Nos. 18-1323, 18-1460

In the
Supreme Court of the United States

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
Petitioners and Cross-Respondents,

v.

DR. REBEKAH GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH
Respondent and Cross-Petitioner.

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

BRIEF OF *AMICAE CURIAE* ABBY JOHNSON AND TERRY BEATLEY IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF THE AMICAE[1]

Abby Johnson is a former director of a Planned Parenthood clinic similar to the ones subject to regulation by Louisiana Act 620 ("Act 620"). Having herself been the client of an abortion provider, Abby became an employee after her graduation from college. During her eight years with Planned Parenthood, Abby became familiar with all aspects of clinic operations, rising through the organization's ranks to become a clinic director.

As the years passed, Abby became increasingly disenchanted with the discrepancy between Planned Parenthood's claim of serving women and the reality of Planned Parenthood's business model, which relied on abortion for profitability. Instead of offering a doctor's "medical judgment" as to the advisability of terminating a pregnancy, Planned Parenthood limited itself to being the *provider* of a specific service—a service so critical to its business model that it imposed abortion sales quotas on its clinics. In 2009, Abby resigned from her position and quit Planned Parenthood.

Because of her firsthand, insider knowledge about Planned Parenthood, Abby is consulted as an expert on questions regarding Planned Parenthood policies and procedures. She has testified before

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or part. No counsel or party, other than *Amicae Curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

state legislatures and provided affidavits in litigation.

Abby is also founder of the CheckmyClinic.org project, which maintains a website with up-to-date "Know Before You Go" information consisting of actual State Health Department deficiency reports obtained from FOIA requests issued to each State that regulates abortion clinics.

Terry Beatley is the author of *What If We've Been Wrong: Keeping My Promise to America's Abortion King*. The book surveys the extensive books, writings and papers of Dr. Bernard Nathanson, co-founder of the industry group "NARAL," the National Abortion Rights Action League (now known as NARAL Pro-Choice America).

After having performed approximately 60,000 abortions, Dr. Nathanson resigned from NARAL and wrote three books exposing the tactics used to promote legalized abortion, including his development, along with the help of a public relations firm, of the slogan, "My Body, My Choice."

Dr. Nathanson was the father of the abortion industry. It was his idea to meet the demand in New York by ambulatory centers. Walk-in and -out, same-day surgery centers were focused solely on abortion services and removed the hospital "monopoly" and control. Dr. Nathanson wrote:

> I know the abortion issue as perhaps no one else does. I know every facet of abortion. I was one of its accoucheurs; I helped nurture the creature in its infancy by feeding it great draughts of blood and

> money; I guided it through its adolescence
> as it grew fecklessly out of control..."

Bernard Nathanson M.D., *The Hand of God*, Life Cycle Books, Ltd., 3 (1993).

SUMMARY OF THE ARGUMENT

The case before this Court raises two important questions: first, whether the State may impose reasonable regulations on physicians who perform abortions at ambulatory service centers (ASCs). This brief addresses the second and logically prior question raised by the cross-petition: what standing should be accorded to the physicians who challenge the regulations? Even if those physicians have standing to assert their own interests in avoiding unwanted regulation, do they have standing to assert the constitutional rights of the women who might seek their services? Under this Court's *jus tertii* jurisprudence, standing to assert the rights of a third party is available only to those who are the "best available proponent"[2] of those rights.

Petitioners rely on *Singleton v. Wulff*, 428 U.S. 106 (1976), in which a plurality granted *jus tertii* standing to physicians based on the description of the abortion decision-making process (and the doctor-patient relationship) found in *Roe v. Wade,* 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). *Roe* and *Doe*—without any factual record—described how women decide to seek an abortion based on the doctor's *medical judgment*

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[2] *Sessions v. Morales-Santana,* 137 S.Ct. 1678, 1689 (2017).

that termination of the pregnancy was advisable. It was the "close relationship" posited by these cases that justified a departure from the ordinary rules of standing that prevent a federal court from adjudicating a party's rights unless that party actually asserts them.

