No. 19-_____

In the United States Court of Appeals for the Fifth Circuit

In re REBEKAH GEE, Secretary of the Louisiana Department of Health; JEFF LANDRY, Louisiana Attorney General; and JAMES E. STEWART, SR., District Attorney for Caddo Parish,

Petitioners

****

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

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

On Petition for Writ of Mandamus to U.S. District Court, Middle District of Louisiana
No. 16-cv-444-BAJ-RLB

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

No. 19-_____, *June Medical 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 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 Dr. John Doe 1; Dr. John Doe 2; Dr. John Doe 3 (physicians associated with plaintiff clinic) **FORMER PLAINTIFFS** 2. Bossier City Medical Suite	**CURRENT COUNSEL** 1. MORRISON & FOERSTER LLP; Dimitra Doufekias; Rachel S. Dolphin; Scott F. Llewellyn 2. RITTENBERG, SAMUEL & PHILLIPS LLC; Charles M. Samuel, III CENTER FOR REPRODUCTIVE RIGHTS; Alexandra Thompson; Emily Nestler; Molly Duane; Caroline Sacerdote; Jenny Ma; Travis Tu **FORMER COUNSEL** 1. RITTENBERG, SAMUEL & PHILLIPS LLC; William E. Rittenberg 2. CENTER FOR REPRODUCTIVE RIGHTS; David Brown; Zoe Levine; Janet Crepps; Leah Wiederhorn 3. MORRISON & FOERSTER LLP; David Scannell

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** 4. J. Michael Burdine, M.D., President of the Louisiana State Board of Medical Examiners 5. J. Schuyler Marvin, District Attorney for Bossier and Webster Parishes 6. 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 subject of confidential testimony)	SCHONEKAS, EVANS, MCGOEY & MCEACHIN, LLC; Ellie Schilling

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
Counsel for Petitioners

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INTRODUCTION

In a litigation campaign spanning nearly a dozen cases over twenty-five years, Plaintiffs have claimed that they represent the interests of Louisiana women who seek abortions. But discovery has shown that Louisiana abortion providers routinely *endanger* Louisiana women in violation of State laws and medical standards, and Plaintiffs are hiding behind protective orders to avoid the consequences. Most troublingly, Plaintiffs have insisted on confidentiality for evidence of criminal and professional misconduct involving abortion patients and have vigorously opposed Defendants Gee, Landry and Stewart's (collectively, "Louisiana" or "State") efforts to report that information to authorities with the power to investigate and pursue appropriate sanctions, including their own personnel.

Plaintiffs' insistence on burying misconduct has now come to a head. On October 4, 2019, in a case involving three of the same Plaintiffs and Secretary Gee, the United States Supreme Court granted certiorari on the question of Plaintiffs' third-party standing to represent their patients, as well as on whether objections to third-party standing can be forfeited. *June Medical Services L.L.C. v. Gee*, Nos. 18-1460, 18-1323

("*June I*"). That the Plaintiff physicians and clinic oppose referring evidence of criminal and professional misconduct to appropriate authorities vividly demonstrates how their interests are *adverse* to their patients (which deprives them of third-party standing). The timing of Plaintiffs' opposition — while a petition for certiorari was pending — illustrates why Secretary Gee should be permitted to raise objections to third-party standing whenever the evidence permits.

The relevant documents are currently under seal in the district court, and a blanket protective order prohibits using them in other litigation. Louisiana moved the district court for leave to file the documents with the United States Supreme Court. Louisiana even offered to maintain the documents under seal in the Supreme Court. Yet Plaintiffs opposed. The district court has not acted, and has *de facto* denied Louisiana's request for expedited consideration.

Secretary Gee is now drafting her opening brief on third-party standing in *June I*, which must be filed in the Supreme Court on December 26. Louisiana will be irreparably harmed if it cannot use the now-sealed documents in support of its standing arguments. Moreover, Louisiana believes it is required to disclose those documents to the

Supreme Court under controlling precedent. Given the district court's prior rulings and refusals to follow this Court's precedent vis-à-vis sealing, there is little reason to expect relief, let alone in time for Supreme Court review. The ordinary appellate process is therefore inadequate to avoid *June I* being resolved by a Supreme Court improperly deprived of significant facts by the Plaintiffs. The result is a quintessential case for mandamus.

ISSUE PRESENTED AND RELIEF REQUESTED

The Petition presents the following questions for review:

1. Should the district court be ordered to unseal briefing (Docs. 270, 273, and 277, together with their attachments, filed under seal at Docs. 284, 287, and 288) on Louisiana's Motion to De-Designate Portions of Dr. Doe 2's Testimony for the limited purpose of filing those briefs under seal with the United States Supreme Court?
2. Should the district court be ordered to unseal briefing (Docs. 270, 273, and 277, together with their attachments, filed under seal at Docs. 284, 287, and 288) on Louisiana's Motion to De-

Designate Portions of Doe 2's Testimony *in toto* and for all purposes?

3. Alternatively, should the district court be ordered to rule forthwith on Louisiana's Motion for Limited Relief (Doc. 293)?

Petitioner Louisiana requests that this Court grant a writ of mandamus compelling the district court (1) to unseal Docs. 270, 273, and 277, together with their attachments, filed under seal at Docs. 284, 287, and 288, for the limited purpose of filing those documents under seal in the Supreme Court; (2) to unseal those documents in toto; or, alternatively (3) order the district court to rule within 3 business days on Louisiana's Motion for Limited Relief (Doc. 293).

