IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES LLC, d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff, et al., Plaintiffs, v. REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health, et al., Defendants.	Case No. 3:16-CV-444-BAJ-RLB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO STAY DISCOVERY

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INTRODUCTION

Discovery should be stayed in this case while the Parties and the Court address certain threshold issues that have recently come to light.

First, through a series of escalating attempts to disclose confidential information, it has become clear that Defendants dispute not only the scope, but also the very right to the existence of the Protective Orders in this case. Defendants have sought to use the discovery process to gut the effect of this Court's Pseudonym Order and Protective Order (collectively, the "Protective Orders"), most recently by challenging all confidentiality designations associated with deposition testimony—including demanding disclosure of the Doe Plaintiffs' identities. Defendants also have made clear that their challenges to confidentiality designations cannot be resolved through an amicable or expedient process. Rather, Defendants have stated that they will not back down from their position that certain confidential information should be disclosed—including the identities of abortion providers—and that they will move to withdraw the Protective Order and mandamus the Court to achieve that end, if necessary. In other words, a lengthy process to clarify the scope of confidentiality protections for this case has only just begun.

Without a stay of discovery in the meantime, Defendants would forge ahead by eliciting confidential information and then refusing to accept its designation as such. Plaintiffs cannot proceed with discovery and expose additional confidential information without a firm understanding that it will be protected. Just as the parties would not have been expected to proceed with discovery in the first instance without a protective order in place, they likewise cannot continue discovery while Defendants are attempting to call the core substance of the existing Protective Orders into question. Indeed, these protections are especially important here,

given the extremely sensitive nature of the subject matter in this case and the fact that in many instances the sharing of confidential information could put people's personal safety at risk.

Second, this case should be stayed for the additional reason that the Supreme Court is currently considering a case that could directly impact the applicable legal standards and scope of discovery in this matter. *See June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *mandate stayed by* 139 S. Ct. 663 (2019), *petition for cert. filed*, No. 18-1323 (Apr. 17, 2019) (the "Admitting Privileges Case"). Indeed, Defendants themselves have repeatedly invoked the Admitting Privileges Case as a purported basis for seeking expansive discovery in this case. And Defendants also have relied on the Admitting Privileges Case to seek stays of other related matters. Yet, Defendants inexplicably refuse to consider a similar approach here, even though doing so would promote judicial efficiency and preserve the resources of the parties.

Accordingly, Plaintiffs' motion to stay discovery should be granted.

I. BACKGROUND

A. Case Filing and Protective Orders

This case is a constitutional challenge to a set of restrictive abortion bills passed in 2016 and provisions of their implementing regulations issued by the Lousiana Department of Health ("LDH"). Second Am. Compl. ¶¶ 1–2, ECF No. 88. Plaintiffs are a women's reproductive health clinic that provides abortion and other services and three physicians who provide abortions in Louisiana. *Id*. ¶¶ 18–21. After years of growing hostility towards abortion providers and abortion care in Louisiana, Plaintiffs are among the small group of providers that remain in the state.

On July 1, 2016, the same day the complaint was docketed, Plaintiffs filed a motion for a protective order to permit the physician Plaintiffs to proceed in this litigation using pseudonyms. ECF No. 8. On July 12, 2016, the Court entered an order permitting physician Plaintiffs to

proceed under pseudonym, with their real names placed under seal. ECF No. 12 (the "Pseudonym Order"). This order was necessary because "abortion providers are often targets of harassment, intimidation, and violence" in the United States generally and in Louisiana in particular. ECF No. 8-2 at 2; *accord* ECF Nos. 8-4 ¶¶ 3–6, 8-5 ¶¶ 3–7, 8-6 ¶¶ 3–9.

On December 8, 2017, following the Court's ruling on Defendants' motions to dismiss, ECF No. 84, Plaintiffs filed the Second Amended Complaint. On February 22, 2018, following issuance of a scheduling order establishing discovery and pre-trial deadlines, ECF No. 94, the Court entered a stipulated Protective Order setting forth the terms for treatment of confidential information about Plaintiffs and third parties in this case, ECF No. 96 ("Protective Order").

B. Current Status of Discovery

While substantial written fact discovery has occurred over the sixteen months since the Court entered an initial scheduling order, several discovery disputes have stalled both fact depositions and expert discovery. The parties engaged in extensive motions practice to resolve these disputes. *See* ECF Nos. 108, 121, 129, 163, 164 (collectively, the "Discovery Motions"). As a result, the Magistrate Judge has extended the discovery deadlines several times. ECF Nos. 119, 148, 176. On August 30, 2018, the Magistrate Judge suspended all discovery deadlines pending resolution of outstanding motions to compel. ECF No. 184. The Magistrate Judge heard oral argument on the Discovery Motions on September 20, 2018, ECF No. 191, and ruled on all five motions by October 23, 2018, ECF Nos. 194,195, 199, 200, 205.