Regardless of whether it was ever true that physicians who perform abortions enjoyed a "close relationship" with the women who seek their services, when the evidence in **this** case is reviewed, the opposite conclusion must be drawn: physicians, including the Petitioners in this case, far from being "intimately involved" in the decision to seek an abortion, **are not involved at all**. Their "relationship" typically consists of a brief encounter lasting a few minutes in which the physician performs a surgical procedure on an anesthetized woman.

The *decision* to seek an abortion—which was the key to allowing physicians in *Doe* and *Singleton* to assert the constitutional rights of their patients—has already been made before the physician begins the relationship. Thus, the evidence in this case clearly demonstrates that Petitioners are not the "best available proponent" of the rights they claim to represent.

This court should apply traditional standing principles to the facts of this case and grant standing to the physicians only to the extent of asserting their own interests in avoiding the challenged regulations.

ARGUMENT

Section I of this brief identifies the importance of a "close relationship" in granting *jus tertii* standing to assert the rights of a third party. Section II identifies the assumption of a "close relationship" in *Roe* and *Doe*, which in turn was incorporated into the finding of *jus tertii* standing in *Singleton v. Wulff*. Finally, Section III reviews the evidence in this case to demonstrate that a "close relationship" does not exist.

I. THE NECESSITY OF A "CLOSE RELATIONSHIP" FOR *JUS TERTII* STANDING.

The question raised by the cross-petition is whether the Petitioners qualify for *jus tertii* standing in light of *Kowalski v. Tesmer*, 543 U.S. 125 (2004). Historically, this Court has been hesitant to grant *jus tertii* standing, in light of the understandable judicial preference to "limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). *See also U.S. v. Raines*, 362 U.S. 17, 21 (1960) ("one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional").

Consequently, *jus tertii* standing has only been recognized where two conditions are met: first, that there is a "close relationship" between

the party seeking standing and the third party whose rights are being adjudicated; and second, that there is a significant "hindrance" to the third party's assertion of their own rights. *Sessions v. Morales-Santana*, *supra*, 137 S.Ct. at 1689 (2017). Only then does it make sense to say that the one who seeks *jus tertii* standing is the "best available proponent" of the third party's rights. *Id.*

This brief focuses on the first prong of the test: whether there is a close relationship.

II. THE FLAWED ASSUMPTIONS OF SINGLETON REGARDING A "CLOSE RELATIONSHIP."

Petitioners rely on *Singleton v Wulff*, 428 U.S. 106 (1976), to establish *jus tertii* standing in this case. Yet the plurality in *Singleton* did not conduct its own analysis of the standing issue, but instead relied upon *Roe v. Wade,* 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), to characterize the relationship between physicians and the women they treated. Because the description of that relationship was the basis for granting *jus tertii* standing in *Singleton*, a careful review of *Roe* and *Doe* is warranted. Only then can the circumstances of the present case be examined—leading to the unavoidable conclusion that *jus tertii* standing cannot be justified.

A. The Characterization in *Roe* and *Doe* of the Doctor-Patient Relationship.

In this case, Plaintiffs challenge the constitutionality of regulations addressing the

conditions under which abortions are performed in Louisiana. *Roe* and *Doe* addressed a more fundamental issue: *who decides* whether a pregnancy should be terminated? *Roe* and *Doe* rejected the state defendants' contention that they had an interest sufficient to displace the medical judgment of the doctor whose recommendation the woman was following. This court refused to allow the states (at least in the first trimester[3]) to condition a woman's right to terminate her pregnancy on the fulfillment of various conditions, such as the concurrence of other doctors, the location of the procedure (in a hospital) and the woman's residence. In short, *Roe* and *Doe* focused on the *decision* to have an abortion, and the central role that the physician played in arriving at that decision.

Both *Roe* and *Doe* assumed[4] that the abortion decision resulted from a particularized

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[3] *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992), replaced the trimester formula with the "undue burden" test, which extended constitutional limitations on the State's ability to condition a woman's decision to terminate her pregnancy. This brief does not address the question of whether the Constitution protects a woman's right to terminate her pregnancy. Instead, it is directed toward the question of who should have standing to assert such a right.

