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THE DOUBLE STANDARD FOR THIRD-PARTY
STANDING: *JUNE MEDICAL* AND THE
CONTINUATION OF DISPARATE
STANDING DOCTRINE

*Brandon L. Winchel**

INTRODUCTION

No jurisdictional principle is more fundamental to the federal judiciary than the doctrine of standing. Before litigants may avail themselves of the tremendous power vested in the federal judiciary, plaintiffs must first establish that they are appropriately situated to assert a legal claim before a court. In analyzing whether a plaintiff possesses the requisite standing to maintain a legal challenge, the Supreme Court has stressed that a court's analysis must be blind to the underlying dispute: "The fundamental aspect of standing is that it focuses on the *party* seeking to get his complaint before a federal court and not on the *issues* he wishes to have adjudicated."¹ Unfortunately, an examination of the Supreme Court's application of standing doctrine suggests that the Court has peeked behind the veil to examine the underlying claims of litigants, applying standing doctrine in an inconsistent manner to legal challenges falling within a specific field of jurisprudence: abortion.

This Note contends that the Supreme Court has misapplied foundational principles of standing to suits brought by plaintiffs challenging state abortion regulations, departing from black letter standing requirements. In particular, this Note explains how the judiciary's continued practice of allowing abortion service providers and doctors to litigate the rights of nonlitigant, third-party women is at odds with the Supreme Court's prudential prohibition on third-party standing.

Part I lays out the current doctrinal framework of standing, noting the various constitutional and prudential requirements a plaintiff must meet to attain standing before a federal court. Part II examines the *jus tertii* excep-

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1 *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added).

tion to the general prohibition on third-party standing, emphasizing the Court's most recent and stringent pronouncement of the doctrine in *Kowalski v. Tesmer*.² Part III highlights the incompatibility of the *jus tertii* doctrine with the prevalent practice, reaffirmed in *June Medical Services, L.L.C. v. Russo*,³ of granting standing to abortion service providers to litigate the interests of nonlitigant, third-party women. Part IV concludes by providing an overview of the effect that third-party standing has had on the jurisprudential landscape in abortion cases.

I. STANDING REQUIREMENTS

Standing requirements are a matter of justiciability that center on the question of “whether [a] litigant is entitled to have the court decide the merits of the dispute or of particular issues.”⁴ The Supreme Court has characterized the “gist of the question of standing” as an inquiry meant to ensure that litigants before a court possess “such a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”⁵ The doctrine of standing is rooted in both constitutional requirements and the exercise of prudential judicial restraint,⁶ although the line between which requirements are compelled by Article III and which are self-imposed by the judiciary is not always clear.⁷ The following overview traces the traditional outline of standing requirements, which previously comprised three constitutional and three prudential elements.⁸ However, as will be illustrated in the discussion to follow, recent developments by the Court have altered this framework, resulting in a current formulation that entails four constitutional requirements and one prudential rule.

A. Constitutional Requirements

The irreducible constitutional requirements for standing derive from Article III, where the judicial power of the United States is authorized to “extend to all Cases . . . [and] to Controversies.”⁹ This “case or controversy”

2 543 U.S. 125 (2004).

3 140 S. Ct. 2103 (2020) (plurality opinion).

4 Warth v. Seldin, 422 U.S. 490, 498 (1975).

5 Baker v. Carr, 369 U.S. 186, 204 (1962).

6 Warth, 422 U.S. at 498.

7 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (“[I]t has not always been clear in the opinions of this Court whether particular features of the ‘standing’ requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution.” (citing *Flast v. Cohen*, 392 U.S. 83, 97 (1968))).

8 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

9 U.S. CONST. art. III, § 2, cl. 1.

requirement ensures that the suit before a court is a justiciable matter properly within a court's constitutionally allocated power to entertain.¹⁰ Despite the fact that a court's judgment may incidentally affect nonlitigants, the judicial power under Article III "exists only to redress or otherwise to protect against injury to the complaining party."¹¹ Were it otherwise, courts would be assuming a greater power than that which is constitutionally conferred to the judiciary, upsetting the delicate balance of power between coequal branches of government.¹² The constitutional dimensions of the standing requirement have been traditionally embodied in a threefold test.¹³ The burden of proving the three elements of this constitutional test lies with the party invoking federal jurisdiction.¹⁴

The first constitutional element requires the plaintiff to "have suffered an 'injury in fact'—an invasion of a legally protected interest."¹⁵ This injury element is itself subject to two conditions—the injury must be "concrete and particularized,"¹⁶ and it must also be "actual or imminent, not 'conjectural' or 'hypothetical.'"¹⁷ Regarding the first of these conditions, the Court has stated that "concrete" and "particularized" are conceptually distinct ideas.¹⁸ A concrete injury is merely one that is real and not abstract; "it must actually exist."¹⁹ A particularized injury is one that "affect[s] the plaintiff in a personal and individual way."²⁰ In other words, it is not enough that a cognizable interest is being injured; "the party seeking review [must] be himself

10 *Warth*, 422 U.S. at 498.

11 *Id.* at 499.

12 *See id.* at 498 (stating that both the constitutional and prudential dimensions of standing requirements operate as limitations on the judiciary's authority, "founded in concern about the proper—and properly limited—role of the courts in a democratic society" (first citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–27 (1974); and then citing *United States v. Richardson*, 418 U.S. 166, 188–97 (1974) (Powell, J., concurring)); *see also* *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation." (citation omitted)); *Frothingham v. Mellon*, 262 U.S. 447, 488–89 (1923) (declaring that for a court to merely prevent the execution of an unconstitutional congressional act where the plaintiff has no standing would result in the courts "assum[ing] a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess").

13 *Lujan*, 504 U.S. at 560 ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements.").

14 *Id.* at 561.

15 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.4 n.1 (3d ed. 2008) (quoting *Lujan*, 504 U.S. at 560–61).

16 *Id.*

17 *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983)).

18 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("Concreteness . . . is quite different from particularization.").

19 *Id.*

20 *Lujan*, 504 U.S. at 560 n.1.

among the injured.”²¹ The second condition of the “injury in fact” element—requiring the presence of an “actual or imminent harm”—introduces a probabilistic component that is designed to ensure that the alleged injury is not overly speculative, which would fail the Article III requirement that courts preside solely over actual cases or controversies.²²

The second constitutional factor requires the alleged injuries to share a causal relationship with the conduct complained of before the court.²³ This factor requires the injury to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”²⁴ Like any causation requirement in law, the question of causation in standing raises intractable questions of degree and remoteness.²⁵ While “the indirectness of [an] injury does not necessarily deprive [a] person harmed of standing to vindicate his rights,” such claims are “substantially more difficult” to maintain under Article III standing requirements, which require the plaintiff to show that the injury is a “consequence of the defendants’ actions.”²⁶

The third constitutional element centers on the redressability of the alleged injury.²⁷ To satisfy this prong of the test, it must be “likely” rather than merely “speculative” that a favorable ruling by the court will redress the injury.²⁸ While the plaintiff need not show with certainty that the injury would be remedied with a favorable ruling, the plaintiff must demonstrate “a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.”²⁹ Additionally, the remedy cannot be unrelated to the injury suffered by the plaintiff—a mere “vindication of the rule of law”—but must rather work to redress a cognizable injury.³⁰ “Relief that does not rem-

21 *Id.* at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972)).

22 13A WRIGHT ET AL., *supra* note 15, at § 3531.4 n.164 (“The element of ‘actual or imminent harm’ is probabilistic. The purpose is to ensure that the alleged injury is not too speculative for Article III purposes.”). When the only alleged injury is one that may occur “at some indefinite future time,” and the “acts necessary to make the injury happen are at least partly within the plaintiff’s own control,” courts will require the plaintiff to show a “high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.” *Lujan*, 504 U.S. at 564 n.2.

23 *Lujan*, 504 U.S. at 560.

24 *Id.* (alterations in original) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)).

25 13A WRIGHT ET AL., *supra* note 15, at § 3531.5.

