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.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO MOTION TO SUPPLEMENT THE RECORD AND TO FILE CERTAIN DOCUMENTS UNDER SEAL

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INTRODUCTION

The State's motion seeks to submit three "supplemental" appendices of extra-record material. Without waiting for a ruling on that motion, Louisiana extensively relies, in its opening brief on the merits, on this extra-record evidence to support its arguments that the Court should disregard *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and that it should overrule decades of precedent recognizing abortion providers' third-party standing.

The Court should deny the State's motion and order it to file a redacted opening brief that blacks out all of its references to evidence outside of the record. None of the State's extra-record materials has been subject to the adversarial process. Nor is any of it properly subject to judicial notice or to any duty to disclose. To the contrary, the evidence goes to the merits of the State's defense of the challenged admitting-privileges law ("Act 620") and to its nonjurisdictional objection to Hope's standing.[1] In addition, the negative factual inferences that Louisiana urges the Court to draw from these materials are hotly contested and directly conflict in many cases with the district court's findings of fact.

Louisiana's "second" sealed supplemental appendix (which the State's motion confusingly addresses first) is improper for an additional reason. These materials are governed by a protective order in a separate ongoing lawsuit ("*June II*") pending in

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[1] This filing refers to Petitioners-Cross-Respondents collectively as "Hope," which is the same convention used in their opening brief on the merits.

the Middle District of Louisiana in which the plaintiffs challenge different abortion restrictions from Act 620. *See* Prot. Order, *June Med. Servs., LLC v. Gee*, No. 3:16-cv-444 (M.D. La. Feb. 22, 2018), ECF No. 96. The district court presiding over *June II* and the Fifth Circuit denied Louisiana's previous motions to modify the *June II* protective order or unseal confidential materials for use in this case. Ruling & Order, *June Med. Servs., LLC v. Gee*, No. 3:16-cv-444 (M.D. La. Nov. 25, 2019), ECF No. 304; Op., *June Med. Servs., LLC v. Gee*, No. 19-30982 (5th Cir. Dec. 19, 2019), ECF No. 0515243451. Louisiana has not sought review of those rulings. As a result, none of the relevant orders from *June II* is before the Court.

REASONS FOR DENYING THE MOTION

I. LOUISIANA'S SUPPLEMENTAL APPENDICES VIOLATE THE WELL-ESTABLISHED RULE THAT MATERIAL OUTSIDE THE RECORD CANNOT BE CONSIDERED ON APPEAL

Our "entire system of determining disputes by trial before a court rests on the assumption that decisions must be based on the evidence submitted to (and held admissible by) the court and nothing else." Robert L. Stern, Appellate Practice in the United States § 10.12, at 276 (2d. ed. 1989). The corollary rule is that "an appellate court can properly consider only the record and facts before the district court and thus only those papers and exhibits filed in the district court can constitute the record on appeal." *Bath Junkie Branson, LLC v. Bath Junkie, Inc.*, 528 F.3d 556, 559-60 (8th Cir. 2008); *see also* Fed. R. App. P. 10(a).

This rule respects the division of responsibility between district courts, which are the triers of fact, and appellate courts, which review only for error. It also furthers fairness and finality. Since there are no mechanisms in appellate proceedings to rebut new materials or test their veracity, the rule limits litigants to evidence that was vetted through the adversarial process. *See United States v. Husein*, 478 F.3d 318, 335 (6th Cir. 2007) ("A party may not by-pass the fact-finding process of the lower court and introduce new facts in its brief on appeal."); *United States v. Elizalde-Adame*, 262 F.3d 637, 641 (7th Cir. 2001) (rule prevents "add[ing] new material to the record in order to collaterally attack the trial court's judgment").

