No. 19-30982

IN THE

United States Court of Appeals for the Fifth Circuit

JUNE MEDICAL SERVICES, LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff; and DR. JOHN DOE 1, DR. JOHN DOE 2 and DR. JOHN DOE 3, on behalf of themselves and their patients,

Plaintiffs-Appellees,

v.

REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health; JEFF LANDRY, in his official capacity as Louisiana Attorney General, and JAMES E. STEWART, SR., in his official capacity as District Attorney for Caddo Parish,

Defendants-Petitioners.

On Appeal from the U.S. District Court, Middle District of Louisiana
No. 16-cv-444-BAJ-RLB

MOTION TO PARTIALLY DISMISS OR LIMIT INTERLOCUTORY APPEAL FOR LACK OF JURISDICTION

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CERTIFICATE OF INTERESTED PERSONS

No. 19-30982, *June Med. Servs., LLC, et al. v. Rebekah Gee, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiffs' Counsel
Current Plaintiffs 1. June Medical Services, LLC d/b/a Hope Medical Group for Women 2. Dr. John Doe 1 3. Dr. John Doe 2 4. Dr. John Doe 3 **Former Plaintiff** 1. Bossier City Medical Suite	**Current Counsel** 1. Center for Reproductive Rights (Emily Nestler, Molly Duane, Caroline Sacerdote, Alexandra S. Thompson, Jenny Ma, Travis Tu) 2. Morrison & Foerster LLP (Dimitra Doufekias, Rachel S. Dolphin, Scott F. Llewellyn) 3. Rittenberg, Samuel & Phillips LLC (Charles M. Samuel, III) **Former Counsel** 1. Center for Reproductive Rights (Janet Crepps, David Brown, Zoe Levine, Leah Wiederhorn) 2. Morrison & Foerster LLP (David Scannell) 3. Rittenberg, Samuel & Phillips LLC (William E. Rittenberg)

Defendants	Defendants' Counsel
Current Defendants 1. Rebekah Gee, Secretary of the Louisiana Department of Health 2. James E. Stewart, Sr., District Attorney for Caddo Parish 3. Jeff Landry, Attorney General of Louisiana **Former Defendants** 1. J. Michael Burdine, M.D., President of the Louisiana State Board of Medical Examiners 2. J. Schuyler Marvin, District Attorney for Bossier and Webster Parishes 3. Jay Dardenne, Commissioner of the Division of Administration of Louisiana	**Current Counsel** 1. Louisiana Department of Justice (Jeff Landry, Elizabeth B. Murrill, J. Scott St. John, Angelique Duhon Freel, Jeffrey Michael Wale) 2. Schaerr | Jaffe LLP (Stephen S. Schwartz) **Former Counsel** 1. Schaerr | Duncan LLP (S. Kyle Duncan) 2. Adams & Reese (Don S. McKinney)
Third Party	**Third Party's Counsel**
Dr. John Doe 5 (physician who is the subject of confidential testimony)	Schonekas, Evans, McGoey & McEachin, LLC (Ellie Schilling)

/s/ Emily Nestler

Emily Nestler
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I. INTRODUCTION

This is an appeal from a narrow order issued by the District Court to address a singular and discrete question: whether certain confidential documents from this litigation can be disclosed to the United States Supreme Court in a separate case.

Notwithstanding the clear terms of the limited order subject to review in this appeal, Louisiana attempts to bootstrap appellate review of "broader" issues that are not properly before this Court at this juncture—including whether good cause exists to maintain longstanding Protective Orders governing this case and to protect confidential information about anonymous physicians from disclosure to the public at large—all of which is the subject of multiple motions that remain pending before the District Court. It is black-letter law that any collateral order appeal requires a district court's "final disposition" of the issues to be reviewed. Because that threshold requirement is not met here, this Court lacks jurisdiction to review those claims.

