BEFORE THE ADVISORY COMMITTEE ON CIVIL RULES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JUDICIAL CONFERENCE OF THE UNITED STATES

PETITION FOR RULEMAKING

REGARDING CIVIL RULE 26(c), RULE 83; AND COURT SPONSORSHIP OF MODEL PROTECTIVE ORDERS IN THE UNITED STATES DISTRICT COURTS

Attention: Secretary of the Committee on Rules of Practice and Procedure,
Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts,
Thurgood Marshall Federal Judiciary Building,
One Columbus Circle, NE, Room 7-300, Washington, DC 20002.
RulesCommittee_Secretary@ao.uscourts.gov

Subject: Request for the Advisory Committee to study the growing use of standard protective order templates by United States District Courts and to consider amendments to Federal Rule of Civil Procedure 26(c), Rule 83, or a new Rule addressing the constitutional and procedural deficiencies identified herein, including the circumvention of Rule 26(c)'s good cause requirement, the inversion of federally assigned burdens, the imposition of prior restraints on speech without adequate procedural safeguards, and the evasion of congressionally mandated rulemaking processes.

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Submitted pursuant to 28 U.S.C. § 2073(a)(1), which provides that the Judicial Conference "shall prescribe and publish the procedures for the consideration of proposed rules" and (c)(1) where Rule Committee meetings "shall be open to the public" and in response to "How to Suggest a Change to Federal Court Rules and Forms," posted on the United States Courts website. [1]

[1] United States Courts, How to Suggest a Change to Federal Court Rules and Forms, "*The Judiciary invites the public to participate in refining the Rules of Practice and Procedure, Rules of Evidence, and court forms. Submitting a suggestion to one of the advisory committees triggers this cooperative process. Suggestions come*

SUMMARY OF THE PETITION

This petition requests that the Advisory Committee on Civil Rules study an emerging structural problem in the administration of discovery in federal civil litigation: the growing use of model protective order templates by United States District Courts in a manner that circumvents the requirements of Federal Rule of Civil Procedure 26(c), evades the rulemaking process mandated by Congress under 28 U.S.C. §§ 2071–2077 and Rule 83, inverts federally assigned burdens of proof, compels parties to make hollow recitals of agreement regardless of mutual assent, and creates mechanisms that can be exploited to impose unconstitutional prior restraints on speech about matters of public record and concern.

Rule 26(c) serves a legitimate and important function but the Protective Order template system, as administered in a growing number of district courts, has diverged from the rule it purports to implement in ways that are constitutionally significant, procedurally irregular, and practically harmful—particularly to individual litigants in public interest cases, civil rights cases, and cases involving allegations of criminal or discriminatory conduct by powerful institutional defendants. This petition identifies several specific deficiencies in the emerging model template system, documents constitutional and procedural concerns, and proposes amendments and guidance for the Committee's consideration.

I. THE CURRENT PRACTICE: HOW PROTECTIVE ORDER TEMPLATES OPERATE

A growing number of United States District Courts have adopted standard protective order templates that are posted on the court's website and referenced in standing orders or local rules. The practice is particularly prevalent in high-volume districts with large commercial, technology, and entertainment dockets, including the Northern District of California and the Central District of California. The Northern District of California appears to be leading this effort nationally.

The framework operates where a standing order provides that parties in civil cases shall use the court's standard protective order template and parties who wish to use a different form, or who oppose entry of a protective order altogether, must file a motion explaining why the court's

from many sources, including judges, practicing attorneys, government agencies, academia, and bar associations." https://www.uscourts.gov/forms-rules/about-rulemaking-process/how-suggest-a-change-federal-court-rules-and-forms (last accessed Feb. 23 2026).

template is inadequate. (for example, Exhibit C). The template itself is presented on the court's website as a stipulated order: it recites that "*the parties agree*" to the existence of confidential information warranting protection, establishes a framework for designating discovery material at various confidentiality tiers, creates a challenge procedure for disputed designations, and provides that designations are binding pending resolution of any challenge. (Exhibit B).

The templates may be derived from or modeled on the Federal Judicial Center's model protective order, adapted by local committees or individual judges but they are not adopted through the notice-and-comment rulemaking process required for local rules under Rule 83(a) and 28 U.S.C. § 2071(b). They also are not formally reviewed by circuit judicial councils for consistency with the Federal Rules. They are, in form, suggested form templates. In practice, they may function as mandatory default rules governing the speech rights, discovery obligations, and sanctions exposure of litigants.

