UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

VALDOSTA DIVISION

YANIRA YESENIA OLDAKER, *Petitioner*, v. THOMAS P. GILES, THE ACTING DIRECTOR OF THE ATLANTA FIELD OFFICE OF IMMIGRATION AND CUSTOMS ENFORCEMENT; CHAD WOLF, THE ACTING SECRETARY OF HOMELAND SECURITY; WILLIAM BARR, THE U.S. ATTORNEY GENERAL; TONY H. PHAM, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; DAVID PAULK, WARDEN OF THE IRWIN COUNTY DETENTION CENTER; HENRY LUCERO, THE EXECUTIVE ASSOCIATION DIRECTOR OF ENFORCEMENT AND REMOVAL OPERATIONS OF IMMIGRATION AND CUSTOMS ENFORCEMENT; PATRICK MUSANTE, THE ASSISTANT FIELD OFFICE DIRECTOR OF THE ATLANTA FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; IMMIGRATION AND CUSTOMS ENFORCEMENT; AND DEPARTMENT OF JUSTICE. *Respondent*	Case No. 7:20-cv-00224-WLS-MSH

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PERMIT 20 NON-PARTIES TO PROCEED BY PSEUDONYM AND UNDER SEAL AND TO PERMIT TWO NON-PARTIES TO PROCEED UNDER SEAL

INTRODUCTION

Pursuant to Fed. R. Civ. P. 5.2, Fed. R. Civ. P. 26(c), and the Middle District of Georgia's procedures for filing restricted documents and sealed entries, Petitioner Yanira Yesenia Oldaker respectfully seeks leave to submit by pseudonym and/or under seal non-party declarations from 20 women currently or formerly detained in the Irwin County Detention Center ("ICDC"), a facility of U.S. Immigration and Customs Enforcement ("ICE"), located in Ocilla, Georgia. Each non-party declarant seeks to submit a declaration in support of Ms. Oldaker's Motion for a Temporary Restraining Order (TRO) and Habeas Corpus Petition, but if filed in their own names, they fear resulting retaliation from Respondents, their employees, and/or their contractors, including accelerated deportation. Additionally, because of the specifically identifying facts that some of the declarants attest to, proceeding under a pseudonym alone would not sufficiently protect their identities should the declarations be viewed by officials, guards, and contractors at ICDC who are familiar with the non-party declarants' circumstances. For this reason, the declarations should also be filed under seal.

FACTUAL BACKGROUND

Petitioner Yanira Yesenia Oldaker is a victim of and witness to medically unnecessary and non-consensual gynecological procedures that were performed on her and other women by Dr. Mahendra Amin while in the custody of ICE at the

Irwin County Detention Center ("ICDC").[1] In mid-September 2020, a nurse formerly employed at ICDC blew the whistle on the medical abuse of ICDC detainees, which resulted in members of Congress visiting ICDC and calling for it to be shut down. On October 26, 2020, Ms. Oldaker's lawyers submitted her sworn declaration to the U.S. Department of Justice (DOJ) attesting to her experiences with Dr. Amin. On November 5, 2020, a lawyer identified her and other women currently or previously detained at ICDC as witnesses concerning Dr. Amin to investigators at the DOJ, the Department of Homeland Security ("DHS"), and the Federal Bureau of Investigation ("FBI"). Days thereafter, Ms. Oldaker was scheduled for removal on the morning of November 9, 2020, before her opportunity to speak as a witness. Also on November 9, Ms. Oldaker filed a petition for a writ of habeas corpus and a motion for a temporary restraining order (TRO), resulting in her deportation being stayed by this Court until December 2, 2020. Since Ms. Oldaker filed her petition, ICE has moved to rapidly deport two other women who were identified on November 5, 2020 to DOJ, DHS, and the FBI as having information relevant to the investigation of Dr. Amin. Habeas petitions have also been filed in the Middle District of Georgia to halt the retaliatory removal of these two women.

[1] 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.

