

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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**ALLENTOWN WOMEN’S CENTER, INC.,** :

Plaintiff, :

v. :

**JOHN DUNKLE** :

and :

**ANTHONY J. SULPIZIO** :

and :

**MARK MICHAEL BOGUNOVICH** :

and :

**JOHN DOE Nos. 1-5,** :

Defendants. :

Civil Action No.: \_\_\_\_\_

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**ALLENTOWN WOMEN’S CENTER, INC.’S MEMORANDUM OF LAW  
IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER  
TO PERMIT WITNESSES TO USE PSEUDONYMS**

Plaintiff Allentown Women’s Center, Inc. (“AWC”), by and through its undersigned counsel, respectfully submits this Memorandum of Law in support of its Motion for Protective Order to Permit Witnesses to Use Pseudonyms.

**I. INTRODUCTION**

AWC seeks an Order from this Court requiring all pleadings, documents, and other filings in this case to use the pseudonyms ascribed to AWC owner, Dr. Roe; AWC employees, Nurse Executive Doe and Employee No. 1; and AWC volunteer escort witnesses, Escort Stiles and Escort Smith (collectively, “witnesses”) in AWC’s Complaint. AWC makes this request to protect the witnesses from publicly revealing their identities so that they may avoid harassment and retaliation from Defendants John Dunkle (“Dunkle”), Anthony Sulpizio (“Sulpizio”) and

Mark Bogunovich (“Bogunovich”) (collectively “Defendants”), those associated with Defendants, and the public. Accordingly, good cause exists for continuing to protect the witnesses’ privacy and this Motion should be granted.

It is well within the Court’s power and discretion to permit witnesses to use pseudonyms where the circumstances justify protection of their anonymity. Here, the witnesses reasonably fear harassment, violence, and retaliation due to the contentious and politically-charged nature of this case and have undertaken efforts to maintain their anonymity. A balancing of the interests further supports AWC’s Motion because requiring the witnesses to disclose their true identities could have the potential consequence of discouraging future witnesses from testifying in suits under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (“FACE”) and the witnesses’ and society’s significant interests in allowing confidentiality substantially outweigh any interests in disclosure. As such, this Court should permit the witnesses to use pseudonyms.

## **II. ARGUMENT**

In managing trials, district courts have the inherent authority and discretion to impress on “witnesses who appear . . . that they cannot be harassed, intimidated, punished, or otherwise suffer harm because they avail themselves of the judicial system.” *EEOC v. Locals 14 & 15, Int’l Union of Operating Engineers*, 438 F. Supp. 876, 879 (S.D.N.Y. 1977). Such discretion is further enabled by the Federal Rules of Civil Procedure, which permit courts to take all reasonable steps necessary to protect witnesses throughout litigation. *See generally*, FED. R. CIV. P. 26(c)(1). Specifically, courts have authority to issue a protective order “to protect a party or *person* from annoyance, embarrassment, oppression, or undue burden.” *See id.* (emphasis added).

Courts have routinely used their discretion to protect the identities of vulnerable witnesses by permitting the witnesses to proceed by pseudonym. *See e.g., James v. Jacobson*, 6

F.3d 233, 238 (4th Cir.1993)(“Privacy or confidentiality concerns are sometimes sufficiently critical that . . . witnesses should be allowed” to proceed under fictitious names). Witnesses who testify as to their experiences in obtaining, providing, or enabling abortion services fall clearly within this category of witnesses who are permitted to testify anonymously. *See e.g., Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1334 (M.D. Ala. 2014) (“[T]he doctors were referred to by pseudonym throughout the case”); *Nat'l Org. For Women, Inc. v. Scheidler*, No. 86-7888, 1999 WL 571010, at \*5 (N.D. Ill. July 28, 1999)(anonymous testimony against anti-abortion protestors); *see also Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 360, 99 Cal. Rptr. 2d 627, 638 (2000), *as modified* (Sept. 14, 2000), *as modified* (Sept. 26, 2000)(allowing Planned Parenthood volunteers to testify under fictitious names). Indeed, the heavy weight of case law permits abortion doctors, clinic staff, or volunteers to testify under pseudonym. *See e.g., Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011) (noting necessity of anonymity in matters involving “abortion, birth control, transsexuality . . . and homosexuality”); *Doe v. Poelker*, 515 F.2d 541, 542 n.1 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977) (permitting pseudonym due to the “controversial nature” of the action, which involved abortion).

Courts should issue a protective order where the proponent of the order demonstrates good cause. FED. R. CIV. P. 26(c).<sup>1</sup> There is good cause where a protective order is necessary to “prevent the infliction of unnecessary or serious pain on parties who the court reasonably finds are entitled to such protection.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994).

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<sup>1</sup> Rule 26(c) further requires, “a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” Because this Motion was filed contemporaneously with the Complaint, it was not possible to confer with counsel for Defendants.