II. IDENTIFIED DEFICIENCIES

A. Inversion of the Rule 26(c) Burden

Rule 26(c)(1) provides that a protective order may be issued "for good cause shown" by the party seeking protection. The burden is on the movant. This allocation is deliberate and well-established: the default in federal litigation is openness, and departures from that default require affirmative justification. *See, e.g., Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) ("[G]ood cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure.").

The template system inverts this burden. The standing order defaults to the protective order's entry. The party who *opposes* protection (who seeks the default position of openness that Rule 26(c) presumes), faced with a motion from the opposing party seeking to compel the order, must file letters or motions and may be forced to make an affirmative showing for departure. (See for example, Exhibit D). The party seeking protection need not demonstrate anything; they simply accept the court's default and ask to have to ordered, regardless of the opposing party's position.

This is a substantive amendment to Rule 26(c)'s burden allocation, accomplished not through the Rules Enabling Act process but through a template form, standing orders, and

"procedural" and "administrative" discovery management. The Advisory Committee did not approve this reallocation. Congress did not review it. The public did not comment on it. It is, in effect, a *sub rosa* amendment to a Federal Rule of Civil Procedure.

B. Circumvention of the Good Cause Requirement

A court must independently determine whether 'good cause' exists under Rule 26(c). *Beckman Indus., Inc. v. Int'l Ins. Co.,* 966 F.2d 470, 475–76 (9th Cir. 1992). However, the Northern District's model template's recital that "the parties agree" to the existence of confidential information serves a specific legal function in that it substitutes for the independent judicial finding of good cause that Rule 26(c) requires. Some Northern District Standing Orders place a burden and restrictions on anyone seeking to modify the model order, including this recital. (See Exhibit C, for example).

With this mandatory recital compelling an assertion that the parties have "agreed" to the need for the Protective Order, then the court apparently need not make its own determination that protection is warranted. As such, the stipulation becomes the good cause showing. However, that is not what the Federal Rules require. "A party seeking a protective order must show good cause by demonstrating harm with specificity... Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1182 (9th Cir. 2006).

In cases where one party opposes the order's entry and is pressured by the court or the standing order's default structure into signing nonetheless (see Exhibit D-E), the "agreement" is fictional, the recital is compelled speech, and state contract law may even nullify the legal effect of the compulsory recital, and thus voiding the legal basis for the order. In that circumstance, the recital states a "fact" that even the docket history directly contradicts. The good cause finding that Rule 26(c) requires cannot be made by the court through this process as it is manufactured by a template that assumes its own predicate, and may be entered through administrative coercion.

The Committee should consider whether Rule 26(c) should be amended to clarify that a protective order requires an independent judicial finding of good cause that cannot be satisfied solely by a template's recital of party agreement, particularly where one or more parties have filed objections to the order's entry.

C. Evasion of the Rulemaking Process

Under 28 U.S.C. § 2071(b), local rules must be adopted after "appropriate public notice and an opportunity to comment." Rule 83(a) imposes the same requirement and adds that local rules must be "consistent with" the Federal Rules and Acts of Congress. Section 2071(c) provides that local rules must be furnished to the circuit judicial council, which may modify or abrogate rules found inconsistent with federal law.

These requirements exist for a reason. The rulemaking process is the mechanism Congress established to ensure that procedural rules (which directly affect litigants' rights) are vetted for constitutional compliance, checked for consistency with the Federal Rules, and subject to input from the affected public before they take effect.

These model Protective Order templates achieve the functional effect of local rules—they govern practice in every civil case, impose obligations on every litigant, restrict constitutional rights, and reallocate federally assigned burdens but without any of the procedural safeguards that local rules require. They are not adopted through notice and comment. They are not reviewed by circuit judicial councils. They are not tested for consistency with Rule 26(c). They are drafted, posted, and imposed through standing orders, bypassing every checkpoint that Congress created to prevent exactly the problems this petition identifies.

If the content of a protective order template is significant enough to be binding on litigants and enforceable through contempt, then it is significant enough to go through the process Congress required for rules that bind litigants. The current practice represents a structural evasion of the rulemaking framework. ("It is currently unclear what, if anything, gives courts the authority to sanction parties for violating protective orders."[2])

D. The Sanctions Gap

Courts sometimes assume that Rule 37(b) provides authority to sanction parties for violating Rule 26(c) protective orders. the Advisory Committee Notes indicate that assumption is almost certainly incorrect for the vast majority of protective orders. Rule 37(b)(2)(A) authorizes

[2] Josephs, Adam M. "The Availability of Discovery Sanctions for Violations of Protective Orders," *University of Chicago Law Review*: Vol. 80: Iss. 3, Article 8. (2013)
https://chicagounbound.uchicago.edu/uclrev/vol80/iss3/8

sanctions when a party "fails to obey an order *to provide or permit discovery*." The use of the infinitive construction is significant. The Rule does not say "an order providing or permitting discovery"(which would describe the order's effect) but rather it says "an order *to* provide or permit discovery"—which describes what the order directs a party to do.

