No. 13-2726

In the United States Court of Appeals for the Seventh Circuit

PLANNED PARENTHOOD OF WISCONSIN, INC., *ET AL.*,
Plaintiffs-Appellees,

v.

J.B. VAN HOLLEN, *ET AL.*,
Defendants-Appellants,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN,
CIVIL ACTION NO. 13-C-465, HON. WILLIAM M. CONLEY

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

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Appellate Court No: 13-2726

Short Caption: PLANNED PARENTHOOD OF WISCONSIN, INC. v. VAN HOLLEN

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Eagle Forum Education & Legal Defense Fund

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Lawrence J. Joseph

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Attorney's Signature: s/ Lawrence J. Joseph Date: September 23, 2013

Attorney's Printed Name: Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported state and local autonomy in areas – such as public health – of traditionally state and local concern. In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. For these reasons, Eagle Forum has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

On the day that Wisconsin's Governor signed "Act 37" into law, Planned Parenthood of Wisconsin, another abortion provider, and two of their abortion doctors (collectively, "Plaintiffs") sued Wisconsin's Attorney General, the Secretary of its Department of Safety and Professional Services, the members of its Medical Examining Board, and the District Attorney for Dane County as a representative of the class of all Wisconsin district attorneys (collectively, "Wisconsin") to enjoin the new law. The district court issued a preliminary injunction, and Wisconsin filed this interlocutory appeal.

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[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Constitutional Background

Under Article III, standing presents a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). These limitations "assume[] particular importance in ensuring that the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations and internal quotations omitted). For a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing prudentially requires that the plaintiff have its own constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Further, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for each form of relief that they request.

In *Roe v. Wade*, 410 U.S. 113 (1974), the Supreme Court held that states may not prohibit certain abortions, and in *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), the Supreme Court revised the *Roe* trimester framework. Under *Casey*, courts called upon to balance State regulation of abortions against the *Roe-Casey* right to abortions must do so under the following

framework:

(1) Given "the State's profound interest in potential life," "the State may take measures to ensure that the woman's choice is informed … as long as their purpose is to persuade the woman to choose childbirth over abortion" and they are "not … an undue burden on the right."

(2) "The State may enact regulations to further the health or safety of a woman seeking an abortion" and "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."

Casey, 505 U.S. at 878. Significantly, when states regulate abortion to protect the pregnant woman, as opposed to the infant, only "unnecessary" regulation triggers undue-burden analysis. *Id.* Were it otherwise, states would be hard-pressed to prohibit even "back-alley" abortions, which plainly is not the law. *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975). As *Menillo* recognized contemporaneously with *Roe*, states may require that "abortion [be] performed by *medically competent personnel under conditions insuring maximum safety* for the woman." *Id.* (emphasis added); *accord Roe*, 410 U.S., at 150 ("[the] State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure *maximum safety* for the patient") (emphasis added). *Casey* did not announce a retreat on these protections of women's health.

Statutory Background

Wisconsin's Act 37 requires that abortion doctors have admitting privileges at a hospital within thirty miles of where an abortion is performed. 2013 Wis. Act 37, §1(*enacting* §253.095(2)). Act 37 provides two remedies for violation of the admitting-privilege requirement: (1) a penalty between $1,000 and $10,000 assessed against the abortion provider, but not "against the woman upon whom the abortion is performed or induced," and (2) a cause of action "for damages, including damages for personal injury and emotional and psychological distress" for the "woman on whom an abortion is performed or attempted" and certain of her family members. *Id.* (*enacting* §253.095(3)-(4)).

STATEMENT OF FACTS

Amicus Eagle Forum adopts the facts as stated in Wisconsin's opening brief. *See* Wisc. Br. at 8-14.

STANDARD OF REVIEW

"When reviewing a district court's grant or denial of a preliminary injunction, [appellate courts] review the court's legal conclusions *de novo*, its findings of fact for clear error, and its balancing of the injunction factors for an abuse of discretion." *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 678 (7th Cir. 2012) (interior quotations omitted). Of course, a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Plaintiffs seeking interim relief must establish that they likely will succeed on the merits and likely will suffer irreparable harm without relief, that the balance of equities favors them versus the defendants' harm from interim relief, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Further, even preliminary injunctions require jurisdiction, *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983), which this Court reviews *de novo*. *Dexia Crédit Local v. Rogan*, 629 F.3d 612, 619 (7th Cir. 2010); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). Appellate courts must "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991). Parties cannot grant jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and dismiss the action. *Id.*

Finally, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici*. *Turner v. Rogers*, 131 S.Ct. 2507, 2519-20 (2011); *accord id.* at 2521 (Thomas, J., dissenting).