Nearly two years after stipulating to one of the governing Protective Orders—which expressly provides that certain information, including the identities of the Doe Plaintiffs, shall be placed under seal—Louisiana seeks the extraordinary relief of rolling back those protections *post hac*, without

even engaging in the requisite process that the law requires. Instead, Louisiana asks this Court to insert itself into an ongoing District Court discovery dispute and expose protected information to public scrutiny—notwithstanding the clear terms of the Protective Orders, the myriad evidence demonstrating the important privacy and safety concerns at stake, and the multiple motions on these important issues currently under consideration by the District Court. Because this Court lacks jurisdiction, Louisiana's request is foreclosed as a matter of law.

Accordingly, the Court should dismiss this appeal for lack of jurisdiction, or alternatively limit this appeal and any merits briefing to the only question at issue in the order that is subject to review here—*i.e.*, whether certain confidential documents from this litigation can be disclosed to the United States Supreme Court in a separate case. In addition, Plaintiffs-Appellees ("Plaintiffs") respectfully request that the Court address this motion at the outset, before any merits briefing takes place. Jurisdiction is a threshold question, and extensive briefing and consideration of matters that are not properly before the Court would only waste the parties' and the Court's resources.

II. FACTUAL BACKGROUND

This case is a constitutional challenge to a set of restrictive abortion bills passed in 2016 and provisions of their implementing regulations issued by the Louisiana Department of Health ("LDH"). Second Am. Compl. ¶¶ 1-2, ECF No. 88. Plaintiffs are a reproductive health clinic that provides abortion and other services and three physicians who provide abortions in Louisiana. *Id.* ¶¶ 18-21.

On July 1, 2016, the day Plaintiffs filed their complaint, Plaintiffs also filed a motion for a protective order to permit the Plaintiff physicians to proceed in this litigation using pseudonyms. ECF No. 8. The District Court entered the order, sealing Plaintiff physicians' true identities, on July 12, 2016. ECF No. 12 ("Pseudonym Order"). Plaintiff physicians sought to proceed under pseudonym because "abortion providers are often targets of harassment, intimidation, and violence" in the United States generally, and in Louisiana in particular. ECF No. 8-2 at 2; *accord* ECF Nos. 8-4 ¶¶ 3-6; 8-5 ¶¶ 3-7, 8-6 ¶¶ 3-9.

On February 20, 2018, the parties jointly moved for a protective order governing treatment of confidential information about Plaintiffs and third parties in this case, stating to the District Court that "good cause" existed for

entering such an order. ECF No. 95. Among other things, the stipulated terms of this protective order expressly reaffirmed that "[t]he real names of [the Doe Plaintiffs] shall be placed under seal." ECF No. 96 ("Protective Order") ¶ 4. The District Court granted this stipulated protective order on February 22, 2018. *Id.*

Since entry of the Pseudonym Order in 2016 and the Protective Order in early 2018 (collectively, the "Protective Orders"), Plaintiffs have produced thousands of documents and Dr. Doe 2 has appeared for a deposition in reliance on the two Protective Orders shielding confidential information in this case.

Starting in October 2018, Louisiana has engaged in an escalating practice of seeking to de-designate and/or unseal information squarely covered by the Protective Orders in this case.[1] Throughout that year,

[1] On October 16, 2018, Louisiana improperly disclosed the identities of certain third-party Louisiana abortion providers in a public filing in this case, violating the Protective Orders and jeopardizing the privacy of third-party physicians. Louisiana refused to remove and redact this information from the public docket—necessitating an Emergency Motion to Strike and ultimately a District Court order that sealed the filing. ECF No. 203 (Oct. 19, 2018). On October 25, 2018, Louisiana moved to vacate that sealing order. Defs.' Mot. to Vacate & Unseal, ECF No. 207. The District Court denied that motion on July 31, 2019. ECF No. 265. On August 16, 2019, Louisiana filed a renewed