[4] It is no secret that *Roe v. Wade* and *Doe v. Bolton* were decided without a record of the actual relationship between the physicians and women whose rights they were asserting. *See, for example,* Clark D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 Vill. L. Rev. 45 (2012), at 47 ("The factual records in *Roe* and *Doe* were non-existent--consisting merely of a complaint, an

medical judgment, and that the physician took into account all of the factors relevant to making the decision about whether to terminate a pregnancy. This assumption is best illustrated in *Doe v. Bolton*, 410 U.S. 179 (1973), in which the majority opinion refers to "the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients." 410 U.S. at 196. The physician, in the words of Justice Blackmun,

> perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error," and needs. The good physician—despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good"—will have sympathy and understanding for the pregnant patient that probably are not exceeded by those who participate in other areas of professional counseling.

Id. at 196-97. Each opinion independently reflects this assumption.

1. *Roe v. Wade*

Roe's description of the physician-patient relationship, in which the pregnant woman looks to her physician for "medical judgment" about how to

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affidavit (unsigned by Jane Roe, signed by Mary Doe), and motions to dismiss").

deal with her pregnancy, contrasts sharply with the reality of contemporary abortion "providers,"—their chosen label[5]—who simply deliver a service requested by the patient. In *Roe* it was assumed that the decision to seek an abortion would result from an individualized review of the "factors the woman and her responsible physician **necessarily** will consider in **consultation**." 410 U.S. at 153 (emphasis added). As set forth in the quotations below, the consultation presumed by the *Roe* Court was aimed at the woman and her doctor together reaching an abortion **decision**:

- "[N]either interest justified broad limitations on the reasons for which a physician and his pregnant patient might **decide** that she should have an abortion in the early stages of pregnancy." *Roe,* 410 U.S. at 156 (emphasis added).

- "If that **decision** [physician's medical judgment that pregnancy should be terminated] is reached, the judgment may be effectuated by an abortion free of interference by the State." *Id.* at 163 (emphasis added).

- "For the stage prior to approximately the end of the first trimester, the abortion **decision** and its effectuation must be left to the medical judgment of the pregnant

[5] See, e.g., Brief of Planned Parenthood Federation of America, et al., Nos. 18-1323, 18-1460 at 5.

> woman's attending physician." *Id.* at 164 (emphasis added).

Repeatedly *Roe* refers to the abortion decision as resulting from the physician's **medical judgment** advising the termination of the pregnancy:

> [F]or the period of pregnancy prior to this 'compelling' point, the attending **physician**, in consultation with his patient, is free to determine, without regulation by the State, that, in his **medical judgment**, the patient's pregnancy should be terminated. If that **decision** is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe, 410 U.S. at 163 (emphasis added).

Similarly, in concluding its opinion, "To summarize and to repeat," the majority stated:

> For the stage prior to approximately the end of the first trimester, the abortion **decision** and its effectuation must be left to the **medical judgment** of the pregnant woman's attending **physician**.

Id. at 164 (emphasis added).

2. *Doe v. Bolton*

Doe v. Bolton, 410 U.S. 179 (1973), relied even more heavily on the assumption that a woman who seeks an abortion does so only after a physician has reviewed her individual circumstances—both medical and personal—and

has arrived at the conclusion that terminating the pregnancy is advisable.

The Georgia statute challenged in *Doe* required not only that the physician exercise his "best clinical judgment," *id.* at 183, but also imposed additional prerequisites: only state residents could obtain an abortion; only hospitals could perform abortions; and the approval of a physician committee was required. *Id.*

Doe struck down these three requirements, but left intact the requirement that the decision to terminate the pregnancy be based on the physician's "best clinical judgment." *Doe* emphasized the expansive scope of the physician's exercise of clinical judgment:

> We agree with the District Court [] that the **medical judgment** may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows **the attending physician** the room he needs to make **his best medical judgment**. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Doe, 410 U.S. at 192 (citation omitted and emphasis added).

B. Relying on *Roe* and *Doe*, the Plurality in *Singleton v. Wulff* Assumed That Physicians Are "Intimately Involved" in the Abortion Decisions of Women.

