

Case No. 05-3093

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

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

Intervenors.

En Banc Review of Eighth Circuit Decision Dated January 9, 2007

**BRIEF OF *AMICUS CURIAE*, FAMILY RESEARCH COUNCIL,
IN SUPPORT OF APPELLANTS**

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Corporate Disclosure Statement

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

Interest of Amici

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

Summary of Argument

Amicus Family Research Council urges this Court to rule that the plaintiff abortion providers lack standing under Article III to represent the third party interests of women seeking abortions to challenge the South Dakota informed consent law at issue in this case, 2005 S.D. Laws ch. 186 (HB 1166), which amends S.D.C.L. § 34-23A.10.1. This means that the plaintiffs have no standing to assert the constitutional claims that women seeking abortions have under *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny, and may only assert in court the possible claims they have as abortion providers.

The panel ruled that the abortion providers did have standing to represent the interests of women seeking abortions to challenge the law:

Planned Parenthood additionally argues that the required disclosures likely violate the rights of women seeking abortion because the disclosures are misleading and patients are forced to listen to the state's ideological message. South Dakota suggests that Planned Parenthood lacks standing to assert these claims because the interests of abortion providers do not align with those of their

patients. It also repeats its assertion that the disclosures contain nothing but neutral facts.

Although ordinarily one may not claim standing to assert the rights of a third party, the Supreme Court has carved out an exception for physicians asserting their patients' right to have access to abortion. *Singleton v. Wulff*, 428 U.S. 106, 114-18, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). *Singleton* did not adopt a per se rule, *id.* at 118 n. 7, 96 S.Ct. 2868, but the Court has never held since then that a physician lacks standing in this context. The test is not whether interests are perfectly aligned, but whether the plaintiff physician will “adequately represent” the absent woman's constitutional rights. *Okpalobi v. Foster*, 190 F.3d 337, 353 (5th Cir.1999). **We conclude that Planned Parenthood has standing here to assert the liberty interest of its patients.**

Planned Parenthood Minnesota v. Rounds, 467 F.3d 716, 726 (8th Cir. 2006)(emphasis added)

With all due respect to the panel' s majority, its cursory examination of the standing issue fails to grapple with the significant problems with granting third party standing to the abortion providers in this case.

The main reason why the abortion providers lack standing to represent the third party interests of women seeking abortions is that the women are capable of defending their own rights in court.

Because nothing hinders the women from asserting their own claims in court, the abortion providers lack standing to raise the women's claims as third parties. *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004).

Additionally, the majority opinion fails to acknowledge and discuss the significant conflicts of interests between the pregnant women and the abortion providers that collide in this case. Their interests do not align in at least three ways.

First, the abortion providers have a financial stake in providing abortions that creates a conflict of interest with the interests of the women. When they receive the information required by the statute, some may choose not to abort, which would mean monetary loss for the abortion providers. Their interests are not in alignment.

Second, the women have a constitutionally-protected parental relationship if their child is born alive. The state law informs the women that they are terminating that constitutional interest if they obtain an abortion. The abortion providers are opposed to women

learning this information. The interests of the women and the abortion providers do not align.

Third, the women, not the abortion providers, would suffer any possible health consequences that might come from not receiving the information required by state law. The abortion providers' interest in suppressing this information to the women means their interests do not align with the women seeking abortions.

The panel majority erroneously relied on *Singleton v. Wulff*, 428 U.S. 106 (1976), as generally authorizing abortion providers to represent the interests of the women seeking abortions. The panel decision did not examine the significant differences between this case and *Singleton*, and should not have relied upon it to allow third party standing in this case. The panel erred by ruling that the abortion providers meet the requirements of Article III to represent the womens' interests in this case.

This Court should rule that the plaintiff-abortion providers lack standing to represent the interests of women seeking abortions in this case.

I.