Trial in this case followed protracted discovery that Louisiana itself has described as "extensive." Def.'s Mem. in Opp'n to Pls.'s Mot. for Prelim. Inj. at 2, ECF No. 88, ROA 900. Over the course of six trial days, the district court received testimony from 20 fact and expert witnesses (live and via deposition), ruled on numerous evidentiary objections, and ultimately received hundreds of exhibits. Then, after this Court decided *Whole Woman's Health* and struck down the Texas law on which Act 620 was modeled, the district court here allowed the parties to supplement the record. *See* Pet. App. 140a; Min. Entry at 2, *June Med. Servs., LLC v. Gee*, No. 14-cv-00525 (M.D. La. Aug. 18, 2016), ECF No. 253, ROA 4079. In fact,

the district court continued to receive supplemental evidence right up until final judgment was entered in April 2017. *See* Pet. App. 247a-48a.[2]

Because Louisiana had a full and fair opportunity to develop the record below, and because this case arises from a final judgment entered after a full trial on the merits, the Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488, 500 (2009), controls. There, the Court held that it would be improper on appeal to consider factual declarations that were proffered "after the trial is over, judgment has been entered, and a notice of appeal has been filed." *Id.* The Court observed that allowing such material to be considered would usher in a "brave new world" of litigation tactics. *Id.* Instead, a party seeking to supplement the record after final judgment must present its supplemental materials to the district court in accordance with Rule 60's requirements for reopening the judgment. *Id.*; *see also FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 235 (1990) (refusing to rely on evidence proffered for the first time before this Court because "it is not in the record of the proceedings below"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970) ("Manifestly, [evidence not in the record] cannot be considered by us in the disposition of this case.").

Louisiana ignores *Summers*, but everything the Court said in that case applies here with equal force. *Summers* also forecloses Louisiana's argument that

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[2] The parties supplemented the record for the last time in or about April 2017 with evidence that Bossier Clinic had closed for reasons not directly related to this litigation. *See* ROA 4168.

supplementation is permissible because its cross-petition for certiorari challenges Hope's third-party standing and jurisdiction can be questioned at any time. Of course, the State's argument wrongly assumes that third-party standing is jurisdictional when the Court has "settled" that it is not. *Craig v. Boren*, 429 U.S. 190, 193 (1976). But even if Louisiana were correct, *Summers* was a case in which Article III jurisdiction was challenged, and the Court nevertheless refused to consider new evidence on appeal. *See Summers*, 555 U.S. at 500; *see also Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240-41 (D.C. Cir. 2015) (following *Summers* in holding that a "court may not consider on appeal supplemental declarations filed after entry of the judgment" in determining whether plaintiffs "have standing").

In fact, Louisiana's challenge to Hope's third-party standing only underscores why supplementation of the record here would be inappropriate. Louisiana repeatedly conceded Hope's standing before the district court and raised this challenge for the first time in May 2019 when it filed its conditional cross-petition for certiorari. Cross-Pet. 1-3; Br. for Resp./Cross-Petr. ("Resp. Br.") 7-10. Because the issue was never raised below, Louisiana never developed a factual record that supports its third-party standing arguments. Louisiana cannot seek to cure that failure by manufacturing a record for the first time in this Court. Nor can Louisiana reasonably expect this Court to overturn decades of precedent supporting abortion providers' third-party standing based solely on one side's presentation of untested materials.

II. THE DOCTRINE OF JUDICIAL NOTICE DOES NOT APPLY HERE

Louisiana suggests that the Court can ignore the rule barring consideration of material outside the record because certain of its supplemental materials can be judicially noticed. This argument fails for at least two reasons.

First, judicial notice is not a "talisman" to fill gaps in the trial record. *Am. Stores Co. v. Comm'r*, 170 F.3d 1267, 1270 (10th Cir. 1999); *see also Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980) ("judicial notice was never intended to permit . . . introduction of substantive evidence at the appellate level"). Otherwise the doctrine of judicial notice would allow circumvention of the district court's gatekeeping role in defining the record.

Second, even in circumstances where the doctrine is properly invoked, judicial notice is not appropriate unless the materials are "not subject to reasonable dispute." Fed. R. Evid. 201(b); *see also, e.g.*, *N.D. ex rel. Parents Acting as Guardians ad litem v. Hawaii Dep't of Educ.,* 600 F.3d 1104, 1113 n.7 (9th Cir. 2010) (rejecting use of judicial notice to supplement the record on appeal with disputed material). Though Louisiana's motion claims that the State's intent is merely to provide the Court with "relevant" and "accurate" information, Louisiana relies on these supplemental materials in its merits brief to make numerous contested factual assertions, many of which directly conflict with the district court's factual findings.