26 *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

27 *Lujan*, 504 U.S. at 561. Some courts have described the redressability element as “the core of the standing doctrine.” *E.M. v. N.Y.C. Dep’t of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014). “An abstract decision without remedial consequence seems merely advisory, an unnecessary expenditure of judicial resources that burdens the adversary and carries all the traditional risks of making bad law and trespassing on the provinces of the executive and legislature.” 13A WRIGHT ET AL., *supra* note 15, at § 3531.6.

28 *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43).

29 *Duke Power Co. v. Carolina Env’t Study Grp., Inc.*, 438 U.S. 59, 79 (1978).

30 *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 106–07 (1998) (finding that plaintiff gratification of seeing defendant punished does not satisfy the redressability

edy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.”³¹

B. Prudential Requirements

In addition to the threshold constitutional requirements, the judiciary has crafted self-imposed limits “designed to deny standing as a matter of judicial prudence rather than constitutional command.”³² While prudential limits are “closely related to Art. III concerns,” they are nevertheless “matters of judicial self-governance”³³ that can be waived by the Court or overridden by congressional acts that grant standing to sue.³⁴ The purpose of these prudential limitations is to ensure that courts are not “called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”³⁵ Traditionally, the Court has imposed three prudential limitations.³⁶ However, due to the Court’s recent reformations in standing doctrine, only one of the three factors—the prohibition on third-party standing—remains as a prudential standing requirement.³⁷

The first prudential requirement prohibited the “adjudication of generalized grievances more appropriately addressed in the representative branches.”³⁸ A generalized grievance is one where the alleged injury affects “every citizen’s interest in proper application of the Constitution and laws,” and the relief sought “no more directly and tangibly benefits [the plaintiff] than it does the public at large.”³⁹ Previously conceived as a prudential limi-

requirement because “psychic satisfaction . . . does not redress a cognizable Article III injury”).

31 *Id.* at 107.

32 13A WRIGHT ET AL., *supra* note 15, at § 3531.7. For a critique of prudential standing requirements, see Kylie Chiseul Kim, *The Case Against Prudential Standing: Examining the Courts’ Use of Prudential Standing Before and After Lexmark*, 85 TENN. L. REV. 303, 305 (2017).

33 *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

34 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020) (plurality opinion); Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 DUKE J. CONST. L. & PUB. POL’Y 149, 151 (2014); *see, e.g., FEC v. Akins*, 524 U.S. 11, 19 (1998) (ruling that congressional provisions within a legislative act granting standing to any person who believes a violation of the act occurred was sufficient to overcome prudential standing limits).

35 *Warth*, 422 U.S. at 500.

36 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)); Young, *supra* note 34, at 150.

37 33 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD MURPHY, FEDERAL PRACTICE AND PROCEDURE § 8343 (2d ed. 2018) (“Of these three principles, only the first, the doctrine of third-party standing or *ius tertii*, still remains in the prudential category.”).

38 *Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated by Lexmark Int’l*, 572 U.S. 118.

39 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992).

tation,⁴⁰ the Court recently recast the issue as a constitutionally mandated requirement, declaring that suits over generalized grievances “do not present constitutional ‘cases’ or ‘controversies.’”⁴¹

The second prudential limitation required that “a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”⁴² In essence, the zone-of-interest test was meant to determine whether the interest sought to be protected by the plaintiff was an interest that was “protected or regulated by the statute or constitutional guarantee in question.”⁴³ While the zone-of-interest test was traditionally characterized as a prudential limitation on standing,⁴⁴ the Court has departed from this characterization of the issue. In *Lexmark International, Inc. v. Static Control Components, Inc.*, the Court recast the zone-of-interest inquiry as a question of statutory interpretation meant to determine “whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”⁴⁵ Accordingly, the zone-of-interest test is no longer a question of standing at all but is now only an inquiry into whether a plaintiff has a cause of action under a congressional statute that authorizes plaintiffs to bring suit.⁴⁶

The third and final prudential limitation, which is the only rule to retain its prudential characterization,⁴⁷ is the “general prohibition on a litigant’s raising another person’s legal rights.”⁴⁸ This requirement effectively prevents a litigant from asserting the legal rights of a third party who is not a litigant in the underlying suit.⁴⁹ Although the rule against third-party standing remains a prudential requirement,⁵⁰ its categorization as such is far from firmly cemented. While stopping short of recharacterizing the rule as a con-

40 See, e.g., *Allen*, 468 U.S. at 751; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982).

41 *Lexmark Int’l*, 572 U.S. at 127 n.3 (“[Generalized grievances] are barred for constitutional reasons, not ‘prudential’ ones.”). While the Court formally recast the prohibition of generalized grievances as a constitutional requirement in *Lexmark*, the Court suggested that the recharacterization of the element was evident in a number of the Court’s prior decisions. *Id.* (first citing *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam); then citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344–46 (2006); and then citing *Lujan*, 504 U.S. at 573–74). The Court’s rationale for characterizing the prohibition on generalized grievances as a constitutional factor was based on the fact that when a court adjudicates a generalized grievance, the court is no longer deciding on the rights of individuals, but is instead engaged in “[v]indicating the public interest,” which “is the function of Congress and the Chief Executive.” *Lujan*, 504 U.S. at 576.

42 *Allen*, 468 U.S. at 751 (citing *Valley Forge*, 454 U.S. at 474–75).

43 *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

44 See, e.g., *Allen*, 468 U.S. at 751; Sarah F. Bothma, *A Practitioner’s Guide to Federal Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 39 AM. J. TRIAL ADVOC. 199, 199 (2015).

45 572 U.S. 118, 127 (2014).

46 13A WRIGHT ET AL., *supra* note 15, § 3531.7.

47 33 WRIGHT ET AL., *supra* note 37, § 8343.

48 *Allen*, 468 U.S. at 751.

49 Kim, *supra* note 32, at 337–38.

50 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020).

stitutional requirement, the Court in *Lexmark* stated that “limitations on third-party standing are hard [] to classify,”⁵¹ noting that some cases have treated third-party standing as “closely related to the question [of] whether a person in the litigant’s position would have a right of action on the claim.”⁵² However, the Court in *Lexmark* also noted that other cases have treated the rule as a purely prudential issue.⁵³ Because the issue of third-party standing was a nonfactor in *Lexmark*, the Court noted that “consideration of [the third-party standing] doctrine’s proper place in the standing firmament can await another day.”⁵⁴ That day came and went six years after *Lexmark* in *June Medical* as the Court punted on offering any clarification on the proper characterization of the rule against third-party standing.⁵⁵ Consequently, the rule is still considered a prudential requirement that is subject to forfeiture or waiver.⁵⁶ As a prudential rule, the justification for the prohibition on third-party standing rests on several policy grounds. These include: protecting a third-party’s rights from being bound by unfavorable precedent created by those who fail in their litigation to enforce the rights of nonlitigants, institutional concerns regarding the judiciary’s unnecessary adjudication of the constitutional rights of third parties who do not wish to assert their rights, prioritizing the quality of litigation that stems from the belief that “third parties . . . usually will be the best proponents of their own rights,” and the desire to avoid judicial speculation on “every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.”⁵⁷

The general prohibition on third-party standing is well-illustrated in *Tileston v. Ullman*.⁵⁸ At issue in the case was the constitutionality of two Connecticut statutes that prohibited the use of drugs and instruments designed to prevent conception, in addition to proscribing counsel or assistance as to their use.⁵⁹ The plaintiff—a registered physician—challenged the as-applied constitutionality of the laws under the Fourteenth Amendment’s Due Process Clause.⁶⁰ In particular, the plaintiff alleged that application of the laws

51 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.3 (2014).

52 *Id.* (quoting *Dep’t of Lab. v. Triplett*, 494 U.S. 715, 721 n.** (1990)).

53 *Id.* (citing *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004)).

54 *Id.* Until the Court alters its characterization of third-party standing, it remains the last standing element the Court views as prudential in nature. Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277, 285 (2015).

