

ACLU of Hawai‘i Foundation

MATEO CABALLERO 10081
JONGWOOK “WOOKIE” KIM 11020
P.O. Box 3410
Honolulu, HI 96801
Telephone: (808) 522-5908
Facsimile: (808) 522-5909
E-mail: mcaballero@acluhawaii.org
wkim@acluhawaii.org

**American Civil Liberties Union
Foundation**

JULIA KAYE*
SUSAN TALCOTT CAMP*
ANJALI DALAL*
RACHEL REEVES*
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2633
Facsimile: (212) 549-2650
E-mails: jkaye@aclu.org
tcamp@aclu.org
adalal@aclu.org
rreeves@aclu.org

*admitted *pro hac vice*

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRAHAM T. CHELIUS, M.D., *et al.*,
Plaintiffs,

vs.

ALEX M. AZAR, J.D., *in his official capacity as* SECRETARY, U.S. D.H.H.S., *et al.*,

Defendants.

CIV. NO. 1:17-cv-00493-JAO-RT

[CIVIL RIGHTS ACTION]

**PLAINTIFFS’
MEMORANDUM OPPOSING
A STAY PENDING
DISPOSITION OF *GEE V.
JUNE MEDICAL SERVICES,
LLC***

Hearing: March 6, 2020, 9:00 a.m.
Judge: Hon. Jill A. Otake
Trial Date: Vacated per Dkt. 82
Related Document: Dkt. 102

The Court has requested the parties' positions on whether to stay this challenge to the FDA's Risk Evaluation and Mitigation Strategy ("REMS") for Mifeprex® pending the Supreme Court's resolution of *Gee v. June Medical Services, LLC*, Nos. 18-1460, 18-1323 ("*June*"), which challenges a Louisiana law requiring abortion providers to have admitting privileges at a local hospital. Plaintiffs' position is that a stay is not appropriate because the questions on which the Supreme Court granted *certiorari* do not materially impact the resolution of this case:

- i. whether courts can "presume" that abortion providers have third-party standing to represent their patients' rights in challenging a purported health regulation, or whether that standing depends on proof of their "close relationship" with their patients and their patients' "hindrance" to suing on their own behalf;
- ii. whether objections to third-party standing are "waivable"; and
- iii. whether to affirm the Fifth Circuit's *application* of the undue burden balancing test in upholding the Louisiana law.¹

Regardless of how the Supreme Court rules on third-party standing, it will not significantly affect this case: *First*, Plaintiffs have moved for summary judgment on three dispositive claims based entirely on their own standing: their Equal Protection claim, and their "arbitrary and capricious" and "exceeds statutory authority" claims under the Administrative Procedure Act. Compl. (Dkt. 1) ¶¶228–

¹ All quotations are from the "Question[s] Presented" in the petition for *certiorari*.

29, 233–40; Pls.’ Mot. Summ. J. (Dkt. 86) 2. *June* has no bearing on those claims. *Second*, even if *June* modified the test for establishing clinicians’ third-party standing to assert their patients’ undue burden claims, Plaintiffs likely would need to supplement the record and their statement of facts only minimally, if at all, to satisfy that revised standard—because there is already extensive record evidence both of the “close relationship” between Plaintiffs (and their members) and their patients,² and of the significant life challenges that “hind[er]” their patients’ ability to mount litigation challenging abortion restrictions as plaintiffs themselves.³

The final question in *June* likewise does not “materially affect the questions that this Court is being asked to decide.” *Greenspon v. AIG Specialty Ins. Co.*, No. 18-CV-00448-DKW-WRP, 2019 WL 2089980, at *3 (D. Haw. May 13, 2019). The Supreme Court granted *certiorari* on whether to affirm the Fifth Circuit’s application of *Whole Woman’s Health v. Hellerstedt*’s “fact-intensive” undue burden test. *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 805 (5th Cir. 2018).

² *See, e.g.*, Decl. of Plaintiff Graham Chelius, M.D. (Dkt. 87-7) ¶14 (describing patient seeking abortion to whom he had previously provided treatment for substance use disorder and obstetrical care); Decl. of Plaintiff California Academy of Family Physicians member Jared Garrison-Jakel, M.D. (Dkt. 87-8), ¶13 (describing patient who confided in him, though not her partner, her desire for an abortion, and whom Dr. Garrison-Jakel cared for throughout pregnancy while trying to assist her in obtaining an abortion).

