

Challenging TRAP Laws: A Defense of Standing for Abortion Providers

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INTRODUCTION

Several landmark abortion cases in the United States have been brought by abortion providers, including *Doe v. Bolton*,¹ *Planned Parenthood of Southeastern*

DOI: <https://doi.org/10.15779/Z38445HC7N>

[†] J.D., Case Western Reserve University School of Law (2019). Special thanks to Professor Emeritus Jonathan L. Entin for introducing me to this topic and for his guidance and support throughout the writing process. An additional thank you to Professor B. Jessie Hill for her helpful comments and insight.

1. 410 U.S. 179 (1973).

Pennsylvania v. Casey,² and most recently, *Whole Woman's Health v. Hellerstedt*.³ Physicians and abortion clinics have routinely challenged abortion restrictions by asserting their own rights⁴ and the constitutional rights of their patients.⁵ But two recent opinions have questioned abortion providers' standing to challenge these laws: the Supreme Court of Ohio's decision in *Preterm-Cleveland, Inc. v. Kasich*⁶ and Justice Thomas's dissenting opinion in *Whole Woman's Health*.⁷

In *Preterm*, an abortion clinic challenged Ohio's inclusion of abortion restrictions in the state's budget bill, arguing that it violated Ohio's single-subject rule.⁸ Two provisions were at issue.⁹ The first provision created new requirements for written transfer agreements between abortion clinics and private hospitals, including that the agreement be updated every two years.¹⁰ The second provision requires physicians to determine whether a fetal heartbeat exists and, if it does, to offer the patient the opportunity to hear the heartbeat.¹¹ In addition, the physician must wait twenty-four hours after detecting a heartbeat to perform or induce the abortion.¹² The Ohio Supreme Court held that the clinic lacked standing to challenge the inclusion of either provision in the budget bill.¹³ The court held that the clinic was unable to show that it suffered any injury as a result of the Written Transfer Agreement Provision because the regulation did not cause the clinic to

2. 505 U.S. 833 (1992).

3. 136 S. Ct. 2292 (2016).

4. See e.g. *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 788 (7th Cir. 2013); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 914 (9th Cir. 2004); *Planned Parenthood Association of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1465 (11th Cir. 1991); *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 289 (3d Cir. 1984); *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 655 F.2d 848, 852 (8th Cir. 1981) (affirmed in part, reversed in part on other grounds in 462 U.S. 476 (1983)); *Wolfe v. Schroerig*, 541 F.2d 523, 524 (6th Cir. 1976); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 874 (5th Cir. 1975).

5. See e.g. *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 586-87 (5th Cir. 2014); *Van Hollen*, 738 F.3d at 788; *Isaacson v. Horne*, 716 F.3d 1213, 1218 (9th Cir. 2013); *Wasden*, 376 F.3d at 914 (9th Cir. 2004); *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 131 (3d Cir. 2000); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999); *Miller*, 934 F.2d at 1465; *Ashcroft*, 655 F.2d at 852; *Charles v. Carey*, 627 F.2d 772, 775 (7th Cir. 1980).

6. 102 N.E.3d 461 (Ohio Supreme Ct. 2018).

7. 132 S. Ct. at 2321.

8. *Preterm*, 102 N.E.3d at 158.

9. *Id.* at 159-60.

10. *Id.* at 159.

11. *Id.* at 159-60.

12. *Id.* at 159-60. The clinic also challenged a third provision that created a program to provide services for pregnant women and parents of infants. The program permitted "the Ohio Department of Job and Family Services to offer federal Temporary Assistance for Needy Families block grant funds to organizations 'not involved in or associated with any abortion activities.'" *Id.* at 160 (quoting Ohio Revised Code § 5101.804(B)(5) (2013)). *Preterm* conceded that it was not injured by the provision but sought to have it severed from Ohio's budget bill. *Id.* at 165.

13. *Id.* at 166.

incur any additional expenses.¹⁴ In addition, the court found that the clinic lacked standing to challenge the Heartbeat Provision because the provision only operated against physicians.¹⁵

In *Whole Woman's Health*, the Supreme Court struck down two Texas abortion restrictions, requiring abortion clinics to meet the standards for ambulatory surgical facilities and obtain admitting privileges at a local hospital located within thirty miles of the clinic.¹⁶ The plaintiffs, a group of abortion providers, asserted both their own rights and the rights of their patients.¹⁷ Justice Thomas dissented, claiming that the Court should not have reached the merits of the case.¹⁸ Thomas argued that abortion providers do not have third-party standing to invoke the rights of their patients because the patients face no “insurmountable” obstacles” to bringing cases themselves.¹⁹ As Thomas notes, women have successfully challenged abortion restrictions in the past—most notably in *Roe v. Wade*.²⁰ Thomas further argues that the Court’s tendency to “bend the rules” of third-party standing when a woman’s right to abortion is at issue has encouraged providers, rather than women, to challenge abortion regulations.²¹ According to Thomas, this prevents the Court from receiving the necessary information to evaluate whether women face an undue burden in accessing an abortion.²²

This Article considers the questions posed by *Preterm* and Justice Thomas’s *Whole Woman’s Health* dissent and examines abortion providers’ standing to challenge abortion regulations, particularly those known as “Targeted Regulation of Abortion Providers,” or TRAP laws. TRAP laws create costly or unattainable requirements for abortion providers in order to restrict access to their services or to close abortion clinics altogether. These laws have been the largest contributing factor to widespread clinic closures throughout the country.²³ At its core, standing ensures that the plaintiff has a personal stake in the outcome of the litigation sufficient to show concrete adversity between the parties.²⁴ The methodical targeting of abortion providers shows that providers have both a personal stake in the outcome of the litigation and legal interests adverse to the defendants in these

14. *Id.* at 164-66.

15. *Id.*

16. 136 S. Ct. at 2300.

17. *Id.*

18. *Id.* at 2321.

19. *Id.* at 2323.

20. 410 U.S. 113 (1973).

21. 136 S. Ct. at 2321 (Justice Thomas, dissenting) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000)).

22. *Id.* at 2323.

23. See “Targeted Regulation of Abortion Providers,” *Guttmacher Institute* (1 Mar. 2018), <https://perma.cc/F62Z-CNAY>; Molly Redden, “Quarter of US Abortion Clinics have Closed Over Last Five Years, Report Says,” *The Guardian* (24 Feb. 2016), <https://perma.cc/5CGH-9RC9>.

24. *Baker v. Carr*, 369 U.S. 186, 204 (1962) (“Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.”).

cases: state officials charged with enforcing TRAP laws.

However, the *Preterm* decision and Justice Thomas's dissent indicate that in order to avoid deciding abortion-restriction cases on the merits, courts may begin to find that providers lack standing to challenge these restrictions.²⁵ Challenges to abortion regulations are generally brought by providers, rather than by women seeking abortions.²⁶ This is unsurprising for two reasons: first, these restrictions often directly target providers, rather than women; and second, women seeking abortions face obstacles to asserting their own rights—particularly low-income women and women of color, who disproportionately seek abortions and are more vulnerable to the impact of abortion restrictions.²⁷ Thus, a lack of standing for providers would likely make these laws much more difficult to challenge. In the meantime, prior to a lawsuit, unchallenged abortion restrictions may close clinics and impede women's already dwindling access to abortion services.²⁸

Ultimately, this Article explains why *Preterm* and Justice Thomas's dissent in *Whole Woman's Health* are unconvincing: both opinions fail not only to reckon with the law's direct targeting of abortion providers but also to apply several other widely accepted standing principles. Part I provides an overview of the history and impact of laws that target abortion providers. Part II briefly explains the purpose and requirements for Article III standing and the exception to the general prohibition against third-party standing. This Part also examines the principle that the object of a particular regulation generally has standing to challenge the law. Part III provides an overview of the court's decision in *Preterm* and argues that the court erred by failing to apply the widely accepted principle that non-economic injuries, including minimal injuries (such as small administrative burdens), may

25. Standing doctrine has been criticized for its lack of clarity and vulnerability to the insertion of judges' politics, particularly as a way for judges to avoid deciding cases on the merits when existing precedent contradicts the desired outcome. See e.g. Mark V. Tushnet, "New Law of Standing: A Plea for Abandonment," 62 *Cornell Law Review* 663, 663-64 (1977) ("The law of standing has . . . become a surrogate for decisions on the merits, providing an especially useful approach for the Court when a decision on the merits might overturn settled precedent."); Richard J. Pierce, "Is Standing Law or Politics?," 77 *North Carolina Law Review* 1741, 1743 (1999) ("The doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts."). In a context similar to abortion restrictions, the Seventh Circuit vacated a district court's finding that Wisconsin's Unborn Child Protection Act was unconstitutional on mootness grounds. *Loertscher v. Anderson*, 893 F.3d 386, 388 (7th Cir. 2018). Wisconsin's Unborn Child Protection Act allows the state to detain pregnant women believed to exhibit a "habitual lack of self-control" related to drug or alcohol use. *Id.* at 388. The court found that the plaintiff's claim fell into the exception to mootness for cases "capable of repetition, yet evading review," but nevertheless held the claim was moot because she had moved out of state and no longer regularly used substances: "Ms. Loertscher has no reasonable expectation that she will find herself within the State of Wisconsin at a time when she is both pregnant and under the influence of drugs or alcohol to a severe degree." *Id.* at 395.

26. See cases cited in notes 4-5 and note 244.

27. Rachel K. Jones & Jenna Jerman, "Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014," 107 *American Journal of Public Health* 1904 (2017).

28. Women who face barriers to accessing legal abortion may turn to self-induced abortions. See e.g. Olga Khazan, "Texas Women are Inducing Their Own Abortions," *The Atlantic* (17 Nov. 2015), <https://perma.cc/SWT5-TSGK>.

be sufficient to justify standing, particularly when the plaintiff is directly targeted by the regulation at issue. Finally, Part IV examines Justice Thomas’s critique of third-party standing for abortion providers. While Justice Thomas asserts that the Court makes special exceptions to its standing doctrine by allowing abortion providers to assert the rights of their patients, the Court has long recognized that service providers may assert the rights of their customers, particularly when the challenged law targets selling rather than receiving the service. This section further argues that because most abortion regulations target providers—rather than the women they serve—providers are often the most sensible plaintiffs to challenge these laws.

I. TARGETED REGULATION OF ABORTION PROVIDERS: THE HISTORY AND IMPACT OF TRAP LAWS

The Supreme Court’s adoption of the undue burden standard in *Planned Parenthood v. Casey* replaced the trimester framework originally set forth in *Roe v. Wade*, giving states new leeway to enact abortion regulations.²⁹ *Roe* established that a woman’s right to abortion is balanced against the state’s interest in preserving a woman’s health and the state’s interest in potential life.³⁰ But the *Casey* standard gave increased consideration to the latter interest, allowing states to enact regulations to protect it.³¹ *Casey* held that “the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”³²

Abortion opponents used this aspect of *Casey* to enact laws that incrementally chip away at abortion access.³³ Two types of laws emerged: laws that attempt to persuade women to carry their pregnancy to term and laws that impose regulations on abortion providers, often under the guise of protecting women’s health.³⁴ In enacting laws of the latter type, legislators have been explicit about their intention to limit abortion access or to close clinics altogether.³⁵ The

29. *Casey*, 505 U.S. 833, 874 (1992).

