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June 25, 2019

The Honorable Sreenivasa Rao Dandamudi
Commissioner
Administrative Hearing Commission
United States Post Office Bldg.
Third Floor
131 W. High St.
Jefferson City, MO 65101

Re: In Camera Filing in 19-0879

Dear Commissioner:

As requested by your order of earlier today, enclosed please find the following documents for your *in camera* consideration:

1. Letter from DDHS to Cathy Williams re "Complaint Investigation Statement of Deficiencies"
2. Letter from Planned Parenthood to William Koebel re "June 13, 2019 Statement of Deficiencies" and plan of correction

I am also enclosing the parties' briefing on the issue of whether the Statement of Deficiencies should be sealed by the Circuit Court of the City of St. Louis.

We appreciate your consideration of the issue.

Sincerely,

Stinson LLP

Charles W. Hatfield

CWH:

cc: Solicitor John Sauer

IN THE
CIRCUIT COURT OF ST. LOUIS, MISSOURI
22nd JUDICIAL CIRCUIT

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION Petitioner, v. MICHAEL L. PARSON, *et al.* Respondents.	Case No. 1922-CC02395 Division No. 6

MOTION TO SEAL COURT RECORDS
CONTAINING CONFIDENTIAL PATIENT HEALTH INFORMATION

COMES NOW Petitioner, by counsel, and moves this Court to seal Exhibit A to Respondents' Motion to Reconsider or Amend the Court's Order Granting a Preliminary Injunction and Notice of Compliance ("Motion for Reconsideration").

INTRODUCTION

On Thursday, June 13, 2019, Respondents filed their Motion for Reconsideration, attached to which was a statement of alleged deficiencies ("Exhibit A"). Motion for Reconsideration, Ex. A. Exhibit A included substantial and specific details of certain patient medical charts, the release of which violates the Health Insurance Portability and Accountability Act ("HIPAA") and Missouri statute. 45 C.F.R. § 164.514(2); § 197.477, RSMo.[1] The information contained in Exhibit A is sufficiently detailed as to raise the very real possibility that its disclosure will compromise patient privacy and safety, particularly given the political environment surrounding this litigation

[1] The release also violates those patients' constitutional privacy rights. *See Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (quoting *Whalen v. Roe*, 429 U.S. 589 (1977)).

(as this Court observed in its preliminary injunction order) and the fact that an anti-abortion extremist organization has already publicized personal information revealed during the course of this litigation.

ARGUMENT

I. The Release of Information in Exhibit A Violates HIPAA Requirements

Though Exhibit A does not include full patient names, it includes other identifying details—including ages, dates of admission to specific health facilities and other identifiable protected health information (such as numbers of prior pregnancies) within the meaning of the HIPAA-implementing regulations. 45 C.F.R. § 164.514(b)(2).

Respondent Department of Health and Senior Services ("DHSS") is a covered entity within the meaning of HIPAA. 45 C.F.R. § 160.103. DHSS was therefore required to de-identify protected health information prior to releasing it, as required by 45 C.F.R. § 164.514 (prescribing limited circumstances under which personally identifying information can be disclosed). Such de-identification includes not only redacting names, but also all elements of dates (except year) including admission dates and discharge dates. 45 C.F.R. § 164.514(b)(2) (outlining data elements that must, at a minimum, be redacted). Exhibit A, however, includes extremely specific details of patient health information, including admission and discharge dates from specific facilities, and such information is particularly sensitive here given the nature of care received. Moreover, because Exhibit A focuses only on extremely rare complications, and provides extremely granular details about those patients and the course of care they received, there is a real risk that the disclosed "information could be used, alone or in combination with other reasonably available information, . . . to identify an individual who is a subject of the information." 45 C.F.R. § 164.514(b)(1)(i). Although Respondents have already and unnecessarily exposed patient privacy,

this Court can and should reduce the risk by sealing Exhibit A.

II. The Release of Exhibit A Violates Missouri Law

The public release of Exhibit A violates Missouri law, which states that DHSS may only disclose statements of deficiencies and other evaluations or reports at the end of the inspection or evaluation. Section 197.477, RSMo.[2] ("*Upon the completion of the final report* of an inspection or evaluation . . . [DHSS] may disclose to the public reports of the inspections or evaluations showing the standards by which the inspections or evaluations were conducted, whether such standards were met, and, if such standards were not met, in what manner they were not met *and how the facility proposed to correct or did correct the deficiencies.* All other information whatsoever . . . collected during such inspections or evaluations or information which is derived as a result of such inspection or evaluations shall be confidential and shall be disclosed only to the person or organization which is the subject of the inspection . . . .") (emphasis added). Respondents are required to comply with the licensing requirements in chapter 197, RSMo.