EMERGENCY CONSIDERATION

Petitioners' opening brief to the Supreme Court in *June I* is due on December 26, 2019. Petitioners submit that the sealed material that is the subject of this motion may affect the outcome of that case, such that Petitioners are obligated to disclose that information to the Supreme Court. Additionally, Petitioners will be irreparably harmed if they cannot address in their opening brief newly-developed facts that contradict Respondents' third-party standing. Petitioners sought relief from the

district court on August 16, 2019 and on October 18, 2019, on each occasion accompanied by a request for expedited consideration and, with the second motion, by a request for shortened response time. Briefing is complete, but the district court has not acted on any of Petitioners' requests. Petitioners certify these facts to be true, and respectfully request action by December 5, i.e., three weeks before Secretary Gee's opening brief is due in *June I*.

STATEMENT OF FACTS

A. Louisiana's Abortion Litigation.

Louisiana has long been concerned that the State's abortion clinics, including the Plaintiff clinic, threaten the health and safety of their patients. The clinics have a "horrifying" history of unsafe and illegal practices such as "unsanitary conditions and protection of rapists." *June I*, 905 F.3d 787, 806 (5th Cir. 2018), *reh'g en banc denied*, 913 F.3d 573 (2019), *mandate stayed*, 139 S. Ct. 663 (Feb. 9, 2019), *cert. granted*, 2019 WL 4889929 (Oct. 4, 2019), *cross-pet. granted*, 2019 WL 4889928 (Oct. 14, 2019). Accordingly, Louisiana enacted a series of health and safety laws intended to improve the standard of care provided at abortion clinics. Louisiana has also enacted laws intended to express and encourage

respect for unborn life. The Plaintiff clinic and different combinations of its doctors have challenged many of those laws.

Two such challenges are relevant here. *First*, in *June I*, the clinic and two of its doctors challenged Louisiana Act 620 (2014), which requires that abortion providers maintain hospital admitting privileges. This Court upheld the constitutionality of Act 620 in 2018, and the case is now pending on the merits in the Supreme Court. It is expected to be argued and decided next year.

Second, in the 2016 complaint that initiated this case, Plaintiffs challenged seven laws enacted for various purposes, including a health and safety law requiring that abortion providers be board-certified in obstetrics and gynecology or family medicine (a credential which is empirically associated with lower rates of physician misconduct). This case remains pending in the district court. Trial had been calendared for late 2019, but the district court vacated all pretrial and trial deadlines on May 31, 2019, and has not set new ones. Doc. 243.

In both cases (and in others), Plaintiffs purport to sue on behalf of their *patients*, asserting that the challenged laws unduly burden the decision to obtain an abortion. In so doing, Plaintiffs invoke the doctrine

of "third-party standing," which empowers litigants to represent the rights of another when they demonstrate (1) "a close relationship with the person who possesses the right" and (2) "a hindrance to the possessor's ability to protect [her] own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

B. Procedural History.

1. The Protective Orders in this case.

Contemporaneously with filing their complaint in this case, the three physician plaintiffs moved *ex parte* for a protective order permitting them to use pseudonyms. Doc. 8. The district court granted the motion before Louisiana appeared, and further ordered Louisiana to confer on the terms of a proposed protective order. Doc. 12 ("Pseudonym Order"). It did so without any case- or fact-specific analysis, cross-referencing a protective order entered two years previously in *June I*. The Pseudonym Order does not provide anonymity for any individual other than the physician plaintiffs.

Based on "the *probability* that certain information produced will reflect sensitive and confidential information," Doc. 95 at ¶ 2, the district court then entered a stipulated blanket protective order almost identical to the protective order entered in *June I*, Doc. 96 ("Protective Order").

The Protective Order was intended to "protect[] the confidentiality of information and facilitate[] the exchange of documents and information between the parties[.]" *Id.* at ¶ 15. The Protective Order covers information "about the Plaintiffs … that could jeopardize the privacy of the staff, physicians, patients, and others associated with Plaintiffs," *id.* at ¶ 5, and "information related to investigations conducted by or legal, disciplinary or other actions taken by the Louisiana Department of Health ('LDH')[.]" *Id.* at ¶ 6.

Consistent with its entry based on the "probability" of producing confidential information, the Protective Order permits the parties to designate material as confidential. To do so, the party's counsel must "believe[] in good faith that such information is 'Confidential' as defined in Paragraphs 5 & 6, respectively" of the order. *Id.* at ¶ 3. The designating party is also obligated to "make designations as narrowly and [*sic*] reasonably practicable." *Id.* at ¶ 3. Absent "subsequent court orders," material designated as confidential may not be "used for any purpose except the prosecution or defense of this litigation." *Id.* at ¶ 7.

The Protective Order contemplates relief from or modification of its terms, *id.* at ¶ 15, as well as challenges to confidentiality designations,

id. at ¶ 16. In such challenges "the burden will be on the designating party or non-party to show good cause as to why the document or information should remain 'Confidential.'" *Id.* "The document in question will remain subject to the confidentiality provisions of [the Protective] Order until the Court rules on the designation of the document." *Id.*

2. The Sealing Order.

In October 2018, Plaintiffs accused Louisiana of violating the Protective Order by filing *publicly available* documents that "disclos[ed] the names and identities of two current Louisiana abortion providers" who are *not* subjects of the Pseudonym Order. Doc. 202-1 at 1. Although Plaintiffs admitted that a Google search for the two individuals identifies them as abortion providers, Doc. 202-2 Attach. 1, Plaintiffs nevertheless filed an Emergency Motion to Strike, Doc. 202.