30. 410 U.S. at 153-54.

31. 505 U.S. at 837.

32. *Id.*

33. Linda Greenhouse & Reva B. Siegel, “The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman’s Health,” 126 *Yale Law Journal Forum* 149, 151 (2016).

34. *Id.* Greenhouse and Siegel argue that only the former is permissible under the *Casey* standard. *Casey*, in consideration of the state’s interest in potential life, allows states to enact laws that persuade women to choose childbirth, but it prohibits states from interfering with abortion access. *Id.* at 155. Further, laws that interfere with abortion access threaten rather than protect women’s health. For instance, in *Whole Woman’s Health*, the Court agreed with the “commonsense inference” that clinic closures caused by TRAP laws result in a decline in the quality of care at remaining facilities due to sudden, increased demand, and these effects “would be harmful to, not supportive of, women’s health.” 136 S. Ct. 2292, 2318.

35. *Id.* Americans United for Life, an anti-abortion advocacy group, advised Texas in drafting the laws at issue in *Whole Woman’s Health*. Charmaine Yoest, the former president and CEO of

term “Targeted Regulation of Abortion Providers,” or TRAP laws, has been popularly adopted in reference to this legislative strategy.³⁶ Through the regulation of building standards, licensing, and admitting privileges, TRAP laws have shut down a large number of abortion clinics throughout the country.³⁷ TRAP laws close clinics by raising costs or by enacting laws that clinics cannot comply with. For example, these laws may require physicians performing abortions at clinics to obtain admitting privileges at hospitals, which may turn abortion providers away due to politics, religion, or stigma.³⁸ For abortion opponents, TRAP laws have been much more effective than laws designed to persuade women not to choose abortion, because those laws “communicate to one woman at a time the state’s message that abortion is the wrong choice, while [TRAP laws] can shut down clinics, thus impairing or preventing access altogether.”³⁹

Americans United for Life, has stated that its legislative strategy involves incrementally “hollowing” the Court’s decision in *Roe*. Emily Bazelon, “Charmaine Yost’s Cheerful War on Abortion,” *The New York Times* (2 Nov. 2012), <https://perma.cc/PFG6-G5LK>. After the Texas Senate approved the bill at issue in *Whole Woman’s Health*, Lieutenant Governor David Dewhurst tweeted a graphic showing that the bill would “essentially ban abortion statewide” by forcing most of the states’ abortion providers to close. Dewhurst wrote that the graphic illustrated why the state fought to pass the bill. David Dewhurst (@DavidHDewhurst), *Twitter* (19 July 2013), <https://perma.cc/R3YE-W694>. Presenting another example, Mississippi governor Phil Bryant made similar statements after he signed a bill into law that would require abortion providers to be certified OB/GYNs and to have privileges at a local hospital. The bill would have forced Mississippi’s only abortion clinic to close. After signing the bill, the governor stated: “Today you see the first step in a movement, I believe, to do what we campaigned on—to say that we’re going to try to end abortion in Mississippi.” Rich Phillips, “Law Could Force Mississippi’s Only Abortion Clinic to Close,” *CNN* (30 June 2012), <https://perma.cc/uuj4-fuze>. Mississippi Lieutenant Governor Tate Reeves also made a statement that the bill “should effectively close the only abortion clinic in Mississippi.” Joe Sutton & Tom Watkins, “Mississippi Legislature Tightens Restrictions on Abortion Providers,” *CNN* (5 Apr. 2012), <https://perma.cc/P96V-57BR>.

36. Greenhouse & Siegel, “The Difference a Whole Woman Makes,” note 33, at 151. TRAP laws “single out abortion for onerous forms of regulation not applied to procedures of equivalent or greater medical risk.” *Id.*
37. *Id.*; see *Targeted Regulation of Abortion Providers*, note 23; Linda Greenhouse & Reva B. Siegel, “Casey and the Clinic Closings: When ‘Protecting Health’ Obstructs Choice,” 125 *Yale Law Journal* 1428, 1430 (2016); Meghan Keneally, “In Growing Number of States, Women Seeking Abortions Face the Problem of Where to Go,” *ABC News* (14 June 2018), <https://perma.cc/8EXU-3BX4>. To illustrate, the Court in *Whole Woman’s Health* concluded there was sufficient evidence that the admitting-privileges requirement caused half of Texas’s abortion clinics to close. 136 S. Ct. 2292, 2313. Continued enforcement of the admitting privileges and ambulatory surgical facility requirements struck down by the Court would have led to the closure of approximately three-fourths of Texas’s abortion clinics. Linda Greenhouse & Reva B. Siegel, “Casey and the Clinic Closings: When ‘Protecting Health’ Obstructs Choice,” 125 *Yale Law Journal* 1428, 1430 (2016).
38. Greenhouse & Siegel, “Casey and the Clinic Closings,” note 37, at 1449.
39. *Id.* at 1449-50. In cases brought by abortion providers challenging TRAP laws, some courts have noted that the challenged regulations would have the effect of closing clinics, imposing an undue burden on a woman’s right to terminate a pregnancy. *Id.* In *Van Hollen*, where abortion providers challenged a Wisconsin admitting privileges statute, the Seventh Circuit found that the providers had standing to challenge the regulation and affirmed the issuance of a preliminary injunction against the law, noting that it would have closed two out of four of the state’s abortion clinics. 738 F.3d at 788. See e.g. *Jackson Women’s Health Org. v. Carrier*, 760 F.3d 448, 451 (5th Cir. 2014) (cert. denied, 136 S. Ct. 2536 (2016)) (finding that a law that would close the only abortion clinic in Mississippi would impose an undue burden by

II. STANDING OVERVIEW

A. Purpose and Requirements

Standing, which arises from Article III's case-or-controversy requirement,⁴⁰ is a judicially-created doctrine intended to maintain the courts' proper role.⁴¹ Article III of the Constitution confers limited authority to the federal courts, which are prohibited from intruding upon the powers of the other branches.⁴² Specifically, Article III grants the federal courts "[t]he judicial power of the United States," and this power is limited to hearing "cases" and "controversies."⁴³ Courts have developed standing as one component of the case-or-controversy requirement.⁴⁴ At its core, standing seeks to ensure that the plaintiff has a personal stake in the outcome of the litigation, as opposed to an abstract interest in the issue. This ensures that the parties have concretely adverse legal interests that are amenable to judicial resolution.⁴⁵

The Supreme Court has recognized three minimum constitutional requirements that a plaintiff must show to have standing. First, the plaintiff must have suffered an injury, which constitutes the "invasion of a legally protected interest."⁴⁶ The injury must be "concrete and particularized" and "actual or imminent."⁴⁷ Next, the plaintiff must show causation, which means that the injury must be "fairly trace[able]" to the defendant's conduct.⁴⁸ And third, a favorable decision on the merits must be likely to redress the plaintiff's injury.⁴⁹

Generally, litigants may only bring a claim that seeks to vindicate their own rights, rather than the rights of a third party.⁵⁰ However, the Court has created an exception to the general prohibition against third-party standing when three requirements are met: (1) the plaintiff suffers an "injury in fact;" (2) the plaintiff has "a close relation to the third party;" and (3) "there . . . exist[s] some hindrance to the third party's ability to protect his or her own interests."⁵¹

B. Standing for the Challenged Law's Direct Target

The Supreme Court has recognized that in a lawsuit challenging government action, if the "plaintiff is himself the object of the action at issue . . . there is

"increasing travel time and costs for women seeking an abortion.")

40. U.S. Constitution article III, § 2.

41. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

42. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1546 (2016).

43. *Id.* at 1547; U.S. Constitution article III, §§ 1-2.

44. *Clapper v. Amnesty International. USA*, 568 U.S. 398, 408 (2013).

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

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

47. *Id.*

48. *Id.*

49. *Id.*

50. *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

51. *Id.* at 411.

ordinarily little question the action or inaction has caused him injury,” and that a “judgment preventing or requiring the action will redress it.”⁵² In other words, there is generally little question that when the plaintiff is the object of the law at issue, the plaintiff’s claim will satisfy the requirements of injury, causation, and redress necessary to confer standing. With the proliferation of TRAP laws, abortion providers have become a frequent target of regulations that are not similarly imposed on doctors or clinics performing other procedures of like risk.⁵³ Thus, courts have generally found that abortion providers have standing to challenge the regulations that states impose upon them.

For example, in *Doe v. Bolton* the Supreme Court held that physicians had standing to challenge a statute that criminalized performing an abortion except in several specific circumstances.⁵⁴ Although there was no evidence that any of the physicians had been prosecuted or threatened with prosecution, the Court found that “[t]he physician is the one against whom these criminal statutes directly operate,” and, therefore, the physician faced a “sufficiently direct threat of personal detriment” to justify standing.⁵⁵ In other abortion cases, courts have found that providers had standing to challenge abortion regulations that subject them to criminal prosecution,⁵⁶ economic harm,⁵⁷ and interference with their

52. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The Court went on to explain that in contrast to a regulation that acts directly upon the plaintiff, when “a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation . . . of *someone else*, much more is needed.” *Id.* at 562.
53. See *Whole Woman’s Health*, 136 S. Ct. at (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Texas 2014)) (“Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny.”); see Bonnie S. Jones et. al, “State Law Approaches to Facility Regulation of Abortion and Other Office Interventions,” 108 *American Journal of Public Health* 486 (2018).
54. 410 U.S. 179 (1973).
55. *Id.* at 188.
56. See e.g. *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 62 (1976) (finding that physicians had standing to challenge an abortion statute, which imposed criminal liability for failure to comply with its requirements, including but not limited to its provisions defining viability, requiring spousal consent of a woman seeking an abortion or parental consent for a minor, and requiring certain reporting and recordkeeping requirements for clinics and physicians); *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 56 footnote 2 (1st Cir. 2004) (finding that a physician and health centers had standing to challenge a statute requiring parental notification in the case of a minor’s abortion regulation because they faced “civil or criminal prosecution for performing an abortion in violation of the Act”), *vacated on other grounds*, 546 U.S. 320 (2006); *Farmer*, 220 F.3d at 147 (health care facility and physicians had standing to challenge “partial birth abortion” ban, which threatened them with license revocation and a \$25,000 fine); *Miller*, 934 F.2d at 1465 footnote 2 (finding that physician had standing to challenge a parental notification provision because the statute subjected him to criminal prosecution), *affirmed in part, reversed in part on other grounds*, 462 U.S. 476 (1983); *Ashcroft*, 655 F.2d at 860 footnote 17 (finding that physicians had standing to challenge an abortion regulation imposing criminal penalties); *Wolfe*, 541 F.2d at 525 (finding that physicians had standing to challenge provisions requiring spousal or parental consent for an abortion, as the provision “directly operates” on physicians by subjecting them to imprisonment or fines); *Van Hollen*, 738 F.3d at 786 (finding that physicians had standing to challenge an admitting privilege statutes that subject them to heavy penalties).
57. See e.g. *Wasden*, 376 F.3d at 917 (finding that physician had standing to challenge a parental

professional interests in “practicing medicine pursuant to [their] best medical judgment”⁵⁸ or the “right to practice medicine free from the imposition of arbitrary restraints.”⁵⁹

