No. 18-1460

IN THE

Supreme Court of the United States

DR. REBECCA GEE, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals,

Petitioner,

v.

JUNE MEDICAL SERVICES. L.L.C., et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Whether abortion providers can 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.

Whether objections to prudential standing are waivable – per the U.S. Court of Appeals for the 4th, 5th, 7th, 9th, 10th, and Federal Circuits – or non-waivable per the U.S. Court of Appeals for the D.C., 2d, and 6th Circuits.

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and has appeared as an *amicus curiae* in this Court on a number of occasions.[2]

Judicial Watch seeks to participate as *amicus curiae* for two reasons. First, Judicial Watch believes this is an important opportunity for the Court to clarify its third-party standing jurisprudence, firmly denounce the use of third-party assumptions, and reaffirm that third-party standing is an essential element that must be proven by any party seeking it. Second, Judicial Watch seeks to highlight the dangerous assumptions that third-party standing brings to the balance and separation of powers, the proper balancing of burdens, and the preservation of rights by those to whom the rights belong.

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[1] Petitioners and Respondents granted blanket consent for the filing of *amicus curiae* briefs in this matter. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than Judicial Watch, Inc. made a monetary contribution intended to fund the preparation and submission of this brief.

[2] As required by Rule 37.2(a), counsel of record for each party has consented to the filing of this amicus brief. Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person other than the amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Third-party standing has a legitimate function and place in our legal system. It has, however, become a tool for favored classes and categories of litigants to challenge any and all laws they find distasteful. These favored litigants have acquired their third-party standing status without any factual analysis or factual determination that the actual right-holders want to challenge the law or cannot challenge the law individually.

This assumption of third-party standing stems from an erroneous reading and application of the Court's holding in *Singleton v. Wulff*, 428 U.S. 106 (1976). Federal courts have perpetuated this erroneous application so intently that often courts simply drop the *Singleton* citation into a footnote or fail to address the issue in its entirety. The result of this erroneous application is a frightening cache of cases that defeats the purpose of standing and throws off the balance of powers. As a practical matter, the erroneous application of *Singleton* also puts the lives of the actual right-holders at risk.

The Petitioners[3] in this case do not meet the third-party standing elements this Court clearly set out in *Singleton*. Petitioners do not have the required "close relationship" with the right-holders. Rather, Petitioners' interests are in direct conflict with the right-holders they purport to be representing.

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[3] For simplicity sake, *amicus* refers to the Plaintiffs/Petitioners in the underlying case, No. 18-1323, as "Petitioners" here. In No. 18-1460, Petitioners are the respondents in the Cross-Petition.

Petitioners also fail to provide evidence that the right-holders are "hindered" in a way that prevents them from asserting their own rights.

ARGUMENT

After in-depth testimony, the Louisiana Legislature passed the "Unsafe Abortion Protection Act" ("Act 620") in 2014 requiring abortion providers to have admitting privileges at a hospital within 30 miles of the clinic where they perform abortions. *June Med. Servs., L.L.C. v. Gee*, 905 F.3d 787, 790 (5th Cir. 2018). Petitioners – one abortion clinic and two unnamed doctors – filed suit in federal court alleging Act 620 unconstitutionally interfered with a woman's right to an abortion. *Id*. at 792. The district court held Act 620 "unconstitutional on its face" and issued a permanent injunction against its enforcement. *June Med. Servs. L.L.C. v. Kliebert*, 250 F. Supp. 3d 27, 88-89 (M.D. La., April 26, 2017). The Secretary of the Louisiana Department of Health ("Respondent") appealed and the Court of Appeals for the Fifth Circuit reversed, holding that Petitioners failed to successfully prove their facial challenge. *June*, 905 F.3d at 815. Petitioners requested this Court review the appeal. Subsequent to Petitioners' request, Respondent filed a Conditional Cross-Petition requesting the Court clear up the issue of third-party standing and whether it can be waived. This *amicus* brief will address these cross-petition issues.

I. A BRIEF HISTORICAL LOOK AT STANDING.

The doctrine of standing is broken into two types: Article III standing and prudential standing. At times courts have intertwined the two but for as long as this Court has recognized the doctrines, it has maintained the two are separate legal requirements: Article III standing invoking constitutional justiciability and prudential standing invoking federal limits on "the courts' decisional and remedial powers." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

A. Article III Standing.

The prime question posed by the Article III standing inquiry is "whether the litigant is entitled to have the court decide the merits of this dispute or of particular issues." *Id*. at 498. Flowing from Article III, § 1 "Cases" and "Controversies" of the U.S. Constitution, this Court determined that all litigants appealing to federal courts must demonstrate: (1) an "injury in fact" that is "concrete and particularized," and "actual or imminent;" (2) a causal connection between the injury in fact and the conduct that is "fairly traceable;" and (3) it is "likely" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

The purpose of imposing Article III standing requirements is to maintain the separation of powers. "[T]he Constitution's central mechanism of separation of powers depends largely upon common

understanding of what activities are appropriate to legislatures, and to courts." *Id.* at 559-60. Put another way, the purpose of Article III standing is to "identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Plaintiffs always bear the burden of establishing Art. III standing.