To trigger Rule 37(b), the order must command a party to produce or allow discovery. *See* Josephs, "The Availability of Discovery Sanctions for Violations of Protective Orders," 80 U. Chi. L. Rev. 1355, 1371–72 (2013) (analyzing the infinitive construction and its implications for the scope of Rule 37(b)). Traditional protective orders do the opposite. They do not direct a party to produce discovery but rather they restrict the receiving party's use of material that has already been or will be produced. These are orders *about* discovery.

Some courts have attempted to bridge this gap by arguing that protective orders "enable" or "allow" discovery to proceed. *See, e.g., Smith & Fuller, PA v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 489 (5th Cir. 2012). But this reasoning proves too much. Any order issued during litigation (a scheduling order, a venue ruling, a motion to dismiss decision) could be characterized as "enabling" discovery in some abstract sense. Without a limiting principle, this reading would extend Rule 37(b) to virtually any court order, which cannot be what the Rule contemplates.

Rule 26(c) authorizes two distinct types of orders: protective orders and discovery orders (directing a party "to provide or permit discovery"). The Rule 26 Advisory Committee Notes to the 1970 Amendment resolve the ambiguity, stating that the subdivision "contains new matter relating to sanctions" and that "[w]hen a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery." In *Lipscher v. LRP Publications, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001), the Eleventh Circuit held that "a Rule 26(c) protective order is not 'an order to provide or permit discovery,' and therefore, such orders do not fall within the scope of Rule 37(b)(2)."

Another enforcement mechanism is the court's inherent sanctioning authority, but under *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46–47 (1991), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980), inherent authority sanctions (particularly the more severe sanctions like fee-shifting and contempt) are generally limited to cases of bad faith or willful disobedience. It's unclear what kind of violation of these model Protective Orders could justify sanctions through this

authority but not have independent basis for sanctions under a more founded legal authority (such as related to mishandling Trade Secrets, etc.).

The Committee should consider whether the enforcement framework for protective orders should be clarified through an amendment to Rule 37(b), as Josephs proposes, and if so, whether any such amendment should be accompanied by the safeguards identified in the original Petition—self-executing scope exclusions, prohibition on designating public information, and a requirement of judicial review before designations may restrict speech about matters of public record. Ideally, the enforcement authority and the substantive safeguards should be addressed together.

E. The Prior Restraint Problem: Designation Without Judicial Review

The most constitutionally consequential feature of the standard template is the interaction between two provisions that appear in the Northern District's version: a scope exclusion for publicly available or already-known information, and a challenge procedure providing that designations are treated as binding pending resolution of any dispute.

When these provisions are read together, they create the following ambiguity: a party may designate any discovery material as "confidential," and the designation is immediately binding on the receiving party. But does this apply regardless of whether the material falls within the order's scope? If the receiving party believes the designation is improper (including because the material is publicly available and thus excluded from the order's coverage) then must the receiving party still initiate a formal challenge process, during which the designation remains in effect?

In practice, that would mean that a private party can impose an immediately effective speech restriction on an opposing party with respect to any information, including information that is already public, with no judicial review at the point the restriction takes effect. The restriction is then enforced by the court's contempt power. Its duration is controlled by the pace of the challenge process, which the designating party can extend through slow-walking meet-and-confer and the restricted party faces the risk of sanctions for any speech during the interim period.

If any court applied the order that way, even if voluntary and consensual entered, this creates an unlawful prior restraint on speech. It is imposed without prior judicial review, it may be used to restrict speech about matters of public record, and it is enforced by the administrative

machinery of the federal courts rather than substantive judicial review. Under *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), protective orders restricting discovery material are only constitutionally permissible when they do not prevent parties from speaking about information they independently know or that is publicly available. *Id.* at 37. A template mechanism that permits the designation of public information as confidential, with binding interim effect, crosses the constitutional line that *Seattle Times* drew, even before considering the coercive compelled entry.