55 When describing the characterization of the rule against third-party standing, the plurality in *June Medical* merely stated: “This rule is ‘prudential.’” *June Med. Servs.*, 140 S. Ct. at 2117 (quoting *Kowalski*, 543 U.S. at 128–29). Neither the plurality opinion nor Chief Justice Robert’s concurrence acknowledged the Court’s previous statements in *Lexmark* suggesting that the prudential characterization of the rule ought to be reconsidered.

56 *Id.*

57 Lea, *supra* note 54, at 296 (alteration in original) (first quoting *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (plurality opinion); and then quoting *United States v. Raines*, 362 U.S. 17, 21–22 (1960)).

58 318 U.S. 44 (1943) (per curiam).

59 *Id.* at 44.

60 *Id.* at 44–45.

would prevent him from providing professional advice regarding the use of contraceptives to three patients, all of whom suffered from health conditions that would endanger their lives during childbearing.⁶¹ Noting that the “sole constitutional attack upon the statutes under the Fourteenth Amendment [was] confined to [the] deprivation of life,” the Court held that the plaintiff lacked standing to bring the challenge because the claimed legal injuries impacted the third-party, nonlitigant patients rather than the plaintiff doctor.⁶² “His patients are not parties to this proceeding,” the Court declared, “and there is no basis on which we can say that he has standing to secure an adjudication of his patients’ constitutional right to life, which they do not assert in their own behalf.”⁶³

II. THE *JUS TERTII* DOCTRINE

As the only remaining prudential requirement, the rule against third-party standing is subject to exceptions based on countervailing policy considerations.⁶⁴ The two most prominent judicially crafted exceptions to third-party standing include the *jus tertii* doctrine and the overbreadth doctrine.⁶⁵ The latter of these exceptions applies solely to First Amendment challenges and is thus not relevant to the discussion of third-party standing in the context of abortion jurisprudence.⁶⁶

The *jus tertii* doctrine “allows a litigant in some circumstances to succeed in challenging government action on the ground that it infringes the rights of a third party.”⁶⁷ The Court’s first application of the *jus tertii* doctrine was in its 1953 decision in *Barrows v. Jackson*.⁶⁸ In the years following, the standards for allowing third-party standing under the *jus tertii* doctrine have evolved, leading to the Court’s most recent formulation of the exception in its 2004 decision in *Kowalski v. Tesmer*.⁶⁹

In *Barrows v. Jackson*, the Court was asked to determine whether a defendant could assert the rights of a third party as a defense to the plaintiff’s allegation that the defendant had breached a race-based restrictive covenant.⁷⁰ Specifically, the plaintiff alleged that the defendant had violated the terms of the agreement entered between the parties by allowing non-Cauca-

61 *Id.*

62 *Id.* at 46.

63 *Id.*

64 Lea, *supra* note 54, at 286, 296; *see also* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2117–19 (2020).

65 Lea, *supra* note 54, at 297.

66 Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282 (1984).

67 Lea, *supra* note 54, at 299.

68 346 U.S. 249 (1953); Lea, *supra* note 54, at 299.

69 543 U.S. 125 (2004); *see June Med. Servs.*, 140 S. Ct. at 2170–71 (Alito, J., dissenting); Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserves a Closer Look*, 84 NOTRE DAME L. REV. 1369, 1383–92 (2009). For a discussion on the history of exceptions to third-party standing leading to the modern formulation of the *jus tertii* doctrine, *see* Lea, *supra* note 54, at 287–302.

70 *Barrows*, 346 U.S. at 251.

sians to reside on specified property, in addition to conveying land without incorporating the terms of the covenant into the new deed.⁷¹ The Court began its analysis by recognizing that, while private and voluntary enforcement of racially based covenants was permissible, the Fourteenth Amendment prohibited the judiciary from enforcing such agreements when doing so would result in the violation of a party's constitutionally protected right to equal protection.⁷² However, the Court also noted that "no non-Caucasian [was] before the Court claiming to have been denied his constitutional rights."⁷³ Thus, the Court was faced with a crucial standing question: May the defendant assert the rights of nonlitigant third parties as a defense to violating the covenant?⁷⁴ The Court answered the question in the affirmative, noting that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."⁷⁵ The cornerstone of the Court's decision rested on the fact that "the reasons which underlie our rule denying standing to raise another's rights . . . are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."⁷⁶

Following the decision in *Barrows*, the Court wrestled with defining the precise purpose of *jus tertii* standing and with formulating a test to determine when use of the doctrine was warranted.⁷⁷ However, a plurality opinion by the Court eventually established a two-part test for the doctrine in *Singleton v. Wulff*.⁷⁸ In articulating the rationale for the test's formulation, the Court summarized two primary justifications for the existence of the rule against third-party standing:⁷⁹

First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them,

71 *Id.* at 252.

72 *Id.* at 253–54 (citing *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

73 *Id.* at 254.

74 *Id.* at 254–55.

75 *Id.* at 257.

76 *Id.*

77 See *Lea*, *supra* note 54, at 299–300. Compare Robert Allen Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 *YALE L.J.* 599, 627 (1962) (stating that an analysis of decisions by the Court revealed that "there are four factors which the Court takes into account in determining the scope of standing to assert the rights of others"), with *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (plurality opinion) ("[T]he Court has looked primarily to two factual elements to determine whether the rule [against third-party standing] should apply in a particular case."), and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (stating that the Court has "looked at three factors" when determining the validity of third-party standing, the third factor being "the impact of the litigation on third-party interests"), and *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991) (characterizing the *Singleton* rubric as a three-factor criterion, the first factor being the "injury in fact" requirement (quoting *Singleton*, 428 U.S. at 112)).

78 *Singleton*, 428 U.S. at 114–16 (plurality opinion); see *Lea*, *supra* note 54, at 300.

79 Although the Court conveyed the rationales for the rule against third-party standing in two reasons, the twin justifications the Court laid forth encompass many of the prudential considerations presented earlier. See *supra* note 57 and accompanying text.

or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.⁸⁰

With these concerns outlined, the Court proceeded by establishing the “two factual elements” required to assert third-party standing.⁸¹ Under the Court’s rubric, a litigant could seek the vindication of a third party’s rights if: “(1) [T]he litigant has a *close relationship* with the third party, which touches upon the asserted third-party right; and (2) there ‘is some *genuine obstacle*’ to the third party’s assertion of her own rights.”⁸²

Under the “close relationship” prong of the test, the Court specified that the nature of the relationship must be such that the third party’s right which the litigant wishes to vindicate is “inextricably bound up with the activity the litigant wishes to pursue.”⁸³ This factor, the Court reasoned, would ensure that the third-party right was not unnecessarily litigated since vindication of the right would, at a minimum, affect the litigant raising the legal challenge.⁸⁴ Additionally, the Court emphasized that the relationship between the litigant and the third party should be one where the litigant “is fully, or very nearly, as effective a proponent of the right” as the third-party rightsholder,⁸⁵ effectively requiring the litigant and nonlitigant third party to share aligned interests in the underlying dispute.⁸⁶ Finally, the Court

80 *Singleton*, 428 U.S. at 113–14 (plurality opinion) (citation omitted) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring)).

81 *Id.* at 114.

82 *Lea*, *supra* note 54, at 300 (emphasis added) (quoting *Singleton*, 428 U.S. at 114–18 (plurality opinion)).

83 *Singleton*, 428 U.S. at 114–15 (plurality opinion).

84 *Id.*

85 *Id.* at 115.

