

No. 19-816

IN THE
Supreme Court of the United States

KRISTINA BOX, Commissioner,
Indiana State Department of Health, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,
Respondent.

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

**BRIEF AMICUS CURIAE OF AMERICANS UNITED
FOR LIFE IN SUPPORT OF PETITIONERS**

CATHERINE GLENN FOSTER
STEVEN H. ADEN
Counsel of Record
KATIE GLENN
NATALIE M. HEJLAN
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave NW, Ste. 500
Washington, D.C. 20036
Steven.Aden@aul.org
Tel: (202) 741-4917

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*¹

Amicus Americans United for Life (AUL) is the first and most active pro-life non-profit advocacy organization dedicated to advocating for comprehensive legal protections for human life from conception to natural death. Founded in 1971, before this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has nearly 50 years of experience relating to abortion jurisprudence. AUL attorneys are highly-regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including model bills aimed at protecting the health and safety of women who choose abortion. See AUL, *DEFENDING LIFE* (2020 ed.) (state policy guide providing model bills that protect women's health). AUL has also documented more than 1,400 health and safety deficiencies and violations of state regulations at 227 abortion clinics in 32 states between 2008 and 2016. See AUL, *UNSAFE: AMERICA'S ABORTION INDUSTRY ENDANGERS WOMEN* (2018 ed.), <https://aul.org/wp-content/uploads/2018/10/AUL-Unsafe-2018-Final-Proof.pdf>.

1 No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties were provided notice of the filing of this *amicus* brief pursuant to Sup. Ct. R. 37.2(a), and have granted written consent to its filing.

SUMMARY OF ARGUMENT

Amicus will address the first question presented by Indiana:

Whether an abortion clinic may assert third-party standing on behalf of its hypothetical minor patients to challenge a statute requiring parental notice before abortion.

Petition for Writ of Certiorari (“Pet.”) i.

AUL contends that Respondent Planned Parenthood of Indiana and Kentucky (“PPINK”) cannot demonstrate a “close relationship” with its patients for two important reasons: First, like abortion facilities in many States,² PPINK has a long history of health and safety violations. This history reveals that not only does PPINK lack the kind of “close” relationship ordinarily required for third-party standing, but also that there is an inherent conflict of interest between abortion providers and their patients regarding state health and safety regulations. Second, PPINK and its predecessor organization have engaged in a lengthy legal campaign to overturn numerous informed consent mandates, health and

² See generally Brief *Amicus Curiae* of Ams. United for Life in Support of Cross-Petitioner, *Gee v. June Med. Servs. L.L.C.*, No. 18-1460 (Vide 18-1323 (2019) https://www.supremecourt.gov/DocketPDF/18/18-1460/103796/20190624094927367_18-1460%20Amicus%20Brief%20of%20Americans%20United%20for%20Life.pdf (citing extensive list of deficiency reports and enforcement actions against Louisiana abortion providers including the Petitioner, June Medical Services).

safety requirements, and legal protections for minors, all in the name of representing “the interests” of its patients. In view of these facts, PPINK cannot be presumed to enjoy a “close” relationship with its patients when it comes to legal challenges brought against the very laws the State passes for the protection of the patients’ health and safety, and it should not be deemed to have third-party standing.

ARGUMENT

I. PLANNED PARENTHOOD LACKS A “CLOSE” RELATIONSHIP WITH MINOR GIRLS SEEKING ABORTION AND SHOULD NOT BE PRESUMED TO HAVE THIRD-PARTY STANDING.

In *Singleton v. Wulff*, this Court concluded that “it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.” 428 U.S. 106, 118 (1976). Based on this generality, this Court and lower courts have assumed *carte blanche* that abortion providers have third-party standing on behalf of women seeking abortion without any meaningful, particularized analysis. Cf. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2322 (2016) (Thomas, J., dissenting) (“[A] plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases.”). Insofar as Respondent PPINK has an extensive history of documented health and safety violations, and routinely challenges State health and safety regulations designed to protect its patients, this presumption is at odds with this Court’s third-party standing doctrine requiring a “close”

relationship between the third party and the persons who possess the right. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

A. Planned Parenthood’s Long History of Serious Health and Safety Violations Is at Odds With Its Assertion that It Has a “Close” Relationship with Women and Minor Girls Seeking Abortion.

