Case Nos. 09-3231, 09-3233, 09-3362

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD MINNESOTA, **NORTH DAKOTA**, **SOUTH DAKOTA**, and **CAROL E. BALL, M.D.**,

Plaintiffs-Appellees,

v.

MIKE ROUNDS, Governor, **LARRY LONG**, Attorney General, in their official capacities,

Defendants-Appellants,

ALPHA CENTER, **BLACK HILLS CRISIS PREGNANCY CENTER**, doing business as **CARENET**, **DR. GLENN A. RIDDER, M.D.**, and **ELEANOR D. LARSON, M.A.**, **LSWA**,

Intervening Defendants-Appellants

Appeal from the United States District Court for the District of South Dakota
Decision and Order filed
August 20, 2009, in 4:05-cv-01077-KES
Hon. Karen E. Schreier

BRIEF OF *AMICI CURIAE*, FAMILY RESEARCH COUNCIL, CARE NET, HEARTBEAT INTERNATIONAL INC., AND NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, INC. IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Family Research Council is a non-profit corporation with no parent corporation and no stockholders.

Care Net is a non-profit corporation with no parent corporation and no stockholders.

Heartbeat International, Inc. is a non-profit corporation with no parent corporation and no stockholders.

The National Institute of Family and Life Advocates, Inc. is a non-profit corporation with no parent corporation and no stockholders.

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INTEREST OF *AMICI CURIAE*[1]

Family Research Council ("FRC") is a non-profit organization located in Washington, D.C. that exists to develop and analyze governmental policies that affect the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal. FRC contends that many women who undergo an abortion experience unexpected emotional and physical harms, including infertility, which they might not risk if adequately informed about the potential harms. Accordingly, FRC further contends that the interests of abortion providers conflict with the interests of women considering abortion. Thus, FRC argues that abortion providers lack standing under Article III of the United States Constitution to assert the third party rights of women considering abortion in their challenge to the South Dakota "informed consent" law found at S.D.C.L. § 34-23A.10.1(1).

Care Net is a District of Columbia non-profit corporation which serves as the largest affiliation organization for pregnancy resource centers in North America. The mission of Care Net is to promote a culture of life through the delivery of valuable, life-affirming, evangelistic ministry to people facing unplanned pregnancies and related sexual issues. To accomplish this mission, Care Net

[1] *Amici* file this brief by the consent of all parties.

provides education, support and training for its 1190 affiliate pregnancy centers in the United States and Canada, four of which are located in South Dakota. Care Net pregnancy centers serve approximately 372,000 clients annually.

Heartbeat International ("Heartbeat") is a non-profit organization located in Columbus, Ohio. Heartbeat is an interdenominational Christian association of faith-based pregnancy resource centers, medical clinics, maternity homes, and nonprofit adoption agencies. Since 1971, Heartbeat has supported, strengthened and started more than 1,500 pregnancy centers. Currently, Heartbeat serves over 1,100 affiliates in nearly 50 countries to provide alternatives to abortion. Heartbeat's affiliates know first-hand the pain that women feel after going through an abortion experience. Several Executive Directors who run pregnancy centers have themselves experienced abortion: and now seek to assist other women facing this life-changing decision. In addition, many Heartbeat affiliates offer post-abortion healing programs to bring healing to women and men affected by an abortion decision.

Heartbeat affiliates have also seen the profound impact that true informed consent has on women who are considering abortion. The vast majority of women who view an ultrasound of their unborn child, choose life for that child. Women are entitled to all of the facts about the development of their unborn child, the abortion

procedure that they are considering, and the risks of that procedure to their physical and emotional well-being.

The National Institute of Family and Life Advocates (NIFLA) is a charitable 501(c)(3) tax-exempt organization which exists to provide life-affirming Pregnancy Help Centers the best legal education, consultation, and training possible. NIFLA empowers women to choose life by equipping Pregnancy Help Centers with legal counsel and support, enabling Pregnancy Help Centers to convert to medical clinic status and energizing Pregnancy Help Centers with a renewed vision for the future. Currently NIFLA has more than 1,195 member Pregnancy Help Centers in all 50 states.

SUMMARY OF ARGUMENT

Amici urge this Court to rule that Plaintiffs-Appellees lack standing to bring this action. Planned Parenthood entirely lacks Article III standing because it is not a "physician" subject to the challenged statute. Plaintiffs-Appellees lack prudential standing to represent the third party interests of women considering abortion. Finally, Plaintiffs-Appellees lack Article III standing to challenge the "medical emergency" provision of the statute because none of the four providers at Planned Parenthood's Sioux Falls location will foreseeably face emergent situations.

