IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS *Plaintiff*, vs. ERIC H. HOLDER, JR., Attorney General of the United States *Defendant* ERIC KENNIE, et al., *Defendants-Intervenors.*	Case No. 1:12-cv-00128 RMC-DST-RLW

TEXAS'S RESPONSE TO THE UNITED STATES'
MOTION FOR PROTECTIVE ORDER

The State of Texas opposes paragraph 1.2 of the proposed protective order, which requires the discovery of confidential information even if those disclosures would violate state or federal law:

> Confidential Information, including information ordinarily exempted from public disclosure pursuant to federal or Texas law including but not limited to the Privacy Act of 1974, 5 U.S.C. § 552a, the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25, and H.B. 991, Tex. Gov't Code § 411.192, may be produced within the context of this litigation and as described in this Consent Protective Order, *notwithstanding any other provision of law to the contrary*. The Court specifically finds that said Confidential Information is potentially relevant to the claims and defenses in this litigation and therefore necessary to be disclosed among the parties, and that the terms of this Consent Protective Order

> provide adequate safeguards with respect to the use of such information.

Proposed Protective Order (Doc. 44, Ex. 1), at 3-4 (emphasis added). Texas could not agree to this language in the proposed consent protective order because the State cannot agree to violate state or federal law by disclosing confidential information. Now the Department of Justice is asking this Court to adopt paragraph 1.2 in the form of a court-imposed protective order. But the language of paragraph 1.2 should be as unacceptable to this Court as it was to the State of Texas.

Neither the Federal Rules of Civil Procedure, nor any concept of legislative supremacy under the Constitution, permits a court to disregard contrary federal statutes when ordering discovery of "potentially relevant" information. Federal courts must obey statutes enacted by Congress, and must assure themselves that a discovery request comports with federal privacy laws before ordering or permitting that discovery. Although Texas is unaware of any federal statutes that prohibit the release of this information, the Department of Justice is nonetheless asking this Court to issue an order requiring that information "ordinarily exempted" from disclosure under federal statutes be disclosed "notwithstanding any other provision of law to the contrary." That type of order effectively asserts a judicial power to nullify federal statutes. Paragraph 1.2 must therefore be reworded to dispel any implication that the discovery in this case might be allowed to proceed in a manner that violates any applicable federal law prohibiting the release of confidential information.

The Department of Justice's indifference toward the requirements of state privacy law is also inappropriate. Texas law forbids the disclosure of most "personal information" in the driver's license database, even for use in litigation. And it imposes criminal liability on those who disclose a social security number submitted on a driver's license application. *See* TEX. TRANSP. CODE § 521.044, 521.461, 730.004, 730.007. These disclosure restrictions and criminal sanctions are needed to protect the privacy of Texas residents who must submit their social security numbers to state authorities to qualify for a driver's license. Yet the Department of Justice insists that state privacy law is *irrelevant* in determining the scope of discoverable material under Rule 26. That stance cannot be squared with the Rules Enabling Act, which forbids courts to construe or apply the Federal Rules of Civil Procedure in a manner that would "abridge, enlarge, or modify" a substantive right secured by federal or state law. 28 U.S.C. § 2072. It also flouts the Supreme Court's ruling in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), which instructs courts to avoid potential conflicts between the Federal Rules and the Rules Enabling Act by "interpret[ing] the Federal Rules with sensitivity to important state interests and regulatory policies." *Id.* at 427 n.7. Much of the protected material in the State's voter database fails to satisfy the "relevance" test of Rule 26(b). But to the extent that State law forbids the disclosure of arguably relevant information (such as social security numbers) this Court must interpret Rule 26 in a manner that avoids the "direct collision" between

Rule 26 and the substantive rights of millions of Texas residents—a collision that can only result in a determination that Rule 26 violates the Rules Enabling Act.

Finally, if this Court decides to compel Texas to turn over the social security numbers of its residents in violation of state law, the State of Texas respectfully requests that this Court limit these disclosures to the Department of Justice. Although Texas state law prohibits *any* disclosure of these social security numbers, it is far less offensive to state law—and to the privacy rights of Texas residents—to share these data with a federal law enforcement agency than with the private citizens and lawyers who have intervened in this case.

