The Honorable Lauren King

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-LK

JOINT RESPONSE TO JANUARY 31, 2022 ORDER TO CONSOLIDATE POSITIONS ON MATERIAL TO BE SEALED OR DESIGNATED AS HSD

INTRODUCTION

On January 31, 2022, this Court entered an order (Dkt. No. 587) striking seventeen pending motions to seal or treat filings as "highly sensitive documents" ("HSDs"). *See* Dkt. Nos. 459, 464, 465, 474, 479, 484, 489, 496, 501, 505, 513, 514, 543, 544, 562, 564, 578. In addition, the Court ordered the parties to file "a joint statement concisely consolidating their positions on the materials they want sealed[.]" Dkt. No. 587 at 1.[1] Set forth below are the parties' positions

[1] The Court initially instructed the parties to submit their joint statement, along with an "updated Joint Status Report," by March 29, 2022. Dkt. No. 587 at 1, 6. In subsequent orders, however, the Court struck the March 29, 2022 deadline and instead instructed the parties to file the joint status report on or before July 8, 2022, and the joint statement on the materials filed under seal by September 30, 2022. *See* Dkt. No. 591, Order Granting Joint Motion to Stay Proceedings and Striking the Joint Statement Deadline, at 7; *see also* Dkt. Nos. 604 & 605, Minute Orders; *see also* Dkt. No. 601 (Joint Status Report filed July 8, 2022).

on the materials submitted for sealing or designation as HSDs. Attached as Appendix A is a chart setting forth the parties' positions on each document at issue, as the Court requested. *See* Dkt. No. 587 at 6. Attached as Appendix B is a declaration from Matthew D. Emrich, U.S. Citizenship and Immigration Services, offered in support of Defendants' requests to seal certain documents or designate them as HSDs. Finally, in accordance with the Court's January 31 Order, the flash drive accompanying this filing contains digital copies of the documents proposed for sealing, appearing in the same order that they appear in the chart at Appendix A. *See* Dkt. No. 587 at 7.

BACKGROUND

Plaintiffs filed this class-action lawsuit in January 2017 against the U.S. Citizenship and Immigration Service ("USCIS") and various individual USCIS and other Government officials in their official capacities. The basis of the lawsuit is the alleged unlawfulness of USCIS' Controlled Application Review and Resolution Program ("CARRP"), the process USCIS has employed since 2008 to evaluate applications for immigration benefits that USCIS believes may have connection to a national security concern. (*See* Dkt. No. 47, Plaintiffs' Second Amended Complaint, ¶¶9-11). The Court has certified two nationwide classes of individuals whose pending benefit applications have been subject to CARRP: (1) those with an application for naturalization pending before USCIS for more than six months, and (2) those with an application for adjustment of status pending before USCIS for more than six months. (Dkt. No. 69, Order Granting Plaintiffs' Motion for Certification of an Adjustment of Status Class and a Naturalization Class).

On August 18, 2017, the Court approved the parties' stipulated protective order, which treats as confidential materials containing "information relating to the basis on which Defendants

have identified any individual as a 'National Security Concern' under CARRP and any information bearing on why an individual's immigration application was or is being processed pursuant to CARRP"; sensitive but unclassified information; and information compiled for law enforcement purposes. (Dkt. No. 86). On May 18, 2018, the Court ordered that the "[d]isclosure of, and access to, the names, Alien numbers "A numbers," and application filing dates of the unnamed plaintiff members" be limited to Plaintiffs' attorneys, their experts, and the Court and court personnel. (Dkt. No. 183; *see also* Dkt. No. 192, Order Modifying Attorneys' Eyes Only ("AEO") Provision to also include staff of Plaintiffs' counsel).

On March 1, 2021, the Western District of Washington entered General Order 3-21, which is intended to protect HSDs from potential breaches of the Court's computer systems by requiring that they be filed only in paper form. *See* General Order 3-21. The General Order defines an HSD as any document whose subject matter "renders it of potential value to malicious nation-state actors seeking to harm the interests of the United States." *Id.* at § 1.a. The Order provides that the Court "will consider" whether the document involves national security among other things. *Id.* It further lists documents that generally are not considered HSDs, including administrative immigration records. *Id.* at § 1.b. The General Order requires the party seeking to file an HSD to submit the document to the Clerk's Office in paper form, along with a motion for leave to treat the document as an HSD. *Id.* at § 2.b-c. It also requires the presiding judge to resolve any disputes between parties as to whether a document should be designated as an HSD. *Id.* at § 1.c. The General Order forbids any electronic filing of HSDs, even under seal. *Id.* at § 2.f.

The seventeen motions to seal and treat documents as HSDs that this Court struck pertain to the parties' filings on their respective summary judgment motions and *Daubert* motions.

Although both Plaintiffs and Defendants have filed these motions, all the motions to seal or for HSD treatment are at Defendants' request. Where Plaintiffs have filed motions to seal or treat documents as HSDs, it has been because Defendants identified information they maintain should be sealed or designated as highly sensitive under General Order 3-21. Plaintiffs have opposed virtually all of Defendants' requests, arguing that Defendants have not demonstrated that the filings meet the standard for being sealed or the definition of an HSD.

On March 25, 2021, Plaintiffs filed a sealed *Daubert* motion to exclude testimony by Defendants' expert Bernard Siskin, Ph.D. (Dkt. No. 459, 463), and publicly filed a redacted version of the motion (Dkt. No. 460). On March 25, 2021, Plaintiffs also submitted to the Court by hand their Motion for Summary Judgment[2] with supporting exhibits and declarations, accompanied by a request for leave to treat the motion and select supporting documents as HSDs (Dkt. No. 464). Plaintiffs simultaneously moved to seal their summary judgment motion and certain other exhibits (Dkt. No. 465).

On March 25, 2021, Defendants filed a sealed *Daubert* motion to exclude testimony by Plaintiffs' expert Sean Kruskol, with supporting exhibits (Dkt. Nos. 474, 475, 476), and publicly filed a redacted version of that filing (Dkt. Nos. 471, 473). On the same date, Defendants also filed a separate *Daubert* motion to exclude testimony from Plaintiffs' experts Jay Gairson, Thomas Ragland, and Nermeen Arastu, with supporting exhibits (Dkt. Nos. 477, 478, 480). While this motion to exclude itself was filed publicly without redaction, Defendants moved the Court to seal select supporting exhibits in support of the motion. (Dkt. Nos. 479, 480).