III. Patient Privacy and Safety May Be Compromised Due to Publicity by Anti-Abortion Extremists

The release of this information is particularly concerning in this instance, where patient confidentiality is already jeopardized by anti-abortion advocates who regularly stand outside Petitioner's clinic protesting and taking notes and photos attempting to document what they believe to be abortion complications,[3] and then post this information—including photographs and cell

[2] This is not the first time DHSS has violated this statute by releasing confidential information obtained during the investigation. *See* Reply Suggestions in Supp. of Pet'r's Mot. for TRO & Prelim. Inj. at 9 n.7.

[3] To avoid drawing more attention to a website that displays the names and photographs of abortion providers so that anti-abortion activists may target and harass them, Petitioner is declining to name or provide links to the group or its website.

phone videos that include patient faces—on their website.[4] .

Already, the extremist group—which has been tied to the 2009 assassination of George Tiller and has publicly referred to the assassination of another abortion provider as "justifiable defensive action"—has obtained the names of every individual subpoenaed by Respondents in this case, presumably obtaining their names from the court website before the subpoenas were sealed. The group immediately proceeded to post the names along with color photographs of each subpoenaed individual, including the young medical residents who provided care at Petitioner's clinic for a brief period last fall as part of their medical rotation. The extremist group has been tweeting a link to their names and photographs every few days since the subpoenas were issued. The group is known to publicize names, photographs, and other identifying information of individuals involved in providing abortion care so that anti-abortion extremists may target them for harassment.

Though Petitioner has not released Exhibit A and is of the understanding that the court clerk has declined press requests to obtain copies of Exhibit A, at least one media outlet has nevertheless already obtained a full copy and has reported on it.[5]

To prevent other such breaches of patient privacy and to protect patient safety, Petitioner respectfully requests that this Court seal Exhibit A.

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[4] Shugerman, Emily, "Inside the Campaign to Shut Down Missouri's Last Abortion Clinic: From weaponized ambulance visits to 'sidewalk counselors,' the 10-year fight over a Planned Parenthood clinic in St. Louis." Daily Beast May 29, 2019, available at https://www.thedailybeast.com/inside-the-campaign-to-shut-down-missouris-last-abortion-clinic last accessed June 14, 2019

[5] Joel Currier & Kurt Erickson, "State Asks St. Louis Judge to Rescind Order in Abortion Clinic's License Fight," St. Louis Post Dispatch, June 13, 2019, available at https://www.stltoday.com/news/local/crime-and-courts/state-asks-st-louis-judge-to-rescind-order-in-abortion/article_955ba38b-9676-5f0a-938f-54e3a354caa6.html/, last accessed June 14, 2019.

WHEREOF, for the foregoing reasons, Petitioner respectfully requests that this Court seal Exhibit A to Respondents' Motion for Reconsideration.

Dated: June 14, 2019

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Attorneys for Reproductive Health Services of Planned Parenthood of the St. Louis Region

** Pro hac vice motion pending*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all parties of record via the Court's electronic notification system and email on this 14th day of June, 2019.

/s/ Jamie L. Boyer
Attorney for Reproductive Health Services of Planned Parenthood of the St. Louis Region

IN THE
CIRCUIT COURT OF ST. LOUIS, MISSOURI
22nd JUDICIAL CIRCUIT

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, Plaintiff, v. RANDALL WILLIAMS, M.D., in Official capacity as Director of the Missouri Department of Health and Senior Services, et al., Defendants.	)	Case No. 1922-CC02395 Division 6

DEFENDANTS' MOTION TO UNSEAL STATEMENT OF DEFICIENCIES

Defendants Governor Mike Parson, Dr. Randall Williams, and the Department of Health and Senior Services (collectively, "the State") respectfully oppose Plaintiff Reproductive Health Services of Planned Parenthood of the St. Louis Region's ("RHS") Motion to Seal the Statement of Deficiencies attached as Exhibit A to the State's Motion to Reconsider or Amend the Court's Order Granting Preliminary Injunction. Because the motion was ruled before the State filed this response, the State respectfully requests that this Court unseal the Exhibit.

Consistent with universal practice, the Department's Statement of Deficiencies contains no personal identifying information of any patient or staff member. Both RHS and the Department have publicly filed Statements of Deficiencies and similar documents containing information about treatment of anonymous patients in the past, including in this very case. Yet RHS now contends that the public filing of Department's most recent Statement of Deficiencies—which provides specific information about the grave threats to patient safety at RHS's facility—should be sealed to protect the anonymity of patients. This argument is meritless. The disclosure of the Statement

of Deficiencies does not violate HIPAA, because the Department's Division of Regulation and Licensure is not a "covered entity" under HIPAA, and RHS fails to identify any HIPAA-protected personal identifying information that could plausibly be used to infer the identity of any individual patients. The disclosure of the Statement of Deficiencies does not violate Missouri law, because the disclosure statute that applies specifically to abortion facilities, § 197.230.3, RSMo, directs that Statements of Deficiencies "shall be made available to the public." RHS's putative concern for patient anonymity rests on unsupported speculation, because the parties have repeatedly filed Statements of Deficiency and similar documents describing the treatment of anonymous patients in the past, yet RHS can identify no instance where any patient was personally identified by the disclosure of such information. In sum, RHS fails to make the compelling showing required by law to overcome the strong presumption in favor of public access to the courts and to justify sealing court records of great public interest.

