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INTRODUCTION

In an unprecedented decision, the Superior Court held that doctors and health care facilities lack third-party standing to challenge the denial of Medicaid coverage for medically necessary abortions on behalf of their patients and that, in any event, a proper plaintiff would have to exhaust a futile administrative process before bringing such a challenge. The Superior Court's conclusion that physicians and health care facilities lack standing is wholly unprecedented in the more than thirty years of litigation in the federal and state courts concerning abortion, is unsupported by Georgia law, and seriously jeopardizes the health and rights of Georgia women. The Superior Court's decision that Plaintiffs were required to exhaust their administrative remedies is equally flawed. The administrative process is not designed to resolve facial constitutional challenges such as the one Plaintiffs bring here. Moreover, requiring Plaintiffs to go through the administrative process would be an exercise in futility given the Agency's repeated statements that it is barred by state law from providing Plaintiffs the very relief they seek. This Court should reverse these unsupported and dangerous rulings and remand for consideration of the weighty constitutional claims raised.

STATEMENT OF JURISDICTION

The Supreme Court has exclusive jurisdiction over this case on appeal because it involves “the construction of . . . the Constitution of the State of Georgia.” See Ga. Const. art. VI, § 6, ¶ 2. Plaintiffs’ claim is that Georgia’s failure to provide Medicaid coverage for medically necessary abortions violates the State Constitution. The trial court’s decision is inextricably intertwined with this claim: absent third-party standing, there may be no meaningful way to challenge the restrictions at issue, as women may be chilled from pursuing their privacy rights, given the time sensitivity of any individual woman’s need for an abortion and the private nature of the right. The Supreme Court also has jurisdiction over this case pursuant to Article 6, Section 6, Paragraph 3(2) of the Georgia Constitution on the basis that this case is an action in equity.

JUDGMENT APPEALED AND DATE OF ENTRY

Plaintiffs seek review of the Fulton County Superior Court’s decision of December 12, 2006, dismissing their claims that Georgia’s denial of Medicaid coverage for medically necessary abortions violates the Georgia Constitution.

STATEMENT OF FACTS

I. Procedural History

In December 2003, seven reproductive health care providers, Feminist Women's Health Center, Planned Parenthood of Georgia, Inc., Planned Parenthood Reproductive Health Services, Inc., Atlanta Surgicenter, Inc., Columbus Women's Health Organization, Inc., Summit Medical Associates, P.C., and Atlanta Women's Medical Center, Inc., filed suit in the Fulton County Superior Court challenging Georgia's selective exclusion of medically necessary abortions from Georgia's otherwise comprehensive Medicaid program. Plaintiffs alleged that the exclusion of medically necessary abortions from Georgia's Medicaid program violated their patients' state constitutional right to privacy and guarantee of equal protection and sought declaratory and injunctive relief. On December 22, 2003, the court denied Plaintiffs' Motion for a Temporary Restraining Order. R-28. In August 2004, Plaintiffs moved for summary judgment. R-42. In March 2005, Plaintiffs amended the complaint to add Plaintiff-Physician Tyrone Cecil Malloy, M.D. R-62. In September 2006, Leslie Roe intervened as a plaintiff. R-84. Ms. Roe is a Medicaid-eligible woman suffering from spina bifida and paralysis who needed, but lacked the funds

for, a medically necessary abortion, and who only obtained the procedure by borrowing funds. R-81 (Roe ¶ 10).

On December 12, 2006, the Superior Court (Brasher, J.) dismissed the case, holding that Dr. Malloy and the other healthcare providers (hereinafter “Provider-Plaintiffs”) lacked standing to raise the rights of their patients and Ms. Roe should have pursued administrative remedies prior to bringing suit. R-90 (Order at 4-7). On January 11, 2007, Plaintiffs filed a timely notice of appeal to this Court. R-91.

II. The Underlying Challenge

Plaintiffs brought this action challenging the discriminatory treatment afforded medically necessary abortions among services covered by Georgia Medicaid. Through its Medicaid program,¹ Georgia provides a comprehensive array of services to eligible residents, including physician services, in-patient and out-patient hospital services, prescription drug coverage, x-ray and laboratory tests, mental health services, and family planning services, among others. See 42 U.S.C. §§ 1396a(a)(10)(A),

¹ Medicaid is a joint federal-state program that provides medical assistance to the poor. 42 U.S.C. §§ 1396-1396v; 42 C.F.R. § 430.0; O.C.G.A. § 49-4-142.

1396d; 42 C.F.R. §§ 440.10-.50, 440.120, 440.160, 441.17, 441.20-.22;
O.C.G.A. §§ 49-4-140 to 157.