Protective Orders cannot not be used to preclude public access to evidence of misconduct, nor may they operate to adjudicate contested legal issues under the guise of discovery. See, *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131–32 (9th Cir. 2003). This problem is further compounded if the designating party asserts that the receiving party's complaints about the designation itself are also confidential and subject to the order, creating a recursive silencing structure in which the restricted party cannot speak about the subject matter and cannot disclose that they have been prevented from speaking. This structure is functionally identical to a secret prior restraint—the most constitutionally disfavored form of speech restriction in American law.

F. Compelled Speech

As discussed above, the template's recital that "the parties agree" to the existence of confidential information compels parties to affirm a proposition they may dispute. This is constitutionally significant under *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), which establish that the government may not compel individuals to affirm beliefs or make statements they disagree with.

The compelled speech through coerced recital performs an unauthorized legal function in that it establishes the evidentiary basis for the order's entry, substituting for the good cause finding that Rule 26(c) independently requires. The compelled speech thus creates the judicial justification for the order that compelled the speech—a self-referential structure that undermines the integrity of the Rule 26(c) process. Compelled Speech is the enemy of the "fixed start in our constitutional constellation" that "no official high or petty, can prescribe… matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

In this circumstance, a party is left with few options if a court pressures it to sign this model order. In order to escalate the matter from a Magistrate Judge they may first have to choose to defy

that Magistrate Judge's Order compelling them to sign the Model Protective Order, which could leave them facing threats of sanctions or contempt. The courts must allow a meaningful opportunity to oppose these orders. *United States v. Heller,* 551 F.3d 1108, 1112 (9th Cir. 2009) holds that district courts must allow parties to make meaningful objections when court procedures affect constitutional or statutory rights.

If the Courts require "stipulation" to a model Protective Order despite a public interest Plaintiff's objection and make the stipulation a requirement for the litigation to proceed, the courts also create a Unconstitutional Condition, denying benefits and rights on a basis that infringes on constitutionally protected interests. This is also directly contrary to the rule where courts will ordinarily subject government actions that compel speech to heightened (not reduced) constitutional scrutiny.

G. IMPACT ON PUBLIC INTEREST LITIGATION AND NON-WAIVABLE RIGHTS

The Model Protective Order system's deficiencies are not equally distributed across case types. They fall most heavily on individual plaintiffs in public interest litigation, civil rights cases, employment discrimination cases, and cases alleging criminal conduct by institutional defendants. In these cases, the plaintiff often has a strong interest in public discussion of the case—both as a matter of First Amendment right and as a practical element of accountability for alleged misconduct.

The defendant, conversely, has a strong interest in suppressing such discussion, especially if evidence of their misconduct may be of strong public interest. The model template system's default (protective order in place, designations binding, burden on the party seeking openness) systematically advantages the party seeking secrecy over the party seeking transparency. This is particularly concerning in districts where the template system appears to have developed in response to aggressive protective order practice by powerful institutional defendants (i.e. Silicon Valley, Hollywood, etc.). In such districts, the template may function less as a neutral case management tool and more as an institutionalized accommodation of the preferences of repeat-player defendants who benefit from default secrecy especially in public policy cases.

The court's administrative convenience interest in reducing protective order litigation is legitimate ("judicial economy"), but it cannot be served by a mechanism that preemptively grants one category of litigant its preferred outcome at the expense of the other's constitutional rights. Even a facially neutral local rule cannot be used to abridge the rights guaranteed by the Federal Rules or Constitution. *Frazier v. Heebe,* 482 U.S. 641, 645 (1987). "'The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705 (1977) citing *Board of Education v. Barnette.*

Additionally, in cases involving state law claims (particularly in states with robust self-executing constitutional protections such as California) the template may purport to waive rights that state law designates as non-waivable. California's Constitution provides independent protections for rights related to privacy (Article I, Section 1), free speech (Article I, Section 2), and crime victims' rights under Marsy's Law (Article I, Section 28(b)). A federal court sitting in California cannot enforce a stipulation that waives these rights if California law does not permit such waiver, especially through coerced "stipulation" to model templates and forms.

The template, if treated as a stipulated agreement, could be unenforceable under state contract law due to duress, unconscionability, and the purported waiver of non-waivable rights. Court policies and productivity documents certainly cannot operate to silence constitutional claims or restrict judicial access when protected disclosures are at issue. *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 887–88 (2009). In which case, the burden to prove the need for the agreement and order is nullified and not present, invalidating the overall order.

III. THE TEMPLATE'S AMBIGUOUS LEGAL IDENTITY

A threshold difficulty in addressing the template system is that the template's legal character is undefined, and it is treated as different things at different moments depending on what is convenient. ("*Nowhere does [Rule 37(b)] mention protective orders or Rule 26(c)…A protective order rarely relates directly to a single claim or defense. Protective orders more often deal with such amorphous concerns as 'embarrassment [or] oppression,' . . . or broader considerations of public policy.*" See*, Coleman v American Red Cross,* 23 F.3d 1091, 1098-1099 (6th Cir. 1994), Ryan dissenting).