86 *Wallace*, *supra* note 69, at 1384; *see Powers*, 499 U.S. at 414 (finding that the “congruence of interests” between a litigant and the third party justified *jus tertii* standing); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004), *abrogated by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (finding that a parent did not have standing to vindicate the rights of his daughter because the interests of the parties “[were] not parallel and, indeed, are potentially in conflict”); *see also Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999) (“[T]here must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party’s interests.”); *Amato v. Wilentz*, 952 F.2d 742, 750 (3d Cir. 1991) (“[C]onflicts of interests between the plaintiff and the third party whose rights are asserted matter[] a good deal. . . . [W]e have held that genuine conflicts strongly counsel against third party standing.” (citing *Polaroid Corp. v. Disney*, 862 F.2d 987, 1000 (3d Cir. 1988)); *Canfield Aviation, Inc. v. Nat’l Transp. Safety Bd.*, 854 F.2d 745, 748 (5th Cir. 1988) (“[C]ourts must be sure . . . that the litigant and the person whose rights he asserts have interests which are aligned”); 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1768 (3d ed. 2005) (“It is axiomatic that a putative representa-

“place[d] primary reliance on . . . the existence of a ‘confidential relationship’ between the rightholder and the party seeking to assert her rights,”⁸⁷ such as in the context of a doctor-patient relationship where physicians may seek to assert the rights of their patients.⁸⁸ This requirement was intended to ensure that “the litigant bears the sort of relationship to the right-holder that portends vigorous prosecution of the right in the litigation.”⁸⁹

Turning to the “genuine obstacle” factor, the Court noted that even when the relationship between the litigant and third party is close, “the reasons for requiring persons to assert their own rights will generally still apply.”⁹⁰ However, when a “genuine obstacle” prevents the third party from bringing their claim, “the third party’s absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right’s best available proponent.”⁹¹

Although *Singleton* provided a metric for analyzing the appropriateness of granting third-party standing, the Court’s rubric was deficient in at least two ways. First, the Court’s later rulings inconsistently characterized the *Singleton* framework, treating the multifactor inquiry as factors to be balanced in some cases, but demanding complete conformity with the test in others.⁹² Second, the latitude with which the Court has interpreted both prongs of the test has waxed and waned over time. Justice Blackmun’s use of the phrase “genuine obstacle” in the *Singleton* plurality opinion was met with criticism in Justice Powell’s four-member partial dissent, the latter opinion contending that the Court’s prior precedents had allowed for *jus tertii* standing only when the ability of third parties to litigate their own rights was “in all practicable

tive cannot adequately protect the class if the representative’s interests are antagonistic to or in conflict with the objectives of those being represented.”).

87 *Singleton*, 428 U.S. at 127 (Powell, J., concurring in part and dissenting in part).

88 *Id.* at 115 (plurality opinion).

89 Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1171 (2008).

90 *Singleton*, 428 U.S. at 116 (plurality opinion).

91 *Id.*

92 Michael A. Fratton, Note, *Constitutional Law—Third Circuit Sets Forth Balancing Test for Evaluating Jus Tertii Standing in First Amendment Context: Amato v. Wilentz (1991)*, 38 VILL. L. REV. 1117, 1123 (1993). Compare Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 623–24 n.3 (1989) (holding that while there was no genuine obstacle preventing the third party from asserting his rights, the balance of factors weighed in favor of granting the litigant *jus tertii* standing), with *Powers*, 499 U.S. at 411 (characterizing the third-party standing test as a rubric where all criteria must be satisfied). Notably, although both *Caplin* and *Powers* characterize the test as containing three factors (with each case outlying a different third factor), the Court’s most recent pronouncement of the test confirms that the test only includes the original two factors outlined in *Singleton*. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

terms impossible.”⁹³ Over time, the Court drifted towards Justice Blackmun’s more lax standard of a mere “genuine obstacle.”⁹⁴ Likewise, the “close relationship” prong of the rubric was construed with equal liberality, with the Court “grant[ing] third-party standing in a number of cases to litigants whose relationships with the directly affected individuals were at best remote.”⁹⁵ However, the Court’s most recent pronouncement of the *jus tertii* doctrine in *Kowalski v. Tesmer* shed much-needed clarification on these issues, reinvigorating both prongs of the test with an increased level of strictness and rigor.⁹⁶

In *Kowalski*, the Court was asked to determine the constitutionality of a Michigan statute that prohibited the appointment of appellate counsel for indigent litigants who plead guilty.⁹⁷ The initial litigants—two attorneys and three indigent criminal defendants—argued that the statute deprived the three criminal defendants of their federal due process and equal protection rights.⁹⁸ By the time the case had reached the Supreme Court, the only remaining litigants challenging the Michigan law were the two attorneys, leaving the Court to decide whether the litigants could seek vindication of rights belonging to the nonlitigant, third-party indigents.⁹⁹

The Court began by asserting that litigants who seek third-party standing are “require[ed to] . . . make two additional showings,” thereby framing both prongs of the *Singleton* test as necessary elements rather than factors to be balanced.¹⁰⁰ Under the “close relationship” prong, the Court found that

93 *Singleton*, 428 U.S. at 126 (Powell, J., concurring in part and dissenting in part). Justice Stevens’s concurring opinion did not join the plurality’s analysis on the issue of *jus tertii*. *Id.* at 122 (Stevens, J., concurring in part).

94 *Lea*, *supra* note 54, at 301–02; *see, e.g.*, *Campbell v. Louisiana*, 523 U.S. 392, 398 (1998) (holding that “the economic burdens of litigation and the small financial reward available” to third parties excluded from jury selection on the basis of race constituted a sufficient obstacle to justify third-party standing). For an overview of the lax approach the Court has taken with the “genuine obstacle” prong of the third-party standing test, *see* *Wallace*, *supra* note 69, at 1389–92.

95 *Kowalski*, 543 U.S. at 134 (Thomas, J., concurring); *see, e.g.*, *Carey v. Population Servs. Int’l*, 431 U.S. 678, 683 (1977) (holding that a mail-order contraceptive seller may assert the rights of their “potential customers”); *Powers*, 499 U.S. at 413 (holding that a defendant may assert the right of a juror excluded from service because “[v] *oir dire* permits a party to establish a relation, if not a bond of trust, with the jurors”).

96 *See* Elizabeth Slattery, *Revisiting Third-Party Standing in the Context of Abortion*, HERITAGE FOUND. (Mar. 4, 2020), <https://www.heritage.org/life/report/revisiting-third-party-standing-the-context-abortion>; *see also* *Wallace*, *supra* note 69, at 1398–99; *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2170–71 (2020) (Alito, J., dissenting) (stating that the Court’s holding in *Kowalski* “refined our rule for third-party standing”).

97 *Kowalski*, 543 U.S. at 127–28 (majority opinion).

98 *Id.* at 128.

99 *Id.*

100 *Id.* at 130; *see also* *June Med. Servs.*, 140 S. Ct. at 2174 (Gorsuch, J., dissenting) (“[T]he plaintiff must demonstrate both that he has a “close” relationship’ with the person whose rights he wishes to assert *and* that some “hindrance” hampers the right-holder’s ‘ability to protect his own interests.’” (quoting *Kowalski*, 543 U.S. at 130)).

there was an insufficient relationship between the attorneys and the indigents because the indigent third parties were merely “hypothetical” clients who were not represented by the attorneys in their underlying criminal proceedings.¹⁰¹ Consequently, the Court not only found that the litigants and third parties lacked a “close relationship,” but that they shared “no relationship at all.”¹⁰² As for the “genuine obstacle” element, the Court noted that nothing prevented the third-party indigents from vindicating their rights as pro se litigants, and thus they were not hindered from “advancing their own constitutional rights.”¹⁰³ In response, the attorneys maintained that unsophisticated pro se litigants “could not satisfy the necessary procedural requirements, and . . . would be unable to coherently advance the substance of their constitutional claim,” thereby constituting a genuine obstacle to the vindication of their rights.¹⁰⁴ The Court rejected this argument by pointing to three instances—two before the Michigan Supreme Court, and one before the United States Supreme Court—in which pro se defendants were able to navigate the appellate process for their claims.¹⁰⁵ Thus, while noting that the assistance of an attorney would be “valuable to a criminal defendant,” the Court deemed that the lack of an attorney was not “the type of hindrance necessary to allow another to assert the indigent defendants’ rights.”¹⁰⁶

The Court’s opinion in *Kowalski* marked a stark departure from the Court’s previously broad approach to both the “close relationship” and “genuine obstacle” elements of the *jus tertii* doctrine.¹⁰⁷ While Justice Rehnquist’s majority opinion declined to draw explicit attention to this fact, the shift did not go unnoted by the concurring and dissenting opinions. Writing in his concurrence, Justice Thomas chastised the latitude given to litigants to assert third-party rights in many of the Court’s prior decisions, emphasizing the overly broad application of the “close relationship” prong.¹⁰⁸ Noting that the Court had “gone far astray” with its liberal allowance of *jus tertii* standing, Justice Thomas explained that his support for the majority’s opinion in the underlying case was due to the Court’s “reasonable application” of prior precedent.¹⁰⁹ Conversely, Justice Ginsburg’s dissenting opinion also noted the Court’s narrowing of the *jus tertii* doctrine. Regarding the “close relationship” requirement, Justice Ginsburg claimed that the Court’s juris-

101 *Kowalski*, 543 U.S. at 131 (emphasis omitted).