SUMMARY OF ARGUMENT

Plaintiffs lack both statutory standing (Section I) and third-party standing (Section II.A) to assert the *Roe-Casey* rights of future patients, and in both cases, the fact that prior decisions found Article III standing is irrelevant to statutory or prudential standing because those prior decisions did not decide *sub silentio* issues that they never discussed. Moreover, unlike the Article III standing at issue in those prior decisions, both statutory standing and prudential standing can be waived, which means that the defendants in those prior decisions waived the issue, such that it would be even more unusual to read those decisions as rejecting a defense *sub silentio* when the defendants had waived the defense. With respect to third-party standing, Plaintiffs cannot claim a sufficiently close relationship with future patients, particularly where Plaintiffs seek to undo parts of Act 37 designed to protect those future women patients (Section II.A).

To the extent that Plaintiffs have Article III standing, their cause of action would be under the rational-basis test that adheres to their rights, not under the undue-burden test that adheres to the rights of women who possess the *Roe-Casey* rights (Sections II.B, III.C). But Plaintiffs have not established their own standing, independent of their future patients, and it is unlikely that they could establish their own standing here because the named defendants have no power to redress the injury from private lawsuits authorized by Act 37, and it is likely that – to avoid

this private, state-court liability – Plaintiffs either would shutter the threatened facilities independently or would encourage their doctors to obtain admitting privileges (Section II.C).

On the merits, the *Casey* undue-burden test has a broader scope against state laws that protect unborn life (*e.g.*, ultrasound or informed-consent requirements) than it has against state laws such as Act 37 that protect the women who seek abortions. *Casey* did nothing to overturn prior cases, such as *Roe* and *Menillo*, that recognized the state's interest in ensuring the "maximum safety" for women abortion patients. For that reason, the *Casey* undue-burden test applies with respect to pregnant women only if the state law is unnecessary, which plainly is not the case with Act 37 which seeks to address Plaintiffs' inadequate transitioning of women with abortion-related complications every sixteen days on average (Section III.A). But even if this Court reaches the merits under either *Casey* (Section III.B) or the rational-basis test (Section III.C), Wisconsin's efforts to protect women's health easily meets the relevant inquiry.

ARGUMENT

I. PLAINTIFFS LACK STATUTORY STANDING TO BRING AN UNDUE-BURDEN CHALLENGE TO ACT 37

As Wisconsin explains, Plaintiffs fail to meet the statutory criteria for their claimed causes of action, which denies them "statutory standing" to bring this action. Wisc. Br. at 17-26. Significantly, "both Article III and statutory standing

requirements must be satisfied," *Frey v. E.P.A.*, 270 F.3d 1129, 1136 (7th Cir. 2001) (*citing Ragsdale v. Turnock*, 941 F.2d 501, 509 (7th Cir. 1991)), although statutory standing and its Article III and prudential namesakes differ in some key respects. *See, e.g., Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (distinguishing statutory and constitutional standing). Notwithstanding the similarities, the differences compel the conclusion – as Wisconsin argues, Wisc. Br. at 24 – that prior decisions that found Article III standing do not control on issues of statutory standing.

The primary difference between statutory standing on the one hand and Article III standing on the other hand is that statutory standing is a merits inquiry resolved under FED. R. CIV. P. 12(b)(6), whereas Article III standing is a jurisdictional inquiry resolved under FED. R. CIV. P. 12(b)(1): "a dismissal for lack of statutory standing is properly viewed as a dismissal for failure to state a claim rather than a dismissal for lack of subject matter jurisdiction." *Vaughn v. Bay Envtl. Mgmt.*, 567 F.3d 1021, 1024 (9th Cir. 2009) (*citing Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1221-22 (11th Cir. 2008); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 803-04 (7th Cir. 2007)). To say that statutory standing is not *jurisdictional* does not mean that statutory standing is not *mandatory:* "Not all mandatory prescriptions, however emphatic, are ... properly typed jurisdictional." *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen*, 558 U.S.