When the court wishes to enter the order without an independent good cause finding, the template may be treated as a *stipulation*—a voluntary agreement between the parties that the court

merely approves. When a party challenges the order's terms, it may be treated as a *court order*—enforceable through contempt, not subject to unilateral modification, requiring formal motion practice to challenge. When asked why it did not go through the Rule 83 rulemaking process, it may be characterized as *just a template*—a convenience, not a rule. When its terms are challenged as unconstitutional, it may be defended as a *case management decision* entitled to deferential review.

Each of these characterizations carries different legal requirements for validity:

- A ***stipulation*** requires genuine mutual assent and is subject to contract law principles.
- A ***court order*** requires an independent legal basis and must comply with the Constitution and Federal Rules.
- A ***local rule*** must go through the Rule 83 process.
- A ***case management decision*** must be a reasonable exercise of discretion.

The template, as currently administered, satisfies the requirements of none of these categories while claiming the benefits of all of them.

The structure of legal authority in which federal court orders operate is well-established. The Constitution is supreme. Federal statutes enacted pursuant to constitutional authority, including the Rules Enabling Act (28 U.S.C. § 2072), follow. The Federal Rules of Civil Procedure, promulgated through the Rules Enabling Act process, come next. Local rules adopted under Rule 83(a) and 28 U.S.C. § 2071 must be consistent with the Federal Rules and Acts of Congress. Standing orders and individual judge practices occupy the lowest tier, subject to all of the above. *See* Fed. R. Civ. P. 83(b).

A model protective order template sits below all of these authorities. It is not a statute. It is not a federal rule. It is not a local rule adopted through the Rule 83 process. It is not even a formally promulgated standing order in most respects. It is a form document, drafted through no formal process, posted on a website, and signed in individual cases at the court's direction.

As demonstrated throughout this Petition and supplement, the template system as currently administered operates in conflict with higher authority at every level of the hierarchy.

- It overrides **Rule 26(c)** by inverting the good cause burden. Rule 26(c) requires the party seeking protection to demonstrate good cause. The template system requires the party opposing protection to make a showing for departure.

- It overrides the **Rules Enabling Act** by abridging substantive rights through a procedural mechanism. The Rules Enabling Act provides that procedural rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Speech rights are substantive rights. The template, if interpreted to permit unilateral prior restraints on speech about public information, abridges substantive rights in a manner that even the Federal Rules themselves could not authorize.
- It overrides the **First Amendment** by restricting speech without the procedural safeguards that prior restraints require—no prior judicial review, no narrow tailoring, no finding of necessity, and a recursive silencing mechanism that prevents the restricted party from identifying the restriction.
- It overrides **state constitutional rights** by purporting to waive, through a coerced "stipulation," rights that state law designates as non-waivable.
- It overrides **Rule 37(b)** by assuming an enforcement mechanism that the Rule's text and Advisory Committee Notes do not support for traditional protective orders.

The Committee should consider whether the Federal Rules should explicitly address the legal status of protective order templates—defining what they are, what authority they carry, what process is required for their adoption, and what limitations apply to their use.

IV. SCOPE OF THE PROBLEM & APPARENT ABSENCE OF APPELLATE REVIEW

The apparent deficiencies identified in this petition, if confirmed by the Committee, would be systemic rather than case- or court- specific. They would arise from the structure of any model protective order template system itself, not from any individual judge's application of it. Every case in a district that uses a template system may be subject to the same burden inversion, the same compelled speech recital, the same prior restraint mechanism, and the same rulemaking evasion.

Meaningful appellate review of these issues is structurally unlikely for several reasons including that protective order disputes are interlocutory and generally not immediately appealable; litigants who object to the template are focused on their underlying case and lack the resources or inclination to pursue collateral appellate litigation over discovery procedures; the practical coercion of the system (sign the template or face judicial displeasure in the case you care about) discourages the preservation of objections that would be necessary for appellate review; and the parties most harmed by the system (individual plaintiffs with fewer resources) are the least able to bear the cost of challenging it.

To make matters worse, the practical enforcement of protective orders in districts often occurs not through formal motion practice with full briefing and hearing, but through informal mechanisms: joint letter briefs, short individual letters, telephonic discovery conferences, and brief minute orders. These streamlined procedures are designed for routine discovery disputes (disagreements over the scope of interrogatories, privilege assertions, scheduling modifications) but they are not designed for (and are constitutionally inadequate to address) disputes that implicate fundamental speech rights.

Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the adequacy of procedural safeguards is evaluated by weighing the private interest affected, the risk of erroneous deprivation through the procedures used, and the government's interest in the streamlined procedure. Applied here: the private interest is speech, a fundamental constitutional right; the risk of erroneous deprivation through letter-brief adjudication is high, because the legal issues are complex, fact-intensive, and constitutional in dimension; and the government's interest in administrative efficiency does not justify streamlined procedures when the thing being adjudicated is whether a party may speak publicly about pre-existing public information.

However, once a model Protective Order is compelled and entered, the party the order has then already fallen into the de facto procedural space where a court now uses administrative procedures to manage active disputes about constitutional rights. Thus, this matter is precisely the type of problem and circumstance in which rulemaking, rather than case-by-case adjudication, is the appropriate corrective. The Advisory Committee exists to identify systemic procedural problems that are unlikely to be resolved through the normal appellate process and to address them through amendments to the Federal Rules. The protective order template problem is such an issue.

V. JUDICIAL ECONOMY HAS ITS LIMITS

The implicit justification for the template system is administrative convenience—it reduces the court's workload in managing protective order disputes. This is a legitimate interest in designing procedures, but it has never been held sufficient to override constitutional rights, and it certainly cannot justify bypassing the rulemaking process that Congress established to prevent exactly the problems identified here. *See Dietz v. Bouldin*, 579 U.S. 40, 45 (2016) (inherent authority "must be a reasonable response to the problems and needs confronting the court's fair

administration of justice"); *Chambers*, 501 U.S. at 47 (inherent powers "must be exercised with restraint and discretion").

Moreover, the administrative convenience interest is not neutral in its application. In districts where the template system developed in response to aggressive protective order practice by powerful institutional defendants (San Jose, San Francisco, Los Angeles, etc.), the "convenience" being served may simply the convenience of not having to adjudicate repeated defense requests for secrecy. The court's solution (granting secrecy by default) eliminates the dispute by preemptively adopting one side's preferred outcome. That is not neutral case management. It is the institutionalization of one category of litigant's preferences, accomplished through a mechanism that bypasses every safeguard designed to prevent exactly that result.

A compelling government interest in efficient case management cannot be served by a mechanism whose practical effect is to facilitate the suppression of speech by less-resourced litigants at the behest of more-resourced litigants. The model template becomes a government "remedial" action for the benefit of corporations and wealthy individuals to eliminate avenues for constitutional objections and public interest legal arguments.

Regardless, if the administrative burden of adjudicating protective order requests case by case is genuinely unmanageable, and the template's beneficial outcome for corporations is simply coincidental, then the proper response is still rulemaking through the processes Congress established – not the adoption of a form document that circumvents those processes while restricting constitutional rights.

VI. PROPOSED RECOMMENDATIONS

Petitioner respectfully submits the following proposals for the Committee's consideration. These are offered as starting points for study, not as final drafted rule text. Petitioner recognizes that the Committee's deliberative process is the appropriate venue for refining these concepts.

A. Clarify that the Rule 26(c) Good Cause Requirement Cannot Be Satisfied by a Template's Recital

The Committee should consider an amendment to Rule 26(c) or an Advisory Committee Note clarifying that entry of a protective order requires an independent judicial finding of good cause, and that a template's recital of party agreement does not satisfy this requirement,

particularly where one or more parties have formally objected to the order's entry. This would restore the burden allocation that Rule 26(c) establishes and that the template system has eroded.

B. Clarify the Enforcement Framework for Protective Orders Under Rule 37(b)

The Committee should study whether Rule 37(b) authorizes sanctions for violations of Rule 26(c)(1) protective orders and, if it determines that the current text does not, consider an amendment expressly extending Rule 37(b) to such orders.

Any such amendment should be accompanied by the substantive safeguards proposed in the original Petition, ensuring that the enforcement authority and the limitations on its exercise are established together. Enforcement authority without safeguards would ratify the existing practice of sanctioning parties for violating constitutionally deficient orders.

C. Prohibit Burden Inversion Through Standing Orders or Templates

The Committee should consider an amendment to Rule 26(c) or Rule 83 providing that no local rule, standing order, or standard form may require a party opposing a protective order to make an affirmative showing for 1) departure from a default protective order or 2) opposition to a protective order unless the other side first makes a showing for the need for that order.

