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# Revisiting Third-Party Standing in the Context of Abortion

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## KEY TAKEAWAYS

Abortion providers often assert women's legal rights when they challenge state abortion regulations.

Women are the best proponents of their own rights.

Courts should not allow abortion providers to bring third-party lawsuits attacking laws that are designed to protect women from those very providers.

On March 4, 2020, the Supreme Court of the United States will hear a challenge to Louisiana's law requiring doctors who perform abortions to have admitting privileges at a local hospital. The Court decided another case, *Whole Woman's Health v. Hellerstedt*,[1] concerning a similar Texas law in 2016. In *Whole Woman's Health*, the Court determined that the burden Texas's law placed on access to abortion outweighed the medical benefits. In the Louisiana case, *June Medical Services v. Russo*,[2] the justices agreed to hear a secondary issue raised by the state: whether abortion providers may assert the legal rights of women seeking abortions when they challenge state regulations.

Generally, a complaining party must demonstrate standing to bring a legal challenge based on actual injuries that he has suffered or will suffer as a result of the defendant's conduct. The Court first allowed

an abortion provider to assert legal rights based on third-party standing in *Singleton v. Wulff* (1976),[3] holding that there must be an obstacle preventing the third party from bringing her own action and a close relationship between the person bringing suit and the third party with the underlying right. Following that ruling, challenges to abortion regulations have been brought more often by clinics and doctors than by the women whom those regulations purportedly burden.

*June Medical Services* offers the Court an opportunity to consider the prudence of allowing such suits to continue when women could bring their own legal challenges and the interests of abortion providers and the women they claim to represent are not aligned.

## Louisiana's Admitting Privileges Law

Louisiana's five abortion clinics have a history of health and safety violations, ranging from providing substandard care to employing unqualified physicians to failing to report the rape of a minor. The Louisiana Department of Health has documented numerous instances of these violations. For example:

- Clinics have been cited repeatedly for failing to sanitize instruments properly and for storing unlabeled and undated medications.[4]
- The medical director of June Medical Services hired a radiologist and an ophthalmologist and trained them to perform abortions.[5]
- The owner of the Delta Clinic of Baton Rouge fought to hire a doctor whose license had been suspended due to a history of malpractice complaints.[6]
- Another doctor at the Delta Clinic left a patient bleeding for three hours, as a result of which she was taken to a nearby hospital and had an emergency hysterectomy.[7]
- Bossier City Medical Suite failed to report the rape of a 14-year-old girl and performed abortions on girls as young as 11.[8]

It was against this backdrop—which represents just a few of the many such problems found at abortion clinics in Louisiana—that the state legislature considered Act 620, requiring doctors who perform abortions to

maintain admitting privileges at a hospital within 30 miles of their clinic. This requirement would serve two purposes: furthering a patient's continuity of care if complications arose during an abortion procedure and ensuring that doctors performing abortions were qualified to do so.

In the course of considering Act 620, the legislature heard testimony about health and safety violations at clinics as well as from women who had experienced complications after having an abortion. One woman testified that she began to hemorrhage during an abortion, and the doctor "could see that something had gone wrong" and "told [her] to get up and get out."[9] She had to undergo an emergency procedure. Abortion providers also testified, explaining how hospitals conduct a rigorous review of a doctor's work history, qualifications, and criminal history in considering applications for admitting privileges.[10] This is far more rigorous than the clinics' hiring process. One clinic owner stated, "If they have a license and the state gave the license, it's not for me to determine if they are capable."[11]

Act 620 was passed by a vote of 88 to 5 in the Louisiana House of Representatives and 34 to 3 in the Senate. Before the law went into effect, a group of clinics and doctors sued to enjoin it, arguing that it placed an undue burden on women seeking abortions. The federal district court enjoined the law, a panel of the U.S. Court of Appeals for the Fifth Circuit reversed, and the Supreme Court agreed to review that ruling in *June Medical Services v. Russo*.

## The Current State of Abortion Jurisprudence

The Supreme Court's current jurisprudence dealing with abortion reflects three guiding principles:

1. The state maintains legitimate and important interests in protecting the mother's health and safety and the life of the unborn child throughout pregnancy.

2. Before viability, states may pass regulations that do not have the purpose or effect of imposing an undue burden on women seeking abortions in a large fraction of cases.

3. In reviewing whether a regulation imposes an undue burden on abortion access, courts must weigh the medical benefits and burdens of the regulation against each other rather than deferring to the legislature's determination.