67, 81 (2009) (internal quotations omitted). Instead, the primary distinction is that, unlike jurisdiction, statutory standing can be waived by failing to raise it. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-16 (2006).[2] Here, of course, Wisconsin has not waived the issue.

The primary similarity between statutory standing, Article III, and prudential standing is that all three inquiries are ones that a Court can use as the basis to decide a case before addressing the substantive merits. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999); *Norfolk Southern Ry. Co. v. Guthrie,* 233 F.3d 532, 534 (7th Cir. 2000). While perhaps unusual in that federal courts can decide a merits issue (*i.e.*, statutory standing) before jurisdictional issues (*e.g.*, constitutional standing), the precedents of the Supreme Court and this Circuit clearly establish that point.

With that background, it is clear that decisions of this Court – such as *Karlin v. Foust,* 188 F.3d 446, 456 n.5 (7th Cir. 1999) and *Planned Parenthood of Wis. v. Doyle,* 162 F.3d 463, 465 (7th Cir. 1998) – that found *constitutional standing* for physicians to challenge abortion restrictions without addressing *statutory standing* simply are not binding precedents on statutory standing: "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are

[2] In *Harzewski,* 489 F.3d at 803-04, this Court cautioned against interpreting prudential standing's "zone of interests" so broadly that the inquiry merges with the statutory entitlement to relief on the merits.

not to be considered as having been so decided as to constitute precedents.'" *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("cases cannot be read as foreclosing an argument that they never dealt with"). Moreover, since the *Karlin* and *Doyle* defendants did not even raise statutory standing, they waived it as a basis for dismissing those suits. *Arbaugh*, 546 U.S. at 515-16. Decisions cannot be read to decide an argument *sub silentio* against defendants who waived that argument by failing to raise it.

II. PLAINTIFFS LACK STANDING TO BRING AN UNDUE-BURDEN CHALLENGE – OR ANY OTHER CHALLENGE – TO ACT 37

Wisconsin also correctly argues that abortion providers like Plaintiffs lack third-party standing to assert their future patients' *Roe-Casey* rights in this litigation. *See* Wisc. Br. at 26-37. To the extent that Plaintiffs have standing at all, they must proceed under their own rights.

The next section explains why Plaintiffs lack third-party standing to assert the *Roe-Casey* rights of their future patients. Before addressing that, however, *amicus* Eagle Curiae first addresses two reasons why prior Supreme Court and Circuit decisions that found abortion doctors to have standing are not extendable to support standing here. First, as explained with statutory standing, decisions that considered only Article III standing without considering prudential limits cannot serve as binding precedents on an issue that those decisions did not consider.

Cooper Indus., 543 U.S. at 170; *Waters*, 511 U.S. at 678. As such, those "drive-by jurisdictional rulings" have "no precedential effect." *Steel Co.*, 523 U.S. at 91. Second, like statutory standing, prudential limits on standing can be waived by failing to raise them. *RK Co. v. See*, 622 F.3d 846, 851-52 (7th Cir. 2010).[3] Thus, as with statutory standing, a decision could not reject an argument *sub silentio* that a defendant failed to raise and thus waived.

A. Prudential Limits on Third-Party Standing Bar Plaintiffs from Asserting Rights under *Roe-Casey*

At the outset, amicus Eagle Forum stresses that "the general state of third party standing law" is "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "is in need of what may charitably be called clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). That said, Wisconsin is certainly correct that the Supreme Court's decision in *Kowalski* calls into question third-party standing decisions in which courts have allowed abortion doctors to premise their third-party standing on their relationship with hypothetical future patients. Wisc. Br. at 30-31. Wisconsin also distinguishes several seemingly relevant decisions such as *Karlin* and *Doyle*, *supra*, based on not only their failure to consider relevant issues but also their

[3] Although the circuits are split on this issue, and the Supreme Court has not resolved the split in authority, the law in this Circuit is that prudential limits on standing case be waived.

misplaced reliance on a four-justice plurality in *Singleton. See id.* at 32-27. *Amicus* Eagle Forum concurs with Wisconsin's analysis and adds or bolsters two additional points that weigh against Plaintiffs' third-party standing to enforce their future patients' *Roe-Casey* rights.

