Nos. 18-1323 & 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., *et al.*, PETITIONERS/CROSS-RESPONDENTS,

v.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS, RESPONDENT/CROSS-PETITIONER

CROSS-PETITIONER/RESPONDENT'S MOTION TO SUPPLEMENT THE RECORD AND TO FILE CERTAIN DOCUMENTS UNDER SEAL

GENE C. SCHAERR
ERIK S. JAFFE
STEPHEN S. SCHWARTZ
KATHRYN E. TARBERT
SCHAERR | JAFFE LLP
1717 K Street NW,
Suite 900
Washington, DC 20006
(202) 787-1060

WILLIAM S. CONSOVOY
JEFFREY M. HARRIS
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209

JEFF LANDRY
Attorney General
ELIZABETH B. MURRILL
Solicitor General
Counsel of Record
JOSEPH SCOTT ST. JOHN
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov

Counsel for Respondent/Cross-Petitioner

December 26, 2019

PARTIES TO THE PROCEEDING

The Respondent/Cross-Petitioner is Dr. Rebekah Gee, Secretary of the Louisiana Department of Health ("LDH"), sued in her official capacity. LDH was formerly referred to as the Louisiana Department of Health & Hospitals. Dr. Gee is Respondent in the underlying Petition, No. 13-1323. To avoid confusion, this motion will refer to Dr. Gee as "Louisiana."

The Petitioners/Cross-Respondents are June Medical Services L.L.C., d/b/a Hope Medical Group for Women, and two pseudonymous abortion providers proceeding as Dr. John Doe 1 and Dr. John Doe 2. Cross-Respondents are Petitioners in the underlying Petition. To avoid confusion, this motion will refer to the Cross-Respondents as "Plaintiffs."

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING I

TABLE OF CONTENTS II

TABLE OF AUTHORITIES III

INTRODUCTION 1

BACKGROUND 2

REASONS FOR GRANTING THE MOTION 5

I. This Court Should Allow Louisiana to Supplement the Record with Information Relevant to the Third-Party Standing Questions Presented Here—Information That is Currently Subject to a Protective Order. 6

II. This Court Should Also Allow Louisiana to Supplement the Record with an Additional, Unsealed Appendix Containing Current Information about Louisiana Abortion Clinics and Providers. 9

III. This Court Should Also Allow Louisiana to Supplement the Record with an Additional Sealed Appendix Containing Relevant Information about Certain Louisiana Abortion Doctors. 11

CONCLUSION 12

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

CASES

American Library Ass'n v. *Odom*,
818 F.2d 81 (D.C. Cir. 1987) 7

Arizonans for Official English v. *Arizona*,
520 U.S. 43 (1997) 6

Bank of Nova Scotia v. *United States*,
487 U.S. 250 (1988) 5

Bd. of License Comm'rs of Tiverton v. *Pastore*,
469 U.S. 238 (1985) 1, 6, 8

Elk Grove Unified Sch. Dist. v. *Newdow*,
542 U.S. 1 (2004) 8, 9

Fusari v. *Steinberg*,
419 U.S. 379 (1975) 6

Goodyear Tire & Rubber Co. v. *Haeger*,
137 S. Ct. 1178 (2017) 5

MGIC Indem. Corp. v. *Weisman*,
803 F.2d 500 (9th Cir. 1986) 8

Opinion, *June Medical Services, L.L.C.* v. *Gee*,
No. 19-30982 (5th Cir. Dec. 17, 2019) 4, 9

Order, *In re Gee*,
No. 19-30953 (5th Cir. Nov. 27, 2019) 2, 4

Order, *June Medical Services, LLC* v. *Gee*,
No. 3:16-cv-444 (M.D. La. Nov. 25, 2019) 7

Protective Order, *June Medical Services, LLC* v. *Gee*,
No. 3:16-cv-444 (M.D. La. 2019) 8

Richmond Newspapers, Inc. v. *Virginia*,
448 U.S. 555 (1980) 6

Schreiber Foods, Inc. v. *Beatrice Cheese, Inc.*,
402 F.3d 1198 (Fed. Cir. 2005) 6

Weicherding v. *Riegel*,
160 F.3d 1139 (7th Cir. 1998) 6

STATUTES

La. R.S. 14:403 2

La. R.S. 40:1061.14 2

La. R.S. 40:1061.19 2

OTHER AUTHORITIES

Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324 (2006) 5

Fed. R. Evid. 201 8

Fed. R. Evid. 401 7

Fed. R. Evid. 803(6) 10

Fed. R. Evid. 803(8) 10, 11

Fed. R. Evid. 803(9) 10

Supreme Court Rule 21 1

Supreme Court Rule 32.3 .... 1, 2

Supreme Court Rule 33.2 1

INTRODUCTION

Pursuant to Rule 21, Louisiana moves to file three appendices, two of which will be under seal. Plaintiffs do not consent to this motion and will respond to it in due course. Pursuant to Rule 33.2, Louisiana further seeks leave to submit these appendices in the same 8½-by-11-inch paper format as the Joint Appendix.