Although the Supreme Court discovered a new constitutional right to abortion in *Roe v. Wade* in 1973, the justices were clear that this ruling should not preclude states from placing reasonable regulations on abortion clinics and doctors. The Court explained that states have a legitimate interest in ensuring that an abortion, "like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."[12] This interest "obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise."[13]

In *Roe*, the Court used the trimester framework to determine the point during a pregnancy at which the government's interest in protecting maternal health and unborn life could outweigh a woman's interest in getting an abortion. The Court wrote that the state's legitimate interest in abortion safety becomes "compelling" after the first trimester and may be vindicated by "requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed...."[14]

Then in a plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court replaced the trimester framework and the related requirement that government must have a compelling interest before regulating the abortion industry with the "undue burden" test. This prohibits states from passing abortion regulations before viability that, for a "large fraction" of women, have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[15] Employing this standard, the Court upheld Pennsylvania's law requiring parental consent for minors seeking an abortion, as well as informed consent and a 24-hour waiting period, but struck down a spousal notification requirement as an undue burden.

In *Gonzales v. Carhart* (2007), a challenge to the federal law banning partial-birth abortions, the Court clarified that while laws regulating abortion must not impose an undue burden, they are subject to rational basis review—the lowest standard of judicial scrutiny—which requires that a law be rationally related to a legitimate state interest. "Where it has a rational basis to act, and it does not impose an undue burden," explained the Court, "the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[16] The Court concluded that "[m]edical uncertainty [about the benefits of a particular regulation] does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."[17]

In *Whole Woman's Health v. Hellerstedt* (2016), the Court ratcheted up the level of review for abortion regulations, holding that courts should not defer to lawmakers on contested medical questions. Instead, courts must weigh the medical benefits and burdens of regulations against each other to determine whether they impose an undue burden on women seeking abortions. Dissenting from this ruling, Justice Clarence Thomas wrote that "by second-guessing medical evidence and making its own assessments of 'quality of care' issues," the Court will become "the country's *ex officio* medical board with powers to disapprove medical and operative practices and standards throughout the United States."[18]

As in many other cases involving abortion, the Court glossed over any discussion of standing. Of this omission, Thomas observed that "[a]fter creating a constitutional right to abortion because it 'involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy...the Court has created special rules that cede its enforcement to others."[19] Thomas explained that the Court based its ruling on what it called "commonsense inferences" about the burden created by Texas's law without "identifying how many women fit this description; their proximity to open clinics; or their preferences as to where they obtain abortions, and from whom."[20] He concluded that commonsense inferences "are no substitute for actual evidence."[21]

## Third-Party Standing Jurisprudence

The Supreme Court's cases dealing with third-party standing reflect two general rules:

1. A complaining party generally may not assert the legal rights or interests of third parties.

2. An exception to this rule exists if an obstacle prevents the third party from bringing her own action and a close relationship exists between the party bringing suit and the third party.

Under Article III of the Constitution, the judicial power extends to resolving only "Cases" or "Controversies." This ensures that courts do not issue advisory opinions, but rather adjudicate actual disputes between adverse parties that are capable of resolution by a court. To satisfy this constitutional requirement (known as Article III standing or constitutional standing), a complaining party must establish an injury-in-fact that is fairly traceable to the defendant's conduct and capable of being redressed by a court.

In addition to these three requirements, the Supreme Court has identified other limits on the exercise of its power "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[22] As the Court explained in *Warth v. Seldin* (1975), "Apart from this minimum constitutional mandate [of Article III], this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers."[23] These have included limits on filing suits alleging generalized grievances, asserting the legal rights or interests of third parties, and raising matters outside the "zone of interests" protected by the relevant law.

In *Lexmark International, Inc. v. Static Control Components* (2014), the Court held that suits raising a generalized grievance or claim outside the "zone of interests" do not present a "case" or "controversy" within the meaning of Article III.[24] The Court declined to address whether third-party claims also fail to present a "case" or "controversy."[25] Regardless of whether third-party claims implicate constitutional or prudential limits on the exercise of the judicial power, a plaintiff seeking to assert the legal rights or interests of a third party must have a close relationship with that third party and demonstrate that there is a "hindrance" or "genuine obstacle" to the third party's asserting her own rights.