This principle, that the direct target of a law generally has standing to challenge it, has been illustrated in a variety of other regulatory contexts. In *Abbott Laboratories v. Gardner*, the Supreme Court found that pharmaceutical companies had standing to challenge a regulation establishing new labeling requirements for prescription drug manufacturers.⁶⁰ The Court, accepting the government’s argument that the mere possibility of financial loss is not sufficient injury in fact to establish standing, nonetheless found that “there is no question” the pharmaceutical companies had standing to challenge the regulation, as the regulation was “directed at them in particular,” “requir[ing] them to make significant changes in their everyday business practices,” and failure to comply with the regulations would expose them to heavy sanctions.⁶¹

Similarly, the United States Court of Appeals for the Sixth Circuit found that gun manufacturers and dealers had standing to challenge regulations prohibiting certain weapons.⁶² In this case, the plaintiffs suffered economic injury: to comply with the regulation, they had to stop manufacturing and selling weapons prohibited by the law. The court emphasized that the regulations “specifically target[ed]” gun manufacturers and dealers, making them the “proper parties to bring suit,”⁶³ and noted that “courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute.”⁶⁴

Finally, in *Pic-A-State, Inc. v. Reno*, the Third Circuit found that Pic-A-State, a lottery ticket seller, had standing to challenge the Interstate Wagering Amendment, which prohibited the interstate transmission of information to be

consent statute, as the statute could “prevent or chill a minor from seeking an abortion she would otherwise seek,” interfering with his financial and professional interests); *Miller*, 934 F.2d at 1462 (physician had standing to challenge parental notification provision, which subject him to criminal prosecution and direct economic harm).

58. *Wasden*, 376 F.3d at 917.

59. *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 875 (5th Cir. 1975).

60. 387 U.S. 136, 138 (1967) (abrogated on other grounds). The challenged statute required manufacturers to prominently print the drug’s “established name” on the label, to “bring to the attention of doctors and patients the fact that many of the drugs sold under familiar trade names are actually identical to drugs sold under their ‘established’ or less familiar trade names at significantly lower prices.”

61. *Id.* at 154.

62. *National Rifle Ass’n of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997).

63. *Id.* at 282-83. The court found that individual plaintiffs who asserted that they wished to engage in activities prohibited by the regulations did not have standing—they did not suffer economic injury like the dealers and manufacturers. Though the court acknowledged that economic injury is not the only type of injury necessary to establish standing, it found that the individual plaintiffs failed to prove that they were harmed by the statute. *Id.* at 293. The court also found that nonprofit gun rights associations, including the National Rifle Association, which brought suit on behalf of its members, failed to show injury in fact. *Id.* at 294-95.

64. *Id.* at 282.

used for the purpose of obtaining lottery tickets.⁶⁵ The government argued that the seller failed to show imminent harm because no prosecution was pending. Invoking the language of *Abbot*, the court found that the argument lacked merit because the regulation targeted the seller in particular: “[I]n introducing the Interstate Wagering Amendment, its sponsors were motivated by the desire to halt operations of Pic-A-State specifically.”⁶⁶ Further, Pic-A-State suffered economic losses and closed its business as a result of the amendment.⁶⁷

III. *PRETERM-CLEVELAND, INC. v. KASICH*

In *Preterm*, an abortion clinic challenged Ohio’s insertion of abortion restrictions into the state’s budget bill, which the clinic alleged was in violation of Ohio’s single-subject rule.⁶⁸ Two provisions were at issue: “the Heartbeat Provision” and “the Written Transfer Agreement Provision.” The Heartbeat Provision requires physicians to determine whether the fetus has a heartbeat, and if so, to wait twenty-four hours before performing the procedure. The Written Transfer Agreement Provision created several new requirements for written transfer agreements between clinics and private hospitals, including that the agreement be updated every two years. The court found that the clinic did not have standing to challenge the inclusion of either provision in the budget bill, because the Heartbeat Provision operated only against physicians, rather than the clinic itself, and the Written Transfer Agreement Provision did not cause the clinic to incur any new expenses.

The Heartbeat Provision requires the person performing or inducing the abortion to determine whether the fetus has a “detectable fetal heartbeat” and record the result in the woman’s medical record along with other information.⁶⁹ Additionally, the Heartbeat Provision created new informed consent requirements. First, if the physician intending to perform or induce the abortion detects a fetal heartbeat, they must “give the pregnant woman the option to view or hear the fetal heartbeat,” and the physician cannot induce or perform the abortion until twenty-four hours after informing the pregnant woman in writing that a heartbeat was detected, as well as the statistical probability of bringing the fetus to term.⁷⁰ Failure to comply with the Heartbeat Provision is cause for criminal prosecution, civil

65. 76 F.3d 1294, 1300 (3d Cir. 1996).

66. *Id.* at 1299.

67. *Id.* at 1298.

68. *Preterm*, 102 N.E.3d at 463-64. The court found that a party challenging multiple provisions of an act as violating Ohio’s single subject rule “must prove standing as to each provision the party seeks to have severed from the enactment by demonstrating it suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the general public because of each provision.” *Id.* 469-70. Thus, if *Preterm* had established standing for any one of the provisions, the court only would have allowed *Preterm* to request that the specific provision be severed from the rest of the bill.

69. *Id.* 464; Ohio Rev. Code Ann. § 2919.191.

70. *Preterm*, 102 N.E.3d at 464-65; Ohio Rev. Code Ann. § 2919.191.

liability, or disciplinary action by the state medical board.⁷¹

The clinic submitted an affidavit from its director of clinic operations, who asserted that the Heartbeat Provision caused the clinic to “amend its policies, procedures, and protocols concerning informed consent,” created new record-keeping burdens, and caused the clinic to “conduct extensive research” to avoid criminal prosecution and civil liability.⁷² The director explained that the required changes to the clinic’s informed consent policies include additional appointments and “strain . . . its staff’s resources” by creating “unexpected scheduling changes for both the patient and the Preterm staff.”⁷³ Prior to the enactment of the Heartbeat Provision, the clinic could provide its abortion services to patients during one appointment. Although Ohio’s previous informed consent laws required patients to visit a physician at least twenty-four hours before their abortion procedure, Preterm’s patients could satisfy this requirement by visiting a physician not affiliated with the clinic, such as a family physician or a physician closer to the patient’s home, and travel to Preterm for the abortion procedure twenty-four hours later.⁷⁴ However, the Heartbeat Provision requires the clinic to host each patient for at least two appointments.⁷⁵ During the first appointment, clinic staff must conduct testing to determine whether a fetal heartbeat is detectable.⁷⁶ The clinic must then host a second appointment at least twenty-four hours later to perform the abortion.⁷⁷ But if clinic staff initially detects a fetal heartbeat at the second appointment, Preterm must schedule the patient for an unexpected third appointment at least twenty-four hours later to perform the abortion.⁷⁸

The court found that the clinic lacked standing to challenge the Heartbeat Provision’s inclusion in the budget bill because “Preterm has not been prosecuted nor does it face a credible threat of direct prosecution . . . because that statute applies to persons who perform or induce abortions,” and “Preterm does not actually perform or induce abortions, so it cannot violate this statute.”⁷⁹ There was no possible civil action because the statute “imposes duties only on persons who determine the presence or absence of a fetal heartbeat and who intend to and do perform or induce abortions.”⁸⁰

The second provision, the Written Transfer Agreement Provision, provided new requirements for the written transfer agreements that ambulatory surgical

71. *Preterm*, 102 N.E.3d at 465; Ohio Rev. Code Ann. § 2919.191; Ohio Rev. Code Ann. § 2919.192.

72. *Preterm*, 102 N.E.3d at 465.

73. *Id.* at 471 (Chief Justice O’Connor, dissenting).

74. *Id.* at 470-71.

75. *Id.* at 471.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 469.

80. *Id.*

facilities⁸¹ must have with private hospitals.⁸² Ohio law, which requires abortion clinics to meet the standards of ambulatory surgical facilities, already required abortion providers to have written transfer agreements with private hospitals. The Written Transfer Agreement Provision contained three new requirements for such agreements: (1) the private hospital must be “local;”⁸³ (2) the written transfer agreement must be updated every two years and filed with the director of health, whereas clinics were previously able to automatically renew such agreements,⁸⁴ and (3) ambulatory surgical facilities must notify the state’s director of health within one business day of any modifications of the written transfer agreement.⁸⁵

Before the provision’s enactment, Preterm had a written transfer agreement that was automatically renewable, and the clinic did not need to take additional steps to renew the agreement or to regularly file the agreement with the Department of Health.⁸⁶ Preterm argued that it was injured by the Written Transfer Agreement Provision because it required the clinic to “negotiate, execute, and file with the state a new written transfer agreement every two years.”⁸⁷ Additionally, the local hospital requirement further limited Preterm’s “options for complying with the written transfer agreement requirement.”⁸⁸

The court found that the clinic failed to prove it “suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general as a result of the [provisions],” offering only “unsubstantiated, conclusory averments about those provisions creating new administrative burdens, limiting the number of hospitals with which it could have such an agreement, and placing its license at ‘greater risk or loss of revocation than before.’”⁸⁹ The court noted that while “a new law might impose administrative burdens that result in use of additional resources by a business, this record does not reflect that Preterm incurred or is at risk of incurring new expenses

81. Ohio is one of twenty-four states that require abortion clinics to meet ambulatory surgical facility standards. Denise Lu & Sandhya Somashekhar, “How restrictive are abortion regulations in your state?” *The Washington Post* (14 Apr. 2017), <https://perma.cc/BS4Q-77S3>. The Court in *Whole Woman’s Health* struck down a Texas provision requiring abortion clinics to meet ambulatory surgical facility centers, in part based upon evidence that the provision was unnecessary and that it failed to benefit patients. *Whole Woman’s Health*, 136 S. Ct. at 2315.

82. *Preterm*, No. 2018-Ohio-441, ¶ 5 (quoting Ohio Rev. Code Ann. § 3702.303(B)). In 2013, Ohio passed a law that bars abortion providers from making their patient-transfer agreements with a public hospital, as was previously permitted. Obtaining a patient-transfer agreement with a private hospital is often more difficult for abortion clinics, as many private hospitals have religious affiliations and refuse to enter agreements with abortion providers. Following the law’s passage, five out of fourteen of Ohio’s clinics closed. Amanda Seitz, “Abortion Clinic Stops Procedures, 9 Facilities Remain in Ohio,” *Dayton Daily News* (20 Aug. 2014), <https://perma.cc/5D39-XBC4>.