Relying on *Roe v. Wade* and *Doe v. Bolton*, decided only three years earlier, the plurality in *Singleton* stated without analysis that a woman seeking an abortion enjoys a "close relationship" with her physician, and that the physician was "intimately involved" in the *decision* to seek an abortion. 428 U.S. at 117. As later portions of this brief will explain, *if* it was true at the time of *Roe v. Wade* and *Doe v. Bolton* that women made the decision to abort only in consultation with their physicians, it is not true today, nor is it true of the physicians subject to regulation under Act 620.[6]

In evaluating whether the criteria for third-party standing had been met, the court posed the question of whether "the party who is in court

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[6] It is important to distinguish the standing of the physicians to assert *their own* interests (to be free from threatened prosecution or claimed unreasonable regulation interfering with their economic interests) from the standing of the physicians to assert *the interests of women seeking abortion services*. Unfortunately, this distinction has not always been maintained. While physicians threatened with criminal prosecution are undoubtedly free to raise on their own behalf constitutional arguments based on, e.g., vagueness or lack of rational basis, they should be allowed *jus tertii* standing **only** where they establish, with evidence, the factors of a close relationship with the third parties and hindrance of those third parties to assert their own rights. *Kowalski v. Tesmer*, *supra*, 543 U.S. at 130.

becomes by default the right's best available proponent." *Singleton*, at 116. If, as *Roe* and *Doe* described it, the decision to seek an abortion was a result of the physician's clinical judgment, the physician could serve as a suitable proxy for the woman herself: "The closeness of the relationship is patent, as it was in *Griswold* [*v. Connecticut,* 381 U.S. 479 (1965)] and in *Doe*. . . . Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. See *Roe v. Wade* . . . ." 428 U.S. at 117.

In dissent, Justice Powell warned that the precedent of permitting third-party standing to providers of professional services seeking compensation would be "difficult to cabin." 428 U.S. at 130, n.7. In response, the plurality pointed to the requirement that future litigants prove that they enjoyed "a confidential relationship such as that of the doctor and patient." 428 U.S. at 118 n. 7. Justice Powell rejoined that the distinguishing factor of a "confidential relationship" was "analytically empty (especially when one recognizes that, realistically, the 'confidential' relationship in a case of this kind often is set in an assembly-line type abortion clinic)." *Id*. at 130, n.7.

According to the *Singleton* plurality, however, because the physician was presumed to be privy to the woman's "woes, emotions, concerns" as well as her "physical, emotional, psychological, familial" condition (*Doe*, *supra*, 410 U.S. at 196), the physician could effectively represent her interests, and thus an exception to the ordinary standing rules was justified.

Justice Powell's "assembly line" analogy was correct.[7] As the following section will show, abortion providers generally, and the Petitioners in particular, do not enjoy a "close relationship" with their patients.

III. PETITIONERS DO NOT HAVE A "CLOSE RELATIONSHIP" WITH THE WOMEN WHOSE RIGHTS THEY CLAIM TO REPRESENT.

The physicians in this case have challenged the constitutionality of Act 620, which among other things ensures that outpatient abortion providers have local hospital admitting privileges. The requirement serves the dual purposes of ensuring credentialing and qualification of the physician, as well as providing continuity of care if the woman experiences one of the many known medical complications of abortion.

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[7] Dr. Bernard Nathanson, who coined the slogan "a decision between a woman and her doctor," described the fiction and the reality:

> Giving it just the barest patina of a medical judgement made it infinitely more acceptable and politically more palatable. In actual fact, the abortion decision is no more the doctor's than a nose job is. It is the woman alone who decides if she wants her nose fixed, or her breasts done, or her child destroyed, and she merely involves the doctor as the instrument of her decision.

Bernard N. Nathanson, MD, *The Abortion Papers*, 199, Frederick Fell Publishers (1983).

As the following sections of this brief demonstrate, the circumstances justifying third-party standing in *Singleton* simply have no application to the methods and practices of abortion providers subject to Act 620. The reality of the practice in the ASCs subject to regulation by Act 620 is that physicians who perform abortions, far from being "intimately involved" in the abortion decision, *have no involvement whatsoever in the decision to seek an abortion*. Following *Roe*, *Doe*, and *Singleton*, if the women who seek the services of Petitioners do not rely on the Petitioners' "medical judgment" in making the decision to terminate a pregnancy, then it is no longer appropriate to allow the Petitioners to assert the women's interests.