The district court—without waiting for Louisiana to respond—denied Plaintiffs' motion to strike but summarily sealed Louisiana's filing and admonished Louisiana for its "carelessness." Doc. 203 ("Sealing Order"). The documents sealed by that Order were (1) a motion; (2) a memorandum of law; (3) a transcript of proceedings in open court; (4) the Pennsylvania grand jury report in the Kermit Gosnell case (a document

that was unsealed and filed as a public record, as indicated by an order attached to the report, which is available as a book on amazon.com, and which was adapted as a motion picture); (5) public disciplinary orders from the website of the Louisiana State Board of Medical Examiners; and (6) an arrest report from the website of the Morgan City Police Department. Doc. 201 *et seq.*; *see also* Doc. 208-3 Exhs. 15-17.

Louisiana moved to vacate and unseal, showing *inter alia* that the sealed documents were not subject to the Protective Order; that the information and documents at issue are public and thus not sealable in any event; and that the Sealing Order was unsupported by factual findings and document-specific findings of good cause. Doc. 207-1 at 6-15; *see also* Doc. 208-3 & Exhs.[1] Over *nine months* later, the district court denied Louisiana's motion, holding that the Protective Order conceals the identity of other abortion providers (even individuals who are publicly known or readily identifiable through public sources) when invoked by Plaintiffs. Instead of finding good cause for sealing, the district court

[1] In the Middle District of Louisiana, sealed filing is accomplished via a sealed motion to file under seal. Louisiana thus does not have access to the as-filed sealed documents. Accordingly, citations in this petition and the exhibits thereto are to the documents as filed with the motions to file under seal, as served via electronic mail.

faulted Louisiana for "offer[ing] no explanation why it is necessary for these documents to remain unsealed." Doc. 265 at 6.

The district court did not disagree that its orders sealed public records, but held that "[b]arring Defendants from making reference to the identities of certain physicians *in this litigation* does not mean they cannot respond to requests for such information" in other contexts, which allows Louisiana to disclose the same information in response to public records requests under Louisiana law. *Id.* (emphasis in original). Not only was no legal or factual basis identified to justify sealing public information, the district court held that it was not required to make findings of fact before sealing the documents. *Id.* An additional motion on this issue has been pending since August 16, 2019, Doc. 271, with briefing completed on September 13, Docs. 273, 277.

3. The Deposition of Doe 2.

Plaintiff Doe 2 was deposed March 19, 2019. Doc. 270-7 Exh. 1. Three aspects of his deposition are relevant here.

First, Doe 2 testified that another Louisiana abortion provider's methods violate the standard of care for second-trimester abortions. According to Plaintiffs operative complaint, the most common method for

second-trimester abortions is dilation & evacuation, or "D&E." Doc. 88 ¶ 28. Plaintiffs allege that an alternative procedure, induction of labor, "is not the standard of care for [second trimester] abortions." *Id.* at ¶ 52. Plaintiffs allege that "[i]nduction procedures must be performed in a hospital and can require a hospital stay of two to three days" and "subjects women to the pain, anxiety, and health risks of labor." *Id.* Consistent with those allegations, Doe 2's counsel elicited testimony that in the second trimester, "[t]he standard of care is . . . what we would refer to as a traditional D&E." Doc. 270-7 Exh. 1 at 357:14-21.

But Doe 2 testified that another Louisiana abortion provider, Doe 5, performed second trimester induction abortions until he insisted she be fired:

> Q. Why did [Doe 5] cease performing abortions at Delta?
>
> A. Well, one of my stipulations with the owner was that if I went to work at Delta, that our methods were so incompatible that I really did not want to work with [Doe 5], that she not be employed at whatever clinic I was working at.

Id. at 110:1-8.

Doe 2 further clarified that Doe 5 told him she performed induction abortions through 19 weeks gestation. *Id.* at 111:9-13. Such second trimester induction abortions likely result in live births. As Doe 2

testified, a 19-week fetus delivered intact "can show signs of the heartbeat and rudimentary movements," *id.* at 226:10-15, and he had personally experienced at least one live birth at an even lower gestational age, *id.* at 245:20-246:21. Thus, "[u]nless you had done something to induce fetal demise, it's certainly a possibility" that the baby would be born alive during an induction abortion. *Id.* at 246:22-247:5.

Doe 2 not only testified that Doe 5 performed abortions that violate the standard of care, he further testified that she performs those abortions without providing pain relief:

> Q. Why did you not want to work with someone who performs labor induction abortions to 19-6 weeks?
>
> MS. DUANE: Objection. Asked and answered.
>
> THE WITNESS: That was -- That -- That's not a method that -- I consider my method superior, which -- and indeed, some -- some medical abortions at that stage end up being a forceps extraction, because not all will pass it spontaneously. So there's that issue. I just -- It's not a method that I really personally like as a method of doing that. But that's my prejudice. But the other thing was, ***she did not give any pain medication, and I had issues with that also***. So we had some philosophical differences about how these should be accomplished.

Id. at 111:14-112:9 (emphasis added).