83. *Preterm*, 102 N.E.3d at 464; Ohio Rev. Code Ann. § 3702.303.

84. *Preterm*, 102 N.E.3d at 464.

85. *Id.* at 464; Ohio Rev. Code Ann. § 3702.307(A).

86. *Preterm*, 102 N.E.3d at 465.

87. *Id.* at 467.

88. *Id.*

89. *Id.* at 468.

due to the Written Transfer Agreement Provisions.”⁹⁰

While Ohio generally relies on federal court decisions to determine questions of standing, the Ohio Supreme Court’s finding that the clinic lacked standing to challenge these two provisions is at odds with federal precedent. The Supreme Court of the United States has recognized that non-economic injuries, including minimal injuries such as small administrative burdens, are sufficient to justify standing—particularly when the plaintiff is directly targeted by the challenged law. In denying the clinic standing to challenge the Heartbeat Provision, the court failed to consider that it required the clinic to make changes to its business practices. And, in denying the clinic standing to challenge the Written Transfer Agreement Provision, the court failed to recognize the widely-accepted principle that non-economic injuries may justify standing.

A. Non-Economic Injuries

The *Preterm* court’s finding that the clinic lacked standing to challenge the Written Transfer Agreement Provision appears to be premised on the assumption that non-economic injuries, like *Preterm*’s injuries in that case, are insufficient for standing purposes. Courts, however, have routinely applied the widely-accepted principle that non-economic injuries may justify standing.⁹¹ Although state courts are not required to follow federal standing doctrine, the Ohio Supreme Court relies on federal court decisions to decide questions of standing.⁹² Nevertheless, the court in *Preterm* ignored the Supreme Court’s stated principle that “[i]t has long been clear that economic injury is not the only kind of injury that can support a plaintiff’s standing.”⁹³ Standing may be conferred based on a variety of interests that are non-economic, such as professional, political, recreational, or spiritual harms.⁹⁴

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court found that a nonprofit housing corporation suffered injury sufficient to confer standing on the basis of interference with its “interest in making suitable low-cost housing available in areas where such housing is scarce.”⁹⁵ The nonprofit challenged local authorities’ refusal to permit multi-family housing in the area, which was zoned exclusively for single-family

90. *Id.*

91. *Id.* at 473 (Chief Justice O’Connor, dissenting) (“This holding is directly contrary to the basic and uncontroversial principle that an injury need not be economic in order to establish standing.”).

92. *Cincinnati City Sch. Dist. v. State Bd. of Educ.*, 113 Ohio App.3d 305, 313 (10th Dist. 1996); see also *Brinkman v. Miami University*, 2007 WL 2410390, at 8 (Ohio 2007) (“Such a rule also would run contrary to clear federal precedent, which Ohio courts regularly follow on matters of standing.”).

93. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262-63 (1977).

94. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376-77 (1982).

95. *Arlington Heights*, 429 U.S. at 262-63.

housing, and argued that the zoning denial was racially discriminatory.⁹⁶ The rezoning denial effectively barred the nonprofit from constructing housing that it already contracted to build.⁹⁷ The Court rejected the village's argument that the nonprofit lacked standing because it did not suffer economic injury. While the Court noted that the nonprofit did, in fact, suffer economic injury, it stated that regardless, standing could be conferred based solely on the zoning denial's interference with the nonprofit's stated objective for the specific project it intended to build: to provide suitable low-cost housing in the area.⁹⁸

Likewise, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Supreme Court recognized that harm to one's aesthetic and environmental well-being may constitute an injury sufficient enough to establish standing.⁹⁹ The Court found that SCRAP, an environmental group, had standing to challenge Interstate Commerce Commission orders authorizing railroads to collect a surcharge for shipping recycled freight.¹⁰⁰ SCRAP alleged that the authorized surcharge adversely affected its members' use of the area's land and natural resources for leisure activities such as camping, hiking, and sightseeing.¹⁰¹ SCRAP argued that the surcharge would cause its members "economic, recreational and aesthetic harm," as it "would discourage the use of 'recyclable' materials," damaging the environment and encouraging extraction of raw materials through mining and lumbering.¹⁰² The Court found that SCRAP had standing to challenge the surcharge, explaining that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society," and are sufficient interests to confer standing.¹⁰³

Furthermore, in *Havens Realty Corp. v. Coleman*, the Supreme Court recognized that social, professional, political, and aesthetic harms are among the types of injuries that may confer standing.¹⁰⁴ City residents alleged they had suffered an injury in fact as a result of racial steering, in which black prospective home buyers were falsely informed that housing in the defendant's apartment complexes was unavailable.¹⁰⁵ The basis of the residents' asserted injury was that racial steering deprived them of "the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices."¹⁰⁶ The Court accepted this kind of injury as sufficient to confer Article

96. *Id.* at 254.

97. *Id.* at 256.

98. *Id.* at 262-63.

99. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-87 (1973).

100. *Id.* at 690.

101. *Id.* at 678.

102. *Id.* at 675-76.

103. *Id.* at 686 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

104. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376-77 (1982).

105. *Id.* at 374.

106. *Id.* at 376.

III standing.¹⁰⁷

In the specific context of abortion cases, courts have found various non-economic injuries sufficient to satisfy standing's injury-in-fact requirement. The Fifth Circuit, for instance, found standing for a physician based primarily on his liberty interests in his "right to practice medicine free from the imposition of arbitrary restraints,"¹⁰⁸ and the Ninth Circuit found standing for physicians based on their liberty to make decisions in accordance with their "medical judgment."¹⁰⁹ Both cases also involved injury that was either economic or that threatened criminal prosecution—but the courts have made clear that other types of injuries may be sufficient to confer standing.

B. Administrative Burdens as Injury

In addition to establishing that non-economic injuries may confer standing, courts have recognized that the injury does not need to be substantial. In *SCRAP*, the Supreme Court rejected the government's argument that only those "significantly" affected by the regulation at issue have standing to challenge it.¹¹⁰ The Court stated that the injury-in-fact requirement "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem."¹¹¹ Thus, the plaintiff's suffered harm must be merely "perceptible," and "an identifiable trifle is enough for standing."¹¹² In the seminal case *Lujan v. Defenders of Wildlife*, the Court reaffirmed that to satisfy Article III standing, the harm only needs to be "perceptible."¹¹³ Therefore, courts have found that minimal non-economic injuries—such as administrative burdens—may be sufficient to justify standing, especially when the challenged regulation is directed at the plaintiff in particular. Accordingly, plaintiffs who suffer the administrative burden of compliance with a new regulation have been found to satisfy Article III's injury-in-fact requirement.

For instance, in *Lozano v. City of Hazleton*, the Third Circuit found that the plaintiff landlords' administrative burden in complying with a local ordinance requiring proof of their employees' legal citizenship was sufficient to establish

107. *Id.* The Court found that the complaint was too general to determine whether the plaintiffs asserted facts sufficient to demonstrate this injury, because they did not specify where they lived within the metropolitan area. *Id.* at 377-78. The Court noted that it has "upheld standing based on the effects of discrimination only within a 'relatively compact neighborhood.'" *Id.* at 377 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 114 (1979)). Thus, the Court instructed the District Court on remand to give the plaintiffs an opportunity to make more definite allegations in the complaint.

108. *Greco*, 513 F.2d at 875.

109. *Wasden*, 376 F.3d at 917 (9th Cir. 2004).

110. *SCRAP*, 412 U.S. at 689 footnote 14.

111. *Id.*

112. *Id.* (quoting Kenneth Davis, "Standing: Taxpayers and Others," 35 *Chicago Law Review* 601, 613 (1968)).

113. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992).

standing.¹¹⁴ The landlords hired contractors for work on their rental properties, and the ordinance required businesses to submit affidavits to the city affirming that they did not employ undocumented workers.¹¹⁵ The city argued that the mere “cost of compliance” with the ordinance, which applied to all businesses in the city, was a generalized burden that lacked sufficient particularity for Article III standing.¹¹⁶ In rejecting the city’s argument as extremely “misguided,” the court stated that the landlords were not “members of the general public complaining of some indefinite and indeterminable harm,” but were the “direct targets”¹¹⁷ of the law and would be affected in a “personal and individual way”¹¹⁸ by the ordinance’s requirements. The ordinance would compel the landlords to investigate the work authorization of prospective contractors and to submit affidavits to the city’s code enforcement office to affirm they did not hire undocumented workers, or else face heavy sanctions—sufficient injury-in-fact for Article III standing.¹¹⁹

The city also argued that even if this cost of compliance was “theoretically sufficient injury under Article III,” the landlords failed to show that the cost of compliance with the local ordinance was “greater than the cost of compliance with federal law.”¹²⁰ Thus, the city argued, the landlords did not show that there was any “actual cost of compliance” with the local ordinance, because the landlords would have already been undertaking these administrative burdens to comply with federal law.¹²¹ The court rejected this argument because federal law did not require businesses to submit an affidavit to the city’s code enforcement office.¹²² The court noted that, even by itself, the burden of submitting the affidavit to the city, “[t]hough relatively small, . . . is sufficient for standing purposes.”¹²³

Similarly, the Second Circuit found that the administrative burden of a sheriff’s workload was sufficient injury in fact.¹²⁴ The sheriff had challenged a section of a federal statute that required state and local officials to conduct background checks for handgun purchasers.¹²⁵ To comply with the statute, the sheriff and other officials in similar positions had to “undertake an analysis of their own internal procedures and capabilities, consider the impact of background

114. 620 F.3d 170, 186-87, 194 (3d Cir. 2010), *vacated on other grounds*, 563 U.S. 1030 (2011).

115. *Id.* at 184. The ordinance required businesses to “submit affidavits affirming they do not utilize the services of unlawful workers; incentivize, and in certain circumstances mandate, the use of E-verify; create procedures for adjudicating independently of federal law whether a business has employed an unauthorized alien; and penalize a business for doing so by suspending its business license.” *Id.*

116. *Id.* at 185.

117. *Id.*

118. *Id.* at 186 (quoting *Lujan*, 504 U.S. at 561 n.1).

119. *Id.*

120. *Id.*

121. *Id.* (emphasis added).

122. *Id.* The court also found that the local ordinance was broader than the federal law, “coerc[ing] as well as incentiviz[ing] different behaviors.” *Id.*

123. *Id.*

124. *Frank v. United States*, 78 F.3d 815, 823 (2d Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 1114 (1997).

