No. 11-1471

In the Supreme Court of the United States

NEBRASKANS UNITED FOR LIFE, DOING BUSINESS AS NULIFE PREGNANCY RESOURCE CENTER,

Petitioner,

v.

PLANNED PARENTHOOD OF THE HEARTLAND, *ET AL.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

AND

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Eagle Forum Education & Legal Defense Fund ("Eagle Forum") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of *Certiorari* submitted by Nebraskans United for Life ("NuLife"). The Planned Parenthood respondents withheld consent, thereby necessitating this motion.

Eagle Forum is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. The Nebraska chapter of a related Eagle Forum organization, founded in 1972, includes members who supported the Nebraska informed-consent law challenged here. For more than thirty years, Eagle Forum has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, Eagle Forum consistently has argued for judicial restraint under both Article III and separation-of-powers principles. For the foregoing reasons, Eagle Forum has direct and vital interests in the issues before this Court.

Before explaining how its brief *amicus curiae* will aid this Court's review of NuLife's petition, Eagle Forum first explains a procedural anomaly. In the district court, the undersigned counsel represented both Eagle Forum as a movant for leave to file a brief *amicus curiae* and then NuLife as a movant for intervention. After the district court denied the

motion for leave to file Eagle Forum's brief, the undersigned counsel agreed to assist NuLife *pro bono* on intervention because (1) NuLife is a non-profit organization, (2) the motion to intervene addressed the same issues that the prior Eagle Forum brief had addressed, and (3) the undersigned counsel already had been admitted *pro hac vice* into the proceeding. Moving the *pro hac vice* admission of new trial counsel could have resulted in untimely notices of appeal, if the district court had denied or delayed ruling on a new *pro hac vice* admission. Because the undersigned counsel already had "e-filing" privileges in the proceeding, he could file the time-sensitive motions to intervene and protective notices of appeal. As NuLife's trial counsel, the undersigned counsel also filed the final notice of appeal. Other than that, the undersigned counsel did not represent NuLife in the Eighth Circuit.

Movant Eagle Forum respectfully submits that its proffered brief *amicus curiae* will bring several relevant matters to the Court's attention:

- In addition to the circuit decisions that NuLife cites as splitting with the Eighth Circuit here on appellate authority to review a district court's jurisdiction in the underlying litigation, the Eagle Forum brief cites a Third Circuit authority, *Lyon v. Whisman,* 45 F.3d 758, 758-59 & n.1 (3d Cir. 1995), in which the appellate court directed the dismissal of counts that the defendant had not even appealed. *Lyon* widens and deepens the circuit split between those circuits that recognize their appellate obligations versus the Eighth Circuit here.

- In addition to the circuit decisions that NuLife cites as splitting with the Eighth Circuit here on whether abortion providers have standing to sue executive officials to invalidate laws that provide patients state-law causes of action over which state courts – not state executive officials – have authority, the Eagle Forum brief cites principles of *jus tertii* (third-party) standing under *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004), to demonstrate that abortion providers lack standing to assert their patients' constitutional rights.
- The Eagle Forum brief encourages the Court to adopt a bright-line rule that post-judgment intervention to challenge jurisdiction is *per se* timely under FED. R. CIV. P. 24 if filed within the time for noticing an appeal, based on the Article III duty of appellate courts to police the lower courts' jurisdiction if an unsuccessful intervener appeals a denial of intervention. Because Article III already imposes this obligation on *appellate courts,* the proposed bright-line rule would serve judicial economy by directing *district courts* how to rule on post-judgment intervention in the first instance.
- Finally, the Eagle Forum brief emphasizes the serious psychological and physiological harms associated with elective abortions to demonstrate the importance of informed-consent laws like the challenged Nebraska law in protecting the health of women patients.

These matters all are relevant to whether this Court grants the writ, and they complement the petition.

For the above reasons, Eagle Forum respectfully requests that this motion for leave to file the accompanying brief *amicus curiae* be granted.