Defendants, however, filed motions to review the Magistrate Judge's well-reasoned orders on the Discovery Motions. *See* ECF Nos. 201, 211. These two motions remain pending. To date, Defendants have opted to take only four fact depositions despite their stated intention to take a total of twenty. *See* Ex. 1 and Ex. 2 at 5, attached hereto as exhibits to the Decl. of Emily

B. Nestler Supp. Pls.' Mot. to Stay Discovery ("Decl."). Plaintiffs have yet to take a deposition, and expert discovery has not yet begun.

C. Defendants' Attempts to Leverage Separate Litigation to Influence Discovery in this and Other Cases.

Throughout the parties' negotiations on the scope of discovery, including in relation to the Discovery Motions, Defendants have insisted that the Fifth Circuit's decision in the Admitting Privileges Case justifies the expansive discovery Defendants seek in this litigation. *See* ECF No. 201-1at 5 (citing Admitting Privileges Case as "emphasiz[ing] the 'fact-intensive' nature of the review required in abortion cases"); Decl. Ex. 1 at 3–4 (citing Admitting Privileges Case as basis to seek an expansive number of depositions). Yet, Defendants now refuse to acknowledge subsequent developments in the Admitting Privileges Case that support staying discovery here and have rejected Plaintiffs' attempts to negotiate on the issue. Decl. Ex. 5 at 1–2.

The Supreme Court has since stayed the Fifth Circuit's mandate in the Admitting Privileges Case pending disposition of Plaintiffs' April 17, 2019 petition for certiorari. *June Med. Servs. L.L.C.*, 139 S. Ct. 663; Pet. for Writ of Cert., *June Med. Servs. L.L.C.*, No. 18-1323. Separately, the Fifth Circuit has held in abeyance a challenge to Texas's ban on dilation and evacuation ("D&E") procedure—a law functionally identical to HB 1081, one of the laws challenged in this case—pending disposition of Plaintiffs' petition for certiori in the Admitting Privileges Case. *See Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017), *appeal docketed*, No. 17-51060 (5th Cir. Jan. 16, 2018), *held in abeyance by* Doc. 514871170 (5th Cir. Mar. 13, 2019).

On March 15, 2019, Defendants asked Plaintiffs to stay a separate case also pending before this Court, *June Medical Services, LLC v. Gee*, No. 3:17-cv-404-BAJ-RLB (the "2017 Case"), on the view that "whatever considerations animated" the Fifth Circuit's abeyance would

apply to that case. Decl. Ex. 5 at 2. Yet, here, where Plaintiffs are challenging a law nearly identical to the Texas law, Defendants have insisted on moving forward with discovery, without addressing the impact of the Fifth Circuit's abeyance on this litigation. *Id.* at 1–2.

D. Defendants' Attempts to Circumvent the Protective Orders.

Notwithstanding the plain terms of the Protective Orders and the parties' initial cooperation on the issues, Defendants have engaged in an escalating strategy of seeking to disclose confidential information over the last year that is clearly covered by these orders.[1]

1. Defendants Improperly Disclosed Providers' Identities.

On October 16, 2018, Defendants improperly filed confidential information on the public docket. *See* ECF Nos. 201-1 at 7, 201-4 through 201-7. After Defendants refused to remedy the filing, the Court ordered the information sealed and reprimanded Defendants for the "careless nature in which Defendants identified physicians in the exhibits to their motions." ECF No. 203 at 1 n.1. Defendants then filed a motion to vacate and unseal those documents, with a request for an expedited response. ECF Nos. 207, 209. The Court denied the request for expedited response, ECF No. 216, and Defendants' motions for additional review remain pending.

2. Defendants Attempted to Unseal Some of the Same Confidential Information in Other Ongoing Litigation.

In October 2018, Defendant Rebekah Gee, the Secretary of LDH, filed a motion in the Fifth Circuit seeking to unseal the names of six abortion providers, including the Doe Plaintiffs in this case, in the Admitting Privileges Case. *See* Appellant's Opposed Mot. to Unseal, *June*

[1] While Defendants may dispute that they have disregarded the Court's Protective Orders by paying lip service to the fact that they "accept those orders as binding," Decl. Ex. 13 at 1, these conclusory statements in no way change the nature of their actions described *supra*, which have flouted and obstructed implementation of the Protective Orders at every step. Indeed, the fact that Defendants recognize the unremarkable proposition that there are Protective Orders actually in place right now (a fact that is apparent from the docket) does not change the fact that they have repeatedly questioned whether those Protective Orders should remain in place, and have stated that they may take extraordinary steps in an effort to displace or amend the Protective Orders.

