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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

YANIRA YESENIA OLDAKER; et al.,

Petitioners-Plaintiffs,

v.

THOMAS P. GILES, et al.,

Respondents-Defendants.

Case No.: 7:20-cv-00224-WLS-MSH

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PERMIT FILING DECLARATIONS AND EXHIBITS UNDER SEAL AND TO PERMIT PETITIONERS AND WITNESSES TO PROCEED UNDER PSEUDONYM

INTRODUCTION

Petitioners-Plaintiffs ("Petitioners") have filed a Consolidated Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief and for

Damages ("Consolidated Petition") asserting federal civil rights claims on behalf of themselves and other women currently or previously detained in the custody of U.S. Immigration and Customs Enforcement ("ICE") at the Irwin County Detention Center ("ICDC"). The Consolidated Petition alleges, among other things, that Petitioners and non-party victims/witnesses ("witnesses") have suffered retaliation, including prioritized deportation, for their willingness to speak out about medical abuses and other unsafe and inhumane conditions at ICDC. Pursuant to Fed. R. Civ. P. 5.2, Fed. R. Civ. P. 26(c), and Local Rule 5.4, and for substantially the same reasons as this Court found persuasive in granting a prior Motion to Proceed by Pseudonym and File Under Seal ("Motion to Seal") (Dkts. 29 & 40), Petitioners respectfully seek leave:

(1) for those Petitioners and witnesses who are afraid to come forward in their own names to proceed anonymously as "Jane Does";

(2) to file under seal, only accessible to this Court, the parties in this litigation, their counsel, and those employed by counsel: certain of Petitioners' and witnesses' declarations, as well as counsel's emails to federal investigators, all of which contain more detailed private, sensitive medical and biographical information than appears in the consolidated pleadings or press statements, as well as containing identifying information that would increase the risk of retaliation; and

(3) to file under seal, and designated as "attorneys' and experts' eyes only," Petitioners' and witnesses' medical evaluations and records, and mental health evaluations, which contain HIPAA-protected, private information (collectively, "Medical Exhibits").

A chart identifying which of the Petitioners and witnesses wish to proceed as "Jane Does" and which are seeking to file their declarations under seal is attached as Exhibit F to the December 21, 2020 Declaration of Elora Mukherjee, Esq. ("Mukherjee Decl.") filed in support of the Consolidated Petition. Petitioners also request that Exhibit F itself be filed under seal. *See also* Mukherjee Decl., Exs. H & J (declarations to be sealed)[1], Ex. K (emails to federal

[1] These declarations are also included as subparts to Exhibits L and M and are requested to be sealed in both places.

investigators to be sealed), and Exs. L & M (Medical Exhibits to be sealed and designated as "Attorneys' and Experts' Eyes Only").

Participating in this litigation against ICE and ICDC exposes Petitioners and witnesses to yet further risk of retaliation. Moreover, the declarations, counsel emails to federal investigators, and Medical Exhibits contain a host of intensely private and sensitive information that should appropriately be limited in its disclosure and kept out of the public domain.

FACTUAL BACKGROUND

Petitioners and witnesses are victims of and witnesses to medically unnecessary, non-consensual, and invasive gynecological procedures that were performed by Dr. Mahendra Amin while the women were in the custody of ICE at ICDC.[2] In mid-September 2020, a nurse formerly employed at ICDC blew the whistle on this and other medical abuse at ICDC, resulting in members of Congress calling for the detention center to be shut down.

Since the whistleblower complaint went public, ICE has initiated retaliatory deportations against women detained at ICDC who have spoken out, or indicated their willingness to speak out, regarding their experiences with Dr Amin and other abuses that they have witnessed and suffered while at ICDC.[3] *See, e.g.*, Consolidated Petition at ¶¶ 97-100, 139-145, 198-200, 329-331, 346-349.

A Consent Motion filed by the parties in this case (Dkt. 39), and ordered enforced by this Court (Dkt. 45), was intended to temporarily protect many of the Petitioners from deportation

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[2] Haven Orecchio-Egresitz, *Women at an ICE facility in Georgia accused a doctor of performing unwanted hysterectomies on them. Lawyers say the problems run even deeper.*, *Insider* (Sep. 18, 2020), https://www.insider.com/allegations-against-irwin-ice-facility-doctor-mahendra-amin -2020-9.