Georgia's Medicaid program pays for covered services when the services are medically necessary. Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Medicaid/Peachcare for Kids, Definition 15 and § 105(k) (July 1, 2004). Among covered services, however, abortions are singled out for unique restrictions. Georgia provides Medicaid coverage for abortion only when the pregnancy is life-threatening or results from rape or incest.² Women whose pregnancies threaten their health, but not their lives, are denied Medicaid coverage for the care they need.³ In contrast,

² Although federal legislation, known as the Hyde Amendment, limits the use of *federal* Medicaid funds for abortions to cases where the pregnancy threatens the woman's life or results from rape or incest, Pub. L. No. 108-7, div. G, tit. V, ! 509(a), 117 Stat. 11, 344 (2003), states remain free to cover other abortions, see id. at ! 509(b), (c), and more than fifteen do so.

³ See R-48, Exhibit B (Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Physician Services § 904.2 and App. H (July 1, 2004)); Exhibit C (Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Advanced Nurse Practitioner Services § 904.2 and App. G (July 1, 2004)); Exhibit D (Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Hospital Services §

poor women in Georgia who carry their pregnancies to term are afforded coverage for all medically necessary care. Abortion is the only pregnancy-related service for which Georgia requires a showing that the pregnancy is life-threatening or the result of rape or incest.

Denial of abortion coverage for women whose pregnancies threaten their health has serious negative consequences for women, as two examples from Dr. Malloy, a high-risk obstetrician-gynecologist, illustrate:

I remember one recent devastating case particularly vividly. My patient – I’ll call her Maria – was a twenty-two-year-old indigent woman. As with other women I have observed with sickle cell disease, the pregnancy exacerbated Maria’s condition. Approximately sixteen weeks into her pregnancy, Maria was suffering a sickle cell crisis almost every forty-eight hours, and the pain was excruciating. Maria desperately wanted to end her pregnancy. She couldn’t afford an abortion, however, and because her life wasn’t in danger, Medicaid would not cover the procedure. Since she could not get the abortion, Maria had to be hospitalized and undergo what is known as an exchange transfusion, where we removed all of her blood and replaced it with new blood. Even after the exchange transfusion, she faced recurring crises. She had to remain in the hospital so we could administer

911.1 and App. I (July 1, 2004)); Exhibit E (Div. of Med. Assistance, Ga. Dep’t of Cmty. Health, Policies and Procedures for Family Planning Clinic Services § 903 (July 1, 2004)); Exhibit F (Div. of Med. Assistance, Ga. Dep’t of Cmty. Health, Policies and Procedures for Nurse-Midwifery Services § 904.2 and App. I (July 1, 2004)); Exhibit G (Ga. Dep’t of Cmty. Health, Billing Manual § 6.5 (July 1, 2004)).

morphine and other narcotics every three hours to relieve her pain. Eventually, after spending about three months in the hospital, Maria was far enough along in the pregnancy where we could deliver the baby and ease her crises. The baby was quite premature and remained in the hospital for several months. Medicaid paid for all the costs associated with these hospitalizations.

R-15 (Malloy ¶ 17).

Michelle was thrilled to be pregnant, but very early in her pregnancy, she developed hyperemesis gravidarum, a syndrome accompanied by vomiting so pernicious that it may result in weight loss; dehydration; acidosis from starvation; or hypokalemia, a potentially dangerous condition caused by a lack of potassium that can trigger psychosis, delirium or hallucinations, among other things. . . . When Michelle became pregnant, she could barely keep anything down. When I first saw her, she had lost almost thirty pounds, a development that itself threatened the health of the fetus. At around seven weeks into her pregnancy, she had to be admitted to the hospital so that we could feed her intravenously. Although this helped, Michelle was still suffering from severe nausea and vomiting, and abdominal pains. She faced an extended hospital stay if she continued her pregnancy. Michelle decided to terminate her pregnancy, but she lacked the money for the abortion. Although Medicaid would cover her hospitalization, it would not pay for the abortion, and Michelle suffered as a result. She had to stay in the hospital for four weeks, in pain and hooked up to feeding tubes, while she struggled to gather the money. She eventually raised the funds for the abortion, but only after a delay of almost a full month of intense suffering on her part.

R-15 (Malloy ¶ 26). These women are not unique. For many women, pregnancy severely compromises their health by either exacerbating existing medical problems or creating new ones.⁴ For instance, Plaintiff Roe, who suffers from hydrocephalus⁵ and spina bifida, is paralyzed from the waist down and has severe spinal, circulatory, kidney, bladder and urinary problems. R-81 (Roe

⁴ A range of chronic health complications, such as severe asthma, diabetes, hypertension, severe liver disease, and epilepsy, can drastically increase the health risk from pregnancy. R-15 (Malloy ¶¶ 19-24); R-11 (Gelberg ¶¶ 18-19). Although pregnancy generally is not life-threatening for women with these conditions, continuation of pregnancy in these circumstances severely, and often permanently, undermines their health. R-15 (Malloy ¶¶ 13, 15). Even for women with no underlying illness, pregnancy can create serious health risks, such as hypertension, preeclampsia, strokes, gestational diabetes, and hyperemesis gravidarum. R-15 (Malloy ¶¶ 7, 10-11, 26); R-11 (Gelberg ¶¶ 15-16).

⁵ Hydrocephalus is a condition in which there is abnormal accumulation of fluid inside the brain. R-81 (Roe ¶ 3).