B. Prudential Standing.

In addition to limiting federal jurisdiction through Art. III standing, this Court has imposed prudential limits on cases as well, which limit "the class of persons who may invoke the courts' decisional and remedial powers." *Warth* at 499. Included in its prudential limits the Court determined that "the plaintiff generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights of third parties." *Id.* In *Warth*, the Court tied prudential standing to Art. III standing in terms of its overall importance. *Id.*

"Without such limitations closely related to Art. III concerns but essentially matters of judicial self-governance the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 500.

The requirement that parties must assert their own rights has an exception: third-party, or "jus tertii," standing. In *Singleton v. Wulff*, this Court

found that the general rule against litigating other parties' rights "should not be applied where its underlying justifications are absent." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). The Court then proffered "two factual elements to determine whether the rule should apply in a particular case." *Singleton* at 114. "The first is the relationship of the litigant to the person whose right he seeks to assert." *Id*. "The other factual element . . . is the ability of the third party to assert his own right." *Id*. at 116. The third-party standing exception has been refined to an inquiry into "whether the party asserting the right has a 'close' relationship with the person who possesses the right, and whether there is a 'hinderance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 126 (2004); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J. concurring). This Court has never held that the third-party standing exception is not also a burden to be carried by the plaintiff similar to the burden of Art. III standing.

II. *SINGLETON V. WULFF* MUST BE CLARIFIED AND CASES ERRONEOUSLY RELYING ON ASSUMED THIRD-PARTY STANDING SHOULD BE VACACTED.

Contrary to Petitioners' claim, this Court has never articulated grounds for the assumption of ***any*** standing doctrine. Assuming standing of any kind would directly sabotage the purposes of the standing doctrines. If standing can be assumed, why require it at all? Indeed, it defies all logic.

A. *Singleton*'s Holding Did Not Create a Vehicle for Assumed Third-Party Standing nor a Categorical Exception.

The fatal flaw in Petitioners' theory that third-party standing may be assumed in certain types of cases or for particular classes of litigants is that it has no legal authority. *See Gee v. June Medical Servs., L.L.C.*, No 18-1460, Opposition to Conditional Cross-Petition for a Writ of Certiorari (August 23, 2019) (Petitioners' Opp.). Petitioners rely solely on an exaggerated reading of this Court's holdings and conclude that they have assumed third-party standing "as a matter of law." Petitioner's Opp. at 17-25 (concluding that once a category of plaintiffs has been approved for standing, "the Court traditionally has applied the same rule in subsequent cases as a matter of law.").

The problem with this theory of assumed third-party standing is that it flies in the face of this Court's precedent. In *Singleton*, the Court applied the third-party exception elements of "close relationship" and the existence of "obstacles," and determined that the plaintiff physicians established third-party standing and could assert the rights of their patients. *Singleton* at 114-17. Nowhere in *Singleton* does the Court express the view that its holding has created an assumption of third-party standing for all future abortion providers who want to challenge any law they don't like. In fact, the language in *Singleton* demonstrates opposition to an assumption. For example, this Court states that the "Court has looked

to two ***factual elements to determine*** whether the rule should apply in a ***particular*** case." *Id.* at 114 (emphasis added). No factual elements would need to be analyzed if the Court simply granted exceptions based on categories of plaintiffs. Nor would the determination be applied in a "particular case" were the Court granting assumed third-party standing based on categories.

Further the Court stated that "application of these [third-party standing] principles ***to the present case*** quickly yields its proper result." *Id.* at 117 (emphasis added). This clearly demonstrates that this Court was considering the specific facts of *Singleton*. And while the Court later states that it "generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision," the Court qualified this "generally appropriate" statement in a footnote meant to pacify Justice Powell's concern of the overreach of the plurality's holding.[4] The plurality states that, "the Court elects to proceed, as it does today, by assessing

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[4] The Court gives another reason to reject the notion that *Singleton* categorically applied to every physician-patient relationship, or even every abortion provider-patient relationship. The plurality stated that the physician is "uniquely qualified . . . to litigate the constitutionality of the State's interference with, or discrimination against, ***the abortion decision***." *Singleton* at 117 (emphasis added). Act 620 is not, per se, a law regulating the abortion decision. Rather, Act 620 pertains to health and safety regulations and brings abortion clinics into compliance with all ambulatory medical centers. *June*, 905 F.3d at 806. As demonstrated by the Fifth Circuit, there is no evidence that Act 620 will impact "the abortion decision" at all. *Id.* at 815.

relevant factors in individual cases … rather than by adopting a set of per se rules." *Id*. at 118, n. 7. It cannot be made any clearer: this Court set forth third-party standing elements which require a case-by-case factual analysis.

Unfortunately, Petitioners are not the first to assert assumed third-party standing. Following *Singleton*, litigants similar to Petitioners began routinely asserting the rights of other parties in order to challenge any state law with regards to abortion. A group that initially included physicians and abortion providers now includes clinics and giant nonprofit organizations. Courts appear confused as to the application of *Singleton* and its progeny and sadly ignore the specific language in *Singleton*. This confusion has been exacerbated by the Court's neglect in reigning in litigants like Petitioners. In several abortion-related cases subsequent to *Singleton*, this Court was silent on the issue of third-party standing entirely.[5] Lower courts have read this as a green light for assumed third-party standing and it has resulted in courts simply using the Singleton citation rather than employing *Singleton's* assessment of "relevant factors in individual cases." *Singleton*, 428 U.S. at 118, n. 7.