The 22 non-party declarants who are the subject of this motion seek to provide information relevant to Ms. Oldaker's habeas petition and TRO motion, including descriptions of their own medical abuse by Dr. Amin and/or various forms of mistreatment and retaliation they have suffered while at ICDC when they have objected to their conditions. Their information would also be relevant in the pending federal habeas cases of the other two witnesses against Dr. Amin who were identified in the November 5, 2020 email to DOJ/DHS/FBI and who ICE is also trying to remove. However, based on ICE's pattern of accelerated deportation of ICDC detainees who indicate a willingness to speak out or testify, the declarants seeking leave to use pseudonyms and file under seal (all of whom are currently still detained at ICDC) fear similar and further retaliation than they have already suffered if their identities are not protected. Similarly, the women no longer in custody at ICDC, having been either released or deported, fear retaliation against those they care about (in and out of ICE detention) and in the adjudication of future immigration cases. They fear that having their names in the public domain may subject them to retaliation in the following forms: re-arrest and deportation by ICE for those who are still in the country; denial of re-entry to the United States should they prevail in their immigration appeals for those who have already been deported; and increased risk of persecution or targeting by gangs or other bad actors in the countries where they have been (or might still be) deported to, should

their names become widely disseminated as a result of participating in this litigation.[2]

Examples of the psychological and physical mistreatment, often retaliatory, that non-party declarants have experienced while at ICDC (and that the declarants still in custody fear experiencing further if their identities are not protected) include, without limitation, the following:

Physical Harm

- Doe Declarant #3, ¶ 16 (witnessed another detainee beaten by guards; afterward, the detainee, who had walked properly before, "could barely walk. She would always fall.")
- Doe Declarant #4, ¶¶ 9-16 (witnessed ICDC official physically assault a detainee; detainee subsequently deported)
- Doe Declarant #5, ¶ 23 ("I have seen how they have punished people before, and I fear for my safety. I was afraid they would beat me up like [another detainee].")
- Doe Declarant #8, ¶ 35 ("I have seen other people getting beaten up by guards for speaking out. A girl from [housing unit] was tackled by a guard in front of me. I felt scared to watch the attack.")
- Doe Declarant #14, ¶¶ 10-11 (describing that after an altercation with another detainee, she was taken outside to talk with the lieutenant. She told the lieutenant she did not want to go to solitary "to get put in that cage like I am some type of animal." After this, "the officers attacked me; they pushed me down to the floor; I screamed 'You're hurting my hands!' They left bruises and scratches on me. When they took me to [housing unit], they left the handcuffs on me for a while.")
- Doe Declarant #16, ¶ 5 ("I heard that [another detainee] was beaten up by guards at Irwin and it scared me a lot") and ¶ 7 ("When I found out about [another detainee's] experience I felt it might happen to any one

[2] *See* "Deported to Danger," Human Rights Watch, Feb. 5, 2020, https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and ("[S]ome people deported from the United States back to El Salvador face the same abusers, often in the same neighborhoods, they originally fled: gang members, police officers, state security forces, and perpetrators of domestic violence").

of us".)

- Navarro Decl., ¶ 37 (guards "treat us like they are about to beat us up"), and ¶ 41 (detainee who participated in making a video posted on YouTube "to help people understand that we were in so much danger from [C]ovid at ICDC" was "beaten up"), and ¶ 51 (detainees pepper sprayed and locked in isolation for participating in food strike)

Deprivation of water, food, clean clothes, sanitary supplies, sleep, or access to outside world

- Doe Declarant #3, ¶¶ 15, 21 (after speaking to investigators about Dr. Amin and other issues at ICDC, declarant not allowed to use the phone)
- Doe Declarant #6, ¶¶ 5,7 (describing how officials took money from commissary accounts of those who went on hunger strike and threatened deprivation of all food and water); ¶ 19 ("I have seen that when people use their First Amendment rights at Irwin, guards threaten you with everything they can—including shutting off the tablets . . . .")
- Doe Declarant #6, ¶ 15 ("Whenever something about Irwin or Dr. Amin would come on the news, the guards would always change the channel. They do not want us to know what is happening here. When we would ask to change the channel back, they would refuse. They have done this since the first story about what happened here began to be talked about on the news.")
- Doe Declarant #7, ¶¶ 7-9 (describing how in response to the hunger strike, officials locked things down, refused requests for water or ice even though not all the cell sinks have running water, turned off the Wi-Fi, took away commissary accounts, and threatened to turn off all water to the cells and provide no food whatsoever); ¶¶ 17-25 (describing deprivation of menstrual pads, toilet paper, and even water in apparent retaliation for having contracted COVID)
- Doe Declarant #11, ¶ 58 ("After the congressional delegation visited Irwin in September 2020 … the guards started giving us clean underwear. Before the Congressional delegation visited, they would give us blood stained underwear.")
- Doe Declarant #11, ¶ 69 ("The lighting in [housing unit] is unbearable. They have these bright fluorescent lights that are incredibly bright and they leave them on all day and night … My friend [name redacted] also couldn't stand the lights being on all the time, and she protested … The officers put [name] in lockdown because of her request to turn off the