¶¶ 3-6). When Ms. Roe discovered that she was pregnant, her physician informed her that if she continued the pregnancy, she would likely need dialysis; that her condition might adversely affect the development of the fetus; and that, in any event, it was very unlikely that she would be able to carry the pregnancy to term. R-81 (Roe ¶ 8). Because Medicaid does not cover medically necessary abortions, Ms. Roe was only able to obtain the procedure because she was able to obtain a loan. R-81 (Roe ¶ 10).

As in the case of Plaintiff Roe, Medicaid-eligible women by definition lack the funds to pay for necessary medical care. In an effort to scrape together funds for an abortion, poor women make enormous sacrifices, diverting funds for subsistence and basic life necessities. R-12 (Hawkins ¶¶ 10-11); see also R-11 (Gelberg ¶ 7); R-10 (Swanson ¶¶ 8, 11). The struggle to raise the necessary funds takes time, pushing women to later and riskier abortions. R-12 (Hawkins ¶ 10); R-14 (Henshaw ¶¶ 15-16); R-15 (Malloy ¶¶ 7, 27). For women for whom abortions are medically necessary, delay also means that they must live with their continuing, often worsening, health condition each day that they are delayed. See, e.g., R-15 (Malloy ¶¶ 7, 26, 27). Some become too sick to work, R-11 (Gelberg ¶ 15), and some face hospitalization, R-15 (Malloy ¶ 26). Still other women

never secure the money for an abortion and are forced to continue pregnancies that threaten their health. R-11 (Gelberg ¶¶ 14-16); R-12 (Hawkins ¶ 15); R-14 (Henshaw ¶¶ 10-11); R-15 (Malloy ¶ 17); R-10 (Swanson ¶ 9).

Georgia's denial of Medicaid coverage for medically necessary abortions also comes at a steep price for the Provider-Plaintiffs. The Provider-Plaintiffs sometimes treat patients needing medically necessary abortions at reduced or no cost in an effort to prevent unnecessary suffering. R-52 (Malloy Supp. ¶ 3); R-9 (Dudley ¶¶ 7, 9); R-55 (Dudley Supp. ¶ 4); R-11 (Gelberg ¶¶ 4, 11-13, 17-19, 21); R-54 (Gelberg Supp. ¶ 4); R-12 (Hawkins ¶¶ 5, 9, 15, 17); R-53 (Hawkins Supp. ¶ 5); R-51 (McLendon ¶ 5); R-47 (Melnik ¶ 4). The Provider-Plaintiffs also collectively spend hundreds of hours each year assisting Medicaid-eligible patients in gathering money for their abortions, R-9 (Dudley ¶¶ 7, 9); R-55 (Dudley Supp. ¶ 5); R-11 (Gelberg ¶¶ 11-13, 15, 17, 19, 21); R-54 (Gelberg Supp. ¶ 3); R-12 (Hawkins ¶¶ 7, 9, 15, 17); R-53 (Hawkins Supp. ¶ 4); R-51 (McLendon ¶ 4); R-47 (Melnik ¶ 5), and offering counseling to patients in distress because of their inability to afford medically necessary abortions, R-55 (Dudley Supp. ¶ 6); R-54 (Gelberg Supp. ¶ 3); R-53 (Hawkins Supp. ¶ 4); R-51 (McLendon ¶ 4); R-47 (Melnik ¶ 5). The Provider-Plaintiffs thus forego significant income and expend

considerable resources to address the needs the State leaves unmet by virtue of the policies at issue. These resource drains and financial losses result directly from the State's denial of Medicaid coverage for medically necessary abortions.

STANDARD OF REVIEW

“In reviewing the grant of a motion to dismiss, an appellate court must construe the pleadings in the light most favorable to the appellant with all doubts resolved in the appellant's favor.” Ewing v. City of Atlanta, 281 Ga. 652, 242 S.E.2d 100, 101 (2007) (citation and internal quotation marks omitted). “A motion to dismiss should only be granted if the allegations of the complaint, construed most favorably to the plaintiff, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts.” Id. (citation, internal quotation marks, and footnote omitted).

ENUMERATION OF ERRORS

1. The Superior Court erred in holding that the Provider-Plaintiffs lacked standing to raise the constitutional rights of their patients.
2. The Superior Court erred in requiring exhaustion of administrative remedies prior to filing suit.

ARGUMENT AND CITATION OF AUTHORITIES

- I. THE SUPERIOR COURT'S HOLDING THAT THE PROVIDER-PLAINTIFFS LACK STANDING IS CONTRARY TO UNIFORM PRECEDENT AROUND THE COUNTRY AND IS WHOLLY UNSUPPORTED BY GEORGIA LAW.