[2] Because Plaintiffs' Summary Judgment Motion was filed in paper form under General Order 3-21, it was not assigned an ECF docket number at the time of filing. The same is true for all other documents described *infra* that were filed in accordance with General Order 3-21.

On April 6, 2021, Defendants filed a sealed opposition to Plaintiffs' *Daubert* motion (Dkt. Nos. 484, 485). On the same date, Plaintiffs filed sealed oppositions to Defendants' two *Daubert* motions (Dkt. Nos. 489, 493, 496, 499). The parties filed redacted versions of all three oppositions on the public record. (Dkt. Nos. 487, 490, 497). On April 8, 2021, the parties filed a joint stipulation agreeing to seal specified portions of Plaintiffs' *Daubert* motion. (Dkt. 501). On April 9, 2021, Defendants filed a sealed reply to Plaintiffs' opposition to Defendants' motion to exclude Plaintiffs' expert Mr. Kruskol, with supporting exhibits (Dkt. Nos. 505, 506, 507). Defendants also filed redacted versions of this reply and supporting exhibits on the public record. (Dkt. Nos. 508, 509). Defendants filed a reply to Plaintiffs' opposition to Defendants' motion to exclude Plaintiffs' other experts but did not seek to seal that reply. (Dkt. 504).

On May 3, 2021, Defendants submitted to the Court by hand their combined opposition to Plaintiffs' summary judgment motion and cross-motion for summary judgment, with supporting documents, accompanied by a request for leave to treat the filing as an HSD under General Order 3-21 (Dkt. No. 513). Defendants also moved to seal their summary judgment filing (Dkt. Nos. 514, 577, 578). On June 11, 2021, Plaintiffs filed, in paper copy, their opposition and reply to Defendants' summary judgment filing, along with a motion to treat the opposition and select supporting documents as HSDs (Dkt. No. 543). Plaintiffs also moved to seal their opposition filing (Dkt. No. 544). On July 2, 2021, Defendants submitted to the Court by hand their reply to Plaintiffs' opposition filing, along with a motion to treat the reply as an HSD (Dkt. No. 562). Defendants also moved to seal their reply and certain supporting exhibits (Dkt. No. 564).

On July 15, 2021, the parties submitted a joint stipulation seeking Court authorization to file public versions of their summary judgment briefs and a declaration Plaintiffs had submitted

as an HSD, with provisional redactions over information designated as confidential and/or related to national security, subject to the pending motions to seal or to designate those filings as highly sensitive under General Order 03-21. Dkt. No. 568. Plaintiffs renewed this request to submit provisionally redacted filings in an unopposed motion on March 4, 2022 (Dkt. No. 593), which the Court granted on March 14, 2022, Dkt. 594. The parties therefore submitted a joint public filing on April 4, 2022, consisting of the four summary judgment briefs and the Third Declaration of Jennie Pasquarella, as provisionally redacted by Defendants. Dkt. 595-1 through 595-5. Plaintiffs maintain their position opposing Defendants' assertion of confidentiality and HSD designations.

LEGAL STANDARD

In general, the public has a right "to inspect and copy public records and documents, including judicial records and documents." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (internal quotes and citations omitted). This Court recognizes a "strong presumption in favor of access to courts," *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003), under which a "motion, opposition, or reply" should remain sealed "[o]nly in rare circumstances." LCR 5(g)(5). The preference for open court records "applies fully to dispositive pleadings, including motions for summary judgment and related attachments." *Kamakana*, 447 F.3d at 1179.

The strong presumption of public access to court records is not absolute, however, and "can be overridden given sufficiently compelling reasons for doing so." *Foltz*, 331 F.3d at 1135. But, "the party seeking to seal a judicial record must articulate compelling reasons supported by specific factual findings." *Kamakana*, 447 F.3d at 1178-79 (quoting *Foltz*, 331 F.3d at 1135 (internal citations omitted)).

The Ninth Circuit has concluded that "[i]n general, 'compelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes.'" *Kamakana*, 447 F.3d at 1179. The Ninth Circuit has identified that potential harm to national security constitutes such a compelling reason to shield information from public disclosure. *See Ground Zero Ctr. for Non-Violent Action v. United States Department of Navy*, 860 F.3d 1244, 1262 (9th Cir. 2017) ("National security concerns can, of course, provide a compelling reason for shrouding in secrecy even documents once in the public domain."); *see also United States v. Ressam*, 221 F.Supp.2d 1252, 1263 (W.D. Wa. 2002) (recognizing "national security" as a "compelling interest . . . unusual in its ongoing nature" and sufficient to justify continued nondisclosure); *see also United States ex rel. Kelly v. Serco, Inc.,* No. 11CV2975 WQH RBB, 2014 WL 12675246, at *4 (S.D. Cal. Dec. 22, 2014). But, "[i]t is not enough that the documents … '*implicate* national security'[], in some vague sense." *Ground Zero Ctr.*, 860 F.3d at 1262. (Emphasis in original).

The Ninth Circuit recognizes an exception to the stringent "compelling reasons" standard for information submitted on non-dispositive motions. *Kamakana*, 447 F.3d at 1179; *Ctr. For Auto Safety v. Chrysler Grp.*, 809 F.3d 1092, 1098-1102 (9th Cir. 2016). The party seeking to seal records submitted with non-dispositive motions need only demonstrate "good cause." *Kamakana*, 447 F.3d at 1179; *Ctr. For Auto Safety*, 809 F.3d at 1098-1102. If the records are submitted in support of a dispositive motion, such as for summary judgment, the party seeking to seal them must demonstrate "compelling reasons." *Kamakana*, 447 F.3d at 1179.

Local Civil Rule 5(g) also requires the party seeking to seal a document to provide a "specific statement of the applicable legal standard and the reasons for keeping a document

under seal, including an explanation of (i) the legitimate private or public interests that warrant the relief sought; (ii) the injury that will result if the relief sought is not granted; and (iii) why a less restrictive alternative to the relief sought is not sufficient." LCR 5(g)(3)(B).

THE PARTIES' POSITIONS[3]

I. Defendants' Statement

Defendants have determined that protection over many of the 185 documents filed under seal and listed in Appendix A may be lessened or removed entirely, while compelling reasons exist to keep the remaining information sealed.[4] In most instances, Defendants have filed, or do not object to filing, redacted public versions of documents submitted under seal.[5]

Additionally, while Defendants maintain all but two of their HSD designations under General Order 3-21, they have prepared redacted versions of many of these HSDs, which no longer include sensitive, national security information that could render them "highly sensitive." Working with Plaintiffs, Defendants publicly filed redacted versions of the parties' summary judgment materials on April 4, 2022, with the Court's approval. (Dkt. 595).