lights — an interaction that happened after several days of sleeplessness for [name redacted].")

- Doe Declarant #12, ¶¶ 6-7 ("People who complain get locked up in [housing unit] for 20 or more hours. When that happens, we can't even get water from the guards. Many times, people get sent there for having complained about the doctors or making a medical request. Because the guards punish speaking out with lockdown, people don't want to speak out … If you don't want to go, they jump on you and force you there.")
- Doe Declarant #13, ¶ 8 ("Whenever we start hearing news about the investigation on the radio in either English or Spanish, the guards would change the station.")
- Navarro Decl., ¶¶ 42-45 (guards refused to turn off the lights at night interfering with detainees' ability to sleep; in response to complaint, guard said, "Go ahead, write your little grievance, it's not going to do anything.")

Ignoring requests for medication or medical attention

- Doe Declarant #2, ¶ 6 (witnessed another detainee who was sick with fever during COVID was not given medical attention but was instead put in solitary confinement where she could not bathe for days at a time; when detainee returned to the housing unit she was "shaken and nervous . . . traumatized")
- Doe Declarant #5, ¶¶ 10-11 ("After I spoke about my surgery it was hard for me to receive the medical assistance I need. When I tell the guards about my symptoms and pain, they say it is nothing and ignore me. I would ask for weeks for my prescribed medication and I would still not receive any medication. I have run out of my medication now. It was not like this before my surgery and before I spoke out. I always have to beg and beg for medical attention now. I put in a medical request every other day after my surgery and it took six weeks for anything to happen. I feel they are neglecting me because I spoke up.")

Locked in Housing Units

- Doe Declarant #5, ¶ 20 (describing being locked in the trailer all day during the Congressional visit and attesting "They did not let me outside like they usually do and I believe that was because they didn't want me to speak up.")
- Doe Declarant #15, ¶ 4 ("I witnessed when they locked up four or five

women in [housing unit] after they made a video speaking out about the situation in this detention center in late April 2020.")

Intimidation and Threats

- Doe Declarant #3, ¶ 20 (since investigation of Dr. Amin started, "guards have told us that they really want to deport us")
- Doe Declarant #5, ¶ 21 ("The guards have also said we will have to pay for this—meaning speaking out and coming forward—if it is a lie … But I am worried they mean we will pay for speaking out about the truth and be punished by ICE, even though we are telling the truth.")
- Doe Declarant #10, ¶¶ 6-7 ("I know that someone has been punished for speaking out against the guards. [Name redacted] spoke up against the guards and they took her outside, threw her to the ground, and beat her up. The guards were filming [name redacted] while she was beaten up and handcuffed. Their film doesn't show the full story, they made it seem like she was violent."
- Doe Declarant # 15, ¶ 4 ("I have always been scared of retaliation from the guards for speaking up") and ¶ 15 ("I know how they retaliate against people for standing up for themselves.")
- Doe Declarant # 16, ¶ 9-11 ("The Congresspeople asked about the guards and the conditions in Irwin. The guards were mad because I had spoken out. The guards were shocked. The guards are watching us all.")