For example, rather than applying the actual holding of *Singleton* and conducting a factual analysis of third-party standing, the U.S. Court of Appeals for

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[5] *See Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *Whole Women's Health v. Hellerstedt,* 136 S.Ct. 2292, 2321 (2016) (discussed only in Justice Thomas' dissent).

the Ninth Circuit found that "indeed, physicians and clinics performing abortions are routinely recognized as having standing to bring broad facial challenges to abortion statutes." *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 917-18 (9th Cir. 2004). The court proceeded to list a few cases in which third-party standing was granted to providers of abortion. *Id.* The Ninth Circuit granted third-party standing to the plaintiffs simply because they fit into the same general category. *Id.* No "relevant factors" of the "individual case" before it were considered. *Singleton*, 428 F.3d at 117-18. For instance, the Ninth Circuit relied on *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 440. n. 30 (1983) ("*Akron I*"), (overruled on other grounds by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992)) as evidence of assumed third-party standing for the category of "physicians and clinics performing abortions." *Wasden,* 376 F.3d at 917-18. *Akron I*, however, made an assumption based on *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976) for evidence of this relationship-based exception. *See Akron I*, 462 U.S. at 440, n. 30. *Danforth* specifically ***rejected*** considering the standing claim brought by Planned Parenthood (the clinic) and relied exclusively on *Doe v. Bolton*, 410 U.S. 179, 188 (1973) for the physician third-party standing. *Danforth*, 428 U.S. at 62. *Bolton*, of course, was a case which involved not only a physician who was personally subject to the criminal penalties of the Georgia statute, but also "Jane Doe" – an individual woman and holder of personal rights – as the lead plaintiff. In finding standing for the physicians (and passing on consideration of all other parties), the Court focused

not on prudential standing but on elements of Art. III standing. "The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment." *Id.* at 188. *Wasden* represents a microcosm of the absurdity of the current view of third-party standing: a federal appellate court relies on articulated generic principles without factual analysis that ultimately leads to a case with absolutely no third-party standing jurisprudence.

Another example of the failure to apply the actual *Singleton* holding is the U.S. Court of Appeals for the Seventh Circuit which stated that "[t]he cases are legion that allow an abortion provider, such as Planned Parenthood of Wisconsin or AMS, to sue to enjoin as violations of federal law state laws that restrict abortion." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 910 (7th Cir. 2015).[6] There

[6] It is questionable whether Planned Parenthood has actually been awarded third-party standing on its own accord. Several courts have made reference to Planned Parenthood's involvement but passed on determining their eligibility for third-party standing because a separate plaintiff had already established it. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 62, n. 2 (1976) (declining to consider Planned Parenthood's standing*); Planned Parenthood Ass'n, v. Miller*, 934 F.2d 1462, 1465, n.2 (11th Cir. 1991); *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 918 (9th Cir. 2004); *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014). And in *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 914 (6th Cir. 2019), a case where Planned Parenthood brought suit for its own sake and not on behalf of individual women, the court expressly determined this Court's holdings "do not establish that the providers themselves have due process rights." The Seventh Circuit's dramatic statement of "legion" is not followed by any citations.

was no factual analysis of whether the relationship Planned Parenthood of Wisconsin or Affiliated Medical Services ("AMS") had with its clients was a "close" one. The Seventh Circuit simply noted the cases were "legion." Legion or not, this Court has never overruled its *Singleton* holding that a plaintiff seeking third-party standing must factually establish the elements of third-party standing.

With just two examples it is clear just how far removed courts are from the actual *Singleton* holding. The effects of this calamitous departure have resulted in both legal and personal harm.

B. The Effects of the Erroneous Application of *Singleton* Are Widespread and Appalling.

It is not an exaggeration to say that the misapplication of *Singleton*'s holding is widespread and appalling. Left untouched and unclarified for decades, the now assumed third-party standing has affected laws in at least 25 states and every federal circuit.

1. The Misapplication and Failure to Apply Singleton.

As demonstrated in *Wasden* and *Schimel*, when lower courts do address third-party standing in the abortion context, the "analysis" generally fails to include any of the factual elements required by *Singleton* and, instead, applies an assumption of third-party standing. *See supra* § II, A. A sampling

of cases from various circuits includes: *Planned Parenthood v. Heed*, 390 U.S. 53, 5, n.2 (1st Cir. 2004), vacated on other grounds by *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006) (citation to *Singleton* with no factual analysis); *Planned Parenthood v. Farmer*, 220 F.3d 127, 147 (3d Cir. 2000) (citation to *Singleton* with no factual analysis); *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh,* 737 F.2d 283, 290, n. 6 (3d Cir. 1984), overruled in part by *Casey*, 505 U.S. at 882 ("affirm this general conclusion" of standing); *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) (stating that the district court had "ruled perfunctorily that abortion providers have never been denied standing to assert the rights of patients," but offered no factual analysis itself and simply cited precedent); *Planned Parenthood of Wis., Inc. v. Schimel*, *see supra* § II, A; *Planned Parenthood v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998) (stating that the "standing of the physician plaintiffs, and of Planned Parenthood as the owner of abortion clinics in Wisconsin, to maintain this suit is not open to question," but relying solely on inapposite precedent)[7]; *Comprehensive Health of Planned*