102 *Id.*

103 *Id.* at 131–32.

104 *Id.* at 132.

105 *Id.*

106 *Id.* (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

107 Wallace, *supra* note 69, at 1402; see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 15 (5th ed. Supp. 2007) (“*Kowalski v. Tesmer* . . . marked a clear departure from the Court’s usual apparent practice of upholding third-party standing in cases in which the underlying claim of third-party rights would appear to be substantially meritorious.”).

108 *Kowalski*, 543 U.S. at 134–35 (Thomas, J., concurring).

109 *Id.* at 134, 136.

prudence had not previously distinguished between “existing” and “hypothetical” relationships as a metric to determine the adequacy of the litigant’s relationship with the third party.¹¹⁰ On the contrary, Justice Ginsburg argued that determining the nonexistence of a “close relationship” from the lack of an existing relationship constituted a noticeable departure from many of the Court’s prior holdings.¹¹¹ Turning to the “genuine obstacle” prong, Justice Ginsburg highlighted the factors that generally hinder criminal defendants from asserting their own rights as *pro se* litigants, citing the lack of high school education and extreme illiteracy that might make navigating the legal regime extremely difficult.¹¹² “An inmate so handicapped,” Justice Ginsburg wrote, “surely does not possess the skill necessary to pursue a competent *pro se* appeal.”¹¹³ For the Court to hold otherwise constituted more than a slight narrowing of the “genuine obstacle” requirement.¹¹⁴

III. THIRD-PARTY STANDING IN ABORTION CASES

The Court’s ruling in *Singleton* established the archetypal model for applying the *jus tertii* doctrine in the context of abortion litigation.¹¹⁵ In fact, the plurality opinion in *Singleton* constitutes “the only opinion in which any Members of [the] Court have ever attempted to justify third-party standing for abortion providers.”¹¹⁶ Since the *Singleton* decision, federal courts have frequently granted third-party standing to abortion service providers to litigate the rights of nonlitigant, third-party women. Indeed, “such cases are often decided without even pausing to question the physician-plaintiff’s standing.”¹¹⁷ The following analysis will articulate why exempting abortion service providers from the general prohibition on third-party standing fails to meet each prong of the two-part test for *jus tertii* standing—both as they were initially conceived in *Singleton*,¹¹⁸ and especially so in light of the Court’s

110 *Id.* at 138–39 (Ginsburg, J., dissenting) (emphasis omitted).

111 *See id.* at 138.

112 *Id.* at 140.

113 *Id.* at 140–41.

114 Justice Ginsburg noted that the “genuine obstacle” requirement was normally approached with a “degree of elasticity,” and that even “a requirement with more starch than [what] the Court has insisted upon in prior decisions” could not account for the majority’s holding. *Id.* at 139–40.

115 *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2322 (2016) (Thomas, J., dissenting) (“In *Singleton v. Wulff*, a plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases.” (citation omitted)); Slattery, *supra* note 96; *see also* Teresa Stanton Collett, *Symposium: After 40+ Years It Is Clear Women Can Speak for Themselves*, SCOTUSBLOG (Jan. 30, 2020, 10:10 AM), <https://www.scotusblog.com/2020/01/symposium-after-40-years-it-is-clear-women-can-speak-for-themselves/>.

116 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2169 (2020) (Alito, J., dissenting); *see also id.* at 2147 (Thomas, J., dissenting).

117 13A WRIGHT ET AL., *supra* note 15, § 3531.9.3.

118 Even before the Court’s narrowing of the *jus tertii* doctrine test in *Kowalski*, the Court’s own reasoning in *Singleton* conflicted with the black letter standard the Court claimed to espouse. *Whole Woman’s Health*, 136 S. Ct. at 2322–23 (Thomas, J., dissenting)

recent articulation of the test in *Kowalski*. The analysis concludes by evaluating the significance of the *June Medical* decision as the first abortion case before the Court where the issue of third-party standing has been explicitly raised since the Court's refinement of the *jus tertii* doctrine in *Kowalski*.

A. *Close Relationship*

At issue in *Singleton* was a provision of Missouri's Medicaid program that excluded Medicaid funding for abortions that were not medically necessary.¹¹⁹ The plaintiffs—two Missouri-licensed physicians—challenged the constitutionality of the provision on the grounds that it infringed the rights of third-party, nonlitigant women to seek abortions.¹²⁰

The plurality opinion began by holding that the “close relationship” prong of the test for third-party standing was satisfied, pointing to the Court's prior precedents that recognized the confidential nature of the doctor-patient relationship.¹²¹ In particular, the plurality emphasized two aspects of the relationship between abortion doctors and their patients to support the Court's conclusion. First, the Court noted that a woman's ability to “exercise . . . her right to an abortion” was intrinsically linked with her ability to secure the assistance of a physician, without whom she could not “safely secure an abortion.”¹²² Second, the Court noted that a woman's decision of whether or not to have an abortion is a decision “in which the physician is intimately involved.”¹²³ Consequently, the plurality reasoned that “[a]side from the woman herself,” the physician performing the abortion procedure was the next best candidate to vindicate any impediment to a woman's ability to attain an abortion.¹²⁴

The problem with the plurality's reasoning in *Singleton* is threefold. First, the Court's description of the confidential relationship between the patients seeking abortions and the doctors who perform them is a legal fiction that frequently fails to comport with the reality of the situation faced by women. Second, the Court's physician-patient exception to the prohibition on third-party standing does not account for the multiple conflicts of interests between women and abortion service providers that should preclude the finding of a “close relationship.” Third, cases justifying the application of the *jus tertii* doctrine in the abortion context have frequently done so when only

(“[T]he [*Singleton*] plurality conceded that the traditional criteria for an exception to the third-party standing rule were not met.”).

119 *Singleton v. Wulff*, 428 U.S. 106, 108–09 (1976).

120 *Id.* at 113 (plurality opinion). The physician-plaintiffs also challenged the Missouri provision on the basis that it infringed their alleged constitutional right to perform abortions. *Id.* However, since the Court ultimately held that the plaintiffs had standing to assert the rights of patients, the Court passed on addressing the question of whether the plaintiffs had suffered any legal injury to their own rights sufficient to attain standing. *Id.*

121 *Id.* at 115, 117.

122 *Id.* at 117.

123 *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 153–56 (1973)).

124 *See id.*

a hypothetical doctor-patient relationship exists, which stands in direct conflict with the precedent established in *Kowalski*.

The first issue with granting abortion service providers *jus tertii* standing is the Court's reliance on the notion of a confidential relationship existing between an abortion physician and a woman seeking an abortion, in which the physician is "intimately involved" with the woman's decision-making process. Justice Powell's partial dissent was especially critical of this claim, noting that "the 'confidential' relationship in a case of this kind often is set in an assembly-line type abortion clinic."¹²⁵ History has borne out Justice Powell's concerns. Individual physicians often perform numerous—sometimes hundreds—of abortions every month.¹²⁶ Some healthcare clinics hire doctors "on a fee-per-procedure basis to perform large volumes of brief procedures on sedated patients whom they never saw before and will never see again."¹²⁷ Compounding this problem is the fact that not only do some abortion providers only see their patients once, but they "often meet them only *after* the patients have been sedated."¹²⁸ And when abortion physicians do meet with their patients, the doctors rarely "delve into the emotional, moral, and sociological aspects of the abortion decision in their consultations with pregnant women seeking abortions."¹²⁹ Accordingly, the cumulative force of these factors has rendered "[t]he phrase 'between a woman and her physician' . . . an empty one."¹³⁰

The second problem with granting abortion service providers third-party standing is that it ignores the serious conflicts of interest that often exist between abortion services providers and nonlitigant women, which evidences the lack of a "close relationship" between the parties and the inappropriateness of permitting *jus tertii* standing.¹³¹ Women undergoing abortive procedures have a fundamental interest in minimizing risks posed to their own health and safety, but abortion clinics have a countervailing interest in reduc-

125 *Id.* at 129–30 n.7 (Powell, J., concurring in part and dissenting in part).