Dated: July 6, 2012 Respectfully submitted,

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QUESTIONS PRESENTED

The petition for a writ of *certiorari* raises three questions:

1. Whether a court of appeals has a duty to address the lack of subject matter jurisdiction for a district court injunction, on a timely appeal.
2. Whether subject matter jurisdiction exists to invalidate a state abortion statute creating a private cause of action, in a federal lawsuit brought against executive officials who lack enforcement authority under the statute.
3. Whether an entity adversely affected by a sweeping injunction lacking in jurisdiction has a right to intervene and appeal.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"),[1] a nonprofit Illinois

[1] *Amicus* files this brief after 29 days' prior written notice. As explained in the motion for leave to file, the undersigned counsel represented both *amicus* Eagle Forum and the petitioner in the district court and, as petitioner's *pro bono* trial counsel, filed the notice of appeal to the Eighth Circuit. Pursuant to Rule 37.6, except as provided in the prior sentence, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the brief's preparation or submission.

corporation, seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion. Founded in 1981, Eagle Forum has consistently defended federalism and supported states' autonomy from the federal government in areas – like public health – that are of traditionally 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

Petitioner Nebraskans United for Life ("NuLife") seeks to intervene into a challenge by respondents Planned Parenthood of the Heartland and one of its doctors (collectively, "Planned Parenthood") to Nebraska's Women's Health Protection Act ("LB594"). In the alternative, even without its intervention, NuLife seeks the dismissal of Planned Parenthood's suit for lack of jurisdiction.

LB594 creates a private state-law cause of action for victims of abortion performed without informed consent and provides mechanisms to protect abortion providers who provide informed consent. NEB. REV. STAT. §28-327.04. Because state courts – not the Nebraska executive-branch defendants that Planned Parenthood sued – will implement LB594, it is unclear whether the named defendants can meaningfully redress Planned Parenthood's alleged injuries.

Although LB594 §11(3) immunizes failure to meet LB594's informed-consent criteria from criminal action, disciplinary action, or revocation of a

license pursuant to the Uniform Credentialing Act, Planned Parenthood claims to fear imminent enforcement *against its facilities* via "disciplinary action against a license issued under the Health Care Facility Licensure Act," for "'[c]ommitting or permit[ting], aiding, or abetting the commission of any unlawful act'" by its facilities' immunized staff. App. 20a (*quoting* NEB. REV. STAT. §71-448). This hypothetical, non-imminent and, indeed, improbable state enforcement served as the district court's jurisdictional hook to enjoin LB594, notwithstanding both that the district court could have enjoined only LB594's enforcement against facilities via §71-448 and that Planned Parenthood has an entirely adequate post-enforcement remedy.

After the district court issued a preliminary injunction and the defendants declined to appeal, NuLife moved to intervene to challenge the injunction and filed a protective notice of appeal of the order granting it. When the district court denied NuLife's intervention, NuLife perfected that appeal, while reserving the right to appeal the merits if the defendants did not adequately represent NuLife's interests. While that appeal was pending, Planned Parenthood and the state executive defendants entered into a settlement, which the district court memorialized into a final judgment. At this point, Planned Parenthood moved to dismiss that first appeal as mooted by the final judgment, and NuLife moved to intervene on the merits and timely appealed the final judgment. The Eighth Circuit subsequently granted the contested motion to dismiss the preliminary-injunction appeal as moot,

and the district court denied NuLife's motion to intervene on the merits. NuLife then amended its notice of appeal on the merits to include the denial of intervention to perfect its merits appeal.

In its opening appellate brief, NuLife argued that the Eighth Circuit had the obligation to consider the district court's jurisdiction for the underlying litigation, even if that court affirmed the denial of intervention. NuLife Opening Br. at 24-27. As summarized in Section I.B, *infra,* NuLife then devoted a third of its brief to demonstrating that Planned Parenthood failed to establish jurisdiction for its action. *Id.* at 27-45. Because Planned Parenthood made the strategic decision to ignore elements of that jurisdictional challenge, Planned Parenthood Br. at 49-51, NuLife cited that silence as a fatal waiver on issues on which Planned Parenthood bore the burden of proof. NuLife Reply Br. at 13-14 (standing), 16-17 (ripeness); *see also* FED. R. APP. P. 28(a)(9)(A), (b) (appellants *and appellees* must argue their "contentions and the reasons for them, with citations to the authorities and parts of the record on which [they] rel[y]"). Because "[e]ven appellees waive arguments by failing to brief them," *U.S. v. Ford,* 184 F.3d 566, 578 n.3 (6th Cir. 1999), Planned Parenthood has waived a jurisdictional argument on which it needs to prevail to obtain *any* merits relief. Accordingly, the Eighth Circuit should have remanded with an order to dismiss for lack of jurisdiction.[2]