Louisiana filed at least six motions to this end, four of which remain pending. *See* Defs.' Mot. to Vacate & Unseal, ECF No. 207 (Oct. 25, 2018) (denied, ECF No. 265); Defs.' Mot. to De-Designate Portions of Dr. Doe 2's Dep. Test., ECF No. 270-3 (filed under seal at ECF No. 284) (Aug. 16, 2019) (pending); Defs.' Renewed Mot. to Vacate & Unseal, ECF No. 271-3 (filed under seal at ECF No. 285) (Aug. 16, 2019) (pending); Defs.' Mot. for Expedited & Consolidated Consideration of Renewed Mot. to Vacate & Unseal & Mot. to De-Designate, ECF No. 279 (Sept. 18, 2019) (pending); Defs.' Mot. to Review Magistrate Judge's Order (ECF 281), ECF No. 292 (Oct. 16, 2019) (pending); Defs.' Mot. for Limited Relief from Protective Order to File Documents with U.S. Supreme Court, ECF No. 293 (Oct. 18, 2019) (denied, ECF No. 304).

A. Louisiana's Motion to De-Designate Confidential Testimony from Plaintiff Dr. Doe 2's Deposition

This interlocutory appeal arises from Louisiana's challenge to the sealing of one of its pending District Court motions: Louisiana's Motion to De-Designate Confidential Information from Plaintiff Dr. Doe 2's Deposition

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motion to vacate the District Court's October 19 Order, seeking to unseal the same confidential documents for the third time. Defs.' Renewed Mot. to Vacate and Unseal, ECF No. 271-3.

Transcript, which was filed on August 16, 2019. ECF No. 270-3 ("Motion to De-Designate"). Louisiana's Motion to De-Designate—filed nearly five months after the March 19, 2019 deposition at issue—seeks to publicly disclose the identities of Dr. Doe 2 and other Louisiana abortion providers, along with other private and sensitive information, without regard for the serious harm that could result. In support of its motion, Louisiana relied on multiple mischaracterizations of the underlying record to claim inaccurately that Louisiana abortion providers have essentially admitted to engaging in "violation[s] of State laws and medical standards." ECF No. 270-4 at 1. For example, while Louisiana claimed that Dr. Doe 2's deposition testimony "suggests that [Dr. Doe 2] committed multiple crimes," ECF No. 270-4 at 13, the cited testimony does no such thing. Rather, the transcript shows only that Dr. Doe 2 could not recall specifics of alleged events from years ago and testimony that Dr. Doe 2 read from the State's *own* documents—reports created by LDH concerning alleged deficiencies that it investigated and resolved years ago. *Id.* at 5 (citing Ex.1 at 331:14–337:12).

Louisiana's Motion to De-Designate is also predicated on the false notion that confidential information from this case is the only way for Louisiana to present information about Louisiana abortion providers' past

practices to state agencies. *Id.* at 9-11. On the contrary, as detailed in Plaintiffs' opposition thereto, Louisiana has ample access to these providers' professional data through Louisiana's mandatory reporting requirements and oversight of abortion clinics—including the same information they seek to disclose through this litigation. ECF No. 273-1 at 3-4. Indeed, as noted above, Louisiana's claims about Dr. Doe 2 are based *on Louisiana's own documents*—reports from LDH— which have been in the State's possession for years. *Id.* at 9.

Briefing on Louisiana's Motion to De-Designate was completed on September 13, 2019, ECF No. 277-3, and the District Court has not yet ruled on that motion. On October 2, 2019, the Magistrate Judge properly sealed the Motion to De-Designate filings along with the accompanying 58 exhibits. ECF No. 281 (entering them on the docket as ECF Nos. 284, 287, and 288).

On October 16, 2019, Louisiana filed a motion to review the Magistrate Judge's October 2 sealing order, asking the District Court to unseal all of the briefs associated with the Motion to De-Designate and the accompanying exhibits. ECF No. 292 ("Motion to Unseal the De-Designation briefs"). Briefing on Louisiana's Motion to Unseal the De-Designation briefs was

completed on October 30, 2019, and remains pending before the District Court.