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[7] Ironically, the Seventh Circuit, which gutted the purpose and judicial self-governance of third-party standing with a "legion" of cases and admonished against even questioning the standing of Planned Parenthood clinics, denied third-party standing for intervening husbands of pregnant women. *Doyle*, 162 F.3d at 465. The court alarmedly cautioned that "if these men have standing to oppose a challenge to the partial birth abortion law, then any potential beneficiary of a statute could intervene in any suit challenging the statute's scope or validity . . . . [T]here is nothing to suggest that the state is not an adequate representative of the intervenors' interests." Yet, this same

Parenthood Great Plains v. Hawley, 903 F.3d 750, 755 (8th Cir. 2018) (relying solely on the Singleton citation); *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013) (relying solely on citations with no factual analysis); *Planned Parenthood of Idaho v. Wasden, see supra § II, A.*; *Aid For Women v. Foulston*, 441 F.3d 1101, 1111-114 (10th Cir. 2006) (court undertakes a fairly in-depth analysis of precedent but fails to apply any factual analysis); and *Planned Parenthood Ass'n v. Miller*, 934 F.2d 1462, (11th Cir. 1991) (replying primarily on *Singleton*'s principles without the factual analysis called for). The result of cases such as these is courts using *Singleton*'s holding without actually applying *Singleton*'s holding. Some of the plaintiffs in these cases may very well qualify for third-party standing but each one of them should be required to factually demonstrate the *Singleton* elements of third-party standing. *Singleton* requires no less.

In addition to courts misapplying the *Singleton* holding, courts sometimes fail to even address the issue of third-party standing despite some of the litigants clearly asserting other parties' rights. Third-party standing is the proverbial elephant in the room: everyone knows the conflict is there, but no one wants to address it. *See Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000); *Women's Med.*

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court refused to even question Planned Parenthood's standing which, for all intents and purposes, permits any provider of abortion, any supporter of abortion, or interested group the opportunity to challenge any suit regarding an abortion law's "scope or validity." There is nothing to suggest women themselves are not adequate representatives of their own interests. See *Schimel*, 806 F.3d at 910; *Doyle,* 162 F.3d at 465.

Prof'l Corp. v. Baird, 438 F.3d 595 (6th Cir. 2005); *Planned Parenthood of the Rocky Mts. Servs. Corp. v. Owens*, 787 F.3d 910, (10th Cir. 2002). Even this Court has remained silent on the issue in previous cases. *See infra* n. 2. While silence may indeed sometimes be golden, when it perpetuates a legal error for decades that harms both legal principles and real individuals, it is anything but golden.

2. The Harm Resulting from Assumed Third-party Standing.

Petitioners make no effort to conceal their objective: to have this Court affirmatively support a doctrine of assumed third-party standing for abortion providers and clinics in every case where they decide to challenge a statute "on behalf" of individual right holders. *See* Petitioners' Opp. at 24. This assumption of third-party standing or "categorical standing" does not support the purposes of prudential standing and inflicts real and lasting harm on both our constitutional jurisprudence and the lives of real people who bear the brunt of Petitioners' avarice.

Courts have acknowledged the importance of prudential standing limits in helping to maintain the judiciary's proper role. In *Warth v. Selden*, 422 U.S. 490, 500 (1975), the Court stated that prudential standing limits were of "critical importance," and "serve to limit the role of the courts in resolving public disputes." It is the function of the judiciary to interpret laws. It is not the function of the judiciary to "resolve public disputes." In *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-227

(1974), this Court carefully addressed the importance of standing to our whole process of government. It held that relaxing the standing requirements endangered the integrity of the judiciary and threatened a "confrontation with one of the coordinate branches of Government." *Id*. at 222 (bypassing standing elements would "create the potential for abuse by the judicial process, distort the role of the Judiciary in its relationship with the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'") A party's inability to demonstrate standing was not a reason to repudiate the need for standing. Rather, this Court found that "our system of government leaves many crucial decisions to the political process." *Id*. at 227. After all, it is in the political process that citizens can take ownership.

Petitioners' claim of assumed third-party standing would effectively gut both the purpose and application of third-party standing. They would essentially be free to challenge any law that even indirectly touches on abortion simply because they fall into a category of favored litigants. This defeats the purpose of the political process, thwarts the will of the people, and contravenes the role of the Legislature. In every case where litigants like Petitioners have used assumed third-party standing, legislative hearings and debate, public hearings and debate, and political and election exercises have been for naught – completely neutralized by Petitioners' desire to leapfrog the political process and usurp the courts. The Court's clarification of *Singleton* is absolutely imperative in saving prudential standing.

In addition to the harm done to bedrock constitutional principles and laws, assumed third-party standing results in harm to the very people Petitioners purport to represent – the women who hold the rights Petitioners want to categorically piggyback.[8] The first element of third-party standing is the existence of a "close relationship" between the litigant and the party who "possesses the right" – the so-called third-party. *Kowalski,* 543 U.S. at 130. While there exists a body of case law in which the third party consists of pregnant women and the litigants are abortion providers, the requirement of a "close relationship" cannot be assumed. Being similarly situated is not tantamount to being the same. In each case the women may be different, the abortion providers may be different, and the laws being challenged may be different. Permitting assumed third-party standing negates all of these differences. Only a factual analysis of each case can determine if a close relationship exists.

In *Singleton*, this Court further stated that a "close relationship" is one where "the relationship between the litigant and third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 499 U.S. at 115; *see also Kowalski*, 543 U.S. at 130

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[8] The "right" referred to here and throughout the amicus brief is the right to abortion. *Amicus* believes this Court's abortion decisions are based on a constitutional misstep and should be thoroughly reviewed however; it is inconsequential what "right" the Petitioners are invoking. In terms of third-party standing, the subject matter is not relevant. Third-party standing requirements are the same for all litigants and all subject matter.