A. Petitioners Cannot Assert the Constitutional Rights of Hypothetical Patients.

Petitioners here have not suggested that they are asserting the rights of any particularly known patients – whether known to them or to the courts before which they have appeared

In *Kowalski*, this Court considered the third-party standing of lawyers seeking to represent the constitutional rights of indigent defendants whose appellate counsel would not be reimbursed by the state. The plaintiffs asserted that the attorney-client relationship was a "close relationship" sufficient to meet the first prong of third-party standing. "Specifically, they rely on a future attorney-client relationship with as yet

unascertained Michigan criminal defendants 'who will request, but be denied, the appointment of appellate counsel, based on the operation' of the statute." 543 U.S. at 130. This Court noted that the other cases in which the court had found the attorney-client relationship to suffice for third-party standing had involved existing relationships with known clients. These existing relationships, this Court noted, were "quite distinct from the hypothetical attorney-client relationship posited here . . . The attorneys before us do not have a 'close relationship' with their alleged 'clients'; indeed, they have no relationship at all." *Id.* at 131.

Petitioners here are in exactly the same position as the attorneys in *Kowalski*. Not only do they not have a "close relationship" with hypothetical future clients; they have no relationship at all.

B. *Jus Tertii* Standing Should Be Granted Only If the Evidence Supports It—And Here It Does Not.

Petitioners argue that the issue of whether physicians qualify for *jus tertii* standing has already been decided as a matter of law, and that a factual record establishing such standing is unwarranted and unnecessary.[8] But in light of the

[8] "[O]nce 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

significance of allowing one party to assert the rights of another party—with resulting effects on those rights through res judicata and *stare decisis*—a party's entitlement to *jus tertii* standing should be established in every case, even if it consists only of showing that its position is sufficiently similar to that of a previous litigant. In this case the evidence shows the complete absence of the "close relationship" assumed in *Singleton* and referenced in *Kowalski*.

It is Petitioners' burden to establish the basis for *jus tertii* standing, but here the Court can take judicial notice of the evidence establishing the complete opposite of what Petitioners would be required to show.

1. Deposition Testimony of Dr. Doe 2.

Dr. Doe 2 testified in a parallel case[9] that his role is limited to performing the procedure and that he is rarely involved in the woman's *decision* to have an abortion: "I feel strongly that the decision to continue that pregnancy or terminate it should rest with the mother, and so far that's who makes it. I don't make the decision to have the abortion,

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law." Petitioners' Opposition to Conditional Cross-Petition for a Writ of Certiorari, at 24.

[9] *June Medical Services LLC v. Gee*, United States District Court for the Middle District of Louisiana, Case No. 3:16-CV-444 BAJ-RLB, Deposition of Dr. John Doe 2, taken March 19, 2019 (hereinafter referred to as "Doe 2 Depo") (available at https://louisianaag.mycusthelp.com/aWEBAPP/_rs/(S(x44px4tiir4aoer1cd1sdyhp))/RequestArchiveDetails.aspx?rid=693&view=1.

but I facilitate her wishes and give her the best, safest procedure I can provide." Doe 2 Depo., 293:14-21. When asked whether he ever counseled a patient who was uncertain about an abortion, he answered "Occasionally, yes." Doe 2 Depo., 135:12. But it turns out that in response to a patient's expressing uncertainty about an abortion, he would refer the patient back to the counseling process, rather than offer such counseling himself. *Id.* Confirming the division of labor described in the Johnson Declaration, *infra*, Dr. Doe 2 testified that if the patient verbalized ambivalence about the procedure, "I'll have the discussion with her that's appropriate. But I'm not, you know, --The vast percentage of patients that I have done through the years have their mind made up and, you know, that's just not something that they verbalize except in very unusual, you know, very rare cases." Doe 2 depo., 139:20-140:1.