PPINK abortion clinics have a slew of health and safety violations documented in Statements of Deficiencies (SOD) by the Indiana State Department of Health (ISDH). Below is a summary of some of the more egregious violations reported by ISDH for four of the Indiana abortion facilities run by PPINK: Bloomington, Georgetown, Lafayette, and Merrillville. The clinic violations reported in the ISDH SODs demonstrate that PPINK does not share its patients’ interests when it comes to health and safety, and as such cannot have the necessary “close” relationship for third-party standing.

PPINK, Bloomington. Planned Parenthood’s Bloomington facility has been cited for violating patient health and safety regulations for many years.

Substandard patient care.

- 2014: Failure to document whether medical history check and physical examination were performed prior to abortion procedure.³
- 2014: Failure to ensure standards of care relating to the checking of vital signs in the surgery room were followed during abortion procedures.⁴
- 2014: Failure to document whether a Spanish-speaking patient could understand the English consent forms and documents.⁵
- 2017: Failure to follow facility's recovery area assessment policy, including failing to include documentation on respiratory rate or pulse for patients in the recovery room.⁶
- 2018: Failure to document vital signs, including blood pressure, respiratory rate, and pulse.⁷
- 2019: Failure to document physical examination or lab results.⁸

³ ISDH, SOD for Planned Parenthood of Indiana and Kentucky, Bloomington [hereinafter PPINK Bloomington] 13–15 (Dec. 18, 2014).

⁴ *Id.* at 15–17.

⁵ *Id.*

⁶ ISDH, SOD for PPINK Bloomington 10–16 (Jan. 24, 2017).

⁷ ISDH, SOD for PPINK Bloomington 6–7 (Mar. 15, 2018).

⁸ ISDH, SOD for PPINK Bloomington 1–2 (Mar. 11, 2019).

Incomplete or inaccurate patient medical records.

- 2014: Contradictory or missing information in patient records, including contradictory information on time of discharge.⁹
- 2014: Incomplete or missing documentation on state-mandated requirements, including whether patient wanted to view ultrasounds, verification of gestational age, medical history, discharge information, and inconsistency with sedation preference.¹⁰
- 2017: Failure to identify the attending physician and log patient's condition at discharge on surgical abortion paperwork.¹¹

Issues with facility or staff licensing or facility policy.

- 2017: Failure to have a policy for reporting licensed health professionals who fail to comply with state licensing requirements.¹²

PPINK, Georgetown. Planned Parenthood's Georgetown facility located in Indianapolis, Indiana has been cited for violating patient health and safety regulations, including improper administration of medication.

⁹ ISDH, SOD for PPINK Bloomington 5–7 (Dec. 18, 2014).

¹⁰ *Id.* at 8–11.

¹¹ ISDH, SOD for PPINK Bloomington 6–7 (Jan. 24, 2017).

¹² *Id.* at 1–2.

Substandard patient care.

- 2014: Patients were administered 100 mcg of fentanyl intravenously for sedation when maximum recommended dose is .05–1 mcg.¹³
- 2014: Failure to document whether practitioner performed a medical history check and physical examination prior to abortion procedure.¹⁴
- 2014: Failure to document whether vital signs, were checked per facility policy.¹⁵
- 2018: Patient’s medical record was missing documentation of a signed informed consent form.¹⁶

Incomplete or inaccurate patient medical records.

- 2014: Failure to adequately fill in patients’ medical records, including by failing to note whether an ultrasound was performed; failing to ask whether the patient had consumed drugs or alcohol; failing to document vital signs and start and end times for the procedure; and failing to note the patient’s preferred method of sedation.¹⁷

¹³ ISDH, SOD for Planned Parenthood of Indiana and Kentucky [hereinafter PPINK Georgetown] 41–43 (Nov. 13, 2014).

¹⁴ *Id.* at 20–22.

¹⁵ *Id.* at 25–29.

¹⁶ ISDH, SOD for PPINK Georgetown 2–3 (Mar. 29, 2018).

¹⁷ ISDH, SOD for PPINK Georgetown 9–20 (Nov. 13, 2014).

- 2014: Failure to accurately record anesthesia or sedation in patient records under facility policy.¹⁸

Issues with facility or staff licensing or facility policy.