(recognizing third-party standing where the "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights.") For this relationship to exist, the two parties must have common interests. *See Powers v. Ohio*, 499 U.S. 400, 413-14 (1991). Where the parties' interests are not common or parallel, a conflict of interests may exist. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 (2004). Where a conflict exists, the litigant is clearly ***not*** as effective a proponent of the rights of the third party and third-party standing must be denied. Again, only applying the facts in each particular case will reveal whether the interests between the litigants and the third party are aligned.[9]

When interests are not aligned and conflict exists, permitting assumed third-party standing has, and will continue to, inflict harm on third parties and others' rights. For example, in *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, abortion providers challenged hospital admitting privileges and a provision that would have require FDA-compliance for medication abortions. *Abbott*, 748 U.S. at 587. Under the guise of their patients' substantive

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[9] The same can be said for the second required element of third-party standing articulated in *Singleton* – a hinderance in the "ability of the third party to assert his own right." *Singleton*, 428 at 115-16. Petitioners' assumption of third-party standing contention amounts to a conclusion that pregnant women are ***never*** capable of asserting their own rights and that abortion providers are **always** better proponents of women's individual rights. This is clearly absurd. Whether a woman is hindered by burdens that affect her ability to assert her own rights is a fact-based analysis.

due process rights, Plaintiffs' actual interests were made clear: unfettered access to perform abortions free of any regulation, ostensibly for financial gain. No individual women appeared as plaintiffs to the case. No women testified that they preferred not to have their abortion providers have admitting privileges or that they preferred abortion providers ignore the FDA-approved use of abortion medications. It defies logic to think women would not have an interest in these things, hence the conflict of interests between the litigant abortion providers and the third-party women right holders.

This conflict is not merely an academic exercise in constitutional concepts but a real conflict that has real victims. It has been testified to and acknowledged by many medical associations that physicians offering "office-based surgery" should have hospital admitting privileges or a transfer agreement with a nearby hospital.[10] At a March 17, 2003 meeting, the American College of Surgeons (ACS), American Medical Association (AMA), American Academy of Pediatrics (AAP), the American College of Obstetrics & Gynecology (ACOG), the Federation of State Medical Boards, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), Accreditation Association for Ambulatory Health Care, Inc. and many other national and state medical associations officially adopted ten "core principles" for physicians who offer office-based surgery.[11] Core Principle #4 read, "Physicians performing office-

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[10] *See* https://www.liveaction.org/news/32-medical-societies-support-admitting-privileges-abortion-advocates-fighting/

[11] *See* http://www.lb7.uscourts.gov/documents/15-17363_000.pdf

based surgery **must have admitting privileges** at a nearby hospital, a transfer agreement with another physician who has admitting privileges at a nearby hospital, or maintain an emergency transfer with a nearby hospital." (emphasis added)[12] It should be noted that several of these medical associations routinely challenge admitting privilege and transfer agreement requirements for abortion clinics.[13] Yet, ***only*** for abortion clinics. It begs the question why pregnant women do not deserve the same protection of Core Principle #4 that every other individual seeing a physician who performs office-based surgery has.

Admitting privileges have the benefit of providing patients with a continuity of care. In case of a medical emergency, a patient transferred to an area hospital will not be lost in paperwork. Her physician's knowledge of the emergency better aids her care. Admitting privileges also ensure a "higher level of physician competence." *June Med. Servs., L.L.C.*, 905 F.3d at 805. Absent these benefits, pregnant women have suffered. Returning to the example of *Abbot*, the Fifth Circuit acknowledged the abortion providers' interest rested on "economic incentives" and failed to consider how this would conflict with the interests of pregnant Texas women and the benefits conferred by the law. *Abbott*, 748 at 586-87.[14] The result of this conflict of interest has resulted in harm to women.

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[12] *See id.*

[13] Both the AMA and ACOG have in fact submitted *amicus curie* briefs opposing the admitting privileges in this case.

[14] Applied as an example, the abortion providers' interest in continuing to use abortion medication contrary to FDA compliance is to receive payment for more medication abortions.

For example, Denise Montoya, Latachie Veal, and Maureen Espinoza – all Texas teenagers past the 20th-week of pregnancy -- suffered life-threatening injuries during their abortions.[15] An ambulance was called for Denise.[16] Latachie and Maureen were sent home.[17] All three died.[18] Records submitted during the *Abbott* trial show it is likely that approximately 1,000 Texas women *a year* are hospitalized as a result of their abortions.[19] This figure includes surgical abortions, medication abortions, and surgical abortions following failed medication abortions.[20] Surely these women would benefit from hospital admitting privileges and providers who comply with

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The woman's interest in FDA compliance is to better ensure her safety and health. This is a clear conflict.

[15] *See* https://www.houstonchronicle.com/news/houston-texas/houston/article/Anti-abortion-group-targets-local-doctor-but-4590356.php;
http://cemeteryofchoice.com/Latachie%20Veal.html;
http://realchoice.blogspot.com/2017/04/two-busy-abortionists-and-other-sad.html.

[16] *See* https://www.houstonchronicle.com/news/houston-texas/houston/article/Anti-abortion-group-targets-local-doctor-but-4590356.php.