A. RHS Does Not Provide a Compelling Justification to Seal Court Records.

RHS's motion does not cite the governing standards for motions to seal court records. Court records are presumptively open to the public for inspection and copying unless there is a compelling justification for their closure. *Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co. ex rel. Intervening Employees*, 43 S.W.3d 293, 303-04 (Mo. banc 2001). This presumption exists because "[j]ustice is best served when it is done within full view of those to whom all courts are ultimately responsible—the public." *Id.* at 301. The presumption that court records should be public is grounded in the common law and reinforced by both the United States and Missouri Constitutions. *Id.*; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Globe Newspaper Co. v.*

Superior Court for Norfolk County, 457 U.S. 596, 603 (1982) (holding the public has a constitutional right of access to the court system under the First Amendment); *Brewer v. Cosgrove*, 498 S.W.3d 837, 841 (Mo. App. E.D. 2016) ("Article I, section 14 of the Missouri Constitution states that the courts of justice shall be open to every person, section 476.170 provides that the sitting of every court shall be public and every person may freely attend the same, and section 510.200 states that all trials upon the merits shall be conducted in open court. This authority further demonstrates the presumption in favor of public court proceedings and records.").

To close court records, the court must "identify specific and tangible threats to important values in order to override the importance of public right of access." *Transit Cas. Co.*, 43 S.W.3d at 302. "Vague or uncertain threats by one party normally would not justify closure." *Id.* RHS has the burden to prove records should be sealed. *Id.* at 301. RHS has a "considerable task in overcoming the presumption of openness." *Id.* at 300. RHS provides no such compelling justification here.

B. HIPAA Does Not Require Sealing the Statement of Deficiencies.

RHS contends that the Statement of Deficiencies contains information protected from public disclosure under the federal Health Insurance Portability and Accountability Act ("HIPAA")'s implementing regulations. Mot. at 1-2. This is incorrect.

First, the Department's Division of Regulation and Licensure, which issues Statements of Deficiencies, is not a "covered entity" under HIPAA. *See* 45 C.F.R. § 160.103. Federal regulations define "covered entity" to include three things: (1) "a health plan," (2) "a health care clearinghouse," and (3) "a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 C.F.R. § 160.103 (defining "covered entity"). Plainly, the Department's Division of Regulation and Licensure is not a "health

care plan," a "health care clearinghouse," or a "health care provider." *Id.* Consistent with the regulatory definition, the Department has determined that "only a few specific bureaus and units [within the Department] satisfy the definition of 'covered entity'" under HIPAA. *See* Mo. Dep't of Health and Senior Services, *Health Insurance Portability and Accountability Act, at* https://health.mo.gov/information/hipaa/. These covered bureaus and units do not include the Division of Regulation and Licensure. *See* MO. DEP'T OF HEALTH AND SENIOR SERVICES, ADMINISTRATIVE MANUAL, § 19.3, at 1 (July 23, 2010) ("The Division of Regulation and Licensure performs regulatory and licensing ('health oversight') functions and is not a covered entity."). The regulated public—including RHS—has been on notice of this determination for many years.

Second, even if the Division of Regulation and Licensure were a "covered entity" under HIPAA (which it is not), the Statement of Disclosure contains no information protected from disclosure under HIPAA that could lead to the identification of individual patients. Consistent with its ordinary and universal practice, the Department carefully excluded all patient identifying information from its Statement of Deficiencies, as well as any information that might be used to identify staff members. HIPAA regulations direct that covered entities should avoid disclosing "identifiers of the individual or of relatives, employers, or household members of the individual," such as "names," address information that includes "geographic subdivisions smaller than a State," "telephone numbers," "fax numbers," "electronic email addresses," "Social Security numbers," and similar information. 45 C.F.R. § 164.514(b)(2)(i). The Statement of Deficiencies contains no such information, and RHS does not identify any such personal identifying information in its Motion. The only information that RHS identifies that even arguably falls within the ambit of

HIPAA relates to the calendar dates of treatment, *see id.*, and without more, that information poses no clear risk of personal identification, as discussed below.