2. Amica Abby Johnson.

Amica Abby Johnson, who was the Director of a Planned Parenthood clinic in Texas, described in a federal court case[10] the procedures that every clinic director was required to follow:

> As the Director of the Bryan Clinic, I supervised twelve paid employees and

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[10] *Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard*, decision reported at 799 F.Supp.2d 1048 (D.S.D. 2011), No. Civ. 11-4071-KES. Abby Johnson submitted a Declaration filed as Document 40-6 on 07/01/2011. Subsequent references are to "Johnson Dec."

> about fifty volunteers. We had two physicians who performed abortions on a contract basis. These two doctors were not employees of Planned Parenthood and just like in all of the Planned Parenthood affiliates throughout the nation, the contract doctors had to follow protocols and procedures established by Planned Parenthood. The doctors did not do the counseling and did not make the disclosures to women during the informed consent process. The Planned Parenthood personnel did the counseling and made the disclosures developed by the New York office of Planned Parenthood Federation of America. Thus, the physicians let Planned Parenthood control the counseling and the informed consent process.

Johnson Dec., ¶ 6. Not only are the doctors excluded, as a matter of clinic policy, from the process by which "informed consent" is obtained, but the clinic personnel who conduct the "counseling" are not qualified to exercise anything resembling "medical judgment":

> Planned Parenthood Federation of America does not have a program to certify or train counselors. The "counselors" are not licensed. As a general matter, Planned Parenthood hires people to provide "counseling" to pregnant women who have no medical background, no training in human genetics or human embryology. Generally, the people they

> hire have no background in psychology or any other background that is useful in counseling pregnant women about matters relevant to taking a consent for a medical procedure. They are not skilled in techniques to assess coercion and other issues of importance. Those like myself, who do have some counseling skills and training are usually placed in a position like mine of Health Center Director. Most "counselors" had no such training.

Johnson Dec., ¶ 13.

It would be one thing if the "counselors," despite lack of medical training or qualification as counselors, engaged in real dialogue with patients in order to ensure that their consent was truly informed. But that is not the case. Consistent with its financial interest in minimizing cost and maximizing profit, Planned Parenthood avoids any genuine consideration of whether an abortion is really in the patient's best interests before preparing for the abortion procedure:

> All Planned Parenthood counseling begins with the assumption that the woman has made her decision before she arrives at the abortion clinic. As a result, Planned Parenthood's counseling procedures are not tailored to assist the woman to go through a decision making process. To Planned Parenthood, her decision has already been made, even in situations where that is clearly not the case. The so-called counseling that Planned Parenthood provides is little

> more than the "counselor" going down a check list to be sure that all of the forms, including the Consent for an Abortion, are signed without regard to the quality of the counseling. Because Planned Parenthood assumes the decision is made before the woman arrives at the abortion clinic, Planned Parenthood dispenses with any real counseling designed to help the woman arrive at a voluntary and informed decision.

Johnson Dec., ¶ 15.

3. Amici Planned Parenthood Federation of America, National Abortion Federation, Physicians for Reproductive Health, and Abortion Care Network.

In their brief in support of Petitioners, Amici Planned Parenthood *et al*. attempt to create the impression that "providers" do in fact enjoy the type of relationship with their patients that the *Roe* and *Doe* majorities envisioned. However, the only "close and meaningful relationships" described in those testimonials develop, if at all, *during* and *after* the abortion. Virtually none of the "providers" suggests that she consults with the women in making the abortion decision. Rather, the women are assembled and waiting for these "providers" as they arrive at the clinics, frequently from long distances. *See, e.g.*, PPFA Brief at 16 (provider who travels from New York to Indiana: "If I'm not there, the center won't open and there are fifteen patients

on the schedule who will not get the care they need").