The State's reference to *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), does not solve this problem. There, the Court took judicial notice of custody

orders showing that the plaintiff, a father who had filed the case claiming to sue as his daughter's "next friend," lacked custody or any other "legal control" over her interests. *Id.* at 14. Because the custody orders were not reasonably open to dispute, judicial notice of them was proper. Here, an examination of the evidence the State seeks to introduce years after trial makes clear that judicial notice is improper:

A. Louisiana's Supplemental Appendix

Louisiana's supplemental appendix contains fact declarations from Cecile Castello, an employee of Louisiana's Department of Health, and Devin George, the state registrar.[3]

Ms. Castello's declaration contains averments regarding two Louisiana abortion providers pseudonymously identified as Dr. Doe 5 and Dr. Doe 2. Ms. Castello avers that Dr. Doe 5 has filed an application for a license to open an abortion facility in New Orleans, and Louisiana relies on this fact in its merits brief to suggest that abortion access is different today than it was in April 2017 when the record closed. Resp. Br. 19-20, 79-80; Mot. to Supp. 4-5, 10-11. But Louisiana fails to mention that the State has refused to grant Dr. Doe 5's application, which has languished now for more than a year.[4]

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[3] Louisiana suggests that these declarations would be admissible at trial under various hearsay exceptions. Mot. to Supp. 10. Even assuming that is correct, Louisiana cites no authority for the proposition that judicial notice is appropriate as long as material is non-hearsay. In fact, declarations setting forth untested facts are an exemplar of materials that cannot be judicially noticed. *See, e.g., Turnacliff v. Westly*, 546 F.3d 1113, 1120 n.5 (9th Cir. 2008).

[4] Louisiana's refusal to grant Dr. Doe 5's license application has been publicly reported, but Hope has not referenced those reports here to preserve Dr. Doe 5's anonymity. Other information in Louisiana's

Ms. Castello avers that Dr. Doe 2 became the medical director at Delta Clinic in Baton Rouge in March 2018, which Louisiana claims is a material change in Dr. Doe 2's status. Resp. Br. 19. But the State acknowledges in its merits brief that Dr. Doe 2 stepped down as the medical director at Delta Clinic in August 2019. *Id.* (citing Supp. App. 2, 38). His status, therefore, has returned to what it was in April 2017 when the district court found that Dr. Doe 2 is only contracted to be a backup abortion provider at Hope Clinic in Shreveport. Pet. App. 161a.[5]

Mr. George's declaration avers that he is the custodian of records for information that abortion providers are mandated to provide to the state through induced termination of pregnancy ("ITOP") reports. Supp. App. 38. Notably, Mr. George's declaration does not attach any actual ITOP reports. Rather, purportedly based upon a review of the reports, Mr. George avers to the months and years when various physicians have and have not reported abortion-related information. *Id.* at 38-40.

Even assuming ITOP reports themselves would be suitable for judicial notice, Mr. George's unverified observations based upon his review of the reports should not be. *See Am. Prairie Constr. Co., v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009) ("Caution

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supplemental materials indicates that Dr. Doe 5 has not provided abortions in the state since March 2018. Supp. App. 39.

[5] Louisiana claims in its merits brief that Dr. Doe 2's stint as medical director at Delta Clinic proves that he could become a full-time provider at Hope Clinic if Act 620 forces Hope Clinic's current full-time provider (Dr. Doe 1) to stop providing abortions. Resp. Br. 79. Ms. Castello's declaration provides no facts that support this speculation.

must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules."). Nevertheless, Louisiana argues based upon Mr. George's averments that the number of abortion providers in Louisiana has changed since April 2017 because two additional physicians, identified as Dr. Doe W and Dr. Doe S, have reported performing abortions. Resp. Br. 20.