The information Defendants wish to protect falls into four categories: information tending to reveal the CARRP status of specific individuals; information describing USCIS'

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[3] The parties agree that certain documents containing personally identifiable information should be filed with redactions in accordance with LCR 5.2. *See* Appendix A, Doc Nos. 3, 56, 62, 69, 118, 152, 184.

[4] Defendants have determined that 41 documents filed under seal may be filed publicly without redactions. *See* Appendix A, Doc Nos. 11, 30, 34, 39, 47, 50, 54, 65, 69, 70, 72, 77-80, 83, 96, 98, 100, 105, 106, 117, 118, 127, 131, 133, 135, 138, 141, 144, 145, 147, 157, 162, 167, 174, 176, 177, 180, 183, 184.

[5] As discussed *infra*, the only documents Defendants are not offering to file publicly, even in redacted form, are A-file excerpts and CARRP training and guidance materials. *See* Appendix A, Doc Nos. 2, 4-10, 18-23, 71, 81, 84-94, 101, 104, 107-116, 119, 120, 123-126, 128-130, 132, 134, 136, 137, 140, 142, 143, 148, 149, 153-156, 158-161, 165, 166, 168-170, 173, 175.

internal processes for handling CARRP cases; information regarding USCIS and third-party law enforcement agency investigative processes; and law-enforcement sensitive statistical data related to CARRP cases. Defendants address below the reasons why each category of information requires protection from public disclosure. Notwithstanding Plaintiffs' insistence to the contrary, Defendants have amply justified their request to seal documents or designate them as HSDs. Furthermore, Defendants have included as much specificity in this memorandum and in Appendix A as is possible on the public record, while also complying with the Court's direction to "concisely" consolidate the Government's position on the materials Defendants seek to seal. Should the Court need additional information regarding any document at issue, Defendants will happily provide it, likely in a sealed or classified submission, as appropriate.

A. Documents Revealing CARRP Status.

Compelling reasons justify shielding documents that may reveal an individual's CARRP status from public disclosure. *See* Appendix A, Doc Nos. 1-10, 13-25; *Kamakana*, 447 F.3d at 1179.[6] Defendants designated as HSDs all documents that tend to indicate whether a particular individual's application was subject to CARRP, and why the individual was subject to CARRP, because it is national security-related information. This includes both parties' summary judgment briefs, excerpts from individual A-Files, portions of various expert witness reports, two sworn declarations, and an excerpt from an agency deposition. *See* Appendix A, Doc Nos. 1-10, 13-25. The General Order defines an HSD, in part, as information that "involves[] matters of national security." General Order 3-21 at 1-2. USCIS utilizes CARRP to identify cases that

[6] Plaintiffs argue that this Court should apply the "compelling reasons" standard to determine whether the documents at issue should be considered HSDs. Assuming for the purpose of argument, without conceding that is the correct standard, the documents at issue here plainly meet it.

raise potential national security ("NS") concerns and assess whether such concerns affect the applicant's eligibility for the immigration benefit sought. *See* CAR000001, Policy for Vetting and Adjudicating Cases with National Security Concerns. Under CARRP, an "NS concern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in" one of the national security grounds for removal. *Id.; see also* 8 U.S.C. § 1182 (a)(3)(A), (B), or (F), or §1227(a)(4) (A) or (B). Thus, publicly disclosing information about whose applications are subject to CARRP and why would necessarily reveal the identities of individuals whom USCIS suspects of presenting threats to national security. (Appendix B, Declaration of Matthew B. Emrich, ¶ 9). And given that USCIS relies heavily on information shared by third-party law enforcement agencies in identifying and vetting NS concerns (*see* Dkt. No. 529, Declaration of Russ Webb, at ¶ 19), publicly identifying applicants who are or have been subject to CARRP could compromise the national security investigations of USCIS and other government agencies involving the applicant or his or her close associates. (Appendix B, ¶¶ 10-11). Detailed information about which individuals may be of interest to the government as national security threats, and why, could be used by malicious actors to determine whether their organizations or specific plans have come to the attention of the government, and to tailor their activities to evade future detection. (Appendix B, ¶ 10).

This Court has previously recognized the dangers of disclosing an individual's CARRP status to the public. *See* Dkt. No. 162 at 3 ("The Court acknowledges that potential national security threats may exist with regard to specific individuals on the class list."). In seeking AEO protection over lists of *Wagafe* class members, Defendants argued that if an applicant becomes aware of an investigation prematurely, he or she may change behavior, and possibly coordinate

with others to prevent government law enforcement agencies from collecting relevant evidence or to provide misinformation. *See* Dkt. No. 126 at 3. Additionally, notification to bad actors that their applications were subject to CARRP could lead them to determine that they are under investigation by government law enforcement agencies and prompt them to disrupt such investigations. *See id.* at 3-4. In light of the risks and concerns Defendants demonstrated, this Court ordered that the CARRP status of all unnamed class members be shielded from the public when it ordered AEO protection over the class lists. *See* Dkt. No. 183.

Contrary to Plaintiffs' assertions, Defendants by no means seek to withhold documents wholesale from the public by designating them as HSDs and requesting that they be sealed. *See* Plaintiffs' Statement at A.3. Indeed, this Court's local rules direct that immigration records generally be filed under seal due to the sensitive nature that they contain. LCR 5.2(c). Defendants have merely identified documents that meet the definition of an HSD, as ordered by the Court, and filed them in the manner proscribed in this Court's General Order. *See* General Order 3-21. Defendants do not object to the public filing of redacted versions of many of these HSD materials. Indeed, with the Court's approval, Defendants filed on the public record versions of the parties' summary judgment submissions that were redacted for national security information, and are willing to do the same for many other documents which Defendants have identified as HSDs. *See* Appendix A, Doc Nos. 3, 13, 17, 24. The only exceptions are excerpts of A-Files pertaining to specific named Plaintiffs, which *in this case* cannot be redacted in a manner that would shield the person's CARRP status. *See* Appendix A, Doc Nos. 2, 4-10, 18-23. This is because a decision to disclose the A-Files of some individuals, but not others, or the presence or absence of significant redactions to a particular A-File that is disclosed publicly, could indicate to even inexperienced observers whether a particular application was subject to

CARRP.[7] (Appendix B, ¶ 12). Further, public disclosure of redacted A-File excerpts could also assist the observer in determining whether the applicant was or is the subject of a third-agency investigation, including a law enforcement or national security investigation. (Appendix B, ¶ 11). Accordingly, compelling reasons support Defendants' request that the A-File excerpts not appear on the public docket even in redacted form. *See*, Appendix A, Doc Nos. 2, 4-10, 18-23.

