gives the women what they want.* If the clinics and doctors win, the patients win." *Id.* (emphasis added). But there is no basis to simply assume that women will always "win" and get "what they want" when the court allows a *doctor* to use *women's* rights to challenge health and safety standards designed to protect women from those very doctors.

Judge Posner is right about one thing: A "legion" of abortion cases have failed to rigorously apply, on a case-by-case basis, the "closeness" and "hindrance" requirements of the third-party standing doctrine. All circuits except the Second and D.C. Circuits have handled third-party standing of abortion providers similarly — *i.e.*, with little or no analysis — making the issue ripe for this Court's resolution. The following is a sampling of relevant decisions:

- First Circuit: *Planned Parenthood of N. New England* v. *Heed*, 390 F.3d 53, 56 n.2 (1st Cir. 2004) (finding standing), *vacated sub nom. Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320 (2006).
- Third Circuit: *Am. Coll. of Obstetricians & Gynecologists, Penn. Section* v. *Thornburgh*, 737 F.2d 283, 289 n.6 (3d Cir. 1984) (finding standing), *aff'd sub nom. Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).
- Fourth Circuit: *Greenville Women's Clinic* v. *Bryant*, 222 F.3d 157, 194 n.16 (4th Cir. 2000) (finding standing).
- Fifth Circuit: *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 748 F.3d 583, 589 & n.9 (5th Cir. 2014) (finding standing); *Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448 (5th Cir. 2014) (leaving standing unaddressed).

- Sixth Circuit: *Women's Med. Prof'l Corp.* v. *Baird*, 438 F.3d 595 (6th Cir. 2006) (leaving standing unaddressed).
- Seventh Circuit: *Schimel*, 806 F.3d 908 (discussed above).
- Eighth Circuit: *Comprehensive Health of Planned Parenthood Great Plains* v. *Hawley*, 903 F.3d 750, 757 n.7 (8th Cir. 2018) (finding standing).
- Ninth Circuit: *Planned Parenthood of Idaho* v. *Wasden*, 376 F.3d 908, 917–918 (9th Cir. 2004) (finding standing); *Isaacson* v. *Horne*, 716 F.3d 1213, 1221 (9th Cir. 2013) (finding standing).
- Tenth Circuit: *Planned Parenthood of Rocky Mountains Servs.* v. *Owens*, 287 F.3d 910 (10th Cir. 2002) (leaving standing unaddressed).
- Eleventh Circuit: *Planned Parenthood Ass'n of Atlanta Area,* v. *Miller*, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991) (finding standing).

As shown in more detail below, the widespread assumption that abortion providers properly have standing to challenge abortion regulations on behalf of their patients makes no sense, especially in challenges to health regulations. The current abortion exception to standing requirements is at odds with standing jurisprudence in all other areas of law and should be rejected. And insofar as any of this Court's

decisions require or assume a more deferential approach to the standing of abortion providers, they should be repudiated.[12]

2. Under this Court's decisions, the first requirement for third-party standing (other than an independent injury-in-fact sufficient to satisfy Article III) is a "close" relationship between the Plaintiff and the supposedly represented party. *Kowalski*, 543 U.S. at 130. Where abortion providers challenge a State health standard (particularly against a backdrop of their own substandard medical care and oversight of care), providers and their patients not only lack a "close" relationship, their interests are in conflict.

In other contexts, when there is a potential conflict of interest between a plaintiff and the parties he purports to represent, third-party standing is lacking. See *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 15 & n.7 (2004) (third-party standing vitiated by potential conflict of interest); *Kowalski*, 543 U.S. at 135 (Thomas, J., concurring) (third-party standing inappropriate when litigants "may have very different interests from the individuals whose rights they are

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[12] See *Franchise Tax Bd.* v. *Hyatt*, 587 U.S. ___, No. 17-1299 (2019), Slip Op. at 17 (weight of precedent depends on "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision"); *Casey*, 505 U.S. at 855 (joint opinion) (*stare decisis* gives way when subsequent legal developments leave it as "no more than a remnant of abandoned doctrine," or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification").

raising"). In any abortion case involving challenges to State health and safety regulations, the conflict of interest between clinics and their patients is patent and all but inevitable. They therefore do not and cannot have the kind of "close relationship" ordinarily required for third-party standing. See, *e.g.*, *Newdow*, 542 U.S. 15 & n.7.

