IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30953

In re: REBEKAH GEE, In Her Official Capacity as Secretary of the Louisiana Department of Health; JEFF LANDRY, In His Official Capacity as Louisiana Attorney General; JAMES E. STEWART, SR., In His Official Capacity as District Attorney for Caddo Parish,

Petitioners

Petition for a Writ of Mandamus
to the United States District Court for the
Middle District of Louisiana

A True Copy
Certified order issued Nov 27, 2019

Clerk, U.S. Court of Appeals, Fifth Circuit

Before DENNIS, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:

Petitioner seeks a writ of mandamus from this court ordering the district court to (1) unseal certain documents for use in briefing before the Supreme Court, or (2) rule on a motion pending in the district court seeking this same relief. During the pendency of this petition, the district court ruled on the pending motion. This court has held that "sealing and unsealing orders are effectively unreviewable on appeal," such that appellate jurisdiction exists under the collateral order doctrine. *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 449–50 (5th Cir. 2019). Because our precedent provides that this order is directly reviewable on appeal, Petitioner has an "adequate means to attain the relief [it] desires," and therefore is not entitled mandamus relief. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)

(internal quotation marks omitted).

Accordingly, IT IS ORDERED that the petition for writ of mandamus is DENIED. Of course, as in any other case, Petitioner may request expedited treatment of any appeal from the district court's order.

No. 19-30953

JENNIFER WALKER ELROD, Circuit Judge, concurring:

I concur because the availability of an expedited interlocutory appeal dictates that mandamus relief is inappropriate.[1] I write separately to highlight some troubling aspects of this fast-moving case.[2] *Cf. In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 347 (5th Cir. 2017) (denying writ of mandamus "[d]espite finding serious error").

The district court's protective order is remarkably overbroad. The district court sealed a *New York Times* Op-Ed written by the president of the

[1] I agree that one form of relief that the petitioner seeks is moot because, now that the district court has ruled, this court can no longer "order the district court to rule within 3 business days on Louisiana's Motion for Limited Relief." ECF No. 4-1 at 37. The petitioner's broader request for relief, however, is still live: we could still "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." *Id.* In addition, I understand this court's denial of the petition to be without prejudice. *See In re Gee*, 941 F.3d 153, 173 (5th Cir. 2019) (denying petition for mandamus without prejudice); *In re Bryant*, 745 F. App'x 215, 222 (5th Cir. 2018), as revised (Nov. 30, 2018) (same).

[2] Notably, although the petitioner asks us to order the district court to unseal certain documents, it has not sought to unseal those documents directly in this court. When presented with an appeal, we routinely unseal documents that were sealed in the district court when those documents are used on appeal and there is no legal basis for sealing. *See, e.g.*, Order, *Landreneau v. Baker Hughes A G E Co.*, No. 19-30512 (5th Cir. Nov. 13, 2019). Indeed, we often do this *sua sponte*. *See, e.g.*, *id.* In *Landreneau*, the district court sealed parts of the record pursuant to a stipulated protective order "in an effort to accommodate the defendant's concerns about its trade secrets becoming public." *See* Letter at 1, *Landreneau* (5th Cir. Oct. 10, 2019). Notwithstanding the stipulated protective order in that case, this court denied the appellant's unopposed motion to place record excerpts under seal and ordered that the record excerpts be unsealed. *See* Order, *Landreneau* (5th Cir. Nov. 13, 2019). Indeed, when parties in this court seek to file documents under seal on appeal, the clerk's office sends them a standard letter that requires them to "explain in particularity the necessity for sealing in our court. *Counsel do not satisfy this burden by simply stating that the originating court sealed the matter*, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding." *BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 211 (5th Cir. 2019) (emphasis added). On appeal, if one is filed, this issue may be explored further.

organization representing the plaintiffs,[3] a *Christian Science Monitor* article that identified the plaintiff clinic and photographed and named clinic staff,[4] a *Rolling Stone* interview,[5] an obituary published in the *Shreveport Times*,[6] and press releases from the Center for Reproductive Rights.[7] All of those public documents are accessible on-line today. The district court also sealed

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[3] Nancy Northup, *How the Supreme Court's Inaction Could Decide the Future of Abortion*, N.Y. Times (Jan. 31, 2019) ("My organization, the Center for Reproductive Rights, has filed an emergency motion with the Supreme Court, asking it to put on hold a medically unnecessary law in Louisiana that requires doctors who perform abortions to have admitting privileges at a hospital no more than 30 miles away."), https://www.nytimes.com/2019/01/31/opinion/supreme-court-louisiana-abortion.html.