The Superior Court's unprecedented ruling that the Provider-Plaintiffs lack standing to raise the rights of their patients flies in the face of more than thirty years of precedent from the United States Supreme Court and state supreme courts around the country. *Indeed, to the best of Plaintiffs' knowledge, if the decision is allowed to stand, Georgia would be the only court in the nation to hold that physicians and clinics lack standing to bring a facial challenge to an abortion restriction on behalf of their patients.* Nothing in Georgia law dictates such a result. To the contrary, Georgia law supports a finding that medical providers have standing to raise the rights of their patients. Moreover, the Superior Court's ruling severely restricts the ability of Georgia's poorest women to vindicate their

constitutional rights and protect their health. Because the Superior Court’s decision is wholly unsupported by Georgia law, is contrary to the law established by every other court in the nation, and imposes serious medical risks on Georgia’s neediest women, this Court should reverse.

For over thirty years, federal and state courts throughout the nation have consistently held that doctors and clinics, like the Provider-Plaintiffs in this case, have standing to raise the rights of their patients to challenge abortion restrictions. For example, in Singleton v. Wulff, 428 U.S. 106 (1976), the United States Supreme Court considered a case remarkably similar to the one at bar – a case brought by physicians challenging the denial of Medicaid coverage for abortions – and held that the physicians had third-party standing to raise the constitutional rights of their patients. Id. at 112-18 (plurality opinion).

In holding that physicians could raise the rights of their patients, the Court explained that the determination of whether third-party standing exists involves two distinct questions: First, do the parties before the court allege an injury in fact. As to this question, the Court found that “there is no doubt now that the respondent-physicians suffer concrete injury [from the denial of Medicaid coverage for abortions because they] allege that they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid

program were it not for [the challenged provisions].” Id. at 112-13; see also Planned Parenthood Ass’n of the Atlanta Area, Inc. v. Miller, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991) (noting that when “legislation inflicts direct economic harm on the physician, he suffers concrete injury” sufficient to satisfy the injury in fact requirement and to enable him to raise the rights of his patients challenging an abortion restriction).

Second, consistent with Singleton, a court must ask whether the plaintiffs are proper proponents of the legal right on which they base their suit. Singleton, 428 U.S. at 112. As Singleton explains, while federal courts should generally hesitate before allowing a party to raise the rights of someone not before the court, “[I]ike any general rule, . . . this one should not be applied where its underlying justifications are absent.” Id. at 113-14. Thus,

[i]f the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary. Furthermore, the 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.

Id. at 114-15. Moreover, “[i]f there is some genuine obstacle [to the party’s assertion of her own right] . . . the third party’s absence from court loses its

tendency to suggest that his right is not truly at stake . . . and the party who is in court becomes by the default the right's best available proponent.” Id. at 116.

“Application of these principles to the present case [in which physicians sought to represent the rights of their patients seeking Medicaid coverage for abortions] quickly yields the proper result.” Id. at 117. In Singleton, as here, “[t]he closeness of the relationship is patent A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician’s being paid by the State.” Id. “Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State’s interference with, or discrimination against, that decision.” Id. (citation omitted).

In addition, as Singleton emphasized, Medicaid-eligible women seeking abortions face serious obstacles to raising their own rights in that they “may be chilled . . . by a desire to protect the very privacy of [their] decision[s].” Id. at 117.⁶

And they face the significant challenge of attempting to litigate their constitutional

⁶ Singleton acknowledged that women could bring a lawsuit pseudonymously and that class actions may be possible, but noted that “if 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.”

claims while their health deteriorates and their pregnancy progresses. Thus, Singleton held “that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.” Id. at 118.

Every subsequent court – state and federal – to have considered the question has followed Singleton and held that physicians and clinics have standing to raise the rights of their patients in challenges to abortion restrictions. Thus, in more than a dozen cases since Singleton, the United States Supreme Court has permitted medical providers to raise the rights of their patients in challenges to abortion restrictions.⁷

Id. at 117-18.

⁷ See Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (plaintiffs were physicians, clinics, city and county); Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) (clinics and physician); Stenberg v. Carhart, 530 U.S. 914 (2000) (physician); Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam) (physicians and physician-assistant); Lambert v. Wicklund, 520 U.S. 292 (1997) (per curiam) (physicians and other medical personnel); Dalton v. Little Rock Family Planning Servs., 516 U.S. 474 (1996) (per curiam) (clinics and physicians); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (clinics and physician); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (clinics, physicians, and other health care professionals); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (physicians, clinics, medical society and individual insurance purchaser); Simopoulos v. Virginia, 462 U.S. 506 (1983) (physician); Planned Parenthood Ass’n of Kans. City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983) (clinics and physicians); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (clinics and physician); Colautti v.

Franklin, 439 U.S. 379 (1979) (physician and medical society); Sendak v. Arnold, 429 U.S. 968 (1976) (physicians); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (clinic and physicians). The Eleventh Circuit has likewise recognized that physicians have standing to raise the rights of their patients in challenges to abortion restrictions. Miller, 934 F.2d at 1465 n.2.