Nothing in Mr. George's declaration casts the district court's factual findings into doubt. According to Mr. George's declaration, Dr. Doe W reported abortions only during a brief two-month period starting in December 2018 and is no longer performing abortions. Supp. App. 39. Mr. George's declaration also indicates that Dr. Doe S began reporting abortions to the State in November 2016, several months *before* the record closed. *Id*. Louisiana never sought to proffer evidence regarding Dr. Doe S before the district court, so it cannot now claim that the district court erred in not considering him.

Moreover, even if Dr. Doe W and Dr. Doe S were "new" abortion providers, Louisiana concedes in its merits brief that there is no evidence that either physician has admitting privileges and could continue to provide abortion care if Act 620 became enforceable. Resp. Br. 20 (describing the status of these physicians' admitting privileges as presently "unknown"). Lacking such evidence, the State is without any basis to claim that the district court's assessment of Act 620's burdens were clearly erroneous or would be different today.

Louisiana's supplemental appendix additionally contains a "statement of deficiency" issued to Delta Clinic in March 2019, which Louisiana cites as proof that Dr. Doe 2 has demonstrated a lack of concern for patient safety that should defeat standing. Resp. Br. 10-11.[6] In fact, the statement of deficiency identifies numerous steps that Delta Clinic promptly took to remedy the purported deficiencies. Supp. App. 21-28. It provides no grounds to disturb the district court's factual finding that Dr. Doe 2 is a well-qualified OB/GYN who has safely and competently provided abortion care in Louisiana for decades. Pet. App. 226a, 213a-14a.

In any event, a statement of deficiency that has not been subject to the adversarial process should not be accepted by the Court as conclusive proof of anything. At trial, Louisiana relied on other statements of deficiency to portray abortion providers as lawless and unsafe. *See* ROA 11436-45, 11446-66, 11467-72, 11473-77, 11478-500, 11501-09, 11510-12, 14060-131. But Hope demonstrated that the deficiencies were often unfounded, did not represent any actual risk to patients' safety, and/or were promptly redressed to the state's satisfaction. The district court ultimately found that the "overwhelming weight of the evidence" demonstrated that abortion in Louisiana is "extremely safe." Pet. App. 218a-19a.

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[6] This document is Exhibit 1 to Ms. Castello's declaration. Notably, other materials in Louisiana's supplemental appendix indicate that the State has permitted Delta Clinic to remain in operation and abortions currently are performed there. Supp. App. 38-39.

B. Louisiana's Supplemental Sealed Appendix

Louisiana's supplemental sealed appendix contains a declaration from J. Scott St. John, one of the lawyers for the State in this case. Supp. Sealed App. 1-4. Mr. St. John's declaration attaches printouts from a state-sponsored website concerning abortion providers' licenses to prescribe controlled substances.[7]

Louisiana claims that these materials confirm Dr. Doe S's status as an abortion provider. But as noted above, Dr. Doe S was known to the State prior to final judgment. *See supra* at 12. Louisiana also claims that these materials show that Dr. Doe 2's admitting privileges at a New Orleans hospital are "relevant" to Act 620's burdens because, even though he has never worked at Women's Clinic in New Orleans, Dr. Doe 2 has a license to prescribe controlled substances at that clinic's street address. Mot. to Supp. 11; *see also* Resp. Br. 77 & n.25. But the district court found (and the Fifth Circuit agreed) that Dr. Doe 2's admitting privileges in New Orleans do not satisfy the requirements of Act 620. Pet. App. 240a-41a, 9a & n.18; *see also id.* at 43a n.58. That would make it impossible for Dr. Doe 2 to perform abortions at Women's Clinic under Act 620, regardless of whether he possesses a license to prescribe controlled substances there.

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[7] Should the State be permitted to supplement the record, Hope agrees that these materials should be filed under seal because they reveal the identities of abortion providers. The district court shielded their identities based upon well-founded fears of harassment and violence.