[17] *See* http://cemeteryofchoice.com/Latachie%20Veal.html; http://realchoice.blogspot.com/2017/04/two-busy-abortionists-and-other-sad.html.

[18] *See* note 6.

[19] *See* http://www.operationrescue.org/archives/court-records-indicate-nearly-1000-abortion-patients-likely-hospitalized-annually-in-texas/.

[20] The same trial records revealed that 6% of women who sought medication abortions required a subsequent surgical abortion due to a failure of the medication to cause an abortion. *See* n. 14. It is likely that the off-label use of the abortion medication, specifically permitting the use of the drugs past the FDA-approved 49 days, contributed to this.

the FDA. No women objected to the requirements. Only the abortion providers objected. Texas abortion providers did not adequately represent the interests of Texas women.

A fatal conflict of interest is not confined to Texas or the Fifth Circuit alone. In *Women's Med. Prof'l Corp. v. Baird*, plaintiff abortion providers objected to an Ohio law requiring them to have transfer agreements with an area hospital. *Baird*, 438 F.3d at 598.[21] Ohio abortion providers' economic interest in providing unrestricted abortion can hardly be in alignment with patients' interests, particularly the ones who are gravely injured during their abortions such as Tia Parks or LaKisha Wilson, who died following fatal injuries sustained during their abortions.[22] Or the woman in Cleveland, OH who was locked out of the clinic following her abortion, despite hemorrhaging.[23] Her 911 call revealed the abortion provider and staff locked up and left with her bleeding profusely in the building lobby.

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[21] One of the litigant providers was Martin Haskell, M.D. who claimed to be asserting the rights of his patients in challenging the law for transfer agreements. *Women's Med. Prof'l Corp. v. Baird*, 227 F. Supp.2d 862, 870 (S.D. Ohio Aug. 15, 2003); *reversed by Baird*, 438 F.3d 595 (6th Cir. 2006), *see also* http://www.operationrescue.org/archives/pattern-of-abortion-complications-at-haskell-clinics-prompts-complaint/.

[22] *See* https://www.lifenews.com/2015/01/21/clinic-that-killed-woman-in-botched-abortion-left-her-on-the-table-with-her-legs-in-the-stirrups/; https://theohiostar.com/2019/09/17/pro-life-advocates-to-hold-prayer-service-for-ohio-woman-who-bled-to-death-after-abortion/.

[23] *See* https://www.youtube.com/watch?v=yjYi2s5ExuM (9-11 recording).

The Eighth Circuit provides another example of direct harm flowing from assumed third-party standing. In *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, Missouri lawmakers amended their definition of "ambulatory surgery center" to include surgical abortion clinics. 903 F.3d 750, 753 (8th Cir. 2017). The amendment would have required surgical abortion clinics to staff doctors who are "privileged to perform surgical procedures in at least one licensed hospital," and would have subjected abortion clinics to physical design and facility layout requirements. *Id.* Abortion providers challenged the amendment as "unnecessary, useless, burdensome or impossible to achieve." *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 263 F. Supp.3d 729 (W.D. Mo., Apr. 19, 2017), *vacated and remanded by Comprehensive Health of Planned Parenthood Great Plains v. Hawley,* 903 F.3d 750 (8th Cir. 2018).

The "unnecessary, useless, burdensome or impossible to achieve" requirements included such things as fire extinguishers, two exits for each floor, corridors at least 6 feet wide (space for a gurney if needed by emergency medical personnel), a working elevator for multi-story clinics, a manual fire alarm, and lighted exit signs. *See* Mo. Code Regs. Ann. Tit. 19, 30-30.070(1). Challenging such simple, common-sense safety requirements emphasizes just how unaligned the abortion providers' interests were from the third-party right holders. It is inconceivable that pregnant women in Missouri would reject having fire extinguishers, multiple lit exists, or working

elevators in the location where they will have their abortions.

This misalignment of interests has had many victims. One St. Louis Planned Parenthood clinic alone has had 75 documented medical emergencies.[24] So egregious are the harms suffered by pregnant women in Missouri that the Missouri Department of Health and Senior Services ("MDHSS") threatened not to renew the St. Louis clinic's facility license.[25] MDHSS based its decision on an investigation into "incidents… resulting in serious patient harm."[26] MDHSS' investigation culminated in a 62-page "deficiency report."[27] The deficiency report included "at least 30 deficient practices" among the worst being: (1) a failed medication abortion that required two follow-up surgical abortions; (2) an incomplete abortion that required a second surgical abortion and resulted in sepsis; (3) an incomplete surgical abortion where the patient did not realize she was still pregnant for more than a month after; and (4) a failed late-term surgical abortion on a patient with placenta previa with potential placenta accrete (considered life-threatening if a hemorrhage occurs). *Id.* The last patient did hemorrhage causing "massive

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[24] *See* https://www.operationrescue.org/archives/st-louis-planned-parenthood-hospitalizes-75th-woman-as-abortion-license-hangs-in-the-balance-over-patient-dangers/.

[25] *See id.*

[26] June 13, 2019 letter from Missouri Department of Health and Senior Services to Reproductive Health Services of Planned Parenthood, *available at* https://www.operationrescue.org/wp-content/uploads/2019/06/1922-CC02395-6-13-2019-Exhibit-A.pdf.

[27] *See* note 14; *see also* note 24.

uncontrolled bleeding resulting in an emergency transfer." *Id*.