Second, Doe 2's testimony suggests that he himself committed several crimes in connection with his abortion practice. Two arise from violations of laws intended to protect patients: failure to report the forcible rape of a fourteen year-old girl, and performing an abortion on a minor without parental consent or judicial bypass. *Id.* at 331:14-337:12; *see also, e.g.*, La. R.S. 14:403; 40:1061.14; 40:1061.29. He also admitted, in testimony Plaintiffs have *not* designated as confidential, that he made no effort to preserve the medical records of a now-closed clinic where he was the medical director and sole abortion provider. Doc. 270-7 Exh. 1 at 301:20-302:4. Doe 2 was personally obligated to preserve those documents, on pain of criminal penalties. *See, e.g.*, La. R.S. 40:1061.19; 40:1061.29; *see also* La. R.S. 40:1165.1. But the records have since been destroyed. Doc. 270-7 Exh. 52 ¶¶ 6-10.

Third, Doe 2's testimony also called into doubt his legal basis for proceeding under a pseudonym. Doe 2 admitted that his abortion practice is the sole reason he is proceeding under a pseudonym:

> Q. You're identified by the pseudonym "Dr. Doe Number 2" in this litigation. Is that correct?
>
> A. That is correct.
>
> Q. And that's because you perform abortions; is that correct?

A. That's correct.

Q. Any other reason?

A. That's the reason.

Doc. 270-7 Exh. 1 at 9:19-10:2. But he then confirmed—just as the Fifth Circuit observed last year—that his status as an abortion provider is "well known." *June I*, 905 F.3d at 792 n.4. Indeed, he admitted that "most physicians" know he is an abortion provider, and that abortion protesters recognize him. Doc. 270-7 Exh. 1 at 125:19-126:13.

After a series of breaks in which Doe 2 concededly conferred with his counsel, *id.* at 368:1-369:1, his testimony changed. His own counsel elicited testimony that Doe 2's concern is not with concealing that he provides abortions, as he previously testified, but with the *number* of individuals who know that he does:

> Q. Why is your confidentiality in this litigation important to you?
>
> A. Basically I am worried for my safety with -- This has been pretty high profile with the State passing these. They get a lot of publicity. ***Yet you can find out from the Internet that I do abortions.*** But once again, I think I used the example, I can go to the grocery store and not fear for suffering harassment and so forth. I fear that if my name is let out in -- in conjunction with what the State has passed and said it's

> going to be much higher profile and ***I'd have to worry about a bigger pool of people potentially***.

Id. at 358:7-20 (emphasis added). But Doe 2 has *voluntarily* identified himself as an abortion provider to the press and in judicial proceedings, *e.g.*, Doc. 270-7 Exhs. 46, 48; and has also served as a plaintiff and testifying expert under his own name in high-profile abortion cases, *e.g.*, *Causeway Med. Suite v. Foster*, 43 F.Supp.2d 604, 605, 617 (E.D. La. 1999) (challenging Louisiana's ban on partial birth abortion); *Causeway Med. Suite v. Foster*, 1999 WL 498187, at *1 (E.D. La. July 13, 1999) (challenging Louisiana's restriction on post-viability abortion).

4. The Motion to De-Designate.

Most of Doe 2's testimony described above was designated by Plaintiffs as confidential under the Protective Order. After an extensive meet-and-confer process in which Plaintiffs refused to withdraw their confidentiality designations, Louisiana filed a Motion to De-Designate Portions of Doe 2's Testimony. Doc. 270-3. The object of the motion was to make it possible for LDOJ attorneys to report the information to relevant authorities and to permit use of Doe 2's deposition testimony

plus Doe 2's true identity in any investigation of the legal and ethical violations Doe 2 described.

With respect to Doe 5, Louisiana explained that Doe 2's pleadings and testimony that induction of labor is not the standard of care for abortions in the second trimester—combined with his testimony that Doe 5 used that technique anyway and that she did so without providing any pain relief—raises serious doubt as to Doe 5's fitness to practice medicine and is certainly germane to Doe 5's pending application for a new outpatient abortion facility license. Doc. 270-4 at 9-11. Louisiana further explained that Doe 5 had voluntarily identified herself as an abortion provider in speeches and court filings, but, regardless, disclosing her conduct to *regulators* who already know she is an abortion provider would not be inconsistent with shielding her from public scrutiny. *Id.* at 11-13.

Louisiana similarly argued that Doe 2's admission that he is publicly known as an abortion provider undercuts his claim for privacy, particularly because he voluntarily identified himself as an abortion provider to the press and in court filings and previously litigated high-profile abortion cases in his own name. *Id.* at 13-18. Doe's 2's claim for privacy thus carried no weight against the need to provide criminal and

professional licensing authorities with testimony suggesting he committed crimes involving patients. Louisiana accompanied its motion with a Motion for Expedited and Consolidated Consideration, explaining that "[a] pending outpatient abortion facility licensing proceeding . . . is implicated by the information sought to be de-designated," and "the protection of the public is implicated." Doc. 279.

Plaintiffs opposed both de-designating and expedited consideration. Docs. 273, 290. With respect to Doe 5, Plaintiffs argued that her identity was shielded by the Protective Order. Misplacing the burden, Plaintiffs also argued that the State did not "need information from this case" to investigate her. In support, they pointed to a prior allegation about her non-use of pain medication that was dismissed for lack of evidence, and assumed that she properly reported other information as required by law. Doc. 273-1 at 3. With respect to Doe 2, Plaintiffs largely relied on his declaration in support of a pseudonym (including statements that were contradicted by his own deposition testimony) as a basis for continued secrecy. Plaintiffs acknowledged Doe 2 is publicly known as an abortion provider, but linked to opinion pieces on *slate.com* and *huffingtonpost.com* as supporting his claimed fear of violence. *Id.* at 5-7.