State courts too have uniformly accorded doctors and clinics standing to raise the rights of their patients in state constitutional challenges to abortion restrictions. Indeed, at least eleven state supreme courts – including the supreme courts of Florida, Mississippi, Tennessee, Texas, and West Virginia – have all decided state constitutional challenges to abortion restrictions where medical providers were the plaintiffs, thereby recognizing the ability of medical providers to raise the rights of their patients.⁸ And many states have done so in cases virtually identical to the one at bar – state constitutional challenges to the denial of Medicaid coverage for

⁸ See, e.g., Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247 (Ind. 2003) (plaintiffs were clinics and physicians); No. Fla. Women’s Health and Counseling Servs., Inc. v. State, 866 So. 2d 612 (Fla. 2003) (clinics, physicians, and women’s rights organizations); Bell v. Low Income Women of Tex., 95 S.W.3d 253 (Tex. 2002) (clinics and physicians); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28 (Ariz. 2002) (physicians); State, Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001) (clinic and physicians); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1 (Tenn. 2000) (clinics and physicians); Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620 (N.J. 2000) (clinics, physicians, and medical society); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 846-47 (N.M. 1998) (clinics, physicians, and advocacy group); Pro-Choice Miss. v. Fordice, 716 So.2d 645, 662-65 (Miss. 1998) (clinic, physicians, and advocacy group); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997) (clinic, physician, and medical societies); Women’s Health Care Ctr. of W. Va. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993) (clinics and advocacy group); see also Mahaffey v. Attorney General, 564 N.W.2d 104 (Mich. Ct. App. 1997) (physicians and city council president); Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993)

abortions.⁹ *In fact, Plaintiffs are not aware of any court’s holding that physicians and clinics lack standing to raise the rights of their patients seeking to challenge an abortion restriction. As Wright and Miller have explained, “[i]n the wake of [the United States Supreme Court] decisions, third-party standing has become firmly established with respect to a number of easily categorized relationships. . . . For example, doctors are allowed to protect the rights of patients”* *See Charles Alan Wright, Arthur R. Miller &*

(clinic, physician, and counselors).

⁹ *See* Humphreys, 796 N.E.2d 247 (Ind. 2003); Bell, 95 S.W.3d 253 (Tex. 2002); Simat Corp., 56 P.3d 28 (Ariz. 2002); Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001); New Mexico Right to Choose/NARAL, 975 P.2d 841 (N.M. 1998); Women’s Health Care Ctr. of West Virginia, 446 S.E.2d 658 (W. Va. 1993).

Edward H. Cooper, Federal Practice and Procedure § 8531.5
(2002) (footnote omitted).

In the face of this uniform precedent, the Superior Court became the only court in the nation in more than thirty years to hold that doctors and clinics lack standing to raise the rights of their patients in challenges to abortion restrictions. The court appears to have rested its decision on a lack of precedent from this Court that squarely addresses the issue. But, in fact, existing Georgia law, as well as the harmful effects for women of the denial of standing, fully support the recognition of standing here. Moreover, nothing in Georgia law supports such a cramped and unprecedented holding.

Indeed, in a variety of contexts, this Court has already recognized the ability of litigants to raise the rights of others not before the court. Thus, for example, in Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989), this Court considered a state constitutional challenge to a statute that prohibited children and mentally handicapped people from testifying in court. Although the only claim in the lawsuit was based on the equal protection rights of the children and mentally handicapped individuals, this Court afforded the State standing to raise those rights. Id. at 407, 383 S.E.2d at 557. The Court did not insist that children and mentally handicapped

individuals bring their own claims through a next friend or guardian, nor did it require that the State be able to assert its own constitutional claims in the case.¹⁰

Similarly, in Aldridge v. Georgia Hospitality & Travel Association, this Court held that associations have standing to raise the rights of third parties – their members – who were not before the Court. 251 Ga. 234, 235-36, 304 S.E.2d 708, 710 (1983). Faced with an absence of Georgia precedent, this Court followed the “ample federal precedent and legal commentary” and adopted the test for

¹⁰ In this respect, the Superior Court was simply mistaken when it stated that “Georgia has extended third-party standing for constitutional challenges only when the statute infringes upon the constitutional rights of that third party.” R-90 (Order at 4). See Agan v. State, 272 Ga. 540, 542 n.1, 533 S.E.2d 60, 62 n.1 (2000) (noting that as long as statute has an adverse impact on party before court, “[t]he statute in question need not affect a constitutionally-protected right in order to give the statute’s attacker standing to question the statute’s constitutionality”).

associational standing set out by the United States Supreme Court. Id.; see also Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta, 281 Ga. 342, 344-45, 638 S.E.2d 307, 312 (2006) (holding that association had standing to raise the rights of its members); Bo Fancy Prods. Inc. v. Rabun County Bd. of Comm'rs, 267 Ga. 341, 344-45, 478 S.E.2d 373, 375-76 (1996) (following United States Supreme Court's precedent on overbreadth standing). This test parallels the test for third-party standing, further supporting that Georgia law recognizes third-party standing. For example, associational standing, like third-party standing, requires a relationship between the litigant, the third party and the right the litigant seeks to protect. Compare Aldridge, 251 Ga. at 236, 304 S.E.2d at 710 (recognizing associational standing where, inter alia, "the interests [the organization] seeks to protect are germane to the organization's purpose") with Singleton, 428 U.S. at 117 (according physicians third-party standing to raise the rights of their patients because, inter alia, "the constitutionality protected abortion decision is one in which the physician is intimately involved").