First, Plaintiffs' challenge to Act 37 seeks to undermine legislation that Wisconsin enacted to protect women from Plaintiffs' practices, and that conflict of interest strains the closeness of the relationship. Third-party standing is even less appropriate when – far from an "identity of interests"[4] – the putative third-party plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 15 (2004) (rejecting third-party standing where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow,* 542 U.S. at 15 n.7. Under *Newdow,* Plaintiffs cannot premise jurisdiction on the third-party *Casey* rights of their hypothetical future potential women

[4] *See, e.g., Lepelletier v. FDIC,* 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.,* 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party … shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 810 (11th Cir. 1993) ("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

patients, when the goal of Plaintiffs' lawsuit is to enjoin Wisconsin from protecting those very same women from Plaintiffs' substandard care.

Second, the instances where courts have found standing for abortion doctors all involved instances where the law applied equally to all abortions and to all abortion doctors, so that the required "identity of interests"[5] was present between the women patients who would receive the abortions and the physicians who would perform the abortions. Here, by contrast, Wisconsin regulates in the interest of pregnant women who contemplate abortions and imposes no restrictions at all on hospital-based abortions. Also significant is the fact that prior laws that supported third-party standing put all abortion doctors into the same camp, subject to the same abortion-related regulation. For example, when the state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating all abortions, the doctors and the patients may have the identical interest. In pertinent part, however, Act 37 does not restrict abortion doctors who already have (or are willing to obtain) admitting privileges, so all abortion doctors do not share the same interests as future abortion patients. *These* abortion doctors (*i.e.*, Plaintiffs) do not even share the same interests as all abortion doctors. Without an identity of interests between Plaintiffs and future abortion patients, the relationship on which Plaintiffs seek to rely is not close enough to support third-

[5] *See* note 4, *supra* (collecting cases).

party standing.

For the forgoing reasons, and those argued by Wisconsin, Plaintiffs lack third-party standing to assert the *Roe-Casey* rights of Plaintiffs' future patients.

B. To the Extent that They Have Established *Their Own* Article III Standing, Plaintiffs Must Proceed under the Rational-Basis Test

When a party – like the Plaintiffs here – does not possess the right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, that party potentially may assert its own rights, albeit without the elevated scrutiny that surrounds third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. *See Euclid v. Ambler Realty Co.*; *Nectow v. City of Cambridge*; *Village of Belle Terre v. Boraas*. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth v. Seldin*.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977) (citations omitted). Lacking standing to allege violation of *their own* rights under *Casey*, Plaintiffs must bring their claim under the rational-basis test.

It appears Plaintiffs have elected to disregard their own standing, relying instead on their claim to represent their future patients. *See* Wisc. Br. at 29. Insofar as standing is the plaintiff's burden and must appear in the record, *Renne*, 501 U.S. at 316, Plaintiffs lack standing even to assert their own injuries. Indeed, as explained in the next section, there are other reasons to question Plaintiffs' standing under Article III.

C. The Named Defendants Cannot Redress Plaintiffs' Injuries from Act 37's Private Cause of Action

Because standing is not dispensed in gross, *Lewis*, 518 U.S. at 358 n.6, Plaintiffs must establish their right to relief for each form of relief that they seek. Thus, for example, even if Plaintiffs had standing to enjoin Act 37's penalties of up to $10,000, they would not necessarily also have standing to enjoin Act 37's private cause of action by their injured patients. Significantly, the defendants whom Plaintiffs have sued have absolutely no authority to provide any relief from the private causes of action, so injury from private litigation is not redressable in this litigation. *Okpalobi v. Foster*, 244 F.3d 405, 425-30 (5th Cir. 2001) (*en banc*); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158 (10th Cir. 2005).

Injury caused by independent parties not before this Court – *e.g.*, state courts or injured patients – is not reviewable under Article III:

> [T]there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly … trace[able] to the challenged action of the

> defendant, and not . . . the result [of] the independent action of some third party not before the court.

Defenders of Wildlife, 504 U.S. 555, 560 (interior quotations omitted, second through fourth alterations in original). Before this Court should even consider whether Plaintiffs have standing to avoid Act 37's penalties, therefore, *amicus* Eagle Forum respectfully submits that the Court should require evidence that the threat of future private liability would neither shutter the threatened clinics nor coerce them to obtain admitting privileges for their doctors, even if this Court allowed an injunction to stand against Act 37's future penalties.