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[2] Even accepting *arguendo* Planned Parenthood's wholly unsubstantiated fear of the Nebraska

Although NuLife's motion to intervene and the accompanying notice of appeal were concededly timely *for purposes of FED. R. APP. P. 4,* Planned Parenthood Br. at 8 (NuLife filed on "the last day to file a notice of appeal"); *accord* App. 3a (NuLife filed "on the last day to file a notice of appeal"), the Eighth Circuit affirmed the district court's holding that NuLife's motion to intervene was untimely *for purposes of FED. R. CIV. P. 24.* App. 5a-6a. Further, the Eighth Circuit held that it could "not reach the underlying federal subject matter jurisdiction questions" "[b]ecause we conclude that we lack appellate jurisdiction." App. 6a n.3. Far from lacking jurisdiction over threshold jurisdictional questions, federal appellate courts have *an obligation* to reach them, acting *sua sponte* if necessary.

STATEMENT OF FACTS

NuLife is a crisis pregnancy center that – as part of its mission – dispenses medical information that the district court held to be misleading, based on the un-rebutted evidence submitted by Planned Parenthood in support of its motion for a preliminary

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executive defendants' enforcing LB564 *against a facility,* an appellate court still would have the obligation to trim the injunction to *that case or controversy* by enjoining such enforcement (which is the only relief that these executive defendants can provide) and nothing else. *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996) ("standing is not dispensed in gross"); *Summers v. Earth Island Institute,* 555 U.S. 488, 497-99 (2009) (plaintiffs must establish standing for all merits relief).

injunction. NuLife proffered affidavits from three experts to rebut Planned Parenthood's submission, but the district court refused to consider them.

As identified by numerous peer-reviewed medical journals, abortion correlates with many risks that warrant disclosure to patients who are considering an abortion:

- Abortion correlates with a sixfold (600 percent) increase in suicide risk compared with birth and a threefold (300 percent) increase versus the general population. M. Gissler *et al., Pregnancy-Associated Deaths in Finland 1987-1994 – Definition Problems & Benefits of Record Linkage,* 76 ACTA OBSTETRICA & GYNECOLOGICA SCANDINAVICA 651-57 (1997); D. Reardon *et al., Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women,* 95:8 SO. MED. J. 834-41 (2002); Orient Aff. ¶31, C.A. App. 287;[3] Coleman Aff. ¶5, C.A. App. 268.
- Women who undergo elective abortions have higher incidence of mood and anxiety disorders than either the general population or women who deliver children. David M. Fergusson *et al., Abortion and mental health disorders: evidence from a 30-year longitudinal study,* 193 BRIT. J. PSYCHIATRY 444-51 (2008); D. Reardon *et al., Record Linkage Study,* 95:8 SO. MED. J. at 834-41; Orient Aff. ¶31, C.A. App. 288; Coleman Aff. ¶¶5, 9, 14, 24-25, 28, C.A. App. 268, 271, 272-73, 269-70, 271.

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[3] *Amicus* Eagle Forum cites the Court of Appeals Appendix as "C.A. App."

- Women who undergo elective abortions have higher incidence of substance abuse than either the general population or women who deliver children. Priscilla K. Coleman *et al., Induced abortion and anxiety, mood, and substance abuse disorders: Isolating the effects of abortion in the national comorbidity survey,* 43 J. PSYCHIATRIC RES. 770-76 (2009); Coleman Aff. ¶¶24, 28, C.A. App. 269, 271.
- Prior abortions correlate with increased risk of premature births in later pregnancies, including a significantly elevated risk (64 percent) of "very preterm" births prior to 32 weeks gestation. Jay D. Iams *et al., Primary, secondary, and tertiary interventions to reduce the morbidity and mortality of preterm birth,* 371 THE LANCET 164-75 (Jan. 2008); Hanes M. Swingle *et al., Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review with Meta-analyses,* 54 J. REPRODUCTIVE MED. 95-108 (2009); Institute of Medicine, *Preterm Birth: Causes, Consequences, and Prevention,* 519 (National Academy of Science Press, July 2006) (listing abortion as an immutable risk factor for preterm birth); Orient Aff. ¶31, C.A. App. 288.[4]