Eavesdropping on Detainees' Calls

- Doe Declarant #4 ¶ 42 ("In about early November 2020, an ICDC guard told me that "they" are now listening to all of the detainees' calls, even the calls in Spanish. I do not know exactly who the guard was referring to, but understood that he meant ICDC employees. The unexplained changes in volume during the calls with my family that have been occurring since September 2020 make me believe someone at ICDC is listening in.")
- Doe Declarant #5 ¶ 14 ("I have overheard the guards say my name and I believe they are talking about me. They make comments that make me think they are watching us, or listening to us, or recording us."); ¶ 16 (describing how after September 2020, the auditory nature of phone calls changed dramatically, leading her to believe someone is listening in)

- Doe Declarant #6, ¶¶ 12-13 ("[O]ne time, I told my family about the hunger strike when I spoke with them over the tablet. The call was cut off immediately.")
- Doe Declarant #8, ¶¶ 20 ("The phone will let you know when you have three minutes remaining and then when you have one minute remaining on the call before hanging up, but when I talk about my bad experiences with Dr. Amin, my phone calls just hangs [sic] up."); ¶23 ("This has never happened when I talk about other topics. It has definitely never happened before.")

Expedited Deportation

- Doe Declarant #4, ¶ 30 (hunger strikers threatened with deportation if they continued; detainee identified as a 'leader' of hunger strike was deported a few months later)
- Doe Declarant #11, ¶¶ 30, 32 ("[Name redacted]'s deportation did not follow [the] typical and normal process. Instead, at some point after she was brought back from her appointment with Dr. Amin, officers brought her up to intake and told that she was being deported that night. It was unusual. I haven't seen something like that before. That unusual process likely happened because [name redacted] confronted Dr. Amin about what he planned to do to her body. I believe that [name redacted] got swiftly deported because of her willingness to speak out against Dr. Amin. He had scheduled her for the hysterectomy, she confronted him about it, and she was deported quickly and in a really unusual way. It doesn't add up either way."

LEGAL STANDARD

I. Filing Under a Pseudonym

Courts have discretion to allow parties to "proceed anonymously." *See In re: Chiquita Brands International, Inc.*, 965 F.3d 1238, 1247 (11th Cir. 2020). To justify a need to proceed anonymously, a party 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 for courts to consider when determining whether to allow a party to proceed anonymously, including:

> (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; or
>
> (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. *See Id.*, n.5. Rather, a court must decide whether a plaintiff's privacy right outweighs the judicial presumption of openness through a totality-of-the-circumstances approach. *Id.*; *see also U.S. v. Ignasiak*, 667 F.3d 1217, 1239 (11th Cir. 2012) (agreeing that the privacy interests of informants assisting in

government investigations are "understandably paramount"); *Plaintiff B v. Francis*, 631 F.3d 1310, 1319 (11th Cir. 2011) (allowing plaintiffs to proceed anonymously where revealing their identities would subject them to immense psychological harm).

Courts may authorize plaintiffs to proceed without revealing their identities to defendants when there is a particularly high risk of retaliation or harassment. *See In re: Chiquita Brands*, 965 F.3d at 1248 (implying that the risk of paramilitary retaliation could serve as a factor in the calculus for determining if a party's risk of harm outweighs the presumption of openness); *Freedom From Religion Found., Inc. v. Emanuel Cnty. Sch. Sys.*, 109 F.Supp.3d 1353, 1358 (S.D. Ga. 2015) (holding the risk of retaliation based on students' religious beliefs—a matter of "utmost intimacy"—justified allowing plaintiffs to proceed anonymously); *see also 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), *vacated and modified in part on other grounds*, 899 F. Supp. 659 (D.D.C. 1995); *Campbell v. U.S. Dep't of Agric.*, 515 F. Supp. 1239, 1246 (D.D.C. 1981) (allowing plaintiffs to proceed anonymously in an action challenging the agency's interpretation of the Food Stamp Act); *Gomez v. Buckeye Sugars*, 60 F.R.D. 106, 107 (N.D. Ohio 1973) (allowing plaintiffs to proceed under pseudonyms in a Fair Labor Standards Act because the plaintiffs feared retaliation

from defendants who were their employers); *Yaman v. U.S. Dep't of State*, 786 F. Supp. 2d 148 (D.D.C. 2011) (allowing plaintiff to file her residential address under seal and ex parte to protect safety of her minor children).

II. Filing Under Seal

Courts may authorize documents to be filed under seal where a party shows good cause that overcomes 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.