I. Paragraph 1.2 Must Be Rephrased to Clarify That It Authorizes Disclosures Only to the Extent Consistent With Federal Privacy Statutes.

Texas is not aware of any *federal* statute that would preclude it from disclosing its databases to the Department of Justice. The Driver's Privacy Protection Act (DPPA), for example, permits state officials to disclose a driver's license database "for use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency." 18 U.S.C. § 2721(b)(4). And the Federal Privacy Act, which applies only to federal agencies, permits disclosures "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). Because neither of these federal statutes appears to impose any barriers to court-ordered discovery, Texas cannot understand why Paragraph 1.2 is phrased as though the proposed disclosures require some special dispensation from this Court. Why would the Department of Justice ask this Court to authorize

the disclosure of "information ordinarily exempted from public disclosure pursuant to . . . the Privacy Act of 1974, 5 U.S.C. § 552a, [and] the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25" when the statutes do not restrict court-ordered disclosures in civil litigation? And why is it necessary to insist that disclosures occur "notwithstanding any other provision of law to the contrary"? If the proposed disclosures contravene some unknown provision of *federal* law, then that federal statute must be obeyed and enforced. An applicable federal statute cannot be ignored or declared inapplicable by court decree.

Paragraph 1.2 should therefore be rewritten to make clear that the proposed disclosures *do not violate* the Privacy Act of 1974, the DPPA, or any federal statute of which the litigants and the district court are aware, and that the legality of disclosing confidential information is contingent upon that finding. The Department of Justice's formulation reads as though each of those federal statutes would "ordinarily" prohibit disclosure and that this Court can somehow override any federal statutory restriction by issuing a protective order.

II. The Rules Enabling Act and the Supreme Court's Ruling in *Gasperini* Preclude This Court From Authorizing or Compelling Disclosures That Would Violate Texas's Privacy Laws.

The Texas Transportation Code prohibits State officials from disclosing "personal information" in the driver's license database, even for use in litigation. TEX. TRANSP. CODE § 730.004 provides:

> Notwithstanding any other provision of law to the contrary, including Chapter 552, Government Code, except as provided by Sections 730.005-730.007, an agency may not disclose personal information

> about any person obtained by the agency in connection with a motor vehicle record.

TEX. TRANSP. CODE § 730.004(6) defines "personal information" to include:

> information that identifies a person, including an individual's photograph or computerized image, social security number, driver identification number, name, address, but not the zip code, telephone number, and medical or disability information. The term does not include:
>
> (A) information on vehicle accidents, driving or equipment-related violations, or driver's license or registration status; or
>
> (B) information contained in an accident report prepared under Chapter 550 or 601.

Finally, section 730.007(a)(2)(D) of the Texas Transportation Code allows the State to disclose "personal information" if the requester represents that the use of the personal information will be "strictly limited" to "use in conjunction with a civil, criminal, administrative, or arbitral proceeding in any court." But even in these situations, the State may release only an individual's name and address, date of birth, and driver's license number. *See* TEX. TRANSP. CODE § 730.007(b)(1)-(3). All other "personal information" in the driver's license database—including social security numbers—remains exempt from disclosure.

The upshot is that state law prohibits the State and its officials from disclosing any of the information in its driver's license database except an individual's name, address, date of birth, and driver's license number, as well as other information that falls outside the definition of "personal information" in section 730.004(6) of the Texas Transportation Code. And section 521 supplements

section 730's protection of social security numbers by imposing criminal liability on those who disclose the social security number of a Texas resident who submits that personal information with his driver's license application. *See* TEX. TRANSP. CODE. §§ 521.044, 521.461.[1]

What's more, much of the information in the driver's license database fails to qualify as "relevant" evidence under Rule 26(b). The driver's license database contains over 600 fields. Many of these fields (such as a driver's medical history, driving record, or status as an organ donor) have no bearing on the claims and defenses in this litigation. To the extent that the "personal information" protected from disclosure involves patently irrelevant information—such as an individual's e-mail address, signature image, and thumbprint images—it can be culled as non-discoverable under Rule 26(b) without any need to resolve whether state privacy laws should affect the scope of discoverable material. The information contained in these fields is nondiscoverable regardless of whether state law restricts their disclosure.[2]

Whether state privacy law can restrict the discovery of "personal information" that is arguably relevant to the claims and defenses in this case

[1] In addition to the restrictions imposed by the Transportation Code, the Government Code also prohibits the State from disclosing social security numbers. TEX. GOV'T CODE § 552.147(a). That prohibition is supplemented by a separate provision criminalizing the release of social security numbers. *Id.* § 552.352.

