No. 18-1460

# In The Supreme Court of the United States

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

*v.*

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, d/b/a Hope Medical Group for Women; John Doe 1; John Doe 2, CROSS-RESPONDENTS.

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

## OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

TRAVIS J. TU
*Counsel of Record*
MARC A. HEARRON
JULIE RIKELMAN
JESSICA SKLARSKY
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
Tel: (917) 637-3627
Email: tjtu@reprorights.org

*Counsel for Cross-Respondents*

AUGUST 23, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTIONS PRESENTED BY CROSS-PETITION

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

2. Should the Court revisit its oft-reaffirmed decision in *Singleton v. Wulff*, 428 U.S. 106 (1976), and consider whether abortion providers have third-party standing to assert the rights of their patients, where Cross-Petitioner failed to present relevant facts or arguments below and admits there is no circuit split on the issue?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Cross-Respondents are June Medical Services L.L.C., a clinic doing business as Hope Medical Group for Women, and two physicians who provide abortion care and were identified in the proceedings below by the pseudonyms Dr. John Doe 1 and Dr. John Doe 2. Cross-Respondents are collectively referred to as "Hope" or "Plaintiffs." Hope has no parent company, and no publicly held company owns 10 percent or more of its stock.

Cross-Petitioner is Dr. Rebekah Gee in her official capacity as Secretary of the Louisiana Department of Health and Hospitals ("LDH"). Cross-Petitioner is referred to as "Louisiana."

## RELATED CASES

*Women's Health Care Ctr., Inc. v. Kliebert*, No. 3:14-cv-597 (M.D. La.), consolidated with No. 3:14-cv-00525, on Sept. 24, 2014, and judgment entered on Dec. 11, 2014.

*June Med. Servs. v. Gee*, No. 16-30116 (5th Cir.), judgment entered on Feb. 24, 2016.

*June Med. Servs. v. Gee*, No. 15A880 (S. Ct.), judgment entered on Mar. 4, 2016.

*June Med. Servs. v. Gee*, No. 16-30116 (5th Cir.), judgment entered on Aug. 24, 2016.

*June Med. Servs. v. Kliebert*, No. 3:14-cv-00525 (M.D. La.), judgment entered on Apr. 26, 2017.

*June Med. Servs. v. Gee*, No. 17-30397 (5th Cir.), judgments entered on Sept. 26, 2018 and Jan. 18, 2019.

*June Med. Servs. v. Gee*, No. 18A774 (S. Ct.), judgment entered on Feb. 7, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## INTRODUCTION

Louisiana's conditional cross-petition should be denied because the third-party standing issue it seeks to present is unworthy of review on its own and is especially unworthy of review in this case, where the state expressly conceded the jurisdiction of the courts below and waived any challenge to Plaintiffs' standing.

Under Louisiana's view of the law, whether Plaintiffs appropriately assert the constitutional rights of women seeking abortions in Louisiana is a fact-bound question that may be answered only after an appropriate factual inquiry. This argument, if it had merit, would provide a powerful reason to deny review, not to grant it: Louisiana did not contest third-party standing below, and for that reason, no record expressly directed to the state's admittedly fact-dependent standing objections was developed.

All the considerations supporting waiver—conservation of judicial resources, avoidance of wasteful litigation, deference to district courts as the finders of fact, and respect for the role of appellate courts by not asking them to decide issues in the first instance—are strongly implicated by Louisiana's effort to raise this issue for the first time before this Court. The Court has made clear that such prudential standing arguments are waivable. No court has held to the contrary. The overriding question whether Louisiana

may be excused from its failure to preserve the third-party standing challenge it now belatedly seeks to mount is not suitable for review.

The underlying question is likewise not worthy of certiorari, much less in this case. The Court has repeatedly held that abortion providers who face sanctions from enforcement of abortion restrictions are appropriate parties to assert their patients' abortion rights. That alignment of interests has been recognized as a matter of law, and Louisiana's argument that third-party standing should be subject to case-by-case relitigation has no legal support. In fact, the state's position is contrary to the Court's treatment of third-party standing in other contexts, where certain relationships have been held to support *jus tertii* standing without the need for repeated factual inquiry.

Of course, there was no factual inquiry expressly directed to third-party standing here because Louisiana did not seek it. Nevertheless, the district court's findings of fact on the merits of Plaintiffs' constitutional claims refute the state's assertions that conflicts of interest between abortion providers and patients exist, and that hindrances to women asserting their constitutional rights do not.

Abortion providers' third-party standing to raise the constitutional rights of their patients is foundational to the Court's abortion jurisprudence and in keeping with the Court's time-honored precedents on third-party standing. Moreover, given the obstacles that women face in asserting their rights to abortion,

the continued ability of abortion providers to assert their patients' rights is vital to the constitutional right to access safe and legal abortion. There is no reason for the Court to reexamine decades of settled precedent on this issue, and Louisiana's plain waiver below makes it entirely improper to do so in this case.