Like their approach to Doe 5's misconduct, Plaintiffs pointed to reports in which the misconduct Doe 2 testified about had been explained away, *id.* at 9, including an apparently false claim that law enforcement was aware of the fourteen-year-old girl's rape that he failed to report, *compare* Doc. 270-7 Exh. 3 at LDH-444-00630 *with* Doc. 270-7 at ¶¶ 57-58.[2]

Briefing on Louisiana's Motion to De-designate was complete on September 13, Doc. 277, and yet these motion remains pending. The magistrate judge sealed all of the briefing, including briefs Plaintiffs *conceded* were not confidential, redacted briefs that Plaintiffs did not contest were consistent with their claims of confidentiality, and a declaration by Doe 2 (in his own name) obtained from the district court's own public records. Doc. 281; *see also* Doc. 278-1 (confirming non-confidentiality of Docs 273 and 273-2); Doc. 270-5 (redacted pleading); Doc. 270-7 Exh. 48 (publicly filed declaration). Louisiana filed a motion for review, briefing on which is complete. Docs. 292, 301.[3]

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[2] Louisiana provided a detailed analysis of how the facts at issue implicate at least three crimes. Doc. 277-3 at 2-3.

[3] The doctor identified in *June I* as Doe 5 has appeared and moved to quash a document subpoena, arrogating to herself the right to appear under a pseudonym in this case. Like Doe 2, Doe 5 claims "safety concerns" if her identity as an abortion provider is publicly disclosed. Doc. 297-1. But also like Doe 2, Doe 5 has publicly identified herself as an

5. Proceedings in the United States Supreme Court.

In April 2019, the three Plaintiffs in this case who are also Plaintiffs in *June I* filed a petition for certiorari in their challenge to the constitutionality of a Louisiana health and safety law, 2014 Act 620, which requires Louisiana abortion providers to have hospital admitting privileges. (U.S. No. 18-1323.) Secretary Gee subsequently filed a conditional cross-petition for certiorari (U.S. No. 18-1460) presenting the following questions:

> 1. Can abortion providers be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a "close" relationship with their patients and a "hindrance" to their patients' ability to sue on their own behalf?

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abortion provider, has made statements to the media about her abortion practice, and has filed a public affidavit as an expert witness related to abortion. Doc. 303-4 Exh. 14; Doc. 289-5 Exhs. 3-7. Indeed, she even advertises her abortion clinic using her own name. Doc. 303-4 Exh. 13. Unlike Doe 2, Doe 5's declaration has a measure of specificity, but that specificity is telling: her examples of ""harassment," "intimidation" and "violence" include "handing out . . . flyers," "a large rally outside of [her] clinic," and a "letter [by a pastor] sent to Alexandria residents" that encouraged "a peaceful and respectful prayer rally" at her business. Doc. 297-3 Exh A & A-1. Her justifications for anonymity are self-defeating: The facts confirm not only that she is a *public* advocate for abortion, but that the supposed hostility she faces is merely speech protected by the First Amendment, with no evidence of anything worse.

> 2. Are objections to prudential standing waivable (per the Fourth, Fifth, Seventh, Ninth, Tenth, and Federal Circuits) or non-waivable (per the D.C., Second, and Sixth Circuits)?

Doc. 293-4 (Conditional Cross Pet.) at i. The Supreme Court granted certiorari on both petitions on October 4, 2019. Doc. 293-6. The Court's briefing schedule requires Louisiana to file its opening brief on third-party standing on or before December 26, 2019.

6. The Motion for Limited Relief from the Protective Order to File Documents in the U.S. Supreme Court.

On October 15, Louisiana asked Plaintiffs for their position on unsealing the De-Designation Briefing for the sole purpose of directing the Supreme Court's attention to them. Plaintiffs did not provide a substantive response, so Louisiana filed a Motion for Limited Relief on October 18, asking for leave to file the De-Designation Briefing under seal in the United States Supreme Court. Doc. 293. Louisiana did not directly challenge the confidentiality of the relevant documents—an issue which is now awaiting a decision from the district court on previous motions—but offered to maintain them under seal in the Supreme Court.

Louisiana accompanied its Motion for Limited Relief with a Motion for Shortened Response Time and for Expedited Ruling. Doc. 294. Plaintiffs opposed, Doc. 295, and the district court implicitly denied

Louisiana's request by not ruling before the proposed response deadline. Plaintiffs filed an opposition on November 8. Doc. 302. Briefing is complete, but no order has issued.

REASONS WHY THE WRIT SHOULD ISSUE

For a writ of mandamus to issue, three requirements must be satisfied: (1) "the [petitioner] seeking issuance of the writ must have no other adequate means to attain the relief [it] desires;" (2) the petitioner must show that its "right to issuance of the writ is clear and indisputable; and (3) "the issuing court, in exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re Volkswagen*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc) (quoting *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004)). The writ "is appropriately issued … when there is ... a clear abuse of discretion[.]" *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964); *see also Volkswagen*, 545 F.3d at 311; *In re United States*, 397 F.3d 274, 282 (5th Cir. 2005); *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992). Those requirements are met here.