[2] Although the Department of Justice has requested the state's "driver's license database" in its request for production, we do not interpret its request to extend to all 600 fields, but only to those categories relevant to the Department of Justice's claim that SB 14 violates section 5 of the Voting Rights Act. For example, the attorneys for the Department of Justice confirmed on Tuesday's conference call with the Court that they are not seeking the medical histories of Texas residents listed in the State's driver's license database.

presents a more subtle question. Consider social security numbers. The Department of Justice insists that the State turn over the social security numbers in the driver's license database because this information "will assist in increas[ing] the reliability of matching between databases." United States Motion for Protective Order (Doc. 44), at 2. But the Texas Transportation Code, as we have noted, prohibits state officials from disclosing these social security numbers and imposes criminal liability on those who do so. If the Court deems this information "relevant" under Rule 26 and orders the State to turn it over, its ruling will alter the substantive right to privacy that the Texas Transportation Code secures for all residents of Texas. This cannot be done consistent with the Rules Enabling Act—or with the Supreme Court's binding pronouncement in *Gasperini*.

Texas's objection to the Department of Justice's discovery request rests on a straightforward syllogism: The Rules Enabling Act prohibits courts from applying the Federal Rules of Civil Procedure in a manner that will "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). The privacy rights secured by the provisions of the Texas Transportation Code represent "substantive" rights. Therefore, Rule 26 cannot be construed to require Texas to produce the social security numbers and other information that state law protects from disclosure. The Department of Justice does not question either the major premise or the minor premise of this syllogism. It therefore cannot avoid the conclusion: Its proposed interpretation of Rule 26 is unlawful.

Rather than attempt to escape the logic of this syllogism, the Department of Justice claims that Texas's argument is "squarely foreclosed" by *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), and insists that the Federal Rules of Civil Procedure can push aside any state-created substantive right so long as the federal rule "really regulates procedure." United States Motion for Protective Order (Doc. 44), at 3 n.2. (quoting *Sibbach*, 312 U.S. at 14). This would effectively replace the Rules Enabling Act with a new statutory provision that says:

> Such rules *may* abridge, enlarge or modify any substantive right, so long as the rule takes the form of a provision that really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

Courts cannot adopt such an atextual construction of federal statutory language. And in all events, *Sibbach* offers no support to the Department of Justice's desired understanding of the Rules Enabling Act. *Sibbach* held that Rule 35 did *not* "abridge, enlarge, or modify" any substantive state-law right because it did not threaten physical confinement or other unpleasant consequences on plaintiffs who refuse to submit to a medical examination. *Id.* at 15 ("The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that as we hold, no invasion of freedom from personal restraint attaches to refusal to comply with its provisions."). *See also Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,* 130 S. Ct. 1431, 1455 (2010) (Stevens, J., concurring in part and concurring in the judgment) ("Nor, in *Sibbach*, was any further analysis necessary to the resolution of the case because the matter at issue, requiring medical exams for

litigants, did not pertain to 'substantive rights' under the Enabling Act."). *Sibbach* did not (and could not) hold that state-law privacy rights can be *overridden* by the Federal Rules of Civil Procedure, as the Department of Justice claims.[3]

Sibbach also did not hold that the Federal Rules can abrogate a statute that confers substantive privacy rights by protecting confidential information from disclosure in litigation. *Sibbach* considered only whether a state judicial *policy* against ordering litigants to submit to medical examinations should carry over to federal-court diversity litigation. None of the state policies at issue in *Sibbach* purported to confer the type of substantive protections conferred by the Texas Transportation Code—a statutory right of privacy that specifically protects social security numbers from disclosure in any type of litigation. To require this policy to yield to a federal discovery request would effectively recognize that state substantive rights *can* be abridged by the Federal Rules of Civil Procedure, and that makes the Rules Enabling Act a dead letter.