B. The Separate Admitting Privileges Case

On October 4, 2019, the Supreme Court granted certiorari in a separate case involving some of the same parties, to review this Court's decision upholding Louisiana's law requiring physicians who provide abortions to have admitting privileges at a local hospital. *June Medical Servs. LLC v. Gee*, No. 18-1323 (Oct. 4, 2019) (order granting certiorari) (the "Admitting Privileges case").

At the same time, the Supreme Court also granted Louisiana's request to consider whether the plaintiffs in the Admitting Privileges case have third-party standing to assert their patients' constitutional rights and whether Louisiana's challenge to the plaintiffs' third-party standing has been waived or forfeited. *Gee v. June Medical Servs. LLC*, No. 18-1460 (Oct. 4, 2019) (order granting certiorari). Prior to filing this conditional cross-petition, Louisiana had never contested the plaintiffs' standing in the Admitting Privileges Case. Opp'n to Conditional Cross-Pet. for Writ of Cert. at 1, *Gee*, No. 18-1460 (Aug. 23, 2019). Because Dr. Doe 2 is a named plaintiff in the Admitting Privileges Case, Louisiana had ample opportunity to obtain

information about Dr. Doe 2 in connection with that matter, and in fact *did obtain* such information. Louisiana deposed Dr. Doe 2 in the Admitting Privileges Case; cross-examined Dr. Doe 2 at trial, Findings of Fact & Conclusions of Law at 76 n. 42, *June Medical Servs. LLC v. Kliebert*, No. 3:14-cv-00525 (M.D. La. Apr. 26, 2017); and served discovery requests to which Dr. Doe 2 responded.

Despite many prior rounds of briefing in this case since October 2018 about whether to de-designate and/or unseal records—including at least five motions that Louisiana filed while their petition for certiorari in the Admitting Privileges Case was pending—Louisiana never sought to unseal confidential information for use in the Admitting Privileges Case, or indicated that they believed such is information necessary to disclose to the Supreme Court , until October 2019. *See, e.g.*, ECF. Nos. 284-1, 285-1, 292-1.

C. Louisiana's Motion for Limited Relief from the Protective Order to File Documents with the United States Supreme Court

On October 18, 2019, Louisiana filed in the District Court a Motion for Limited Relief from the Protective Order, seeking to disclose certain sealed documents from this litigation to the Supreme Court in the Admitting Privileges Case. ECF No. 293 ("Motion for Limited Relief"). Specifically,

Louisiana sought to unseal papers associated with one of their many pending motions: their Motion to De-Designate Confidential Information from Plaintiff Dr. Doe 2's deposition—including the briefs and the accompanying 58 exhibits filed in connection therewith. Defs.' Mem. Supp. Mot. for Limited Relief at 2, ECF No. 293-1. Those papers include Dr. Doe 2's deposition transcript; years-old reports from LDH; correspondence among attorneys about discovery matters in this case; printouts from anti-abortion websites; and a fact declaration from Louisiana's own attorney, among other documents. *See*, *e.g.*, ECF No. 284-4 (Exs. 1-10, 32, 47).

On November 18, 2019, a mere ten days after Louisiana's Motion for Limited Relief was fully briefed and without waiting for a decision from the District Court, Louisiana filed an Emergency Petition for Writ of Mandamus, requesting three alternative forms of relief from this Court. Petition, No. 19-30953, ECF No. 515204988. Specifically, Louisiana asked this Court to: (1) order that the Motion to De-Designate briefs and accompanying exhibits may be filed under seal with the Supreme Court in the Admitting Privileges Case; (2) "unseal those documents *in toto*"; or (3) "order the district court to rule within 3 business days on Louisiana's Motion for Limited Relief." Pet. at 4.