First, Louisiana seeks leave to file, under seal, a document entitled Second Supplemental Sealed Appendix containing sealed documents from another case with overlapping parties, *June Medical Services, LLC* v. *Gee*, No. 3:16-cv-444 (M.D. La.) ("*June II*"). These documents powerfully demonstrate the conflicts of interest between Plaintiffs and their patients. Pursuant to *Bd. of License Comm'rs of Tiverton* v. *Pastore*, 469 U.S. 238, 240 (1985), Louisiana believes the parties are obligated to bring that information to this Court's attention. Louisiana could ordinarily draw those documents to this Court's attention by citing the *June II* docket. But the documents are now sealed subject to a protective order that precludes Louisiana from using them in any other litigation, including this case. Louisiana thus seeks leave of this Court to file that material under seal in a subsequent supplemental appendix.

Second, Louisiana seeks leave to file, on the public docket, a document entitled Supplemental Appendix containing non-confidential evidence of changes in the abortion landscape in Louisiana since the trial record closed. Contemporaneously with this Motion, and pursuant to Rule 32.3, Louisiana will file a letter—that will be served on all parties—seeking leave to lodge this appendix with the Clerk.

Third, Louisiana seeks leave to file, under seal, certain judicially noticeable public records in a document entitled Supplemental *Sealed* Appendix. The records in

question are relevant to the merits of the case and Louisiana would ordinarily be entitled to cite them directly in its briefs as well. However, the documents disclose the true names of abortion providers who are now anonymous in this case. Louisiana thus seeks leave to present the documents under seal. Contemporaneously with this Motion, and pursuant to Rule 32.3, Louisiana will file a letter seeking leave to lodge the Supplemental Sealed Appendix[1] with the Clerk.

By allowing Louisiana to supplement the record through these supplemental appendices, this Court will ensure that its ruling is based on the most accurate and up-to-date information available on abortion and abortion providers in Louisiana.

BACKGROUND

1. Earlier this year, in a deposition in the *June II* litigation, Plaintiff Dr. John Doe 2 gave testimony indicating that another Louisiana abortion doctor—known in this case as Dr. John Doe 5—"violates the standard of care for second-trimester abortions." See *In re Gee*, No. 19-30953 at 6 (5th Cir. Nov. 27, 2019) (Elrod, J., concurring). Doe 2's testimony also suggests he himself committed crimes in connection with his abortion practice, including failing to report the rape of a 14-year-old girl and knowingly performing an abortion on another minor without parental consent or a judicial bypass. *Id.* at 6–7; see also, *e.g.*, La. R.S. 14:403; 40:1061.14; 40:1061.19.

Because Plaintiffs designated that testimony as confidential, a protective order governing *June II* prevented Louisiana from referring it directly to law enforcement

[1] Louisiana will fully redact all identifying information in the Supplemental Sealed Appendix prior to lodging electronically.

and disciplinary authorities. See Protective Order ¶ 7, *June II* (ECF 96) (providing that confidential material may not be "used for any purpose except the prosecution or defense of this litigation, or be in any way revealed, delivered or disclosed, or otherwise made known, in whole or in part, to any person" with certain exceptions not relevant here). Louisiana sought leave to make such a disclosure, but the *June II* plaintiffs (Hope and Dr. John Does 1, 2, and 3) opposed. The district court has not yet resolved that motion. The briefing on the motion, which includes the relevant documents as exhibits, is now under seal in the district court (over Louisiana's objection) and therefore cannot be provided to this Court except by court order.

On October 15, 2019, less than two weeks after this Court granted certiorari, Louisiana asked Plaintiffs for their position on unsealing the briefing and documents in the district court record for the limited purpose of filing them under seal in this Court. On October 18, after Plaintiffs failed to provide a substantive response, Louisiana filed a motion for expedited relief with the district court. Louisiana explained that the underlying facts, coupled with Plaintiffs' effort to prevent use of the facts by Louisiana regulators and law enforcement, illustrate a conflict of interest between Plaintiffs and their patients. After waiting an entire month for the district court to resolve the motion, Louisiana filed an emergency mandamus petition in the Fifth Circuit, asking it to compel the district court to (1) unseal the district court briefing, including the sealed documents attached as exhibits, for the limited purpose of filing those documents under seal in this Court; (2) unseal those documents *in toto*;

or, alternatively (3) rule within 3 business days on Louisiana's pending motion.