[3] *See* Gianna Toboni & Ana Sebescen, "ICE Attempts to Deport Multiple Witnesses in Gynecologic Surgery Scandal," VICE (Nov. 5, 2020), https://www.vice.com/en/article/jgqq7p/ice-attempts-to-deport-multiple-witnesses-in-gynecologic-surgery-scandal.

until a Temporary Restraining Order (TRO) hearing, now set for February 3, 2021, was held. However, on December 10, 2020, ICE's attorneys filed a Motion to Reconsider (Dkts. 47 & 48) seeking revision or release from this term of the Consent Motion. This indicates that ICE seeks to retain the option to remove Petitioners before even their TRO claims can be heard by this Court. Thus, retaliatory deportation is still very much a concern for those participating in this litigation either as Petitioners or witnesses, which is why some of them are seeking to proceed as "Jane Does" and have their declarations filed under seal. *See* Mukherjee Decl., Ex. F (identifying who seeks to proceed as a "Jane Doe" and which declarations are requested to be sealed).

In addition to ICE's retaliatory deportation efforts, ICDC officials and employees frequently engage in punitive action towards detainees—including many of the Petitioners and witnesses—when they protest their treatment or conditions, or endeavor to communicate with outside investigators, members of Congress, or journalists about Dr. Amin and other abuses at ICDC. As cited in the Memorandum of Law in support of the prior Motion to Seal in this case, which the Court granted (Dkts. 29 & 40), retaliation by ICDC officials has included, without limitation: physical harm; deprivation of necessities, privileges, and access to the outside world; being locked in housing units or put in isolation; ignoring requests for medical attention and medications; and intimidation, including threats of early deportation. *See* Dkt. 29.1 at pp. 5-9. In light of this history, certain of the Petitioners and witnesses in this litigation who are still detained have a well-founded fear that unless their declarations are sealed they will suffer further adverse action by ICDC employees.

Certain of the Petitioners and witnesses who are no longer in ICE's physical custody also seek to seal their declarations due to fear that having their names in the public domain will subject them to retaliation. For those who are still in the country, this includes returning them to

ICE detention (where they would again face ICDC retaliation) and/or deporting them. For those who have already been or might soon be deported, the risk of retaliation includes denial of re-admission to the United States should they prevail in their immigration appeals or qualify for another route for lawful return in the future. Some of the Petitioners and witnesses seeking to seal their declarations also fear increased risk of persecution or targeting for violence or harassment in the countries to which they have been, or might still be, deported if news coverage of this case makes them publicly identifiable as U.S. deportees.[4]

Further, certain Petitioners and witnesses seek to seal their declarations that discuss in more detail than the Consolidated Petition or any press statements numerous sensitive topics including medical history, sexual abuse, experiences of interpersonal violence, and criminal histories, which the declarants have a legitimate privacy interest in keeping out of the public domain. *See* Mukherjee Decl., Exs. H & J. This is also true of the emails that Petitioners' and victims' counsel sent to federal investigators detailing victims' experiences of abuse at ICDC. *See* Mukherjee Decl., Ex. K. Thus, for both privacy and retaliation concerns, Petitioners ask that these certain declarations and the emails to federal investigators be sealed.

Finally, the privacy interests at stake are even stronger with respect to Petitioners' and witnesses' Medical Exhibits consisting of medical and mental health evaluations. *See* Mukherjee

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[4] *See, e.g.*, Human Rights Watch, "Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse," (Feb. 2020), (discussing how known deportees may be targeted by both police and gangs in El Salvador), https://www.hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf; Alfredo Corchado, "'We own this place': Gangs prey on deportees along the U.S.-Mexico border," Dallas News (Aug 27, 2017) (discussing how gangs target known deportees in Mexico for violence, extortion and other crimes), https://www.dallasnews.com/news/mexico/2017/08/27/we-own-this-place-gangs-prey-on-deportees-along-the-u-s-mexico-border/; Robert McKee Irwin, "Police Harassment of Deported Migrants," UC Davis Global Migration Center (last accessed Dec. 13, 2020) ("[P]olice harassment of deported migrants is frequent . . . Police target them, extorting what little money they may have, sometimes beating them, often confiscating their personal papers and other items, and sending them to jail for a few days without any clear charges."), https://globalmigration.ucdavis.edu/police-harassment-deported-migrants.