As with the other cases, no Missouri women testified that they are burdened by the requirements imposed on ambulatory surgery centers. No Missouri women testified that they did not have an interest in abortion clinics maintaining simple, common-sense safety standards. Pregnant women have been physically harmed by Missouri abortion clinics' countervailing interests in avoiding safety precautions they deem "unnecessary, useless, burdensome." The abortion providers are clearly not the best advocates for their individual patients and do not have a "close relationship."

Assumed third-party standing results in very real injuries of third-party pregnant women that are not confined to physical injuries sustained during their abortions. In at least two jurisdictions, abortion providers challenged parental notification laws leaving minor pregnant girls as victims of unconsented abortions and sexual abuse. In *Planned Parenthood of Idaho v. Wasden*, the Ninth Circuit held that Idaho's parental consent law – although "in pursuit of legitimate interests" – was unconstitutional. 376 F.3d at 938. One of the provisions the abortion clinics sought to challenge on behalf of pregnant minors was the "mandatory reporting" provisions. *Id*. at 915. The clinics argued that mandatory reporting "would result in a criminal investigation of the minor's sex partner." *Id*. The clinics' interest was in providing unrestricted access

to abortion to minors, regardless of how the minor became pregnant.

The State of California – part of the Ninth Circuit – removed the safety-net of parental notification laws. In *Am. Acad. of Pediatrics v. Lungren,* 940 P.2d 797 (Cal. 1997), the Supreme Court of California permitted a "group of healthcare providers" to invoke third-party standing to challenge parental consent laws. *Id*. at 805. The court brazenly disregarded the concerns of the health and safety of pregnant minors and the existence of a judicial bypass exception and invalidated the parental consent law. *Id.* at 825-30. As in *Wasden*, abortion providers in California have one interest: unfettered access to pregnant minors. Removing the parental notification or judicial bypass exception leaves minor girls in California targets for sexual predators who can simply abort the evidence of their crimes without any parental or judicial interference.

In at least three documented cases, adult rapists brought their minor victims to California abortion clinics.[28] In each instance, the minor girls had abortions performed at the request of their rapist and no law enforcement report was made. With no affirmative duty to contact or receive consent from a

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[28] *See People of the State of California v. Andrew King*, *People of the State of California v. Gary W. Cross*, and *People of the State of California v. Edgar Ramirez available at* https://illinoisrighttolife.org/the-case-against-planned-parenthood/#MedicaidFraud.

custodial parent, these girls were simply returned to their rapists and the abuse continued.[29]

And in the Tenth Circuit, the interest of the named plaintiff in *Planned Parenthood of the Rocky Mts. Servs. Corp. v. Owens* in performing unrestricted abortions on minors created an opportunity for child abusers and rapists to avoid detection and prosecution. In *Owens*, abortion providers challenged the Colorado Parental Notification Act. *Owens*, 287 F.3d at 915. The Tenth Circuit held that the Act was unconstitutional. *Id.* at 927. Without a parental notification requirement or judicial bypass exception in place, abusers have free reign. *Sisk v. Rocky Mountain Planned Parenthood* details the case of a 13-year-old girl who was the victim of years of sexual abuse at the hands of her stepfather.[30] When she discovered she was pregnant, her stepfather brought her to Planned Parenthood of the Rocky Mountains for an abortion.[31] Despite different last names, calling her stepfather by his first name, and appearing to be in distress, no one at the clinic questioned the victim as to the nature of pregnancy or

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[29] In *People v. Edgar Ramirez*, the 13-year-old victim was forced to undergo two abortions in the span of a few months that resulted from her father raping her. *See id.* Despite the two visits being so close together and her age, law enforcement was not alerted. *Id.* Rather, the abortion provider placed a long-term contraceptive in her to prevent pregnancy. *Id.* It did not prevent her continued abuse. *Id.*

[30] *See Sisk v. Rocky Mountain Planned Parenthood,* District Court, Denver, CO, Case Number: 2014CV31778, (Dec. 22, 2014) *available at* http://www.adfmedia.org/files/SiskThirdAmendedComplaint.pdf.

[31] *See id.*

if she wanted the abortion.[32] She took direction from her stepfather and he filled out the paperwork.[33] The stepfather instructed her to accept birth control and she obeyed.[34] He subsequently left the abortion clinic while the victim was undergoing the abortion and did not return inside the clinic.[35] The abortion clinic staff released her – a minor – on her own accord and sent her home where the abuse continued.[36]

This is a prime example of a conflict of interest. The same plaintiff abortion clinic to bring suit in the *Owens* case, purportedly representing the interests of pregnant minors, directly harmed a minor patient. Not only were the interests of litigant abortion clinics and third-party right holders not aligned, they were deeply conflicted. These conflicts – stemming primarily from litigant abortion clinics' desire to maintain an unrestricted source of income – have caused irreparable harm and will continue to do so until this Court affirmatively declares that *Singleton*'s third-party analysis must be done in each and every case where third-party standing is pled.

C. Petitioners Do Not Satisfy the *Singleton* Test for Third-Party Standing.

Applying this Court's third-party elements in *Singleton* to this case, it is clear that Petitioners fail

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

to demonstrate both the necessary "close relationship" and the "hinderance" elements.[37] As described during trial testimony by the abortion providers themselves, the provider typically spends ten minutes with his patient and does not meet with her prior to the abortion nor after the abortion. *See June Med. Servs., L.L.C.*, 905 F.3d at 812. No ten-minute relationship could be considered "close." The very notion is risible.