Until the mid-20th century, courts would "not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect."[26] The Court generally has held third-party claims to a rigorous standard, finding that "personal rights"—such as the Fourth Amendment right against being subject to an unreasonable search or seizure, the Fifth Amendment right against compelled self-incrimination, and the Sixth Amendment right to counsel—may not be "vicariously asserted."[27] In *Kowalski v. Tesmer*, for example, the Court held that lawyers could not challenge a state's process of appointing appellate counsel for indigent defendants who plead guilty.[28] Writing for the majority, Chief Justice William Rehnquist explained that these lawyers lacked a close relationship with future, hypothetical clients to seek to vindicate their Sixth Amendment rights.[29] "[I]t would be a short step from the...grant of third-party standing in this case," Rehnquist concluded, "to a holding that lawyers generally have third-party standing to bring...the claims of future unascertained clients."[30]

In some other contexts, however, the Court has been more permissive of third-party standing. The Court has allowed litigants to assert the equal protection claims of potential jurors excluded because of their race, vendors to assert potential customers' equal protection rights, and doctors to assert potential patients' right to seek an abortion.[31]

For instance, in *Craig v. Boren* (1976), the Court allowed a beer vendor to bring an equal protection challenge to a state law barring the sale of 3.2 percent beer to men between the ages 18 and 21.[32] The individual plaintiff had turned 21 while the suit was pending, but the Court saw no reason to "forgo consideration of the constitutional merits" when "the applicable constitutional questions have been and continue to be presented vigorously and 'cogently.'"[33] Chief Justice Warren Burger disagreed, writing that "despite the most creative efforts," this case failed to meet the exceptions to the bar on third-party suits.[34]

In *Singleton v. Wulff* (1976), Missouri abortion providers challenged the state's denial of Medicaid funding for non-medically indicated abortions for women who were eligible for Medicaid, arguing that this violated the patients' right to have an abortion. In a plurality opinion for four members of the Court,[35] Justice Harry Blackmun found that the doctors had standing to assert their patients' rights in addition to their own claims for reimbursement and that, while "third parties themselves usually will be the best proponents of their own rights...if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician."[36] Blackmun explained that the close relationship between doctor and patient here "is patent" since a woman cannot "safely secure an abortion without the aid of a physician."[37]

Obstacles to a woman challenging the Missouri law on her own included "a desire to protect the very privacy of [the abortion] decision from the publicity of a court suit" and the "imminent mootness...of any individual woman's claim" when she is no longer pregnant.[38] Blackmun acknowledged that these obstacles are "not insurmountable."[39] A woman could file a suit using a pseudonym, and such a suit would meet the exception to mootness (in the event that the plaintiff was no longer pregnant) for a claim that is "capable of repetition yet evading review."[40] Nevertheless, the plurality concluded that doctors are "uniquely qualified to litigate the constitutionality of the State's interference with" abortion.[41]

In dissent, Justice Lewis Powell expressed concerns about the ability to cabin this ruling, writing that "the Court's holding invites litigation by those who perhaps have the least legitimate ground for seeking to assert the rights of third parties."[42] Powell questioned the closeness of the relationship, pointing out that "realistically, the 'confidential' relationship in a case of this kind often is set in an assembly-line type abortion clinic."[43] He further noted that "an interest in being compensated for professional services without more" is not "a sufficiently compelling reason to justify departing from a rule of restraint that well serves society and our judicial system."[44]

*Singleton* has been relied upon as the basis for doctors and clinics filing numerous third-party lawsuits premised on women's right to an abortion.

## Third-Party Standing in *June Medical Services v. Russo*

When Louisiana's law was enjoined, the district court cited *Whole Woman's Health* to find that the law advanced "minimal" health benefits while placing "substantial burdens" on women seeking an abortion. On appeal at the Fifth Circuit, a three-judge panel reversed the district court, holding that the facts in Louisiana were remarkably different from those in Texas in *Whole Woman's Health*. The panel concluded that some of the doctors in Louisiana failed to make a good-faith effort to obtain admitting privileges.

After reviewing which doctors were likely to obtain privileges, the court noted that it appeared the law would result in a slight increase in wait times "at one of the state's clinics for at most 30% of women."[45] This did not meet the standard of a "substantial burden on a large fraction of women" seeking abortions in Louisiana.[46] The clinics and doctors sought and received a temporary stay from the Supreme Court in February 2019 and then petitioned the Supreme Court for review. Louisiana filed a cross-petition, asking the justices to consider whether abortion providers have standing to challenge the law on behalf of their patients. The Court agreed to review the issues raised in both petitions.

The Court's willingness to bend the traditional rules of standing is part of a broader problem of distorting traditional legal and constitutional principles when abortion is involved.[47] This case shows that Justice Powell's concerns about third-party standing have been realized. The doctors and clinics challenging Louisiana's admitting privileges law do not have the "close" relationship envisioned by the plurality in *Singleton*, and there are no actual obstacles preventing women from challenging the law themselves. The Court should take this opportunity to make clear that there is no abortion provider exception to the general rules of standing.