Decl., Exs. L & M. To an even more granular degree than Petitioners' declarations or counsels' emails to federal investigators, these documents contain information covered by the Health Insurance Portability and Accountability Act (HIPAA). The mental health evaluations also contain detailed family histories and background that recount private facts, not only about the Petitioners and witnesses, but also about their third-party family members who are not involved in this litigation. No legitimate purpose would be served by allowing such intensely sensitive information as contained in the Medical Exhibits to be accessed by anyone other than this Court, the parties' counsel or those in their employ, and any medical or mental health experts retained by the Respondents-Defendants (*i.e.*, but not the Respondents themselves). This Court has sufficient discretion, when applying the balancing factors for sealing, to so limit disclosure.

ARGUMENT

I. PROCEEDING ANONYMOUSLY

A. Legal Standard

Courts have discretion to allow parties and non-parties to "proceed anonymously." *See In re: Chiquita Brands International, Inc.*, 965 F.3d 1238, 1247 (11th Cir. 2020). To justify this protection, a movant must show "a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'" *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992) (internal citations omitted). The Eleventh Circuit articulates the following, non-exhaustive factors to be weighed when determining whether to allow a movant to proceed anonymously:

> (1) whether the party seeking to proceed anonymously is challenging government activity;
>
> (2) whether the party seeking to proceed anonymously would be compelled, absent anonymity, to disclose information of utmost intimacy;

(3) whether the party seeking to proceed anonymously would be compelled, absent anonymity, to admit an intent to engage in illegal conduct and thus risk criminal prosecution;

(4) whether the party seeking anonymity is a minor or faces a real threat of physical harm absent anonymity; and

(5) whether the party's requested anonymity poses a unique threat of fundamental unfairness to the defendant.

In re: Chiquita Brands, 965 F.3d at 1247 & n.5. No one factor is meant to be outcome-determinative, as the court articulated a totality-of-the-circumstances approach. *See id.*, n.5.

B. The "Jane Does" Easily Meet the *In re Chiquita* Factors.

Taking into account the relevant *In re: Chiquita* factors,[5] the totality of the circumstances weigh heavily in favor of allowing those Petitioners and witnesses who so desire (collectively "the Jane Does") to proceed anonymously where they otherwise would be too afraid to present their evidence to this Court.

1. The "Jane Does" Are Challenging Government Activity.

The "Jane Does" provide evidence describing their abuse and mistreatment at ICDC to support the Petitioners' litigation challenges to government activity, thereby satisfying the first *In re: Chiquita* factor. *See J.W. v. District of Columbia*, 318 F.R.D 196, 201 (D.D.C. 2016) ("Courts have concluded that anonymous litigation is more acceptable when the defendant is a governmental body[.]").[6]

2. Absent Anonymity, the "Jane Does" Would Be Compelled to Disclose Information that Risks Serious Retaliatory Harm to Them.

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[5] The third factor regarding admission of intent to engage in illegal conduct is inapplicable here.

[6] *See also Int'l Refugee Assistance Project (IRAP) v. Trump*, No. TDC-17-0361, 2017 WL 818255, at *2 (D. Md. Mar. 1, 2017) (noting that while a lawsuit against a private party may cause the defendant reputational and economic harm such that fairness requires the identification of the plaintiffs, "the government is not vulnerable to similar reputational harm, particularly in a case involving a challenge to the constitutional, statutory, or regulatory validity of government activity").