I. DEFENDANTS CANNOT OBTAIN ADEQUATE RELIEF BY ANY OTHER MEANS.

To begin with, Louisiana has no alternative to mandamus. Louisiana's opening brief on third-party standing in *June I* is due on December 26, and the district court has sealed material that is directly relevant to the third-party standing questions on which certiorari was granted. Promptly after certiorari, Louisiana filed a Motion for Limited Relief seeking permission to file those materials under seal in the Supreme Court. The district court nevertheless refused to even grant a shortened briefing schedule on Louisiana's motion.

Plaintiffs have used the Protective Order to hide evidence of criminal and professional misconduct by abortion providers. That position is directly adverse to the interests of their patients, and likely destroys their third-party standing under existing law. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 & n.7 (2004). That Plaintiffs undertook to hide misconduct while purporting to represent their patients' interest in a petition for certiorari powerfully illustrates why third-party standing must be non-waivable: adversity of interests can arise at any time. Louisiana — and the law — will be irreversibly

harmed if Louisiana is unable to present these developments to the Supreme Court.

Under ordinary circumstances, Louisiana could simply direct the Supreme Court's attention to filings on the district court's public docket. The Court could then take judicial notice that Plaintiffs oppose efforts to bring facts to the attention of relevant State authorities. But Plaintiffs have relied on the Protective Order to conceal the relevant briefing from the Supreme Court. That leaves Louisiana in an impossible bind, including vis-à-vis its affirmative duty to bring that evidence to the Supreme Court's attention. *See* Part II-B, *infra*. By improperly relying on the Protective Order at every turn, Plaintiffs seek to shield themselves from all accountability.

Relief from the district court is clearly not forthcoming. The district court has refused to apply controlling law on sealing, even to the point of declaring that it need not make findings to support its wholesale sealing orders. Doc. 265 at 7. And waiting on the district court to rule on Defendants' Motion to De-Designate and taking an ordinary appeal — even under the collateral order doctrine — would not lead to a final

decision in time for the State to refer to the relevant documents in its briefing.

This Court considers direct appeal inadequate when the district court's error, if not corrected by mandamus, "will have worked irreversible damage and prejudice by the time of final judgment." *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 289 (5th Cir. 2015). That is precisely the case here, where "the harm . . . will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle." *Volkswagen*, 545 F.3d at 319.

II. DEFENDANTS ARE "CLEARLY AND INDISPUTABLY" ENTITLED TO THE WRIT.

The law governing sealing makes clear that the State is clearly and indisputably entitled to the writ. Plaintiffs have not disputed that the De-Designation Briefing constitutes a court record. Before sealing such records, a district court "must balance the public's common law right of access against the interests favoring non-disclosure." *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 450 (5th Cir. 2019) (quoting *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993)). "Undergirding [that] balancing is a presumption in favor of the public's common law right of access . . . ." *Id.* Accordingly, "the district court's

discretion to seal the record of judicial proceedings is to be exercised charily," *Van Waeyneberghe*, 990 F.2d at 848, and sealing documents without a countervailing interest in nondisclosure is an abuse of discretion, *United States v. Holy Land Found'n*, 624 F.3d 685, 691 (5th Cir. 2010).

A. Plaintiffs have not met their burden to justify sealing.

1. Plaintiffs have not identified any interest justifying non-disclosure to the Supreme Court.

Here, the only interest articulated for sealing *anything* is a claim of fear if Doe 2's or Doe 5's already-public identities are mentioned in this litigation. Given that both have voluntarily identified themselves to the press and in public court filings, that claim is dubious. But a motion for limited unsealing of the De-Designation Briefing to file it under seal with the Supreme Court is entirely consistent with that claimed interest, and is a course of action this Court has endorsed. *See United States v. Sealed Search Warrants*, 868 F.3d 385, 398 (5th Cir. 2017) (discussing *Breidenbach v. Bolish*, 126 F.3d 1288 (10th Cir. 1997)). Plaintiffs tellingly fail to articulate any specific harm that would result from that disclosure, such that denying Louisiana's Motion for Limited Relief would be a clear

abuse of discretion. *See Holy Land*, 624 F.3d at 691. Louisiana is clearly and indisputably entitled to at least that relief.

2. Plaintiffs failed to establish good cause to seal the De-Designation Briefing or the underlying deposition testimony, such that declining to unseal those documents would be a clear abuse of discretion.

A more fundamental flaw bars sealing of the De-Designation Briefing: Plaintiffs have not shown good cause for protecting those documents or the underlying deposition. "Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that 'the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.'" *In re Terra, Int'l*, 134 F.3d 302, 306 (5th Cir. 1998) (quoting *United States v. Garett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)). Entry of a protective order absent the required demonstration "constitute[s] a clear abuse of discretion." *Id.* (granting mandamus).

Here, Plaintiffs principally point to the Protective Order itself as justifying sealing, Doc. 273-2, and the district court previously accepted that argument in the Sealing Order, Doc. 265 at 5-6. But the Protective Order was a blanket order based on the mere "probability" that

confidential information would be produced. Doc. 95 at ¶ 2. It did *not* include a finding of good cause to protect any particular documents or information. Doc. 96. Thus, once challenged, Plaintiffs were required to make an *actual* showing of good cause for the specific items they seek to protect. *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003); *see also, e.g.*, *Shane Grp. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 306 (6th Cir. 2016) (vacating sealing orders: "that a mere protective order restricts access to discovery materials is not reason enough … to seal from public view materials that the parties have chosen to place in the court record"); *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (holding "invalid" a protective order "giving each party carte blanche to decide what portions of the record shall be kept secret").