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[4] Significantly, among very preterm newborns, the risk of cerebral palsy increases fifty-five fold (5500 percent) vis-à-vis full-term newborns. E. Himpens *et al., Prevalence, type, and distribution and severity of cerebral palsy in relation to gestational age: a meta-analytic review,* 50 DEVELOPMENTAL MED. CHILD NEUROLOGY 334-40 (2008).

- Induced abortions correlate with significantly increased breast-cancer risk. Kim E. Innes, Tim E. Byers, *First Pregnancy Characteristics & Subsequent Breast Cancer Risk Among Young Women,* 112 INT. J. CANCER 306-11 (2004); Janet R. Daling *et al., Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion,* 86 J. NAT'L CANCER INST. 1584 (1994); Orient Aff. ¶31, C.A. App. 288; Lanfranchi Aff. ¶¶11-18, 27, 262-63, 265. Significantly, the physiology of why abortion increases the risk of breast cancer is well-understood, but nonetheless minimized or suppressed, apparently for political reasons. *See* Angela Lanfranchi, M.D., *The Federal Government and Academic Texts as Barriers to Informed Consent,* 13:1 J. AM. PHYSICIANS & SURGEONS 12, 13-15 (Spring 2008); Lanfranchi Aff. ¶¶13-17, C.A. App. 263.
- Induced abortions correlate with a sevenfold (700 percent) increase in the risk of placenta previa, J. M. Barrett *et al., Induced abortion: a risk factor for placenta previa,* 141(7) AM. J. OBSTET. GYNECOL. 769-72 (1981), the leading cause of uterine bleeding in the third trimester and medically indicated preterm birth. Women who have placenta previa face markedly higher risks of preterm birth, low birth weight, and perinatal death in subsequent pregnancies, as well as increased risk of hemorrhaging (of which placenta previa is a major cause). John M. Thorp *et al., Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence,* 58 OB GYN SURVEY 67-79 (2002).

While some abortion providers and many of their academic supporters dispute the causation underlying the foregoing correlations, no one can seriously dispute either that abortion providers generally fail to disclose these ongoing scientific debates to their patients and prospective patients, *see* NEB. REV. STAT. §28-325(6) ("existing standard of care for preabortion screening and counseling is not always adequate to protect the health needs of women"), or that such correlated risks routinely would be disclosed as a matter of course in less-politicized medical practices.

REASONS TO GRANT THE WRIT

This litigation presents the opportunity for this Court not only to resolve an important circuit split on appellate jurisdiction to review district courts' jurisdiction in the underlying litigation but also to resolve issues of exceptional public importance on the respective roles of state legislatures and federal courts in ensuring informed consent under *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).

I. The Eighth Circuit's holding that it lacked jurisdiction to review the district court's jurisdiction over the underlying litigation, after affirming the denial of intervention, conflicts with the holdings of several circuits and goes to a fundamental question of Article III jurisdiction that this Court has the responsibility to police.

II. As part of policing the lower courts' Article III jurisdiction, this Court should adopt a bright-line rule that post-judgment intervention is *per se* timely under FED. R. CIV. P. 24 if filed within the

time for noticing an appeal. Although *appellate courts* already have the duty to review lower courts' jurisdiction on appeal, a bright-line rule would ensure that *district courts* reach these fundamental threshold limits on judicial power, *without* unnecessary appeals.

III. Enjoining Nebraska's informed-consent law on Planned Parenthood's un-rebutted preliminary-injunction record, without the district court's reviewing the countervailing evidence offered by Eagle Forum as an *amicus curiae* and by NuLife as a proposed intervener, endangers Nebraska women who do not receive sufficient information on abortion's psychological and physiological effects from abortion providers. Both *Casey* and federalism demand more deference from federal courts to legislative judgments on public health.