Relevant to the second and fourth factors—*i.e.*, disclosure of intimate information and the risk of harm upon disclosure—courts have frequently recognized that individuals who are vulnerable to adverse action because of their immigration status have good reason to proceed anonymously when challenging the government.[7]

Here, the "Jane Does" are filing sworn statements alleging facts against the very agency that holds them in physical or constructive custody and has the ability to remove them from the country. In light of ICE's pattern of moving quickly to deport women at ICDC when they try to give voice to their mistreatment, as well as ICE's efforts to undo this Court's prior order providing temporary protection from deportation for at least the named Petitioners, the "Jane Does" credibly fear they will be deported next if their identities are not protected.[8]

Also relevant to the fourth *In re: Chiquita* factor is the fact that the "Jane Does" still in custody at ICDC have credible fear of retaliation by detention center employees if their true

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[7] *See Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1247 & n.8 (11th Cir. 2012) (opining that exposure of school children's immigration status could lead to "harassment and intimidation" and citing cases where immigrant plaintiffs were allowed to proceed anonymously); *Lozano v. City of Hazelton*, 620 F.3d 170, 195 (3d Cir. 2010) (holding that plaintiffs could proceed without disclosing their identities because of "legitimate[ ] fear that defendant [municipality] was determined to expose their legal status to federal authorities"), *vacated and remanded on other grounds*, 563 U.S. 1030 (2011); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1169 (9th Cir. 2000) (holding that plaintiffs' "highly vulnerable [immigration] status" was a factor weighing in favor of allowing them to proceed anonymously); *IRAP v. Trump*, 2017 WL 818255, at *2 (allowing plaintiffs to proceed anonymously partly because disclosure of their identities to the Government could dissuade them from pursuing their rights in court while their relatives' visa applications were pending); *Puente Az. v. Arpaio*, No. CV14-1356-PHX-DGC, 2014 U.S. Dist. LEXIS 166223, at *5 (D. Ariz. Dec. 1, 2014) (allowing undocumented immigrants to file Doe declarations in a challenge to state law criminalizing seeking employment without federal work authorization); *Keller v. City of Fremont*, No. 8:10-cv-270, 2011 WL 41902, at *1-*3 (D. Neb. Jan. 5, 2011) (allowing undocumented immigrant plaintiffs to proceed anonymously in challenge to ballot initiative that would make it unlawful to lease or rent property to undocumented persons).

[8] While some Petitioners and non-party witnesses choose to use their own names, this is a personal decision that they make knowing the risk it entails and should not result in all Petitioners and non-party witnesses being forced to reveal their identities.

names are revealed. ICDC guards control nearly every aspect of the daily lives of detainees and may reasonably view the testimony of "Jane Does" in this case as threatening their reputation or livelihood. Previous retaliation by ICDC guards has taken the form of, without limitation: physical harm; deprivation of necessities, privileges, and access to the outside world; being locked in housing units or put in isolation; ignoring requests for medical attention and medications; and intimidation and threats, including of early deportation. *See* Dkt. 29.1 at pp. 5-9. This reality weighs strongly in favor of allowing the "Jane Does" to proceed anonymously. *See Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia*, 877 F. Supp. 634, 639 n.1 (D.D.C. 1994) (allowing prisoners to proceed under pseudonyms due to the risk of retaliation by prison guards).[9]

3. The Anonymity Sought Presents Little Risk of Unfairness to the Respondents.

Turning to the fifth factor under *In re: Chiquita*, this Court's protection of the identities of "Jane Does" poses little risk of unfairness to Respondents-Defendants ("Respondents") at this early stage of the litigation. This is because the "Jane Does" are largely third parties to this case and the issues to be resolved at the TRO stage involve no dispositive findings of fact or damages.