Courts consider the following factors in ascertaining whether there is good cause justifying a witness to testify under pseudonym:

- (1) the extent to which the identity of the litigant has been kept confidential;
- (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases;
- (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity;
- (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities;
- (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and
- (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives.

*Doe v. Megless*, 654 F.3d at 408 (apply factors to parties).

Considering all relevant factors, this Court should use its authority to issue a protective order permitting the AWC witnesses to proceed in pseudonym. First, in contemplation of the risk of using their names, the witnesses here have undertaken conscience efforts to maintain the secrecy of their identities and other personal information. A party has made "significant efforts to maintain the confidentiality of" their identities where the plaintiffs' names were not "disclosed in any of the pleadings, motions, and/or exhibits" in the action. *See Doe v. Oshrin*, 299 F.R.D. 100, 103 (D.N.J. 2014)(allowing plaintiff to proceed under pseudonym). By filing this Motion in conjunction with the Complaint, the witnesses have taken affirmative steps to maintain their confidentiality. Since the witnesses have exercised care to protect their anonymity, the court should maintain that protection.

Second, the AWC witnesses have a reasonable basis to fear the repercussions that would stem from the public disclosure of their testimony. Abortion remains a fiercely contentious issue in this country and there are no shortage of disturbing stories of abortion providers who have been targeted by anti-abortion groups, intensifying the necessity of securing the witnesses' identities. *See generally, Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism* (2015, Oxford University Press). In permitting Planned Parenthood volunteers to testify by pseudonymously, one state court prudently observed,

The privacy interests at issue in the present case are particularly strong because the consequences of disclosure of the private information are profound. Human experience compels us to conclude that disclosure carries with it serious risks which include, but are not limited to: the nationwide dissemination of the individual's private information, the offensive and obtrusive invasion of the individual's neighborhood for the purpose of coercing the individual to stop constitutionally-protected associational activities and the infliction of threats, force and violence.

*Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 360, 99 Cal. Rptr. 2d 627, 638 (2000), *as modified* (Sept. 14, 2000), *as modified* (Sept. 26, 2000). Those who seek and provide abortions may “live and work in a climate of extreme hostility to the practice of abortion,” such that there is a legitimate fear of “violence, harassment, and hostility” following an open trial. *See e.g., Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1334 (M.D. Ala.) (allowing abortion doctors to proceed by pseudonym and referring to all doctors, regardless of biological sex, with female pronouns to promote anonymity).

Here, the witnesses have a substantial and reasonable fear that public disclosure of their identities would result in harassment and retaliation by the very Defendants alleged to have threatened them in the underlying litigation. *See Decl. of Dr. Roe*, at ¶ 1 (attached hereto as “Exhibit A”); *Decl. of Nurse Executive Doe*, at ¶ 1 (attached hereto as “Exhibit B”); *Decl. of*

*Employee No. 1*, at ¶ 1 (attached hereto as “Exhibit C”); *Decl. of Escort Smith*, at ¶ 1 (attached hereto as “Exhibit D”); *Decl. of Escort Stiles*, at ¶ 1 (attached hereto as “Exhibit E”).

Third, the public interest provides additional support to the requisite showing of good cause. Requiring witnesses who wish to testify in FACE actions to do so publicly would substantially deter clinic volunteers, doctors, and patients from coming forth in aiding these actions. Allowing pseudonyms to be used here will encourage, rather than deter, others to raise and vindicate their rights through the courts. Thus, the magnitude of the public interest in maintaining confidentiality supports AWC’s Motion.

Lastly, this action was brought by AWC to vindicate not only its own rights, but the rights of others, including staff, patients, and volunteers. To the extent there is an overlap between the witnesses and the group of individuals this action seeks to protect, there would be a substantial irony and paradox that would follow if, in vindicating their rights to be free from harassment, force, and threats of force, the witnesses were then subjected to increased harassment, force, and threats of force.

On the other side of the balance, there is no possibility that Defendants will be prejudiced if this Court permitted the witnesses to testify under pseudonyms. Such a procedure has routinely been permitted in circumstances such as these, and Defendants are still able to engage in discovery as to the substance of the witnesses’ testimony. The matter can proceed expeditiously and fairly without using the witnesses’ real names.

Granting AWC’s Motion permit witnesses to proceed pseudonymously is consistent with case law, the purposes underlying FACE, as well as the interests of justice. The issuance of the protective order will enable the witnesses to participate in the litigation without the real and reasonable threat of retaliation by extremist anti-abortion activists. While the protective order

will provide the witnesses with safety, security, and necessary privacy, it will not prejudice Defendants in the litigation of this action. As such, this Court should grant Plaintiff's Motion.

### III. CONCLUSION

For the reasons stated above, it is respectfully submitted that AWC's Motion for Protective Order to Permit Witnesses to Use Pseudonyms be granted.

Respectfully submitted,

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