Romero, 480 F.3d at 1247; *Doxe v. Volunteers of America, Southeast, Inc.*, 2014 WL 12606651, *2 (N.D. Ala. Aug. 7, 2014) (using *Romero* factors to find that privacy interest warranted sealing court filing in case involving retaliation for race

discrimination in workplace).

ARGUMENT

Each of the non-party declarants seeks to share their experiences and knowledge of abuses at ICDC in support of Ms. Oldaker and her legal action against ICE and DHS. Yet the declarants currently in ICE detention who are seeking to use a pseudonym and file under seal each face grave risk of retaliation, including accelerated removal from the country, if their identities are revealed.

The declarants who are not currently in ICE custody — and thus are proceeding under their own names but seeking to file under seal — fear retaliation against themselves and those they care about if their names are part of the public domain. Such retaliation would present in the form of re-arrest and deportation by ICE for those declarants still in the country; refusal of re-entry to the country for those declarants already deported who may prevail in their immigration appeals; and risk of harassment/intimidation in their country-of-deportation if their names are associated with (or otherwise made public as a result of) this litigation.[3]

Meanwhile, protecting the identities of the non-party declarants poses little risk of unfairness to Defendants as the declarants are not parties to this case. Moreover, the government will have the names of the declarants seeking only to file under seal, and the government does not need to know the individual identities

[3] *Id.*

of the declarants still in ICE custody in order to respond to the thematic substance of their declarations as relates to Ms. Oldaker's legal claims.

I. ANONYMITY IS NECESSARY TO PROTECT HIGHLY SENSITIVE AND PERSONAL INFORMATION OF THE NON-PARTY DECLARANTS STILL IN ICE CUSTODY

Weighing in favor of the non-party declarants under the *In re: Chiquita Brands* factors, numerous federal courts have recognized that information related to immigration status is highly sensitive and may warrant protection from disclosure. *See, e.g.*, *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1247 & n.8 (11th Cir. 2012) (noting that revealing immigration status of school children could lead to "criminal prosecution, harassment and intimidation" and identifying cases in which courts allowed immigrant plaintiffs to proceed anonymously); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1169 (9th Cir. 2000) (crediting plaintiffs' "highly vulnerable [immigration] status" as one of several factors weighing in favor of allowing plaintiffs to proceed anonymously); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (stating in a protective order ruling that allowing defendant employers to seek discovery regarding plaintiffs' immigration status could inhibit them from pursuing their rights "because of possible collateral wholly unrelated consequences, [and] because of embarrassment and inquiry into their private lives"); *Oah v. Tabor*, 1991 WL 120087, at *1 n.1 (allowing an immigrant plaintiff to proceed

anonymously).

The sensitivity of information relating to immigration status is further heightened when the action is against a governmental entity, which could use the information to deport immigrants involved in the lawsuit (in the case of the federal government) or facilitate those actions by the federal government (in cases of state or local governmental entities). For that reason, courts are especially inclined to shield the identity of noncitizens with uncertain or vulnerable immigration status who challenge governmental actions. *See, e.g., Lozano v. City of Hazelton*, 620 F.3d 170, 195 (3d Cir. 2010) (allowing plaintiffs to proceed without disclosing their identities to defendants, because plaintiffs "could legitimately 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); *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 against state statutes 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 immigrants to proceed anonymously as plaintiffs in case challenging a ballot initiative making it unlawful for any entity to knowingly or recklessly lease or rent property to undocumented immigrants).

Regarding the non-party declarants in this case who are seeking to use a pseudonym and file under seal, disclosing their names in an action against DHS means disclosing their names to the very government agency that controls immigration removal and has very recently (i.e., just days and weeks ago) demonstrated a pattern of retaliatory deportation of witnesses similarly situated to these declarants. Thus, the non-party declarants credibly fear that unless their declarations are filed pseudonymously, they will be deported next.[4] *See Lozano*, 620 F.3d at 195 (allowing plaintiffs to not reveal their identities to defendant because plaintiffs would be discouraged from vindicating their rights "if doing so would require alerting federal immigration authorities to their presence"); *Int'l Refugee Assistance Project (IRAP) v. Trump*, No. TDC-17-0361, 2017 WL 818255, at *2 (D. Md. Mar. 1, 2017) (allowing plaintiffs to proceed anonymously partly because disclosure of plaintiffs' identities to the Government could dissuade them from pursuing their rights in court while their relatives' visa applications were pending); *Puente Az.*, 2014 U.S. Dist. LEXIS 166223, at *5–*6 (finding that undocumented immigrant declarants "reasonably fear serious consequences if their identities are disclosed" because defendants are seeking to prosecute the conduct