Moreover, the actual parties-in-interest—most of the Petitioners and Respondents—are identified by name where known, as are some of the witnesses. The Government does not need to know the individual identities of every woman involved to respond to the thematic substance of their allegations in support of the consolidated civil rights claims. *See D'Onofrio v. SFX Sports Grp.*, 256 F.R.D. 277, 280 (D.D.C. 2009) ("[T]here need not be a great deal of harm to

[9] *See also Gomez v. Buckeye Sugars*, 60 F.R.D. 106, 107 (N.D. Ohio 1973) (allowing plaintiffs to proceed under pseudonyms because they feared retaliation from their defendant employers).

justify protecting information when doing so would not prejudice the party who will be prevented from seeing the information."). In the event Respondents determine later in the litigation that they have a need for the identities of the "Jane Does," they could then make a motion attempting to demonstrate such need, at which point a protective order for the "Jane Does" names may be necessary.[10]

Because the relevant factors under *In re: Chiquita* demonstrate that the totality of the circumstances weighs in favor of anonymity for the Petitioners and witnesses who request it, Petitioners' motion for the "Jane Does" to proceed anonymously should be granted.

II. SEALING

A. Legal Standard

Courts may authorize documents to be filed under seal where a party shows good cause to overcome the public's qualified common-law right of access to judicial proceedings. *Romero v. Drummond Co.,* 480 F.3d 1234, 1245 (11th Cir. 2007). In deciding whether a party has shown good cause to seal, the Eleventh Circuit identifies six factors to be considered:

(1) whether allowing access would impair court functions or harm legitimate privacy interests;

(2) the degree of and likelihood of injury if made public;

(3) the reliability of the information;

(4) whether there will be an opportunity to respond to the information;

(5) whether the information concerns public officials or public concerns; and

(6) the availability of a less onerous alternative to sealing the documents.

[10] *See* Fed. R. Civ. P. 26(c); *see also* Order Granting Mot. for Protective Order, *Doe 1 v. Trump*, No. CV 17-1597 (D.D.C. Sept. 13, 2017) (Dkt. No. 38) (limiting disclosure of pseudonym plaintiffs' identities to counsel for defendants and those in counsel's employ); *Alexander v. Falk*, No. 16-cv-2268, 2017 WL 3749573 (D. Nev. Aug. 30, 2017) (ordering disclosure of plaintiffs' identity to defendants' counsel only, with a prohibition on disclosing plaintiffs' identity to counsel's clients).

Romero, 480 F.3d at 1247.

Petitioners move to file two categories of exhibits under seal: (1) declarations of certain Petitioners and witnesses, and counsel emails sent to federal investigators about specific victims' abuse; and (2) Medical Exhibits consisting of medical and mental health evaluations, and any attached medical records, for Petitioners and some of the witnesses. *See* Mukherjee Decl., Exs. F, H, J, K, L & M. Petitioners also request that the Medical Exhibits be designated "Attorneys' and Experts' Eyes Only," which the Court also has discretion to require based on a finding of "good cause" under the *Romero* factors.

B. Declarations of Certain Petitioners and Witnesses and Emails to Federal Investigators Should be Sealed.

1. Those Still Detained at ICDC Fear Retaliation if Their Identities are Disclosed.

Prongs (1) and (2) of the *Romero* balancing test weigh in favor of the request to seal certain Petitioners' and witnesses' declarations and also counsel's emails to federal investigators about specific victims' abuse at ICDC. This is because, as this Court previously found (Dkt. 40), those women still detained at ICDC have a credible fear of retaliation if their identities become known to ICDC guards—and, for the "Jane Doe" declarants, if their identities become known to ICE. Leaving the declarations and emails unsealed so that they could be shared outside of the circle of litigants and their counsel would likely have the unintended consequence of identifying the women to ICDC guards. Indeed, some of the declarations and the counsel emails to federal investigators, on their face, reveal the women's names. Meanwhile, for those women seeking to proceed as "Jane Does," the specific events and interactions at ICDC described in their declarations may well be recognizable to individuals working at the facility who, in addition to

piecing together the women's identities and retaliating against them, may also coordinate with ICE to prioritize their deportation.