PROCEDURAL HISTORY

The party seeking to invoke the federal court's jurisdiction - normally, the plaintiff - bears the burden of pleading and proof on each step of the standing analysis. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, at 561 (1992). Plaintiffs-Appellees' First Amended Complaint (Docket #208, filed August 10, 2006), challenged the informed consent provisions as violative of "the physicians' First and Fourteenth Amendment rights." *Id.* at 2, ¶ 2; at 8, ¶ 17. Plaintiffs-Appellees also asserted their patients' rights to be free from coerced exposure to the State's message under the First and Fourteenth Amendments. *Id*. at 2, ¶ 3; at 8, ¶ 18.

The District Court did not consider standing in granting Plaintiffs-Appellees' Motion for Preliminary Injunction in the first instance. *Planned Parenthood v. Rounds*, 375 F. Supp. 2d 881 (Dist. S.D. 2005). On their first appeal to the Eighth Circuit, Appellants-Defendants and Appellants-Intervenors raised the issue of Plaintiffs-Appellees' standing to assert claims belonging to their patients. Nonetheless, the panel ruled that the abortion providers did have standing to challenge the informed consent provisions by representing the interests of women considering abortion:

> Although ordinarily one may not claim standing to assert the rights of a third party, the Supreme Court has carved out an exception for physicians asserting their patients' right to have access to abortion. *Singleton v. Wulff*, 428 U.S. 106, 114-18 (1976). *Singleton* did not

> adopt a per se rule, *id*. at 118 n. 7, but the Court has never held since then that a physician lacks standing in this context. The test is not whether interests are perfectly aligned, but whether the plaintiff physician will "adequately represent" the absent woman's constitutional rights. *Okpalobi v. Foster*, 190 F.3d 337, 353 (5th Cir.1999). *We conclude that Planned Parenthood has standing here to assert the liberty interest of its patients.*

Planned Parenthood v. Rounds, 467 F.3d 716, 726 (8th Cir. 2006) (emphasis added; interior citations omitted). Intervenors urged the Eighth Circuit to review the panel's decision on standing among other issues, Petition for Rehearing and Petition for Rehearing *En Banc* on Behalf of Intervenors Alpha Center, *et al*., Appeal No. 05-3093, filed November 10, 2006 at 25-26, but while the full Court granted *en banc* rehearing, it did not consider the issue in its opinion. *See generally Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (*en banc*). However, as the full Court of Appeals noted, "[t]he district court granted the preliminary injunction based solely on Planned Parenthood's claim that [the biological disclosure] violates physicians' First Amendment rights to be free from being compelled to speak." 530 F.3d at 733. Thus, insofar as standing to bring the physicians' own claims under the First Amendment coerced speech doctrine is perhaps the only strong link in Plaintiffs-Appellees' asserted chain of Article III standing, the District Court's analysis was arguably unnecessary dicta.

On remand, Intervenors again raised the issue of Plaintiffs-Appellees'

standing to bring claims on behalf of their patients. The District Court's opinion on summary judgment did not discuss standing in the context of the First Amendment and vagueness challenges to the informed consent provisions, nor, arguably, need it have, except to clarify that any standing possessed by a "physician" who is subject to the terms of the Act does not extend to third parties such as Planned Parenthood and the physicians' patients. The court did, however, engage in an extended discussion of Plaintiffs-Appellees' standing to challenge the "medical emergency" exception. *Planned Parenthood v. Rounds*, 650 F. Supp. 2d 972, 984 (Dist. S.D. 2009). Relying principally on the United States Supreme Court's decision in *Doe v. Bolton* (410 U.S. 179, 188 (1973)), the court found that the Plaintiffs-Appellees possess standing "because they are challenging a statute that may subject them to criminal prosecution." *Planned Parenthood*, 650 F. Supp. 2d at 984. With no explanation of its reasoning and no record citation, the court conclusorily stated, "The physicians at Planned Parenthood have stated their intention to continue to perform abortions for patients, some of whom may require an emergency abortion." *Id.*

Turning to the question of Plaintiffs-Appellees' standing to assert their patient's rights, the District Court noted that a plaintiff may assert the rights of others where two factual elements are present: "The first is the relationship of the

litigant to the person whose right he seeks to assert." *Id*. at 985, quoting *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). "The other factual element to which the Court has looked is the ability of the third-party to assert his own right." *Id*., quoting *Singleton*, 428 U.S. at 115-16. As to the first element, the court held based on *Singleton*'s plurality opinion that the Plaintiffs-Appellees have a "close relationship" with women considering abortion:

> Here, as in *Singleton*, a woman needs the aid of a physician to undergo a safe abortion procedure, the statute in question puts a woman's right to an abortion into jeopardy, and the physician is significantly involved in a woman's abortion decision. Accordingly, as in *Singleton*, in the instant case, physicians are qualified to litigate the constitutionality of the state statute which regulates abortions because of their intimate relationship with their patients.

Id. The court further concluded that "[P]laintiffs' interests align with those of their patients in the event a medical emergency arises, such that they can provide proper representation of those rights." *Id*. at 986.