On November 25, with the mandamus petition pending in the Fifth Circuit, the district court entered an order denying Louisiana's motion. Then, on November 27, the Fifth Circuit denied mandamus, holding that mandamus was unavailable because the November 25 order denying leave could be directly appealed under the collateral order doctrine. Order, *In re Gee*, No. 19-30953 (5th Cir. Nov. 27, 2019).

Louisiana accordingly appealed on an expedited basis, and on December 17, 2019, the Fifth Circuit once more declined to provide relief, holding that "[t]he question of what documents, if any, the Supreme Court should consider in deciding *June I* [the admitting privileges case] is not for us to resolve. That decision is within the purview and prerogative of the Court." Opinion at 2, *June Medical Services, L.L.C.* v. *Gee*, No. 19-30982 (5th Cir. Dec. 17, 2019), *as revised* Dec. 19, 2019.

2. Trial in this case was held more than four years ago, in June 2015. The district court issued final judgment in April 2017. The district court's decision was necessarily based on facts as they existed at the time. Since the district court's decision, however, the number and distribution of Louisiana abortion providers have changed, and further regulatory actions have been taken involving some of them. As explained in Louisiana's opening brief, those factual developments go both to the merits of the case and to Plaintiffs' standing to represent their patients.

Louisiana has accordingly compiled a small set of documents that illustrate those changes. The documents include (1) declarations from two Louisiana state officials, as well as a supporting exhibit describing serious safety violations recently

found at a Louisiana abortion clinic, and (2) public records showing affiliations between several doctors (including Doe 2, Dr. John Doe 6, and another doctor referred to as Dr. John Doe S) and Louisiana abortion clinics. Those public records reveal the doctors' true names.

3. Several of the documents discussed above are not readily converted from their native formats into this Court's booklet format. In addition, some of the documents under seal in the district court in *June II* are voluminous. The documents could be easily be presented in 8½-by-11-inch paper format, the format used for the Joint Appendix in this case.

REASONS FOR GRANTING THE MOTION

This Court has inherent authority to govern its own proceedings "so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co.* v. *Haeger*, 137 S. Ct. 1178, 1186 (2017). The issues addressed in this motion implicate that inherent authority. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) (including within the "inherent supervisory authority over the proceedings conducted before it" the "authority to review lower courts' exercise of … supervisory authority, insofar as it affects the judgments brought before" this Court); see also Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324, 387 n.57 (2006) (This "Court's inherent authority over its own procedure might permit it to dictate some inferior court procedures designed to facilitate the Supreme Court's own review of the inferior court record."). The documents covered by this motion would aid this Court's review, and so the Court should exercise its authority to receive them. The Court should also seal

those documents that raise confidentiality or privacy interest.

I. This Court Should Allow Louisiana to Supplement the Record with Information Relevant to the Third-Party Standing Questions Presented Here—Information That is Currently Subject to a Protective Order.

This Court recognizes a "'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." *Bd. of License Comm'rs of Tiverton* v. *Pastore*, 469 U.S. 238, 240 (1985) (per curiam) (quoting *Fusari* v. *Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). Information that is potentially dispositive of a claim falls within that duty. See, *e.g.*, *Schreiber Foods, Inc.* v. *Beatrice Cheese, Inc.*, 402 F.3d 1198, 1205 (Fed. Cir. 2005) (gap in ownership that implicated standing, enforceability, and quantum of damages); *Weicherding* v. *Riegel*, 160 F.3d 1139, 1141-1142 (7th Cir. 1998) (criminal conviction that undermined claim for equitable relief). Disagreement about the importance of the facts does not negate the reporting obligation. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 68 n.23 (1997). Consistent with that duty, Louisiana first seeks leave to file its Second Supplemental Sealed Appendix that includes information that is currently sealed subject to the *June II* protective order.[2] That protective order precludes Louisiana from even lodging the appendix with this Court at this time.

1. The information covered by the *June II* protective order is highly relevant to both questions presented in Louisiana's cross-petition. After the record closed in this

[2] Louisiana disagrees that sealing is proper for the documents in question. The records are presumptively public. *E.g.*, *Richmond Newspapers, Inc*. v. *Virginia*, 448 U.S. 555, 572 (1980). However, Louisiana will file the documents under seal to permit lower courts to address their confidentiality in the first instance, should this Court wish to reserve the question.

case, evidence developed of serious violations of medical and legal standards intended for the protection of abortion patients, and Plaintiffs sought to conceal it from state authorities. That information illustrates a conflict between Plaintiffs and their patients, a fact which ordinarily vitiates third-party standing, see *American Library Ass'n* v. *Odom*, 818 F.2d 81, 86 (D.C. Cir. 1987), and shows how conflicts can develop or come to light at any time while a case is pending. The information thus "may conceivably affect the outcome" of both issues presented by the cross-petition: (1) whether the Plaintiffs have third-party standing to represent those same patients, and (2) whether objections to third-party standing can be forfeited.