[4] Nooman Merchant, US deports migrant women who alleged abuse by Georgia doctor, *Associated Press* (Nov. 11, 2020), https://apnews.com/article/us-deports-migrant-women-georgia-doctor-b6a5fc1e2d4a822eb3767f9a858ea670 ("'Mbeti's fear in answering the investigators' questions was that it would make her immigration case worse,' Mukherjee said. 'And within hours of the interview, her worst fears were realized.'").

discussed in their declarations); *Keller*, 2011 WL 41902, at *2 (allowing plaintiffs to not reveal their identities while challenging a local ordinance that would criminalize renting to undocumented immigrants).

II. DISCLOSURE OF THE IDENTITIES OF THE DECLARANTS STILL IN CUSTODY WOULD CREATE A SIGNIFICANT RISK OF PSYCHOLOGICAL AND EVEN PHYSICAL HARM

Another *In re: Chiquita Brands* factor that weighs in favor of the non-party declarants being allowed to proceed as "Jane Does" is the significant anxiety and psychological harm they experience due to fear of deportation and other retaliation if they are required to reveal their names. Moreover, having their names "in the public domain, especially in the Internet age," would create significant risk of psychological and even physical harm at the hands of ICDC employees who control the declarants' daily lives and who may reasonably view declarant's testimony in this case as threatening their livelihood. *See* Doe Declarant #1, ¶ 21 (guard stated that detainees' complaints would cause guards to lose their job); *see also Women Prisoners of the D.C. Dep't of Corrs.,* 877 F. Supp. at 639 n.1 (allowing prisoners to proceed under pseudonyms due to the risk of retaliation by prison guards). The risk of harm to the non-party declarants comes in the form of, without limitation, verbal abuse or interrogation, physical abuse, intentional neglect of declarants' needs, or denial of discretionary services or privileges.[5]

[5] See "Factual Background" above for specific examples from the Doe Declarations.

Indeed, many of the non-party declarants attest in their declarations to ICDC officials' various forms of punishment of detainees who protest their treatment or conditions — e.g., ignoring detainees' requests for medication, locking them in their housing units, reprimanding them for pretextual reasons, shortening the time they are allowed to call their families, and, again, threatening them with prioritized deportation. *See Plaintiff B*, 631 F.3d at 1319 (allowing plaintiffs to proceed anonymously where revealing their identities would subject them to immense psychological harm).

III. THIS ACTION IS AGAINST THE GOVERNMENT, WHICH WEIGHS IN FAVOR OF ANONYMITY AND SEALING

Another *In re: Chiquita Brands* factor that weighs in favor of allowing the anonymity of the non-party declarants still in custody is the fact that this action is against the Government, rather than a private party. "[A]lthough the mere filing of 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." *IRAP*, 2017 WL 818255, at *3; *see also 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[.]"). Because there is no due process concern when the Government is the

defendant, this is all the more reason to credit the powerful considerations favoring anonymity for the non-party declarants still in custody. This argument also carries over to the non-Jane Doe declarants who have been released, providing support for their request to file their declarations under seal.

IV. ANY RISK OF UNFAIRNESS TO DEFENDANTS IS MINIMAL AND OUTWEIGHED BY THE RISK TO THE NON-PARTY DECLARANTS

Under the last *In re: Chiquita Brands* factor, any potential unfairness to Defendants is minimal and outweighed by the non-party declarants' need for anonymity (or, in the case of the released declarants, restricting public access to their names). All of the declarants are third parties. The tradition of public access and open proceedings is implicated to a much lesser degree when the status of third-party declarants (rather than the actual litigants) is at issue. *See Puente Az.*, No. CV14-1356 PHX DGC, No. 2016 WL 7743406, at *4 (D. Ariz. Jan. 22, 2016) (noting in a protective order ruling in favor of non-party Doe declarants that "the public's interest in an open and fair adjudication is not seriously impaired" when the plaintiffs are openly identified and the proceedings would remain public); *cf. J.W.*, 318 F.R.D. at 201 (noting that courts are wary of permitting anonymous litigation when doing so would pose "litigation obstacles for defendants"). Here, the real parties-in-interest—Ms. Oldaker, Thomas Giles, ICE, William Barr, DOJ, Chad Wolf, DHS—are fully identified. Allowing the non-party declarants to

proceed via pseudonym and under seal (or, in the case of the released declarants, only under seal) would not seriously hinder the Government's defense. *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 justify protecting information when doing so would not prejudice the party who will be prevented from seeing the information.").