If the Court finds that any of the documents Defendants have identified as HSDs do not meet that definition, they should nevertheless be sealed. As described above, the potential harm to national security from disclosing the identities of individuals who have been identified as national security concerns is significant. Plaintiffs' claim that these documents are merely "administrative immigration records" is simply wrong. *See* Plaintiffs' Statement at A.3. The information regarding CARRP status contained in the documents at issue here is far different from the types of information contained in a typical A-File. *See* Appendix B, ¶ 12. The public has not historically had a right to access national security-related information contained in the A-Files, or government files in national security investigations, and should not be allowed to access the information at issue here. *See Times-Mirror Co. v. U.S.*, 873 F.2d 1210, 1213 (9th Cir. 1989) (the public has no historical right of access to pre-indictment investigative processes). Accordingly, there are compelling reasons to shield from public disclosure documents containing CARRP status information. (*See generally,* Appendix B; *see also* Dkt. No. 183, allowing Defendants' request for AEO protective order over A-File information).

[7] It is irrelevant that the Named Plaintiffs may believe that they are subject to CARRP, *see* Plaintiffs' Statement at A.2, as Defendants have never confirmed or denied their status to them.

B. Documents Describing USCIS' Tools and Methods for Handling Cases in CARRP.

Among the materials that Defendants seek to seal are thousands of pages of internal, USCIS documents instructing officers on how to apply CARRP. *See* Appendix A, Doc Nos. 1, 3, 11-13, 15, 16, 32, 55-58, 63, 64, 71, 73-75, 81, 82, 84-94, 99, 101-104, 107-116, 119, 120, 123-126, 128-130, 132, 134, 136, 137, 140, 142, 143, 148, 149, 151, 153-156, 158-161, 165, 166, 168-170, 173, 175, 178. Most of these documents are training materials in the form of presentation slides, but this grouping also includes operational guidance memoranda. Compelling reasons exist for maintaining these documents entirely under seal. *Kamakana*, 447 F.3d at 1179. The documents reveal sensitive information showing how USCIS evaluates and makes decisions concerning applications presenting national security concerns. (Appendix B, ¶¶ 14-15). This includes sensitive information regarding screening and vetting practices and law enforcement checks pertinent to cases reviewed through CARRP. Publicly disclosing this information would reveal sensitive, internal case-handling procedures that would risk circumvention or evasion of the law. (Appendix B, ¶¶ 14-15). Malicious actors privy to such information could learn specific factors USCIS considers in its investigations and gain insight into how it decides applications presenting a possible national security risk, and better prepare to slip through USCIS' vetting without triggering additional scrutiny. (Appendix B, ¶¶ 14-15); *see also* Dkt. No. 282, Declaration of Matthew D. Emrich (describing harms if sensitive information in the certified administrative record were to become public). The public historically has not had a right of access to sensitive, internal government training material, especially training materials pertaining to handling of national security matters. *See Times-Mirror Co.*, 873 F.2d at 1213. The threat to national security of releasing the CARRP training materials and guidance memoranda is a compelling reason to keep this information under seal. *See* Order on Production

of 50 Case Sample, Dkt. No. 162 at 3, quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("no governmental interest is more compelling than the security of the Nation").

Redacting the lengthy training materials for public filing is not a reasonable alternative, nor would it benefit the public, where most of the text would be shielded, leaving the disclosed, unconnected phrases divorced from context and susceptible to misinterpretation. In many instances, the absence of context would render disclosed portions incomprehensible to an outside observer. Moreover, Plaintiffs' citations generally cherry-pick a few isolated pages or lines from these training documents, which typically consist of more than 100 pages, to support inaccurate conclusions to force-fit their theory of the case. *See, e.g.,* Pls' Summ. J. Br. at 5, ln. 13-14; 29, ln. 4-12; 39, ln. 26-27; 40, ln. 18-22 (Dkt. 595-1). The burden on the government in preparing these lengthy documents for public filing would be significant. Furthermore, placing a heavily redacted training document in the public eye, with cherry-picked statements lacking complete context, severely detracts from any presumptive benefits of disclosure. In an effort to be as transparent as possible without jeopardizing national security interests, Defendants have released dozens of pages of documents publicly in this case that describe the detailed workings of CARRP. *See* Dkt. 286, Certified Administrative Record (Public Portion). Accordingly, Defendants respectfully ask the Court to keep sealed USCIS CARRP training materials and guidance memoranda that Defendants have assessed and determined are too sensitive for public disclosure for the compelling reasons described above. *See* Appendix A at, Doc Nos. 1, 3, 11-13, 15, 16, 32, 55-58, 63, 64, 71, 73-75, 81, 82, 84-94, 99, 101-104, 107-116, 119, 120, 123-126, 128-130, 132, 134, 136, 137, 140, 142, 143, 148, 149, 151, 153-156, 158-161, 165, 166, 168-170, 173, 175, 178.

C. Investigative Processes.

Defendants also seek to seal documents that discuss sensitive aspects of USCIS' investigative processes. *See* Appendix A, Doc Nos. 1, 3, 13-15, 32, 35-37, 55-57, 62-64, 67, 68, 73, 74, 76, 102, 103, 150, 151, 163, 172, 178, 179, 181, 182. These include small and discrete portions of sworn declarations, deposition transcripts, and expert witness reports that reference or describe steps USCIS takes in evaluating and processing applications for certain benefits, both those processed through CARRP and those that are not. Compelling reasons justify keeping these documents under seal. *See Kamakana*, 447 F.3d at 1179. Redacted versions either have been filed publicly or are available for filing on the public docket, as noted in Appendix A.