The Abortion Providers Lack Article III Standing To Assert The Third Party Rights Of Women Seeking Abortions

A. The Abortion Providers Lack Standing to Assert The Rights Of Women Seeking Abortions Because Nothing Hinders Them From Asserting Their Own Interests In Court.

The abortion providers who are plaintiffs-appellants in this case lack standing under Article III of the U.S. Constitution to raise the constitutional interests of women seeking abortions to challenge 2005 S.D. Laws ch. 186 (HB 1166), which amends S.D.C.L. § 34-23A.10.1. In general, the Article III's "case or controversy" provision requires plaintiffs to "assert [their] own legal rights and interests, and [they] cannot rest [their] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S.498, 499 (1975). This means that Article III creates a presumption against third party representation. "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

This presumption against third party standing is not absolute, and courts do allow it in certain circumstances. *See e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (plaintiffs may challenge statutes that violate the First Amendment rights of those not before the court when the law is facially overbroad). The Supreme Court has permitted parties to represent the constitutional claims of third parties when they meet two criteria: (1) when the “party asserting the right has a ‘close’ relationship with the person who possesses the right,” and (2) “whether there is a ‘hindrance’ to the possessor's ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004), citing *Powers v. Ohio*, 499 U.S. 400, 411(1991).

The plaintiff abortion providers do not meet either of these two criteria in the context of their legal challenge to South Dakota’s informed consent law. The abortion providers lack a “close relationship” with the women seeking abortions because their interests are not in alignment and, in fact, are at odds in some crucial aspects. This brief develops that point in sections IB and IC

of this brief.

The main reason why the abortion providers lack standing as third parties to represent women seeking abortions is that they fail the second factor stated above in *Kowalski*: There is no “hindrance” to these women asserting their own rights in court.

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

For example, the Supreme Court allowed the NAACP to bring suit on behalf of its members to stop lower court orders directing the organization to disclose the names of its members to government officials in Alabama. The Supreme Court ruled that “[to] require that [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.” *NAACP v. Alabama*, 357 U.S. 449, . 459 (1958).

Another example of parties asserting the claims of others hindered to bring their claims to court is *Hodel v. Irving*, 481 U.S.

704 (1987). In that case, the Supreme Court agreed with this Court that the descendants of Ogala Sioux who lost tribal lands had third party standing to challenge the federal government's actions against their deceased ancestors. *Id.* at 711. Obviously, dead people cannot bring their claims to court, and need representatives, such as their descendants, to assert their claims in court.

Here, nothing bars women seeking abortions in South Dakota from asserting their own claims under *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) in federal court. There is no unique or special bar to women bringing their claims themselves to court. In fact, women have challenged laws restricting abortion in the past in such major cases as *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973). There is no reason that Amicus is aware of that would hinder women seeking abortions from challenging this South Dakota law. The abortion providers lack standing to raise the constitutional claims of women seeking abortions in their challenge to the South Dakota law.

B. The Interests Of Women Seeking Abortions Are Not in Alignment With the Abortion Providers In Terms Of Challenging the South Dakota Informed Consent Statute.

The interests of abortion providers in challenging this South Dakota law do not align with the interests of women seeking abortions. In other cases, such as *Singleton*, the Supreme Court found that the the interests of the abortion providers were in alignment with those of the women they serviced. “[T]he relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.” *Singleton*, 428 U.S. at 115. That was true in *Singleton* because the women on government assistance wanted to receive abortions, and the abortionists wanted payment from the government. The Supreme Court ruled that their interests were in alignment, so that the abortion providers could represent the interests of the women in court to seek payment. *Id.* at 117.

That alignment does not exist here. In at least three ways the interests of the abortion providers do not align iwth the interests of the women seeking abortions in the context of challenging this

South Dakota law.

First, the abortion providers have a financial incentive or stake in this case that creates a conflict of interest with those of the women seeking abortions. The abortion providers receive payment only when women receive abortions. The information that the statute requires women to receive may cause some of them to forego their planned abortions. If that occurred, the abortion providers would receive less income than they would if they were free from the requirements of the South Dakota law. This conflict of interest means that the women should represent their own interests in court, and not have them represented by those who have a financial incentive in the women receiving abortions.