On November 25, 2019, before Plaintiffs' opposition to Louisiana's Petition was due, the District Court denied Louisiana's Motion for Limited Relief. Ruling & Order, ECF No. 304 (the "Limited Order"). The Limited Order only addressed the narrow issue raised by Louisiana's Motion for Limited Relief—*i.e.*, Louisiana's request to disclose the confidential documents as evidence to the Supreme Court under seal in the Admitting Privileges case. *Id*. at 1-2. The Limited Order explained that the Federal Rules of Appellate Procedure and Fifth Circuit precedent preclude Louisiana from using the documents at issue for its requested purpose. *Id.* The Limited Order did not resolve any other pending motions, nor did it address any broader questions about unsealing the documents generally or for any other purpose. *Id.*

Two days later, on November 27, 2019, this Court denied Louisiana's Petition as moot in light of the Limited Order, noting that the Limited Order affords Louisiana "adequate means" to pursue relief through direct appeal. Dispositive Order at 1, No. 19-30953, ECF No. 515216827.

On November 29, 2019, Louisiana noticed its appeal from the Limited Order and indicated that it seeks review of issues far beyond the scope of the Limited Order. Specifically, the Notice purports to "appeal from any and all

orders antecedent and ancillary thereto, including any and all judgments, decrees, decisions, rulings and opinions that . . . that shaped the Ruling and Order, that are related to the Ruling and Order, or upon which the Ruling and Order is based." Defs.' Notice of Appeal ("Notice") at 1, ECF No. 515217684.

On the same day that Louisiana filed its Notice of Appeal, it also filed a Motion for Expedited Consideration in this Court. Appellants' Mot. for Exp. Consid. ("Mot.") at 1, ECF No. 515217934. Louisiana's motion states that it has "noticed this appeal *in part* to obtain leave to provide certain material sealed by the district court to the United States Supreme Court in a related case." *Id.* (emphasis added). Louisiana further argued that "being unable to refer to the sealed material in [its Supreme Court brief] would not moot this appeal" because it "seeks *broader relief* from the district court's overbroad and unsupported sealing orders." *Id*. (emphasis added).

In other words, Louisiana explicitly states that the instant appeal seeks review of disputes beyond the purview of the Limited Order, including its broader challenges to the confidentiality protections in this case. As discussed *supra* in Part II, protection of this information from public disclosure is the subject of several pending motions before the District Court—including Louisiana's Motion to Unseal *in toto* the very same deposition testimony and

related briefing that are the subject of this appeal. *See* ECF No. 270-3. Nothing from this Court authorizes interlocutory appeal of Louisiana's "broader" challenge to the Protective Orders in this case, much less while those issues remain pending before the District Court.

III. LEGAL STANDARD

Under 28 U.S.C. § 1291, federal courts of appeal have jurisdiction over "appeals from all final decisions of the district courts." This finality requirement "precludes consideration of decisions that are subject to revision, and even of 'fully consummated decisions [that] are but steps towards final judgment in which they will merge.'" *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). "Under 28 U.S.C. § 1291, a final judgment is normally deemed not to have occurred until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Sammons v. Economou*, 940 F.3d 183, 185-86 (5th Cir. 2019) (quotation and citation omitted). If a judgment is not final, an appellate court generally does not have jurisdiction to consider an appeal. *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 499 (5th Cir. 2004) ("Generally, all claims and issues in a case must be adjudicated in the district court, and a final judgment

or order must be issued, before our jurisdiction can be invoked under § 1291.").

A narrow exception to the finality requirement comes in the collateral order doctrine, which only applies to a "'small class' of district court decisions that, though short of final judgment, are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Behrens*, 516 U.S. at 305 (quoting *Cohen*, 337 U.S. at 546). The collateral order doctrine provides that an order is appealable "if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 105 (2009) (quoting *In re Mohawk*, 541 F.3d 1048, 1053 (11th Cir. 2008)).