As with the CARRP training materials discussed above, the USCIS investigative information reveals sensitive, internal case-handling procedures that should not be publicly disclosed because public access, in this instance, would jeopardize the integrity of the investigations. *See Times-Mirror Co.*, 873 F.2d at 1213 (noting that public access to grand jury proceedings and juror deliberations is possible, but not advisable because of need to safeguard integrity of the processes). If malicious actors were to learn what information USCIS obtains from its law enforcement agency partners, the details of third-agency cooperation with USCIS, the investigative steps USCIS uses, and the criteria it employs in vetting national security concerns related to the eligibility requirements under the INA, such actors could use that information to try to evade detection of their organizations, personnel, or activities. (Appendix B, ¶¶ 14-15). Further, if USCIS' law enforcement agency partners lack confidence in USCIS' ability to protect their equities, this increases the risk that such agencies will discontinue cooperation with USCIS, to the detriment of our national security. (Appendix B, ¶ 15). The harm to national security and the need to safeguard federal law enforcement priorities and

equities are compelling reasons to keep the investigative information and related processes under seal. *See* Dkt. No. 274 ("The Court is persuaded … that disclosure of certain information and methods originating from law enforcement agencies external to USCIS immigration processing, … could cause harm to national security."). This is law of the case. As the Ninth Circuit held in *Delta Sav. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001), while a district judge has "some discretion" to reconsider an interlocutory order by another judge of the same court, that discretion is "limited." *Id.* at 1027. "The prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.*

Recognizing the need for transparency and the strong interest in providing public access to court records, Defendants have already filed redacted versions of many of the documents in question on the public docket. *See, e.g.,* Appendix A, Doc Nos. 1, 15, 16, 25, 178, 179, 181, 182. And in preparing the parties' response to this Court Order, Defendants have identified yet additional documents that may be filed publicly in redacted form with minimal risk to the government's interest in protecting the integrity of its internal investigative processes. *See, e.g.,* Appendix A, Doc Nos. 3, 13, 15, 17, 24, 35-37, 55-57, 62-64, 67, 68, 73, 74, 76, 102, 103, 105, 151, 163, 172.

D. Statistical Data.

Defendants have also sought to keep sealed a very limited portion of the statistical data related to the processing of CARRP cases that is referenced in briefs related to *Daubert* motions to exclude expert testimony or summary judgment motions, and in deposition transcripts, expert reports, and declarations submitted as exhibits concerning such motions. *See* Appendix A, Doc

Nos. 1, 15, 16, 25, 26-29, 31-33, 35-38, 40-46, 49, 51-53, 55, 59, 60, 64, 66-68, 95, 97, 102, 103, 121, 122, 146, 150, 163, 164, 171, 172, 178, 179, 181, 185. Most statistical data presented or discussed in the parties' submissions would remain public, including, for example, the number and percentage of I-485 and N-400 applications referred to CARRP, the year and date of the application receipt and adjudication, and the outcome of the adjudication (*e.g.*, whether approved or denied). The data of principal interest to the claims in this litigation, such as the CARRP referral rates for applicants from Muslim-majority countries, compared to other applicants, the processing times and approval and denial rates for their applications, is not redacted. The limited data of national security concerns that Defendants seek to protect includes the number and percentages of cases referred to or processed through CARRP broken down by each year with specific granularity and details as to the number and percentages of cases referred to CARRP based on information derived from law enforcement investigations of other government agencies that interact with USCIS; data specific to each country based on the applicants' country of birth and nationality; whether the applicant is a known or suspected terrorist ("KST"), a non-KST, or holds another national security concern status that USCIS records in its computerized database for tracking and managing CARRP cases; the specified national security concern status for each applicant, individually and collectively; and the case numbers and referral rates to CARRP, processing times, and adjudication outcomes for each sub-category of cases set out by year, country, and national security concern type and status. Compelling reasons dictate that such elaborate and extensive detailing of sensitive information addressing applications presenting national security concerns not be publicly disclosed. *See Kamakana*, 447 F.3d at 1179.

Public release of the limited statistical data at issue could harm the United States and private individuals. Public knowledge of how many applications from certain countries of origin

are processed through CARRP could jeopardize U.S.-foreign relations; such information should only be released at the direction of Executive Branch officials. (Appendix B, ¶¶ 16-17). Public release of this information, and disclosing fields of information and other details about USCIS' internal systems tracking such data, could compromise those systems by making them vulnerable to manipulation by hackers and other malicious cyber attackers, which could also compromise national security. (Appendix B, ¶¶ 16-17). Some of the information at issue tends to reveal the extent to which other government agencies work with USCIS in identifying and addressing cases with potential national security concerns; as discussed above, if such agencies suspect that USCIS cannot protect their equities, they will no longer work with USCIS, which would likely harm national security. (Appendix B, ¶¶ 16-17).

In addition, if the information is made public and malicious actors learn what data points USCIS collects and considers in evaluating benefit applications, particularly those that pose a potential risk to national security, those actors could use such knowledge to evade detection of themselves and their activities. (Appendix B, ¶¶ 16-17). Finally, the extremely detailed information contained in submissions by Plaintiffs' expert Mr. Kruskol, including applicants' country of origin, date of birth, and date of application or decision, could allow for identifying individuals who applied to USCIS for immigration benefits and the actions taken on their applications. This would invade their privacy, as such records are not usually made public. *See Times-Mirror Co.*, 873 F.2d at 1213. Further, if those applications were subject to CARRP, and the individuals or other malicious actors are able to discern that those individuals' applications were subject to CARRP, it could jeopardize national security by revealing U.S. priorities and targets of law enforcement investigations. *See supra*, Section A. These are all compelling reasons to keep the statistical data under seal. Defendants either have already filed, or will file,

public versions of each of these documents with the limited statistical data in need of protection redacted.

II. Plaintiffs' Statement

Plaintiffs challenge the lawfulness and constitutionality of CARRP, a significant, extra-statutory vetting policy for immigration applications, that has denied thousands of people their statutory and constitutional rights, by prohibiting USCIS field officers from approving an application with an alleged potential national security concern (regardless how attenuated or speculative) and instead directing officers to deny the application or delay adjudication—often indefinitely—all without any legal authority to do so. Without notice to applicants, their lawyers, or the public at large, USCIS has profiled law-abiding applicants as "national security concerns" based on national origin, religious activity, and innocuous characteristics and associations—casting unfounded suspicion on applicants based on who they are or who they know, not because they did anything wrong or are ineligible for the benefit.

There is a "strong presumption in favor of access to courts," *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003), under which documents should remain sealed "[o]nly in rare circumstances." LCR 5(g)(5). The court, in turn, "may seal records only when it finds a compelling reason and articulates the factual basis for its ruling, without relying on hypothesis or conjecture." *Ctr for Auto Safety*, 809 F.3d at 1096–97 (internal quotations omitted). The standard requires Defendants to "articulate specific facts to justify sealing, and [to] do so with respect to each item sought to be sealed." *MD Helicopters Inc. v. United States*, No. CV-19-02236-PHX-JAT, 2019 WL 2415285, at *2 (D. Ariz. June 7, 2019) (emphasis added).