Second, the interests of the women seeking abortions are not in alignment with the abortion providers in the context of this statute, because the abortion will affect dramatically the constitutional rights the potential mother would have if that child were born alive. Under the statute, the abortion providers must disclose the following information:

(b) That the abortion will terminate the life of a whole, separate, unique, living human being;

(c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;

(d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;

Parents have a fundamental Fourteenth Amendment liberty interest in raising their children. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 534-35 (1925) and *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Abortion, therefore, is not merely a medical procedure that a woman undergoes, but it is also a procedure that destroys the woman's legal right in the nascent parent-child relationship that the Constitution protects. The State of South Dakota has reasonably concluded that a woman should be fully informed that by having an abortion, she is giving up her parental rights protected under the Fourteenth Amendment. The state law attempts to make sure those

disclosures get communicated to the women seeking abortions so that they may make fully informed decisions.

Third, the women would suffer the health consequences that might occur from the withholding of the information required by the state law, but the abortion providers would suffer no such harm.

Women have a right to make the final decision about whether to undergo a medical procedure or not. The South Dakota statute in question here supplies information to the women contemplating abortion information relevant to their decision-making. S.D.C.L. § 34-23A.10.1(1)(e) states that the doctors must provide, among other things, this information to the women seeking abortions:

(e) A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:

(i) Depression and related psychological distress;

(ii) Increased risk of suicide ideation and suicide;

(iii) A statement setting forth an accurate rate of deaths due to abortions, including all deaths in which the abortion procedure was a substantial contributing factor;

(iv) All other known medical risks to the physical

health of the woman, including the risk of infection, hemorrhage, danger to subsequent pregnancies, and infertility...

It is not relevant to the question of standing whether the abortion providers dispute the relevance or accuracy of these disclosures required by state law. Their interests do not align with the women seeking abortions because the women's health will be directly affected by any of these medical risks. The abortion providers cannot represent the constitutional claims of women when the relief requested is to withhold the information from the women seeking the procedure that may result in physical harm.

The interests of the abortion providers do not align with the interests of the women seeking abortions, so they lack standing to represent the interest of those women in this case.

C. This Court's Decision in *Singleton v. Wulff* Does Not Determine Whether The Abortion Providers Have Standing Or Not.

The Supreme Court's decision in *Singleton v. Wulff*, 428 U.S. 106 (1976) does not answer the question of third party standing in this case. *Singleton* involved a suit in which abortion providers

sought to recover payment from the State of Missouri for abortions they had performed. The abortion providers had their own constitutional claims independent of women seeking abortions because they were clearly harmed for purposes of Article III standing if they did not receive payment from the government for their services. There was no potential conflict of interests between the abortionists and the women who received abortions from them. These women were on public assistance, they received abortions, and the abortionists sought payment from the state government for their services.

Although the women in *Singleton* could have brought their own lawsuit, the Supreme Court allowed the abortion providers to represent the interests of the women for two reasons, neither of which apply here, and arguably, did not exist in *Singleton*, either. First, the Supreme Court allowed the abortion providers to represent the women seeking abortions because “she may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit.” *Id.* at 117. However,

women frequently appear as plaintiffs in abortion-related lawsuits and hide their identities with pseudonyms. Indeed, the Supreme Court's major decisions on abortion, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) were brought by women using alias to hide their identities. Women in South Dakota who believe the informed consent statute interferes with their right to abortion could bring such a lawsuit and effectively hide their identities as the women did in *Roe* and *Doe*.

The Supreme Court in *Singleton* gave a second reason why abortion providers may represent the third party interests of women seeking abortions is the fact that a woman makes the decision to get an abortion in only a few months of pregnancy, and that "her right [to an abortion] will have been irrevocably lost, assuming, as it seems fair to assume, that unless the impecunious woman can establish Medicaid eligibility she must forgo abortion." *Singleton*, 428 U.S. at 117.