126 *See* Slattery, *supra* note 96.

127 Brief for the Respondent/Cross-Petitioner at 47, *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460); *see June Med. Servs.*, 140 S. Ct. at 2168 (Alito, J., dissenting) ("[A] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited.").

128 Amy Howe, *Federal Government's Brief in Abortion Case Supports Louisiana's Position, Raises Possibility of Overruling Whole Woman's Health*, SCOTUSBLOG (Jan. 3, 2020, 10:07 AM) (emphasis added), <https://www.scotusblog.com/2020/01/federal-governments-brief-in-abortion-case-supports-louisianas-position-raises-possibility-of-overruling-whole-womans-health/>.

129 Mary Julia Regan Marcin & Raymond B. Marcin, *The Physician's Decision-Making Role in Abortion Cases*, 35 JURIST 66, 71 (1975) (summarizing an abortion provider's critique of *Singleton*).

130 *Id.* (quoting Bernard N. Nathanson, *Sounding Board—Deeper into Abortion*, 291 NEW ENG. J. MED. 1189, 1189 (1974)).

131 *See supra* note 86 and accompanying text.

ing costs and avoiding time-consuming measures.¹³² Unsurprisingly, when state regulations are advanced that pit the competing interests of costs and safety against one another, “[i]t is nearly always abortion providers”—not women—who challenge the regulatory standards.¹³³ Strikingly, in medical contexts outside of abortion, federal courts have readily recognized that the competing interests of costs and safety are sufficiently adversarial to prevent medical service providers from representing their patients’ interests. For example, in *Gold Cross Ambulance & Transfer & Standby Service, Inc. v. City of Kansas City*, the Eighth Circuit Court of Appeals held that ambulance service providers could not assert third-party standing on behalf of nonlitigant, third-party patients because the ambulance companies “are principally interested in operating their businesses profitably, while Kansas City-area residents are principally concerned with receiving high quality ambulance service at the lowest possible cost.”¹³⁴ Within the context of abortion, however, “glaring” and “blatant” conflicts of interest are frequently overlooked,¹³⁵ and abortion service providers are often assumed without question to possess a close relationship with nonlitigant women sufficient to justify third-party standing.¹³⁶ While some litigants attempt to downplay the significance of conflicting interests by arguing that state regulations with the appearance of promoting patient health and safety achieve neither aim, such arguments fail to justify third-party standing for abortion service providers because the ability for a plaintiff to avail a court for redress requires a prerequisite showing of standing that cannot hinge on the plaintiff’s ability to prove the merits of their argument at trial.¹³⁷

Finally, an insurmountable obstacle to granting third-party standing to abortion service providers is the fact that, in a significant number of cases,

132 Denise Harle, *Symposium: A Long-Awaited Opportunity to Close the Loophole on Third-Party Standing*, SCOTUSBLOG (Jan. 29, 2020, 10:21 AM), <https://www.scotusblog.com/2020/01/symposium-a-long-awaited-opportunity-to-close-the-loophole-on-third-party-standing/>.

133 *Id.* (citing examples of suits brought by abortion providers, “not women,” challenging regulations requiring the sterilization of abortion instruments and the requirement that doctors performing abortions be licensed physicians).

134 705 F.2d 1005, 1016 (8th Cir. 1983). On appeal, the Supreme Court denied the petition for certiorari. *Gold Cross Ambulance Co. v. City of Kansas City*, 471 U.S. 1003 (1985).

135 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2166 (2020) (Alito, J., dissenting) (“Like any other regulated entity, an abortion provider has a financial interest in avoiding burdensome regulations Women seeking abortions, on the other hand, have an interest in the preservation of regulations that protect their health. The conflict inherent in such a situation is glaring.”).

136 Ed Whelan, *Pending Supreme Court Abortion Case: Against Aberrational Third-Party Standing*, NAT’L REV. (Jan. 13, 2020), <https://www.nationalreview.com/bench-memos/pending-supreme-court-abortion-case-against-aberrational-third-party-standing/> (“For decades, the federal courts have simply assumed that abortion providers have third-party standing to assert the constitutional rights of their patients.”); 13A WRIGHT ET AL., *supra* note 15, § 3531.9.3.

137 See *June Med. Servs.*, 140 S. Ct. at 2166 (Alito, J., dissenting).

the relationship between the litigants and the third-party, nonlitigant women is purely hypothetical.¹³⁸ In *Kowalski*, the Court clearly stated that litigants do not share a “close relationship” with nonlitigants sufficient to attain third-party standing where the alleged relationship is hypothetical.¹³⁹ Indeed, the Court has even held that physicians lack standing to *defend* state abortion regulations on the theory that unborn children constitute possible future patients.¹⁴⁰ A consistent application of this rule would have necessitated a denial of standing to abortion service providers and physicians in many of the Court’s landmark abortion decisions, including *June Medical*, *Whole Woman’s Health v. Hellerstedt*, *Gonzales v. Carhart*, *Stenberg v. Carhart*, *Planned Parenthood v. Casey*, among others, all of which granted standing to litigants claiming to vindicate the rights of future hypothetical patients.¹⁴¹ Simply put, abortion service providers and future hypothetical patients do not merely lack a close relationship—they in fact “have no relationship at all.”¹⁴²

B. *Genuine Obstacle*

When analyzing the “genuine obstacle” factor, the *Singleton* plurality noted two impediments facing nonlitigant women seeking abortion services. First, the Court expressed concerns that a woman’s pursuit of an abortion may be “chilled” by the countervailing desire to protect her privacy from the publicity of a lawsuit.¹⁴³ Second, the plurality pointed to the “imminent mootness . . . of any individual woman’s claim,” observing the time-sensitive nature of a pregnancy that imposes a limited window on the ability of women to seek an abortion.¹⁴⁴ However, the plurality itself acknowledged that these obstacles did not impose a serious hindrance.¹⁴⁵ In addressing the privacy

138 See Thomas M. Fisher, *Symposium: As States Seek to Protect Women, the Court with June Medical Services Has Multiple Ways to End Abortion Litigation Free-for-All*, SCOTUSBLOG (Jan. 28, 2020, 10:09 AM), <https://www.scotusblog.com/2020/01/symposium-as-states-seek-to-protect-women-the-court-with-june-medical-services-has-multiple-ways-to-end-abortion-litigation-free-for-all/> (“The ability of abortion practitioners to assert the 14th Amendment rights of hypothetical future patients has been at the core of abortion providers’ litigation strategy for several decades.”).

139 See *supra* notes 101–02 and accompanying text.

140 *June Med. Servs.*, 140 S. Ct. at 2174 (Gorsuch, J., dissenting) (citing *Diamond v. Charles*, 476 U.S. 54, 66 (1986)).

141 See *id.* at 2170 (Alito, J., dissenting); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2323 & n.1 (2016) (Thomas, J., dissenting); see also Editorial Bd., Opinion, *Not About Roe v. Wade*, WALL ST. J. (Mar. 3, 2020), <https://www.wsj.com/articles/not-about-roe-v-wade-11583281645> (“[A] six Justice majority in *Kowalski* (2004) rejected third-party standing for attorneys seeking to vindicate the legal rights of hypothetical future clients. The same principle should apply to abortion providers.”).

142 *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004).

143 *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion).