³ *See, e.g.*, Decl. of Diana M. Pearce, Ph.D. (Dkt. 87-5) ¶¶15–22 (discussing poverty among women seeking abortions), ¶¶44–46 (discussing risks associated with disclosure of abortion decision, including violence).

Even if the Supreme Court affirms that application, this Court would still “weigh[] both the benefits and the burdens” of the Mifeprex REMS. *Id.*⁴ At most, limited supplemental briefing may be warranted on whether and how *June* impacts the undue burden claim. Thus, Plaintiffs do not believe that staying this significant matter, which Plaintiffs filed in October 2017, is the appropriate course.⁵

⁴ Nor would the Fifth Circuit’s reasoning, if affirmed, dictate the balancing here. Its conclusion that the benefits of the Louisiana law, though “not huge,” outweighed its burdens on abortion access rested primarily on its finding that those burdens were attributable not to the law, but to the failure of “the vast majority” of Louisiana abortion providers to make even a “good-faith effort” to apply for hospital privileges. *June*, 905 F.3d at 807–08. Here, by contrast, there is undisputed evidence that Plaintiffs’ members have undertaken heroic efforts to try to comply with the REMS, *see, e.g.*, Decl. of Plaintiff Society of Family Planning member Charisse Loder, M.D. (Dkt. 87-9) ¶¶5–20, 28 (Dr. Loder spent at least 100 hours trying to get University of Michigan’s Women’s Clinic in compliance with the REMS, including convening a multidisciplinary task force, which delayed her provision of Mifeprex by five years), but many clinicians face barriers that simply prevent compliance, *see, e.g.*, Garrison-Jakel Decl. ¶10 (colleague in leadership position will not consent to stocking and dispensing Mifeprex onsite); Decl. of Society of Family Planning member Joey Banks, M.D. (Dkt. 87-6) ¶15 (many of her former residents work at clinics that “simply will not stock Mifeprex”); *June*, 905 F.3d at 808, 810 (finding doctor made good faith effort to comply with Louisiana law where “hospital declined to extend an invitation [for admitting privileges] because of department resistance to staffing an abortion provider”).

⁵ Should the Court disagree with Plaintiffs’ position, Plaintiffs respectfully suggest that the Court issue a stay that takes effect after the parties submit their reply briefs on their cross-motions for summary judgment on February 7, and then set a status hearing after *June*. This would be more “efficient for [the Court’s] own docket” than discarding the current briefing and beginning anew on all five claims, three of which are entirely unrelated to *June*, and more “fair[] ... for the parties” than restarting briefing after the submission of opposition briefs. *Leyva v. Certified Groceries of Calif., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979).

Dated: January 17, 2020.

Respectfully submitted,

/s/ Julia Kaye

JULIA KAYE*

SUSAN TALCOTT CAMP*

ANJALI DALAL*

RACHEL REEVES*

American Civil Liberties Union Foundation

/s/ Mateo Caballero

MATEO CABALLERO

JONGWOOK “WOOKIE” KIM

ACLU of Hawai‘i Foundation

Attorneys for Plaintiffs

**Admitted Pro Hac Vice*

ACLU of Hawai‘i Foundation

MATEO CABALLERO 10081
JONGWOOK “WOOKIE” KIM 11020
P.O. Box 3410
Honolulu, HI 96801
Telephone: (808) 522-5908
Facsimile: (808) 522-5909
E-mail: mcaballero@acluhawaii.org
wkim@acluhawaii.org

American Civil Liberties Union Foundation

JULIA KAYE*
SUSAN TALCOTT CAMP*
ANJALI DALAL*
RACHEL REEVES*
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2633
Facsimile: (212) 549-2650
E-mails: jkaye@aclu.org
tcamp@aclu.org
adalal@aclu.org
rreeves@aclu.org

*admitted *pro hac vice*

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRAHAM T. CHELIUS, M.D., *et al.*,

Plaintiffs,

vs.

ALEX M. AZAR, J.D., *in his official capacity as* SECRETARY, U.S. D.H.H.S., *et al.*,

Defendants.

CIV. NO. 1:17-cv-00493-JAO-RT

[CIVIL RIGHTS ACTION]

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 17, 2020, true and correct copies of the foregoing documents were electronically transmitted to the Clerk's Office using the CM/ECF System, which will send notification of such filing to all counsel of record.

DATED: Honolulu, Hawaii, January 17, 2020.

Respectfully submitted,

/s/ Mateo Caballero
MATEO CABALLERO
ACLU of Hawai'i Foundation

Attorney for Plaintiffs