[4] Samantha Laine Perfas, *Hard choices, sweet tea: A day at a Louisiana abortion clinic*, Christian Science Monitor (July 10, 2019) ("Kathaleen Pittman, the clinic's director, says there are a lot of misperceptions when it comes to the women who seek abortions."), https://www.csmonitor.com/USA/Politics/2019/0710/Hard-choices-sweet-tea-A-day-at-a-Louisiana-abortion-clinic.

[5] Andrea Grimes, *An Abortion Provider Speaks Out: 'I'll Do Whatever My Conscience Tells Me I Must,'* Rolling Stone (Nov. 24, 2015) ("Dr. Cheryl Chastine discusses the recent attacks on Planned Parenthood, and why she provides abortions, despite threats and harassment[.]"), https://www.rollingstone.com/politics/politics-news/an-abortion-provider-speaks-out-ill-do-whatever-my-conscience-tells-me-i-must-51616/.

[6] Obituary, *Robin Lee Heckendorf*, Shreveport Times (Jan. 2, 2011) ("Robin spent her life protecting the rights of women, coming to Shreveport to open Hope Medical Group for Women."), https://www.legacy.com/obituaries/shreveporttimes/obituary.aspx?n=robin-lee-heckendorf&pid=147518883.

[7] Press Release, The Center for Reproductive Rights, June Medical Services v. Gee (June 27, 2017, *revised*, July 20, 2018) ("The Center for Reproductive Rights filed a new lawsuit against the state of Louisiana's clinic licensing law that has forced most of the state's abortion clinics to close."), https://reproductiverights.org/case/june-medical-services-v-gee-TRAP; Press Release, The Center for Reproductive Rights, Abortion Battle Goes to U.S. Supreme Court (Apr. 17, 2019) ("Today, the Center for Reproductive Rights is filing a petition for certiorari with the U.S. Supreme Court, asking the Court to strike down a law designed to close abortion clinics throughout Louisiana—a state with only three clinics left."), https://reproductiverights.org/press-room/abortion-battle-goes-to-us-supreme-court.

pleadings in state[8] and federal courts,[9] as well as an order entered by a United States district court.[10]

In addition to sealing these documents that are already public, the district court order prohibits the petitioner from using that publicly available information in other litigation.[11] On its face, the protective order prohibits the petitioner from filing these documents with the Supreme Court, even if they are kept under seal. *See* Protective Order, *June Med. Servs. v. Gee*, No. 3:-cv-00444-BAJ-RLB, (M.D. La. Feb. 22, 2018) ("Under no circumstances other than those specifically provided for in this Order or subsequent Court Orders . . .

[8] *See, e.g.,* Motion for Summary Judgment, *Leonard v. Bossier City Med. Suite*, No. 128,416 (26th Dist. Ct. La. June 5, 2014).

[9] Complaint, *Little Rock Family Planning Servs. v. Rutledge*, No. 19-449 (E.D. Ark. June 26, 2019).

[10] *Gee v. Women's Health Care Ctr.*, No. MC 18-4793, 2019 WL 2617109 (E.D. La. June 25, 2019).

[11] The abortion providers' request for anonymity is itself unusual practice. Abortion providers regularly litigate under their own names. *See, e.g., Planned Parenthood of Wisconsin, Inc. v. Kaul*, 384 F. Supp. 3d 982, 984 (W.D. Wis. 2019), *aff'd*, No. 19-1835, 2019 WL 5800060 (7th Cir. Nov. 7, 2019) (involving case brought by Dr. Kathy King, Natalee Hartwig, Sara Beringer, and Katherine Melde, on behalf of themselves and their patients); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1220 (E.D. Ark. 2019) (granting preliminary injunction to Dr. Thomas Tvedten, on behalf of himself and his patients); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2019 WL 5556198, at *1 (M.D. Ala. Oct. 29, 2019) (granting injunction to Dr. Yashica Robinson, on behalf of her patients). Nor is the identity of the "John Does" in this case unknown. Doe 2 acknowledged in his deposition that "you can find out from the internet that [he provides] abortions" and he has submitted public declarations in past abortion litigation.