3. Nor is there any basis for a general presumption that patients are "hindered" from asserting their own interests, even though lower courts routinely assume abortion patients face hindrances in asserting their own rights. See, *e.g.*, *Abbott*, 748 F.3d at 589 & n.9; *Isaacson*, 716 F.3d at 1221.

At the threshold, the notion that women considering abortion are unable to assert their own rights is a legal fiction belied by this Court's abortion caselaw. As Justice Thomas has put it, "women seeking abortions have successfully and repeatedly asserted their own rights before this Court." *Hellerstedt*, 136 S. Ct. at 2323 & n.1 (Thomas, J., dissenting) (collecting nine Supreme Court cases in which "women seeking abortions … capably asserted their own rights, as plaintiffs"). If "Mary Doe," the pregnant plaintiff in the companion case to *Roe* v. *Wade*, could challenge a statute requiring that an abortion be performed in a hospital, see *Doe* v. *Bolton*, 410 U.S. 179, 184 (1973), there is no principled reason to guess that a woman cannot

challenge a hospital admitting-privileges requirement too.[13]

The *Wulff* plurality identified two potential obstacles to patients directly challenging abortion-related laws. "For one thing, she may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim." 428 U.S. at 117. But in the same paragraph, the *Wulff* plurality recognized that those obstacles are insubstantial. The plurality noted that this Court had already long agreed that such women could proceed pseudonymously. *Id.* ("Suit may be brought under a pseudonym, as so frequently has been done."); see also *Doe*, 410 U.S. at 184 ("[D]espite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state[.]") (citing *Roe* v. *Wade*, 410 U.S. 113 (1973)).[14] And the *Wulff* plurality also allowed that "[a] woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is capable of repetition yet evading review." *Wulff*, 428 U.S. at 117 (citing *Roe*, 410 U.S. at 124–125). It is no

[13] Even today, abortion patients do challenge abortion statutes in their own name, see *McCormack* v. *Herzog*, 788 F.3d 1017 (9th Cir. 2015), or through legal guardians, see *Azar* v. *Garza*, 138 S. Ct. 1790 (2018).

[14] The district court in this case employed the same device for the benefit of Plaintiff doctors; there is no reason it could not have done so for a patient.

stretch to say that *Wulff* "conceded that the traditional criteria for an exception to the third-party standing rule were not met." *Hellerstedt*, 136 S. Ct. at 2322–2323 (Thomas, J., dissenting).

The *Wulff* plurality excused those obvious defects with the assertion that "there seems little loss in terms of effective advocacy from allowing its assertion by a physician." 428 U.S. at 117–118. But cases like this one illustrate why that is not true: As Justice Thomas has observed, allowing abortion providers to proceed without a single patient in sight "deprives [the Court] of the information needed to resolve that issue," including "how many women [might be burdened]; their proximity to open clinics; or their preferences as to where they obtain abortions, and from whom." 136 S. Ct. at 2323. That is exactly what happened here, where Plaintiffs did not present evidence of the preferences or needs of any abortion patients — or even any sociological study specific to Louisiana women — at trial. See *supra* at 10–11.

It may be that in some special circumstances, women would be unable to challenge abortion regulations on their own behalf. But that is a matter to be proven, not assumed. *Lujan*, 504 U.S. at 561; see also *Lewis*, 518 U.S. at 358 n.6. And if this Court grants the underlying Petition, this Court should grant review to make that clear to the lower courts.

### B. This case is an excellent vehicle for resolving the first question presented.

Each of the flaws in lower courts' treatment of the third-party standing of abortion providers is well illustrated in the present case, making it an excellent vehicle for resolving the first question presented.

1. The record in this case confirms that — as in other cases involving challenges to abortion safety standards — Plaintiffs' interests conflict with their patients'. Plaintiffs' case assumes their patients have an interest in seeking an abortion from a doctor qualified to provide one. See *Wulff*, 428 U.S. at 117–118 (discussing third-party standing in context of the "abortion decision"). But Plaintiffs' *own* interest — and that of other Louisiana abortion providers — is to reduce their present and future compliance obligations while providing as many abortions as possible. That leads to at least three kinds of conflicts evidenced by the record.