In the event Defendants determine later in the litigation that they have an actual need for the identities of the non-party declarants who are still in custody, they could then make a motion attempting to demonstrate such need, at which point a protective order for the declarants' identities may be necessary.[6]

V. FILING THE ANONYMOUS DECLARATIONS UNDER SEAL IS NECESSARY TO PROTECT THE PERSONALLY IDENTIFYING INFORMATION CONTAINED THEREIN

A. The anonymous designation is insufficient to protect the non-party declarants who are still in custody

Even if the non-party declarants who are still in ICE custody are allowed to proceed anonymously as "Jane Does," their declarations contain accounts of events and interactions, including with ICDC guards and other officials, that could

[6] *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 the employ of counsel for defendants in a suit challenging the presidential memorandum prohibiting accession of transgender military members); *Alexander v. FBI*, 186 F.R.D. 54 (D.D.C. 1998) (limiting disclosure of plaintiffs' medical information to counsel of record and not the defendant agency); *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).

still personally identify the declarants to ICDC employees, even without the declarants' names being used. As explained above, the Jane Doe declarants risk multiple forms of daily retaliation from ICDC officials, resulting in psychological and even physical harm, if ICDC officials are able to identify the declarants. Safeguarding them therefore requires that their pseudonymous declarations also be filed under seal, accessible only to the parties and their counsel. This double layer of protection is warranted due to the fact that the declarants are speaking out against ICE—the very agency that has the power to deport them—and given the strong evidence that ICE has recently and repeatedly retaliated against detainees who have indicated a willingness to testify about some of very same issues as the declarants. Indeed, where, as here, the subject matter of the case is so sensitive, or where, as here, the risk of retaliation is so great, courts have seen fit to approve both anonymity and filing under seal. *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 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").

In addition to the somewhat unique circumstances of this case that warrant

double protection for the identities of the non-party declarants, the Eleventh Circuit's *Romero v. Drummond* "good cause" balancing test also weighs in favor of the requested sealing. 480 F.3d at 1245, 1247. First, the non-party declarants still in custody have a substantial privacy interest in protecting their identities because of their vulnerable immigration status. This is primarily because of the risk of prioritized deportation they face if their anonymous declarations were to be made public such that ICDC officials could access them, piece together their identities, and report them to ICE, an agency described as "ruthless."[7] Retaliatory deportation is a significant harm that weighs in favor of sealing. While less severe than removal, the other forms of retaliation described above that declarants reasonably fear if officials are able to piece together their identities also weighs in favor of sealing. The further harm of the psychological fear and anxiety the declarants would suffer if they thought that their identities might be discoverable to ICDC officials and ICE further weighs in favor of sealing. Additionally, sealing would not impair the court's functions as Defendants and their counsel would still have access to the declarations to be able to respond to their substance. *See Hood*, 2017 WL 2408196 at *3 (allowing anonymity and sealing where the parties' attorneys could still access the sealed documents).

[7] Fiona Harrigan, "Even as COVID-19 grips nation, ICE remains ruthless," *Sun Sentinel*, Apr. 20, 2020, https://www.sun-sentinel.com/opinion/commentary/fl-op-com-harrigan-coronvirus-ice-immigration-arrests-20200419-o5jzosh3qfcltklywb633gcz6q-story.html (last visited Nov. 18, 2020).

To be sure, there are multiple important matters of public concern at issue in Ms. Oldaker's case. These include abuse of vulnerable populations held in government custody, retaliation for speech and prior restraint of speech by government offices and officials, and 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 evidence in the case, which is the majority of the material. It is only necessary to seal the non-party declarations because of the great likelihood and magnitude of potential harm to the Jane Doe declarants in particular, but also the declarants proceeding in their own names (as further explained below), if their declarations are allowed to be made public.