What remains is Doe 2's conclusory claim of fear. At the outset of this litigation, he swore that his "concern" was being identified as a public advocate for abortion and retaliation by hospitals and agencies. Doc. 8-5 at ¶¶ 5-6; *see also* Doc. 270-7 Exh. 1 at at 9:19-10:2. But Doe 2 then admitted "you can find out from the internet that [he does] abortions," "certainly physicians" know he does, and even abortion protesters

recognize him. Doc. 270-7 Exh. 1 at 125:19-126:13; 358:7-20. Indeed, Doe 2 spent decades advocating in the press, serving as a testifying expert and submitting public declarations in support of abortion litigation, and litigating abortion cases in his own name. *E.g.*, Doc. 270-7 Exhs. 46, 48. Such publicly available facts can't be sealed, and they can't form the basis of sealing other documents. *United States v. Pearson*, 340 F.3d 459, 465 (7th Cir. 2003) ("[O]nce the identity of the unindicted coconspirator became known, the indictment should have been unsealed . . . ."), *vacated in part on other grounds Hawkins v. United States*, 543 U.S. 1097 (2005); *see also, e.g.*, *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1359-61 (Fed. Cir. 2011) (*sua sponte* sanctioning attorney for a filing that designated as confidential, *inter alia*, facts that were publicly disclosed in a consent judgment).

Washington Post v. Robinson, 935 F.2d 282, 292 (D.C. Cir. 1991), is illustrative. In that case, the District of Columbia Circuit held that a district court erred in sealing a plea agreement where the fact of the agreement had been reported in newspapers and acknowledged by an official source. *Id.* at 125-26. The court rejected fear-based arguments because it was "not evident" how confirming to the public what was

already known "could pose any extra threat to the safety of [the defendant] and his family." *Id.* That same analysis applies here, where Doe 2 has admitted both to the press and in public pleadings that he is an abortion provider and litigant, and he has publicly litigated abortion cases far more contentious than this one, including challenges to bans on partial-birth and post-viability abortions.

Particularly given his very public identity as an abortion provider, Doe 2's conclusory claims of fear aren't sufficient to keep his identity under seal. *See Vantage Health*, 913 F.3d at 451. Even those conclusory claims are given some weight, sealing should be limited to information that implicates Doe 2's claims. Thus, if Doe 2 fears being identified as an advocate in conjunction with this litigation, Doc. 270-7 Exh. 1 at 358:7-20, that might justify sealing the few lines of Doe 2's deposition identifying him as a plaintiff. But Louisiana's deposing him in connection with a facial challenge to the State's abortion laws doesn't implicate Doe 2 as a plaintiff. Certainly the De-Designation Briefing itself — which never identifies Doe 2 by name — doesn't impact his claimed privacy interests, such that those interests give no basis for sealing.

3. Plaintiffs' actions outside this litigation are inconsistent with serious fear of publicity.

At the same time Doe 2's counsel were claiming "the sharing of confidential information could put people's personal safety at risk," Doc. 270-7 Exh. 6 at 3, June Medical invited reporters from the *Christian Science Monitor* into the clinic where he allegedly practices and permitted those reporters to interview and photograph the clinic's staff, *id.* Exh. 54. In the resulting article, one of the Doe doctors characterized abortion as a "safe option," and June Medical's staff played up the clinic's "relaxation room" and offer of "herbal tea" to its patients. *Id.* Its lawyers' demand for confidentiality notwithstanding, the clinic doesn't seem to object to having photographs — including a photograph of a doctor — and full names of its staff published in the national press if the coverage is sympathetic.

Like their clients, June Medical's lawyers have repeatedly engaged with the media, issuing press releases claiming "abortion is extremely safe" and Louisiana law is full of "medically unnecessary requirements," Doc. 270-7 at Exhs. 55, 56. Earlier this year, they even attacked Louisiana in a *New York Times* op-ed. *Id.* at Exh. 57. At the same time they were insisting evidence of Doe 2's misconduct remain sealed, his

lawyers posted to YouTube an apparent fundraising video in which they interviewed and identified June Medical's staff by name.[4] Such active attention-seeking by June Medical and its lawyers is wholly inconsistent with serious safety concerns. That their media strategy may be undermined by evidence of misconduct is not good cause to seal.

4. The district court has refused to follow this Court's controlling precedent.

Notwithstanding the very narrow privacy interest claimed by Doe 2 and the other Plaintiffs and their very public identities, the district court has indulged broad demands for sealing. When Plaintiffs filed a motion to retroactively seal public records of misconduct by *other* abortion providers — available to the world on the internet — the district court did not even wait for Louisiana to respond. Doc. 203. Nine months after Louisiana moved to vacate and unseal, the district court affirmed its sealing order, and expansively construed its Protective Order to cover every abortion provider in Louisiana, together with an infamous former abortion provider who was retired to a Pennsylvania prison. Doc. 265 at

[4] https://www.youtube.com/watch?v=GrrJ9PzaWBM&feature=youtu.be

6.[5] Indeed, the district court reversed the burden for sealing under Rule 26(c) and faulted Louisiana for "offer[ing] no explanation why it is necessary for these documents to remain unsealed." *Id.*