*First*, Act 620 would require Plaintiffs to adopt a standard of patient care higher than they would otherwise provide (and which happens to be analogous to standards Louisiana already applies to other outpatient surgeries).[15] There is no real ground for disagreement that doctors and patients have conflicting interests regarding health and safety requirements. That conflict exists regardless of the *merits* of how

[15] See La. Admin. Code § 48:4535(E)(1).

much Act 620 serves the purpose of patient health and safety — an issue the parties contest.[16]

Here, moreover, the record shows that Plaintiffs are paid on a per-procedure basis and, like any business, have a financial incentive to minimize expense and maximize profit. See *supra* at 5–6. The Plaintiff clinic — where both Doe 1 and Doe 2 practice, and where Doe 3 is medical director — has repeatedly acted *contrary* to the safety of its patients, given its repeated citations for practices that threaten patient health.[17] *E.g.*, ROA.7598–7600, ROA.7602–7605, ROA.7609–7611, ROA.7614, ROA.7563. Without State regulation, the Plaintiff clinic's health record would presumably be even worse. The clinic has also shown disregard for the very concern that Act 620 is supposed to address: credentialing and qualification of clinic staff, including doctors. ROA.7560–7561, ROA.7563, ROA.7614, ROA.7690–7694, ROA.8224–

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[16] That this case involves a challenge to a health statute distinguishes *Wulff*. *Wulff* — where a plurality of this Court stated that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decisions" — involved a challenge to limits on State *funding* for abortions. 428 U.S. at 118. Even if doctors and patients had the same interest in having the State pay for abortions, the conflict is plain where abortion providers resist health protections for their patients. But if *Wulff* conflicts with the correct standards of third-party standing, it should be overruled.

[17] Plaintiffs, again, are not alone in that regard. As shown above, health violations and professional disciplinary sanctions affect the whole class of Louisiana abortion providers. See *supra* at 11–13.

8225. For Plaintiffs to resist a higher standard that would provide women with greater confidence in their doctor's competency is a textbook example of a conflict of interest. Yet the lower courts simply assumed that Plaintiffs maintained third-party standing.

*Second*, the efforts of Louisiana abortion doctors to sabotage their own privileges applications likewise shows a conflict with their patients. As the panel concluded, "the vast majority [of active Louisiana abortion providers who lack privileges] largely sat on their hands, assuming that they would not qualify." App. 41a. "At least three hospitals have proven willing to extend privileges" to abortion providers, and "Doe 2, Doe 5, and Doe 6 could likely obtain privileges" if they made a good-faith effort to obtain them. App. 46a. But even though a good-faith effort to comply with Act 620 would have enabled those doctors to continue providing abortions to their patients, they chose not to do so. *Id.*

The likeliest reason for the doctors' failure to make a good-faith effort to satisfy Act 620 is that they would have run the risk of *succeeding*, thereby undermining their claims that Act 620 was unduly burdensome.[18] Louisiana abortion providers thus were willing to risk their ability to serve abortion patients in order to pursue their own business or policy goals in court. It disserves Louisiana women if parties willing to trade

[18] The record contains evidence supporting that inference. ROA.15286.

their patients' interests for their own gain have standing to represent them.

*Third*, the conflict between Plaintiffs' patients' alleged interest in abortion services and Plaintiffs' own interests led Plaintiffs to take litigation positions that the patients themselves never would have taken or agreed with. In the lower courts, Louisiana always argued that Doe 2's "courtesy" privileges at Tulane would qualify him to provide abortions if Act 620 went into effect. On Plaintiffs' theory of the case that would seem to be a *good* thing, consistent with the claimed interests of patients in having more doctors available to perform abortions. And it presumably would be in line with the interests of any patients with whom Doe 2 claimed a "close" relationship, such that they would seek an abortion from him.

But instead of agreeing to Louisiana's interpretation of the admitting privileges requirement, Plaintiffs insisted that Doe 2's privileges would *not* qualify and that he would *not* rely on them to perform abortions if Act 620 went into effect. It is Doe 2's position, not Louisiana's, that would limit his ability to provide abortions.[19] Plaintiffs thus went out of their way to

[19] It is conceivable that a change in Louisiana's interpretation of Act 620 could affect Doe 2's ability to perform abortions on *future* patients. But *Kowalski* holds that a plaintiff cannot assert third-party standing on behalf of hypothetical individuals he may have a doctor-patient relationship with in the future. 543 U.S. at 131 (attorneys cannot assert third-party standing to represent interests of "hypothetical" future clients). And assuming arguendo

take a legal position contrary to their patients' presumable interests (and contrary to any position patients themselves would take were they here to pursue their own claims).