Med. Servs., LLC. v. Gee, Case No. 17-30397 (5th Cir. Oct. 22, 2018), Doc. No. 514692413. The Fifth Circuit denied that request less than four months ago. *Id.* at Doc. No. 514809974 (5th Cir. Jan. 25, 2019). And, just last month, in the 2017 Case, the Magistrate Judge rejected Defendants' attempts to limit the scope of a similar and previously agreed-upon protective order. *See* Order at 1, *June Med. Servs., LLC*, No. 3:17-cv-404-BAJ-RLB (M.D. La. Apr. 29, 2019), ECF No. 111.

3. Defendants Seek to Alter the Scope of Confidentiality Protections in this Case by Demanding Disclosure of Confidential Deposition Testimony.

After months of inaction in this case, Defendants demanded to depose the first of three physician Plaintiffs, Dr. John Doe 2, on March 19, 2019. Decl. Ex. 5. Notably, deposition discovery has only just begun in this litigation, with Defendants having taken four depositions to date.[2] Decl. Ex. 13 at 5. During the deposition of Dr. Doe 2, Defendants refused to use the Court-ordered pseudonyms for any Plaintiff, including that of Dr. Doe 2, and then proceeded to discuss and elicit large swaths of confidential information throughout the deposition.

In accordance with the Protective Order, Plaintiffs designated portions of the Dr. Doe 2 deposition transcript confidential. Ex. A to Decl. Ex. 6. On April 17, 2019, Defendants replied with a long list of baseless objections to those confidentiality designations (the "Confidentiality Objections") and also noted that their list was provided only "by way of example, without limitation" and that Defendants "do not intend to waive objections to other designations that are objectionable for similar reasons." *Id.* at 1 n.1. Defendants' Confidentiality Objections seek to make public several categories of information that fall squarely within the Protective Orders.

[2] Although Defendants insist they should be allowed twenty depositions, far in excess of the ten allotted by Federal Rule of Civil Procedure 30, Defendants have taken only four depositions during the sixteen months that discovery has been ongoing. Decl. Ex. 13 at 5. While negotiating the Joint Motion to Vacate Pre-Trial and Trial Deadlines, ECF No. 234, Defendants noticed the depositions of Dr. Doe 1, Dr. Doe 3, and Hope's administrator "purely as a protective matter, in the event the forthcoming motion to continue is not granted promptly," stating that "[i]n the event of a continuance, [Defendants] intend to cancel the depositions pending other discovery." Decl. Ex. 10.

First, Defendants seek to make public the identities of abortion providers, *including the identities of the Doe Plaintiffs as well as third-party abortion providers*. Decl. Ex. 9 at 2. For example, Defendants seek to de-designate an exchange in which Dr. Doe 2's only testimony is his full name, notwithstanding the Pseudonym Order. *Id.* Second, Defendants' Confidentiality Objections seek to disclose "personnel information"; "financial information"; clinic "policies and procedures"; "actions taken by the Louisiana Department of Health"; and other "sensitive information that could jeopardize the privacy of the staff, physicians, patients, and others associated with Plaintiffs." *Id.* at 4 (citing Protective Order ¶¶ 5–6). Defendants claim they "can discern *no* reason" for certain designations except to "arbitrarily conceal particular pieces of information from public view," Decl. Ex. 6 at 2 (emphasis in original), notwithstanding the fact that the covered information *falls squarely within the plain language of the Protective Order*. Finally, Defendants seek to disclose testimony describing documents which have been designated confidential by both parties. *Id.*

In response, Plaintiffs: (1) made explicit that Plaintiffs oppose any attempt to publish confidential information from Dr. Doe 2's deposition or similar information going forward; (2) asked Defendants to clarify the scope of their Confidentiality Objections; (3) provided a detailed explanation about why certain categories of information are properly designated as confidential; and (4) expressed willingness to meet and confer with Defendants on these issues. Decl. Ex. 9.

E. Plaintiffs Have Acted in Good Faith and Complied with the Court's Discovery Orders.

In line with the Court' directive, Plaintiffs have worked to resolve discovery disputes prior to seeking relief from the Court, *see* ECF No. 191, and to meet Defendants' discovery requests promptly. Plaintiffs have produced thousands of documents, compromised on the

number of depositions,[3] and worked in good faith to move this case along. Most recently, when Defendants issued their Fifth Set of Requests for Production less than thirty days prior to Dr. Doe 2's deposition, Plaintiffs produced documents *early* as a gesture of good faith. Decl. Ex. 4.