**A "Close" Relationship.** The first requirement for departing from the rule against third-party claims is that the complaining party has a close relationship with the third party. Justice Powell's skepticism about the "close" relationship between doctor and patient proved to be well-founded for two reasons.

*First,* the *Singleton* Court was wrong to assume that there is an "intimately involved" consultation and that doctors are "uniquely qualified" to challenge abortion regulations. Instead, the record in *June Medical Services* shows that clinics are operated like the "assembly-line" that Powell imagined: One Louisiana doctor estimated that he performs 250–300 abortions

per month, working three days a week;[48] others testified that they could perform "about six procedures in one hour" and "between 40 and 60... surgical abortions and 20 to 30" medical abortions per week.[49] Another clinic administrator testified that doctors at her clinic performed roughly 30 abortions on busy days but "could provide to up 60."[50]

*Second,* doctors and clinics cannot claim a "close" relationship with patients when their interests are clearly not aligned with the women they purport to represent. In *Singleton*, the Court departed from the general rule against third-party claims because women cannot "*safely* secure an abortion without the aid of a physician."[51] As noted, the record demonstrates that the Louisiana abortion industry was rife with health and safety violations that put women at risk.

Sadly, Louisiana is not an outlier in this regard. There have been instances across the country of abortion providers refusing to comply with mandatory child-abuse reporting requirements, performing abortions on minors and sending them home with their abusers.[52] Abortion providers attack reasonable health and safety regulations, such as those requiring clinics to meet the same standards as other outpatient surgical centers, mandating parental notification for minors and informed consent, and providing that only licensed physicians perform abortions. Meanwhile, stories about the abortion industry—such as the Indiana doctor who kept the remains of 2,411 aborted babies in his garage, Planned Parenthood's alleged involvement in the sale of organs from aborted babies, and the "house of horrors" clinic run by Kermit Gosnell, who is serving a life sentence for the involuntary manslaughter of a patient and murder of three babies—continue to shock the nation.

The *Singleton* Court was wrong to assume that the interests of abortion providers and women are aligned and that there is a close relationship sufficient to depart from the general rules of standing. In fact, those interests are far from being aligned. The challenged laws are designed to protect women from life-threatening incompetence on the part of some of the very doctors who are seeking to invalidate those laws by filing lawsuits supposedly intended to vindicate the rights and interests of their patients.

**"Genuine Obstacles."** The second requirement for allowing third-party claims is that the complaining party must demonstrate that there are obstacles preventing women from challenging abortion regulations themselves. The *Singleton* plurality identified two obstacles—publicity and mootness—but admitted that neither would actually prevent women from filing lawsuits.

Before and after *Singleton*, women would bring anonymous actions to avoid publicizing their involvement. The "Jane Roe" plaintiff in *Roe v. Wade*,

for example, was a pregnant woman who brought a class action challenging the constitutionality of a state law; a doctor who faced prosecution for performing abortions was allowed to intervene in the case as well. And in *Roe*, the Court addressed mootness, calling pregnancy a "classic justification for a conclusion of nonmootness" since the average pregnancy is much shorter than the appellate process.[53] Neither mootness nor publicity was an actual obstacle to women bringing their own legal challenges when the Court decided *Singleton*, and neither is an obstacle today.

Suits brought by abortion providers in the years since the Court's *Singleton* ruling in 1976 have vastly outnumbered those brought by women seeking to enforce their own rights. A study of abortion challenges filed in federal court shows that between 1973 when *Roe v. Wade* was decided and 1976 when *Singleton v. Wulff* was decided, women brought more than half of all such lawsuits on their own.[54] They joined abortion providers to file suit in 13 percent of cases, bringing women's total involvement to two-thirds of all federal lawsuits. By contrast, from 1976 to 2019, clinics and doctors filed 76 percent of cases, women brought 11 percent, and suits brought by abortion providers and women together made up 12 percent of cases. Looking at the past 10 years, clinics and doctors filed 88 percent of cases, women brought 5 percent, and providers and women together account for 7 percent of cases.

The relaxed standing that abortion providers enjoy when challenging laws regulating abortion surely has contributed to the proliferation of such lawsuits. Instead of continuing to engage in a cursory review of third-party standing, the Court should clarify that it is an exception rather than the rule and require doctors seeking to assert women's claims to demonstrate why those women cannot bring suit on their own.