## JURISDICTION

Hope filed a petition for certiorari on April 17, 2019, No. 18-1323, which was docketed on April 19, 2019. *See* 28 U.S.C. § 2101(c); 28 U.S.C. § 1254(1). Louisiana filed its conditional cross-petition on May 20, 2019, challenging for the first time Plaintiffs' third-party standing to sue on behalf of their patients. *See* S. Ct. R. 12.5.

## COUNTERSTATEMENT OF THE CASE

Conspicuously absent from Louisiana's statement of the case is any mention of the state's failure to challenge Plaintiffs' third-party standing in the proceedings below. Hope's petition for certiorari describes in detail the procedural history of this case. Only so much is repeated here as is necessary to document the extent of the state's waiver.

Hope and two of its physicians, identified by the pseudonyms Dr. Doe 1 and Dr. Doe 2, filed this pre-enforcement challenge to La. Rev. Stat. § 40:1061.10 ("Act 620") in August 2014. Compl., ECF No. 1. Over the next several years, the parties extensively litigated the constitutionality of Act 620 through dismissal motions,

temporary and preliminary injunction proceedings, summary judgment, and trial.

Louisiana did not dispute Plaintiffs' third-party standing before the district court. Rather, Louisiana expressly acceded to the district court's jurisdiction. *See* Answer of Def. Kathy Kliebert to *June Med. Servs.* Am. Compl. 2, ECF No. 64 (admitting to the existence of jurisdiction in federal court). Louisiana urged the district court to reach the merits of Plaintiffs' claims. *See, e.g.*, Min. Entry of Aug. 8, 2016 Telephone Status Conference, ECF No. 253 (Louisiana "agree[d]" on remand following *Whole Woman's Health* "that it is now time to work towards the permanent injunction . . . [and] agreed that no additional evidence needs to be presented in this matter"). And even when the case was tried, Louisiana proposed no findings of fact or law disputing Plaintiffs' third-party standing or the district court's jurisdiction. *See* Sealed Def.'s Proposed Findings of Fact & Conclusions of Law, ECF No. 200.

Louisiana's waiver was repeated on appeal. Twice Louisiana appealed to the Fifth Circuit seeking reversal of a district court order enjoining enforcement of Act 620. On appeal from the district court's preliminary injunction order, Louisiana did not complain of any defect in third-party standing.[1] Def.'s Mem. in

[1] Even though Louisiana did not contest it, the Fifth Circuit acknowledged Plaintiffs' third-party standing in its decision granting Louisiana's requested stay of the preliminary injunction order. *June Med. Servs., L.L.C. v. Gee*, 814 F.3d 319, 322 (5th Cir. 2016), *vacated*, 136 S. Ct. 1354 (2016) ("the physician plaintiffs have standing to assert the rights of their prospective patients").

Supp. of Mot. for Stay Pending Appeal, for Expedited Consideration, & for Temp. Stay, ECF No. 229-1. Nor did Louisiana raise third-party standing when it appealed the district court's grant of a permanent injunction. To the contrary, Louisiana conceded before the Court of Appeals that jurisdiction in the federal courts exists:

| **Louisiana's Statement of Jurisdiction to the Court of Appeals** |
| --- |
| "The district court had subject-matter jurisdiction over this constitutional challenge to [Act 620] under 28 U.S.C. § 1331. . . . This Court has jurisdiction over this appeal from a final decision of the district court under 28 U.S.C. § 1291." Corrected Br. of Appellant Dr. Rebekah Gee–Redacted 2. |

Louisiana's waiver extends to proceedings before this Court. Twice Louisiana opposed Plaintiffs' emergency applications to the Court to stay rulings by the Court of Appeals that would have enabled Louisiana to begin enforcing Act 620. Louisiana made no mention of third-party standing in opposition to Plaintiffs' request in 2016 to vacate the Fifth Circuit's stay of the district court's preliminary injunction order. *See* Resp't's Opp'n to Emergency Appl. to Vacate Stay of Prelim. Inj. Pending Appeal. Louisiana also did not raise third-party standing in opposition to Plaintiffs' request, earlier this year, to stay the Fifth Circuit's mandate after final judgment. *See* Obj. to Emergency Appl. for a Stay

Pending the Filing & Disposition of a Pet. for a Writ of Cert.

On April 17, 2019, Hope filed its petition for certiorari, urging the Court to summarily reverse the Fifth Circuit's decision in light of its conflicts with *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) and other binding precedents. Louisiana responded with this conditional cross-petition, asserting for the first time that Plaintiffs lack third-party standing and, therefore, that federal jurisdiction does not exist.

Highlighting its about-face on this issue, Louisiana's cross-petition includes a statement of jurisdiction that states exactly the opposite of what it previously represented to the Court of Appeals:

| **Louisiana's Statement of Jurisdiction to the U.S. Supreme Court** |
| --- |
| "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." Cross-Pet. 3. |

Louisiana includes the identical eleventh-hour denial of jurisdiction in its brief in opposition to Plaintiffs' petition for certiorari. Br. in Opp'n 1, No. 18-1323.