F. Defendants Have Obstructed Discovery through Extraordinary Actions Directed at Both Plaintiffs and Their Counsel.

By contrast, Defendants' counsel has repeatedly obstructed discovery by taking steps to interfere with the relationship between Plaintiffs and their counsel. For example, Defendants directly served a represented party with a subpoena at his home,[4] despite ongoing negotiations between Plaintiffs' and Defendants' counsel regarding the terms of that deposition, and without even promptly notifying Plaintiffs' counsel that this subpoena had been served on their client. *See* Decl. Ex. 3 at 1. Defendants' counsel has also repeatedly sought to elicit privileged information during depositions, badgering deposition witnesses over the objections and instructions of their counsel. *See, e.g.*, Decl. Ex. 9 at 5 (quoting Doe 2 Tr. at 368:1–10).

Following Dr. Doe 2's deposition, Defendants took the extraordinary and inexplicable step of threatening Plaintiffs' Counsel personally. In an April 17 letter, Defendants' counsel threatened to file baseless ethics claims against Plaintiffs' counsel *unless they agreed to turn over attorney-client communications.*[5] Decl. Ex. 7. Defendants implausibly claimed that, because Dr. Doe 2 either could not understand or did not remember certain legal issues at his deposition,

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[3] The ten depositions allotted by Rule 30 of the Federal Rules of Civil Procedure are sufficient to meet the needs of this case. But, to move the case forward, Plaintiffs offered to meet Defendants' demand for up to twenty depositions provided that such depositions were limited to 98 hours total, with a maximum of seven hours per witness, with the understanding that many of the depositions would be brief. Decl. Ex. 2 at 5. In exchange, Plaintiffs required that Defendants conduct depositions in locations that would ease the significant burdens on the witnesses.

[4] The represented party was Michael Rothrock, who was to be deposed in both his personal capacity and as a 30(b)(6) representative of Hope. Decl. Ex. 3 at 1.

[5] While Defendants' suggest that "[a]ny such documents should of course be redacted to remove sensitive attorney-client materials and attorney work product," Decl. Ex. 7 at 4, this qualifier in no way minimizes the impropriety of the request, since the very nature of the information sought goes to the heart of attorney-client privileged materials.

the only logical inference could be that Plaintiffs' counsel had committed a breach of their ethical obligations to keep their clients apprised about the case. *Id*. at 1. Defendants' counsel purported to feel "compelled to proceed with referrals to the disciplinary authorities of the relevant bars." *Id*. at 4. But, the cherry-picked exchanges Defendants cited from Dr. Doe 2's deposition, far from suggesting misconduct by Plaintiffs' Counsel, instead reflect that Defendants' counsel bullied the witness for over six hours and repeatedly asked questions about the content of Dr. Doe 2's communications with his attorneys over the objections of counsel. Lest there could be any doubt about the motives behind Defendants' baseless claims, their letter further explained that their purported "concerns" could be assuaged only if "Plaintiffs' counsel establish their compliance with the relevant rules by providing documentary evidence—such as email correspondence—demonstrating that Plaintiffs' counsel consulted with Dr. Doe 2 as the relevant rules required." *Id.* Plaintiffs' counsel responded to this letter, making clear that they have complied with all professional and ethical obligations and noting that Defendants' tactic itself violated Rule 8.4(g) of both the Louisiana and District of Columbia Rules of Professional Conduct 8.4(g). D.C. Rules of Prof'l Conduct 8.4(g) ("It is professional misconduct for a lawyer to . . . [s]eek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter."); *see also* La. Rules of Prof'l Conduct; Decl. Ex. 8 at 1. Plaintiffs asked Defendants to withdraw their baseless accusations in writing by May 6, Decl. Ex. 8 at 2, but Defendants have not responded to date.[6]

[6] This is not the first time Defendants' counsel has threatened to endanger Plaintiffs' counsel's reputation to gain leverage in this litigation. Previously, Defendants' counsel threatened to file a motion for sanctions when Plaintiffs' counsel merely asked to remove filings from the public docket that violated the Protective Order. *See* ECF No. 202-2 ("If Plaintiffs proceed with your threat and groundlessly burden Defendants and the Court, Defendants will move for sanctions, including but not limited to personal sanctions against the attorney who signs Plaintiffs' filing.").