Regarding the ability of the third-party patients to assert their own rights, the District Court again cited the *Singleton* plurality's conclusion that obstacles exist to a woman's assertion of her right to an abortion:

> Using [*Singleton*] as guidance, the court finds that plaintiffs' patients do indeed face genuine obstacles to asserting their claims. A woman needing an abortion in an emergency situation would face the obstacle of imminent mootness. Her rights would be lost in a very short, limited period of time. Further, women may be hindered from asserting their rights because they do not want their health care decisions to be public

> information. Accordingly, the court finds that plaintiffs also meet the second consideration for third-party standing because of the difficulty a woman faces in pursuing her own claim.

Id. In other words, the court relied on the same factors stated in *Singleton* by parroting the plurality opinion in that case, without regard to the record in the present case and without regard to the fact that the Supreme Court has made it clear that mootness and privacy concerns are no barrier to women bringing an abortion case. It thus remains for this Court to ascertain whether Plaintiffs-Appellees possess Article III jurisdictional and prudential standing to bring this case in light of the well-developed record below.[2] For the reasons discussed below, the Court's *Amici* assert that they do not. Because the court erred by ruling that the abortion providers meet the requirements of jurisprudential and prudential standing, Planned Parenthood should be dismissed entirely and Plaintiff Ball's claims on behalf of her patients should likewise be dismissed. Moreover, Plaintiffs-Appellees' challenge to the medical emergency provisions should also be dismissed because, on their own admission, Planned Parenthood's contract physicians do not provide "emergency"

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[2] That the parties did not raise Planned Parenthood's standing or the standing of Plaintiffs *viz.* the informed consent provisions is no bar to this Court's consideration of those jurisdictional issues. "[A]n appellate court that sees that the lower court proceeded without subject matter jurisdiction must correct the error even if neither party brought it to the lower court's attention." *United States v. Foley*, 73 F.3d 484, 487 (2nd Cir. 1996), citing *Bender v. Williamsport*, 475 U.S. 534, 540 (1986).

abortions and will not foreseeably face such situations.

ARGUMENT

The standing requirement ensures that "the decision to seek review" is not "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)). "[F]ederal courts [must] satisfy themselves that the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, __ U.S. __, 129 S. Ct. 1142, 1149 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

Requiring that plaintiffs have been directly impacted by challenged governmental enactments "assure[s] that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). "By focusing on the factual situation" presented to the court by a plaintiff whose own interests are truly at stake, courts ensure that they are adjudicating "'flesh and blood' legal problems with data 'relevant and adequate to an informed judgment.'" *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999).

This Court should rule that the Plaintiffs-Appellees lack standing to represent

the interests of women considering abortion in this case.

I. PLAINTIFF-APPELLEE PLANNED PARENTHOOD LACKS STANDING.

Planned Parenthood cannot demonstrate the requisite personal stake in this controversy that is the hallmark of Article III jurisprudence. Planned Parenthood is a Minnesota corporation doing business as a foreign corporation in South Dakota. First Amended Compl., at 4, ¶ 10. Although it arranges for the performance of abortions in its Sioux Falls location, it is not a "physician" within the meaning of South Dakota Codified Laws § 34-23A-10.1. *See* SDCL § 34-23A-1(7) ("Physician" defined as "a person licensed under the provisions of chapter 36-4"). In fact, "[I]t is the public policy of [South Dakota] that a corporation may not practice medicine or osteopathy." SDCL § 36-4-8.1.

It is the physician, not the corporation contracting with the physician, who is required to obtain full informed consent under the statute. The obligations are individual and personal to the physician; she must obtain voluntary and informed written consent from the mother before performing an abortion, or determine that a medical emergency exists and that the conditions for deemed waiver of consent pertain.[3] It is the physician who must counsel mothers and document their

[3] For the reasons set forth below, however, the Court's *Amici* urge that Plaintiffs-Appellees lack standing to challenge the emergency exception because the Planned Parenthood physicians perform no emergency abortions.

understanding in the medical chart. SDCL § 34-23A-10.1. And it is the physician, not her employer, that stands in jeopardy of criminal and civil liability for failing to adhere to the law's provisions. SDCL § 34-23A-10.2 (criminal liability provision); SDCL § 34-23A-22 (civil liability provision).