## Conclusion

If women chose to challenge Louisiana's admitting privileges law on their own, a court would be able to evaluate the law based on evidence of any alleged burden and based on the women's actual preferences, such as whether they would prefer to see a doctor who can treat them at a local hospital should complications arise. Justice Blackmun was right when he wrote that third parties are the "best proponents" of their own rights. Abortion providers are not the best proponents of the rights of women, and the Supreme Court should hold them to the same standing requirements that are applied to any other litigant.

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## Endnotes

1. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
2. June Medical Services LLC v. Gee, 905 F.3d 787 (Sept. 26, 2018). Stephen Russo replaced Rebekah Gee as the Interim Secretary of the Louisiana Department of Health and Hospitals.
3. Singleton v. Wulff, 428 U.S. 106 (1976).
4. *See* Brief Amici Curiae of 207 Members of Congress, June Medical Services LLC v. Russo, No. 18-1323 and 18-1460 at 5–14 (summarizing Louisiana Department of Health deficiency reports).
5. June Medical Services, 905 F.3d at 799.
6. *See*, *e.g.*, *In the Matter of: Kevin Govan Work*, No. 13-I-014 (Louisiana Board of Medical Examiners Oct. 17, 2014).
7. Members of Congress Brief, *supra* note 4 at 9.
8. Louisiana Department of Health, Statement of Deficiencies for Bossier City Medical Suite at 12 (Feb. 1, 2017), *available at* https://prolifelouisiana.org/wp-content/uploads/2019/04/005.pdf.
9. *June Medical Services*, 905 F.3d at 792.
10. *Id.* at 805.
11. Brief of Amici Curiae Louisiana State Legislators, June Medical Services LLC at 8.
12. Roe v. Wade, 410 U.S. 113, 150 (1973).
13. *Id*.
14. *Id.* at 163.
15. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion).
16. Gonzales v. Carhart, 550 U.S. 124, 158 (2007).
17. *Id.* at 164.
18. Whole Woman's Health, 136 S. Ct. at 2326 (Thomas, J. dissenting).
19. *Id.* at 2323.
20. *Id.*
21. *Id.*
22. Warth v. Seldin, 422 U.S. 490, 498 (1975).
23. *Id.* at 499.
24. 572 U.S. 118, 127 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied…it cannot limit [one] that Congress has created merely because 'prudence' dictates." *Id.* at 128.
25. *Id.* at n. 4.
26. Clark v. City of Kansas City, 176 U.S. 114, 118 (1900).
27. Alderman v. United States, 394 U.S. 165, 174 (1969) (Fourth Amendment); Rakas v. Illinois, 439 U.S. 128 (1978) (Fifth Amendment right against self-incrimination); Kowalski v. Tesmer, 543 U.S. 125 (2004) (Sixth Amendment right to counsel).
28. *Kowalski*, 543 U.S. at 130.
29. *Id.* at 131.
30. *Id.* at 134.
31. Campbell v. Louisiana, 523 U.S. 392 (1998) (finding that a litigant has a "close relationship" to "excluded jurors, who share with him a common interest in eradicating discrimination from the grand jury selection process."). *Id.* at 400; Craig v. Boren, 429 U.S. 190 (1976) (equal protection); Singleton v. Wulff, 428 U.S. 106 (1976) (abortion).
32. *Craig,* 429 U.S. at 197.
33. *Id*. at 194.
34. *Id.* at 215 (Burger, C.J., dissenting).
35. Justice John Paul Stevens concurred in part but declined to join the third-party standing ruling, and four members of the Court dissented.
36. *Singleton,* 428 U.S. at 114–118.

37. *Id.* at 117.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 130 (Powell, J., dissenting).
43. *Id*. at n. 7 (Powell, J., dissenting).
44. *Id.* at 131 (Powell, J., dissenting).
45. *June Medical Services*, 905 F.3d at 815.
46. *Id.*
47. *See*, *e.g.*, Hill v. Colorado, 530 U.S. 703, 753 (2000) (Scalia, J., dissenting) ("There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents."); Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from the denial of certiorari) ("[T]hese cases are not about abortion rights. They are about private rights of action under the Medicaid Act.").
48. *Id.* at 798.
49. *Id.* at 797–99.
50. *Id.* at 798.
51. *Singleton*, 428 U.S. at 117 (emphasis added).
52. Live Action, Aiding Abusers: Planned Parenthood's Cover-up of Child Sexual Abuse at 8 (May 2018); *available at* https://www.liveaction.org/wp-content/uploads/2018/05/Planned%20Parenthood%20Sexual%20Abuse%20Report%202018.pdf.
53. *Roe*, 410 U.S. at 125.
54. Brief of Amici Curiae for Concerned Women for America & Charlotte Lozier Institute, June Medical Services LLC at Appendix 1-21.