Instead, RHS contends that "the information could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 C.F.R. § 164.514(b)(2)(ii). But this concern rests entirely on unsupported speculation. RHS—which, unlike the Department, *is* a "covered entity" under HIPAA—has itself publicly filed multiple Statements of Deficiency and Plans of Correction *in this very case*, which also contain detailed information about treatment of anonymous patients. *See* Verified Petition, Ex. A (March 27, 2019 Statement of Deficiencies); *id.* Ex. B (April 9, 2019 Plan of Correction); *id.* Ex. G (May 20, 2019 Letter re Statement of Deficiencies and Plan of Correction); *id.* Ex. H (updated Plan of Correction); *id.* Ex. I (May 23, 2019 Letter re Statement of Deficiencies and Plan of Correction); *id.* Ex. J (updated Plan of Correction). The Department has done so as well, without objection from RHS. *See* Defendants' Suggestions in Opposition to Plaintiff's Motion for Temporary Restraining Order, Ex. A (affidavit of William Koebel). Moreover, the parties have publicly filed Statements of Deficiencies in high-profile litigation in the past, without objection. *See, e.g.,* Doc. 169-7 *in Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 2:16-CV-04313-BJW (W.D. Mo.) (filed Jan. 14, 2019) (publicly filing numerous Statements of Deficiency regarding RHS's facility); *id.* Doc. 141-1 (publicly filing Statement of Deficiency regarding Comprehensive Health's abortion facility in Columbia, Missouri). Finally, RHS does not dispute that the Department routinely discloses Statements of Deficiencies containing specific information about treatment of anonymous patients at all manner of other health facilities—not just abortion facilities—in response to public requests for information, as authorized by Missouri law. Indeed,

once the "final report" of an investigation is completed, such disclosures are explicitly authorized under the state statute RHS cites. *See* § 197.477, RSMo.

To the Department's knowledge, none of these numerous prior disclosures of information regarding the treatment of anonymous patients at abortion and other health-care facilities has led to a single instance of the public identification of any individual patient, and RHS identifies no such instance. And RHS identifies no information in the Statement of Deficiencies that would create a plausible risk of inference of any patient's identity when combined with other publicly available information. In fact, to the Department's knowledge, the innumerable disclosures of similar reports in the past have not resulted in the public identification of any individual patient at any facility, including abortion facilities. In short, RHS raises (at most) a "vague and uncertain threat" of patient identification, not the "specific and tangible threat" required to justify sealing court records. *Transit Cas. Co.*, 43 S.W.3d at 302.

C. Missouri Law Requires the Disclosure of the Statement of Deficiencies.

RHS also contends that a Missouri statute, § 197.477, RSMo, requires the Statement of Deficiencies to be kept confidential until a "final report" of the investigation is issued by the Department—which, in light of recent events, will likely occur quite soon. *See* § 197.477, RSMo (authorizing the disclosure of Statements of Deficiencies and Plans of Correction "upon the completion of the final report" from an inspection or investigation). Again, this is incorrect. RHS relies on the general disclosure statute that relates to all health care facilities, § 197.477, RSMo, and overlooks that there is a more specific, more recently enacted statute that applies to abortion facilities in particular, § 197.230.3, RSMo. Section 197.230.3 provides: "Inspection, investigation, and quality assurance reports *shall be made available to the public*. Any portion of a report may

be redacted when made publicly available if such portion would disclose information that is not subject to disclosure under the law." § 197.230.3, RSMo (emphasis added).

Notably, unlike section 197.477, section 197.230.3 is not limited to the time after "the completion of the final report," but applies immediately to inspection, investigation, and quality assurance reports relating to abortion facilities. *Id.* It is indisputable that the Statement of Deficiencies is an "investigation . . . report" that relates to an abortion facility, and thus its public disclosure is mandatory under section 197.230.3, which directs the Department that such a report "*shall* be made available to the public." *Id.* To be sure, the Department "may" redact or exclude information that is not subject to disclosure under another provision of law—but, for the reasons stated above, the Statement of Deficiencies does not contain any such information. Indeed, because section 197.477 explicitly authorizes the public disclosure of Statements of Deficiencies upon completion of the "final report of an inspection or evaluation of a health facility," such Statements of Deficiencies plainly do not constitute "information that is not subject to disclosure under the law" within the meaning of section 197.230.3. § 197.230.3, RSMo. Under the plain terms of section 197.477, RSMo, those Statements *are* "subject to disclosure under the law." *Id.* RHS's argument, therefore, gets state law backwards. The applicable statute does not require the Department to conceal the information in the Statement of Deficiencies—it requires the Department to disclose it.[1]

[1] Notably, section 197.230.3 applies to "reports" of investigations and inspections, not to patient records examined or copied during investigations. § 197.230.3, RSMo. The Department maintains the confidentiality of patient records as a matter of course under § 197.477, RSMo.