Thus, Georgia law suggests adherence to, not departure from, settled principles of third-party standing, including the recognition that physicians and clinics may raise the rights of their patients challenging abortion restrictions. There is certainly nothing in Georgia law that suggests that this Court would take a more

cramped view of standing to vindicate state constitutional rights than have the courts of its sister states and the United States Supreme Court.

Moreover, as other courts have noted, recognizing third-party standing here is critical to the preservation of a woman's right to seek an abortion.

[I]f the medical facilities are not allowed to raise the constitutional rights of their women patients, such rights could easily become diluted. Women might be forced to suffer unjustified restrictions on their right to [an] abortion. . . . Such dilution is even more likely in a case like this, where women whose rights are affected may be reticent to give up the privacy of their abortion decision by coming forward as plaintiffs in a law suit.

Women's Med. Ctr. of Providence, Inc. v. Roberts, 512 F. Supp. 316, 324 (D.R.I. 1981). The need to allow medical providers to challenge laws that restrict access to abortion is particularly acute here where the challenged restriction has serious, adverse effects on the women's health,¹¹ making it all the more difficult for even a

¹¹ See, e.g., R-15 (Malloy ¶¶ 16-17, 19-24) (describing medical conditions, such as sickle cell disease, diabetes, hypertension, heart disease, renal disease, autoimmune disease, severe asthma, and epilepsy that necessitate medically necessary abortions); R-11 (Gelberg ¶¶ 14-19)

patient brave enough to bring such a suit to do so, and all the more dangerous for a court to deny women the most realistic means of accessing the courts.¹²

Because the Superior Court's decision denying the Plaintiff-Providers standing is unsupported by Georgia law, contrary to the decisions of every court to

(describing range of medical conditions, ranging from sickle cell anemia to heart problems, requiring medically necessary abortions).

¹² The fact that one individual woman did muster the ability to join this lawsuit does not diminish the obstacles that most women face in participating in such a challenge. Indeed, the fact that most challenges to abortion restrictions are brought by health care providers – and not individual women – is testament to the barriers to women's participation in such cases. Even in this case, the litigation was pending for more than two years before an individual woman sought to intervene.

have considered the issue, and seriously threatens the ability of women to protect their health and their constitutional rights, it should be reversed.

II. THE SUPERIOR COURT ERRED IN HOLDING THAT EXHAUSTION WAS REQUIRED.

The Superior Court's ruling that Plaintiffs were required to pursue administrative remedies before filing the instant suit is flawed for three reasons.¹³ First, under the express terms of the regulatory scheme governing the State's Medicaid program, there is no administrative remedy available to Plaintiffs because appeals to the Agency are only permitted for erroneous denials of coverage for treatment covered by the existing policies. Second, exhaustion is not required because Plaintiffs are bringing a facial constitutional challenge – a challenge that is within the expertise of the judiciary, not of the Agency, to decide. Third, even if Plaintiffs technically had an administrative remedy available to them, which they do not, pursuing that remedy is not required where, as here, it is futile because the Agency has repeatedly taken the position that it is powerless to grant the relief that Plaintiffs seek.

¹³ Because the Superior Court had already found that the Provider-Plaintiffs lacked standing, it discussed exhaustion only with respect to Plaintiff Roe. Because Plaintiffs believe that the Provider-Plaintiffs have standing, however, we address the argument as it relates to both Ms. Roe and the Provider-Plaintiffs.

A. There Is No Administrative Process Available to Plaintiffs.

Contrary to the Superior Court’s conclusion, requiring administrative exhaustion is inappropriate in this case because no administrative process exists to resolve the type of claims Plaintiffs bring – claims that the terms of Georgia’s Medicaid scheme themselves violate the State Constitution.

With respect to Medicaid recipients like Ms. Roe, the governing statute entitles her to a hearing only if she alleges that “any medical or remedial care or service . . . should be reimbursed under the terms of the state plan which was in effect on the date on which such care or service was rendered or is sought to be rendered.” O.C.G.A. § 49-4-153(b)(1) (emphasis added); see also Ga. Comp. R. & Regs. 350-4-.02(1)(a) (same). In other words, the administrative process allows a recipient to challenge a denial of coverage only when she claims that under the terms of the state policy her treatment should have been covered; it does not permit her to challenge the terms of the policy itself. Under Georgia Medicaid, coverage for abortions is limited to those circumstances when the pregnancy is life-threatening or results from rape or incest. Coverage is not available for women whose pregnancies threaten their health, but not their lives.¹⁴ Thus,

¹⁴ See supra notes 2-3 and accompanying text.

the administrative process does not provide Ms. Roe the means to address and resolve her claim that the policy itself violates the State Constitution.

