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A. Benjamin Spencer

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Abortion case may not overturn Roe, but could effectively nullify it

On Wednesday, the U.S. Supreme Court heard oral argument in [June Medical Services LLC v. Russo](#), a case challenging a Louisiana law requiring physicians who perform abortions to have admitting privileges at a local hospital. The case is widely viewed as the first vehicle that could allow the current court to chip away at [Roe v. Wade](#), if not overturn it. However, it may be more likely that the court will beat back the challenge to the Louisiana law on narrower grounds that have received much less attention: a lack of standing.

While deciding this case on standing grounds would mean that the court leaves *Roe v. Wade* untouched, the adverse consequences for future legal challenges to abortion restrictions would be significant.

June Medical Services operates an [abortion clinic](#) in Louisiana and is challenging the state's law on the ground that it imposes an undue burden on women seeking abortions and is thus unconstitutional. Standing doctrine requires a party presenting a legal challenge to demonstrate an injury to rights caused by the challenged law, and that a favorable decision will "redress" that harm. But a caveat within standing doctrine is that the plaintiff must assert a violation of his or her own legal rights, not the rights of other third parties.

For example, if the sale of contraceptive products were prohibited by a state, a drug store owner in that state who wished to challenge that law could not do so on the ground that the law violated the constitutional right of women to have access to such products.

This rule against so-called "third-party standing" is simply a judicially crafted limitation that the Supreme Court has imposed on federal courts, not one mandated by the Constitution. The court has allowed third-party standing when the underlying justifications for the limitation are absent. Specifically, the court allows third-party standing when the plaintiff and the third party have a close relationship, and the third party is otherwise hindered in being able to bring suit to protect their own interests.

In the Louisiana case, the Supreme Court will have to address whether the requirements for third-party standing have been satisfied. Here the injury asserted is to the rights of women seeking abortions, not to the rights of physicians and businesses providing those abortions. So June Medical Services will have to show that there are meaningful barriers to a suit brought by those women on their own behalf.

Yes, the relationship between doctors and their patients has been endorsed by the court in the past as sufficiently close to provide doctors with standing to assert the rights of the women they treat. But here exists a potential for a conflict of interest between those physicians and their patients, since the law being opposed by the physicians — at least on its face — is aimed at protecting the health and safety of patients.

In other words, it is a question of whether physicians should be heard to use the rights of women as a basis for thwarting a law arguably designed to protect women.

Regarding the other requirement for permitting third-party standing, there may be insufficient evidence that women interested in seeking abortions could not themselves bring a legal challenge to the Louisiana law.

Yet if the court opts to reject June Medical Service's challenge on standing grounds, doing so would likely be a problem for those wishing to challenge restrictions on abortion rights going forward. It may be too much to expect women who are seeking abortions to know that their reduced access to abortion services has been caused by a particular state law. Further, they would be unable to litigate the issue themselves through the trial and appeals courts within a meaningful timeframe, given the short period within which an abortion may be sought.

The point is not that these arguments against third-party standing for June Medical Services do or do not have merit. Rather, the point is that when confronted with a decision as momentous as whether to turn against a precedent such as *Roe v. Wade* — which would be extremely controversial and consequential — the court is unlikely to do so when there are less controversial and more “technical” ways to decide the case in a manner that will result in upholding the Louisiana law.

As all eyes are on the court to see if the June Medical Services case ushers in the post-*Roe v. Wade* era, keen observers should be prepared to confront a decision that has less to do with abortion rights and more to do with the ability of future litigants to challenge abortion restrictions in federal court.

A. Benjamin Spencer is the Bennett Boskey Visiting Professor of Law at Harvard Law School and the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law. Follow him on Twitter [@PROFSPENCER](#).