This long-standing practice is grounded in "the need for . . . the public to have confidence in the administration of justice." (internal quotations omitted). Open court records promote the

"interest[s] of citizens in 'keeping a watchful eye on the workings of public agencies.'" *Kamakana*, 447 F.3d at 1178 (quoting *Nixon v. Warner Commc'n., Inc.*, 435 U.S. 589, 597 n.7, 98 S. Ct. 1306 (1978)).

Defendants seek to shield the documents establishing, executing, and now challenging CARRP from the public record. The public has a strong interest in accessing the parties' dispositive briefing, supporting documents, and *Daubert* motions to understand the weighty statutory and constitutional issues that strike at the heart Plaintiffs' individual rights.[8]

A. The Court Should Not Allow Defendants to Shield Documents Labeled HSD Entirely from the Public Record A-File Information.

Defendants misstate and, in any event, cannot meet the standard for filing any document as a Highly Sensitive Document ("HSD").

"A document is an HSD if its subject matter renders it of potential value to malicious nation-state actors seeking to harm the interests of the United States." *See* General Order No. 03-21 at 1. Defendants must meet *this* standard. General Order 3-21 says that "The Court *will consider* whether the document involves: matters of national security ..." 1-2. Documents involving claims of national security are not presumptively HSD as Defendants argue above.

Defendants fail to meet the HSD designation standard. Core to Plaintiffs' argument is that USCIS widely sweeps applicants into CARRP that are *not* national security concerns based on overbroad criteria. Defendants don't provide any evidence or examples about why the *specific information they seek to have designated as HSD* would be of value to malicious nation-state actors. The A-Files do not contain law enforcement investigatory techniques. They do not reveal sources or informants. And they do not contain classified information. USCIS is not a

[8] As noted above, the standard to seal the *Daubert* motions is "good cause," but the "compelling reasons" standard applies to the summary judgment briefs and supporting documents. *Kamakana*, 447 F.3d at 1179; *Ctr. For Auto Safety*, 809 F.3d at 1098-1102.

law enforcement agency and has no offered expertise in what may or may not be valuable to a bad actor seeking to harm the United States. The A-Files themselves, as submitted, are merely administrative documents used in thousands of cases around the country. And the suggestion that the government does not produce the entire A-File when required to do so is both alarming and finds no support in the caselaw. Defendants ask the Court to merely accept USCIS' conclusory national security warnings without question.

1. The Court Should Apply At Least the Compelling Reasons Standard to HSD Designations

The HSD designation is reserved for those documents that are *so sensitive* that they cannot be filed on the docket *at all*, even in redacted form. Designating a document as HSD is far more restrictive to public access than sealing or redacting a filing. As such, the Court should apply, at least, the Ninth Circuit's compelling reasons standard, supported by specific factual findings, to Defendants' HSD designations because all the filings Defendants label as HSD are or support dispositive briefing. *See Kamakana*, 447 F.3d at 1178. Applying any less of a standard would allow Defendants to evade the exacting standard for sealing dispositive motions (and supporting exhibits) and jettison the long-standing presumption of public access to court records. After all, the General Order expressly recognizes that *sealed* filings in civil cases are generally not HSD. *See* General Order at 2 (one category that is generally not considered HSD is "sealed filings in most civil cases") (emphasis added). There is no dispute that Defendants have the burden to show the Filings should be properly designated as HSD. Defendants fail to meet this burden.

2. Vague Threats to National Security Do Not Make the A-Files HSD

Defendants assert, without any specificity, evidence, or examples, that these A-Files should receive an HSD designation because information regarding whether and why the

government considers a person to pose national security concerns is valuable to malicious nation-state actors.

Defendants' vague assertions of "national security" do not satisfy the compelling reasons standard and are not supported by any specific facts. Claims that "documents *implicate* national security, in some vague sense" are insufficient to meet the "compelling reasons" standard. *Ground Zero Ctr.*, 860 F.3d at 1262 (emphasis in original) (internal quotations omitted). And such vague allegations should not suffice to treat a document as HSD.

Contrary to what Defendants claim in their motion, the A-File excerpts contain little to no information about CARRP or why the applicant was subject to CARRP. Of the six A-File excerpts, totaling just over 100 pages, that Defendants seek to designate as HSD, there appear to be few mentions of CARRP. Redacted from these files, and withheld from Plaintiffs under Defendants claims of privilege, is any information about why any particular person was subject to CARRP. The A-Files discussed in the briefs and supporting documents are replete with law enforcement privilege redactions that appear to include all information obtained from or relating to third-agency law enforcement agencies. These redactions include nearly all why information and any third-agency law enforcement techniques and any third-agency law enforcement involvement. *See* Ex. 74 (A-File heavily redacted with no unredacted mention of third agencies or why applicant was subject to CARRP). Claims that these A-File excerpts contain "investigative information" or "information regarding whether and why the government considered them national security concerns" are simply false. What Defendants seek to designate as HSD is exactly what the Court's General Order specifically says is not HSD, namely "administrative immigration records."

Defendants also fail to explain why disclosing the *specific A-Files at issue here* would lead to the grave harms that Defendants claim. Plaintiffs filed this lawsuit pleading that they were in fact subject to CARRP, so there is certainly no harm in disclosing *their A-Files*, subject, of course, to the privacy redactions of LCR 5.2(a). In their statement, Defendants, without any support whatsoever, suggest that the Named Plaintiffs are "bad actors" and that disclosure of their A-Files will cause the Named Plaintiffs to change their behavior to disrupt ongoing investigations. Defendants' Position at 11. Not only is that wrong, but it is precisely why Defendants' lack of specificity is so misleading to the Court.

Defendants provide no specific facts to support their claim that disclosing whether and why the government considers applicants to be national security concerns would create a security risk that could possibly meet the standard for HSD information. First, whether someone is a "national security concern" is a USCIS label. It does not apply to the entire government. Second, this misleading statement hits at one of the main issues in this litigation: USCIS widely sweeps applicants into CARRP that are not national security concerns based on overbroad criteria. Third, one pillar of Plaintiffs' statutory and constitutional claims is how USCIS determines an applicant is a national security concern. Such weighty issues should not be shielded from public view or scrutiny. Fourth, the briefs and supporting documents do not contain classified information. Fifth, Defendants do not even provide a declaration from any third agency law enforcement official or agency to support their claims. USCIS is not a law enforcement agency and has no offered expertise in what may or may not be valuable to a bad actor seeking to harm the United States. Defendants ask the Court to merely accept USCIS' conclusory national security warnings without question.