IV. ARGUMENT

This is an appeal from the District Court's Limited Order. ECF No. 304. That order resolved a single and discrete motion seeking limited relief in the form of "permission to file [the De-Designation briefs and accompanying

exhibits] under seal with the United States Supreme Court." ECF No. 293 at 1. In other words, neither the underlying motion nor the Limited Order addressed broader issues about the scope of the Protective Orders governing this case, such as whether there is good cause to protect from public disclosure certain confidential information at issue. On the contrary, whether confidential information from this case is should remain under seal and be protected from public disclosure is the subject of several motions that remain pending before the District Court—including multiple motions challenging sealing of the De-Designation papers that are the subject of the instant appeal.

Nonetheless, Louisiana has made explicit that this appeal seeks review well beyond the scope of the Limited Order. Louisiana's Notice purports to:

> [A]ppeal from any and all orders antecedent and ancillary thereto, including any and all judgments, decrees, decisions, rulings, and opinions that merged into and became part of the Ruling and Order, that shaped the Ruling and Order, that are related to the Ruling and Order, or upon which the Ruling and Order is based.

Notice at 1, ECF No. 515217684. Lest there be any doubt, Louisiana's Motion for Expedited Consideration confirms that the State seeks *in toto* unsealing of documents for public disclosure. For example, Louisiana's motion explains that it "noticed this appeal *in part* to obtain leave to provide certain material

sealed by the district court to the United States Supreme Court in a related case." Mot. at 1, ECF No. 515217934 (emphasis added). And the motion further states that "being unable to refer to the sealed material in [its Supreme Court brief] would not moot this appeal" because Louisiana "also seeks *broader relief* from the district court's overbroad and unsupported sealing orders." *Id.* (emphasis added).

To the extent Louisiana's appeal seeks relief beyond the scope of the District Court's Limited Order, this Court lacks jurisdiction to consider those claims. It is a threshold requirement for collateral order appeals that there must be a "final disposition" on the matter to be reviewed. *Cohen*, 337 U.S. at 546; *see also* Wright & Miller, 15A Fed. Prac. & Proc. Juris § 3911.1 (2d ed. 2019) ("The most basic element of collateral order finality is that the district court must have decided the matter offered for appeal."). Appellate courts routinely dismiss appeals because a district court has not yet ruled on the relevant issue. *See, e.g.*, *Meza v. Livingston*, 537 F3d 364, 366-67 (5th Cir. 2008) (no final reviewable order where district court had not yet ruled on defendant's motion for summary judgment); *Haley v. Walker*, 751 F.2d 284, 286 (8th Cir. 1984) (dismissing collateral appeal after first motion for denial of counsel, because plaintiff made a second motion for appointment that remained pending); *In re*

Post-Newsweek Stations, 722 F.2d 325, 329 (6th Cir. 1983) ("[B]ecause no decision had been issued by the district court . . . the first requirement of the collateral order doctrine was not satisfied."); *Citibank, N.A. v. Fullam*, 580 F.2d 82, 89 (3d Cir. 1978) (dismissing collateral appeal because order was not a "disposition" of a claim).

To the extent Louisiana seeks appellate review of "broader" issues beyond the scope of the Limited Order—*e.g.*, whether good cause exists for the Protective Orders in this case and to protect confidential information from disclosure to the public at large—there is no "fully consummated" decision on those matters to be reviewed. On the contrary, those very issues are the subject of several motions actively pending before the District Court. Defs.' Mot. to De-Designate Portions of Dr. Doe 2's Depo. Testimony; Defs.' Renewed Mot. to Vacate & Unseal; Defs.' Mot. to Review Magistrate Judge's Order (ECF 281). Indeed, one of those pending motions directly addresses the "broader" questions that Louisiana now attempts to lump into this appeal—*i.e.*, whether the District Court should unseal the De-Designation briefing and

accompanying 58 exhibits for disclosure to the public at large. ECF No. 281.[2] By definition, then, there can be no final decision subject to appeal on that issue—whether through the collateral order doctrine or otherwise.[3]

Nor could Louisiana credibly argue that broader issues about the scope of the Protective Orders, or whether the documents are properly sealed from public disclosure, fall within the purview of this Court's review of the Limited Order—which considered only the question of whether the information could