144 *Id.*

145 See *id.* at 126 (Powell, J., concurring in part, dissenting in part) (“The plurality virtually concedes, as it must, that the two alleged ‘obstacles’ to the women’s assertion of their rights are chimerical.”).

concern, the Court observed that a suit “may be brought under a pseudonym, as so frequently has been done.”¹⁴⁶ Moreover, the Court outlined two solutions to the “imminent mootness” hindrance. First, the plurality noted that “[a] woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is ‘capable of repetition yet evading review.’”¹⁴⁷ Second, the Court found that “a class could be assembled, whose fluid membership always included some women with live claims.”¹⁴⁸ Despite refuting their own raised concerns, the Court nevertheless reasoned that third-party standing was appropriate on the basis that, if nonlitigant patients could have their rights vindicated by a class of representative women, there would be “little loss in terms of effective advocacy” in allowing nonlitigant women to have their rights vindicated by an abortion physician.¹⁴⁹

Even without examining the Court’s retreat from such sweepingly broad constructions of the “genuine obstacle” prong in *Kowalski*, the plurality’s rationale in *Singleton* fails on its own terms. In essence, the *Singleton* plurality conceded that the obstacles faced by third parties were insignificant but nonetheless granted third-party standing to physicians on the grounds that the differences between the assertion of a claim by a class of similarly situated women as opposed to abortion providers were insignificant. Regardless of whether this claim is true—and it certainly would not be if a physician-litigant failed the “close relationship” prong of the test—the Court’s narrow focus on the effectiveness of a litigant’s advocacy wholly ignores the first prudential concern outlined by the plurality as a justification for prohibiting third-party standing: “[C]ourts should not adjudicate . . . rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.”¹⁵⁰ Thus, even if nonlitigant patients could attain equally effective representation by physicians as they could from a class of similarly situated women, the Court’s alternative and equally important rationale for the prudential prohibition on third-party standing necessitates a denial of *jus tertii* standing to abortion service providers.

Aside from the plurality’s own internal inconsistencies in *Singleton*, the majority opinion in *Kowalski* all but forecloses the argument that patients generally face a sufficient obstacle to justify *jus tertii* standing. In particular, the majority in *Kowalski* “looked to practical judicial examples of similar first-party plaintiffs bringing their own suits as conclusive evidence that there was no qualifying hindrance,”¹⁵¹ pointing to three instances where criminal defendants had navigated the appeals process as pro se litigants.¹⁵² In com-

146 *Id.* at 117 (plurality opinion).

147 *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 124–25 (1973)).

148 *Id.*

149 *Id.* at 117–18.

150 *Id.* at 113–14 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring)).

151 Wallace, *supra* note 69, at 1404.

152 *Kowalski v. Tesmer*, 543 U.S. 125, 132 (2004).

parison, the *Singleton* plurality readily admitted that women “frequently” used pseudonyms to preserve their privacy during litigation, in addition to outlining exceptions to mootness and class actions suits as mechanisms that ensure the viability of women vindicating their own rights in court. In short, “[n]either 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.”¹⁵³

In addition to the two obstacles cited in *Singleton*, some proponents of applying the *jus tertii* doctrine to abortion service providers have cited other challenges faced by women in bringing their own suits. In particular, such obstacles include the general financial burdens of litigation, especially in light of the fact that women from marginalized communities are more likely to elect to undergo abortion procedures.¹⁵⁴ However, the Court in *Kowalski* rejected a comparable argument, finding that third-party rightsholders did not face a hindrance to vindicating their own rights sufficient to justify third-party standing, despite the fact that the third parties were indigent, unsophisticated criminal defendants.¹⁵⁵ Moreover, many nonprofit advocacy groups—such as the Center for Reproductive Rights and the American Civil Liberties Union—represent women in their challenges to abortion laws, in addition to the numerous law firms that represent low-income women on a pro bono basis.¹⁵⁶ Finally, the vulnerable position of many women litigants who seek abortion services ought to make courts more skeptical of “self-appointed advocates” claiming to represent their interests, “especially in the context of challenges to laws designed to protect those patients.”¹⁵⁷

C. June Medical

For purposes of standing doctrine, the Court’s ruling in *June Medical* is significant because it represents the first time the Court has addressed third-party standing in the abortion context since the refinement of the *jus tertii* doctrine in *Kowalski*. While the Court has “reflexively allowed” abortion service providers to litigate the rights of nonlitigant, third-party women in the wake of the *Kowalski* ruling, the issue of third-party standing in such cases was

153 Slattery, *supra* note 96. As Justice Gorsuch noted in *June Medical*, “whatever the supposition of a 1976 plurality, in the years since interested women have challenged abortion regulations on their own behalf in case after case.” *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2174 (2020) (Gorsuch, J., dissenting) (first citing *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015); then citing *Jane L. v. Bangertter*, 102 F.3d 1112 (10th Cir. 1996); and then citing *Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986)).

154 Hannah Tuschman, *Challenging TRAP Laws: A Defense of Standing for Abortion Providers*, 34 BERKELEY J. GENDER, L. & JUST. 235, 262 (2019).

155 *Kowalski*, 543 U.S. at 132.

156 *June Med. Servs.*, 140 S. Ct. at 2168–69 (Alito, J., dissenting) (“[T]here is little reason to think that a woman who challenges an abortion restriction will have to pay for counsel.”); Editorial Bd., *supra* note 141; Amy Howe, *Symposium: Abortion Debate Returns to the Roberts Court*, SCOTUSBLOG (Jan. 27, 2020, 11:55 AM), <https://www.scotusblog.com/2020/01/symposium-abortion-debate-returns-to-the-roberts-court/>.

157 Brief for the Respondent/Cross-Petitioner, *supra* note 127, at 40.

never explicitly raised and defended by the Court, thereby failing to constitute new precedent on the issue.¹⁵⁸ Accordingly, *June Medical* presented the Court with an opportunity to extend the precedent of *Kowalski* to the context of abortion jurisprudence, correct the obsolete holding in *Singleton*, and bring a level of uniformity to the Court's rule against third-party standing. The Court declined to do so.

Justice Breyer's plurality opinion in *June Medical* offered no new substantive defenses of third-party standing in abortion cases to the rationales already offered in *Singleton*. Rather, the Court began by flatly stating that the prohibition on third-party standing was a prudential rule¹⁵⁹—a shift away from the Court's recent sentiment that the rule may actually be a constitutional requirement grounded in Article III.¹⁶⁰ As a prudential rule, the plurality found that it could be forfeited and waived, which the Court held was the case in this instance since the State had failed to raise the issue at the district court below.¹⁶¹ Although this finding could have been sufficient for the Court to dismiss the third-party standing challenge, the plurality continued to address the substance of the State's claim on third-party standing. "We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations," the Court declared, and this "long line of well-established precedents foreclose[s] the State's] belated challenge to the plaintiffs' standing."¹⁶² The plurality's reliance on precedent was paired with the assertion that, since the State's health and safety regulations directly affected abortion clinics, abortion service providers were "'the least awkward' and most 'obvious' claimants" to challenge the State's regulations.¹⁶³ As for Chief Justice Roberts's concurrence, which was the deciding fifth vote in the case, his contribution to the Court's standing analysis was contained in a single, footnoted sentence: "For the reasons the plurality explains, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients."¹⁶⁴

Perhaps of more significance to the Court's holding were the issues *not* discussed by the plurality or Chief Justice Roberts's concurrence. Conspicuously absent from the Court's rationale was any discussion of either the "close relationship" or "genuine obstacle" prong of the Court's two-part test for third-party standing.¹⁶⁵ Relatedly, there was no discussion of the conflicting

158 *June Med. Servs.*, 140 S. Ct. at 2146–47 (2020) (Thomas, J., dissenting) (first citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); then citing *Gonzales v. Carhart*, 550 U.S. 124 (2007); then citing *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006); then citing *Stenberg v. Carhart*, 530 U.S. 914 (2000); then citing *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam); and then citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

159 *June Med. Servs.*, 140 S. Ct. at 2117 (plurality opinion).

160 *See id.* at 2143–46 (Thomas, J., dissenting).

161 *Id.* at 2117–18 (plurality opinion).

162 *Id.* at 2118, 2120.

163 *Id.* at 2119 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

164 *Id.* at 2139 n.4 (Roberts, C.J., concurring in the judgement) (citation omitted).