Planned Parenthood has no responsibilities and carries no liabilities under the challenged statute. Consequently, its interest in this lawsuit is vicarious of the rights of its contract workers and/or its patients. As to the First Amendment coerced speech claims, it is well established that outside of the overbreadth context (*see, e.g., Broadrick v. Oklahoma*, 413 U.S. 601(1973)), which is inapplicable here, third parties lack standing to enforce the First Amendment free speech claims of others. *Osediacz v. City of Cranston*, 414 F.3d 136, 142-143 (1st Cir. 2005) (resident lacked standing to bring Free Speech Clause claim on behalf of other residents who allegedly were being subjected to prior restraint). And absent the injury in fact required for Article III jurisdiction, a claimant may not come into court at all, however interested it may be in the outcome. *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007) (plurality opinion). Moreover, while case law has suggested that under certain limited circumstances a physician may bring suit on behalf of his patients' Fourteenth Amendment substantive due

process rights, *e.g.*, *Singleton v. Wulff, supra*,[4] Planned Parenthood is not a "physician." Planned Parenthood did not plead that it brought this lawsuit on behalf of its patients or on behalf of Dr. Ball, though it did assert its own interests as an "abortion provider" - a term that *Amici* argue conveys no legal import under the South Dakota statutes or Article III standing jurisprudence. Planned Parenthood "provides" abortions only through its contract physicians, including Plaintiff Dr. Carol Ball, who presents her own claims as a Plaintiff. Consequently, Planned Parenthood is not a proper party to this action and should be dismissed.

II. PLAINTIFFS-APPELLEES LACK ARTICLE III STANDING TO CHALLENGE THE RELATIONSHIP AND MEDICAL DISCLOSURES ON BEHALF OF THE THIRD PARTY RIGHTS OF MOTHERS CONSIDERING ABORTION.

Dr. Ball pleads that she brings this lawsuit "on her own behalf and on behalf of her patients." First Amend. Compl., at 5, ¶ 11. However, although Dr. Ball's standing to assert her own First and Fourteenth Amendment free speech and vagueness claims may be colorable, she may not bring the First Amendment claims of third parties for the reasons discussed above. Moroever, Dr. Ball utterly fails to meet the requisite elements for third-party standing to assert the Fourteenth Amendment substantive due process rights of her patients under *Singleton* and

[4] For the reasons set forth below, however, *Amici* argue that the instant case is not an appropriate case for the application of the rule announced by the plurality in *Singleton*.

similar cases. Accordingly, she may not challenge the "medical emergency" exception on behalf of her patients.

Article III's "case or controversy" provision requires plaintiffs to "assert [their] own legal rights and interests, and [they] cannot rest [their] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S.498, 499 (1975); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing… to vindicate the constitutional rights of some third party."). "[P]rudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This presumption against third party standing is not absolute, and the Supreme Court has permitted parties to represent the constitutional claims of third parties when they meet two criteria: (1) when the "party asserting the right has a 'close' relationship with the person who possesses the right," and (2) when there is "a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004), citing *Powers v. Ohio*, 499 U.S. 400, 411(1991). Plaintiff-Appellees meet neither of these two criteria. Abortion providers have *no* real relationship, let alone a "close relationship," with women considering abortion. Planned Parenthood's manner of providing abortions through contract workers

bears no resemblance to the venerated traditional physician-patient relationship contemplated by the Supreme Court in its seminal abortion cases, so much so that their interests are at odds with those of their patients in crucial aspects. They also fail the second *Kowalski* factor, as there is no "hindrance" to women asserting their own rights in court.

The lower court erroneously relied on the plurality opinion in *Singleton v. Wulff*[5] as generally authorizing abortion providers to represent the interests of women considering abortion. The court did not examine the significant differences

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[5] Only three Justices joined Justice Blackmun in holding that abortion physicians may bring the Fourteenth Amendment claims of their patients. 428 U.S. at 108. Justice Stevens concurred in part, but stated that he was "not sure whether the analysis" in that part of the plurality's opinion "would, or should, sustain the doctors' standing," *id*. at 121-22, and consequently declined to join that part of the opinion. Justice Powell, joined by the Chief Justice and Justices Stewart and Rehnquist, dissented from that part of the plurality opinion. *Id*. at 122.

Moreover, a broad reading of Singleton is no longer tenable in light of the Supreme Court's virtually unbroken string of decisions more strictly construing both jurisdictional and prudential standing in the last several years. *See, e.g*., *Kowalski, supra* (holding attorneys lacked prudential standing to represent the interests of their clients); *Newdow, supra* and discussion, *infra* (holding that a father lacked prudential standing to represent the interests of his daughter where their positions were in conflict); *Hein, supra* (restricting Article III taxpayer standing); and *Summers, supra* (restricting Article III standing in environmental cases). The Supreme Court has before it a petition addressing whether "offended observer" standing in Establishment Clause cases contravenes the Article III "injury in fact" requirement. *Salazar, Sec. of Interior v. Buono*, Docket No. 08-472 (argued October 7, 2010). The Court's decision in that case is forthcoming, and may be instructive for the Court of Appeals in considering Plaintiffs-Appellees' standing.

between this case and *Singleton*, and should not have relied upon it to allow third party standing in this case. *Singleton* involved a suit in which abortion providers sought to recover payment from the State of Missouri for abortions they performed for women on public assistance. 428 U.S. at 109. There was no potential conflict of interest between the abortionists and their patients under those circumstances.