## REASONS FOR DENYING THE CROSS-PETITION

Louisiana's conditional cross-petition for certiorari should be denied because Louisiana waived any challenge to Plaintiffs' third-party standing in the proceedings below. Moreover, even if waiver were not present, whether abortion providers have third-party standing to assert the rights of their patients, especially when the abortion providers are themselves subject to sanction for violation of the challenged restrictions, is a question the Court has answered in the affirmative numerous times. Louisiana concedes there is no circuit split on this issue, and the state's objections to abortion providers' third-party standing lack merit.

### I. WHETHER THIRD-PARTY STANDING IS WAIVABLE IS NOT A QUESTION WORTHY OF CERTIORARI

Louisiana asks the Court to resolve a purported circuit split over whether objections to prudential standing are waivable. Implicit in this question is a concession that Louisiana tiptoes around but cannot seriously deny: Louisiana waived any challenge to third-party standing in the proceedings below.

#### A. Louisiana's Waiver Was Plain

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This traditional rule of waiver extends to third-party standing, especially "where the lower court already has entertained the relevant constitutional challenge

and the parties have sought or at least have never resisted an authoritative constitutional determination." *Craig v. Boren*, 429 U.S. 190, 193 (1976).

That is precisely the situation here. The district court presided over this case for years, delving deeply into Act 620's constitutionality and the provision of abortion in Louisiana. Louisiana did not resist the district court's jurisdiction. In fact, Louisiana admitted that federal jurisdiction was proper and joined Plaintiffs in seeking a determination on the merits regarding Act 620's constitutionality. *See supra* pp. 3-4.

Louisiana cemented its waiver on appeal, conceding to the Court of Appeals that federal jurisdiction exists and raising no objections to Plaintiffs' standing. *See supra* pp. 5-6.

Louisiana interjected the issue of third-party standing for the first time nearly five years into this litigation, and only after the Court granted Plaintiffs' emergency application to stay the Fifth Circuit's mandate. The federal courts (including this Court), however, have already invested substantial resources in the issues at the heart of Plaintiffs' claims. Louisiana's third-party standing arguments were never analyzed or ruled upon below. No facts supporting Louisiana's objections to abortion providers' standing were found by the district court. Yet Louisiana apparently wants the Court to decide this issue in the first instance based upon a *de novo* review of evidence cherry-picked from the voluminous trial record.

Waiver is meant to protect the judicial system against all these harms. *See Honcharov v. Barr*, 924 F.3d 1293, 1296 (9th Cir. 2019) (waiver is an "important tool[] for preserving the structure of hierarchical court systems by allowing appellate courts to act as courts of review, not first view"); *Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1023 (10th Cir. 2007) (waiver "preserve[s] the integrity of the appellate structure" by ensuring that "an issue must be presented to, considered and decided by the trial court before it can be raised on appeal" (citation omitted)); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 87 (1st Cir. 1990) (waiver prevents "scarce judicial resources" from being "squandered").

There is no reason to excuse Louisiana's waiver. Louisiana argues that its challenge to third-party standing was foreclosed by *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014). Cross-Pet. 36. True, *Abbott* is one of many cases that recognize abortion providers' third-party standing. 748 F.3d at 589. But the existence of adverse precedent does not excuse the state's failure to raise its challenge below. Rather, if a party intends to seek modification or overruling of adverse precedent, the issue must be presented to the district court and preserved for appeal. *See, e.g.*, *United States v. Araguz-Briones*, 170 F. App'x 332, 333 (5th Cir. 2006) (per curiam) (plaintiff "properly concedes that his argument is foreclosed in light of . . . precedent, but he raises it here to preserve it for further review"); *United States v. Turk*, 48 F. App'x 104 (5th Cir. 2002) (per curiam)

(plaintiff "acknowledges that his claim is foreclosed by existing Fifth Circuit precedent and states that he raises the claim solely to preserve it for possible Supreme Court review").

Louisiana knows what is required to avoid waiver. In another abortion case currently pending in federal district court, Louisiana is actively contesting abortion providers' third-party standing. *See* Defs.' Answer to Am. Compl. ¶198, *June Med. Servs., LLC v. Gee*, No. 3:17-cv-00404-BAJ-RLB (M.D. La. Apr. 29, 2019), ECF No. 110 ("This Court lacks jurisdiction over some or all of Plaintiffs' claims because Plaintiffs lack standing to bring them on behalf of their patients[.]"). This makes Louisiana's decision not to challenge third-party standing in this case all the more unjustified.

### B. This Court Has Held Third-Party Standing Is Subject to Waiver

Louisiana's argument that challenges to third-party standing are not waivable is contrary to this Court's precedent.

In *Craig v. Boren*, Oklahoma challenged for the first time on appeal a beer vendor's third-party standing to raise the rights of customers, requiring the Court to confront whether challenges to third-party standing may be waived. 429 U.S. at 192-93. The Court held that third-party standing is subject to waiver. *Id.* at 192-94.