C. Louisiana's Second Supplemental Sealed Appendix

In a second supplemental sealed appendix, Louisiana proposes to submit confidential discovery materials from the *June II* case. Louisiana does not provide the Court with copies of these materials because, as the State concedes, the protective order in *June II* precludes the State from doing so. Mot. to Supp. 2-3. Nevertheless, Louisiana makes the inflammatory claim that these confidential materials would show that Dr. Doe 5 does not adhere to the standard of care for abortions in the second trimester and that Dr. Doe 2 has committed crimes in connection with his abortion practice. *Id.* at 6-7. To bolster this claim, Louisiana selectively quotes a concurring opinion from the Fifth Circuit's order *denying* the State's request for a writ of mandamus directing the district court in *June II* to rule on its request for relief from the protective order. *See In re Gee*, No. 19-30953, at 6-7 (5th Cir. Nov. 27, 2019) (Elrod, J. concurring).

As an initial matter, the Fifth Circuit's decision denying mandamus provides no support for the State's inflammatory suggestions. The court of appeals denied mandamus as moot (because the district court ruled) before Hope even had an opportunity file an opposition. And the concurrence was merely summarizing Louisiana's contentions, not the materials themselves. *See id.* (prefacing its discussion with "According to Louisiana" and "Louisiana argues").

More fundamentally, Louisiana's claim that these materials are subject to judicial notice is completely without merit. Mot. to Supp. 7. Discovery in the *June II*

case is still in its early stages, and none of the confidential materials has been subject to the adversarial process or vetted by any court. All of Louisiana's assertions based upon these materials remain unproven and hotly disputed.

Indeed, Louisiana made the very same misleading claims regarding the significance of these materials in support of its unsuccessful motions for relief from the *June II* protective order before the district court and the Fifth Circuit in that case. Though most of the briefing on those motions is sealed, even the few public filings confirm that the plaintiffs in *June II* contested Louisiana's interpretation and showed that Louisiana has trumped up these charges based upon information that was known to the State before final judgment was entered in this case. *See, e.g.*, Opp. to Appellant's Mot. for Expedited Consideration 5-6, *June Med. Servs., LLC v. Gee,* No. 19-30982 (5th Cir. Dec. 4, 2019), ECF No. 515223591; Opp. to Mot. for Limited Relief 3-4, *June Med. Servs., LLC v. Gee*, No. 3:16-cv-444 (M.D. La. Nov. 8, 2019), ECF No. 302.[8]

Neither the district court nor the Fifth Circuit in *June II*—which, unlike this Court, could review the materials under terms of the protective order—was swayed by Louisiana's mischaracterizations. *See* Ruling & Order, *June Med. Servs., LLC v. Gee*, No. 3:16-cv-444 (M.D. La. Nov. 25, 2019), ECF No. 304 (finding Louisiana had

[8] For example, Louisiana sought permission to use confidential portions of the transcript of Dr. Doe 2's March 2019 deposition in *June II*. But the plaintiffs in *June II* demonstrated that the supposed "crimes" the State sought to establish at the deposition related to years-old events that were known to the State before April 2017 when the record in this case closed. *Id.*

provided no grounds "whatsoever" to permit supplementation of the record in this case with the confidential materials); Op., *June Med. Servs., LLC v. Gee*, No. 19-30982 (5th Cir. Dec. 19, 2019), ECF No. 0515243451 (affirming that decision). Regardless, because the contents of the materials are reasonably disputed, Louisiana's argument that the Court can take them on judicial notice must be rejected.

III. LOUISIANA IS PRECLUDED FROM RELYING ON CONFIDENTIAL MATERIALS FROM *JUNE II* BY ORDERS NOT SUBJECT TO REVIEW IN THIS CASE

Louisiana's proposed appendix of confidential materials from *June II* should be rejected for the additional reason that the Court does not have the ability to modify the *June II* protective order in the context of this case.

The Court's appellate and certiorari jurisdiction is limited to review of lower courts' orders only in the case before it. *See Ortiz v. United States*, 138 S. Ct. 2165, 2176 (2018) (recognizing that the Court can exercise "appellate" jurisdiction "only when it is supervising an earlier decision by a lower court"). Indeed, even in cases where the Court has exercised its discretion to go beyond questions on which certiorari was granted, the Court has confined its review to issues and orders in those cases. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981) (collecting cases).