Finally, the Court has already held that whether the Named Plaintiffs were subject to CARRP cannot be withheld under the law enforcement privilege because "determination of whether Plaintiffs' applications were subject to CARRP has already been disclosed either through FOIA requests or disclosures by Defendants." Dkt. 274 at 3. Because whether a Named Plaintiff was (or is) subject to CARRP is not privileged and oftentimes has already been disclosed under FOIA, it cannot transform an A-File into an HSD either.

3. The A-Files Are Administrative Records Not Subject to HSD Designations

A-Files are "administrative immigration records," which are excluded from the HSD designation. *See* General Order at 2 (among one of several categories that "are generally not considered HSDs"). The A-File is the administrative record of an individual's immigration proceedings before, and interactions with, U.S. immigration agencies and is maintained by USCIS. *See Dent v. Holder*, 627 F.3d 365, 372 (9th Cir. 2010); *see also id.* at 373 ("The government uses the A-file routinely in almost every case to determine [the adjudication of immigration benefits]."). USCIS also routinely produces A-Files to noncitizens under the Freedom of Information Act. *Id.* at 374. The Named Plaintiffs' A-Files and related documents are no different. Accordingly, the documents are not HSD, nor should the Court treat them as such.

The A-File excerpts that Defendants submitted are largely portions of applications submitted by the applicants themselves and in some instances include some of the purported reasons that Defendants gave when granting or denying certain applications. The Filings are exactly the types of A-files and information that the General Order specifically says is not HSD. Even so, what Defendants are really arguing is that the Court should consider all A-Files where applicants are subject to CARRP as presumptively HSD even though the CARRP information is

redacted in the A-File. This interpretation would impact the hundreds of CARRP related mandamus cases filed in federal courts across the country, allowing USCIS to take all of them out of the public eye. But Defendants' position is also a central issue in this case. USCIS's consideration of an applicant as a "national security concern" is determinative of how the agency adjudicates that benefit—whether it adjudicates it under the law or instead under CARRP to delay or pretextually deny it. This weighty dispute is yet another reason to not designate the Filings as HSD.

B. Defendants Cannot Show Compelling Reasons to Continue Shielding CARRP from Public View

Defendants fail to provide compelling reasons, supported by specific facts, to shield the dispositive motions, supporting documents, and *Daubert* motions from the public. Instead, Defendants continue to rely on unsupported and general invocations of "national security." Indeed, Defendants cannot advance specific facts because they have withheld as law enforcement privileged any truly sensitive information. As the Supreme Court has cautioned, "national-security concerns must not become a talisman used to ward off inconvenient claims." *Ziglar v. Abassi*, 137 S.Ct. 1843, 1862 (2017). In any event, much of what Defendants seek to seal is already in the public record, just in different formats. Defendants cannot meet their burden to show what appears in the public record already and what does not.

1. Unsupported and Generalized Assertions Regarding National Security are Not Compelling Reasons.

Defendants resort to broad claims of national security threats based on nothing but hypothesis and conjecture, without ever explaining what specific information requires sealing and why that specific information would present a national security threat if revealed. That is not enough. Defendants cannot simply rely on broad assertions that the documents they seek to seal would otherwise threaten national security interests. A document's relationship to national

security alone is not a compelling reason for the court to seal its records. Instead, to restrict access to judicial records relating to national security interests, a party must demonstrate "specific facts showing that disclosure of particular documents would harm national security." *Ground Zero Ctr.*, 860 F.3d at 1262 (emphasis added).

"[V]ague" implications of national security, *see id.*, and reference to "general investigative procedures, without implicating specific people or providing substantive details" are insufficient to meet the compelling reasons standard. *United States ex. Rel. Lee v. Horizon W., Inc.*, No. C 00–2921 SBA, 2006 WL 305966, at *2 (N.D. Cal. Feb. 8, 2006) (the "Government's bare assertion that the disclosure of its extension requests would reveal pieces of the government's investigatory techniques, decision-making processes, research, and reasoning that apply in hundreds of similar cases" was not "a compelling showing" sufficient to prevent the court from lifting seal on the entire record) (internal quotations omitted). Rather, any restrictions had to be "justified by specific facts showing that disclosure of particular documents would harm national security." *Id.* (emphasis added).

Similarly, in *United States ex rel. Kelly v. Serco, Inc.*, No. 11CV2975 WQH-RBB, 2014 WL 12675246, at *4 (S.D. Cal. Dec. 22, 2014), the court allowed the sealing of a single exhibit only because it revealed the specific locations of surveillance towers along the border and "a variety of sensitive technical information related to the installed technology and sensor capabilities" of the towers. *Id.*

And even when the "rare circumstances" involving highly sensitive national security information arise, courts are directed to "minimize the extent of sealed proceedings" to uphold the public's right to access. *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. SACV 16-00300-CJC (RAOx), 2017 WL 2806897, at *5 (C.D. Cal. Mar. 30, 2017); *United States v.*

Ressam, 221 F. Supp. 2d 1252, 1263-64 (W.D. Wash. 2002) (redacting only the name of an individual and nine other words that would immediately implicate the government's ability to gather intelligence).

USCIS is not a law enforcement or intelligence agency, and it makes no effort to explain how it is competent to assess threats to national security. Nor is CARRP a law enforcement program. Defendants offer no declaration from law enforcement or intelligence agency officials to support its claim of national security risks.

The information that Defendants seek to seal is also highly generalized in nature. For example, several exhibits contain training materials related to CARRP and other policy documents. They discuss USCIS's instructions for officers with respect to broad categories of national security concerns. Other exhibits provide a general overview of the program and discuss how USCIS processes immigration benefits in accordance with the program. None of the information implicates specific sources, reveals investigative secrets, discloses third-agency intelligence gathering sources or methods, or provides substantive details such that its disclosure would harm national security.

Defendants' attempt to assert "national security" as a reason to seal does not satisfy this Court's precedent as meeting the compelling reasons standard. To the contrary, this information is precisely the type of information to which citizens should have access "to keep a watchful eye on the workings of public agencies." *Nixon*, 435 U.S. at 598.