The Court in *Craig* explained that, while Article III standing requirements are jurisdictional and cannot

be waived, the Court's "decisions have settled that limitations on a litigant's assertion of [third-party standing] are" prudential and "not constitutionally mandated." *Id.* at 193. Indeed, if the rule were otherwise, the Court recognized that defendants could strategically delay until final judgment before asserting that the case should have been brought by a different party, which would "impermissibly . . . foster repetitive and time-consuming litigation in the name of caution and prudence" and "serve no functional purpose." *Id.* at 194.

Louisiana does not contend that *Craig* should be overruled. Instead, Louisiana argues that the Court's recognition that third-party standing is prudential and waivable is dicta, and that *Craig* is "not consistent" with *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). Cross-Pet. 32. Louisiana is wrong on both counts.

After holding that third-party standing is subject to waiver, the Court in *Craig* remarked that the plaintiff in any event would have third-party standing under established precedent. 429 U.S. at 194-95. A ruling on two independent grounds, however, does not render any aspect of the decision dicta. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum"); *Union Pac. R.R. Co. v. Mason City & Fort Dodge R.R. Co.*, 199 U.S. 160, 166 (1905) ("each" independent ground for decision "is the judgment of the court, and of equal validity with the other").

*Bender* and *Craig* also do not conflict. *Bender* held that an individual school board member lacks Article III standing to appeal a declaratory judgment against the board as a whole. *Bender*, 475 U.S. at 543. However, because Article III standing is jurisdictional, the Court was constitutionally required to address standing, despite the issue not having been raised below.[2] *Id.* at 541-43. Here, Louisiana does not dispute that Plaintiffs satisfy Article III, and the constitutional standing requirements are clearly met. Abortion providers directly subject to Act 620's onerous admitting privileges requirement have an injury-in-fact caused by the law that would be redressed if it were enjoined. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992) ("there is ordinarily little question" that a plaintiff has standing when "the plaintiff is himself an object" of the government's action); *Singleton*, 428 U.S. at 114 ("there is no doubt" abortion providers "suffer concrete injury" for purposes of Article III from abortion restrictions that impact their ability to care for patients).

### C. There Is No Circuit Split to Be Resolved

Louisiana's argument that the lower courts are divided on whether prudential standing can be waived

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[2] Louisiana strains to read a conflict into a footnote in *Bender*, which quotes an earlier case for the proposition that Article III and prudential standing are "threshold" considerations. 475 at 546 n.8 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). But this statement does not concern waiver; it underscores a plaintiff's "responsibility . . . clearly to allege facts" in its complaint to show that standing exists. *Warth*, 422 U.S. at 518.

fails: no courts have held that challenges to third-party standing are non-waivable.

Every court of appeals to address this issue has followed *Craig* and held that challenges to *jus tertii* standing can be waived. *See Bd. of Miss. Levee Comm'rs v. U.S. Envtl. Prot. Agency*, 674 F.3d 409, 417-18 (5th Cir. 2012); *MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 748-49 (7th Cir. 2007); *Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5th Cir. 1999); *Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937, 945-46 (9th Cir. 1993).

Louisiana argues that one D.C. Circuit case is in tension with this line of unanimous precedent, but *American Immigration Lawyers Association v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000), can readily be harmonized. There, the D.C. Circuit held that immigrant-rights groups lacked standing to challenge the federal system for expedited removal of persons not eligible for entry into the United States. *Id.* at 1360-64. While the federal government did not challenge the plaintiffs' third-party standing to raise the rights of noncitizens, the D.C. Circuit found compelling reasons to consider the issue *sua sponte*—namely, Congress manifested a clear intent to foreclose legal challenges by representative plaintiffs by, among other things, prohibiting class actions in the removal statute at issue. *Id.* at 1359-60, 1364.

Explaining its decision, the D.C. Circuit stated that "in this circuit we treat prudential standing as *akin to* jurisdiction" so it is "an issue we *may* raise on

our own." *Id.* at 1357-58 (emphasis added). This passage does not state or imply that objections to third-party standing are never waivable. Rather, the better reading is that, even when a defendant waives the issue, a court "may" raise third-party standing on its own in compelling circumstances, such as when Congress has manifested a clear intent to preclude it.[3]

Other than *American Immigration Lawyers Association*, Louisiana's purported circuit split relies upon cases involving so-called "statutory standing"—the short-hand courts once used when deciding whether plaintiffs fell within the "zone of interests" that Congress intended a statute to protect. *See Ass'n of Battery Recyclers, Inc. v. Envtl. Prot. Agency*, 716 F.3d 667 (D.C. Cir. 2013); *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007); *Gilda Indus. v. United States*, 446 F.3d 1271 (Fed. Cir. 2006); *Thompson v. Cty. of Franklin*, 15 F.3d 245 (2d Cir. 1994); *Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050 (6th Cir. 1994).