Amicus Eagle Forum respectfully submits that each of the foregoing reasons provides sufficient justification for this Court to grant the writ.

I. REGARDLESS OF THE OUTCOME ON NULIFE'S INTERVENTION, THIS COURT SHOULD GRANT THE WRIT TO VACATE THE INJUNCTION BECAUSE PLANNED PARENTHOOD LACKS STANDING AND A RIPE CLAIM

Contrary to the Eighth Circuit's holding that it lacked appellate jurisdiction to review the district court's jurisdiction to enter a judgment, federal appellate courts have the obligation to review lower courts' jurisdiction in any case properly brought up on appeal. Because Planned Parenthood lacks standing and a ripe claim, the Eighth Circuit should

have remanded, and this Court should remand, with instructions to dismiss Planned Parenthood's suit for lack of jurisdiction.

A. Appellate Courts Have the Obligation to Assess Not Only their Jurisdiction But Also the Jurisdiction of the Lower Courts

In holding that courts of appeal lack appellate jurisdiction to review district courts' jurisdiction over the underlying litigation in any appeal properly brought up, the Eighth Circuit deviated wildly from the Article III holdings of this Court and the circuits. This Court should grant the writ to correct this fundamental error and to enforce Article III's limits.

Specifically, far from lacking jurisdiction, federal appellate courts have an *obligation* to consider not only their own jurisdiction but also the lower courts' jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541 (1986); *California ex rel. Sacramento Metro. Air Quality Management Dist. v. U.S.,* 215 F.3d 1005, 1009 (9th Cir. 2000).

The Eighth Circuit's holding that appellate courts lack this jurisdiction is illogical. Perhaps, when appellate courts lack jurisdiction over an *entire appeal,* they may have to dismiss the appeal without reviewing the underlying litigation. *Browder v. Director, Dep't of Corr.,* 434 U.S. 257, 264 (1978) (noting that the timely filing of an appeal is "mandatory and jurisdictional"). But that situation does not apply here, where an appellate court obviously could *grant* NuLife intervention and – even

short of that – could stay the district court's judgment pending appeal.

As NuLife points out, the Second Circuit has relied on *Bender* to reach a decision squarely at odds with the Eighth Circuit's decision here. *Am. Lung Ass'n v. Reilly,* 962 F.2d 258, 262-63 (2d Cir. 1992). In *Reilly,* the Second Circuit reviewed the lower court's subject-matter jurisdiction, after affirming the denial of intervention. *Reilly,* 962 F.2d at 262-63; *cf. MasterCard Intern. Inc. v. Visa Intern. Service Ass'n, Inc.,* 471 F.3d 377, 384-85 (2d Cir. 2006) (appellate jurisdiction to review intervention includes jurisdiction to review any non-appealable order necessary to review intervention).

The Third Circuit went so far as to remand the defendants' partial appeal with an order to dismiss not only the appealed portion of the case, but also the plaintiff's judgment on counts that the defendants *did not even appeal,* because the district court lacked jurisdiction. *Lyon v. Whisman,* 45 F.3d 758, 758-59 & n.1 (3d Cir. 1995). Although not concerned with intervention, *Lyon* supplements and widens the split that NuLife identifies between the Eighth Circuit here and other circuits.

Nor are these jurisdiction issues harmless error. Instead, these Article III issues "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). In addition to its obligation to police the lower courts' assertions of jurisdiction that they lack, appellate courts have the

obligation to exercise the jurisdiction that they have. As Chief Justice Marshall famously put it, "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. U.S.,* 424 U.S. 800, 817 (1976). No principle of law or equity authorized the Eighth Circuit to avoid the threshold jurisdictional issues presented here.

Two unmistakable results flow from the foregoing authorities. First, the Eighth Circuit had the obligation to exercise the jurisdiction that NuLife's timely appeal presented. Second, that appellate jurisdiction extends not only to the specific issues presented on appeal (namely, the district court's order denying intervention) but also to the district court's jurisdiction over the underlying litigation. Accordingly, this Court should reverse the panel's contrary holding and determine whether Planned Parenthood has standing and a ripe claim for all of the relief in the district court's judgment.