Louisiana claims that the Court can use its "inherent power" to modify the *June II* protective order. Mot. to Supp. 9. But the authorities that Louisiana cites recognize only the Court's inherent authority to "formulate procedural rules" to govern the federal courts. *See* Supervisory Powers of Federal Courts, 8 Fed. Proc., L.

Ed. § 20:11; 28 U.S.C. §§ 2071-77. Louisiana cites no case that suggests the Court can reach beyond the boundaries of this case and modify orders in a *different* case that is not before it. *Cf. United States v. Curry*, 47 U.S. 106, 113 (1848) (recognizing that the Court has "no power" to review cases for error beyond the limited procedure for granting certiorari established by Congress).

Equally misguided is Louisiana's claim that the *June II* protective order is preventing the State from discharging a "duty" under *Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985), to disclose material facts. That case (like the others the State cites) concerns parties' obligations to notify the Court of a fundamental change in circumstances that may have rendered the case moot. *Id.* Even accepting Louisiana's inaccurate characterization of what the *June II* materials purportedly show, the State does not contend that this case is moot. Any broader reading of *Tiverton* is untenable, for it would swallow well-settled rules governing the evidentiary record on appeal and allow parties always to escape forfeiture of arguments for failure to submit evidence in a timely manner.

While Louisiana complains that its predicament is "untenable," the Court should understand two things. First, Louisiana stipulated while this case was on appeal to the *June II* protective order. *See* Joint Mot. for Prot. Order, *June Med. Servs., LLC v. Gee*, No. 3:16-cv-444 (M.D. La. Feb. 20, 2018), ECF No. 95. Second, Louisiana did not seek review of the Fifth Circuit's decision in *June II* affirming the district court's order denying the State relief from the protective order for the purpose

of using confidential materials in this case. Perhaps the State concluded that its procedural options would be too difficult or that the applicable standard of review would be too demanding. But the consequence of the State's decision not to seek review of the Fifth Circuit's decision is that none of the relevant *June II* orders is before the Court.

The State stresses that the Fifth Circuit indicated in that decision that the State's request was better addressed to this Court. Mot. to Supp. 9. But the State never explains how the Fifth Circuit's comment could absolve the State of the need to seek review—under proper procedures and the applicable standard of review—of *that* decision (or at least somehow in *that* case), as opposed to asking this Court in this case to exercise an amorphous and unprecedented conception of its inherent powers.

IV. THE COURT SHOULD TAKE APPROPRIATE STEPS TO ENSURE THAT HOPE IS NOT UNFAIRLY PREJUDICED BY LOUISIANA'S LATE-BREAKING MOTION AND TACTICS

Certiorari was granted in this case on October 4, 2019. That gave the State almost three months before its brief was due to seek leave to supplement the record. It never did. Instead, Louisiana took it upon itself to file a merits brief relying on extra-record materials and only then sought permission from the Court to do so.

Because these materials are not properly considered as part of the record on appeal, it would be well within the Court's discretion to strike Louisiana's arguments in its merits brief that are based upon these materials. *See Holmberg v. Baxter*

Healthcare Corp., 901 F.2d 1387, 1392 n.4 (7th Cir. 1990) (striking portions of the brief referring to the "facts outside the record"); *Riley v. City of Montgomery*, 104 F.3d 1247, 1251 n.4 (11th Cir. 1997) (same). But Hope's second and final submission on the merits is due to the Court in just over a week on January 17, 2020. As part of that submission, Hope needs to quote language and cite to particular pages of the State's brief. Therefore, to minimize the disruption the State has caused—while ensuring that Hope is not unfairly prejudiced by argumentation relying on evidence outside the record—the Court should order the State to file a revised merits brief that redacts all references to, and argumentation based on, evidence that is outside the record on appeal.

If, on the other hand, the Court grants the State's motion, a different problem would arise. Because Hope considers all the State's supplemental materials improper and cannot reasonably anticipate which, if any, might be allowed, Hope requests that if Louisiana's motion is granted, even if only in part, Hope be given the opportunity to file a supplemental merits brief responding to the new materials.

CONCLUSION

For these reasons, Louisiana's motion to supplement and file certain documents under seal should be denied.

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