These providers boast, not of having a close pre-existing relationship in which women confide in and consult with them about the decision to abort, but of empowering women to execute their own decisions and "take agency" over their own lives. *See, e.g.* PPFA Brief at 7 ("I helped my patients take agency over their own lives"); 16 ("I believe that people should be able to decide what is best for them and their families and should have agency over their own bodies"); 18 ("There aren't many opportunities in medicine where you're able to support your patients as they take agency over their lives, and I get to do that multiple times a day"); 19 ("Some of the most meaningful connections I have had with patients have come while providing abortion care, granting me a small part in the self-empowerment of my patients on their way to futures they see for themselves").[11]

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[11] The providers also cite to letters they have received from women after their abortions as proof of their "close relationships" with former clients. PPFA Brief at 14–16, 19. The PPFA Amici apparently are not aware that grateful customers frequently send letters of appreciation to service providers, even without being encouraged to do so by ideologically-driven national campaigns. *See e.g.*, https://www.plannedparenthood.org/planned-parenthood-gulf-coast/blog/national-day-of-appreciation-for-abortion-providers; https://www.reproductiveaccess.org/get-involved/thank-an-abortion-provider/. A thank-you note is not evidence of a "close relationship."

C. Petitioners Are Not the "Best Available Proponent" of the Rights of the Women They Seek to Represent.

The two requirements of third party standing—a "close relationship" with the third party and some hindrance to the third party asserting his or her own rights—are in the service of the overarching goal of ensuring that the party asserting the rights be the "best available proponent" of those rights. *Sessions v. Morales-Santana, supra,* 137 S.Ct. at 1689. Here, too, Petitioners fail.

The regulation at issue in this case, namely, that a physician have admitting privileges at a local hospital before performing an abortion at an outpatient surgical facility, differs from other types of abortion regulation in a manner directly relevant to the issue of standing and the question of who is the "best available proponent" to assert the constitutional rights at issue.

First, and most obviously, the regulation in no way restricts a woman's ability to **decide** to have an abortion at a particular gestational age, by a particular method, for a particular reason, in consultation with particular family members, or having considered particular information or other options. It simply has no bearing on the decision-making process envisioned by the *Roe* and *Doe* majorities.

The gravamen of the regulation at issue here is whether Petitioners will be allowed to provide the abortion without having taken steps that the state believes are necessary or prudent to

safeguard the health and well-being of the woman undergoing the abortion. In this context, the conflict of interest between the Petitioners and the unknown woman on whom they would operate is clear. Petitioners, and Petitioners alone, are asserting the "rights" of women to have abortions without the protections of the health and safety regulation at issue. In this context, the petitioners would be the "best **available** proponent" only if a woman or women seeking an abortion in such circumstances were, beyond doubt, not available. Petitioners have failed—indeed, have not even tried—to demonstrate the unavailability of a better proponent.

Second, Petitioners have gone on the record as being opposed to all health and safety restrictions on abortion. Petitioners, including not only June Medical Services[12] but also one of the two individual physician petitioners here, brought an "extraordinary" action challenging "virtually all of Louisiana's legal framework for regulating abortion." *In re Gee*, 941 F.3d 153, 156 (5th Cir. 2019). These regulations include, as described by the Fifth Circuit, "legal provisions that would benefit rather than harm women seeking abortions," such as a provision requiring them to give women instructions for post-operative follow-up care, and another prohibiting them from

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[12] Because it is obvious that a corporation cannot have a "close relationship," as described in *Roe*, *Doe*, and *Singleton*, with a woman considering abortion, this brief has not, up to this point, addressed the standing of June Medical Services, L.L.C.

charging women for abortions in the 24 hours after a woman gives informed consent, before the abortion takes place. *Id.* at 165. In light of their "extraordinary" opposition to all regulations on abortion, including those that are actually beneficial to women, Petitioners here simply cannot credibly claim to be the "best available proponents" of their future clients' rights.

CONCLUSION

Contrary to the rule advocated by Petitioners, standing—particularly *jus tertii* standing—should not be assumed as a matter of law based upon a previous case, regardless of how dissimilar the facts are in the subsequent case. Instead, the burden is on the party claiming *jus tertii* standing to show that it is entitled to represent—with all of the consequences such representation entails—the rights of the third party. Petitioners in the case before this Court have not established, and cannot establish, the type of "close relationship" that would justify *jus tertii* standing. Consequently, decisions below predicated upon such standing should be vacated.

Respectfully submitted,

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January 2, 2020