- 2018: Failure to conspicuously post current license. License in waiting area had expired 6/30/17.¹⁹
- 2018: Failure to have two licensed staff members sign or initial the Control Substance Log.²⁰

Unsanitary conditions; expired medications or medical supplies.

- 2017: Emergency cart contained two 500 mL IV solution bags that were expired as of 1/2017.²¹
- 2017: Vaginal probe was not cleaned in accordance with the facility's Infection Control Manual because the test strips were used after their expiration date of 1/28/17.²²
- 2017: Failure to ensure monthly checks of emergency supplies and medications.²³

¹⁸ ISDH, SOD for PPINK Georgetown 37–39 (Nov. 13, 2014).

¹⁹ ISDH, SOD for PPINK Georgetown 1 (Mar. 29, 2018).

²⁰ *Id.* at 7–9.

²¹ ISDH, SOD for PPINK Georgetown 8–10 (Feb. 15, 2017).

²² *Id.* at 10–12.

²³ *Id.* at 19–21.

- 2019: Facility failed to change disinfection solution that had a discard date of 1/12/2016.²⁴

PPINK, Lafayette. Planned Parenthood's Lafayette facility has been cited for violating patient health and safety regulations, including repeated citations for improper documentation and unsanitary conditions.

Incomplete or inaccurate patient medical records.

- 2015: Failure to provide documentation ensuring a patient received the necessary informed consent form since the forms were allegedly at a different facility but all documents at the facility were shredded.²⁵
- 2019: Failure to electronically sign patient's visit summary within 120 hours of visit.²⁶

Issues with facility or staff licensing or facility policy.

- 2015, 2017: Failure to have a policy for reporting licensed health professionals who fail to comply with state licensing requirements, documenting actions taken against health professionals who fail to comply with clinic

²⁴ ISDH, SOD for PPINK Georgetown 3–4 (Mar. 21, 2019).

²⁵ ISDH, SOD for Planned Parenthood of Indiana and Kentucky, Lafayette [hereinafter PPINK Lafayette] 3–9 (Sept. 29, 2015).

²⁶ ISDH, SOD for PPINK Lafayette (Mar. 5, 2019).

policies, and reporting information to the appropriate state or law enforcement agency.²⁷

- 2015: Failure to have an emergency response policy to govern physicians.²⁸
- 2015, 2017: Failure to have a policy for reporting “adverse reactions and medication errors” to physician.²⁹

Unsanitary conditions; expired medications or medical supplies.

- 2015: Box containing material labeled as biohazard kept in a closet risking cross-contamination.³⁰
- 2015: Opened bottle of Betadine did not have the required expiration date noted.³¹
- 2017: Small storage shed labeled as biohazard was kept in a clean utility room and used to store biohazard waste.³²

PPINK, Merrillville. Planned Parenthood’s Merrillville facility has been cited for numerous health and safety deficiencies.

²⁷ ISDH, SOD for PPINK Lafayette 9–10 (Sept. 29, 2015); ISDH, SOD for PPINK Lafayette 2–4 (Mar. 1, 2017).

²⁸ ISDH, SOD for PPINK Lafayette 21–22 (Sept. 29, 2015).

²⁹ *Id.* at 25–26; ISDH, SOD for PPINK Lafayette 9–10 (Mar. 1, 2017).

³⁰ ISDH, SOD for PPINK Lafayette 18 (Sept. 29, 2015).

³¹ *Id.* at 22–23.

³² ISDH, SOD for PPINK Lafayette 8–9 (Mar. 1, 2017).

Substandard patient care.

- 2014: Failure to ensure patient vital signs were taken during procedure or recovery.³³

Incomplete or inaccurate patient medical records.

- 2014: Contradictory or missing information in patient records, including contradicting procedure and discharge times and missing authentications by provider.³⁴
- 2014: Failure to ensure receipt of patient's medical history or informed consent, or failure to include a terminated pregnancy report in the patient's medical record.³⁵
- 2019: Failure by provider to electronically sign Patient Visit Summaries according to facility policy.³⁶

³³ ISDH, SOD for Planned Parenthood of Indiana and Kentucky, Merrillville [hereinafter PPINK Merrillville] 10–14 (Nov. 1, 2014).