III. THE PLAINTIFFS CANNOT PREVAIL ON THE MERITS

Although *amicus* Eagle Forum respectfully submits that this Court need not even reach the substantive merits because Plaintiffs lack both prudential and statutory standing, *see* Sections I-II, *supra*, this section shows that Plaintiffs are unlikely to prevail on the merits, should the Court reach the merits. Although this is the only criterion of the preliminary-injunction test argued in this brief, *amicus* Eagle Forum supports Wisconsin's arguments on the other criteria. *See* Wisc. Br. at 61-64. Because Plaintiffs have not made the showing required for the "extraordinary and drastic remedy" they seek, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), this Court should vacate the preliminary injunction.

A. Even If *Casey* Applied, Act 37 Would Not Trigger Undue-Burden Review under *Casey*

The *Casey* undue-burden test would not apply here, even if Plaintiffs had

standing. The district court's cramped reading of *Casey* restricts states' latitude to protect the health and safety of women who seek abortions, which conflicts with federalism and establishes an unsound policy. As read by the district court, *Casey* weakened Wisconsin's police power to protect its citizens in an area of traditional state and local concern (namely, public health) where the federal government lacks a corresponding police power. That leaves only the judiciary and abortion providers to protect the public from abortion providers, which is to say no one who is both qualified *and* disinterested to protect public health. *Amicus* Eagle Forum respectfully submits that that is not – and cannot be – the law.

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are 'primarily, and historically, ... matter[s] of local concern.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (*quoting Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)) (second and third alterations in *Medtronic*). For their part, the federal Executive and Congress lack a corresponding police power to take up the slack: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison*, 529 U.S. 598, 618-19 (2000). If states cannot regulate the abortion industry's excesses, and the federal government cannot, that leaves only the judiciary and the abortion industry itself.

The judiciary, of course, is ill-suited by training to determine or second-guess what medical procedures are safe or necessary. *Cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 766 (2007) (federal courts "are not social engineers") (Thomas, J., concurring). Indeed, judges are even less qualified to practice medicine than they are to practice social engineering. Because the judiciary cannot be a credible regulator, the district court's narrow view of the flexibility that *Casey* gives the states would make abortion essentially a self-regulated industry.

While some might argue that the public and the states should be able to trust abortion providers, that approach would be extremely naïve. Perhaps because of the politicization of this issue in the United States – caused in great part by the unprecedented *Roe* decision – abortion providers appear to regard themselves more as civil-rights warriors than as medical providers. As such, many abortion providers apparently believe that they simply cannot disclose anything negative about their abortion mission:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis*, ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted). The industry's

lack of transparency calls out for heightened regulation, vis-à-vis other, less-politicized medical practices.

Certainly, the abortion industry throws great public-relations and advocacy efforts into fighting disclosure of correlated health effects that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*) (opposition to South Dakota's requiring disclosure of abortion's correlation with suicide ideation); *K.P. v. Leblanc*, __ F.3d __, 2013 U.S. App. LEXIS 18423 (5th Cir. Sept. 4, 2013) (No. 12-30456) (opposition to Louisiana's tying limitation on liability to only those medical risks expressly disclosed in an informed-consent waiver). In other words, claims that states have targeted the abortion industry for *unwarranted* scrutiny have it precisely backwards.

Wisconsin has regulated an industry that cuts corners and hides information by requiring that that industry integrate itself – through its physicians' admitting privileges – into the larger medical community. Wisconsin thus has acted appropriately in seeking to increase the standard of care and to minimize unnecessary death and injury. Put another way, Wisconsin has required "medically competent personnel under conditions insuring maximum safety for the woman." *Menillo*, 423 U.S. at 10-11; *accord Mazurek*, 520 U.S. at 971; *Roe*, 410 U.S. at 150 (*quoted supra*). Under such circumstances, "legislatures [have] wide discretion to

pass legislation in areas where there is medical … uncertainty," and "medical uncertainty … provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. That holding from *Gonzales* applies even more so here.

Indeed, as *amicus* Eagle Forum reads *Casey*, that is precisely what the Supreme Court intended in adopting the *Casey* framework, which balances competing state and individual interests. Significantly, *Roe* concerned states' ability to *prohibit* abortions in the interest of the *infant* and the state's interest in that new life. By contrast, this litigation concerns the states' ability to *regulate* abortions in the interest of *pregnant women* who contemplate and receive abortions. On the application of the police power to protecting the *pregnant woman's* health, the Supreme Court never has ruled that the right to a particular abortion method trumps the states' interest in public health. As *amicus* Eagle Forum understands *Casey* – and contrary to how the district court understands *Casey* – the undue-burden analysis does not enter the equation for "necessary" regulation of abortion procedures to protect women seeking an abortion. *See Casey*, 505 U.S. at 878 (only *unnecessary* regulations of women's health trigger

the substantial-obstacle inquiry).