True, some courts historically treated challenges to statutory standing as non-waivable. But this Court

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[3] Read appropriately, *American Immigration Lawyers Association* is not in conflict with decisions from other courts of appeals. Several courts of appeals, in fact, have similarly acknowledged their inherent power to raise third-party standing in special cases, even when the issue has been waived. *See, e.g.*, *MainStreet Org.*, 505 F.3d at 749 (explaining that failure to object to third-party standing "is a ground for refusing to consider the doctrine," but it does not "bar[] judicial consideration of it"); *Bd. of Miss. Levee Comm'rs*, 674 F.3d at 417-18 (acknowledging that courts of appeals may consider the propriety of third-party standing *sua sponte*).

clarified in *Lexmark International, Inc. v. Static Control Components*, that these courts had categorically erred in treating statutory standing as a species of prudential standing. 572 U.S. 118, 126-28 & n.3 (2014) ("prudential standing is a misnomer as applied to the zone of interests analysis"). Louisiana's pre-*Lexmark* statutory standing cases are dead letter and have nothing relevant to say about waiver of third-party standing. *Id.*; *see also Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016) (recognizing that *Lexmark* clarified that the "zone of interests" inquiry "in fact is not a standing issue" at all); *Sierra Club v. Envtl. Prot. Agency*, 755 F.3d 968, 976 (D.C. Cir. 2014) (same).

### D. Louisiana's Reasons for Declaring Third-Party Standing Non-Waivable Lack Merit

Certiorari also should be denied because Louisiana's arguments for declaring challenges to third-party standing non-waivable are without merit.

First, Louisiana argues that a rule precluding waiver of third-party standing would be more "consistent with the purposes of limitations on third-party standing." Cross-Pet. 35. The primary purpose of such limits, however, is to prevent courts from being dragged into cases "where the applicable constitutional questions are ill-defined and speculative." *Craig*, 429 U.S. at 193; *see also Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (limits on third-party standing ensure litigants have "appropriate incentive to challenge" and "do so with the necessary zeal and appropriate presentation"). That

concern is obviously not present here, as evidenced by the zealousness with which this case has been litigated and the lower courts' detailed rulings on the merits.

Second, Louisiana argues that defendants should not risk waiver because "there is no reason to artificially force parties to raise [objections to third-party standing] at particular times." Cross-Pet. 35. But if a defendant genuinely believes that a case must be brought by a different party, this issue absolutely should be presented to a court before substantial resources have been invested. The risk of waiver creates that incentive, whereas a rule precluding waiver would inspire more litigation-by-ambush tactics like Louisiana has displayed here.

Finally, Louisiana argues that, given the number of abortion cases brought by physicians and clinics currently pending in federal courts, efficiency would be promoted if the Court were to "clarify" now when abortion providers can and cannot raise the rights of patients. Cross-Pet. 36-38. Louisiana's impatience in seeking to remake the law on abortion providers' third-party standing, however, is not a valid reason to exempt all third-party standing challenges from traditional rules of waiver that apply in every other case.

## II. ABORTION PROVIDERS HAVE THIRD-PARTY STANDING UNDER SETTLED PRECEDENT, AND THERE ARE NO REASONS TO REVISIT THIS ISSUE

Even if Louisiana had not waived the issue, certiorari should be denied as to the question whether abortion providers have standing to raise their patients'

rights. Decades of precedent support abortion providers' assertion of *jus tertii* standing, especially when they are challenging abortion restrictions that subject them to onerous regulatory requirements and risk of sanctions. Louisiana concedes there is no disagreement between lower courts on this issue, and this case is not distinguishable from the legions of others that have affirmed abortion providers' third-party standing.

Louisiana's contention that courts must conduct a case-by-case factual inquiry has no legal support and is contrary to this Court's precedents that have treated third-party standing as a matter of law. Moreover, even if the state's contention had merit, Louisiana's fact-bound objections to abortion providers' third-party standing find no support in the district court's factual findings. In fact, the district court's findings negate the factual premises on which the state's arguments rest.

### A. Lower Court Decisions Recognizing Abortion Providers' Third-Party Standing Are Consistent with This Court's Precedents

Louisiana asks the Court to resolve a "conflict" between the Court's precedents on third-party standing and lower court decisions permitting abortion providers to sue on behalf of their patients, but no such conflict exists. Cross-Pet. 16-32.

