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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

v.

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

Defendants.

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

**DEFENDANTS' RESPONSE
REGARDING A STAY**

Defendants hereby respond to the Court’s Order of January 13, 2020, (Dkt. No. 102) asking for the parties’ positions “as to whether this action should be stayed pending the disposition of *Gee v. June Medical Services, LLC*, No. 18-1460, which is currently pending before the Supreme Court.” The Defendants believe a stay would be the most prudent course of action given the substantial overlap of issues under consideration in this case and *June Medical*.

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). When a stay is requested because of pending proceedings that bear on the case, the court may grant a stay in the interests of the efficiency of its own docket and fairness to the parties. *See Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979).

On October 4, 2019, the Supreme Court granted *certiorari* and consolidated two cases. *See June Medical Servs. v. Gee*, Nos. 18-323 & 18-1460. The United States has argued that *June Medical* “presents important questions about the scope of third-party standing and the undue-burden standard for abortion regulation.” U.S. Amicus Brief at 1, *June Medical Servs. v. Gee*, Nos. 18-323 & 18-1460 (Jan. 2, 2020) (“U.S. Amicus Brief”). As this case involves the same two issues, the outcome of *June Medical* could substantially influence the disposition of this case.

First, a decision in *June Medical* that physician plaintiffs lack standing to assert claims on behalf of their patients could directly affect the standing of both the physician and organizational plaintiffs in this case. Although Defendants withdrew their Motion to Dismiss challenging Plaintiffs' standing, Defendants did so without prejudice to reassert such objections as may be warranted at later stages in the case. *See* Dkt. No. 40 at 3. Moreover, even if Defendants had not preserved their ability to contest the Plaintiffs' standing, the Court could consider their standing *sua sponte* because the limits on third-party-standing exist to protect absent parties and courts. This is especially true in constitutional cases, where rulings will govern the fundamental rights of other individuals and the authority of the political branches. *See* U.S. Amicus Brief at 15; *c.f. Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986) (noting a "special importance" to notice defects in subject-matter jurisdiction regarding constitutional questions).

Second, a decision in *June Medical* also could affect assessment of the Plaintiffs' undue-burden claims. As an initial matter, a *June Medical* decision may well resolve the disagreement between the parties in this case about whether the Court must find that the Mifeprex REMS presents a substantial obstacle to abortion access before engaging in a benefits-burden balancing test. Plaintiffs apply a free-standing benefits-burdens balancing test in making their arguments against the REMS, *see* Dkt. No. 96 at 24; Defendants believe that Supreme Court precedent requires a threshold substantial-obstacle analysis, *see Planned Parenthood of Se.*

Penn. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion); *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). A decision in *June Medical* further may invalidate the large-fraction formulation that the Ninth Circuit employs in adjudicating facial challenges to abortion laws. As Defendants have observed, the validity of that formulation remains an “open question” in the Supreme Court. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); U.S. Amicus Brief at 29-30.

In these circumstances, where substantial overlap exists between the legal issues present here and those the Supreme Court soon will decide in *June Medical*, Defendants believe that entering a stay pending the result of the Supreme Court’s decision would be the most appropriate path for conserving the Court’s resources and efficiently adjudicating this case. In addition, should the Court impose a stay, it will not be indefinite as the Supreme Court has already granted *certiorari* and set a briefing schedule. Any stay need only last until the Supreme Court issues a decision, which is likely to be no later than the end of its current term in June.

Should the Court enter a stay, Defendants propose that, within fourteen days of the issuance of a decision in *June Medical*, the parties jointly submit a proposed schedule for proceeding with this case—and that, should circumstances change prior to a decision, any party may file a motion to lift the stay.

Dated: January 17, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following:

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Dated: January 17, 2020.

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