The provisions governing the administrative process available to the Provider-Plaintiffs contain a similar limitation. Like recipients, providers may not seek administrative review based on claims that existing Agency policies are unconstitutional, but rather may only seek administrative review on claims that payment is due “in accordance with” such policies. See Ga. Comp. R. & Regs. 350-4-.01(1)(a) (allowing providers to seek administrative review when they are aggrieved by the denial of “medical assistance” for services rendered); O.C.G.A. § 49-4-141(5) (defining “medical assistance” as payment to a provider of the cost of services rendered “in accordance with . . . all applicable laws of this state, the state plan, and regulations of the department which are in effect on the date on which the items are rendered”); Ga. Comp. R. & Regs. 350-1-.01(12) (same).

Thus, the governing statute and regulations confine the administrative process to the adjudication of complaints about the manner in which existing rules and policies are applied. Because the existing administrative framework cannot be utilized to resolve Plaintiffs’ constitutional challenge to

the policies themselves, this Court must reverse the Superior Court's ruling that Plaintiffs should have exhausted administrative remedies.

B. Exhaustion Is Not Required Because Plaintiffs Have Brought a Facial Constitutional Challenge, the Determination of Which Is Within the Expertise of the Judiciary, Not of the Agency.

Even if Plaintiffs had an administrative process available to them, which they do not, exhaustion would not be required because a court – not an administrative agency – is the appropriate forum for the resolution of Plaintiffs' facial constitutional challenge. This Court has repeatedly held that exhaustion is not required for facial constitutional challenges. As this Court has explained, "it is important to distinguish between 'as applied' and 'facial' challenges." Greater Atlanta Homebuilders Ass'n v. DeKalb County, 277 Ga. 295, 296, 588 S.E.2d 694, 696 (2003). Although litigants raising as-applied challenges generally must first exhaust their administrative remedies, litigants raising facial constitutional challenges have no such requirement. Id. at 296-97, 588 S.E.2d at 696; see also King v. City of Bainbridge, 272 Ga. 427, 428, 531 S.E.2d 350, 351 (2000) (no exhaustion requirement for facial challenges); OS Adver. Co. of Ga., Inc. v. Rubin, 263 Ga. 761, 763, 438 S.E.2d 907, 909 (1994) (same), overruled on other

grounds by Ashkouti v. City of Suwanee, 271 Ga. 154, 516 S.E.2d 785 (1999).

In the face of this Court’s precedent, the Superior Court, without citation to any authority, held that this rule did not apply here because Plaintiffs seek to challenge an agency rule, R-90 (Order at 6), rather than a statute or ordinance. But the lower court’s novel exception lacks any support in either case law or reason.¹⁵ As an initial matter, numerous courts have noted that the rule that exhaustion is not required when plaintiffs mount a facial constitutional challenge applies to statutes and regulations alike. See, e.g., Georgia Hosp. Assoc. v. Dep’t of Med. Assistance, 528 F. Supp. 1348, 1353 (N.D. Ga. 1982) (rejecting argument that plaintiffs were required to exhaust administrative remedies before bringing facial constitutional challenge to regulation because “exhaustion is not required where plaintiffs attack the constitutionality of the statute or

¹⁵ Although the Superior Court cites Agan, 272 Ga. 540, 533 S.E.2d at 62-63 (R-90 (Order at 6)), nothing in that case supports a finding that Plaintiffs here were required to pursue administrative remedies. Indeed, the quoted language says only that (1) “while [a] party is engaged in administrative proceedings,” and (2) can raise his constitutional claim in that proceeding, courts have not permitted such a party to “disrupt the administrative proceedings by seeking a declaratory judgment” in court. Id. Neither of those prerequisites – a current administrative proceeding or the ability to raise this facial challenge in such a proceeding – is present here.

regulation under which the administrative agency acts, and the case does not turn upon a factual determination requiring administrative expertise” (emphasis added)); Presbytery of Seattle v. King County, 787 P.2d 907, 914 (Wash. 1990) (en banc) (holding administrative exhaustion not required for facial challenge to regulation); Colo. Dep’t of Pub. Health and Env’t v. Bethell, 60 P.3d 779, 785-86 (Colo. Ct. App. 2002) (same).

Nor is there any good reason to require Plaintiffs to go through the administrative process. “Courts justify the requirement of exhaustion on grounds that it permits the administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.” Barnes v. City of Atlanta, 281 Ga. 256, 258, 637 S.E.2d 4, 6 (2006) (internal quotation marks omitted). But the adjudication of a facial constitutional challenge is not within the Agency’s “special competence.” Because the instant case turns solely on a question of constitutional law, there is no need for the Agency to develop a factual record. Nor does the Agency have any expertise relevant to this constitutional question – whether the Georgia Constitution prohibits the State from denying coverage for medically necessary, but non-lifesaving, abortions. Rather, it is the unique responsibility of the courts to decide such constitutional questions. See, e.g., Int’l Bus. Machs. Corp.

v. Evans, 213 Ga. 333, 338, 99 S.E.2d 220, 224 (1957) (noting Court’s “exclusive constitutional authority and duty to declare void any act of the legislature that offends the State Constitution”); see also Marbury v. Madison, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

The only other reason the Superior Court gave for its departure from the general rule that exhaustion is not required prior to a facial constitutional challenge is that the Agency should have the opportunity to interpret its own regulation. R-90 (Order at 6). But the claims in this case have nothing to do with the Agency’s interpretation of its policy. Rather, the sole question in this case is whether the Georgia Constitution allows the Agency to deny coverage for abortions that are medically necessary but not life-saving – a question that lies within the expertise of the judiciary – not of the Agency – to resolve.