CONCLUSION

For the reasons stated, the Statement of Deficiencies attached as Exhibit A to the State's Motion to Reconsider or Amend should be unsealed.

Dated: June 17, 2019

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

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Counsel for State Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on June 17, 2019, the foregoing was filed electronically through the Court's electronic filing system to be served electronically on all counsel of record.

/s/ D. John Sauer

IN THE
CIRCUIT COURT OF ST. LOUIS, MISSOURI
22nd JUDICIAL CIRCUIT

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION Petitioner, v. MICHAEL L. PARSON, *et al.* Respondents.	Case No. 1922-CC02395 Division No. 6

SUGGESTIONS IN OPPOSITION TO RESPONDENTS' MOTION TO UNSEAL STATEMENT OF DEFICIENCIES

Respondents' politically motivated campaign against Planned Parenthood and its physicians now extends to an attempt to expose individual patients' private, highly sensitive, and identifying health information. These patients are non-party private citizens who are swept up in this matter because of the deeply personal, confidential abortion care they received at Planned Parenthood. It was entirely correct for the Court to recognize the sensitive nature of the patient information at issue and the risk to patients from that information being made public, and to seal the Statement of Deficiencies. The risk of patient exposure is not hypothetical. As detailed below, during the brief time before this Court sealed the Statement of Deficiencies Respondents filed, anti-abortion extremists identified one patient described therein and posted a photograph and other identiftying information about the patient on the Internet. There is a real, concrete, present danger to these patients from this information being made public, and the Court should prevent further similar harms by denying Respondents' Motion to Unseal.

FACTUAL BACKGROUND

The Statement of Deficiencies contains extensive, detailed information about patients, including dates of service and information about their personal and health histories. For example, as to one patient the Statement of Deficiencies contains information about the date she was treated at Planned Parenthood, the date and time of day she was transferred to the hospital, and the date she was discharged from the hospital. It also includes her age, the fact that she previously had two live births, the birthday of one of her children, the gestational age of her pregnancy on the date of her visit to RHS's St. Louis health center, and a pregnancy complication with which she had been diagnosed. Defs.' Mot. to Recons. or Amend Order Granting Prelim. Inj. & Not. of Comp., Ex. A at 5, 34–38. This in addition to, of course, the fact that she had an abortion. The Statement of Deficiencies embeds this granular information within a detailed narrative of the patient's entire course of care, including the specifics of her pregnancy, the complication she experienced, her symptoms, and her course of treatment. *Id.* As is explained below in Part III, this is certainly sufficient information for this patient to be identified, particularly to those in her life who were aware of her pregnancy and medical condition. The Statement of Deficiencies gives similarly detailed narratives and granular details for multiple other patients.

ARGUMENT

I. The Court Properly Sealed the Individually Identifying Patient Information Contained in the Statement of Deficiencies

The Court properly sealed the Statement of Deficiencies to protect the sensitive, confidential patient information described above. While there is a presumption in favor of court records being open to the public, *see Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co. ex rel. Intervening Emps.*, 43 S.W.3d 293, 301 (Mo. banc 2001), the Court has the discretion to seal records when there is a "threat[] to the [public] values which the court finds override the

right of access," *United States v. Antar*, 38 F.3d 1348, 1351 (3d Cir. 1994); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."). The Missouri Supreme Court in *Transit Casualty Company* provided a non-exhaustive list of sensitive materials that warrant sealing, among them "private psychiatric, medical or academic records of non-parties," precisely the sort of information at issue here. *Transit Cas. Co.*, 43 S.W.3d at 302; *see also State ex rel. Lester E. Cox Med. Ctr. v. Keet*, 678 S.W.2d 813 (Mo. banc 1984) (recognizing the sensitivity of non-party medical records). The Court may also seal records to "insure that its records are not used to gratify public spite or promote public scandal." *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (quoting *Nixon*, 435 U.S. at 598).

There can be no doubt that the private health information of Planned Parenthood's patients (which is particularly sensitive given that these patients sought abortion care) is the very sort of information the Missouri Supreme Court considers confidential so as to warrant sealing. The Court properly recognized this in its order sealing the Statement of Deficiencies and that order should not be disturbed.

II. Missouri and Federal Confidentiality Laws and Policies Support Sealing

Missouri and federal laws regarding the confidentiality of patient health information weigh heavily in favor of sealing the Statement of Deficiencies to protect patient privacy. Respondents rely entirely on the statute authorizing disclosure of "investigation . . . reports," § 197.230.3, RSMo., and essentially ask this Court to ignore Missouri law requiring that DHSS maintain confidential all information collected during inspections or evaluations, § 197.477, RSMo., except final reports, arguing that the law permitting disclosure of statements of deficiency is "more recently enacted." Defs.' Mot. to Unseal Statement of Deficiencies ("Resps.' Unseal Mot.") 6–7.

