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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho,

Defendant.

Case No. 1:23-cv-00323-DKG

RESPONSE TO MOTION FOR PROTECTIVE ORDER [DKT. 78]

INTRODUCTION

The Attorney General is not opposed to the entry of the District of Idaho's Model Protective Order in this case, and has informed Plaintiffs' counsel of that fact on several occasions. Notwithstanding that months-old, and oft repeated, concession, Plaintiffs insist on including provisions in the protective order that are unreasonable, unduly burdensome for the Defendant, and unnecessary. Plaintiffs' argument in support of a protective order is primarily based on the red herring that medical information ought to be protected. But nobody is arguing that it shouldn't be—that's why Defendant's undersigned counsel has stated, no less than five times, that the District of Idaho Model Protective Order is acceptable and should be entered in this case.

But Plaintiffs' counsel has instead insisted upon including vacated federal regulations and non-applicable statutes from other states. This effort to include vacated regulations and non-applicable state protections in a federal case should be rejected. Plaintiffs are not, as they argue, seeking just a protective order over medical information. If they were, Defendants' months old agreement to enter the District of Idaho Model Protective Order should have mooted the point—obviously, Rule 26(c) covers medical records too. Instead, Plaintiffs are simply attempting to insert a vacated federal regulation and various state statutes that have zero relevance to federal discovery, and to suggest that the Court, by way of Protective Order, has the authorization to provide sweeping judicial immunity going to any information obtained in this case. The Court lacks the power to grant sweeping criminal immunity through a backdoor. The Court should only grant relief in part, by entering the District of Idaho Model Protective Order.

BACKGROUND

The parties have negotiated fruitlessly for a protective order for two months. Defendant, on no less than five occasions, offered to stipulate to the District of Idaho Model Protective Order. Plaintiffs disagreed and offered their own order. Defendant responded by asking Plaintiffs to justify

the departures from the Model Order, since, if Plaintiffs moved for such an order, they would have the burden to show why the order was necessary. Plaintiffs failed to justify the departures, other than to say that the changes were important to them. Defendant remains willing to stipulate to the Model Protective Order.

LEGAL STANDARD

The law presumes that materials produced in pre-trial discovery are public. *San Jose Mercury News, Inc. v. U.S. Dist. Ct.-N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999). Rule 26(c) allows a court to override this general presumption with the entry of a protective order upon a showing of "good cause." Importantly, Plaintiffs bear the burden of asserting good cause for each document they seek to protect by way of protective order, including "showing that specific prejudice or harm will result if no protective order is granted." *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). The same is similarly true for discovery related to non-parties; any "person" under Rule 26(c), must meet this burden. *In re Roman Catholic Archbishop of Portland in Ore.*, 661 F.3d 417, 426 (9th Cir. 2011). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (quoting *Cipollone v. Ligget Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)).

Importantly, "[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). "Nor is it a sufficiently 'compelling reason' that a party designated information as

confidential pursuant to a protective order." *TML Recovery, LLC v. Cigna Corp.*, 714 F.Supp.3d 1214, 1218 (C.D. Cal. 2024) (collecting cases).[1]

ARGUMENT

Plaintiffs' arguments about specific provisions can be divided into two buckets: 1) those provisions or issues that the Model Protective Order already covers and therefore do not provide good cause for departing from the model order; and 2) those that Plaintiff does not show good cause for.

I. The Model Protective Order already provides most of the protections that Plaintiffs seek.

Several issues raised in the motion are dealt with by virtue of the Model Protective Order already including appropriate language.

The first is the need to designate "sensitive medical and personal information of nonparties to this litigation" as confidential. There is nothing in the District of Idaho Model Protective Order that prohibits the designation of such information as confidential, indeed "sensitive personal information"—a category more broad than simple medical records—is expressly contemplated by the order. Parties routinely designate such material as confidential, and regardless of what the Protective Order says about the material it is intended to cover, the only standard that matters in determining whether a designation is appropriate remains the same regardless of the express inclusion of particular language in the protective order. *Archbishop of Portland*, 661 F.3d at 424–25 (citing factors in *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)). Put differently, whether the Model Protective Order contains specific language about medical

[1] To be sure, the compelling reasons test for seal and the good cause requirement under Rule 26(c) are distinct. *See Kamakana*, 447 F.3d at 1180. But it stands to reason that if incrimination is not sufficient to satisfy the more stringent compelling reasons test, it is not sufficient to satisfy the good cause standard either.

procedures is irrelevant to the protection the Order gives to any given document. A party challenging the designation is going to need to satisfy the same factors and overcome the same burden. Accordingly, there is no good cause for departing from the Model Order and using different language.

For the same reason, Plaintiffs have failed to show good cause for including references to various State statutes and a vacated federal regulation (*see* Dkt. 78 at 4–5 and Dkt. 78-1 at 3 (incorporating statutes and regulations) and 12–13 (incorporating protection from vacated regulation)). Those statutes do not apply to federal courts and offer no more protection against disclosure than Rule 26(c) provides. Plaintiffs do not argue in their motion as to why the state statutory language should be included. The only support that Plaintiff has for the proposition that a now-vacated regulation should, *despite being vacated* for being unauthorized, govern discovery is a district court case *denying* a protective order. *See* Dkt. 78 at 6 (citing *U.S. ex rel. Kaplan v. Metropolitan Ambulance and First-Aid Corp.*, 395 F.Supp.2d 1 (2005); *and compare* Dkt. 78 at 6 with *Purl v. U.S. Dep't of Health and Human Servs.*, 787 F.Supp.3d 284 (N.D. Tex. 2025). That does not constitute good cause.