Nearly five decades ago, the Court held that abortion providers have third-party standing to assert their patients' constitutional rights to abortion. *See*

*Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("doctors consulted by pregnant women" have third-party standing). The Court has proceeded on that understanding ever since. *See Singleton*, 428 U.S. at 108 ("physicians who perform nonmedically indicated abortions" have third-party standing); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976) (physicians "clearly have standing" to challenge abortion restrictions on behalf of patients); *see also Whole Woman's Health*, 136 S. Ct. at 2301 (permitting "a group of abortion providers" to assert claims on behalf of patients); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 324 (2006) (same for an "obstetrician and gynecologist" and "three clinics that offer reproductive health services"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845 (1992) (same for "five abortion clinics and one physician").[4]

Lower courts have uniformly followed the Court's precedents and emphatically recognize abortion providers' third-party standing. Indeed, Louisiana makes

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[4] *See also Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (same for "doctors who perform second-trimester abortions" and "Planned Parenthood Federation of America, Inc.[ and] Planned Parenthood Golden Gate"); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (same for "a Nebraska physician"); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 752 (1986) (same for "Pennsylvania abortion counselors and providers"), *overruled on other grounds by Casey*, 505 U.S. 833; *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983) ("physician plaintiff . . . has standing to raise the claims of his minor patients"), *overruled in part and on other grounds by Casey*, 505 U.S. 833; *Bellotti v. Baird*, 443 U.S. 622, 626-27 (1979) (same for a physician to assert rights of minor patients).

a compelling case for denying its own petition by cataloguing the "legion" of courts of appeals' decisions affirming the third-party standing of abortion providers. Cross-Pet. 19-20 (summarizing cases from the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

Louisiana also asks the Court to "clarify" that abortion providers are subject to the same principles of third-party standing that apply in other contexts, but the Court has already made this abundantly clear. In *Singleton v. Wulff*, the Court applied the same criteria applied in other third-party standing cases—i.e., whether a close relationship exists between the plaintiff and the third-party whose rights the plaintiff seeks to represent, and whether the third-party is hindered from enforcing its own rights—and found it entirely "appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." 428 U.S. at 118.

*Singleton* has been affirmed many times, and the Court has cited *Singleton* with approval in third-party standing cases having nothing to do with abortion. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 410-14 (1991) (applying *Singleton* in case involving third-party standing of a criminal defendant to assert claims on behalf of an excluded juror); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (citing *Singleton* in case involving third-party standing of an attorney to assert claim on behalf of criminal defendant); *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 954-59 (1984) (citing *Singleton* in case

involving third-party standing of professional fund-raising corporation).

### B. The Court's Precedents Are Not Distinguishable

Louisiana asserts that *Singleton* is "distinguish[able]" because the law disputed in that case concerned funding for abortions, whereas Act 620 is a purported health and safety requirement. Cross-Pet. 26 n.16. *Singleton* is not distinguishable, and in any event, there is no merit to Louisiana's argument that abortion providers have a conflict of interest with their patients when health and safety requirements are concerned.

Third-party standing, if anything, is more firmly rooted in this case than *Singleton* because the law challenged in *Singleton* only *indirectly* regulated physician conduct by denying state funding to patients seeking abortions. 428 U.S. at 111, 114-18. Prior to *Singleton*, the Court held in *Doe* that abortion providers have third-party standing to challenge abortion restrictions that *directly* regulate their conduct under threat of sanctions. 410 U.S. at 188. In fact, by the time *Danforth* was decided in the same term as *Singleton*, the Court had "clearly . . . established" that physicians have standing to assert the rights of patients when the "physician is the one against whom [the challenged statutes] directly operate[]." 428 U.S. at 62.

Louisiana does not distinguish *Doe* and does not even cite *Danforth*, but they plainly control. Act 620 restricts women's access to abortion by imposing onerous requirements directly on physicians, and the law

coerces compliance by threat of criminal sanction, civil penalties, and licensure actions against physicians and clinics. App. 286a-90a; *see also* La. Rev. Stat. §§ 40:1061.10(A)(2)(c), 40:1061.29; La. Admin. Code, tit. 48, pt. I, §§ 4415(B), 4417(A). Like *Doe* and *Danforth*, this is a case where plaintiffs "clearly" have third-party standing, because Hope and its physicians are the ones against whom Act 620 "directly operate[s]," even if the brunt of the constitutional violation is borne by patients. *Danforth*, 428 U.S. at 62.

The Court has also recognized abortion providers' third-party standing in numerous cases challenging purported health and safety regulations. *See City of Akron*, 462 U.S. at 440 n.30 (permitting physicians to raise the rights of patients in challenge to, *inter alia*, a "health regulation" that required second trimester abortions be performed in hospitals); *Danforth*, 428 U.S. at 62, 75-76 (permitting physicians to raise the rights of patients in challenge to, *inter alia*, a ban on a certain method of abortion that the state asserted was "deleterious to maternal health"); *Doe*, 410 U.S. at 188-89, 193-95 (permitting physicians to raise the rights of their patients in challenge to requirement that abortions be performed in accredited hospitals, which supposedly was necessary to protect women's health).

*Whole Woman's Health* is the most recent and on point example. Only three years ago, the Court struck down Texas's admitting privileges law, which the state defended as a necessary health and safety measure, in a case brought by clinics and physicians. *Whole Woman's Health*, 136 S. Ct. 2292. So clear was the

plaintiffs' third-party standing that the majority found it unnecessary to remark upon it. But Justice Thomas made clear in dissent that third-party standing is essential to the Court's holding, noting that the case was "possible only because the Court has allowed abortion clinics and physicians to invoke" a "woman's right to abortion." *Id.* at 2321-22 (Thomas, J., dissenting).