[2] After the Magistrate Judge issued an Order sealing the De-Designation briefing, Louisiana filed a motion asking the District Court judge to review that decision, ECF No. 281, which remains pending. The Magistrate Judge's interim order does not alter the analysis here. "[I]t is well established that a magistrate judge's order is not 'final' within the meaning of § 1291 and may not be appealed to this court directly." *Donaldson v. Ducote*, 373 F.3d 622, 624 (5th Cir. 2004); *see also Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 139 F.3d 899 (5th Cir. 1998) ("The request for stay pending review is DENIED for want of appellate jurisdiction over the order of the magistrate judge.").

[3] Even if the District Court were to resolve some of these pending motions, jurisdiction under the collateral order doctrine still would not be appropriate. As a threshold matter, such interim orders still do not meet the requisite elements to qualify for interlocutory review under the collateral order doctrine. *See supra* Part III. Among other things, even where an interim order conclusively determines a discovery matter, appellate jurisdiction is still lacking where the existence of other motions about the same issue raise "the possibility that the order could be revisited by the district court" and therefore render "the issue [] simply not conclusively determined." *Goodman v. Harris Cty*, 443 F.3d 464, 468-69 (5th Cir. 2006). Plaintiffs reserve all rights to argue that the District Court's resolution of pending motions are not properly before the Court on collateral appeal.

be provided to the Supreme Court *under seal*. ECF No. 304. It is well-settled that where an appealable order does not reach a certain issue, that "issue is beyond the scope" of the appeal. *Speck v. Wiginton*, 606 F. App'x 733, 735 (5th Cir. 2015) (finding no appellate jurisdiction over the question of whether the plaintiff's rights were violated on appeal from a motion to dismiss because the district court did not decide the merits of the claim or enter a final judgment). Appellate courts generally can only entertain issues that were decided by the district court. *Janvey v. Alguire*, 647 F.3d 585, 603-04 (5th Cir. 2011).

In rare instances, the Court may exercise "pendent appellate jurisdiction" over issues that otherwise could not be appealed, but "pendent interlocutory appellate jurisdiction . . . is looked on with disfavor." *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007) (quoting *McKee v. City of Rockwall*, 877 F.2d 409, 413 (5th Cir. 1989)). And pendent appellate jurisdiction over interlocutory issues exists only in limited circumstances not present here: (1) the pendent issues must have been "sufficiently developed so as not to require further development at the trial court level"; and (2) the pendent and appealable interlocutory issues must be "so entangled as to arrive" together with the appealable order, such that delaying review would

"make no practical sense" and "waste judicial resources without any offsetting benefit in the form of a more fully developed record." *In re Lease Oil Antitrust Litig.*, 200 F.3d 317, 320 (5th Cir. 2000); *see also Martin v. Mem'l Hosp.*, 86 F.3d 1391, 1401 (5th Cir. 1996) (exercising collateral order jurisdiction to review the district court's denial of state action immunity on an interlocutory basis, but finding that the Court did not have pendent appellate jurisdiction over the trial court's refusal to dismiss certain claims).

This narrow exception for pendent appellate jurisdiction clearly does not apply here. Louisiana's separate challenges to the scope of the underlying Protective Orders and broader sealing of confidential information from public disclosure are not "so entangled" with the issues in the Limited Order that they can only be decided together. Rather, the only determination made in the Limited Order was whether "appellate records are limited to materials filed with the district court in that case," such that there was no basis to disclose confidential materials from this separate litigation to the Supreme Court under seal. ECF No. 304 at 1. Because Louisiana's Motion sought only this limited relief, the Limited Order did not address any ancillary questions about the significance of the underlying documents and/or whether they can or should

be disclosed to the public. *Id.* at 1-2.[4] This Court does not have to decide ancillary issues about sealing of confidential documents generally—which are the subject of multiple pending motions before the District Court—to review the narrow question at issue in the Limited Order.