Additionally, Petitioners are also ***not*** "nearly as effective a proponent of the rights" of Louisiana women in regard to Act 620. *See Singleton*, 499 U.S. at 115. Act 620's purpose is to protect women. *June Med. Servs., L.L.C.*, 905 at 791-72. As such, women are the beneficiaries of Act 620. Act 620 does not compel abortion clinics to maintain unique, overly burdensome requirements but merely brings abortion clinics into compliance with other outpatient surgery centers. *Id.* at 806. Petitioners have made it clear they do not see the value of Act 620 and fought its enforcement, despite the benefits. Petitioners want an exception made for them, and only them, as outpatient surgery centers. By fighting Act 620, Petitioners show their interests are not aligned with

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[37] It is also questionable whether Petitioners have Article III standing. Specifically, Petitioners have not demonstrated any real harm or injury inflicted by Act 620. Act 620 requires Petitioners to have admitting privileges. In order to obtain admitting privileges, Petitioners are required to write letters and make phone calls. Only if Petitioners have been categorically denied admitting privileges from all available area hospitals can Petitioners rely on the penalties arising from Act 620. Surely the Court does not deem phone calls and paperwork as a constitutional injury or harm.

those of their patients and demonstrate they do not believe women in their clinics deserve the same protections as patients in every other ambulatory surgery center. Petitioners are discriminating *against* pregnant women. Petitioner fail the first *Singleton* third-party element.

While failing one element of third-party standing is sufficient to deny Petitioners third-party standing, *amicus curie* notes that Petitioners fail the second element as well by neglecting to demonstrate that women in Louisiana are hindered from asserting their own rights. *Singleton* noted that women may be hindered from asserting their own rights in regard to abortion in two ways. First, a hinderance due to being "chilled from such assertion by a desire to protect the very privacy of her decision." *Singleton*, 428 U.S. at 117. Second, women may be hindered by mootness – the time involved in the pregnancy, abortion decision, and case maturity could moot the claim. *Id*. However, this Court immediately explained how these two potential hinderances are "not insurmountable." *Id*. Just as the individual abortion providers did in this case, or the Plaintiffs in *Roe v Wade* and *Doe v. Bolton* did, any woman may bring a suit under a pseudonym. *Id*. at 117. Similarly, the Court quelled the fear of mootness by recalling the point that "a woman no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition." *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 124-25 (1973)).

The same relief is possible in Louisiana for any woman who so desires to assert her rights. She may

bring suit under a pseudonym if privacy is a concern and she need not be physically pregnant to so do. There simply is no good reason for women to be hindered by Act 620. Women would be their own best advocates and only women can speak personally about how Act 620 affects them.[38]

The Court's *Singleton* holding clearly established a requirement that all litigants seeking third-party standing must prove they satisfy the elements of both Article III standing and prudential standing. Third-party standing can never be assumed as it leads to an imbalance of powers, thwarting the constitutional process, and a disregard for, and harm to, the interests of the actual right holders. Petitioners have failed to factually prove the *Singleton* third-party standing elements.

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[38] Being a facial challenge with no actual patients testifying that Act 620 unduly burdens their access to abortion, Petitioners relied solely on biased experts and the fact that several of the abortion providers were unable to obtain admitting privileges. However, the Fifth Circuit showed the lack of good faith in all but one abortion provider. *June Med. Servs., L.L.C.* at 808-810. In fact, the court found that three of the providers "could likely obtain privileges." *Id.* at 810. As such, Act 620 did not affect the overall availability of abortion in Louisiana. ("[The challenge] fails to establish that the women potentially impacted suffer an unconstitutional burden." *Id.* at 815).

III. PETITIONERS OFFER NO EVIDENCE THAT PRUDENTIAL STANDING MUST BE WAIVED IN ANY FEDERAL CIRCUIT.

Petitioners claim Respondents waived their ability to assert a third-party standing challenge by not asserting the challenge below. Petitioners' Opp. at 3-16. Petitioners' opposition to the cross-motion is spent primarily on this point. *Id.* Whether the Court opts to clarify the circuit split regarding waiver of third-party standing is immaterial to the Court's need to clarify *Singleton* and affirm the requirement for all litigants to prove the elements of third-party standing. Petitioners have only shown that certain circuits **may** waive the issue if not asserted in the lower courts. Petitioners have not demonstrated that any court has held it **must** waive the issue. At a minimum, courts have the authority to deal with the issue on a case-by-case basis.

Amicus supports Respondent's contention that, being essential to the "integrity and results of the judicial process," third-party standing guarantees "that claims are brought by the right parties." *See* Respondent's Conditional Cross-Petition, May 20, 2019 at 35. It therefore follows that, like Article III standing, third-party standing ought not to be waived. In *Warth*, this Court appears to agree: "The rules of standing, whether as aspects of the Art. III case-and-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. It is the responsibility of the complaint clearly to allege facts

demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." 422 U.S. at 517-18. The Court needs only to affirm *Warth*.

CONCLUSION

Petitioners failed to demonstrate the *Singleton* elements of third-party standing. For the foregoing reasons, Amicus respectfully requests that this Court clarify its *Singleton* holding and affirmatively hold the need for any litigant pursuing third-party standing to carry the burden of proving third-party standing and vacate any cases which relied on assumed third-party standing.

Respectfully submitted,

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