Further, although the women in *Singleton* could have brought their own lawsuit, the Supreme Court allowed the abortion providers to represent the interests of the women for two reasons, neither of which apply here (and arguably did not exist in *Singleton*, either). First, the Supreme Court allowed the abortion providers to represent women who obtained abortions because such women "may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit." *Id*. at 117. However, women frequently appear as plaintiffs in abortion-related lawsuits and hide their identities with pseudonyms. Indeed, the Supreme Court's major decisions on abortion, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) were brought by women using aliases to hide their identities. Women in South Dakota who believe the informed consent statute interferes with their right to abortion could bring such a lawsuit and effectively hide their identities as the women did in *Roe* and *Doe*.

The *Singleton* plurality's second reason why abortion providers could

represent the third party interests of women who had abortions was the fact that a woman makes the decision to get an abortion in only a few months of pregnancy, and that "her right [to an abortion] will have been irrevocably lost, assuming, as it seems fair to assume, that unless the impecunious woman can establish Medicaid eligibility she must forgo abortion." *Singleton*, 428 U.S. at 117. However, the plurality admitted that this obstacle could be overcome by asserting the exception to the mootness doctrine for situations that are "capable of repetition yet evading review," 428 U.S. at 117, quoting *Roe v. Wade*, 410 U.S. at 124-25. The *Singleton* plurality also admitted that a class action would avoid the mootness problem of pregnancy being too short a time to litigate claims to a right to abortion in federal court actions lasting several years. *Id.* The Court allowed abortion providers to represent women who had abortions nonetheless, stating that because the courts allow "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." *Singleton*, 428 at 117-18. Here, there is much to be lost if Planned Parenthood and its physicians are permitted to "advocate" for women considering their services even though the statute they challenge was enacted by the State of South Dakota to protect women from Planned Parenthood's own practices. For the reasons discussed below, the record in the appeal before the Court presents none of

the factors relied on in *Singleton* to find standing, and the District Court was therefore in error in relying upon it.

A. BECAUSE THE INFORMED CONSENT STATUTE WAS ENACTED TO PROTECT PREGNANT MOTHERS FROM PLAINTIFFS' OWN ABUSIVE PRACTICES, THE INTERESTS OF PLAINTIFFS ARE IN CONFLICT WITH THEIR PATIENTS, NOT IN ALIGNMENT WITH THEM.

The interests of abortion providers in challenging this South Dakota law do not align with the interests of women who are considering abortion. *Singleton* required that "[T]he relationship between the litigant and the third party may be such that the former is *fully, or very nearly, as effective a proponent of the right as the latter*." *Singleton*, 428 U.S. at 115 (emphasis added). That alignment clearly does not exist here. The plurality assumed in *Singleton* that an established traditional physician-patient relationship exists between an abortionist and her patient, but that is usually not the case, either in South Dakota or elsewhere. *Cf. Report of the South Dakota Task Force to Study Abortion* (December 2005), available at http://www.docstoc.com/docs/2912381/REPORT-OF-THE-SOUTH-DAKOTA-TASK-FORCE-TO-STUDY-ABORTION (last viewed Jan. 21, 2010) (herein "Task Force Report"), at 9, quoting *Roe v. Wade*, 410 U.S. at 153 ("All these factors the woman and her responsible physician necessarily will consider in consultation."). After a thoroughgoing survey of Planned Parenthood's operation,

the South Dakota Task Force to Study Abortion concluded:

> We find that there is no true physician-patient relationship in this process, and once the decision has been made, the woman is seeing the doctor, not for counseling, consultation, or help in reaching a decision, but rather to submit to the medical procedure that she has already committed to, whether or not it was informed.

Task Force Report at 16-17.

The findings of the Task Force were borne out in spades by the District Court record, which established that all four physicians who perform abortions at the Sioux Falls Clinic of Planned Parenthood reside in Minnesota and travel to Sioux Falls approximately one to four times a month, typically arriving during the morning and flying back home the same day in the late afternoon or early evening. State Defendants' Statement of Material Facts ("State's SSOF"), Docket No. 263, No. 1, citing Doc. 150, Ex. 1 (McCreary Dep. at 16-17); Ex 2 (Van Oppen Dep. at 26); Ex. 3 (D'Ascoli Dep. at 10-11) (usually stays overnight, but currently does very few abortions); Ex. 4 (Ball Dep. at 11-12). The typical patient who goes to the Sioux Falls Planned Parenthood clinic for an abortion does not have an established doctor-patient relationship with the physicians providing the abortions. State's SSOF, No. 4, citing Doc. 150, Ex. 4 (Ball Dep. at 34-35). The woman pays for the abortion procedure and signs off on various informed consent documents first, before receiving any one-on-one "counseling" by a "patient educator" or a