125. *Id.* at 820-21.

checks on their budgets and on delivery of customary sheriff's services, and work together to determine who may best conduct the interim background checks."¹²⁶ The court noted that the "[t]he burden of an allegedly unconstitutional statute need not be crippling before it may be challenged in court."¹²⁷

C. Standing for Preterm to Challenge the Insertion of the Heartbeat Provision and the Written Transfer Agreement Provision into Ohio's Budget Bill

In accordance with these principles, the clinic in *Preterm* should have had standing to challenge the insertion of both the Written Transfer Agreement and the Heartbeat Provision into the budget bill. First, the Written Transfer Agreement Provision requires the clinic to update its transfer agreement with a hospital every two years, whereas it could previously renew its agreement automatically; it also requires the clinic to file any changes to the agreement with the Department of Health.¹²⁸ Preterm alleged that the provision required it to use additional staff time and resources,¹²⁹ as it must negotiate, execute, and file an updated written contract every two years, thus placing the clinic at increased risk of its agreement not being renewed.¹³⁰

The *Preterm* majority stated that while regulations may obligate businesses to undertake additional administrative burdens, the clinic failed to establish standing because there was no evidence that it "incurred or is at risk of incurring new expenses."¹³¹ However, as the Supreme Court has made clear, the injury suffered by Preterm need not be economic to justify standing.¹³²

Likewise, the Supreme Court has made clear that minimal injuries may be sufficient for purposes of standing. This principle was illustrated by the Third Circuit in *Lozano*, where the administrative burden placed on the landlord was "relatively small," and the court explained that the submission of an affidavit to the city's code enforcement office was itself sufficient to establish standing.¹³³

Thus, Preterm's obligation to renew its written transfer agreement every two years and to submit an updated copy to the Ohio Department of Health is adequate for standing purposes. As noted by the dissent in *Preterm*, business owners rely

126. Id. at 824.

127. Id.

128. *Preterm*, 102 N.E.3d at 472 (Chief Justice O'Connor, dissenting).

129. Id. at 471.

130. Id. at 472.

131. Id. at 473.

132. See discussion in Sections II.A, II.B.

133. *Lozano*, 620 F.3d at 186. The dissenting justices in *Preterm* noted that the defendants distinguished *Lozano* on the basis that the landlord did not just need to submit an affidavit, but he had to investigate the work authorization of the contractors he hired. The dissent found this unpersuasive because the landlord occasionally hired contractors to perform repairs; he could have, however, hired the same contractor for every repair—this was not a significant burden. *Preterm*, 102 N.E.3d at 474. Regardless, the court noted that the submission of an affidavit to the city's code enforcement office was, alone, enough to establish standing. See Part II.B.

on stable relationships with certain suppliers because they find doing so to be more efficient and because they find “renewing contracts to be a burden.”¹³⁴ Business owners may find automatic contract renewals to be more efficient for a variety of reasons, including that automatic renewal forgoes the possibility of re-negotiating and re-executing the contract or losing the contract altogether, and at the very least eliminates some administrative burdens. This burden, despite being small, interferes with the clinic’s business interests, which sufficiently justifies Preterm’s standing to challenge the regulation.

Regarding the Heartbeat Provision, the court found that the clinic lacked standing because “Preterm has not been prosecuted nor does it face a credible threat of direct prosecution . . . because [the] statute applies to persons who perform or induce abortions,” and “Preterm does not actually perform or induce abortions.”¹³⁵ There was also no possible civil action because the statute “imposes duties only on persons who determine the presence or absence of a fetal heartbeat and who intend to and do perform or induce abortions.”¹³⁶ Based on this reasoning, while a physician may have standing to challenge the provision, the clinic itself does not.¹³⁷

The Heartbeat Provision, however, applies to both physicians and the clinic. Even if the clinic does not face prosecution or civil action, as noted by the dissent, the court did not address Preterm’s argument that the Heartbeat Provision injures the clinic itself; when a fetal heartbeat is detected, Preterm must, by law, require the patient to return for one or more additional appointments.¹³⁸ Preterm described how this requirement harmed the clinic, such as by creating “unexpected scheduling changes,” resulting in “logistical problems for Preterm’s scheduling system and administrative staff.”¹³⁹ Because compliance with the Heartbeat Provision requires additional appointments, it also requires “Preterm to use more resources to provide its services.”¹⁴⁰ Thus, compliance with this regulation

134. *Preterm*, 102 N.E.3d at 475. The dissent, implying that other businesses would have standing to challenge a regulation that placed a similar burden on their business, argued that there is no reason that Preterm’s position should be judged differently than that of any other type of businesses. *Id.* at 474-75.

135. *Id.* at 468-69.

136. *Id.* at 469.

137. The dissent agreed with Preterm’s argument that the regulations apply to the clinic itself because the Ohio Revised Code includes corporations in its definition of “persons.” *Id.* at 471-72. Other courts have found standing for clinics to challenge laws forbidding a “person” from performing abortions. *Id.* at 472. For example, the Ohio Court of Appeals for the Eighth District had upheld Preterm’s standing to challenge the Heartbeat Provision, noting that “[p]hysicians cannot and do not provide abortion services without the organized administration, real estate, and medical expertise of the clinic, . . . the clinic’s staff, or its equipment,” and therefore, “such provisions that target the person performing the abortion likewise target the clinic where the abortion is ultimately performed.” *Preterm-Cleveland, Inc. v. Kasich*, 68 N.E.3d 314, 320 (Ohio Ct. App. 2016).

138. *Preterm*, 102 N.E.3d at 464-65 (noting that a “person generally shall not ‘perform or induce the abortion’ until 24 hours after informing the pregnant woman in writing about the heartbeat and the statistical probability of bringing the unborn human individual to term”).

139. *Id.*

140. *Id.*

substantially alters the clinic's business practices.

Furthermore, the court found that Preterm did not suffer injury distinct from that experienced by the public in general even though the provisions directly targeted Preterm for regulation.¹⁴¹ In *Lozano*, for instance, the court rejected the defendant's argument that the burden was generalized and lacked sufficient particularity, because the landlords, as business owners, were the "direct targets" of the law.¹⁴² As in *Lozano*, the clinic in *Preterm* has a personal stake in the outcome of the litigation different from that of the general public because the regulations target the clinic directly. In fact, Preterm's stake in the outcome of the litigation is more personal and particularized than the landlords' in *Lozano*, because the law at issue in *Lozano* targeted all businesses in the city, whereas the law at issue in *Preterm* singled out one particular type of medical provider in Ohio: those that provide abortions.

The principle that the direct target of a law generally has standing to challenge it gets to the heart of standing doctrine: the plaintiff must have a personal stake in the outcome of the litigation, rather than an abstract interest in the problem, to ensure concrete adversity between the parties and thus create a justiciable controversy.¹⁴³ In other words, standing distinguishes those with a personal or direct stake in "the outcome of a litigation—even though small—from a person with a mere interest in the problem."¹⁴⁴ Because the provisions directly target the clinic, Preterm has an obvious stake in the outcome of the litigation, making it a proper party to challenge the inclusion of the provisions in Ohio's budget bill.

Further, Preterm's personal stake in the outcome of the litigation becomes even clearer within the broader context of the proliferation of TRAP laws in the United States, including in Ohio, where half of the state's abortion clinics have closed over the past eight years.¹⁴⁵ Across the country, at least 162 abortion clinics closed or stopped performing abortions between 2011 and 2016.¹⁴⁶ During this period, legislators enacted over 1,000 new abortion restrictions.¹⁴⁷ While clinics close for a variety of reasons, legislation aimed at restricting abortion providers is by far the greatest contributing factor.¹⁴⁸ By 2015, the closure or curtailment of seven out of sixteen of Ohio's abortion providers since 2011 placed the state

141. Id. at 468, 466, 469-70.

142. *Lozano*, 620 F.3d at 185.

143. See *Baker*, 369 U.S. at 204 (stating that the plaintiff must have "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends").

144. *U.S. v. SCRAP*, 412 U.S. 669, 689 footnote 14 (1973).

145. Catherine Candisky, "Abortion Clinic in Akron Closes, Leaving 8 in Ohio," *Columbus Dispatch* (7 Jul. 2017), <https://perma.cc/F8DE-28UK>.

146. Esmé E. Deprez, "Abortion Clinics Are Closing at a Record Pace," *Bloomberg Businessweek* (24 Feb. 2016), <https://perma.cc/4JEE-8VGQ>.

147. "Last Five Years Account for More Than One-quarter of All Abortion Restrictions Enacted Since Roe," *Guttmacher Institute* (13 Jan. 2016), <https://perma.cc/M39Q-465Z>.

148. See note 153; Molly Redden, "Quarter of US Abortion Clinics have Closed Over Last Five Years, Report Says," *The Guardian* (24 Feb. 2016), <https://perma.cc/5CGH-9RC9>.

second in closures nationally, behind only Texas.¹⁴⁹ A large contributor to these closures was a law passed by Ohio legislators in 2013, which required clinics to have a patient-transfer agreement with a nearby private hospital. The law barred clinics from making the agreement with a public hospital, as was previously permitted.¹⁵⁰ Obtaining a patient-transfer agreement with a private hospital is often more difficult for abortion clinics, as many private hospitals have religious affiliations and refuse to enter agreements with abortion providers.¹⁵¹ Following the law's passage, several clinics closed or stopped providing abortion services because they were unable to obtain a patient transfer agreement with a private hospital.¹⁵²

Given that many abortion clinics struggle to obtain contracts with private hospitals, which are often reluctant to enter such agreements, *Preterm's* fear that the new requirements under the Written Transfer Agreement Provision put it at risk of losing its agreement is not unreasonable. And once a regulation forces a clinic to close, even if the law is later overturned, the clinic may struggle to reopen.¹⁵³ In light of the direct stake *Preterm* has in the litigation and the burden imposed by the provisions on its business interests, barring the clinic from litigating the merits of its case was incongruent with fundamental standing principles.

IV. THIRD-PARTY STANDING FOR ABORTION PROVIDERS

While the clinic in *Preterm* sought to challenge the inclusion of abortion restrictions in the state's budget bill by asserting its own rights, another possible route for providers to challenge abortion restrictions is by asserting the rights of their patients. Although courts have routinely found that abortion providers may challenge abortion regulations by invoking their patients' rights, Justice Thomas's dissent in *Whole Woman's Health* raises new questions about third-party standing for abortion providers.

Generally, litigants must assert their own rights rather than the rights of third parties. However, the Supreme Court has recognized that litigants may invoke the rights of third parties if three criteria are met: (1) the litigant has "suffered an 'injury in fact,' thus giving [them] a 'sufficiently concrete interest' in the outcome of the issue in dispute;" (2) the litigant has a "close relation to the third party;" and (3) there is "some hindrance" to the third-party's ability to assert their own

149. Amanda Seitz & Julie Carr Smyth, "Abortions Decline, Clinics Close Under New Ohio Restrictions," *Dayton Daily News* (4 May. 2015), <https://perma.cc/3TW5-WGLS>.