The Department of Justice's analysis also contradicts the Supreme Court's ruling in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), which it does not cite. *Gasperini* instructs courts to avoid potential conflicts between the Federal Rules and the Rules Enabling Act by "interpret[ing] the Federal Rules with sensitivity to important state interests and regulatory policies." *Id.* at 427 n.7. Yet the Department of Justice contends that state law is *irrelevant* in determining the scope of discoverable material under Rule 26—even when state law protects an

[3] *Hanna v. Plumer*, 380 U.S. 460 (1965), is not on point because the state law requiring in-person service was procedural, not substantive. *Id.* at 473-74.

undeniably substantive privacy right. This contention flies in the face of *Gasperini* and invites this Court to flout not only the Rules Enabling Act but also a binding Supreme Court pronouncement.

In determining whether the social security numbers in the driver's license database should be deemed "relevant" and discoverable under Rule 26(b)(1), and in determining whether the social security numbers should be exempt from discovery under the cost-benefit analysis test in Rule 26(b)(2)(C)(iii), this Court must exhibit solicitude toward the "important state interests" reflected in Texas privacy law. Texas law carefully guards the confidentiality of social security numbers to protect its citizens from identity theft. Ordering Texas officials to violate state law and disclose the social security numbers not only to the Department of Justice but also to dozens of private lawyers representing a large and growing number of private intervening parties is a grave affront to the privacy rights of Texas citizens and to the officials of this State who are duty-bound to uphold state law. And it is simply unacceptable to allow the intervening parties themselves access to the unredacted databases, as the Department of Justice proposes in its protective order, when publicly available records obtained from a non-state, online database indicate that at least one of the intervenors has a criminal record that includes convictions for forgery and assault.[4] Providing millions of Texans' social security numbers to dozens of private intervening parties is an untenable security risk that violates state law.

[4] *See* Ex. 1. We have relied only on the publicly available database to substantiate this criminal history.

It is no answer to invoke the Supremacy Clause to justify this intrusion on state law and the state-protected rights of Texas citizens. *See* United States Motion for Protective Order (Doc. 44), at 2. That does nothing but beg the question. The very issue before this Court is the scope of federal authority under the Federal Rules of Civil Procedure, as defined by the Rules Enabling Act and the Supreme Court's pronouncement in *Gasperini*. Texas is not contending that the State can "direct[] a federal court with regard to the evidence it may order produced in the adjudication of a federal claim." *See* United States Motion for Protective Order (Doc. 44), at 2 (quoting *Kalinoski v. Evans*, 377 F. Supp. 2d 136, 140-41 (D.D.C. 2005). Rather, Texas maintains that the Rules Enabling Act limits the scope of federal power under the Rules of Civil Procedure, and that *Gasperini* requires courts to respect the Rules Enabling Act by interpreting the Rules of Civil Procedure with "sensitivity to important state interests and regulatory policies." These commands come from Congress and from the Supreme Court—not from the States—and the Supremacy Clause requires federal district courts to obey them.

The Department of Justice also attacks a straw man by suggesting that Texas wants state law to control assertions of privilege in federal-court proceedings. Texas readily acknowledges that claims of privilege in cases involving federal-law claims in federal court are governed by federal common law rather than state law; the Federal Rules of Evidence require this regime. *See* FED. R. EVID. 501. But Texas is not asserting an evidentiary privilege. It is asserting a substantive state-law restriction that prohibits the disclosure of social security numbers, which

protects individual Texans from having their sensitive, personal information disclosed *either inside or outside of court*. The State opposes discovery of these numbers not because it deems them "privileged," but because Rule 26 must be interpreted to render Texans' social security numbers nondiscoverable—either because of their dubious relevance under Rule 26(b)(1), or because of the "burden or expense of the proposed discovery outweighs its likely benefit" under Rule 26(b)(2)(C)(iii). This interpretation of Rule 26 is compelled by the Rules Enabling Act as well as *Gasperini*'s instruction to apply the Rules of Civil Procedure with "sensitivity to important state interests and regulatory policies." Any other construction of Rule 26 will create a conflict with the Rules Enabling Act—a conflict that courts must make every effort to avoid.