165 *Id.* at 2169 (Alito, J., dissenting).

interests between abortion service providers and their patients over the State's health and safety regulations, nor was there any defense of the fact that the relationship between the plaintiff and the nonlitigant, third-party women in the case was merely hypothetical—a point of acute significance for the Court in denying third-party standing for the litigants in *Kowalski*.¹⁶⁶ Rather, the Court merely recited its prior line of abortion precedents, reaffirming the practice of “permitt[ing] abortion providers to invoke the rights of their actual or *potential* patients” without ever explaining or acknowledging the conflict between the Court's older abortion precedents and the standing doctrine that would normally apply outside of the abortion context as outlined in *Kowalski*.¹⁶⁷ Equally absent from the Court's analysis was any explicit discussion of how the twin policy rationales underlying the two-pronged test in *Singleton*¹⁶⁸ were furthered by the allowance of third-party standing to abortion service providers. Rather than focusing on whether abortion service providers constituted the “most effective advocates”¹⁶⁹ for addressing a law's infringement on the legal rights of third parties, the Court instead inquired whether abortion services providers constituted the “least awkward” claimants¹⁷⁰ for addressing a law's regulatory burdens—an inquiry notably absent from both *Singleton* and *Kowalski*.

In short, the Court made no effort to reconcile the numerous disparities that plagued the original *Singleton* decision as between the black letter standing requirements and the Court's holding, nor did the Court address the incongruences in the *jus tertii* doctrine as between *Singleton* and *Kowalski*. Despite the Court taking up the question of third-party standing for abortion service providers, “a majority of the Court all but ignore[d] the question.”¹⁷¹

IV. JURISPRUDENTIAL LANDSCAPE

While the judiciary's discrepant application of the *jus tertii* standing doctrine in abortion cases is problematic on a theoretical level, one might wonder whether the liberal allowance of third-party standing in abortion cases has noticeably affected the jurisprudential landscape. One recent survey suggests an affirmative answer to this inquiry.

The study, conducted by Professor Teresa Stanton Collett, analyzed 637 abortion challenges decided in federal courts between 1973 and 2019.¹⁷² Between the *Roe* decision in 1973 and the *Singleton* ruling in 1976, thirty-

166 *Id.*; *id.* at 2173 (Gorsuch, J., dissenting).

167 *Id.* at 2118 (plurality opinion) (emphasis added).

168 *Supra* note 81 and accompanying text.

169 *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976) (plurality opinion).

170 *June Med. Servs.*, 140 S. Ct. at 2119 (quoting *Craig*, 429 U.S. at 197).

171 *Id.* at 2142 (Thomas, J., dissenting).

172 Collett, *supra* note 115. “State cases and federal cases involving tort or criminal charges brought against individual doctors for providing abortions, wrongful birth actions, immigration and/or asylum cases involving abortions that took place in another country, clinic protest cases, and general birth-control-access actions were excluded from the study.” *Id.*

three federal cases—representing 48% of the total number of challenges—were filed by women, while only twenty-two cases—or 32% of the total number of challenges—were brought by abortion service providers.¹⁷³ Since the *Singleton* decision in 1976, abortion service providers filed 76% of abortion challenges in federal courts, with suits brought solely by women declining to just 11%, along with an additional 12% of cases lodged jointly by women and abortion service providers.¹⁷⁴ In the past ten years alone, abortion service providers filed 88% of cases in federal courts, with suits brought solely by women further declining to just 5%, along with an additional 7% of cases brought jointly by women and abortion service providers.¹⁷⁵ When viewed on an annual basis, cases filed by abortion services providers since 1973 average 9.1 cases per year, with suits filed exclusively by women averaging 2.1 cases per year, along with 1.6 cases per year filed jointly by women and abortion service providers.¹⁷⁶

In addition to the numerical disparity between challenges brought by abortion service providers in comparison with women, Collett's study also evidences a noticeable divide in the type of challenges brought by abortion service providers as opposed to women. Women were most likely to bring challenges seeking public funding for abortion services, in addition to filing suits against laws that required spousal, parental, or judicial consent.¹⁷⁷ Notably, almost no cases were filed solely by women plaintiffs "challenging conscience rights, informed-consent requirements, fetal-disposition laws and provider regulations generally."¹⁷⁸ For instance, of the thirty-nine challenges brought in federal courts against informed consent laws, thirty-seven of the suits (representing about 95% of such challenges) were brought by abortion service providers, one challenge was filed solely by a woman, and one additional case was filed jointly by an abortion service provider and a woman.¹⁷⁹ And of the 122 challenges brought in federal courts against abortion provider regulation laws, 109 of the suits (representing about 89% of such challenges) were brought by abortion service providers, three challenges were filed solely by women, and seven additional cases were filed jointly by abortion service providers and women.¹⁸⁰

173 See *id.*; Brief of Amici Curiae for Concerned Women for America & Charlotte Lozier Institute, at app. 1–3, *June Med. Servs.*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460).

174 Slattery, *supra* note 96.

175 *Id.*

176 Collett, *supra* note 115. "Since 1976, there have been 16 years in which there were no cases filed by women alone, and 13 years in which women brought only one." *Id.*

177 *Id.*

178 *Id.*

179 Brief of Amici Curiae for Concerned Women for America & Charlotte Lozier Institute, *supra* note 173, at app. 24–25. Informed consent challenges include challenges to laws regarding ultrasounds, required information, and reflection periods. *Id.*

180 *Id.* at 25. The study shows that three other challenges were brought by parties who were neither abortion service providers nor women. *Id.* Provider regulation challenges include challenges to laws regarding admitting requirements, building and zoning, health and safety, licensure, and reporting. *Id.* at 25–26.

These numbers illustrate that the expansion of third-party standing has had a drastic effect on the landscape of litigants filing challenges to abortion regulations. Moreover, in the context of challenges brought against regulations on abortion clinics and doctors, the disparity in the number of suits brought by women rightsholders and the abortion service providers who claim to vindicate their rights evidences a definitive misalignment of interests. In retrospect, it would seem that Justice Powell's warning in *Singleton* has proven true: the Court's allowance of third-party standing for abortion service providers had shown impossible to "cabin," which has resulted in "litigation by those who perhaps have the least legitimate ground for seeking to assert the rights of third parties."¹⁸¹

CONCLUSION

Justice O'Connor once wrote that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."¹⁸² The doctrine of standing is no exception. Federal courts, at all levels of the judiciary, have granted third-party standing to litigants challenging state abortion regulations in clear opposition to black letter standing requirements. First, abortion service providers do not share a "close relationship" with the women whose rights they seek to litigate. Doctors performing abortions frequently fail to have any meaningful prior relationship with their patients, and abortion physicians often seek to litigate the rights of hypothetical third-party women with whom they have no existing relationship at all. Moreover, it is often impossible for abortion service providers to satisfy the "close relationship" requirement because of the inherent conflicts of interests they have with their hypothetical patients. Second, women do not face hindrances sufficient to constitute a "genuine obstacle" to filing their own legal claims. The Court has acknowledged this fact since *Singleton*, and its reluctance to effectuate this prong of the *jus tertii* standing test in *June Medical* is all the more problematic after the Court's reinvigoration of the test's elements in *Kowalski*.

The effect of the Supreme Court's inconsistent application of standing requirements to cases challenging state abortion regulations is plainly evident. The jurisprudential landscape in abortion challenges has seen a tremendous shift since the *Singleton* decision in 1976, with suits brought by abortion service providers claiming to litigate the interests of women vastly outnumbering those suits actually filed by women. In many of these cases, the standing of abortion service providers to litigate the interests of nonlitigant, third-party women is presumed and never questioned. This Note contends that is a presumption worth questioning. The Court's articulation of

181 *Singleton v. Wulff*, 428 U.S. 106, 129–30 (1976) (Powell, J., concurring in part, dissenting in part).

182 *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting), *overruled by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

the *jus tertii* doctrine in *Kowalski* does not permit an exception to the prohibition on third-party standing for abortion service providers, and the Court's ruling in *June Medical* "is inconsistent with [the Court's] more recent standing precedents."¹⁸³

¹⁸³ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2143 (2020) (Thomas, J., dissenting).