However, the high Court in *Singleton* admitted that this obstacle could be overcome by asserting the exception to the

mootness doctrine for situations that are “capable of repetition yet evading review,” *Roe v. Wade*, 410 U.S. at 124-25. The Supreme Court in *Singleton* also admitted that a class action would avoid the mootness problem of pregnancy being too short a time to litigate claims to a right to abortion in federal court actions lasting several years.

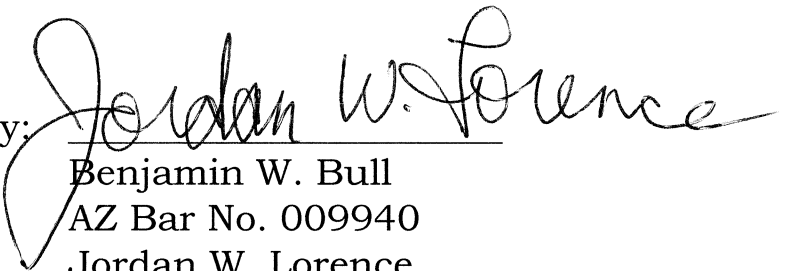
Nonetheless, the Supreme Court in *Singleton* allowed abortion providers to represent women seeking abortions anyway, stating that because the courts allow “the assertion of the right is to be ‘representative’ to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician.” *Singleton*, 428 at 117-18.

Women seeking abortions in South Dakota are not hindered in bringing a lawsuit to challenge this law. They can hide their identities behind pseudonyms. They could bring a class action. Abortion providers do not have to or need to represent the interests of these women in order to have their claims heard in federal court.

CONCLUSION

Amicus Family Research Council respectfully urges this Court to reverse the decision made by the panel in this case, and uphold 2005 S.D. Laws ch. 186 (HB 1166), which amends S.D.C.L. § 34-23A.10.1.

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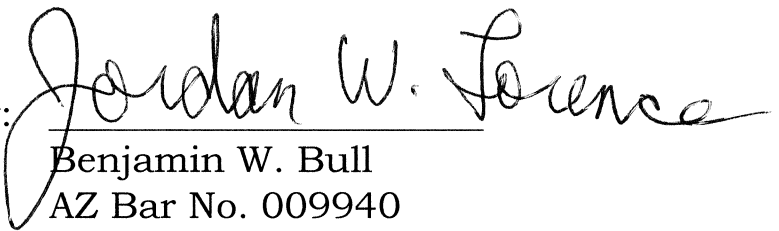
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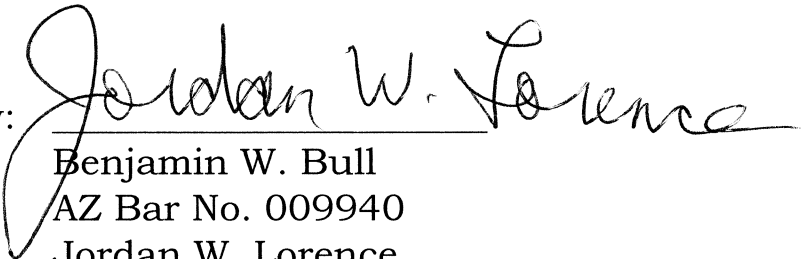
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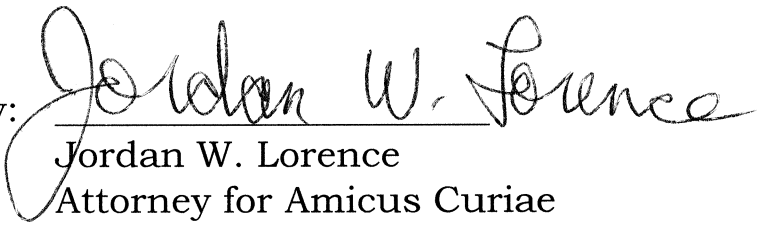
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