The relevance of the information was conceded by the district court in the very order that denied Louisiana's motion. See Order at 1, *June Medical Services, LLC* v. *Gee* [*June II*], No. 3:16-cv-444 (M.D. La. Nov. 25, 2019) ("[T]he evidence sought may well be relevant to [Louisiana's] arguments in *June I*."). And relevance under the federal rules is a very low bar—"Evidence is relevant if: (a) it has *any* tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is *of consequence* in determining the action." Fed. R. Evid. 401 (emphasis added).

Under ordinary circumstances, Louisiana could simply direct this Court's attention to relevant filings on the district court's public docket in the other pending case or include them in a supplemental appendix. The Court could then take judicial notice of the facts that (a) the Louisiana Department of Justice concluded that Doe 2's testimony included evidence of criminal and professional misconduct, and (b) that Plaintiffs affirmatively sought to prevent that evidence from being referred to

criminal and regulatory authorities. Fed. R. Evid. 201; see also, *e.g.*, *MGIC Indem. Corp.* v. *Weisman*, 803 F.2d 500, 504-505 (9th Cir. 1986) (affirming award of attorney's fees after taking judicial notice of inconsistent statement in related proceeding to establish knowledge and absence of reliance). But Plaintiffs have objected to that approach based on the *June II* protective order, which currently prevents Louisiana from providing the relevant documents to this Court. See Protective Order ¶ 7, *June II* (ECF 96). Plaintiffs' reliance on that order leaves Louisiana in an impossible bind. It can either (1) violate its affirmative duty under *Tiverton* to bring the evidence to this Court's attention or (2) violate its affirmative duty to act in accordance with the district court's protective order in the other case. That is untenable.

2. That the information Louisiana seeks to provide this Court arose during discovery in another case is of no moment. Even if Plaintiffs dispute the significance of the information developed in *June II*, there is no question they are obstructing further investigation. If not for the protective order, Louisiana could simply cite to the public documents illustrating that fact.

This Court has previously considered events and information that became apparent to a reviewing court only after the close of the trial record in holding that a litigant lacked third-party standing. One example is *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 9, 15 (2004), which ultimately turned on the plaintiff's ability to assert his daughter's First Amendment rights. *Id.* at 5. This Court held that he could not, because he lacked "exclusive legal custody" over her, an issue that was not

apparent until the girl's mother intervened *after* the Ninth Circuit had issued an opinion. *Id.* at 9, 15. In *Newdow*, as here, relevant facts arose after the close of evidence.

Louisiana has now attempted to obtain relief through the lower courts, but that effort was ultimately unsuccessful. In three separate decisions, the district court and Fifth Circuit have denied leave. As things now stand, therefore, Louisiana is unable to present to this Court the full range of relevant facts developed in *June II* related to Plaintiffs' (lack of) standing. At this point, the appropriate relief can only come from this Court, pursuant to its inherent power to govern its own proceedings. Louisiana accordingly seeks this Court's permission to file, under seal, a supplemental appendix with the *June II* materials bearing on Plaintiffs' standing that both the district court and the Fifth Circuit have refused to allow Louisiana to file with this Court. As noted, that refusal is based on the Fifth Circuit's view that that "[t]he question of what documents, if any, the Supreme Court should consider in deciding *June I* [this case] is not for us to resolve. That decision is within the purview and prerogative of the Court." Opinion at 2, *June Medical Services, L.L.C.* v. *Gee*, No. 19-30982 (5th Cir. Dec. 17, 2019), *as revised* Dec. 19, 2019.

II. This Court Should Also Allow Louisiana to Supplement the Record with an Additional, Unsealed Appendix Containing Current Information about Louisiana Abortion Clinics and Providers.

In addition to seeking leave to file a supplemental appendix containing sealed documents which are currently subject to the protective order in *June II*, Louisiana also seeks leave to file a separate, unsealed Supplemental Appendix to supplement

the record with changes to the abortion landscape in Louisiana since the close of evidence in the underlying case. Louisiana is seeking leave to lodge this appendix through a letter being filed contemporaneously with this motion.

