

SUPREME COURT  
OF GEORGIA  
FILED

IN THE SUPREME COURT OF GEORGIA

2007 MAY 30 AM 11:27

FEMINIST WOMEN'S HEALTH CENTER, et. al., )

Plaintiffs, )

vs. )

TIM BURGESS, in his official capacity and his )  
successors in office as Commissioner of the )  
Georgia Department of Community Health, et. al., )

Defendants. )

Case No.: S07A1039

TIMOTHY J. DANIELS  
CLERK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Gerald Weber (Ga. Bar No. 744878)  
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*

## TABLE OF CONTENTS

|                                                            |    |
|------------------------------------------------------------|----|
| TABLE OF CONTENTS .....                                    | i  |
| TABLE OF AUTHORITIES.....                                  | ii |
| I. The Provider-Plaintiffs Have Standing .....             | 1  |
| II. Exhaustion Is Not Required, As It Would Be Futile..... | 3  |
| CERTIFICATE OF SERVICE                                     |    |

12

## TABLE OF AUTHORITIES

### CASES

|                                                                                                                                                            |        |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <u>Abdulkadir v. State</u> , 279 Ga. 122, 610 S.E.2d 50 (2005).....                                                                                        | 4      |
| <u>Agan v. State</u> , 272 Ga. 540, 533 S.E.2d 60 (2000) .....                                                                                             | 2      |
| <u>Aldridge v. Georgia Hospitality &amp; Travel Association</u> ,<br>251 Ga. 234, 304 S.E.2d 708 (1983).....                                               | 1-2, 3 |
| <u>Ambles v. State</u> , 259 Ga. 406, 383 S.E.2d 555 (1989) .....                                                                                          | 3      |
| <u>Arden House, Inc. v. Heintz</u> , 612 F. Supp. 81 (D. Conn. 1985) .....                                                                                 | 7      |
| <u>Ayotte v. Planned Parenthood of N. New England</u> , 126 S. Ct. 961 (2006).....                                                                         | 6      |
| <u>Doe v. Busbee</u> , 481 F. Supp. 46 (N.D. Ga. 1979), <u>rev'd on other grounds</u> ,<br><u>Georgia v. Heckler</u> , 768 F.2d 1293 (11th Cir. 1985)..... | 7      |
| <u>Doe v. Maher</u> , 40 Conn. Supp. 394, 515 A.2d 134 (Conn. Super. Ct. 1986) .....                                                                       | 5      |
| <u>Ga. Hosp. Ass'n v. Dep't of Med. Assistance</u> ,<br>528 F. Supp. 1348 (N.D. Ga. 1982).....                                                             | 7      |
| <u>Harris v. McRae</u> , 448 U.S. 297 (1980).....                                                                                                          | 6      |
| <u>Planned Parenthood of Kansas &amp; Mid-Missouri, Inc. v. Nixon</u> ,<br>__ S.W.3d __, 2007 WL 1260923 (Mo. May 1, 2007).....                            | 1      |
| <u>Roe v. Norton</u> , 380 F. Supp. 726 (D. Conn. 1974),<br><u>rev'd on other grounds</u> , <u>Maher v. Roe</u> , 432 U.S. 464 (1977).....                 | 7      |
| <u>Singleton v. Wulff</u> , 428 U.S. 106 (1976) .....                                                                                                      | 1, 3   |

### OTHER AUTHORITIES

|                                                                                                                                            |   |
|--------------------------------------------------------------------------------------------------------------------------------------------|---|
| Div. of Med. Assistance, Ga. Dep't of Cmty. Health, <u>Policies and Procedures for<br/>Physician Services</u> § 904.2 (July 1, 2004) ..... | 5 |
|--------------------------------------------------------------------------------------------------------------------------------------------|---|

For the reasons set forth below, the State's attempts to defend the unprecedented decision of the Superior Court, dismissing Plaintiffs' state constitutional challenge to Georgia's discriminatory denial of Medicaid coverage for abortions necessary for women's health, are unavailing. This Court should accordingly reverse the decision below.