G. The Parties Met and Conferred Regarding a Stay of Discovery, but Could Not Reach Agreement

On April 29, 2019, Defendants' counsel suggested the parties request a joint status conference before the Court due to the upcoming pretrial deadlines. Decl. Ex. 12 at 7. Plaintiffs responded on May 1, agreeing that the upcoming deadlines are unworkable because: (1) several of Defendants' discovery motions remain pending, and (2) Defendants' Confidentiality Objections make clear that the parties do not have a clear understanding of the terms of the Protective Order. *Id.* at 6. Plaintiffs explained that "[g]iven the extremely sensitive nature of the subject matter in this case, and the fact that in many instances sharing of confidential information could put people's personal safety at risk, there is no question that we need to resolve these matters before pressing ahead." *Id.* Because of the importance of resolving these threshold issues before disclosure of additional sensitive information, Plaintiffs suggested the parties file a joint motion to stay discovery and vacate the current deadlines. *Id.* Plaintiffs also requested a time to meet and confer on the issue if Defendants did not agree to this approach. *Id.*

On May 6, Defendants responded without providing a time to meet and confer or addressing Plaintiffs' proposal. *Id.* at 5–6. Instead, they suggested the parties file a joint motion to vacate the current deadlines alongside "separate statements on proposed next steps." *Id.* at 6.

On May 7, Plaintiffs responded that a status conference with the Court would be illogical given that the parties were still negotiating open issues about the scope of discovery. Plaintiffs reiterated their request to stay discovery and attached a letter to their email, detailing their concerns about the confidentiality disputes. *Id.* at 4–5 (attaching Decl. Ex. 9). This letter explained that they have proceeded with discovery up to this point based on the understanding that the Protective Orders fully resolved the scope of confidentiality in this case, but that Defendants' recent actions and in particular their Confidentiality Objections following Dr. Doe

2's deposition demonstrate that Defendants are nonetheless intent on challenging the boundaries of the Protective Orders. Decl. Ex. 9. Plaintiffs further explained that, without a firm understanding of the protections that govern discovery, they cannot continue producing confidential information through documents or depositions because, *inter alia*, it would put people's safety at risk. *Id*. Finally, Plaintiffs again stated their preference to resolve the issue without court intervention and requested that Defendants provide a time to meet and confer. *Id.*

Defendants answered on May 8, only stating that they were not opposed to seeking to vacate the pre-trial and trial deadlines. Decl. Ex. 12 at 4. On May 14, Plaintiffs proposed a joint motion to vacate the deadlines, yet again requesting a meet and confer regarding a stay of discovery. *Id*. at 3–4. Defendants finally agreed to meet and confer on the proposed stay. *Id.* at 3.

The parties met and conferred on May 16, 2019 regarding the proposed stay of discovery. *Id.* at 1–2; Decl. Ex. 11. Plaintiffs tried to discuss Defendants' Confidentiality Objections and their inappropriate treatment of confidential information. Decl. Ex. 12 at 1–2. Defendants at first suggested that Plaintiffs' designations are an abuse of the Protective Order, but then shifted to arguing that the Protective Order is itself improper, ultimately threatening to seek withdrawal of the Protective Order and to file a request for mandamus to get it withdrawn if needed. *Id.*

Plaintiffs' explained that Defendants' statements only confirmed why discovery should be stayed, as this discussion over the Confidentiality Objections laid bare the parties' fundamental confidentiality disputes. Plaintiffs noted that the same types of confidential information (*e.g.*, names of individual abortion providers) will continue to arise at every step of discovery, including in the context of the remaining sixteen depositions that Defendants intend to take, and that it would be unworkable to address these overarching issues on a piecemeal basis. *See id.* Plaintiffs also explained they cannot proceed with discovery under these circumstances,

as any determinations about what information sharing is appropriate must account for corresponding confidentiality concerns and/or protections associated with disclosure. *Id.*

Finally, during this same meet and confer, Plaintiffs also reiterated their view that this case should be stayed pending the outcome of the Admitting Privileges Case that is pending before the Supreme Court, *id.* 1; *see also supra* Part I.C. The parties agreed to meet and confer again to discuss further a potential stay on that basis. Ex. 12 at 2.

