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IN THE 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 for the State of Idaho,

Defendant.

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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF PROTECTIVE ORDER (DOCUMENTS)

Plaintiffs Lourdes Matsumoto, Northwest Abortion Access Fund, and Indigenous Idaho Alliance ("Plaintiffs") submit this reply in support of their Motion for Entry of Protective Order. Defendant acknowledges that a protective order is appropriate here, but despite having asked for sensitive information about third parties and despite repeatedly asking in discovery requests whether Plaintiffs have committed other, unrelated crimes, he argues that the model protective order is enough and insists that only its provisions are necessary. (Dkt. 82). He contends that it provides sufficient protection for any medical records and that an "Attorney Eyes Only" designation is not necessary. But it is apparent from Defendant's opposition here and to Plaintiffs' separate motion for a protective order regarding minors' identities (Dkt. 83), that the Defendant intends to use the discovery process as a criminal fishing expedition to retaliate against Plaintiffs for seeking to vindicate their constitutional rights. The protective order submitted by Plaintiffs is therefore appropriate.

ARGUMENT

This Court has broad discretion to determine whether a protective order is appropriate and, if so, what degree of protection is warranted. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) ("Broad discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant."). Here, the Plaintiffs have proposed a Protective Order that provides clear protection for sensitive medical and personal information, allows extra protection in the form of an "Attorney Eyes Only" designation for material that is highly sensitive. Among the information Defendant seeks in discovery are records from Plaintiffs IIA and NWAAF regarding minors whom they have assisted in obtaining reproductive

health care. Their interrogatories also directly ask whether Plaintiffs have violated criminal statutes. Certainly, both categories of information are highly sensitive, and information related to services provided to minors directly implicates the privacy rights of third parties. On this facial challenge to Idaho Code § 18-623, protection of this highly sensitive material in the manner set out in Plaintiffs' proposed Protective Order is warranted.

A. Non-party and Reproductive Health Information Warrants Significant Protection in Discovery.

It is routine for a party to a case to seek protection of information related to non-parties, *see Cabell v. Zorro Prods., Inc.*, 294 F.R.D. 604, 607 (W.D. Wash. 2013) ("Fed. R. Civ. P. 26(c)(1) permits a party to seek a protective order from the presiding court in order to restrict the party seeking discovery from pursuing certain requests on third parties.") And neither party can waive the privacy interests of the third-parties whose records Defendant seeks and Plaintiffs seek to protect. *See Beebe v. Andrews*, No. 1:21-CV-00012-SLG, 2022 WL 621782, at *2 (D. Alaska Mar. 3, 2022). It is undisputed that here, the discovery Defendant seeks relates to nonparties to the litigation, many of whom have sought Plaintiffs' assistance precisely because they understand that Plaintiffs will keep such information confidential. Plaintiffs have filed this lawsuit precisely to be able to continue serving and associating in solidarity with young Idahoans to help them access lawful medical care. Only the Protective Order sought by Plaintiffs is sufficient to protect against disclosure of these third-party interests.

In addition, until recently, reproductive health information was afforded extra protection by federal regulation. 45 C.F.R. § 164.502(a)(5)(iii) (prohibiting a covered health care entity from disclosing protected health information potentially related to reproductive health care if the information will be used to conduct a criminal, civil or administrative investigation of any person for the mere act of, inter alia, providing or facilitating reproductive health care). This regulation

was declared invalid in *Purl v. HHS*, 787 F.Supp.3d 284 (N.D. Tex. June 18, 2025), not because its premise was flawed, but because the court determined that HHS acted in excess of its statutory jurisdiction when promulgating the regulation. *Id.* at 306.

This Court should order such protection here because of the important privacy interests at stake and because it is necessary to prevent the use of indirect evidence obtained in this case for impermissible purposes. Although the Defendant argues that this Court cannot confer immunity on Plaintiffs for criminal conduct, Plaintiffs' proposed Protective Order does not seek such immunity. Plainly, if the Defendant were to obtain evidence that it decided to use to seek criminal prosecution of Plaintiffs through some other source, Defendant could take whatever action he deems appropriate. Plaintiffs' proposed Protective Order simply observes the principle that a civil case cannot be used to further a criminal investigation, *See, e.g.*, *United States v. Heine*, 314 F.R.D. 498, 509 (D. Or. 2016) (the State generally cannot use civil discovery to build a criminal case); *see also United States v. Kordel*, 397 U.S. 1, 11-13 (1970) (suggesting that the government may act in bad faith if it brings a civil action solely for the purpose of obtaining evidence in a criminal prosecution).

And the case Defendant cites, *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991), for the proposition that this Court cannot grant immunity has nothing to do with protective orders or civil discovery. Rather, it addresses whether a defendant was denied a fair trial because the government granted use immunity to one witness, who favored the government's case, and not to a second witness, who favored the defendant's case. *Id.* And although it contains the parenthetical cited by the Defendant, "A criminal defendant is not entitled to compel the government to grant immunity to a witness" (*id.* (quoting *United States v. Shirley*, 884 F.2d 1130, 1133 (9th Cir. 1989)), it also points out that the Ninth Circuit has

"recognized an exception to this rule in cases where the fact-finding process is intentionally distorted by prosecutorial misconduct, and the defendant is thereby denied a fair trial. *United States v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983)." *Westerdahl*, 945 F.2d at 1086. In short, *Westerdahl* provides no guidance to the Court here.

B. **An "Attorney Eyes Only" Designation is Appropriate to Include in the Protective Order.**

Defendant objects to Plaintiffs' including an "Attorney Eyes Only" provision, suggesting there is no one to protect it from. Dkt. 82 at 6. As set out in the Plaintiffs' proposed Protective Order,

> "'Attorney Eyes Only' materials shall include documents and tangible things (regardless of how generated, stored, or maintained) that qualify as "Confidential" and that the designating party reasonably believes contain highly sensitive business or personal information, the disclosure of which to another party or non-party would create a risk of competitive or commercial disadvantage, or highly sensitive personal disadvantage, to the designating party, or a person for whom the designating party provides personal services, that could not be avoided by less restrictive means. Such information and materials shall be referred to herein as "Attorney Eyes Only."

Dkt. 78-1, § 2. Thus, Plaintiffs seek to provide extra protection to individuals' sensitive personal information related to their reproductive health choices. Such information is undoubtedly highly sensitive, warranting an "Attorney Eyes Only" designation. *See Planned Parenthood of S. Arizona v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002) (acknowledging that disclosure of sensitive, private information involving a young person's decision to obtain an abortion would cause significant harm); *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001) (stating that abortion "has been a traditional target of hostility"); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1334 (M.D. Ala.) ("Against the backdrop of this history of violence, abortion providers and women seeking abortions in Alabama today live and work in a climate of extreme hostility to the practice of abortion."), *as corrected* (Oct. 24, 2014),

supplemented, 33 F. Supp. 3d 1381 (M.D. Ala. 2014), and *amended*, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014). Defendant apparently does not plan to show any discovery to anyone who is not an attorney, so the "Attorney Eyes Only" designation should not impose any burden on Defendant.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Motion for Entry of a Protective Order, this Court should enter the Protective Order set out in Exhibit 1 to that motion, Dkt. 78-1.

DATED: November 10, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2025, I electronically filed the foregoing 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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