150. Amanda Seitz, "Abortion Clinic Stops Procedures, 9 Facilities Remain in Ohio," *Dayton Daily News* (20 Aug. 2014), <https://perma.cc/DAR3-6J4J>.

151. Greenhouse & Siegel, "Casey and the Clinic Closings," note 37, at 1457 footnote 133.

152. *Id.*

153. Emily Crockett, "It Could Take Years for Texas Abortion Clinics to Reopen, Even After a Supreme Court Victory," *Vox* (27 Jun. 2016), <https://perma.cc/29PW-5YV4>.; Claire Landsbaum, "Here's Why Texas Abortion Clinics Are Still Struggling to Reopen," *The Cut* (27 Jun. 2017), <https://perma.cc/MLN5-Y6NR>.

rights.¹⁵⁴

In his dissent, Justice Thomas argues that the tendency of courts to favor some rights over others has created too many contradictory exceptions to the general prohibition against third-party standing, rendering the doctrine unworkable.¹⁵⁵ For example, lawyers cannot invoke a client's Sixth Amendment right to a fair and speedy trial "because they lack any current, close relationship,"¹⁵⁶ but a litigant can assert the rights of potential jurors to challenge race or sex discrimination in jury selection.¹⁵⁷ According to Thomas, courts have been especially willing to "bend the rules"¹⁵⁸ and "undercut restrictions on third-party standing" when the right to abortion is at stake.¹⁵⁹ Thomas contends that the Court erred in *Singleton v. Wulff* by holding that abortion providers may invoke the rights of their patients, and the precedent set by abortion cases has created further confusion.¹⁶⁰

Thomas's primary argument is that in *Singleton*, like *Whole Woman's Health*, the "traditional criteria for an exception to the third-party standing rule were not met," as the Court in *Singleton* conceded that there are no "insurmountable" obstacles that prevent women from asserting their own rights.¹⁶¹ Thomas is correct that the obstacles recognized in *Singleton* are not insurmountable, as women have successfully brought claims themselves. But the presence of an "insurmountable" obstacle to a third party's ability to assert their own rights is not the Court's standard to justify a third-party standing exception.¹⁶²

Further, according to Thomas, the Court's tendency to make exceptions for certain rights contributes to the problem that standing seeks to prevent: "when the wrong party litigates a case, we end up resolving disputes that make for bad law."¹⁶³ Thus, Thomas reasons, when abortion providers invoke the rights of their patients, the presiding court lacks the necessary information to determine the constitutionality of abortion regulations—that is, whether the law poses an undue burden on patients' access to abortion services.¹⁶⁴ Third-party standing for abortion providers, however, aligns with the accepted principle that vendors generally may invoke the rights of their customers—in fact, a vendor is the most sensible plaintiff to challenge the law at issue where the law targets the sale of a particular good or service, rather than its purchase or use.¹⁶⁵ The regulations at

154. *Powers*, 449 U.S. at 411.

155. *Whole Woman's Health*, 136 S. Ct. at 2321-23 (2016) (Justice Thomas, dissenting).

156. *Id.* at 2322 (citing *Kowalski v. Tesmer*, 543 U.S. 125, 130-31 (2004)).

157. *Id.* (citing *Powers*, 449 U.S. at 410-16).

158. *Id.* at 2321 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Justice Scalia, dissenting)).

159. *Id.* at 2322.

160. *Id.* (citing 428 U.S. 106 (1976)).

161. *Id.* at 2323.

162. *Id.*

163. *Id.* at 2322.

164. *Id.* at 2323.

165. See e.g. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 446

issue in abortion litigation are typically directed at abortion providers in particular, rather than women themselves. Thus, abortion providers are often the most logical plaintiffs to challenge these laws and can supply the necessary facts to show that the law poses an undue burden on access to their services, in turn burdening women's right to abortion.

Thomas is correct that third-party standing doctrine, like standing generally, is often unclear and at times contradictory. But his argument that the courts have made special exceptions when the right to abortion is at stake is unpersuasive. The idea that businesses can invoke the rights of their customers predates the Court's abortion-related third-party standing decisions. In addition, since the Court extended its third-party standing doctrine in *Singleton*, lower courts have generally applied the principles laid out in *Singleton* to cases outside of the abortion context.¹⁶⁶ Courts have continued to find that vendors can invoke the rights of their customers and have found that physicians can invoke the rights of their patients in a variety of other contexts.

A. *Singleton v. Wulff*

According to Thomas, forty years prior to the Court's ruling in *Whole Woman's Health*, the Court erred in finding that abortion providers may invoke the rights of their patients, and since then, providers—rather than women themselves—have been encouraged to challenge abortion regulations.¹⁶⁷ In *Singleton v. Wulff*, the Court found that physicians had standing to challenge a Missouri statute's exclusion of abortions that were not "medically indicated" from Medicaid benefits.¹⁶⁸

In *Singleton*, the Court cited two reasons to caution against third-party standing: first, the third party may not wish to assert their rights, or may be able to enjoy their rights whether or not they are litigated; and second, the third party may be "the best proponents of [their] own rights."¹⁶⁹ The Court noted that only the "most effective advocates" should be permitted to defend a third party's rights, especially due to considerations of stare decisis. If the third party later chooses to litigate, they may not be able to convince a court to overturn precedent set by the original litigant.¹⁷⁰ The Court stated that the general prohibition against third-party standing gives way when the two underlying justifications for it are inapplicable. The Court went on to state that it has looked primarily to two factual elements to determine if third-party standing is appropriate in a given case: (1) whether there is a close relationship between the litigant and the third party, and (2) "the ability

(1972).

166. See generally *Singleton v. Wulff*, 428 U.S. 106 (1976).

167. *Id.*; see also *Planned Parenthood Minnesota v. Rounds*, 467 F.3d 716 (8th Cir. 2016) (noting that *Singleton* did not create a "per se rule . . . but the Court has never held since then that a physician lacks standing in this context").

168. 428 U.S. 106, 108 (1976).

169. *Id.* at 113-14.

170. *Id.* at 114.

of the third party to assert [their] own right.”¹⁷¹ The closeness of the relationship ensures that that the litigant is as “fully, or very nearly, as effective a proponent” as the third party.¹⁷² And the second requirement ensures that the third party has a genuine stake in the matter to begin with. If there is no hindrance to the third party’s ability to assert their own rights and they have chosen not to bring a case, this may suggest that their rights are “not truly at stake, or truly important to [them].”¹⁷³

The Court found that a close relationship exists between the physician and the patient because a woman’s ability to procure a safe abortion is dependent on the help of a physician, making the physician “uniquely qualified to litigate the constitutionality of the State’s interference with, or discrimination against, that decision.”¹⁷⁴ And women face obstacles to asserting their own rights for two reasons: first, the desire to keep their decisions private and away from “the publicity of a court suit”; and second, a pregnancy, continuing at most for about nine months, is unlikely to outlast a federal case, and the termination of the pregnancy will render the case moot.¹⁷⁵ The Court admitted that these “obstacles are not insurmountable,” as women may protect their privacy in a lawsuit through the use of pseudonyms, and women who are no longer pregnant may still be able to litigate a case because of an exception to the mootness doctrine that allows courts to review cases that are “capable of repetition yet evading review.”¹⁷⁶ But the Court noted that “there seems little loss in terms of effective advocacy from allowing its assertion by a physician.”¹⁷⁷

B. Before and After *Singleton*: Third-Party Standing for Vendors to

171. *Id.* at 115-16.

172. *Id.* at 115.

173. *Id.* at 116.

174. *Id.* at 117.

175. *Id.*

176. *Id.* In *Roe*, the Court applied the “capable of repetition yet evading review” exception to litigation involving pregnancy. The Court stated that if pregnancy-related cases became moot after the pregnancy was terminated, “pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.” *Roe*, 410 U.S. at 125. In recent years, at least one district court has dismissed such a case as moot, despite the capable of repetition yet evading review exception. A Missouri woman, along with the Satanic Temple, challenged the state’s requirement that before procuring an abortion, women must read a state-sponsored booklet stating that “life begins at conception,” and that a fetus is “a separate, unique, living human being.” The law requires women to wait seventy-two hours after reading the booklet to access an abortion procedure. The plaintiffs argued that the requirements violated her religious freedom as a Satanist. The district judge dismissed the case, noting that “Plaintiff Doe is not now pregnant, there is no guaranty that she will become pregnant in the future, and that if she does, she will seek an abortion, thus, Plaintiffs’ injuries are not sufficiently concrete for the Court to order the requested relief.” Lindsay Toler, “Judge Dismisses Satanic Temple’s Lawsuit Against Missouri Abortion Rules,” *St. Louis Magazine* (5 Aug. 2016), <https://perma.cc/L8VX-2NA9>.

177. *Singleton*, 428 U.S. at 118.

Assert the Rights of Their Customers

In 1925, decades before the Court's decision in *Singleton*, the Court allowed corporations that established and operated private schools to challenge a statute requiring children to attend public schools by asserting the parents' Fourteenth Amendment rights.¹⁷⁸ The Court noted that corporations had been able to assert third-party rights "to protect business enterprises against interference with the freedom of patrons or customers."¹⁷⁹ And in 1953, the Court in *Barrows v. Jackson* found that a white seller of a home, charged with violating a racially restrictive covenant, had standing to invoke the constitutional rights of black buyers.¹⁸⁰ The Court, noting the general rule against invoking the constitutional rights of others, found that it would be "difficult if not impossible" for the buyers to assert their own rights, and the general rule of standing was "outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."¹⁸¹

Following *Singleton*, the Court in *Craig v. Boren* found that a beer vendor could invoke the equal protection rights of men aged eighteen to twenty to challenge a statute prohibiting the sale of 3.2 percent beer to men under the age of twenty-one and women under the age of eighteen.¹⁸² First, the Court found that the vendor suffered injury in fact sufficient to satisfy Article III standing because the statute directly addressed vendors, forcing them to obey the statute and incur a "direct economic injury," or to face "sanctions and perhaps loss of license."¹⁸³ Further, because the statute only impacted men aged eighteen to twenty, if men were to assert their own rights, the case would likely become moot during the course of litigation. In fact, Craig, one of the original plaintiffs in the case, was a man aged eighteen to twenty whose case became moot when he turned twenty-one.¹⁸⁴ The Court noted that, as in *Singleton*, overcoming the mootness obstacle was not impossible because the plaintiffs could assemble a class in which there were always men with non-moot claims.¹⁸⁵ However, "if the assertion of the right is to be 'representative' to such an extent anyway, there seems to be little loss in terms of effective advocacy from allowing its assertion" by the vendor.¹⁸⁶

The Court also noted the possibility that the statute could deter the vendor from selling 3.2 percent beer to men ages eighteen to twenty, therefore "result[ing] indirectly in the violation of third parties' rights."¹⁸⁷ As the Court explained, "vendors and those in like positions have been uniformly permitted to resist efforts

178. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

179. *Id.* at 536.