This court does not usually allow parties to proceed anonymously based on generalized concerns. Just recently, we affirmed this district court's denial of a police officer's request to proceed as an anonymous plaintiff. *See Doe v. Mckesson*, 935 F.3d 253, 266 (5th Cir. 2019). That officer argued that "the public nature of his job put[] him and his family in danger of additional violence," and he listed examples of acts of violence perpetrated against police officers for political reasons. *Id.* That was not enough. We approved of the district court's rejection of that argument because "the incidents Officer Doe listed did not involve Officer Doe and were not related to this lawsuit." *Id.* Indeed, "Officer Doe conceded that he had received no particularized threats of violence since filing his lawsuit." *Id.*

shall 'Confidential' information be used for any purpose except the prosecution or defense of this litigation[.]").

The document of greatest interest to the state is the deposition of plaintiff-physician Doe 2. According to Louisiana, Doe 2 testified during his deposition that another Louisiana abortion provider, Doe 5, violates the standard of care for second-trimester abortions. Doe 2 also testified that the standard of care for second-trimester abortions is dilation and evacuation. Yet Doe 2 also testified that Doe 5 performed induction abortions through 19 weeks of gestation. Louisiana points out that Doe 2 testified that a 19-week fetus delivered intact "can show signs of the heartbeat and rudimentary movements" and that Doe 2 had personally experienced a live birth between 14 and 15 weeks. Doe 2 stated that with the labor induction method, such live births are "certainly a possibility." A licensed physician violating the standard of care is directly relevant to whether that physician adequately represents the interests of his or her patients. That question is relevant to the petitioner's challenge to third-party standing in *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (U.S. Oct. 4, 2019) (mem.) (No. 18-1460) ("*June I*"), a case involving many of these same parties, currently before the Supreme Court. Yet the petitioner is unable to submit this deposition to the Supreme Court in *June I* because of the district court's protective order in this case.[12] Whether a physician is violating the standard of care is also a matter of public safety, which the right of public access to court records seeks to vindicate.

Louisiana also argues that the same deposition may provide support for the proposition that Doe 2 committed crimes in connection with his abortion

[12] This deposition was taken after the close of evidence in *June I*.

practice. According to Louisiana, in one incident, Doe 2 may have failed to report the forcible rape of a fourteen-year-old girl. *Cf.* La. Stat. Ann. § 14:403 (requiring mandatory reporters to report sexual abuse of a minor). In another, Louisiana proffers that Doe 2 may have knowingly performed an abortion on a minor without parental consent or judicial bypass. *Cf.* La. Stat. Ann. § 40:1061.14. Louisiana also contends that Doe 2 may also have failed to maintain medical records, in violation of state law. *Cf.* La. Stat. Ann. § 40:1061.19.

However, the district court order denying relief does not note the presumption of public access to this information. That presumption is significant in this case because it goes to one of the most vital public interests—public health. The district court did not grapple with the general incongruity of sealing a *New York Times* Op-Ed. Nor did it consider whether some parts of the deposition could be unsealed with appropriate redactions for medical privacy, trade secrets, or any other proper legal reason. *Cf.* Order, *Planned Parenthood of Greater Tex. v. Smith*, No. 17-50282 (5th Cir. Aug. 30, 2017) (granting motion to unseal in part and ordering party to file redacted version of video that "blurs the faces of individuals who are not Planned Parenthood staff members"). Indeed, in its denial of Louisiana's motion to vacate and unseal, the district court provided no legal reasons for sealing these documents. Instead, its logic proceeded thus: (1) the terms of the protective order allow sealing, (2) Louisiana "offered no explanation why it is necessary for these documents" to be unsealed, and (3) the court's order does not violate the First Amendment because Louisiana does not enjoy First Amendment rights. *See June Med. Servs., LLC v. Gee*, No. 16-CV-00444-BAJ-RLB, 2019 WL 3482777, at *2–*3 (M.D. La. July 31, 2019).