Lastly, as to the sixth *Romero* factor, there are no less onerous alternatives to sealing that would adequately protect the non-party declarants still in custody since, for the reasons explained, pseudonyms alone do not adequately protect them from risk of harm. Further, it would be impossible to effectively redact all identifying information from the declarations without rendering them meaningless since it is difficult to know precisely what pieces of information contained in the declarations the employees at ICDC may be able to piece together to identify the declarants. For example, in one Jane Doe's declaration, she alleged that an ICDC official told her to "mind your own business and keep your mouth shut." In other declarations, there are references to the housing units the detainees lived in and the procedures they had

to go through before a Congressional visit. Non-party ICDC officials could easily deduce who made these declarations because of their involvement in these situations, and removing every instance like this would leave the declarations barren of useful information. *See Tobar v. Federal Defenders of the Middle District of Georgia, Inc.*, 2014 WL 12650710, at *2 (M.D. Ga. Feb. 24, 2014) (regarding attempt to redact rather than seal a document containing privileged information: "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.").

In sum, considering them in totality, the *Romero* factors balance in favor of sealing the Jane Doe declarations.

B. Filing under seal would protect the non-party declarants who have been deported or released.

Filing under seal would also protect all non-party declarants who are not in ICE custody and therefore are not filing as Jane Does. While they do not face all the same threats of retaliation as the Jane Doe declarants, there is nevertheless sufficient risk of harm to justify sealing their declarations. The balance of relevant factors supports sealing these affidavits.

First, the degree and likelihood of injury if their names are made public remains high. Although these individuals do not face the risk of current retaliation by ICDC officials, they remain at risk of retaliatory harm by immigration officials now and in the future. Two of named declarants remain in the United States but have

been released from physical custody. Unless and until their immigration cases and/or removal orders are resolved, however, they remain in constructive custody and at risk. These risks include prioritized execution of their removal orders or their return to carceral immigration custody. Consequently, filing their motions under seal could help protect them from this harm.

Second, although four of the declarants are not in ICE custody, these individuals and people they care about could seek to return lawfully to the United States in the future. They may reasonably fear, however, that if their names become public the government would prevent their reentry as retaliation for cooperating in the investigations and litigation concerning ICDC officials and Dr. Amin. Thus, they face related harms as identified by the Jane Doe declarants should they attempt to pursue lawful admission to the U.S. in the future.

The named declarants also fear harm in the countries where they have been (or might still be) deported to, should their names become widely disseminated as a result of participating in this litigation. These individuals fear that if their names become publicized, they face increased risk of persecution or targeting by gangs or other bad actors. For example, one declarant attests, "I want to maintain my privacy and preserve my safety." This is largely because recent known deportees from the United States to Central and South America are often targeted.[8]

[8] *See, e.g.*, "Deported to Danger,"*supra* note 3 ("According to Salvadoran authorities, the

For the same reasons discussed above with respect to the Jane Doe declarants, the *Romero* factors also balance in favor of sealing the named declarants' declarations.

CONCLUSION

For the foregoing reasons, Ms. Oldaker respectfully requests that the Court permit the non-party declarants currently in ICE custody to proceed via pseudonym and file their declarations under seal, and to permit the remaining non-party declarants proceeding under their own names to file under seal.

DATED: November 19, 2020

deportees at the highest risk of harm are alleged former and current gang members and those with alleged links to gangs. These alleged former and current gang members are sometimes killed by their own or rival gangs (they are also killed by state actors or death squads []). An individual deportee's reported status as a gang member by the press, by the police, or by other observers, may or may not be true. Accounts of killings of deportees by gangs in court filings and press accounts indicate that a deportee might be killed by his own gang for not "re-activating" with the gang once in El Salvador, battling for power within the gang, committing crimes like robbery, or calling attention to the gang through flamboyant behavior. Gangs reportedly kill members of rival gangs, or those assumed to be members, for living in or transiting their area, including one who was evangelizing after leaving behind gang life and one who was recently deported.")

Respectfully submitted,

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