B. Planned Parenthood Lacks Standing and a Ripe Claim

Article III requires an actual or imminent injury-in-fact to a legally protected interest. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992). Planned Parenthood must have a "credible threat" of enforcement against it to bring a pre-enforcement challenge. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979); *cf. Defenders of Wildlife,* 504 U.S., at 564 ("'some day' intentions –

without any description of concrete plans, or indeed any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require") (emphasis in original). 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 v. Carhart,* 550 U.S. 124, 163 (2007). Certainly, abortion providers must meet Article III's minima, just like other litigants. The idea that the Nebraska executive defendants would bring a facility-based enforcement action against Planned Parenthood for "aiding and abetting" its staff's actions that LB594 immunizes is simply fanciful.

Planned Parenthood also seeks to assert abortion rights under *Roe v. Wade*, 410 U.S. 113 (1974), and its progeny. But those rights belong to the women patients that LB594 protects, not to abortion providers.[5] Generally, for a plaintiff to assert the

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[5] When this Court has allowed abortion providers to assert women's rights under *Roe* and its progeny, the abortion providers faced criminal penalties, thereby putting the providers in the same shoes as the patients. LB594 does not similarly penalize abortion providers. *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 440 n.30 (1983), *abrogated on other grnds.*, *Casey,* 505 U.S. at 882-83; *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 62 (1976); *Doe v. Bolton,* 410 U.S. 179, 188 (1973).

rights of absent third parties, *jus tertii* (third-party) standing 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)). Here, Planned Parenthood lacks standing and so fails the first *Powers* prong. Moreover, abortion providers do not have a close relationship with their patients, who have only sporadic occasions to seek abortions. Importantly, this Court foreclosed basing third-party standing on the "*hypothetical* … relationship posited here." *Tesmer,* 543 U.S. at 131 (emphasis in original). Under the circumstances, because it lacks standing and a close relationship with its future patients, Planned Parenthood cannot assert women's rights under *Roe* and its progeny. *Tesmer,* 543 U.S. at 128-31. Constitutional jurisprudence aside, physicians obviously cannot rely *on their patients' rights* to deny those patients the right to informed consent.

II. COURTS SHOULD HEAR INTERVENERS' POST-JUDGMENT CHALLENGES TO JURISDICTION IF FILED WITH TIMELY NOTICES OF APPEAL

Amicus Eagle Forum respectfully submits that this Court should adopt a bright-line rule that intervening to challenge a district court's jurisdiction is *per se* timely when – as here – the movant seeks to intervene within the time allowed for filing a notice of appeal and files a timely notice of appeal. Given that appellate courts have the obligation to consider

the lower courts' jurisdiction, even if the appellate court denies intervention, *see* Section I.A *supra,* the proposed bright-line rule already applies *in appellate courts* as a practical matter. The proposed rule's benefit would accrue *in district courts,* which would resolve such issues without unnecessary appeals.

Before addressing post-judgment intervention's timeliness where the movant files a timely notice of appeal, *amicus* Eagle Forum first explains the value of this Court's adopting a bright-line rule. In the proceeding below, the district court did not consider the jurisdictional issues that NuLife raised, choosing to rule on the perceived untimeliness of NuLife's motion to intervene and NuLife's standing. Given the Nebraska executive defendants' capitulation and federal courts' duty to assess their jurisdiction, however, the district court should have accepted NuLife's "concrete adverseness … [that] sharpens the presentation of issues upon which the court[s] so largely depend[] for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962). Otherwise, courts risk entering judgments that lack a "true challenge" in the absence of intervention. *Horne v. Flores,* 129 S.Ct. 2579, 2596 (2009).

Had the district court weighed and ruled on NuLife's jurisdictional arguments, the Eighth Circuit and this Court would have the benefit of a more complete decision on appeal. Indeed, while the non-prevailing party potentially would have appealed, the district court's jurisdictional analysis at least potentially could have resolved this litigation without the need for any appeal. Given that

appellate courts must consider these jurisdictional issues in any event, *see* Section I.A, *supra,* the proposed bright-line rule would serve judicial economy by having *district courts* resolve these important issues, before any appeal.