physician. State's SSOF, No. 6, citing Doc 150, Ex. 8 (Andrea Dep. at 39, 47-51); Ex. 5 (Gues Dep. at 31-34); Ex. 7 (Lobby Dep. at 82-89). Only then does the patient first meet the abortionist, immediately before the abortion, at which time the doctor spends only about 2-5 minutes with the patient prior to performing the procedure. The doctor typically asks the patient if she has any questions, and if she does not, the abortion is done. State's SSOF, No. 10, citing Doc. 150, Ex. 1 (McCreary Dep. at 233-234); Ex. 4 (Ball Dep. at 46-47); Ex. 9 (Nelson Dep. at 64-65). The typical patient at the clinic spends a very short time in "recovery" after the abortion during which the focus is on medical complications. Emotional or psychological consequences of the abortion are not discussed with the woman as a matter of routine, despite the fact that many are sad or crying. State's SSOF, No. 13, citing Doc. 150, Ex. 1 (McCreary Dep. at 79); Ex. 4 (Ball Dep. at 61-62); Ex. 2 (Van Oppen Dep. at 52-75). With the exception of the small percentage of abortion patients at the Planned Parenthood Clinic who undergo a medical abortion and require a follow-up visit, most of the abortion patients do not see the doctor who performed the abortion again after the day of the abortion. State's SSOF, No. 14, citing Doc. 150, Ex. 3 (D'Ascoli Dep. at 36-38); Ex. 1 (McCreary Dep. at 206-207); Ex. 2 (Van Oppen Dep. at 77). *Accord* South Dakota Task Force Report, at 18, Dr. Ball testimony ("we have a verbal agreement with an Ob/Gyn group in Sioux Falls

who will help us with any complications that occur"). Therefore, if any woman has complications, local doctors who are unfamiliar with the patient's history and were in no way involved in the abortion procedure must see her. Planned Parenthood's physicians have no relationship, "close" or otherwise, with their patients, and they therefore lack standing to assert their legal interests.

Even assuming for the sake of argument that some sort of "relationship" exists between abortionists and their patients, "the courts should not adjudicate such [constitutional] rights unnecessarily, and it may be that in fact the holders of those rights… do not wish to assert them." *Singleton*, at 113-14. "Relationship" is not a legal shibboleth, as the Supreme Court's decision denying *jus tertii* standing to the natural father of a putative third-party minor plaintiff in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) aptly shows. Newdow was a father who brought a constitutional challenge to the recital of the Pledge of Allegiance in his daughter's public school, citing his "unrestricted right to inculcate in his daughter – free from governmental interference – the atheistic beliefs he finds persuasive." *Id*. at 15. The Supreme Court demurred, holding that Newdow lacked standing because "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict." *Id*., distinguishing *Singleton*, 428 U.S. at 113-18.

Like the dysfunctional familial relationship between father and daughter in

Newdow, the interests of abortion providers are in diametric conflict, not alignment with, the interests of pregnant women who are considering abortion in at least two important ways. First, the abortion providers have a financial incentive or stake in the provision of abortion that creates a conflict of interest with the interests of women considering abortion. Planned Parenthood's abortionists are mostly paid on a contract basis per abortion (State's SSOF, No. 2, citing Doc. 150, Ex. 1 (McCreary Dep. at 9-10, 19)); Ex. 2 (Van Oppen Dep. at 94); thus, they are paid only when women receive an abortion. In Planned Parenthood's clinic, the woman ordinarily pays for the abortion procedure and signs off on various informed consent documents prior to receiving any one-on-one "counseling" by a "patient educator" or a physician. State's SSOF, No. 6, citing Doc 150, Ex. 8 (Andrea Dep. at 39, 47-51); Ex. 5 (Gues Dep. at 31-34); Ex. 7 (Lobby Dep. at 82-89). The information that the statute requires women to receive may cause some of them to forego their planned abortions. If that occurs, the abortion providers would receive less income than they would if they were free from the requirements of the law. Furthermore, SDCL § 34-23A-10.1, SDCL § 34-23A-22 provides a civil cause of action for the mother and her parents against an abortionist under certain circumstances. These pecuniary conflicts of interest strongly suggest that women should represent their own interests in court, and not have them represented by

those who have a financial incentive in providing them abortions.

Second, the interests of women considering abortion are not in alignment with the abortion providers in the context of this statute because Planned Parenthood's practice of misleading its patients and withholding critical information from them is the very reason that South Dakota enacted the statute to protect its patients. Plaintiffs-Appellees assert an interest on the part of their patients not to be given full information regarding the existence of the second patient within them and the fact that the abortion will affect dramatically the constitutional rights of the mother and her child.

Parents have a fundamental Fourteenth Amendment liberty interest in raising their children. *See, e.g., Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 534-35 (1925) and *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Abortion, therefore, is not merely a medical procedure that a woman undergoes, but more fundamentally it is a procedure that destroys the woman's legal right in the parent-child relationship that the Constitution and State laws protect. The State of South Dakota has reasonably concluded that a woman should be fully informed that by having an abortion, she is terminating the life of a second patient and abandoning legally protected rights to her relationship with that patient. Hearing on House Bills 1166 and 1233 Before the House State Affairs Comm.