Act 620 is identical to the law struck down in *Whole Woman's Health*, and there is no basis to distinguish the abortion providers who prevailed in that case from Plaintiffs here.

All the Court's precedents involving challenges to abortion regulations that were defended as health and safety measures tacitly reject Louisiana's conflict-of-interest argument. The Court has never denied abortion providers' standing based upon a real or perceived conflict of interest. Courts of appeals, meanwhile, have expressly rejected this conflict-of-interest theory. *See Abbott*, 748 F.3d at 589 n.9 (rejecting conflict-of-interest argument in challenge to admitting privileges law); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 794 (7th Cir. 2013) (same because "women who have or want to have an abortion . . . [are] seeking the same thing the clinics are seeking . . . : invalidating the statute"); *McCormack v. Herzog*, 788 F.3d 1017, 1027-28 (9th Cir. 2015) (rejecting conflict-of-interest argument based upon physicians' purported lack of commitment to patient safety).

*Whole Woman's Health* also highlights a fundamental problem with Louisiana's conflict-of-interest

argument. If the argument had merit, a state could negate an abortion provider's third-party standing in any case, even if its proffered health and safety justifications for the challenged law were pretextual. The Court in *Whole Woman's Health* ultimately determined that all Texas's health and safety justifications for requiring admitting privileges were factually baseless. *See* 136 S. Ct. at 2310-14. However, if the plaintiffs had been denied third-party standing from the outset, the Court never could have made that determination.[5]

### C. No Case-By-Case Factual Inquiry Is Required

Louisiana's argument that courts must conduct a case-by-case factual inquiry into whether abortion providers have third-party standing also fails. Every one of the cases Louisiana cites for this purported obligation concerns Article III standing. *See Lujan*, 504 U.S. at 559-62; *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Louisiana cites no case suggesting that the prudential

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[5] Louisiana's reliance on *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) to support its conflict-of-interest argument is misplaced. Cross-Pet. 21-22. The *Elk Grove* plaintiff was a non-Christian father asserting his Christian daughter's supposed desire not to speak the pledge of allegiance. 542 U.S. at 7-10. Their religious differences gave rise to a potential conflict of interest, but the Court ultimately held that the father lacked third-party standing because, as the non-custodial parent following divorce, he had no legal authority under state law to sue in his daughter's name. *Id.* at 13-14. *Elk Grove* noted that the father's unique legal position relative to his daughter was in "marked contrast" to the physician-patient relationship in *Singleton*. *Id.* at 15.

considerations underlying third-party standing must be replead and proven in every case.

To the contrary, once the Court recognizes that a certain category of plaintiffs (e.g., abortion providers) has standing to assert the rights of third parties (e.g., patients), the Court traditionally has applied the same rule in subsequent cases as a matter of law. *Compare Singleton*, 428 U.S. at 112-18 (analyzing physicians' standing under the established test for third-party standing) *with Danforth*, 428 U.S. at 62 (deeming abortion providers' standing "established") *and Whole Woman's Health*, 136 S. Ct. at 2301 (permitting abortion providers to assert patients' rights without analysis).

The Court has taken the same approach in cases unrelated to abortion. For example, because it was an issue of first impression in *Craig* whether a beer vendor had standing to assert claims of customers, the Court carefully weighed the prudential considerations before concluding that third-party standing exists. 429 U.S. at 192-97. But one year later, the Court held as a matter of law that a contraceptives vendor had standing to assert claims on behalf of its customers, finding the issue of vendor-customer standing was "settled" by *Craig*. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 683 (1977).

The Court's recognition that third-party standing is an issue of law is further evident in decisions concerning third-party claims on behalf of jurors excluded based on race. *See, e.g.*, *Powers*, 499 U.S. at

410-14 (applying the *Singleton* factors to conclude that a white defendant had third-party standing to raise a *Batson* challenge on behalf of excluded black juror); *Campbell v. Louisiana*, 523 U.S. 392, 397-400 (1998) (holding the same rule applies to grand jury proceedings); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628-31 (1991) (holding same rule applies in civil cases).

### D. Louisiana's Objections to Abortion Providers' Third-Party Standing Lack Merit

Certiorari is especially inappropriate in this case because, even if Louisiana were correct about the need for a case-specific factual inquiry, the state did not raise its standing objections below, and the district court thus made no factual findings expressly directed to third-party standing. Moreover, the district court made extensive factual findings on the merits of Plaintiffs' constitutional claims, and those findings refute Louisiana's arguments that abortion providers do not satisfy the "close relationship" and "hindrance" requirements for third-party standing.

Louisiana argues that abortion providers lack the requisite "close relationship" for third-party standing for two reasons. First, Louisiana argues that abortion providers and their patients cannot have a close relationship because the evidence purportedly showed that abortion procedures are quick and some require sedation. Cross-Pet. 29-31. The Court has never defined the "closeness" inquiry or the physician-patient relationship in these terms.