The Rule 26(c) burden belongs to the party seeking protection, and it cannot be reallocated through administrative mechanisms without running foul of the Rules and Constitution.

D. Require That Standard Protective Order Templates Go Through the Rule 83 Process

If a district court wishes to adopt a standard protective order template that functions as a default template in civil cases, the template should be subject to the same adoption process required for local rules: public notice, opportunity to comment, judicial council review, and consistency check against the Federal Rules.

This would ensure that templates receive the scrutiny that their practical significance warrants and would close the gap between the template's functional authority and its procedural legitimacy.

E. Establish That Scope Exclusions in Protective Orders Are Self-Executing

The Committee should consider a rule provision or Advisory Committee Note establishing that where a protective order excludes certain categories of information from its scope (such as publicly available or already-known information) that exclusion operates independently and is self-executing.

Assumably, a party shares information which falls in a scope exclusion (such as public records) would not be required to use the order's challenge procedure to establish what the order's text already provides, and a designation of excluded information has no binding interim effect. But this may need to be expressed directly and in a formal rule to ensure adherence.

This would prevent the weaponization of the "treat as designated pending challenge" convention against information that the order, by its own terms, does not cover. It would also help to resolve the constitutional difficulty: if scope exclusions are self-executing, the template does not authorize prior restraints on speech about public information, and the *Seattle Times* framework remains satisfied.

F. Prohibit Protective Orders from Restricting Speech About Litigation Conduct

The Committee should consider a rule provision establishing that a protective order does not restrict a party's right to publicly discuss the conduct of the litigation itself, including, generally, comments on an opposing party's use of confidentiality designations, the filing of motions, or other procedural events. A protective order governs discovery material; it does not and constitutionally cannot function as a gag order on meta-commentary about the litigation process.

G. Require Judicial Review Before Designations Restrict Speech About Public Information

The Committee should consider a provision requiring that before a confidentiality designation may restrict a party's speech about information that is already in the public record (including information contained in publicly filed pleadings, court orders, or other public documents) the designating party must obtain a court order specifically authorizing the designation after a showing that the standard for a prior restraint on speech has been met.

The "treat as designated pending challenge" default should never apply to information that is already public, because the constitutional interest in suppressing public information is, by definition, nonexistent. However, unless directly communicated, there's opportunity for abuse.

H. Address the Template's Legal Identity

The Committee should consider a rule provision or Note addressing the legal status of protective order templates. This may need to address the requirements of Rule 26(c), the First Amendment, and/or the Rules Enabling Act.

I. Prohibit Courts from Compelling Parties to Sign Template Orders Over Constitutional Objections Without a Hearing

The Committee should consider a rule provision establishing that when a party raises a formal constitutional objection to the entry of a protective order, the court must hold a hearing and issue a written ruling addressing the constitutional arguments before entering the order.

A party may not be compelled to sign a stipulated order or punished for refusing to sign while a constitutional objection remains unresolved. This would help to ensure the "meaningful opportunity to oppose" required by *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009).

VII. CONCLUSION

The protective order template system, as currently administered in some United States District Courts, represents a significant departure from the framework Congress established for the regulation of discovery and the protection of litigants' rights.

It inverts burdens that the Federal Rules deliberately assign. It may manufacture consent through compelled recitals. It can restrict constitutional rights through mechanisms that bypass the rulemaking process. It creates the potential for private parties to impose prior restraints on speech about public information, enforced by the coercive power of the federal courts, without any judicial review at the point the restriction takes effect. They are structural features of the template system that can be, and have been, exploited by well-resourced litigants to suppress speech by less-resourced opponents in cases involving matters of significant public interest.

The Advisory Committee is uniquely positioned to address this problem. The appellate process is structurally unlikely to produce a comprehensive solution, because the parties most

harmed by the system are the least able to pursue appellate relief, and the interlocutory nature of protective order disputes limits appellate access. Rulemaking is the appropriate vehicle.

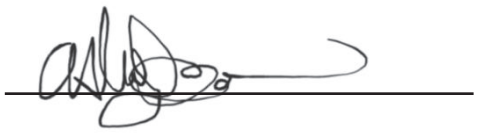
Petitioner respectfully requests that the Advisory Committee place this issue on its study agenda, solicit input from the bench, bar, and public, and consider amendments to the Federal Rules that would restore the protections that the template system has eroded—while preserving the legitimate administrative benefits that well-designed protective orders provide.

In the meantime, advisory letters or guidance documents directed towards the courts currently piloting these model templates may be prudent in order to put these courts on notice of an examination and scrutiny of their new processes.