On May 20, the parties again met and conferred on these issues. During this call, it became even clearer that Defendants' core point of contention is not about whether information falls *within* the Protective Orders, but rather whether the Protective Orders should remain in place at all. While objections to deposition designations are hardly the appropriate way to address such contentions, Plaintiffs nonetheless expressed a willingness to work with Defendants to see if they could narrow some issues and asked Defendants to provide a full list of their objections in order to facilitate that effort. Defendants inexplicably refused to provide any such list and responded that they would instead object to every single one of Plaintiffs' confidentiality designations in all four of the depositions Defendants have taken thus far. Decl. Ex. 13 at 5. Defendants then demanded that Plaintiffs provide a log explaining each of their designations. *Id.* at 3. Plaintiffs explained that providing a "log" would be unnecessary, redundant, and extremely time-consuming—particularly in light of Defendants' refusal to identify the designations in dispute, and the number of depositions anticipated in this case. *Id.* A "log" would not solve the threshold issue at hand: that Defendants continue to question the very existence of the clear confidentiality protections in place under the Protective Orders. *Id.* Plaintiffs offered to sit down with Defendants' counsel, either over the phone or in person, to work together through disputed designations, but Defendants' counsel would not agree to participate in any such effort. *Id.* at 5.

Finally, Defendants confirmed that they seek to de-designate confidential information from this case in order to use that information for purposes *other* than the defense of this litigation. *Id.* (describing intent to use confidential information in order to launch separate investigation into a non-party abortion provider). As the Protective Order makes clear, such use is wholly improper. Protective Order ¶ 7. And Defendants have never articulated any reason why maintaining the confidentiality of information impedes their ability to defend this litigation.

II. LEGAL STANDARD

Plaintiffs are seeking a protective order in the form of a stay of discovery. The Court may for good cause issue a protective order "specifying terms, including time" for discovery to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). To satisfy the "good cause" requirement, the movant must show "[t]he 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, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir.1978)). The movant must also certify that they have conferred—or attempted to confer—in good faith with the other affected parties to resolve the dispute. Fed. R. Civ. P. 26(c)(1). The Court has "wide discretion in setting the parameters of a protective order." *Santos-Lemos v. Tasch, LLC*, 313 F. Supp. 3d 717, 720 (E.D. La. 2018). This includes the power to stay discovery. *See Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987); *June Med. Servs., LLC v. Gee*, 2018 WL 357874, at *2 (M.D. La. Jan. 10, 2018).

Confidentiality concerns can be sufficient to satisfy the "good cause" requirement. *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 683–85 (5th Cir. 1985) (restricting use of documents to present litigation where "interest in preserving the confidentiality of its records for some

purposes is sufficient 'good cause'"); *cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34–35 n.21 (1984) (recognizing that "privacy' is implicit in "broad purpose and language" of Rule 26(c)).

III. ARGUMENT

There is good cause to stay discovery here. First, a stay is necessary to resolve the parties' ongoing confidentiality disputes and to reach firm resolution on the scope of confidentiality protections that govern this case before moving ahead with discovery. It is clear that any resolution of the parties' confidentiality disputes—and thus the terms that govern discovery in this case going forward—cannot be resolved expediently. While the parties are in the process of negotiating those disputes in the hopes of narrowing the issues, it has become apparent that they have reached an impasse with respect to the confidentiality of at least some information (*i.e.*, the identities of individual abortion providers), and the need for motions practice seems inevitable. Defendants have indicated that they will not accept an adverse ruling on these issues and may move to withdraw the Protective Orders and mandamus the district court "if needed." Decl. Ex. 12 at 1–2. In the meantime, just as the parties would not have been expected to proceed with discovery in the first instance without a protective order in place, they likewise cannot continue with discovery when Defendants are attempting to call the core substance of the Protective Orders into question.

Second, the Court should stay this case while the Supreme Court considers the Admitting Privileges Case, the outcome of which could directly impact the applicable legal standards and scope of discovery in this matter.

A. A Stay is Necessary Because Ongoing Disputes Regarding the Scope of Confidentiality Protections Must Be Resolved to Proceed with Discovery.

While it had been Plaintiffs' operating understanding that the terms of discovery were established by the Protective Orders, it has become clear that Defendants' treatment of

confidential information remains an open issue. Defendants' Confidentiality Objections go beyond questioning how to apply the Protective Orders, but rather reflect disagreement with the very terms of the Protective Orders in and of themselves—including even whether the Doe Plaintiffs' identities should remain confidential. For example, Defendants objected to designation of the Doe Plaintiffs' names as confidential on the purported basis that "their identities are 'well known,'" and Defendants now first question whether anonymity for Dr. Doe 2 is "legally defensible" at all. Decl. Ex. 6 at 1. Defendants have never articulated a single reason why the public disclosure of this confidential information is relevant, much less necessary, for them to litigate this case. By contrast, Plaintiffs have repeatedly explained that the disclosure of confidential information—such as the identities of abortion providers—could put people's personal safety at risk, and the anonymity of individual providers is indeed a matter that has already been resolved by the Court at multiple points in this case. *See, e.g.*, ECF No. 203 at n.1 ("The Court notes with great concern and consternation the careless nature in which Defendants identified physicians in the exhibits to their motion, as filed in the open record. The Court admonishes Defendants to ensure that such carelessness not be repeated in future filings.").