- C. Because the Agency Has Repeatedly Stated That It Is Powerless to Grant the Relief Plaintiffs Seek, Requiring Plaintiffs to Pursue an Administrative Remedy Would Be Futile and Is Therefore Not Required.

Administrative exhaustion is also unwarranted because pursuit of an administrative remedy would be futile. See, e.g., City of Albany v. Oxford Solid Waste Landfill, Inc., 267 Ga. 283, 284, 476 S.E.2d 729, 730 (1996)

(holding exhaustion of land use permit claim not required where it would be futile given the city commission's order to deny the permit); Powell v. City of Snellville, 266 Ga. 315, 317, 467 S.E.2d 540, 542 (1996) (holding exhaustion of rezoning application was not required because it would be "a futile act" where city twice rezoned land over property owner's objections and purposefully imposed land use restrictions contrary to owner's intent); Wilson v. Ledbetter, 260 Ga. 180, 182, 390 S.E.2d 846, 847-48 (1990) (holding that exhaustion was not required where agency's own rules precluded review and adequate remedy); Hilton Constr. Co., Inc. v. Rockdale County Bd. of Educ., 245 Ga. 533, 539, 266 S.E.2d 157, 162 (1980) ("Impossibility or improbability of obtaining adequate relief by pursuing administrative remedies is often a reason for dispensing with the exhaustion requirement." (citation and internal quotation marks omitted)).

In this case, the Agency has repeatedly taken the position that it is barred by state statutes and the State Constitution from granting the relief sought by Plaintiffs, namely coverage of medically necessary abortions. See, e.g., R-59 (Defs.' Resp. to Pls.' Mot. for Summ. J. at 13-22); R-27 (Defs.' Initial Resp. to Pls.' Mot. for TRO and Prelim. Inj. at 5-11).¹⁶ The fact

¹⁶ For example, the Agency has consistently taken the position that

that the Agency's top administrator has taken the position – whether or not legally correct – that the Agency is legally precluded from covering

because no federal money is available to cover medically necessary abortions, the Georgia Constitution, as well as state statutes requiring the Agency to maximize federal financial participation, bar the Agency from covering such procedures. See R-59 (Defs.' Resp. to Pls.' Mot. for Summ. J. at 18-22); R-27 (Defs.' Initial Resp. to Pls.' Mot. for TRO and Prelim. Inj. at 5-9). Similarly, the Agency takes the position that it is powerless to grant the relief that Plaintiffs seek because coverage of medically necessary abortions would, in the Agency's view, require a new appropriation from the legislature. R-27 (Defs.' Initial Resp. to Pls.' Mot. for TRO and Prelim. Inj. at 9-11).

Plaintiffs, of course, dispute that any statute or constitutional provision precludes the Agency from covering medically necessary abortions. Who has the better of the argument, though, is of no consequence to the exhaustion question. With respect to exhaustion, the only relevant factor is that the Agency believes itself to be powerless to grant relief, making exhaustion futile and unnecessary.

medically necessary abortions renders the administrative process useless. The Agency cannot have it both ways: to the extent that it argues that it is barred by state law from covering medically necessary, but not lifesaving, abortions, it cannot also argue that Plaintiffs are required to go through the administrative process.

* * *

For all of these reasons, the Superior Court erred in dismissing Plaintiffs' claims for failure to exhaust administrative remedies and this Court should reverse.

CONCLUSION

The Superior Court's decision contravenes the uniform precedent from courts throughout the nation, Georgia law, and reason and must be reversed.

Respectfully submitted,

Gerald Weber (Ga. Bar No. 744878)
(by Louise Melling by expressed
permission)

Margaret Garrett (Ga. Bar No. 255865)
ACLU Foundation of Georgia
75 Piedmont Avenue, Suite 514
Atlanta, GA 30303
(404) 523-6201

Louise Melling*
Jennifer Dalven*
Charu A. Chandrasekhar*
ACLU Foundation
Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2633

*Admitted *pro hac vice*

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served by overnight express delivery a copy of the Brief for Plaintiffs-Appellants upon the following counsel for Defendants-Appellees:

Michelle Townes
Assistant Attorney General
Office of the Attorney General
40 Capitol Square SW
Atlanta, GA 30334-1300

DATED this the 3rd day of May, 2007.

Respectfully submitted,

Charu A. Chandrasekhar*
ACLU Foundation
Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2633

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs-Appellants