The existing system works when everyone acts in good faith and has built in checks for parties who do not act in good faith. The Federal Rules provide safeguards that operate even when (especially when) good faith is absent. That is what this petition asks the Committee to ensure it occurs with protective orders and that Constitutional rights cannot be waived or bypassed by administrative templates.

* * *

Respectfully submitted,



Ashley M. Gjovik, J.D.
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LINKED EXHIBITS

- **EXHIBIT A:** Northern District of California, Model Protective Orders ("The protective orders on this page are court-approved model forms… With the exception of Patent Local Rule 2-2, the Local Rules do not require the parties to use any of the model protective orders and counsel may stipulate to or move for another form of protective order.") https://cand.uscourts.gov/rules-forms-fees/northern-district-guidelines/model-protective-orders

- **EXHIBIT B:** Northern District of California, MODEL STIPULATED PROTECTIVE ORDER (for standard litigation), 12 pages, https://cand.uscourts.gov/sites/default/files/documents/CAND_StandardProtOrd.Feb2022_0.pdf

- **EXHIBIT C:** Northern District of California, Magistrate Judge Standing Order Example: ("*If parties believe a protective order is necessary, they shall, where practicable, use one of the model stipulated protective orders (URL), Parties shall file one of the following with their proposed protective order: (a) a declaration stating that the proposed order is identical to one of the model orders except for the addition of case-identifying information or the elimination of language denoted as optional; (b) a declaration explaining each modification to the model order, along with a redline version comparing the proposed protective order with the model order; or (c) a declaration explaining why use of one of the model orders is not practicable*.") https://cand.uscourts.gov/sites/default/files/standing-orders/KAW-CivilStandingOrder-12-19-2025_0.pdf

- **EXHIBIT D:** Northern District of California, Example of U.S. Judge's denial of party's request for full briefing prior to Magistrate Judge compelled all-party "stipulation" to model protective order with Constitutional objections filed, (See, Case 3:23-cv-04597, Order at Dkt. 213 dated May 14 2025 responding to Motion to Quash compelled Protective Order at Dkt. 211 and attempted Petition for Appeal at Dkt. 208)(" The Court also notes that [party's] request for relief seems premature in several ways: (1) [Magistrate Judge] has not issued a final ruling on the terms of a protective order governing, inter alia, discovery; and (2) even if [defendant] designates certain documents as confidential, that does not bar [plaintiff] from contesting a designation… the Court DENIES the request for an order requiring full briefing on the matter of a protective order,") and example of U.S. Judge's denial of party's request for full briefing and public hearing for judicial review of allegations of "breach" of Model Protective Order, (see, Case 3:23-cv-04597, Order at Dkt. 287 dated Feb. 20 2026, responding to Motion to Quash an informal telephonic conference as hearing for sanctions, compelled action, and prior restraint arising from Model Protective Order as a legal authority denying objections and request to quash).

- **EXHIBIT E:** Northern District of California, July 2 2025 Telephonic Conference transcript, Magistrate Judge to pro se Plaintiff objecting to Protective Order in public interest litigation: ("all of the district judges and magistrate judges in the Northern District got together and agreed on that Model Order. So we put it on the court's website so that the parties could simply just use it… you might think that there's something, you know, improper or -- you know, in

this case, I think you're feeling somewhat ambushed about it. But it's really just a very standard procedure for parties to enter into this protective order. And, in fact, we expect people to use it…. that cuts down on the amount of work all of us have to do… I'm prepared to just enter the protective order as it is written because that's the Model Protective Order. And then that will govern how you -- how the parties deal with confidential information… what I'm talking about is just getting this protective order done and getting it signed by the parties and filed so that I can sign off on it…. this is the standard Model Protective Order approved by all the judges on this court. So, you know, you're not being forced to do anything that's against your rights… if we're finished with that issue and you're prepared to go ahead and just sign off on the Model Protective Order, then we can move on to the next issue… I think that the parties should just get it signed as soon as possible and then get it to me…. So [objecting party], can you sign it as soon as possible?.. That becomes the court's order…" Case 3:23-cv-04597, Dkt. 230-233, Transcript pp. 4-17).

- **EXHIBIT F:** Central District of California, example of a "Stipulated Protective Order" ("*Discovery in this action is likely to involve production of confidential, proprietary or private information for which special protection from public disclosure and from use for any purpose other than pursuing this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulated Protective Order*.") https://www.cacd.uscourts.gov/sites/default/files/documents/JDE/AD/Stipulated%20Protective%20Order.pdf%20rev%202.16.18.pdf