The Petitioners and witnesses not currently detained at ICDC seeking to seal their declarations similarly fear being identified—either by name, if given, or by the identifying information in their "Jane Doe" declarations—and retaliated against via return to detention and/or deportation by ICE. For those already or soon to be deported, retaliation may take the form of denial of re-admission to the United States should they prevail in their immigration appeals or qualify for another route for lawful return in the future. Petitioners and witnesses also fear risk of persecution or being targeted for violence or harassment in the countries to which they have been or might yet be deported, if news reporting on this case makes them publicly identifiable as U.S. deportees (*i.e.*, it is important for their safety that their status as having been deported remain guarded).[11]

Additionally under *Romero* prongs (1) and (2), certain of the Petitioners' and witnesses' declarations and counsel's emails to federal investigators contain detailed and sensitive personal information beyond what is contained in the Consolidated Petition or any press statements—*e.g.*, specific details about their medical and reproductive health and/or personal histories, including sexual abuse—that they have not shared with their families or that they do not want to be forever publicly accessible via internet searches of their names. Where, as here, the subject matter of the case is so sensitive, and the risk of retaliation is so great, courts have seen fit to approve both anonymity for those who desire it *and* filing under seal, as some Petitioners and non-party

[11] *See, e.g.*, Human Rights Watch, *supra* note 4 (discussing how known deportees may be targeted by both police and gangs in El Salvador); Irwin, *supra* note 4 (discussing police harassment and extortion of deportees to Mexico); Corchado, *supra* note 4 (discussing how gangs target known deportees in Mexico for violence, extortion, and other crimes).

witnesses seek in this case. *See, e.g.*, *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 187 (2d Cir. 2008) (parties proceeded anonymously and the court sealed the judicial record to protect the plaintiff from retaliation, as she was suing the government officers who sexually assaulted her); *Doe v. Hood*, 2017 WL 2408196, *3 (S.D. Miss. June 2, 2017) (plaintiffs convicted under the state's sodomy statute could proceed anonymously and with "none [of their] personally identifying information [ ] made public on the Court's docket").[12]

2. Sealing Would Not Obstruct Respondents' Ability to Defend or the Public's Access to Information Regarding Official Conduct.

Under prongs (1) and (4) of *Romero*'s balancing test, sealing would not impair the Court's functions in this matter as Respondents and their counsel would still have access to the declarations, both sealed and unsealed, and to the counsel emails to federal investigators. Thus, Respondents could still respond to the substance of this evidence. *See Hood*, 2017 WL 2408196 at *3 (allowing anonymity and sealing where the parties' attorneys could still access the sealed documents). Moreover, under the third prong of *Romero*, the Petitioners' and witnesses' accounts in their declarations and relayed by their counsel to federal investigators are sufficiently reliable, as these statements speak to information of which the women have first-hand knowledge.

To be sure, under *Romero* prong (5), there are multiple important matters of public concern at issue here. These include: abuse of vulnerable populations held in government custody, retaliation for speech and prior restraint of speech by government officials, and

[12] *See also Warren v. S&S Prop. Mgmt.*, 2020 U.S. Dist. LEXIS 161859, at *21 (N.D. Ga. June 3, 2020) ("Accounts of sexual assault can represent some of the most painful chapters in the lives of individuals.") (internal quotation and citations omitted); *Wilmink v. Kanawha Cty. Bd. of Educ*., No. CIV.A. 2:03-0179, 2006 WL 456021, at *3 (S.D.W. Va. Feb. 23, 2006) ("[T]he competing interest of keeping this information [about sexual assault victims] private significantly outweighs the public's common-law right of access.").

interference with the right to petition the government for grievances. However, these issues will be publicly exposed and vetted through the non-sealed records and proceedings in the case. To the extent public access is diminished by sealing, here this is outweighed by the personal harm that would result to the Petitioners and non-party witnesses if the sealing request is denied.

3. There are No Less Onerous Alternatives to Sealing.

As to *Romero*'s prong (6), there are no less onerous alternatives to sealing that would adequately protect the Petitioners and witnesses from harm because it would be impossible to effectively redact the declarations sought to be sealed without rendering them meaningless given that the sensitive information pervades each declaration. Moreover, it would be difficult to know precisely what pieces of information would allow employees at ICDC, or people in the outside world, to be able to piece together to a declarant's identity, making it difficult to isolate the information that should be redacted. *See Tobar v. Federal Defenders of the Middle District of Georgia, Inc.*, 2014 WL 12650710, at *2 (M.D. Ga. Feb. 24, 2014) ("Due to the large quantity of highly sensitive information in this exhibit and the impracticality of redaction, there is good cause to restrict access to this exhibit in its entirety.").