180. 346 U.S. 24, 257 (1953).

181. *Id.*

182. 429 U.S. 192-97 (1976).

183. *Id.* at 194.

184. *Id.* at 192.

185. *Id.* at 194.

186. *Id.* (quoting *Singleton*, 428 U.S. at 117-18).

187. *Id.* at 195.

at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.”¹⁸⁸ And the vendor herself appeared to be the most sensible plaintiff: “the law challenged here explicitly regulates the sale rather than the use of 3.2% beer, thus leaving a vendor as the obvious claimant.”¹⁸⁹

The Court similarly allowed a vendor to invoke a customer’s rights in *Eisenstadt v. Baird*, in which a lecturer provided an attendee with contraceptives and was prosecuted under a statute forbidding the distribution of contraceptives except by physicians or pharmacists to married couples.¹⁹⁰ There, the Supreme Court found that the lecturer had standing to invoke the constitutional rights of single people. In discussing the close relation requirement, the Court highlighted the lecturer’s role as an advocate for single people’s rights: “here the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so.”¹⁹¹ But the Court stated that even more important than the relationship between the litigant and the rights holders is “the impact of the litigation on the third-party interests.”¹⁹² The Court emphasized that the statute only prohibited distribution of contraceptives, not their use. Because the rights holders themselves were not subject to prosecution and therefore “denied a forum in which to assert their own rights,” it was particularly appropriate to allow the litigant to advocate on their behalf.¹⁹³

Further, in *Kaahumanu v. Hawaii*¹⁹⁴ and *Epona, LLC v. County of Ventura*,¹⁹⁵ the Ninth Circuit found that wedding vendors had standing to invoke the rights of their customers. In *Kaahumanu*, an association of individuals and businesses that provide commercial services for weddings challenged a beach permitting scheme by invoking the First Amendment rights of their potential clients.¹⁹⁶ The permitting scheme required permits for “commercial weddings,” and the permits placed requirements and limitations on the use of the beaches, such as requiring permit applicants to obtain “comprehensive public liability insurance” and limiting the number of chairs that could be placed on the premises.¹⁹⁷ The association alleged that the permitting scheme violated their

188. *Id.*

189. *Id.* at 197.

190. The Court noted that the “self-imposed rule against the assertion of third-party rights must be relaxed in this case” *Eisenstadt v. Baird*, 405 U.S. 438, 444 (1972). See also *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

191. *Eisenstadt*, 405 U.S. at 445. In fact, “the very point of Baird’s giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives.” *Id.*

192. *Id.* at 445.

193. *Id.* at 446.

194. *Kaahumanu v. Hawaii*, 682 F.3d 789 (9th Cir. 2012).

195. *Epona, LLC v. County of Ventura*, 876 F.3d 1214 (9th Cir. 2017).

196. *Kaahumanu*, 682 F.3d at 793, 797.

197. *Id.* at 794.

potential clients' First Amendment rights by "unduly burden[ing] their right to organize and participate in weddings on unencumbered state beaches."¹⁹⁸ The court found that the association had third-party standing because its members, the wedding vendors, suffered economic injury (due to permitting fees, insurance requirements, and lost prospective clients); and relying on precedent allowing vendors to invoke the constitutional rights of their customers, the court noted that the legal duties created by the permitting scheme were directed towards the vendors themselves.¹⁹⁹ Similarly, in *Epona*, the court found that a property owner who sought to rent out his property for weddings was a vendor; thus, like the plaintiffs in *Kaahumanu*, he had standing to invoke the First Amendment rights of his potential clients.²⁰⁰

The Ninth Circuit had previously declined to extend third-party standing to a supermarket vendor to invoke the rights of its customers.²⁰¹ The vendor had alleged that the selection of eligible food products for a state-funded food assistance program was racially discriminatory because it failed to account for cultural differences, violating its clients' equal protection rights.²⁰² The court, noting that cases involving vendors have been subject to certain third-party standing exceptions, stated that the third-party standing vendor exception stems from the requirement that the relationship between the litigant and the third party be more than a "fortuitous connection between a vendor and potential vendees"—rather, it must be "the relationship between one who acted to protect the rights of a minority and the minority itself."²⁰³ Thus, to establish third-party standing, the vendor had to show that it would be an effective advocate for its customers' rights.²⁰⁴ In this case, the court was persuaded that there was a conflict of interest between the supermarket and recipients of the food-assistance program. The supermarket admitted that its requested remedy of enjoining the program was overly broad, but only after the defendants in the case accused the supermarket of "placing its own interest in avoiding administrative sanctions above those of the [food-assistance program] participants."²⁰⁵ The court, focusing on the supermarket's requested outcome in the case, noted that the supermarket's own economic interests did not preclude third-party standing, but the manner in which the supermarket litigated the case cast "considerable doubt" on its competence.²⁰⁶ The court ultimately found that the supermarket's interests were not "inextricably" intertwined with the program recipients'.²⁰⁷

198. *Id.* at 175.

199. *Id.* at 797-98.

200. *Epona*, 876 F.3d at 1220.

201. *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078 (9th Cir. 1987).

202. *Id.* at 1079.

203. *Id.* at 1081 (quoting *Eisenstadt*, 405 U.S. at 445).

204. According to the Court, the vendor "must be able to convince the court that it would be as effective a proponent of its customers' rights as they would be." *Id.* at 1081.

205. *Id.* at 1082.

206. *Id.*

207. *Id.*

C. Third-Party Standing for Physicians to Assert the Rights of Their Patients

Courts have also allowed physicians to invoke the constitutional rights of their patients outside of the abortion context. In *Griswold v. Connecticut*, the Supreme Court allowed physicians to raise the constitutional rights of a married couple to whom they had prescribed contraceptives.²⁰⁸ The Court emphasized that the relationship between the physician and the couple was protected by confidentiality and that “[t]he rights of husband and wife . . . are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.”²⁰⁹

Additionally, the Second and Ninth Circuits have allowed physicians to invoke the rights of terminally ill patients to challenge suicide regulations.²¹⁰ And the Third Circuit held that psychiatrists had standing to invoke the rights of their patients in asserting tort claims against managed care organizations.²¹¹ The court found that psychiatrists and their patients had a sufficiently close relationship to establish third-party standing, noting that the “intimate relationship” between psychiatrists and their patients “ensures psychiatrists can effectively assert their patients’ rights.”²¹² Further, patients may be inhibited from asserting their own rights due to the stigma associated with receiving mental health services.²¹³

D. Revisiting Third-Party Standing for Abortion Providers

In his dissent, Thomas implies that the third party must face an “insurmountable” obstacle in asserting their own rights if the plaintiff is to meet the hindrance prong of the third-party standing test.²¹⁴ Thomas also characterizes

208. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

209. *Id.*

210. *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *reversed on other grounds*, 521 U.S. 793 (1997); *Compassion in Dying v. State of Washington*, 79 F.3d 790 (9th Cir. 1996), *reversed on other grounds*, 521 U.S. 702 (1997).

211. *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278 (3d Cir. 2002). An association of psychiatrists alleged that the managed healthcare organizations “impaired the quality of healthcare provided by the psychiatrists to their patients by refusing to authorize necessary psychiatric treatment, excessively burdening the reimbursement process and impeding other vital care.” *Id.* at 280. The Second Circuit later declined to extend third-party standing to physicians in the context of a purely statutory claim. *American Psychiatric Association v. Anthem Health Plans, Inc.*, 821 F.3d 352, 361 (2d Cir. 2016) (finding that because “the psychiatrists are not among those expressly authorized to sue,” they could not invoke the rights of their patients to bring a claim under the statute).

212. *Pennsylvania Psychiatric Society*, 280 F.3d at 289.

213. *Id.* at 290 (noting that “a party need not face insurmountable hurdles to warrant third-party standing,” and “[t]he stigma associated with receiving mental health services presents a considerable deterrent to litigation”). The court also noted that in addition to the obstacle created by stigma, mental health patients’ “impaired condition may prevent them from being able to assert their claims.” *Id.*

214. *Whole Women’s Health*, 136 S. Ct. at 2323 (Justice Thomas, dissenting) (“There are no ‘insurmountable’ obstacles stopping women seeking abortions from asserting their own rights, the plurality admitted.”) (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)).

the required obstacle as “formidable,” citing to *Powers v. Ohio*.²¹⁵ *Powers*, however, stated that there must be “some” hindrance and found that the fact that a juror dismissed because of race will have little incentive to bring a case forward was enough of a hindrance to allow a criminal defendant to invoke the rights of the juror.²¹⁶ Further, as discussed above, courts considering issues outside of the abortion context have frequently held that the existence of some possible deterrent satisfies the hindrance prong of the third-party standing analysis. For example, the holding in *Craig* rested, in part, on a surmountable mootness issue²¹⁷ and the holding in *Pennsylvania Psychiatric Society* rested on the patients’ privacy interests.²¹⁸ Thus, even though the obstacles women face to asserting their own rights are not insurmountable, these privacy and mootness barriers are similar to other obstacles that courts have found to be sufficient to justify a third-party standing exception.

Beyond the obstacles the Court recognized in *Singleton*, low-income women and women of color, who disproportionately seek abortion services and are more likely to be impacted by abortion restrictions, face further obstacles to challenging these laws.²¹⁹ The majority of patients who seek abortion care in the United States are low-income or women of color,²²⁰ and black women in particular seek abortion services at disproportionately high rates, even when controlling for income.²²¹

Women from marginalized groups not only seek abortions at disproportionately high rates but also are much more vulnerable to the impact of TRAP laws. TRAP laws may disproportionately impact women of color who already face additional barriers to accessing reproductive care regardless of income.²²² Moreover, low-income women are more vulnerable to the impact of

215. *Id.* at 2322 (“A plaintiff could assert a third party’s rights, the Court said, but only if the plaintiff had a ‘close relationship to the third party’ and the third party faced a formidable ‘hindrance’ to asserting his own rights.”) (citing *Powers*, 499 U.S. at 411).

216. *Powers*, 499 U.S. at 411, 415.

217. *Craig*, 429 U.S. at 194.

218. *Pennsylvania Psychiatric Society*, 280 F.3d at 290. As *Singleton* recognized, the stigma surrounding abortion is not a negligible obstacle and may very well prevent a woman from challenging an abortion restriction. Although women have the option of using a pseudonym, this may not fully address the privacy issue. Stigma and shame may prevent a woman from seeking out a lawyer at all, or they may wish to keep their decision concealed from even their partner.

219. Jones & Jerman “Population Group Abortion Rates,” note 27; “Abortion Patients are Disproportionately Poor and Low Income,” *Guttmacher Institute* (9 May 2016), <https://perma.cc/2PPQ-DWHD>. One national survey found that in 2014, 75 percent of abortion patients were low-income. Jenna Jerman et al., “Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008,” *Guttmacher Institute* (May 2016), <https://perma.cc/G739-JQNA>. Further, the obstacles recognized by *Singleton* are not negligible—the stigma surrounding abortion may very well prevent a woman from challenging an abortion restriction. Although women have the option of using a pseudonym, this may not fully address the privacy issue. Stigma and shame may prevent a woman from seeking out a lawyer at all, and they may be hesitant to speak about their abortion on record.