The bad faith of Louisiana abortion doctors, including Plaintiffs — set, again, against the backdrop of conflicting interests in safety regulation — vitiates third-party standing in this case.

2. Not only are Plaintiffs and their patients in conflict, but their relationship lacks the "closeness" of a traditional relationship between a doctor and a patient. The Plaintiff clinic is only a business; it therefore cannot enjoy a doctor-patient relationship with patients. And even as to Louisiana abortion *doctors*, including the Plaintiff doctors, there is no evidence of a close relationship: The doctors perform very brief procedures on drugged patients whom they never saw before and will never see again. ROA.7574–7575, ROA.7667, ROA.7730–7731, ROA.7891–7894, ROA.8228–8229, ROA.10162. Most patients do not appear to believe they have a close relationship to their abortion providers, failing even to come back for their follow-up appointments. ROA.7574–7575,

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that such a change occurred, the clinic and the doctor would have administrative and judicial remedies under State law. La. Rev. Stat. §§ 49:961, 49:962, 49:963, 49:964, 49:965; La. Rev. Stat. § 40:2175.6(G)–(H). The fact that Doe 2 continues to challenge Act 620 itself rather than pursue those remedies at the appropriate time further illustrates the conflict between him and his patients.

ROA.7891–7894. Plaintiffs could not even *find* a patient willing to testify at trial, even with the confidentiality procedures the district court adopted. See, *e.g.*, ROA.1651 (anonymization of third parties), ROA.7640 (witness testifying behind a screen). At least in this case, presuming a close doctor-patient relationship conflicts with the record.

At most, the record establishes that Plaintiffs are vendors of abortion services. Plaintiffs may argue that that is enough to justify their standing. See *Craig* v. *Boren*, 429 U.S. 190, 195–196 (1976) (holding that a beer vendor could assert the equal-protection rights of a subset of her customers). It is a long step, though, from an ordinary vendor representing her customer's interest in making a purchase to a doctor representing a patient's interest in safety when she makes one of the most "grave" decisions she can ever face. *Gonzales*, 550 U.S. at 159. At any rate, even if vendors in *some* cases have standing to represent their patients, Plaintiffs in *this* case still have to prove the requisite elements of a close relationship and aligned interests, which they failed to do.

Assuming, furthermore, Plaintiffs rely solely on their status as vendors, that merely creates another conflict with cases that rest the third-party standing of abortion providers on their *medical* role, not merely as vendors. See, *e.g.*, *Wulff*, 428 U.S. at 117 & n.7; *Schimel*, 806 F.3d at 910; *Abbott*, 748 F.3d at 589; *Isaacson*, 716 F.3d at 1221; *Miller*, 934 F.2d at 1465 n.2. If Plaintiffs wish to assert standing in their status as providers of a service that some women happen to

want to pay for, all parties would be better served by candor. Regardless, lower courts would benefit from clarification of whether, when, and why abortion providers have a sufficiently close relationship with their patients to justify third-party standing.

3. While the lower courts in this case did not address the existence of any "hindrance" to self-representation, there is no record evidence of such an obstacle. No past or prospective patient of Plaintiffs' testified, and Plaintiffs presented no explanation for their patients' absence from the case. As noted previously, there may be special cases where an abortion provider can prove that women cannot challenge a given abortion regulation on their own behalf. But Plaintiffs did not do so here — and the lower courts did not inquire. The fact that courts in abortion cases *assume* a jurisdictional fact that must be *proven* case-by-case creates a conflict that deserves review and correction, if this Court grants the Petition.

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As Justice Thomas's dissent in *Hellerstedt* explained, the real result of the special treatment of abortion providers is not to protect women, but to make it easier for abortion providers and their attorneys to obfuscate the evidence. 136 S. Ct. at 2323. It also encourages abortion providers and their lawyers to pursue their own legal agenda under the pretense of patient care. If the Court grants the underlying Pe-

tition, it should also grant the Cross-Petition to confirm that the ordinary rules of third-party standing apply even in abortion cases.