The totality of the *Romero* factors balances in favor of sealing certain of the Petitioners' and witnesses' declarations, and also counsel's emails to federal investigators, such that these exhibits are only accessible to this Court, the parties in this litigation, their counsel, and those employed by counsel.

B. Medical Exhibits Should Be Sealed and Designated "Attorneys' and Experts' Eyes Only."

Petitioners seek to file Medical Exhibits under seal and designated as "Attorneys' and Experts Eyes Only" because, to an even greater degree than Petitioners' and witnesses' declarations, these documents contain medical and mental health information covered by the

Health Insurance Portability and Accountability Act (HIPAA). The mental health evaluations contained in the Medical Exhibits, also contain detailed family histories and private biographical facts, not only about the Petitioners and witnesses, but also about their third-party family members who are not involved in this litigation.

Courts in the Eleventh Circuit applying the *Romero* factors have regularly "recognized a party's privacy interest in their medical records and have permitted [the] same to be filed under seal." *U.S. v. Emanuelli*, No. 6:17-cr-10-Orl-41TBS, 2017 U.S. Dist. LEXIS 87807, at *1, *3 (M.D. Fla. June 8, 2017).[13] Courts similarly allow sealing of mental health records containing HIPAA-protected information. *See, e.g., Bell v. Warden, FCI Tallahassee*, No. 4:19cv442-WS/MAF, 2020 U.S. Dist. LEXIS 117686, at *29-30 (N.D. Fla. June 9, 2020) (granting prisoner's motion to seal psychological reports). Such sealing within the Eleventh Circuit is consistent with practice in other circuits.[14]

Here, the privacy harm that would result from disclosing the voluminous private, HIPAA-protected details contained in the Medical Exhibits substantially outweighs the public's right of access where the general nature of the medical harm at ICDC that Petitioners allege is known through the pleadings. *See Pena v. Marcus*, No. 6:15-cv-69-Orl-18TBS, 2016 U.S. Dist. LEXIS 194362, at *4 (M.D. Fla. Nov. 4, 2016) (noting that the "public is already informed as

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[13] *See, e.g.*, *Varnadore v. Merritt*, No. CV 217-13, 2017 U.S. Dist. LEXIS 59821, 2017 WL 1450816, at *1 (S.D. Ga. April 19, 2017); *United States v. McDonald*, No. 10-00273-KD-B, 2016 U.S. Dist. LEXIS 132798, 2016 WL 4923511, at *1 (S.D. Ala. Sept. 14, 2016); *United States v. Deruiter*, No. 2:14-c4-46-FtM-38MRM, 2016 U.S. Dist. LEXIS 27210, 2016 WL 825532, at *1 (M.D. Fla. Mar. 3, 2016); *United States v. Wilborn*, No. 6:13-cr-253-Orl-37GJK, 2015 U.S. Dist. LEXIS 34292, 2015 WL 1268256, at *6 (M.D. Fla. Mar. 19, 2015).

[14] *See, e.g.*, *Romero v. Ahsan*, No. 19-1056, 2020 U.S. App. LEXIS 29194, at *13, n.5 (3d Cir. Sep. 15, 2020) (granting motion to seal medical records); *Myers v. Knight Protective Serv.*, 774 F.3d 1246, 1249 (10th Cir. 2014) (same); *Hence v. Berghuis*, No. 14-2551, 2016 U.S. App. LEXIS 24236, at *16 (6th Cir. Feb. 5, 2016) (same); *U.S. v. Sanchez,* 254 F. App'x 205, at *1 (4th Cir. 2007) (same).

to the nature of the [alleged] injuries" in support of finding that the "Plaintiff's privacy interest outweighs the public's interest in learning the details [from] her medical records.").