Finally, numerous courts from other jurisdictions have recognized that federal courts must consider state privacy laws when determining the scope of discoverable material under Rule 26. *See, e.g., Dorsett v. County of Nassau*, 762 F. Supp. 2d 500, 530-32 (E.D.N.Y. 2011) (enforcing New York Civil Rights Law § 50-a(1), which creates privacy right for police personnel files, in federal-court discovery); *State of Wisconsin Inv. Bd. v. Plantation Square Assocs., Ltd.*, 761 F. Supp. 2d 1569 (S.D. Fla 1991) (allowing a state privacy law to limit discovery under Rule 26); *Kelly v. City of San Jose*, 114 F.R.D. 653, 656 (ND Cal 1987) ("[F]ederal courts generally should give some weight to privacy rights that are protected by state constitutions or state statutes."). All of this shows that the Department of

Justice is badly overreaching by insisting that Texas privacy laws must be deemed *irrelevant* when resolving discovery disputes under Rule 26.

For all of these reasons, the State of Texas respectfully proposes that paragraph 1.2 of the proposed protective order be amended to read as follows:

> Consistent with the Privacy Act of 1974, 5 U.S.C. § 552a, and the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25, confidential Information may be produced within the context of this litigation and as described in this Protective Order, to the extent consistent with federal and state law. Nothing in this protective order shall be construed to elevate state law over any provision of "supreme" federal law in Article VI of the Constitution.

III. If This Court Decides to Order the State of Texas to Produce Social Security Numbers Notwithstanding the State-Law Prohibitions on Their Disclosure, the State Respectfully Requests That This Court Limit Their Disclosure to the Department of Justice.

Although Texas believes that the Rules Enabling Act and *Gasperini* forbid this Court to order disclosures of social security numbers in violation of state law, the State recognizes that this Court might take a different view of the matter. In the event that this Court disagrees with our analysis of these federal authorities, the State respectfully requests that this Court limit the disclosure of Texans' social security numbers to the Department of Justice, and prohibit the intervening parties and their lawyers from accessing this sensitive and highly confidential information.

An order from this Court that limits the disclosure of social security numbers to the Department of Justice would represent a far less serious affront to state law—and to the privacy rights of Texas residents—than an order compelling the disclosure of social security numbers to the private intervenors. The federal government already has the social security numbers of every U.S. citizen, so

releasing the social security numbers of Texas drivers to a federal government entity might not even qualify as a "disclosure" under TEX. TRANSP. CODE § 730.004. (Texas deems this a strained interpretation of the state statute, but not an entirely unreasonable one.) What's more, the Department of Justice (like the Texas Department of Public Safety) is a governmental and law-enforcement agency. Releasing millions of Texans' social security numbers to the Department of Justice has implications far different from providing that information to dozens of private citizens representing the intervenors—who have neither the experience nor the infrastructure to adequately secure that electronic information, nor access to social security numbers through preexisting federal law-enforcement databases. The protective order drafted by the Department of Justice allows each of the intervening parties, as well as their lawyers, to access the unredacted databases that contain social security numbers and other highly confidential indentifying information. *See* Proposed Protective Order (Doc. 44, Ex. 1), at 4-5. It is utterly unacceptable to allow these private citizens access to these social security numbers, especially when one of the lead intervenors holds a felony conviction for forgery. Texas will vigorously oppose any efforts by the intervening parties to access the social security numbers of Texas residents.

If the Court decides that it is unable to adopt the language that Texas proposed in Section II, then the State of Texas respectfully requests that paragraph 1.2 of the proposed protective order be amended to read as follows:

> Consistent with the Privacy Act of 1974, 5 U.S.C. § 552a, and the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25, confidential

Information may be produced within the context of this litigation and as described in this Protective Order, to the extent consistent with federal law. The State of Texas shall produce confidential information that is discoverable under the Federal Rules of Civil Procedure to the Department of Justice, notwithstanding any provision of state law to the contrary. The State of Texas shall not be required to violate state law by disclosing to the intervening parties any information that state law protects from disclosure, and the Department of Justice shall not grant the intervening parties access to any information that Texas is compelled to disclose in violation of state law.

CONCLUSION

The Department of Justice's motion for protective order should be denied.

Respectfully submitted.

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Dated: March 29, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this day, March 29, 2012, I electronically filed this notice with the Clerk of the Court using the CM/ECF system which will electronically serve the following counsel of record:

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