220. Jones & Jerman “Population Group Abortion Rates,” note 27, at 1906.

221. *Id.*; Susan A. Cohen, “Abortion and Women of Color: The Bigger Picture,” 11 *Guttmacher Policy Review* 2 (Summer 2008).

222. See e.g. Zoe Dutton, “Abortion’s Racial Gap,” *The Atlantic* (22 Sept. 2014),

TRAP laws because their already-limited ability to travel to sometimes far-away clinics is further constrained by laws that impose waiting periods and thus necessitate multiple clinic visits.²²³ Because abortion is a time-sensitive procedure, middle-class and upper-class women who are impacted by TRAP laws are likely to travel to a location where they are most easily able to access the procedure.²²⁴ Women with greater accessibility thus have little incentive to pursue legal action. And even if a woman with greater accessibility chose to challenge an abortion restriction, her ability to obtain the procedure may make it difficult to show injury sufficient to establish standing.

Furthermore, as the Court recognized in *Craig v. Boren* and *Eisenstadt v. Baird*, when service providers—rather than the rights holders themselves—are subject to persecution, it may be difficult for the rights holders to assert their own interests, and it is particularly appropriate for service providers to advocate on their behalf.²²⁵ In the context of TRAP laws, the fact that these laws target clinics rather than women and contribute to clinic closures rather than prohibit abortion outright could make it difficult for women to challenge many of these restrictions.

To illustrate, it may have been difficult for a woman seeking an abortion to challenge the Texas law struck down in *Whole Woman's Health*, which required abortion providers to have admitting privileges at a hospital located within thirty miles of the clinic.²²⁶ This law contributed to clinic closures across the state, forcing women in some areas to travel longer distances to access abortion care.²²⁷ But in such a case, some of these women inevitably do not have the means to manage necessary travel expenses, such as lost wages, transportation, accommodations, and child care, especially because many states' mandatory waiting period requirements mean that they must either make multiple trips to the

<https://perma.cc/X4GP-YA7J> (discussing how factors such as racism, differences in opportunity, and access to reproductive health education may result in unequal access to reproductive care for women of color, regardless of income).

223. See Jenna Jerman et al., “Barriers to Abortion Care and Their Consequences For Patients Traveling for Services: Qualitative Findings from Two States,” 49 *Perspectives on Sexual & Reproductive Health* 95 (2017) (“Given that 75% of abortion patients were poor or low-income in 2014, any additional barriers to abortion care—including travel and its associated costs, such as lost wages and expenses for child care, transportation and accommodations—may be significant for many women.”); Jenna Jerman & Rachel K. Jones, “Secondary Measures of Access to Abortion Services in the United States, 2011 and 2012: Gestational Age Limits, Cost, and Harassment,” 24 *Women's Health Issues* 419, 419-20 (2014).
224. See Rebecca Harrington & Grace Panetta, “23 Creative Ways States are Keeping Women from Getting Abortions in the US—that could Erode *Roe v. Wade* without Repealing it,” *Business Insider* (14 Jul. 2018), <https://perma.cc/P95Q-KDNC> (noting that “abortion rights will slowly erode over time until only women in blue states (or rich women who can travel there) can get them”).
225. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972).
226. *Whole Woman's Health*, 136 S. Ct. 2292, 2300 (2016).
227. *Id.* at 2313. The Court found that the record contained sufficient evidence that the admitting-privileges requirement closed half of Texas's clinics, and that after the law went into effect, “the number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider [increased] from approximately 10,000 to 290,000”) (quoting 46 F.Supp.3d at 681).

clinic or stay overnight.²²⁸ Thus, some women who live in areas impacted by clinic closures will struggle to access legal abortion. But because this law targeted providers, it could have been difficult for the women themselves to bring a legal challenge. Women seeking abortions must first realize the connection between the law at issue and their inability to access abortion services, then have the means to seek out an attorney, and then be willing to participate in a legal battle that will extend past the narrow window of time that they have to seek an abortion. Alternatively, public interest organizations seeking to challenge the law could seek these plaintiffs out, but for many of the same reasons, finding a woman to challenge the law would likely take an extended amount of time and resources. It is also possible that the court would find that in such a case, a woman seeking an abortion would not be able to show redressability for standing purposes: that if the law were to be overturned, she would be able to access an abortion.

Ultimately, although third-party standing precedent is inconsistent, Thomas's argument that the courts make special exceptions for abortion litigation is unpersuasive. The Court has long held that businesses may invoke their customers' rights to protect their business from interference with their customers' freedom.²²⁹ It is true, however, that some third-party standing cases have failed to address the third party's obstacle to asserting their own rights, while some lower courts have found that without a nearly insurmountable obstacle, third-party standing is not justified. In contrast, rather than looking to the seriousness of the obstacle, many decisions seem to place special importance on whether the litigant will be an effective advocate for the third party's rights.²³⁰ This consideration makes sense given the two underlying justifications for the general prohibition of third-party standing as articulated in *Singleton*: first, that the third party may not wish to assert their rights or may be able to enjoy them anyway, and second, that the third party may be the "best proponent" of their own rights.²³¹

In this regard, courts have consistently found that abortion providers are effective advocates for women. The Seventh Circuit, for instance, rejected the argument that because certain abortion regulations were designed to protect women from "abusive medical practices," providers had a conflict of interest in asserting their patients' rights.²³² In rejecting this argument, the court noted that the parties conceded that the plaintiffs were sincerely concerned for their patients' welfare.²³³ Regardless, since *Singleton*, the Court has chosen to expand its self-made doctrine, and courts have largely followed the principles articulated in

228. Jenna Jerman et al., "Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States," 49 *Perspectives on Sexual & Reproductive Health* 95 (2017).

229. See discussion in Section III.B.

230. See e.g. *Rounds*, 467 F.3d at 726 ("The test is not whether interests are perfectly aligned, but whether the plaintiff physician will 'adequately represent' the absent woman's constitutional rights.") (quoting *Okpalobi v. Foster*, 190 F.3d 337, 353 (5th Cir.1999)).

231. *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976).

232. *Charles*, 627 F.2d at 785.

233. *Id.* at 779-80 footnote 10.

Singleton in cases unrelated to abortion.

Finally, Thomas argues that *Whole Woman's Health* reveals another flaw created by third-party standing exceptions: “when the wrong party litigates a case, we end up resolving disputes that make for bad law.”²³⁴ But abortion providers are the best parties to litigate TRAP laws both because of practical necessity and because of the laws’ direct impact on their services. Few recent cases challenging abortion regulations have been brought by women, and in cases in which the plaintiffs include women seeking abortions, women have generally been joined by abortion providers.²³⁵ This trend is unsurprising. Not only do the women asserting their own rights face several obstacles in doing so, but many abortion regulations target providers directly, making them the most sensible party to bring a legal challenge. Courts, such as those in *Craig*, *Eisenstadt*, and *Kaahumanu*, have consistently considered whether the law at issue regulates the sale or distribution of a good or service, rather than its use, to justify a third-party standing exception.

CONCLUSION

In his *Whole Woman's Health* dissent, Justice Thomas ignores providers’ ability to assert their own rights to challenge abortion regulations, even though providers are often the direct targets of such laws. Many of these regulations are enacted with the purpose of restricting access to abortion providers’ services or closing clinics altogether. Providers are vulnerable to these laws, which have successfully restricted patients’ access to their services and have contributed to clinic closings across the country. Thus, abortion providers should be able to challenge these laws by asserting their own rights—their personal stake in the controversy ensures that there is sufficient adversity to satisfy the Article III case-or-controversy requirement. This is true even where the injury is minimal, such as a small administrative burden. Therefore, the Ohio Supreme Court erred when it held that the clinic lacked standing to challenge abortion restrictions in the state’s budget bill, because it failed to recognize the line of standing decisions accepting small administrative burdens as sufficient injury-in-fact, particularly when the plaintiff is directly targeted by the law at issue.

Because most of these regulations directly target providers, providers are often the most sensible party to challenge these regulations, whether they assert their own rights or the rights of their patients.²³⁶ Although Justice Thomas

234. *Whole Woman's Health*, 136 S. Ct. at 2322.

235. See generally *Roe*, 410 U.S. at 113; see also *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (plaintiffs included both doctors and pregnant minors); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (amongst the plaintiffs included two doctors and an indigent woman); *Harris v. McRae*, 448 U.S. 297 (1980) (plaintiffs included a pregnant woman and New York City Health and Hospitals Corp., which operated twelve hospitals providing abortion services); *Bellotti v. Baird*, 428 U.S. 132 (1976) (amongst the plaintiffs included pregnant minors, a non-profit abortion provider, and a physician); *Poelker v. Doe*, 432 U.S. 519 (1977) (action brought by pregnant woman); *Beal v. Doe*, 432 U.S. 438 (1977) (action brought by women); *Maher v. Roe*, 432 U.S. 464 (1977) (action brought by women).

236. “An Overview of Abortion Laws,” *Guttmacher Institute* (last updated 1 Apr. 2019),

correctly recognizes the inconsistencies in third-party standing doctrine, his argument that the court makes “special exceptions” for abortion rights is unpersuasive.²³⁷ While Thomas claims the obstacles women face in challenging abortion restrictions are not “insurmountable,” he fails to consider that insurmountability is not the requirement that the Court has established to justify third-party standing. Rather, the Court has found the existence of some hindrance, such as lack of incentive to challenge a law, to be sufficient.²³⁸ And in finding that abortion providers have standing to challenge abortion restrictions by invoking their patients’ rights, the Court has correctly followed precedent that enables businesses to assert the rights of their customers.²³⁹ In particular, courts have consistently found that a business is often the most logical plaintiff to challenge a law that prohibits providing rather than receiving a service.²⁴⁰

These two opinions fail to apply established standing principles and suggest that courts may begin to use standing as a way to improperly avoid deciding abortion cases on the merits. Such a trend would not only be detrimental to providers but would also interfere with the rights of their patients. Women seeking abortions are likely to face obstacles in asserting their own rights: most restrictions target providers, rather than patients, and women from marginalized groups are most impacted by these restrictions. In turn, challenges to abortion restrictions would be likely to take longer, thus providing states already hostile to abortion rights more freedom to enact and enforce unconstitutional abortion restrictions.

<https://perma.cc/2NGQ-FM7A>.

237. *Whole Woman’s Health*, 136 S. Ct. 2292, 2321-22 (2016) (Justice Thomas, dissenting).

238. *Id.* at 2323; *Powers*, 499 U.S. at 411.

239. See e.g. *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925).

240. See e.g. *Eisenstadt*, 405 U.S. at 446; *Craig*, 429 U.S. at 197.