Moreover, there is no prejudice to Respondents where their counsel and their rebuttal experts will have access to the exhibits to prepare and present a response. *See, e.g., Kojac v. US Investigations Servs., LLC*, No. 13-62162-CIV-DIMITROULEAS/S, 2014 U.S. Dist. LEXIS 196465, at *3 (S.D. Fla. May 22, 2014) (restricting access to the plaintiff's medical records to counsel only); *Estate of Carrillo v. FDIC*, No. 11-22668-CIV-ALTONAGA/SIMONTON, 2012 U.S. Dist. LEXIS 69611, at *14 (S.D. Fla. May 18, 2012) (same); *Men of Destiny Ministries, Inc. v. Osceola Cty.*, No. 6:06-cv-624-Orl-31 DAB, 2006 U.S. Dist. LEXIS 54385 (M.D. Fla. July 19, 2006), at *5 (same). As the foregoing cases illustrate, there is no specific test for determining when an "attorneys' eyes only" provision is warranted so long as circumstances satisfy the factors for a sealing or a protective order.[15] Rather, "balanc[ing] [a party's] privacy rights against the [opposing party]'s entitlement to discovery" is a matter of the court's discretion. *Estate of Carrillo*, 2012 U.S. Dist. LEXIS 69611, at *14. *See also Alexander v. FBI*, 186 F.R.D. 54, 58 (D.D.C. 1998) ("While most cases limiting disclosure of information to attorneys involve trade secret or other proprietary information, the same rationale applies to information obtained through medical or psychological examinations.").

As noted in *White v. Honda of America Manufacturing* (S.D. Ohio Dec. 31, 2008), medical records "are particularly subject to misuse, especially if widely disseminated" and are "commonly restricted . . . to opposing counsel and experts, preventing even opposing parties

[15] *See* Fed.R.Civ.P. 26(c)(1)(A) (providing that, upon a showing of good cause, a court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," which order may include forbidding disclosure or discovery);*West v. City of Albany, Georgia*, No. 19-11418, 2020 WL 5870246, at *3 (11th Cir. Oct. 2, 2020) ("If the district court decides a protective order is warranted, it has broad discretion in determining the scope of that protection.").

from viewing such information unless there is an especially compelling reason for them to do so." No. 2:07-CV-216, 2008 U.S. Dist. LEXIS 112102, at *6. Here, there is no compelling reason why the Respondents, as a group, would need to view the Medical Exhibits. With the possible exception of Respondent Mahendra Amin, Respondents have no independent direct knowledge that would position them to respond to the Medical Exhibits. And none of the Respondents are mental health experts who would be qualified to opine on the contents of the mental health evaluations. *See, e.g.*, *Alexander*, 186 F.R.D. at 58 (finding, in action against White House officials and the FBI, that defendant federal agencies were "unable to demonstrate any actual prejudice from their personal inability to review the [medical and other] information that [would] be provided by plaintiffs" and accessible to counsel).

Should a compelling reason arise, for an individual Respondent to have access to some limited portion of the content in the Medical Exhibits, Respondents' counsel could attempt to make that showing. But presently, there is no generalized compelling reason for Respondents, as a group, to have access. The *Romero* factors, when applied to the Medical Exhibits, weigh heavily in favor of the requested sealing and restricted access to only this Court, counsel, and experts.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Court grant their motion:

(1) for those Petitioners and witnesses who are afraid to come forward in their own names to proceed anonymously as "Jane Does";

(2) to file under seal, only accessible to this Court, the parties in this litigation, their counsel, and those employed by counsel: certain of Petitioners' and witnesses' declarations, as well as counsel's emails to federal investigators, all of which contain more detailed private, sensitive medical and biographical information than appears in

the consolidated pleadings or press statements, as well as identifying information that would increase the risk of retaliation; and

(3) to file under seal, and designated as "attorneys' and experts' eyes only," Petitioners' and witnesses' medical evaluations and records, and mental health evaluations, all of which contain HIPAA-protected, private information (collectively, "Medical Exhibits").

Additionally, Exhibit F to Mukherjee's declaration, which identifies the Jane Does and the names of the women whose declarations are to be sealed, should itself be filed under seal.

Respectfully submitted on this 21st day of December,

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