### **I. The Provider-Plaintiffs Have Standing.**

As detailed in the opening brief, with the exception of the Superior Court, *every court in the nation* to consider the question in over thirty years has recognized that physicians and clinics have standing to bring challenges to abortion restrictions on behalf of their patients. The State offers no credible, let alone persuasive, argument why the Georgia courts should become the aberration.

Most important, the State cannot discount the precedent and its persuasive force simply by noting that Singleton v. Wulff, 428 U.S. 106 (1976), concerned Article III standing. As Plaintiffs established in the opening brief, not only the U.S. Supreme Court, but every state court addressing the question under its state constitution – including the high courts of Florida, Mississippi, Tennessee, Texas, West Virginia, and just this month, Missouri<sup>1</sup> – has ruled as did Singleton.

Notably, the State cites nothing to indicate that Georgia would or should deviate from this overwhelming authority. Indeed, in Aldridge v. Georgia

---

<sup>1</sup> Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Nixon, \_\_\_ S.W.3d \_\_\_, 2007 WL 1260923, at \*2-3. (Mo. May 1, 2007).

Hospitality & Travel Association, this Court looked to the “ample federal precedent and legal commentary” and adopted the associational standing test set out by the U.S. Supreme Court. 251 Ga. 234, 235, 304 S.E.2d 708, 710 (1983). The State’s attempt to distance Aldridge from this case – by noting that Provider-Plaintiffs are not associations – misses the point: that Aldridge and other cases cited by Plaintiffs stand for the clear proposition that the courts of this state have recognized third-party standing and have followed U.S. precedent in so doing. Nothing in this Court’s decisions suggests a cramped standing jurisprudence that would stand apart from all courts in the nation and deny abortion providers third-party standing.

Finally, the precedent of this Court belies the State’s contention that, to have third-party standing, Plaintiffs must show injury to their own constitutionally protected rights. Appellees’ Br. at 5. Indeed, this Court has stated explicitly that, as long as a statute has an adverse impact on the party before the 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.” Agan v. State, 272 Ga. 540, 542 n.1, 533 S.E.2d 60, 62 n.1 (2000). And this Court has, in a variety of contexts, recognized the ability of third parties to raise the constitutional rights of others not before the court, without requiring those third parties to show injury to their own constitutional rights. See Aldridge, 251 Ga. at 235-37, 304

S.E.2d at 710-11 (holding that association may raise rights of its members); Ambles v. State, 259 Ga. 406, 406-07, 383 S.E.2d 555, 556-557 (1989) (permitting State to bring third-party challenge to witness competency statute). The cases cited by the State (Appellees' Br. at 4-5) are not to the contrary as they do not involve third-party standing, but rather a party seeking to challenge a statute on its own behalf.<sup>2</sup>

In short, like every other court in the country, this Court should conclude that Provider-Plaintiffs have standing. As the State's brief makes clear, there is nothing in Georgia law to support a contrary ruling.

## **II. Exhaustion Is Not Required, As It Would Be Futile.**

In proceedings in the Superior Court, the State conceded, as the law requires, that the requirement of exhaustion should be relaxed "when the administrative remedy would be futile, exclude relief, or afford no remedy." R-89 (Letter Br. Submitted By Defs. In Resp. To Pls.' Letter At 4). The State's efforts

---

<sup>2</sup> The State does not argue that the Provider-Plaintiffs lack injury in fact necessary to standing. Appellees only note that the providers in Singleton had submitted claims and been denied reimbursement. This, of course, is of no matter, as the Singleton Court did not condition standing on this fact. Rather, the Court held that there was "no doubt" that plaintiffs suffered sufficient injury because they "performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the [challenged regulation]." 428 U.S. at 112-13. That is precisely what the Provider-Plaintiffs have shown here. E.g., Pls.-Appellants' Br. at 9-10 (detailing harm of challenged policy for the Provider-Plaintiffs).

notwithstanding, Plaintiffs have shown that exhaustion would be futile and is not otherwise required.