The Court should stay discovery pending resolution of these confidentiality disputes, as it is unworkable to litigate the validity and scope of the Protective Orders on a piecemeal basis (*i.e.* on a deposition-by-deposition basis), and the absence of clarity on confidentiality protections renders it impossible for Plaintiffs to make decisions about what is safe to disclose in discovery at this time. The balance of equities favors a stay under these circumstances, where Plaintiffs risk irreparable harm in the form of potential disclosure of sensitive and life-threatening information, and Defendants have not articulated any reason why public disclosure of such information would advance the needs of this litigation or otherwise be appropriate.

1. It is Unworkable to Proceed with Discovery Until Confidentiality Issues are Resolved.

As a threshold matter, it is unworkable to proceed with discovery until the parties' overarching disputes about confidentiality protections are resolved. These confidentiality disputes do not concern isolated designations, but rather entire categories of information, including, *inter alia*, the protection of the identities of individual abortion providers.

Under the Protective Orders, the Parties are required to meet and confer in an attempt to resolve disputes about confidentiality designations and, if the parties cannot resolve the issue, the designating party must then seek relief from the Court within fourteen days. Protective Order ¶ 16. This process has already been extremely time-consuming for multiple reasons: Defendants insist on using Plaintiffs' true names during depositions (rather than their pseudonyms); Defendants object to confidentiality designations of deposition testimony that falls squarely within the Protective Orders; the parties have exchanged many letters articulating their disparate views about the scope of the Protective Orders in relation to the confidentiality designations; and the parties have held multiple telephonic conferences regarding this issue. *See supra* Part I.G.

As negotiations regarding Dr. Doe 2's confidentiality designations continue, it is increasingly apparent that the parties will not be able to independently resolve these disputes without Court intervention. And because these points of dispute are likely to be intertwined with matters that are fundamental to the subject matter of this case, it follows that these same issues will arise in the context of most, if not all, future depositions in this case. Under these circumstances, absent a stay of discovery, Plaintiffs will be in the position of seeking relief from the Court for each deposition or whenever information is otherwise exchanged. If Defendants intend to take sixteen more fact depositions in this case (in addition to an unknown number of expert depositions), that scenario would be extremely onerous and inefficient for both the parties

and the Court. It makes no sense to restart this process for each deposition in this case and thereby continue to engage with these issues on a piecemeal basis.

Moreover, Defendants have suggested they may move to withdraw the Protective Orders and/or seek to mandamus this Court if they get an adverse ruling on Dr. Doe 2's deposition confidentiality designations. Decl. Ex. 12 at 12. If Defendants intend to revisit the very existence of the Protective Orders, that clearly should be resolved before discovery continues.

2. Confidentiality Protections Directly Bear on the Discoverability of Confidential Information in this Litigation.

It would be unreasonable, and potentially dangerous, for discovery to proceed before these confidentiality issues are resolved. The Federal Rules permit discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). This consideration should take into account, *inter alia*, "the importance of the issues at stake in the action," "the importance of the discovery in resolving the issues," and "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* The sensitivity of information is part of the proportionality analysis. *See Coughlin v. Lee*, 946 F.2d 1152, 1160 (5th Cir. 1991) (directing district court to "weigh [documents'] relevance against the government's interest in maintaining confidentiality" to determine "what additional discovery . . . should be allowed and under what conditions"); *Tingle v. Hebert*, 2018 WL 1726667, at *8 (M.D. La. Apr. 10, 2018) ("[U]tility of permitting a forensic examination of personal cell phones must be weighed against inherent privacy concerns"); *Hume v. Consol. Grain & Barge, Inc.*, 2016 WL 7385699, at *4 (E.D. La. Dec. 21, 2016) (holding "proportionality factors" weigh against discovery of third party's "information regarding his non-party patients" and "commercially sensitive proprietary materials"); *Turner v. Hayden*, 2016

WL 6993864, at *2 (W.D. La. Nov. 29, 2016) (affirming that production would endanger confidentiality and that request is "overbroad" and "not proportional to the needs of the case").[7]