(S.D. Feb. 9, 2005); Hearing Re: House Bills 1166, 1233, 1249 Before the Senate State Affairs Comm. (S.D. Feb. 23, 2005). Both the Task Force and the legislature relied on unrefuted testimony that a physician who has a pregnant woman as a patient has two separate patients and has a duty to both the mother and the child. *See* Intervenors' Statement of Material Facts, Docket. No. 296, No. 76, citing Docket No. 185; 185 A-D, Declaration of Dr. T. Murphy Goodwin; Docket No. 184, First Declaration of Harold Cassidy, American College of Obstetrics and Gynecologists, Ethics in Obstetrics and Gynecology 34 (2d ed. 2004) ("The maternal-fetal relationship is unique in medicine…. both the fetus and the woman are regarded as patients of the obstetrician"). The physician has a duty to disclose to the pregnant mother the adverse consequences of a procedure upon the mother's unborn child. *Id*., No. 77, citing Docket No. 185; 185A – 185D, Goodwin Decl. The state law attempts to make sure those disclosures are communicated to women considering abortion so that they may make fully informed decisions. Plaintiffs-Appellees brought this suit seeking to continue to *withhold* information the State of South Dakota deemed necessary for full informed consent. There interests are opposed not, not in alignment with, those of their patients.

Likewise, it is the women, not Planned Parenthood and its physicians, who would suffer the health consequences that can occur from the withholding of the

medical disclosures required by State law. Women have a right to make the final decision about whether to undergo a medical procedure or not. The South Dakota statute in question supplies information to the women contemplating abortion information relevant to their decision-making. It is not relevant to the question of standing whether the abortion providers dispute the relevance or accuracy of the disclosures required by state law. Their interests do not align with those of women considering abortion because Planned Parenthood and its contract physicians desire to perpetuate their practice of providing less than complete information to women considering abortion. Close to 2,000 women who have had abortions provided statements to the Task Force detailing their experiences, trauma, and the impact abortion has had on their lives. *Task Force Report* at 7. In virtually every case these women testified that they were told that what was being evacuated was "nothing but tissue," and their depression was at least in part triggered by the subsequent realization that by having an abortion they were mothers who had killed their own child. *See* Intervenors' Statement of Material Facts, no. 4, citing Docket No. 184, First Cassidy Decl. (Ex. 1, p.4, LT at 9-15 to 9-22 (Kling); Ex. 1, p.5, LT at 12-7 to 12-21 (Julian); Ex. 1, p.7, LT at 22-10 to 22-13 (Frick); Ex. 1, p.19, LT at 34-17 to 34-22 (Avila)). These women all felt they had been "lied to" by the providers. *See id*., no. 5, citing Docket No. 184, First Cassidy Decl. (Ex. 1, p.5, LT

at 11-3 (Kling); Ex. 1, p.6, LT at 15-8 to 10 (Julian); ex. 1, p.8, LT at 22-22-25 (Frick); ex. 1, p.19, LT at 33-16 (Soske); Ex. 1, p.20, LT at 35-15 (Avila)).

Planned Parenthood believes that even simple information about fetal development simple information about fetal development is irrelevant to the woman's decision of whether or not to have an abortion. *Id.*, no. 22, citing Pacer Document 184, First Cassidy Declaration (Exhibit 24), deposition of Kate Looby, South Dakota State Director of Planned Parenthood, P.63, L.24 to P.64, L.2. ("Frankly, I would say that fetal development is not something that is part of the decision-making process for a person with an unplanned pregnancy"). *See also* Exhibit 24, Tr. of Looby Dec., P.157, L.9 to P.158, L.8; *id.*, Ex. 25, Tr. of Depo of Dr. Carol Ball, P.176, L.20 to L.25. (Dr. Ball agrees that fetal development is not relevant to the decision of a pregnant woman contemplating submitting to an abortion); Exhibit 26, Tr. of Depo. of Dr. Dirk Van Oppen, p.133, L.17 to P.134 L.13. (Dr. Van Oppen doesn't think information about fetal development is relevant to women's decisions of whether to have an abortion). The Client Information for Informed Consent provided to abortion patients at Planned Parenthood's clinic describes the entity being aborted as "contents of the uterus," "pregnancy tissue" or "removing the pregnancy." State's SSOF, No. 7, citing Doc. 150, Ex. 4 (Ball Dep. Ex. 5). During this initial consult process, the doctor describes the procedure as

"removing the pregnancy," "pregnancy tissue" or the "contents of the uterus" and purposely chooses terms which do not invoke negative emotions or visual images in the patient's mind. State's SSOF, No. 11, citing Doc. 150, Ex. 3. Women at the clinic may not ask for information regarding fetal development or the psychological effects of the abortion because they are in a very difficult emotional state. State's SSOF, No. 17, citing Doc. 151, Ex. 11 (Avila Dep. at 20); Ex. 12 (Jane Doe Dep. at 122-124, 126, 130-132, 151-152, 238-239); Ex. 13 (Nelson Dep. at 50-52); Ex 14 (Soske Dep. at 39-43, 50-55, 65-66, 72-73, 80-86).