In addition to its utility, Eagle Forum's proposed bright-line rule also would reflect applicable law. As a threshold matter, FED. R. CIV. P. 24 plainly *permits* post-judgment intervention filed within the time for noticing an appeal. *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394 (1977). As the panel below indicated, Eighth Circuit precedent provides "[t]he *general rule* … that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." App. 4a (*quoting U.S. v. Associated Milk Producers, Inc.,* 534 F.2d 113, 116 (8th Cir. 1976)) (emphasis added). To the extent that it set an inflexible rule *against* post-judgment intervention, however, *Associated Milk Producers* would be inconsistent with *Nat'l Ass'n for Advancement of Colored People v. New York,* 413 U.S. 345, 365-66 (1973) ("*NAACP*"), which held that courts evaluate timeliness under a totality-of-the-circumstances test in which "the point to which the suit has progressed is one factor" "not solely dispositive." *Id.* Significantly, neither *Associated Milk Producers* nor *NAACP* involved an intervener's jurisdictional challenge to the underlying litigation.

An un-appealed judgment that lacks subject-matter jurisdiction easily qualifies as an exceptional circumstance that warrants post-judgment

intervention on the jurisdictional issue. *Acree v. Republic of Iraq,* 370 F.3d 41, 50-51 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005), *abrogated on other grnds.*, *Republic of Iraq v. Beaty,* 556 U.S. 848, 866-67 (2009). *Steel Company* should answer any concerns over allowing post-judgment intervention to challenge jurisdiction: "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Steel Co.,* 523 U.S. at 101. This Court simply cannot assume prejudice from vacating an *ultra vires* judgment.[6]

For all of the foregoing reasons, this Court should adopt a bright-line rule that a jurisdictional challenge brought in a motion to intervene is timely

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[6] Even if a typical litigant or district court would have legitimate concerns about arguments arriving post-judgment, that would not be relevant here. As Planned Parenthood complained below, NuLife's post-judgment arguments reprised the arguments that NuLife made in opposing the preliminary injunction before the entry of judgment, which reprised the arguments that Eagle Forum made in an *amicus* brief that the district court declined to file before the entry of the preliminary injunction. In any event, the term "prejudice" does not mean "merely the loss of an advantageous position, but must be something more closely tied to the merits of the issue." *In re O'Brien Envtl. Energy, Inc.,* 188 F.3d 116, 127 (3d Cir. 1999). Under the circumstances, no one can complain of prejudice.

if the movant timely files a notice of appeal.[7] As a practical matter, this Court has the obligation to review these jurisdictional challenges on appeal in any event, but a bright-line rule would instruct district courts how to handle these issues below.

III. THIS CASES RAISES EXCEPTIONALLY IMPORTANT ISSUES FOR ENSURING INFORMED CONSENT AND PROTECTING WOMEN WHO CONSIDER ABORTIONS

In addition to the important jurisdictional issues raised here, NuLife's petition raises two issues of exceptional public importance – one procedural and one substantive – related to the respective roles of state legislatures and federal courts in defining and protecting women's rights under *Roe* and its progeny. Even if these issues were irrelevant to *how* this Court would decide this case, *amicus* Eagle Forum respectfully submits that both issues are relevant to *whether* the Court should hear this case.

A. NuLife's Intervention Will Help Enforce Article III's Limits and Federalism

The process below fits a troubling pattern in challenges to state abortion laws, with Planned Parenthood's waiting until just before LB594 took effect to race to court for interim relief. The timing

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[7] Notices of appeal are timely if a movant for intervention – after moving to intervene – files a protective notice of appeal within FED. R. APP. P. 4's jurisdictional timelines. *Mausolf v. Babbitt,* 125 F.3d 661, 666 (8th Cir. 1997); *Purcell v. BankAtlantic Fin. Corp.,* 85 F.3d 1508, 1151 n.3 (11th Cir. 1996).

left Nebraska's executive-branch defendants and their government lawyers half of the time that Local Rule 7.0.1(b)(1)(B) provides for an opposition. As a result, the state could not develop evidence to counter Planned Parenthood's evidence, and the district court capriciously denied leave to file the *amicus* brief and evidence that Eagle Forum marshaled on short notice. After losing on the preliminary injunction under hurried conditions, the defendants – who have very little, *if anything,* at stake – simply capitulated.