In denying Louisiana's motion for limited relief from the protective order to file documents under seal in the Supreme Court, the district court order simply relied on the protective order and then stated that the Supreme Court would refuse to consider the materials because "appellate records are limited to materials filed with the district court in that case." *See June Med. Servs., LLC v. Gee*, No. 16-CV-00444-BAJ-RLB, Doc. No. 304 (Nov. 25, 2019) (citing Fed. R. App. P. 10(a)). Both of these rulings are questionable.

We recognize a presumption in favor of the common-law right to access judicial records. *Casa Orlando Apartments, Ltd. v. Fed. Nat. Mortg. Ass'n*, 624 F.3d 185, 201 (5th Cir. 2010). This means that the burden is on the party that wishes to seal: "[t]he default is public access." *BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 210 (5th Cir. 2019). Yet the district court placed the burden on Louisiana to justify *unsealing* the disputed records, just because they were within the ambit of the protective order. *June Med. Servs.*, 2019 WL 3482777, at *3. And although the district court correctly noted that it had the authority to seal documents for "good cause shown," it did not articulate a good cause for any particular document. The only interest the court relied on was "potential harm that may result to the non-Doe Doctors, should their names be publicized." But that interest does not align with the documents that were sealed. How can an eight-year old obituary result in potential harm to the non-Doe Doctors? Or a public order of a United States district court?

Further, the district court order denying relief fails to address the justification for the common-law right of access to judicial records. The *public* has an interest in transparent court proceedings that is independent of the parties' interests. "The right to public access 'serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide

the public with a more complete understanding of the judicial system, including a better perception of its fairness.'" *BP Expl.*, 920 F.3d at 210 (quoting *United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010)).

In its order denying relief, the district court declined to allow the petitioner to use the contested documents in their appeal in *June I* because "the record in that matter is closed, and appellate records are limited to materials filed with the district court" under Federal Rule of Appellate Procedure 10(a). But this reasoning prejudges the petitioner's argument to the Supreme Court, "which is that the Supreme Court may consider new factual developments that defeat Plaintiffs' third-party standing at any time." ECF No. 26 at 1.

The "general rule" enshrined in Rule 10(a) is not an ironclad one. *McIntosh v. Partridge*, 540 F.3d 315, 327 (5th Cir. 2008). We may grant a motion to supplement the record if the movant "provide[s] sufficient justification to depart from this general rule." *Id.* Because "standing is essential to the exercise of jurisdiction, and that lack of standing can be raised at any time," *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989), it is far from clear that an appellate court would not allow a litigant to supplement the record on appeal if the proffered evidence went to a lack of standing. *See Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 400–01 (D.C. Cir. 2017) (considering evidence proffered for the first time on appeal in a challenge to standing). Indeed, the Supreme Court has previously considered evidence filed after the record closed in the district court in a challenge to standing. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 9, 14–15 (2004), *abrogated on*

other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

All told, the question of whether the Supreme Court should allow the petitioner to supplement the record on appeal is for the Supreme Court itself to decide—not for us or for the district court.[13] Thus, Rule 10(a) was not a proper basis for the district court to deny the petitioner's motion. The issue before us is how the documents can even get to the Supreme Court for its consideration.

I end where I began. Despite the vastly overbroad protective order and improper burden placement, because of the adequate remedy at law, we cannot grant mandamus relief.

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[13] This far I agree with my colleague in concurrence. However, I do not agree that a decision from this court is unnecessary "as a prerequisite to the Court's consideration of what additional items (sealed or unsealed), if any, it should consider in deciding *June I*"—it is unclear how the petitioner is to request that the Supreme Court consider the documents if the district court's sealing order prevents them from filing them in the Supreme Court at all.

HAYNES, Circuit Judge, concurring:

I concur in the decision to deny the mandamus petition, but I do so for a different reason. The case prompting the petition for writ of mandamus is one in which certiorari was recently granted, *June Medical Services L.L.C. v. Gee*, Nos. 18-1460, 18-1323 (U.S. Oct. 4, 2019) (*June I*). Obviously, then, it is not pending before us. Thus, the question of what documents, if any, the Supreme Court should consider in deciding *June I* is a matter within the Court's purview and prerogative. Whatever we say, we cannot bind the Supreme Court nor is our decision on the mandamus petition necessary as a prerequisite to the Court's consideration of what additional items (sealed or unsealed), if any, it should consider in deciding *June I*. For that reason, I concur in the decision to deny the petition for writ of mandamus.