The second issue relates to the apparent need to prevent the use of discovery material in this case from being used in other proceedings. Plaintiffs' perfunctory assertions on this are unfounded and unsupported, but in any event, the Model Protective Order expressly provides in Paragraph 1, "[u]se of any information or documents labeled 'Confidential' and subject to this Protective Order, including all information derived therefrom, shall be restricted solely to the litigation of this case and shall not be used by any party for any other purpose." . If the information at issue is personal medical information (or otherwise properly designated as confidential under

Rule 26(c)), then the Model Protective Order not only offers protection, *see supra*, but would also prohibit its use for any other purpose.

To be sure, Plaintiffs suggest that a further use of the protective order is warranted, adding a broader protection related to *any* discovery, whether or not designated as confidential. Specifically, they are asking the Court to impose language that the parties "will not seek information or use information obtained through discovery in this case to investigate or impose liability on any person for seeking, obtaining, providing, or facilitating reproductive health care or to identify any person for such purposes." Dkt. 78-2 at 13. Thus, they are asking the Court to specifically include protections from the vacated federal regulation. *Compare* Dkt. 78-1 ¶ 11 with 45 C.F.R. § 164.520(b)(1) (vacated by *Purl*, 787 F.Supp.3d 284). They do so, seeking "assurance[] that they will not be prosecuted for the mere act of bringing their constitutional challenge." Dkt. 78 at 7; Dkt. 78-1 ¶ 11. This fails to supply good cause for any modification of the Model Protective Order for two reasons.

First, the framing is incorrect—there is no criminal cause of action associated with simply bringing a constitutional challenge, and Plaintiffs have not identified one. If Plaintiffs prevail, and prove that the challenged statute is unconstitutional, then they cannot be prosecuted for any alleged violation of a statute that the Court finds to be unconstitutional. And if they fail, they are entitled to no protection at any rate.

Second, the Court lacks the inherent power to grant criminal immunity, let alone do so by protective order. *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991) ("A criminal defendant is not entitled to compel the government to grant immunity to a witness."). Moreover, despite stating that the use of information gained in civil discovery for a criminal prosecution would be "impermissible" Plaintiffs cite *zero* authority for that proposition. Dkt. 78 at 6.

Consequently, a protective order that effectively provides immunity to Plaintiffs or witnesses for criminal actions uncovered in civil discovery by precluding its use in other cases regardless of context, is not authorized. Dkt. 78-1 ¶ 11; *see also cf. Fierro Cordero v. Stemilt AG Servs., LLC*, 142 F.4th 1201, 1207 (9th Cir. 2025) (noting 9th Circuit's favor of access to discovery materials for individuals "engaged in other litigation because allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.").

* * *

Because Plaintiffs have not explained why the Model Protective Order's language is insufficient to protect any legitimate interests, Plaintiffs have not established good cause for entry of their preferred protective order. To the extent that Plaintiffs desire a Protective Order to avoid incriminating themselves, that is neither within the Court's power to provide (*Westerdahl*, *supra*), nor an appropriate use of Rule 26. *Kamakana*, 447 F.3d at 1179.

II. Plaintiffs do not identify good cause for an AEO provision.

A further addition of substance that gets scant mention in the motion is the proposed protective order's inclusion of an attorneys' eyes-only provision. Plaintiffs do not explain why an AEO provision is necessary in addition to the protections already afforded under a confidentiality designation. There simply is no explanation as to why the latter is inadequate, no consideration of the contrasting provisions, and no legal support for an AEO designation. *See generally*, Dkt. 78 at 5. Indeed, given the Defendant in this case, and the lack of explanation as to who the AEO provision is supposed to keep documents from, it is unclear as to what additional protections an AEO designation would provide over and above a standard confidentiality designation. Plaintiffs have not shown good cause for the additional burdensome step of adding an AEO designation to the protective order. *Beckman*, 966 F.2d at 476.

III. Plaintiffs do not identify good cause for the remaining additions.

Plaintiffs' proposed protective order contains additions related to the notification of other parties if a subpoena for confidential or AEO information is received, inadvertent production, and changes to Model Protective Order provisions related to non-termination and return of documents. Plaintiffs do not address these provisions in their motion at all. *See generally* Dkt. 78. Consequently, Plaintiffs have failed to show good cause for their inclusion. *See* Dkt. 78-1 at ¶¶ 7–10.

CONCLUSION

For the foregoing reasons, the Court should grant in part the motion for protective order, entering only the District of Idaho Model Protective Order, and rejecting Plaintiffs' request to deviate from that model order.

DATED: November 4, 2025

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/ *Aaron M. Green*
AARON M. GREEN
Deputy Attorney General
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on November 4, 2025, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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