But DHSS itself acknowledged when Planned Parenthood turned over the patient records at issue that section 197.477 specifically applies to investigations of abortion facilities and requires that the records be kept confidential.[1] *See* Exs. I & J to Ex. A to Respondents' Suggs. in Opp'n to Mot. for TRO; *see also* Pet. Ex. F. Indeed, legal counsel for DHSS confirmed via email that:

> The patient records [DHSS is] seeking would be collected during an inspection or evaluation under section 197.230.1 RSMo, so section 197.477 RSMo applies. They aren't reports that are disclosable under section 197.477 RSMo, so they shall be confidential under that statute. Because they shall be confidential, they would be "protected from disclosure by law" under section 610.021(14) RSMo.

Ex. J at 116 to Ex. A to Respondents' Suggs. in Opp'n to Mot. for TRO, Email from Josh Wille, Legal Counsel, DHSS, to Richard Muniz, Staff Attorney, PPFA (May 10, 2019, 08:27 CST). DHSS has therefore itself acknowledged that section 197.230.3 does not override section 197.477. This is a natural interpretation of the two laws, as DHSS's statements of deficiency do not generally include such detailed information from underlying documents, let alone from patient medical records.[2] And more fundamentally, it is shocking that DHSS—having offered its

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[1] Other Missouri statutes also recognize that patient health information related to abortion must be kept confidential, § 188.055, RSMo. (mandating that information regarding abortions collected by DHSS via mandatory reporting "shall be confidential and shall be used only for statistical purposes"); § 188.070, RSMo. (mandating that records or reports relating to abortion required by Missouri law must be maintained as confidential). Missouri law similarly protects patient health information in other contexts. § 354.515, RSMo. (requiring health, treatment, or diagnosis information held by an HMO be kept confidential); § 191.317, RSMo. (classifying "[a]ll testing results and personal information" as "a confidential medical record" which may only be released by the Department upon "consent"); § 192.067, RSMo. (establishing that patient's medical records, when used by the Department to conduct epidemiological studies, must be kept confidential and that release must be in a form "that precludes and prevents the identification of patient, physician, or medical facility"); § 192.655, RSMo. (keeping confidential patient information maintained by the Department in its Cancer Information Reporting System); § 191.657, RSMo. (requiring courts to refrain from disclosing other sensitive medical information—HIV-related information—except in extremely limited circumstances).

[2] At the very least, to the extent Missouri law conflicts regarding whether the patient information contained in the Statement of Deficiencies may be made public, the Court should resolve the conflict in favor of protecting the extraordinarily sensitive patient information at issue here. *See*

assurances that the information obtained in the course of its inspection would be protected as confidential—now seeks to unseal it and publicly expose the details of these patients' medical situations and courses of care.

Respondents assert that previous statements of deficiency containing similar patient information here have previously been filed in this and other litigation, Resps.' Unseal Mot. at 5, but this is not correct. The examples Respondents cite do not provide anywhere near the extensive, identifying details regarding patient demographic information, health histories, specific complications, symptoms, and courses of treatment contained in the current Statement of Deficiencies.[3]

Federal HIPAA protections also require that the patient information be maintained under seal. Respondents argue that HIPAA does not apply because DHSS is a hybrid entity for HIPAA purposes and that it has determined that its Division of Regulation and Licensure is not covered by HIPAA. Resps.' Unseal Mot. 3–4. Given the Division's clear handling of protected health information, Petitioner questions the appropriateness of Respondents' determination that it is not covered by HIPAA. But even if Respondents are correct regarding the Division's status, the Court should still protect the patient information at issue, given HIPAA's clear guidance that the information DHSS seeks to disclose violates the privacy rights of Planned Parenthood's patients.[4]

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45 C.F.R. § 160.203 (HIPAA regulation explaining that when laws conflict the law more protective of patient privacy should govern).

[3] For example, one document cited by Respondents (and which was filed by Respondents in another litigation, and not by Petitioner) includes dates of care, but no patient-specific demographic or health history information. *See* Doc. 169-7 in *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 2:16-CV-04313-BJW (W.D. Mo.) (filed Jan. 14, 2019). Others contain fully anonymized information about courses of patient treatment with no identifying information at all, not even dates of service. *See e.g.,* Verified Petition, Ex. A (March 27, 2019 Statement of Deficiencies).