In sum, the district court has issued an obviously overbroad permanent injunction against a duly enacted law of the State of Nebraska on a paltry and biased record at the preliminary-injunction stage – which would not even control on the merits, *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981) – with only trivial, disinterested opposition. Surely a federal court needs more to displace a sovereign state.

Although the Eighth Circuit clearly should have considered *at least* NuLife's jurisdictional arguments, if not also its merits arguments, that opportunity has passed, based on the Eighth Circuit's mistakenly crimped view of the scope of its appellate jurisdiction. Granting the writ not only would cure the Eighth Circuit's jurisdictional error on *appellate* jurisdiction but also would put district courts on notice of the need to ensure that future cases meet Article III's minimum, bedrock criteria, particularly when an intervener appears to enforce those criteria.

B. The Injunction Denies Women Truly Informed Consent

As signaled in the Statement of Facts, elective abortions correlate with significant psychological and physiological harms. If such abortions were not highly politicized, abortion providers presumably would advise their prospective patients of these risks as a matter of professional course. Orient Aff. ¶¶22, 42, C.A. App. 286, 290. Disclosure is limited, however, because groups like Planned Parenthood view abortion more as a civil right and less as a medical procedure. This viewpoint appears to have limited the disclosure that normally accompanies any medical procedure:

> 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[.]

Orient Aff. ¶34, C.A. App. 288-89 (*quoting* Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis,* ch. 3 (Lippincott, Williams & Wilkins, 3rd ed. 2005)). Unfortunately, there is ample history for politically powerful groups using professional and governmental organizations to deflect concerns about health, as for example with smoking. Coleman Aff. ¶¶6-7, 29-31, C.A. App. 269-70, 281-82; Lanfranchi Aff. ¶¶25, 32, C.A. App. 264, 265.

As NuLife indicates, Nebraska's Legislature expressly found "[t]hat the existing standard of care

for preabortion screening and counseling is not always adequate to protect the health needs of women." NEB. REV. STAT. §28-325(6). Significantly, these scientific issues arise in an area where "[t]he State may enact regulations to further the health or safety of a woman seeking an abortion," and where only "[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. Thus, whereas *Roe* concerned States' ability to *prohibit* abortions in the interest of the *infant,* this litigation and LB594 concern Nebraska's ability to *regulate* abortions in the interest of *pregnant women* who contemplate abortions.

At a minimum, abortion's correlation with significant psychological and physiological harms requires disclosure, and Planned Parenthood cannot overcome "[Nebraska's] wide discretion to pass legislation in areas where there is medical … uncertainty," where "medical uncertainty … provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales,* 550 U.S. at 164 (emphasis added). The States' role contemplated in *Casey* requires a more balanced analysis than occurred here – namely, a paltry and biased preliminary-injunction record from disinterested defendants – before a federal court enjoins a duly enacted State law.

At least when a willing intervener appears to defend state law, the defendants' quick capitulation in a case in which they have *at best* tangential involvement does not provide the delicate balancing

that *Casey* requires. In the absence of definitive proof in these medical debates, the question is whether *the patient* is entitled to learn of the *potential* risks.

As countless pro-choice physicians can attest, there is nothing *legitimate* about being "pro-choice" that precludes being "pro-information":

> [I]t will surely be agreed that open discussion of risks is vital and must include the people – in this case the women – concerned. I believe that if you take a view (as I do), which is often called "pro-choice," you need at the same time to have a view which might be called "pro-information" without excessive paternalistic censorship (or interpretation) of the data.

Stuart Donnan, M.D., Editor in Chief, *Abortion, Breast Cancer, and Impact Factors – in this Number and the Last,* 50 J. EPIDEMIOLOGY & COMMUNITY HEALTH 605 (1996). True choice presupposes the information needed to make the choice. Planned Parenthood's challenge to LB594 is pro-abortion and pro-profit, but not pro-choice.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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