Specifically, following *Roe*, *Menillo*, and *Mazurek*, *Casey* allows that states "may enact regulations to further the health or safety of a woman seeking an abortion," "[a]s with any medical procedure." *Casey*, 505 U.S. at 878. The only prohibition in the *Casey* prong applicable to pregnant women is that "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* (emphasis added). To unpack this language to its constituent parts, an undue-burden violation for woman-focused state regulation requires that the plaintiff establish both of two elements: (1) a woman-based health regulation is *unnecessary;* and (2) that regulation has either the purpose or effect of presenting a *substantial* obstacle. If the regulation is necessary (*i.e.*, not "unnecessary"), however, that ends the analysis: there is no *Casey-Roe* violation.[6]

Here, this Court cannot seriously question the Wisconsin legislature with respect to finding that the abortion industry's unsupervised handoffs of abortion patients with abortion-related complications pose a risk to women's health. Under the plain terms of *Casey*, 505 U.S. at 878, the undue-burden issue does not apply.

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[6] Although legislative motives do not appear to be at issue, legislative intent is essentially irrelevant because a "substantial obstacle" is required without regard to legislative intent.

B. Act 37 Does Not Impose an Undue Burden on *Roe-Casey* Rights

Although this Court lacks jurisdiction to reach the *Casey* merits at all, *see* Section II.A, *supra*, and that the *Casey* undue-burden analysis does not even arise with states adopt *necessary* protections for pregnant women who receive abortions, *see* Section III.A, *supra*, Act 37 does not impose an undue burden under *Casey*. As Wisconsin demonstrates, the appellate courts that have considered this issue have determined that *Casey* allows states to require abortion doctors to have admitting privileges at a local hospital both as a legal matter and – to the extent that Act 37 indeed causes the closure of Plaintiffs' northern facilities – as a factual matter from increased travel distances to reach Plaintiffs' southern facilities or facilities in neighboring states. Wisc. Br. at 42-53.[7] When a state "law … serves a valid purpose" (as Act 37 does) and "has the incidental effect of making it more difficult or more expensive to procure an abortion," the added difficulty or expense "cannot be enough to invalidate it." *Casey*, 505 U.S. at 874. *Casey* requires more, but Plaintiffs have not provided sufficient proof of even their insufficient grounds, much less proof of sufficient grounds.

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[7] The Wisconsin brief cites decisions from the Fourth, Sixth, Eighth, and Ninth Circuits in support of admitting-privilege statutes or related statutes: *Greenville Women's Clinic v. Comm'r*, 317 F.3d 357, 363 (4th Cir. 2002); *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 598 (6th Cir. 2006); *Women's Health Ctr. of West Cnty., Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989); *Tuscon Woman's Clinic v. Eden*, 379 F.3d 531, 547 (9th Cir. 2004).

C. Act 37 Does Not Violate the Rational-Basis Test

To the extent that Plaintiffs have both jurisdiction and a cause of action to challenge Act 37 *without* asserting their future patients' rights under *Casey*, Plaintiffs must proceed under the rational basis test:

> It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955). Here, Wisconsin found that, once every sixteen days on average, Plaintiffs dump a women patient with abortion-related complications – many of which are life-threatening – into Wisconsin's hospital system without appropriate transitioning. *See* Wisc. Br. at 10-11. To defeat Wisconsin's legislative solution under the rational-basis test, Plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). Even if that were possible – and *amicus* Eagle Forum doubts that it is – Plaintiffs certainly have not made the showing that having their physicians obtain admitting privileges would not help transition Plaintiffs' patients who experience complications into safe care within Wisconsin's hospital system.

CONCLUSION

This Court should vacate the preliminary injunction and remand this

litigation to the District Court with instructions to dismiss Count III for failure to state a claim on which relief can be granted.

Dated: September 23, 2013

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CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned hereby certifies that, pursuant to Circuit Rule 31(e), this brief has been filed electronically.

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 5,519 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2013, a copy of the foregoing *amicus* brief – as an exhibit to the accompanying motion for leave to file the brief and Circuit Rule 26.1 Disclosure Statement – was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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