Rather, the Court has held that a "close relationship" exists "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth*, 422 U.S. at 510. Abortion providers in Louisiana easily satisfy this requirement because, as the district court found, enforcement of Act 620 against Louisiana's abortion providers "would result in a substantial number of Louisiana women being denied access to abortion in this state" and "would result in delays in care, causing a higher risk of complications, as well as a likely increase" in "unlicensed and unsafe abortions." App. 254a-55a, 260a.

Second, Louisiana argues that the evidence showed that abortion providers in Louisiana have poor safety records, supposedly confirming the existence of a conflict-of-interest between them and their patients. However, based upon a full review of the record, the district court found that the "overwhelming weight of the evidence" at trial "demonstrate[d] that, in the decades before [Act 620's] passage, abortion in Louisiana [was] extremely safe." App. 218a-19a. The district court also found that this excellent safety record extends to

Hope[6] and its physicians, including Dr. Doe 1 and Dr. Doe 2.[7] App. 212a-14a.

Louisiana next argues that the "hindrance" requirement of third-party standing is not met because, in the state's view, the record contained no evidence that supports the "legal fiction" that women face hindrances to asserting their own constitutional rights to abortion. Cross-Pet. 22-24. *Singleton* recognized that women are chilled from asserting their abortion rights out of concern for their privacy. 428 U.S. at 117-18. This

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[6] Plaintiffs thoroughly rebutted below Louisiana's argument that Hope has a history of "serious regulatory violations." Cross-Pet. 11. At trial, Plaintiffs demonstrated that Hope's purported regulatory deficiencies were often unfounded, ROA.7596-600; all were promptly addressed to LDH's satisfaction, ROA.7629-30; and none could have been avoided by a requirement that physicians have admitting privileges, ROA.7634. Notably, the district court credited none of Louisiana's arguments based upon the clinic's past regulatory compliance.

[7] Louisiana quotes out of context testimony that Dr. Doe 1 did not receive training in abortions while in medical school or residency, and that Dr. Doe 1 supposedly could not recall having read Hope's safety policies and procedures. Cross-Pet. 9, 13. In fact, Dr. Doe 1 testified that he obtained extensive training in abortion care *after* completing his residency, including an intensive course at a hospital in New Mexico. ROA.8140-41. Dr. Doe 1 also testified that he assuredly had reviewed the clinic's safety policies and procedures, even though he could not recall having done so "recently." ROA.8224-25.

Louisiana also asserts that Dr. Doe 2 showed a lack of commitment to patients by taking the legal position below that "courtesy privileges" extended to him by a New Orleans hospital would not allow him to continue to provide abortions. Cross-Pet. 28-29. The district court, however, determined that Dr. Doe 2's legal position was correct and compelled by Act 620's plain language. App. 225a-41a. The Court of Appeals affirmed. App. 9a.

hindrance will deter women from asserting their rights so long as abortion carries stigma. *Singleton* also recognized that women are hindered by the imminent mootness of their constitutional claims due to the time-limited nature of pregnancy. *Id.* This hindrance is grounded in biology and immutable.[8]

Louisiana is also incorrect that no evidence in this case indicates that women face hindrances to asserting their rights. Cross-Pet. 31. In fact, the district court found that abortion in Louisiana is accompanied by discrimination, hostility, and occasional violence. App. 185a-89a. Women seeking abortions in Louisiana also must overcome numerous obstacles, including financial distress, long travel distances, childcare obligations, and others. App. 260a-65a. While the district court found that these obstacles impair women's abortion access, they just as assuredly hinder women's ability to enforce their constitutional rights when that access is unduly burdened or denied.

Despite the hindrances recognized in *Singleton* and the district court's findings, Louisiana urges the Court to find that women face no hindrances, because some women have challenged abortion restrictions in the past. Cross-Pet. 22-24. This was true when *Singleton* was decided, *see, e.g.*, *Roe v. Wade*, 410 U.S. 113, 120 (1973), and is not a credible reason to grant certiorari. That a handful of women in five decades have managed

[8] Louisiana evidently finds these hindrances unpersuasive, but its cross-petition merely recycles arguments that were raised by the dissent in *Singleton* and rejected. *Compare* Cross-Pet. 22-24 *with Singleton*, 428 U.S. at 122-31 (Powell, J., dissenting).

to overcome obstacles to challenge abortion restrictions does not prove that the barriers that hinder most women from doing so have been diminished or erased.

## CONCLUSION

For the foregoing reasons, this Court should deny the conditional cross-petition.

Respectfully submitted,

TRAVIS J. TU
*Counsel of Record*
MARC A. HEARRON
JULIE RIKELMAN
JESSICA SKLARSKY
CENTER FOR
REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
Tel: (917) 637-3627
Email: tjtu@reprorights.org

*Counsel for Cross-Respondents*

AUGUST 23, 2019