Louisiana made clear that sealing requires record support and factual findings. Doc. 207-1 at 13-14. Implicitly acknowledging the lack of any basis to seal public records, the district nevertheless held it could "seal documents without placing findings of fact onto the record." Doc. 265 at 7 (citing *Test Masters Educ. Servs. v. Robin Sing Educ. Servs.,* 799 F.3d 437, 455 (5th Cir. 2015)). That overlooks the subsequent history of *Test Masters*, in which the panel "view[ed] the matter somewhat differently on rehearing," acknowledged *Van Waeyenberghe*, 990 F.2d at 848, and "remanded to the district court so that it may make explicit findings as to the necessity of keeping the transcript under seal." *Test Masters Educ. Servs. v. Robin Singh Educ. Servs.*, 2015 WL 13768849 (5th Cir. Oct 22, 2015). In short, the district court relied on dicta to depart from long-established precedent, and it did so without acknowledging this circuit's controlling legal standards that were called to its attention.

[5] The Eastern District of Louisiana notably reached the opposite conclusion when it construed the Protective Order. *Gee v. Women's Health Care Center*, 2019 WL 2617109, at *4-6 (E.D. La. June 25, 2019).

Cf. Vantage Health, 913 F.3d at 450-51 ("[I]n two scenarios we have held that a district court abuses its discretion to seal or unseal documents: failure to identify and apply the proper legal standards, or failure to provide sufficient reasons for its decision to enable appellate review.").

The district court's actions vis-à-vis the De-Designation Briefing leave little reason to expect a different result. The briefing itself identifies evidence of criminal and professional misconduct. It also notes that a pending licensing proceeding and the public health are implicated. The district court nevertheless ignored Louisiana's request for expedited consideration, Doc. 279, and it has sat on the motion for two months. The district court also failed to act on Louisiana's request for a shortened response time and expedited consideration of its Motion for Limited Relief, Doc. 294, leaving resolution uncertain as the clock ticks toward deadlines at the Supreme Court. This Court has made clear, however, that a district court cannot deny relief by running out the clock when time is critical. *See In re Gulf Pub. Co.*, 135 Fed. App'x 716 (5th Cir. 2005) (granting mandamus to require unsealing decision by date-certain).

B. There are strong interests favoring mandamus, including the parties' affirmative obligation to the Supreme Court.

The Supreme Court has made clear that counsel "have 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) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). Information that is potentially dispositive of any claims falls within the 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. Reigel*, 160 F.3d 1139, 1141-42 (7th Cir. 1998) (criminal conviction that undermined claim for equitable relief). That parties may dispute the legal import of those facts does not excuse counsel's obligation. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997).

Applied here, there can be no serious dispute that Plaintiffs' taking a legal position adverse to the interests of their patients "may conceivably affect the outcome" of *June I*: Certiorari was granted on the very question of whether the Plaintiffs have third-party standing to represent those same patients, and whether objections to third-party standing are

forfeited.[6] The parties therefore appear obligated to inform the Supreme Court that Plaintiffs have now taken legal positions plainly adverse to their patients' interests. Plaintiffs do not appear to intend to comply with that duty, however, and Secretary Gee is unable to do so without relief from the Protective Order.

III. THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE WRIT.

Finally, mandamus is an appropriate exercise of this Court's discretion. Mandamus is appropriate both where "the issues presented and decided above have an importance beyond" the case at hand, *Volkswagen*, 545 F.3d at 319, and "as a one-time device to 'settle new and important problems' that might have otherwise evaded expeditious review," *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019) (quoting *In re EEOC*, 709 F.2d 392, 394 (5th Cir. 1983) (itself quoting

[6] A litigant must maintain standing at all stages of the litigation. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1986). Accordingly, a litigant's standing may be raised at any time, including on appeal. *Id.*; *see also, e.g.*, *Johnson v. City of Dallas*, 61 F.3d 442, 443-44 (5th Cir. 1995). Appellate courts can take evidence on the issue of standing, *ANSWER v. District of Columbia*, 846 F.3d 391, 400-01 (D.C. Cir. 2017), or remand if there is a dispute. Whether those same rules apply to third-party standing is the very question raised by the grant of certiorari.

Schlagenhauf, 379 U.S. at 111)). Both formulations justify mandamus here — to ensure that the Supreme Court is fully informed as it rules on the question of third-party standing, and to correct the district court's repeated refusals to follow the law governing sealing.

Whether based on a First Amendment or common law right of access, this Court's sister circuits have not hesitated to grant mandamus where a district court reversed the applicable burden on sealing, *United States v. Pickard*, 733 F.3d 1297, 1303-05 (10th Cir. 2013), sealed documents without the requisite factual findings, *In re Washington Post Co.*, 807 F.2d 383, 393 (4th Cir. 1986), or clearly erred in determining there was a countervailing privacy interest, *In re McClatchy Newspapers, Inc.*, 288 F.3d 369, 374-75 (9th Cir. 2002) (instructing district court to unseal). This Court should do so here.

CONCLUSION

This Court should grant a writ of mandamus and (1) order the district court to unseal the De-Designation Briefing, either *in toto* or for the limited purpose of filing that briefing with the Supreme Court, or (2) order the district court to rule within 3 business days on Louisiana's Motion for Limited Relief (Doc. 293).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 18, 2019, I filed the foregoing brief with the Court's CM/ECF system and caused copies to be deposited with Federal Express and sent by e-mail to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 21(d)(1) because it contains **7,586** words, exclusive of parts of the brief exempted.

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