Abortion providers cannot represent the constitutional claims of women when the relief requested is to withhold information from women considering the procedure that may result in physical and psychological harm. The interests of Plaintiffs-Appellees do not align with the interests of women considering abortion, and thus they lack standing to represent the interests of those women in this case.

B. PLAINTIFFS-APPELLEES LACK STANDING TO ASSERT THE RIGHTS OF WOMEN CONSIDERING ABORTION BECAUSE NOTHING HINDERS THEM FROM ASSERTING THEIR OWN INTERESTS.

Third party standing is availble only when third parties face a hindrance to litigating their rights. It must be "difficult if not impossible for persons whose rights are asserted to present their grievance before any court." *Barrows*, 346 U.S. at 257.

Here, nothing bars women considering abortion in South Dakota from asserting their own claims in court. There is no unique or special bar to women bringing their claims themselves to court. In fact, women have pseudonymously challenged laws restricting abortion in the past in such major cases as *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), as well as a myriad others in the Circuits. There is no reason that *Amici* are aware of that would hinder women considering abortion from challenging this South Dakota law, and, in fact, state law requires that their identity be protected. See SDCL § 34-23A-23 (anonymity of female plaintiff in abortion actions; "In the absence of written consent of the female upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action pursuant to this chapter shall do so under a pseudonym."). Women are capable of defending their own rights in court. Because nothing hinders the women from asserting their own claims in court, the abortion providers lack standing to raise the women's claims as third parties. *Kowalski v. Tesmer*, 543 U.S. at 129-30.

III. PLAINTIFFS-APPELLEES LACK ARTICLE III STANDING TO CHALLENGE THE MEDICAL EMERGENCY EXCEPTION TO THE STATUTE WHERE THE RECORD REVEALS THAT THEY DO NOT PERFORM EMERGENCY ABORTIONS.

Planned Parenthood of Sioux Falls does not offer emergency services. State's SSOF, No. 25, citing Doc. 151, Ex. 15 at ¶¶10-11 (Complaint at ¶ 10). Medical

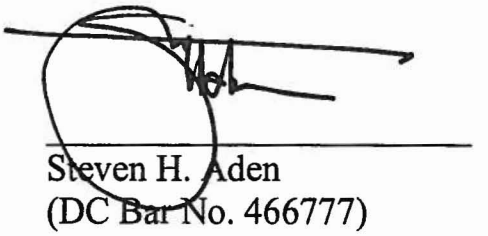
emergencies are not confronted in the abortion clinic situation at the Planned Parenthood clinic in Sioux Falls because the types of abortions that are performed at the clinic are not the types which involve emergencies. State's SSOF, No. 30, citing Doc. 150, Ex. 2 (Van Oppen Dep. at 216). Planned Parenthood's protocols require that high-risk pregnancies be referred to others. State's SSOF, No. 26, citing Doc. 150, Ex. 4 (Ball Dep., Ex. 11 at 1-2); Doc. 151, Ex. 16 ¶ 2 (Ball Reb. Rpt. In 02-4009); Ex 17 (Ball Ex. Rpt. At ¶ 8-9 in 02-4009). Planned Parenthood screens women for factors or medical history that would place them at greater risk for complications and if the physician believes it is not appropriate to do the procedure in an outpatient setting, the patient is referred to a hospital. State's SSOF, No. 27, citing Doc. 151, Ex. 16 ¶ 2 (Balls Reb. Rpt. in 02-4009).

Because there is no reasonable possibility that Planned Parenthood's physicians will face a circumstance involving "emergency abortion," their claim of standing to challenge the provision governing those situations should be denied.

CONCLUSION

Amici respectfully urge this Court to dismiss the appeal as to Plaintiff-Appellee Planned Parenthood and Plaintiffs-Appellees' substantive due process challenge to the "emergency" exception, and to hold they lack standing to challenge the relationship and medical disclosures on behalf of Planned Parenthood's patients.

Respectfully submitted this 22nd day of January, 2010.



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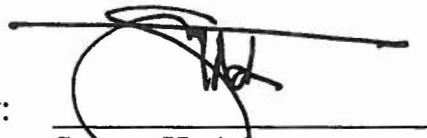
By: 

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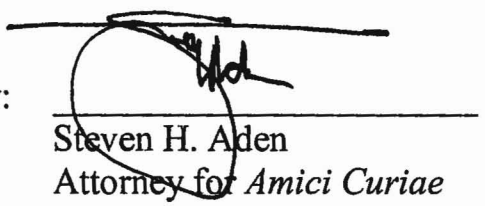
By: 

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