## II. IF THIS COURT GRANTS REVIEW, IT SHOULD RESOLVE A CIRCUIT SPLIT OVER WHETHER OBJECTIONS TO THIRD-PARTY STANDING ARE WAIVABLE.

The question of third-party standing was not addressed below by the parties or the lower courts. But because the facts of this case raise the question of Plaintiffs' third-party standing so directly, the case also presents the Court with an opportunity to resolve a circuit split on the question whether objections to third-party standing are waivable.

This Court has historically characterized third-party standing as a question of *prudential* jurisdiction, not one going to a federal court's Article III jurisdiction. *Warth* v. *Seldin*, 422 U.S. 490, 509 (1975); see also *Kowalski*, 543 U.S. at 129 ("[W]e shall assume the attorneys have satisfied Article III and address the alternative threshold question whether they have standing to raise the rights of others."). But it has not definitively resolved the issue whether challenges to prudential jurisdiction may be waived or forfeited, and its *dicta* are not consistent. Compare *Craig*, 429 U.S. at 193–194 (stating that "prudential objectives" of third-party standing doctrine would not be furthered by addressing for the first time on appeal, but holding that the requirements of third-party standing were met), with *Bender* v. *Williamsport Area Sch.*

*Dist.*, 475 U.S. 534, 546 n.8 (1986) (stating that "[t]he rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention," but holding that petitioner lacked Article III standing) (quoting *Warth*, 422 U.S. at 517–518).

The result has been a circuit split. The Fifth, Seventh, Ninth, Tenth, and Federal Circuits hold that prudential standing arguments are waivable. *Bd. of Miss. Levee Comm'rs* v. *E.P.A.*, 674 F.3d 409, 417 (5th Cir. 2012) (holding third-party standing waived); *RK Co.* v. *See*, 622 F.3d 846, 851 (7th Cir. 2010) (holding third-party standing waived); *Bd. of Nat. Res. of State of Wash.* v. *Brown*, 992 F.2d 937, 946 (9th Cir. 1993) (holding third-party standing waived); *Finstuen* v. *Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007) (holding statutory standing waived); *Gilda Indus.* v. *United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006) (holding statutory standing waived); see also *United States* v. *Day*, 700 F.3d 713, 721 (4th Cir. 2012) (dicta) (stating that "issues of prudential standing are non-jurisdictional and may be 'pretermitted in favor of a straightforward disposition on the merits'") (quoting *Finstuen*, 496 F.3d at 1147).[20] But the D.C. Circuit holds that

[20] This Court held in *Lexmark International* v. *Static Control Components* that the doctrine of statutory standing, sometimes called the "zone-of-interests" test, should not be treated as a matter of prudential standing but as going to the question "whether

prudential standing arguments are *not* waivable, *Ass'n of Battery Recyclers* v. *E.P.A.*, 716 F.3d 667, 674 (D.C. Cir. 2013) (statutory standing); *Am. Immigration Lawyers Ass'n* v. *Reno*, 199 F.3d 1352, 1357–1358 (D.C. Cir. 2000) (third-party standing). Panels of the Second and Sixth Circuits have agreed, albeit in dicta. *Thompson* v. *Cnty. of Franklin*, 15 F.3d 245 (2d Cir. 1994) ("The jurisdictional nature of the standing inquiry, therefore, convinces us that we have an independent obligation to examine Thompson's standing under arguments not raised below[.]"); *Comm'ty First Bank* v. *Nat'l Cred. Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) ("We find no authority for the plaintiffs' argument that prudential standing requirements may be waived by the parties."). Courts in circuits that do not appear to have resolved the issue have acknowledged the split. See *Pharm. Research & Mfrs. of Am.* v. *Concanno*n, 249 F.3d 66, 73 & n.3 (1st Cir. 2001), *aff'd sub nom. Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003); *UPS Worldwide Forwarding* v. *United States Postal Serv.*, 66 F.3d 621, 626 n.6 (3d Cir. 1995); *Lucas* v. *Jerusalem Cafe*, 721 F.3d 927, 938–939 (8th Cir. 2013); *Weinshenker for Weinshenker* v. *Berryhill*, No. 1:17-cv-4, 2017 WL 3841861, at *6 (M.D.N.C. Sept. 1, 2017). Such a well-

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[a plaintiff] has a cause of action under the statute" that underlies the claim. 572 U.S. 118, 127–128 (2014). Even if statutory standing cases are discounted, however, the circuit split remains. And even if challenges to so-called statutory standing are waivable, challenges to third-party standing should not be.

recognized circuit split is an obvious candidate for resolution by this Court.