³⁴ *Id.* at 1–7.

³⁵ *Id.* at 7–10.

³⁶ ISDH, SOD for PPINK Merrillville (Mar. 13, 2019).

Issues with facility or staff licensing or facility policy.

- 2017: Failure to have a policy for reporting “adverse reactions and medication errors” to physician.³⁷

In view of this extensive history of violations, PPINK cannot be heard to assert claims against health and safety laws, informed consent requirements, and patient record and privacy laws, when it has proven to be a scofflaw routinely disregarding such laws.

B. Planned Parenthood’s Extended Legal Campaign Against Virtually Every State Regulation of Its Abortion Business Belies Its Presumption that It Has a “Close” Relationship with Women and Minor Girls Seeking Abortion.

When it comes to State health and safety regulations, there is an inherent conflict of interest between abortion providers and their patients. It is impossible for abortion clinics and doctors to share or represent the interests of their patients when they seek to *eliminate* the very regulations designed to protect their patients’ health and safety. The standing problem is heightened when an abortion provider ostensibly sues on behalf of its minor patients to challenge laws designed to protect the parent-child relationship both the minor and her parents have an interest in preserving and nurturing. *Belotti v. Baird*, 443 U.S. 622 (1979); *Hodgson v. Minnesota*, 497 U.S.

³⁷ ISDH, SOD for PPINK Merrillville 7–8 (Jan. 31, 2017).

417 (1990). As this Court instructed in *Belotti, id.* at 640:

[P]arental notice and consent are qualifications that typically may be imposed by the State on a minor’s right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.

For the Court, then, the appropriate Constitutional approach to parental involvement laws is to presume that parents will fulfill their proper role of nurturing and tutoring children in right behavior, not to engage in wholesale speculation about “another world” that exists between parents and children in which a “stark social reality” of dysfunctionality governs, *Planned Parenthood of Indiana and Kentucky, Inc. v. Adams*, 937 F.3d 973, 984 (7th Cir. 2019) (quoting *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 537 (1990) (Blackmun, J., dissenting)), and in which well-grounded fear of parental retribution dominates. *Id.* at 985.

PPINK thrives on judicial indulgence of this contrarian dystopia, which has allowed it to routinely challenge laws designed to protect its patients,

including its very young patients. PPINK's predecessor affiliate, Planned Parenthood of Indiana,³⁸ brought suit ostensibly on behalf of minor patients to prohibit the Indiana Medicaid Fraud Control Unit of the Attorney General's office from exercising its statutory authority to review medical files of 73 Planned Parenthood patients who were under 14, the age of statutory consent.³⁹ *Planned Parenthood v. Carter*, 854 N.E.2d 853 (Ind. Ct. App. 2006). Intercourse with a child under 14 is a Class A or B felony under State law, depending on the age of the adult or the use of deadly force or infliction of bodily injury. *Id.* at 862, citing Ind. Code § 35-42-4-3(a). Planned Parenthood staff were mandatory reporters of suspected child abuse or neglect. *Id.*, citing Ind. Code § 31-33-5-2, and the court of appeals concluded that Indiana's Medicaid fraud unit was authorized by federal law to investigate the alleged failure of Planned Parenthood to report child abuse. *Id.* at 866–867.

The court of appeals held, however, that Planned Parenthood could assert Fourteenth Amendment

³⁸ PPINK's predecessor in interest, Planned Parenthood of Indiana, merged with Planned Parenthood of Kentucky to form PPINK in 2013. See *Our History*, Planned Parenthood of Indiana and Kentucky, Inc. (last visited Jan. 24, 2020), <https://www.plannedparenthood.org/planned-parenthood-metropolitan-new-jersey/patients/planned-parenthood-indiana-kentucky/about/history>.

³⁹ See *Planned Parenthood v. Carter*, 854 N.E.2d 853, 867 (Ind. Ct. App. 2006), citing 42 U.S.C. § 1320a-7(b)(12); 42 C.F.R. § 1007.11; Ind. Code § 4-6-10-1.5(1) (Medicaid Fraud Control Unit has authority to investigate, in accordance with federal law, abuse and neglect of Medicaid patients).