The first item in that appendix is a declaration from Cecile Castello, the Director of the Health Standards Section ("HSS") at LDH. Supp. App. 1-2. It includes information on the activities of Does 2 and 5 since the close of trial, disclosures made to LDH by Louisiana abortion providers, and an exhibit showing deficiencies uncovered at Delta Clinic of Baton Rouge. Supp. App. 2. The record of deficiencies is a record of regularly conducted LDH activities, based on "observations and findings of HSS personnel." Supp. App. 2.

The second item is a declaration from Devin George, Louisiana's Registrar of Vital Records. Supp. App. 37-38. Mr. George is the custodian of Louisiana's vital records, including induced termination of pregnancy ("ITOP") reports filed pursuant to Louisiana law. Supp. App. 38. Those reports reveal the entries and exits of abortion doctors from the Louisiana market, and reveal where given abortion doctors are performing abortions at given times. Supp. App. 38-39.

Both of these declarations will establish changes to the abortion providers' clinic affiliations and activities, as well as the results of clinic health inspections, since the close of evidence. These documents are directly relevant to the resolution of the questions in this case and—as public records setting out official activities—are not based on impermissible hearsay. See Fed. R. Evid. 803(6), (8), (9).

Because this information will reflect the most current data available on this

issue, Louisiana could not have previously provided it to the Court. Recognizing its duty to fully inform this Court of all relevant information, Louisiana refers to those documents in its opening brief to ensure that this Court has full information on the subsequent activities of the abortion providers in Louisiana.

III. This Court Should Also Allow Louisiana to Supplement the Record with an Additional Sealed Appendix Containing Relevant Information about Certain Louisiana Abortion Doctors.

This Court should also allow Louisiana to file the Supplemental Sealed Appendix containing a sealed declaration and exhibits of publicly available—but confidential—documents with information about the clinic affiliation of certain Louisiana abortion doctors. Louisiana is seeking leave to lodge this appendix through a letter being filed contemporaneously with this motion.

The documents are official public records that reveal Doe 2 and two other doctors are affiliated with both Delta Clinic in Baton Rouge and Women's Healthcare Center in New Orleans. See Fed. R. Evid. 803(8); Supp. Sealed App. 5-22. Doe 2's affiliation with the New Orleans clinic, Supp. Sealed App. 15-18, highlights the relevance of the admitting privileges Doe 2 received in New Orleans and suggests his ability to practice there. This appendix also confirms the entry of at least one other abortion provider in the Louisiana abortion market. Supp. Sealed App. 12, 22. That goes to the merits of Plaintiffs' claim—in this pre-enforcement facial challenge—that Act 620 imposes an undue burden on the abortion decision.

The public records are publicly available online and could be cited directly in Louisiana's brief. However, they include the doctors' true names and so, if cited in

Louisiana's brief, would end their anonymity. Supp. Sealed App. 2-4.[3] Allowing Louisiana to file this information under seal will provide this Court with a more complete understanding of the issues in this case while maintaining the doctors' anonymity.

CONCLUSION

For these reasons, Louisiana moves this Court or leave to file (1) the Second Supplemental Sealed Appendix containing relevant documents that are under seal pursuant to the *June II* protective order, (2) the Supplemental Appendix containing documents describing recent developments in the Louisiana abortion market, and (3) the Supplemental Sealed Appendix containing public records revealing current clinic affiliations. Louisiana requests leave to file the first and third appendixes under seal. Louisiana further requests leave to file all three appendixes in 8½-by-11-inch paper format, consistent with the Joint Appendix.

---

[3] Louisiana disagrees that anonymity is proper, see Pet. App. 5a n.4, but does not challenge it for purposes of this motion.

Respectfully submitted,

GENE C. SCHAERR
ERIK S. JAFFE
STEPHEN S. SCHWARTZ
KATHRYN E. TARBERT
SCHAERR | JAFFE LLP
1717 K Street NW,
Suite 900
Washington, DC 20006
(202) 787-1060

WILLIAM S. CONSOVOY
JEFFREY M. HARRIS
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209

JEFF LANDRY
Attorney General
ELIZABETH B. MURRILL
Solicitor General
Counsel of Record
JOSEPH SCOTT ST. JOHN
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov

Counsel for Respondent/Cross-Petitioner

December 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2019, I sent a copy by United States mail as well as an electronic copy of the foregoing to the following counsel of record:

/s/ Elizabeth B. Murrill
____
Elizabeth B. Murrill
Counsel for Petitioner

TRAVIS J. TU
The Center for Reproductive Rights
199 Water Street
22nd Floor
New York, NY 10038
(917) 637-3627
tjtu@reprorights.org