A comparison to *Janvey* is instructive. In *Janvey*, the Court held that it lacked pendent appellate jurisdiction to bootstrap review of a motion to compel arbitration onto an appeal of a preliminary injunction. 647 F.3d at 604. Even though a finding of arbitrability could impact the propriety of further injunctive relief, the Court found there was no appellate jurisdiction under any jurisprudential exception to finality because: (1) it was not necessary to address the arbitrability issues in order to review the issues raised by the preliminary injunction itself; and (2) the lower court did not resolve arbitrability of the underlying rights and obligations. For similar reasons, this Court does not have pendent appellate jurisdiction over the broader ongoing confidentiality disputes in this case, both because resolution of those issues is not necessary to address the federal procedure questions at stake in the

[4] Indeed, the Court expressly declined to opine on the meaning of the underlying documents and thus whether they could have any substantive bearing on the Admitting Privileges case. *Id.*

Limited Order, and also because those broader questions remain unresolved in the ongoing District Court proceedings.

Finally, even assuming *arguendo* that the District Court had issued an order regarding broader issues about unsealing confidential information for public disclosure, collateral review would still be foreclosed because any such order is not "effectively unreviewable on appeal from final judgment." *Mohawk Indus., Inc.*, 558 U.S. at 105 (quoting *In re Mohawk*, 541 F.3d at 1053). While orders *unsealing* records are subject to collateral review because "a decision to unseal a document cannot be undone; once confidential information is released, there is no going back," *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 448 (5th Cir. 2019), an order requiring discovery materials to remain under seal is only reviewable on appeal from a final judgment, *see, e.g.*, *SEC v. Van Waeyenberghe*, 990 F.2d 845 (5th Cir. 1993) (reversing an order sealing documents as part of an appeal of a permanent injunction order). This is sensible because, though confidential information once revealed cannot be made secret again, discovery materials

filed under seal can later be published. Under such circumstances, there is no basis for an immediate appeal.[5]

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court Grant their Motion to Partially Dismiss or Limit this Interlocutory Appeal.

Dated: December 5th, 2019

Respectfully Submitted,

/s/ Emily Nestler

Dimitra Doufekias
MORRISON &

Emily Nestler
Molly Duane

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[5] While this motion is limited to dismissal of the ancillary issues that are separate and apart from the Limited Order, Plaintiffs do not concede that this Court has subject matter jurisdiction to review the Limited Order and reserve all rights to dispute whether there is jurisdiction over that issue through this appeal. Louisiana's Notice of Appeal assumes the collateral order doctrine applies based on *Vantage Health*. Notice at 1. But, *Vantage Health* did not hold that sealing and unsealing orders are *always* unreviewable on appeal and thus are always subject to the collateral order doctrine. Rather, *Vantage Health* held only that "sealing and unsealing orders *like those involved here* are reviewable on interlocutory appeal . . . under the collateral order doctrine." 913 F.3d at 448 (emphasis added). *Vantage Health* addressed very different factual circumstances from those at issue here, including with respect to the Limited Order. Whereas here Louisiana seeks interlocutory review of an order sealing records, *Vantage Health* addressed interlocutory appeal of an order *unsealing* records. For the reasons discussed above, that is a material distinction.

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CERTIFICATE OF SERVICE

I certify that on December 5, 2019, the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using its CM/ECF system, which will send a notice of electronic filing to all parties.

/s/ Emily Nestler

Emily Nestler
Counsel for Plaintiffs-Appellees

Dated: December 5, 2019

CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains **4,946** words, exclusive of parts of the brief exempted.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman, 14-point font.

3. In accordance with Fifth Circuit Rule 27.4, Counsel for Plaintiffs-Appellees contacted counsel for Defendants-Appellants on December 2, 2019. Defendant-Appellants indicated that they oppose this motion.

/s/ Emily Nestler

Emily Nestler
Counsel for Plaintiffs-Appellees

Dated: December 5, 2019