[4] Moreover, RHS is a covered entity for HIPAA purposes and, as such, sought assurances prior to turning over the patient records at issue to DHSS that the records and the information contained

HIPAA sets a national standard for what information is identifying and how that information should be de-identified before it is disclosed. As is discussed in detail below, those national standards have not been met here. As a hybrid entity that regularly deals with HIPAA issues, DHSS is surely aware of this national standard, but wants to disregard that standard in this litigation for political gain. This Court should not permit it to do so. Rather, since there can be no doubt that the patient information in the Statement of Deficiencies is information protected by HIPAA, and no doubt that the Court has authority to protect it, the Court should exercise its discretion and maintain that protection.[5]

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therein would be maintained as confidential. *See* Ex. J to Ex. A to Respondents' Suggs. in Opp'n to Mot. for TRO. DHSS provided those assurances to RHS, *see id.*, but now seeks to make public these patients' private information.

[5] Both the Missouri and Federal Constitutions also provide protection for private medical information, further underscoring the need for the Court to protect the information contained in the Statement of Deficiencies. In particular, the Fourteenth Amendment to the United States Constitution protects an individual interest in avoiding disclosure of personal matters, and in particular, medical information including an individual's decision to obtain an abortion. *See, e.g.*, *A.L.A. v. W. Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) ("There is no dispute that confidential medical information is entitled to constitutional privacy protection."); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to [constitutional] privacy protection."); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1094 (E.D. Ark. 2017), amended, 2017 WL 6946638 (E.D. Ark. Aug. 2, 2017) ("Numerous courts have recognized that confidential medical information is entitled to constitutional privacy protection in order to prevent the disclosure of such personal medical records."). Similarly, Missouri courts have repeatedly recognized a right to privacy under the Missouri Constitution that extends at least to informational privacy, including health records. *See, e.g.*, *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 417 n.13 (Mo. 1988) (explaining that a right to privacy that protects against the publication of private facts grows out of a constitutional right (citing *Barber v. Time, Inc.*, 348 Mo. 1199, 1205–06, 156 S.W.2d 291, 294 (1942))); *State v. Nolan*, 316 S.W.2d 630, 634 (Mo. 1958) ("The right of privacy is . . . the right to be let alone. It has also been defined as the right of a person to be free from unwarranted publicity, and as the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.' 41 Am. Jur., Privacy, Section 2, page 925. We have held that the right 'is, or at least grows out of, a constitutional right.'" (quoting *Barber*, 348 Mo. at 1206, 159 S.W.2d at 294)); *Chasnoff v. Mokwa*, 466 S.W.3d 571, 578–79 (Mo. App. E.D. 2015) (explaining that the constitutional right to privacy "has been extended to protect an individual's interest in preventing

In sum, Missouri and federal law make clear that patient health records and the information contained therein should be maintained as confidential, and the Court properly exercised its discretion to seal the Statement of Deficiencies. The law allowing for public disclosure of final investigative reports cannot override the critical interest in protecting patient confidentiality.

III. The Patient Health Information Contained in the Statement of Deficiencies Is Highly Sensitive and Individually Identifying

Respondents attempt to minimize the harm to patients from public disclosure of the Statement of Deficiencies by arguing that it does not contain patient identifying information and that any patient information has been anonymized, Resps.' Unseal Mot. at 4, but this could not be further from the truth. HIPAA provides important guidance on the national standard for what is considered to be patient identifying information and the information contained in the Statement of Deficiencies undoubtedly rises to that level. Moreover, the feverish public interest in this litigation, including by anti-abortion extremists, has already resulted in one of the patients described in the Statement of Deficiencies being indentified via a photo that is now available on the Internet. Far from being only theoretical that a patient could be identified using the information, it has already occurred. This is an extreme invasion into the privacy of these private citizen, third-party patients.

HIPAA considers to be identifying "information [that] could be used, alone or in combination with other reasonably available information . . . to identify an individual who is a subject of the information."[6] 45 C.F.R. § 164.514(b)(1)(i). This HIPAA provision is directed precisely at the sort of situation the Statement of Deficiencies presents: a situation in which so

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the disclosure of personal matters," including health history (quoting *N. Kan. City Hosp. Bd. of Trs. v. St. Luke's Northland Hosp.*, 984 S.W.2d 113, 121 (Mo. App. W.D. 1998))).

[6] Even if DHSS is correct that HIPAA does not apply to it in this situation, HIPAA provides critical national guidance regarding what health information may be identifying and needs to be de-identified prior to disclosure.

much information is provided that, taken all together, it is identifying. But such vast amounts of information are not necessary for information to be identifying. As is explained in Petitioner's Motion to Seal, admission and discharge dates alone are considered to be "identifiers" under HIPAA, and must be de-identified prior to disclosure. 45 C.F.R. § 164.514(b)(2)(C). In order for a date of admission or discharge to be de-identified the only element that may remain is the year. Not only does the Statement of Deficiencies contain months and days, it also contains down-to-the-minute information about when a patient had a procedure or was transferred to the hospital, as well as detailed narratives of patients' unique and specific courses of care.