In an effort to defend an exhaustion requirement in this case, the State employs the following tactic: They sow confusion as to the distinction between abortions necessary for a woman's *health* and those necessary to save a woman's *life* – an approach meant to suggest the agency could perhaps provide relief and has relevant expertise. Indeed, the State goes so far as to suggest that all medically necessary abortions, not only Ms. Roe's, might be covered as lifesaving.

Appellees' Br. at 10.

But this they cannot do. There is a category of abortions necessary for women's health – distinct from lifesaving procedures. As to this, the Medicaid provisions at issue in this case, Defendants' own arguments, and the case law, leave no doubt. And, it is the blanket rule – by which the state Medicaid program expressly denies reimbursement for any abortion that does not pose a threat of death – that is at issue here. And it is this blanket rule that cannot be effectively challenged through the administrative process – be it by Leslie Roe or the Provider-Plaintiffs.<sup>3</sup>

---

<sup>3</sup> Contrary to the State's argument, it is appropriate here for the Provider-Plaintiffs to raise exhaustion arguments, for if the Provider-Plaintiffs have standing, this Court must address the exhaustion requirement as to them. See, e.g., Abdulkadir v. State, 279 Ga. 122, 125 n.16, 610 S.E.2d 50, 53 n.16 (2005) (“Even if the trial

First, consistent with Georgia policy, “the Division will reimburse for abortions performed on Medicaid-eligible patients if the life of the mother would be endangered if the fetus were carried to term or if the mother was a victim of rape or incest.” R-48, Exhibit B (Div. of Med. Assistance, Ga. Dep’t of Cmty. Health, Policies and Procedures for Physician Services § 904.2 (July 1, 2004) (emphasis added)). On its face, this language does not encompass abortions that are necessary only to preserve a woman’s health.

Second, the State has conceded that all medical conditions requiring abortions are not and cannot possibly be construed as a threat to a woman’s life. There is no other way to understand its argument that that any order requiring the State to pay for abortions that are deemed medically necessary would force it to violate Georgia law as well as Georgia’s Constitution. See, e.g., R-27 (Defs.’ Initial Resp. to Pls.’ Mot. For TRO and Prelim. Inj. at 5).<sup>4</sup>

Third, the litigation at the federal and state level – now having occurred in more than twenty states – challenging the denial of Medicaid coverage for

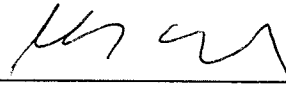
---

court or Court of Appeals reasoning was flawed, a judgment that is right for any reason will be affirmed.”).

<sup>4</sup> The affidavits in this case also speak to the distinction. For example, Dr. Tyrone Malloy speaks of, among others, a woman with sickle cell anemia, forced to be hospitalized to address her recurring sickle cell crises; her life, however, was not in danger. R-15 (Malloy ¶ 17); see also Doe v. Maher, 40 Conn. Supp. 394, 408, 515 A.2d 134, 141 (Conn. Super. Ct. 1986) (recognizing that indigent pregnant women could experience “medical problems as a result of their pregnancies which may not necessarily be life-threatening but for which a medically necessary abortion may be indicated).

In sum, this Court should recognize that the State's argument for the exhaustion of administrative remedies is meritless, as exhaustion would be futile.

Respectfully submitted,



---

Gerald Weber (Ga. Bar No. 744878)  
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*

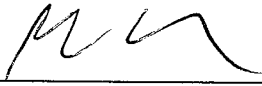
**CERTIFICATE OF SERVICE**

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

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

DATED this the 30th day of May, 2007.

Respectfully submitted,



---

Gerald Weber (Ga. Bar No. 744878)  
ACLU Foundation of Georgia  
75 Piedmont Avenue, Suite 514  
Atlanta, GA 30303  
(404) 523-6201

*Attorneys for Plaintiffs-Appellants*