“informational privacy” claims on behalf of its minor patients. The court turned aside the State’s objection that its interest in investigating crimes against children overrode the privacy interests Planned Parenthood asserted for its patients:

[Indiana] observes that [Planned Parenthood’s] patients also have an interest in being protected from sexual abuse. This observation is valid as far as it goes, but it does not negate the closely aligned privacy interests of [Planned Parenthood] and its patients, *most of whom are likely minors with limited means who might be hesitant to assert their privacy rights because of fear of parental reprisal* and/or the sensitive nature of the medical information at issue. We therefore conclude that [Planned Parenthood] has standing to assert a Fourteenth Amendment informational privacy claim on behalf of its patients.

Carter, 854 N.E.2d at 870 (emphasis added), citing *Aid for Women v. Foulston*, 441 F.3d 1101, 1111–15 (10th Cir. 2006) (holding that minor children’s interests were sufficiently close to those of the reproductive health care provider, and that minors were sufficiently hindered from asserting their own claims to satisfy third-party standing test in challenge to the application of a sexual abuse reporting statute). The Tenth Circuit in *Aid for Women* had also relied upon the notion that minors may be hindered from suing “by the fear of reprisal from parents.” 441 F.3d at 1114. This indulgence of the presumption against parental guidance turns *Belotti* on its head—founding

the constitutional law of abortion on a regime of judicial presumption that the fear of “many” children of parental reprisal prevents State authorities from investigating crimes against children—even when the investigation is mandated by federal Medicaid law.

Whether Planned Parenthood’s mandatory reporting policies and procedures were in place following its legal action to prevent State authorities from reviewing the medical files of its very young patients was called into question shortly afterward, when Planned Parenthood of Indiana reportedly violated Indiana’s mandatory reporting law in 2008 when an employee in its Bloomington office failed to report an apparent incident of statutory rape by a 31-year-old against a 13-year-old girl. Sara Galer, *Planned Parenthood Worker Fired*, WTHR (Dec. 10, 2008, 4:54 PM) <https://www.wthr.com/article/planned-parenthood-worker-fired>. Planned Parenthood terminated the employee and stated it would retrain all of its workers on mandatory reporting. *Id.*

PPINK has indulged the judicial presumption in favor of allowing it to stand in the shoes of women and young girls seeking abortion in numerous other cases in which the abortion business has challenged laws designed to protect them. It has sought to overturn full informed consent provisions, see *e.g.*, *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (opposing full informed consent requirement); *Planned Parenthood of Ind. & Ky. v. Comm’r of the Ind. State Dept. of Health*, 896 F.3d 809 (7th Cir.

2018), petition for writ of certiorari filed, No. 18-1019 (challenging mandatory ultrasound viewing informed consent law); documentation and reporting requirements, see *e.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dept. of Health*, No. 1:18-cv-1219 (S. Dist. Ind. filed Apr. 23, 2018); and a law mandating minimal clinician staffing requirements, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dept. of Health*, 984 F. Supp. 2d 912 (S.D. Ind. 2013) (challenging regulation of chemical abortion). PPINK also challenged Indiana’s law mandating that human fetal remains be treated with “dignity”, but a Seventh Circuit decision in its favor was summarily reversed by this Court in a *per curium* opinion. *Planned Parenthood of Ind. & Ky, v. Comm’r of the Ind. State Dept. of Health*, 917 F.3d 532 (7th Cir. 2018), petition for writ of certiorari granted in part, reversed in part, 139 S. Ct. 1870 (2019). Amicus respectfully suggests that it is time for the Court and lower federal courts to, at a minimum, require that abortion business that challenge abortion regulations demonstrate to the court that they actually do enjoy a “close” relationship with women seeking abortions and that no conflict of interest exists between them.

CONCLUSION

Amicus respectfully submits that if the Supreme Court rejects third-party standing for the abortion business plaintiff in *June Medical Services v. Gee*, No. 18-1323, it should grant, vacate and remand Indiana’s petition for further consideration of whether PPINK truly enjoys a “close relationship” with women seeking

abortions that allows it to stand in their shoes and challenge laws designed to protect them.

Respectfully submitted,

Catherine Glenn Foster
Steven H. Aden
Counsel of Record
Katie Glenn
Natalie M. Hejran
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave NW
Suite 500
Washington, D.C. 20036
Steven.Aden@aul.org
(202) 741-4917

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