Treating third-party standing as non-waivable would have at least two advantages illustrated by the facts of this case. *First*, it is more consistent with the purposes of limitations on third-party standing. Third-party standing, like Article III standing, protects the integrity and results of the judicial process by ensuring that claims are brought by the right parties. Compare, *e.g.*, *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State*, 454 U.S. 464, 472–474 (1982) (explaining that Article III standing requirements "put[s] the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome"), with *Kowalski*, 543 U.S. at 129 (explaining that limitations on third-party standing exist because "the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation"). Those concerns, whether rooted in Article III or prudential considerations, do not diminish over the course of a case, so there is no reason to artificially force parties to raise them at particular times.

*Second*, unlike in *Craig* — where reaching the question of prudential jurisdiction on appeal would have "foster[ed] repetitive and time-consuming litigation under the guise of caution and prudence," 429 U.S. at 194 — addressing Plaintiffs' third-party standing would foster the efficient administration of justice. In this case, it would have been futile for Defendants

to raise Plaintiffs' third-party standing in the lower courts because the Fifth Circuit resolved the issue before Plaintiffs filed suit. In *Planned Parenthood of Greater Texas Surgical Health Services* v. *Abbott*, the Fifth Circuit addressed the Texas hospital admitting privileges law that was eventually enjoined in *Hellerstedt*. 748 F.3d 583. Texas argued that the abortion providers lacked third-party standing to challenge the admitting-privileges requirement, but the panel held that "doctors who perform abortions share a sufficiently close relationship with their patients, and … a pregnant woman seeking to assert her right to abortion faces obvious hindrances in timely now bringing a lawsuit to fruition." *Id.* at 589. Although the panel acknowledged that "the doctor's economic incentives regarding the performance of abortions may not always align with a woman's right to choose to have an abortion," it was "convinced that . . . no such conflict exists here[.]" *Id.* at 589 n.9.

*Abbott* was controlling throughout the pendency of this case in the lower courts. Given the *Abbott* panel's categorical statements about abortion providers' standing to challenge an admitting-privileges requirement, there would have been little point in raising the issue below except to waste the resources of the parties and lower courts.

More broadly, dozens of challenges to abortion laws are now pending in federal courts and *in virtually all of them* the rights of patients are nominally represented by abortion providers (many of them re-

peat litigants). Many of those cases, like this one, involve challenges to health and safety standards. Thus, vast resources are spent every year on cases that rest on jurisdictional assumptions that are not only unexamined, but often false.

To take one example, in a whole series of cases filed in the last two years abortion providers have challenged the "cumulative" effects of entire State licensing regimes intended to make sure that women obtain abortions in safe environments. *June Med. Servs.* v. *Gee*, No. 3:16-cv-444 (M.D. La.), Doc. 88 at 39; *June Med. Servs.* v. *Gee*, No. 3:17-cv-404 (M.D. La.), Doc. 87 at 53; *Jackson Women's Health Org.* v. *Currier*, No. 3:18-cv-171 (S.D. Miss.), Doc. 23 at 55; *Whole Woman's Health All.* v. *Paxton*, No. 1:18-cv-500 (W.D. Tex.), Doc. 1 at 39; *Whole Woman's Health All.* v. *Hill*, No. 1:18-cv-1904 (S.D. Ind.), Doc. 1 at 39; *Falls Church Med. Ctr.* v. *Oliver*, No. 3:18-cv-428 (E.D. Va.), Doc. 41 at 62; *Planned Parenthood Ariz.* v. *Brnovich*, No. 4:19-cv-207 (D. Ariz.), Doc. 1 at 54. The result of such suits, if they are successful, would be to liberate a State's abortion providers from broad categories of health and safety regulation. The conflict between the abortion providers and the patients that the States wish to protect is obvious; the resources that will be spent litigating those challenges will be immense. But there is no reason to expect lower courts to scrutinize the standing of the providers unless this Court acts. Particularly if this Court grants the Petition — and will already be devoting resources to this case and its facts — granting the Cross-Petition will be an efficient

means of timely addressing important issues in a suitable factual context.

## CONCLUSION

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

Respectfully submitted.

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