Respondents argue that it is mere "speculation" that the information contained in the Statement of Deficiencies could be used to identify a patient, but during the brief time the Statement of Deficiencies was publicly available on the docket, the information was already used by anti-abortion extremists to identify a patient's photo, and that photo is posted on the internet. The web pages in question contain photos of the patient being transported to a waiting ambulance, state the patient's race, and provide the patient number used in the Statement of Deficiencies to refer to the patient. This demonstrates precisely why dates and times are considered to be protected information under HIPAA: these anti-abortion extremists matched that information up with photos they had taken at the time in order to identify the patient.[7] For Respondents to attempt to characterize the information in the Statement of Deficiencies as anonymous in the face of these facts is ludicrous.

[7] As Petitioner explained in their Motion to Seal the Statement of Deficiencies, these extremists regularly stand outside Petitioner's clinic protesting and taking notes and photos and then post this information—including photographs and cell phone videos that include patient faces—on their website. Mot. to Seal Ct. Rs. Containing Confidential Patient Health Information at 2–3.

Even if the information in the Statement of Deficiencies had been properly de-identified and made anonymous, courts have recognized that given the highly sensitive and personal nature of medical information related to abortion, even de-identified information may violate patient confidentiality and privacy rights. As the United States Court of Appeals for the Seventh Circuit has explained:

> The natural sensitivity that people feel about the disclosure of their medical records . . . is amplified when the records [relate to abortion]. . . . This is hardly a typical case in which medical records get drawn into a lawsuit. Reflecting the fierce emotions that the long-running controversy over the morality and legality of abortion has made combustible, . . . litigation[s] . . . have generated enormous publicity. These women must know that, and doubtless they are also aware that hostility to abortion has at times erupted into violence, including criminal obstruction of entry into abortion clinics, the firebombing of clinics,[8] and the assassination of physicians who perform abortions.
>
> Some of these women will be afraid that when their redacted records are made a part of the trial record [], persons of their acquaintance, or skillful "Googlers," sifting the information contained in the medical records concerning each patient's medical and sex history, will put two and two together, "out" the 45 women, and thereby expose them to threats, humiliation, and obloquy. "[W]hether the patients' identities would remain confidential by the exclusion of their names and identifying numbers is questionable at best. The patients' admit and discharge summaries arguably contain histories of the patients' prior and present medical conditions, information that in the cumulative can make the possibility of recognition very high." . . . .
>
> Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded.

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[8] These sorts of safety threats are far from theoretical. A Missouri Planned Parenthood location was set on fire by an anti-abortion extremist in February of this year, and that incident drew extensive news coverage. *See* Emily S. Rueb, *F.B.I. Investigates Suspicious Fire at Planned Parenthood Clinic in Missouri*, N.Y. Times, Feb. 13, 2019, https://www.nytimes.com/2019/02/13/us/planned-parenthood-fire-missouri.html.

> The revelation of the intimate details contained in the record of a[n] . . . abortion may inflict a similar wound.

Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 928–29 (7th Cir. 2004) (citing *Parkson v. Cent. DuPage Hosp.*, 435 N.E.2d 140, 144 (Ill. Ct. App. 1982)); *see also Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 922, 128 P.3d 364, 378 (Kan. 2006) (stating, in case regarding subpoena for patient abortion records, "[t]he type of information sought by the State here could hardly be more sensitive, or the potential harm to patient privacy posed by disclosure more substantial"); *Planned Parenthood Fed'n of Am., Inc. v. Ashcroft*, No. C03-4872 PJH, 2004 WL 432222, at *2 (N.D. Cal. Mar. 5, 2004) (explaining, in opinion holding abortion providers would not be required to produce records of abortion patients in discovery that "[a]lthough the government has agreed to the redaction of names, addresses, birthdates, and other objectively identifying information, the records nevertheless contain other potentially identifying information of an extremely personal and intimate nature, including, among others, types of contraception, sexual abuse or rape, marital status, and the presence or absence of sexually transmitted diseases"). As in these other cases, the Court here should protect the privacy of Planned Parenthood's patients who have sought abortions.

CONCLUSION

The brief public disclosure of the Statement of Deficiencies has already resulted in grave breaches of patient privacy, and, for the reasons stated above and in Petitioner's Motion to Seal, the Court should not disturb its previous order sealing the document. At the very least, the Statement of Deficiencies should be made public only if all patient information is redacted.[9]

WHEREFORE, for these reasons, Petitioner respectfully requests that this Court deny Respondents' Motion to Unseal Statement of Deficiencies.

[9] Petitioner would be happy to prepare a redacted Statement of Deficiencies upon the Court's request.

Dated: June 20, 2019

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* *Pro hac vice motion pending*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all parties of record via the Court's electronic notification system and email on this 20th day of June, 2019.

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