The scope of confidentiality protections directly bears on the proportionality analysis governing what information is and is not discoverable under Rule 26(b)(1). Confidentiality and privacy concerns may "tip the scales of proportionality against disclosure." *Williams v. Am. Int'l Grp., Inc.*, 2016 WL 3156066, at *2 (M.D. Ala. June 3, 2016). This is true even where systems would be set up to protect information. *Areizaga v. ADW Corp.*, 2016 WL 9526396, at *3 (N.D. Tex. Aug. 1, 2016) (finding request "too attenuated and not proportional" due to "significant privacy and confidentiality concerns" even though requesting party offered to pay all expenses and use a third-party vendor to restrict requesting party's access to information). While Plaintiffs have thus far engaged in discovery in reliance upon the Protective Orders, any narrowing of these protections would shift the proportionality analysis governing future disclosures. This is especially important here, as the Court already recognized the serious privacy concerns at stake in this litigation, and where Defendants seek to disclose personal information that could cause irreparable harm to individuals' safety and privacy. ECF Nos. 8-4 ¶¶ 3–6, 8-5 ¶¶ 3–7, 8-6 ¶¶ 3–9.

Because any assessment of the proper scope of discovery must consider the extent to which confidential information is protected, and because Defendants actively dispute those protections, there is good cause to halt disclosure of information until those issues are resolved.

3. The Balance of Equities Favors a Stay of Discovery.

At stake here is the risk of permanently disclosing sensitive information to the public (including people's identities). If discovery continues absent a clear understanding of what

[7] The benefits of discovery should also be tied to the specifics of the case. Fed. R. Civ. P. 26(b)(1) (permitting discovery that that is relevant and "proportional *to the needs of the case*" (emphasis added)). Defendants have not tied the purported benefits of disclosing confidential information to the needs of the case.

information is protected from public disclosure, Plaintiffs will be boxed into an impossible position: either release sensitive information to Defendants without an understanding of how it will be used, or else withhold information that otherwise might be considered relevant or proportional to the needs of this important case. Either way, the harm would be substantial.

The harm to Defendants would be minimal. Discovery began in January of 2018, and the process has stalled due to Defendants' own dilatory tactics. Defendants have obstructed discovery at every step of the way—*i.e.*, rushing to this Court with baseless motions and refusing to comply with the Protective Orders. Defendants have not taken steps to move forward with deposition discovery expeditiously; while Defendants insist they will take twenty fact depositions, they have only taken four such depositions throughout the sixteen months that discovery has been ongoing. Any suggestion that Defendants have an interest in proceeding with discovery immediately, or resolving this case quickly, is thus belied by their own actions.

B. The Court Should Stay Discovery While the Supreme Court Considers the Admitting Privileges Case.

Uncertainty regarding the precedential value of the Fifth Circuit's decision in the Admitting Privileges Case provides an additional and independent reason to stay discovery here. In light of the Supreme Court's decision to stay the Admitting Privileges Case, the precedential value of the Fifth Circuit's decision in that case is in doubt. Indeed, the Fifth Circuit has already stayed the pending Texas D&E case on this basis—which challenges a law nearly identical to H.B. 1081, the Louisiana D&E ban challenged here.

The Fifth Circuit's decision to stay the Texas D&E case pending the Supreme Court's resolution of the Admitting Privileges Case indicates that the Fifth Circuit itself recognizes that the Supreme Court's decision could impact other abortion cases. That concern is well-founded. The Plaintiffs in the Admitting Privileges Case—who overlap with the Plaintiffs in this case—

explain in their certiorari petition that the Fifth Circuit's decision in the Admitting Privileges case disregarded the most recent binding Supreme Court precedent, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), in a variety of ways. Pet. for Writ of Cert. at 21–32, *June Med. Servs. v. Gee*, No. 18-1323 (U.S. Apr. 19, 2019). Particularly relevant here, Plaintiffs' certiorari petition demonstrates that the Fifth Circuit's decision in the Admitting Privileges Case misinterpreted the governing legal standard in cases such as this one, and imposed a higher evidentiary burden than the Supreme Court applied in the less than three-year-old precedent of *Whole Woman's Health*. *See id.*[8]

IV. CONCLUSION

For these reasons, Plaintiffs' motion for a stay of discovery should be granted. Plaintiffs respectfully request the opportunity to present oral argument in support of this motion.

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Respectfully submitted,

/s/ Charles M. Samuel

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[8] Given these unusual circumstances, this situation is very different from the period during which lower courts continued to litigate abortion cases under the Supreme Court's longstanding precedent *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992) while *Whole Woman's Health* was pending in the Supreme Court.

CERTIFICATE OF SERVICE

I certify that on this 24th day of May, 2019, I electronically filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Emily Nestler

Emily Nestler