2. Defendants Already Withheld as Privileged Sensitive Law Enforcement and Third-Agency Investigative Techniques.

Defendants fail to point to a single example of how the dispositive motions and supporting documents reveal sensitive law enforcement techniques or intelligence gathering operations, nor could they. Defendants already withheld as law enforcement privileged what

could be considered sensitive law enforcement techniques or intelligence gathering, especially related to third-agency information. Following discovery litigation, the Court permitted Defendants to withhold all material containing third-party information, third-party communications, and inter-agency coordination as law enforcement privileged. *See, e.g.*, Dkt. 274 (denying, in part, Plaintiffs' motion to compel and allowing Defendants to redact privileged information from certain documents originating from third party agencies); *see* Dkts. 320; 451. As a result, there is no unredacted information that reveals any of the information Defendants complain about. Nevertheless, Defendants argue grave national security risk to USCIS's third-party partners if the Court unseals the dispositive motions and supporting exhibits. Since that information was withheld as privileged, there is no risk to unsealing the briefs and supporting documents. It is revealing that Defendants do not cite a single example, even to a page in the briefs or any supporting exhibit, of sensitive third agency information that would so devastatingly undermine national security if revealed.

Defendants' claim that the Court's determination that disclosure of certain law enforcement information would harm national security is law of the case is misplaced. The Court reached this finding when ruling on a discovery motion (a motion to compel production of documents without redaction) applying the much more lenient "good cause" standard. *See* Dkt. 274. Nowhere in the Court's opinion does it hold that Defendants have compelling reasons to withhold such national security information from Plaintiffs. There is no such law of the case.

Finally, Defendants have not invoked the State's Secret privilege over *any* of the materials filed. And none of the materials filed contains any classified information. *See Ground Zero Ctr.*, 860 F.3d at 1262 ("[T]he fact that the documents are not classified" is relevant to the assessment of whether nondisclosure to the public is justified).

CARRP cannot escape public scrutiny on a dispositive motion merely because Defendants would prefer it stays secret, especially when such important constitutional and statutory rights are at issue in this case.

3. There are no compelling reasons to seal publicly available information.

No compelling reasons exist for this Court to seal information that is already in the public domain. *See, e.g.*, *Ibrahim v. Dep't of Homeland Security*, 62 F. Supp. 3d 909, 935 (N.D. Cal. 2014) (plaintiff challenged inclusion on the No-Fly list, and court emphasized that despite "the legitimacy of protecting SSI and law enforcement investigative information," court is less likely to protect information that has been already made publicly available). Sealing such information directly refutes the strong presumption in favor of access to court records. *See, e.g.*, *id.*, at 936 ("public release of this entire order will reveal very little, if any, information about the workings of our watchlists not already in the public domain"). Much of the information that Defendants seek to keep under seal is information that Plaintiffs either obtained via court order, the Freedom of Information Act ("FOIA"), or information that would be subject to FOIA. *See, e.g.*, Muslims Need Not Apply, ACLU: SOUTHERN CALIFORNIA (Aug. 21, 2013), available at https://www.aclusocal.org/en/publications/muslims-need-not-apply (extensive reporting on CARRP based on information obtained via FOIA request and court order). *See, e.g.*, *Al Otro Lado, Inc. v. Wolf*, No. 3:17-cv-2366-BAS-KSC, 2020 WL 3487823, at *4 (S.D. Cal. June 26, 2020) (public could request documents via FOIA, which undermined "[d]efendants' assertion that the information in these records is particularly sensitive and should be protected from disclosure"). If the information were "confidential," as Defendants suggest, it would not be available via FOIA—nor already in Plaintiffs' hands, for that matter. *See also*, *Moussouris v. Microsoft Corp.*, No. 15-cv-1483 JLR, 2018 WL 1159251, at *9 (W.D. Wash. Feb. 16, 2018)

("The fact that the documents are exempt under FOIA is not support for sealing documents on the court docket under a compelling reasons standard."); *Bryan*, 2017 WL 1347681, at *5–7 (unsealing, in part, certain TECS records about Plaintiffs which the Government had disclosed).

For example, Defendants claim that the briefs and supporting documents must be sealed because they would reveal the criteria USCIS uses to identify a person as a "national security concern" and how it vets applicants for such concerns. Defendants insist that disclosure of such information would let bad actors change their behavior and slip past Defendants' vetting. But those categories of information are *already the subject of public knowledge*. *See, e.g.*, CARRP Officer Training: Attachment A - Guidance for Identifying National Security Concerns, at 157-159, available at https://www.aclusocal.org/sites/default/files/wp-content/uploads/2013/01/Guiance-for-Identifying-NS-Concerns-USCIS-CARRP-Training-Mar.-2009.pdf (listing indicators of a national security concern to include: employment, training, government affiliations, unusual travel, membership or participation in particular organizations, large scale transfer or receipt of funds, family members or close associates, suspicious financial transactions listed in FBI Name Checks, and others); *see also* CARRP FOIA Documents, https://www.aclusocal.org/carrp (USCIS produced dozens of CARRP documents through FOIA, including training guides, workflows, and statistics).

Dozens of core CARRP documents—the operative policy memoranda and guidance documents, as well as various training modules—have been produced through FOIA requests and litigation, and been the subject of public scrutiny for more than a decade, prompting policy reports, news and law review articles, and litigation around the country.[9] The operative core

[9] *See, e.g.*, Dkt. 27 ¶4; CARRP, Wikipedia, https://en.wikipedia.org/wiki/CARRP; Jennie Pasquarella, Muslims Need Not Apply: How USCIS Secretly Mandates the Discriminatory Delay and Denial of Citizenship and Immigration Benefits to Aspiring Americans, ACLU of So. Calif. (Aug. 21, 2013), shorturl.at/nrR89; Katie

guidance document listing indicators of a "national security concern" in CARRP, known as "Attachment A," has been public for years. *See* Dkt. 286-3 at 29-37; CARRP Attachment A, shorturl.at/oBIZ9. Based on these disclosures, applicants and their attorneys have long been able to determine whether USCIS views them as a "national security concern." This is reason enough to deny Defendants' request to seal the briefs and supporting documents. *Ground Zero*, 860 F.3d at 1262 ("the extent to which the information [was] already . . . publicly disclosed" is relevant to whether nondisclosure to the public is justified).

Defendants themselves submitted CARRP policy documents as part of the publicly filed certified administrative record ("CAR") in this case, which reveal the very information Defendants claim should be shielded from public view. The "indicators" that USCIS uses to determine whether someone is a national security concern, including those originating from FBI security checks, are contained in Defendants' own publicly filed CAR too. *See* Dkt. 286-3 ECF pages 31-32.

Under FOIA, USCIS has made hundreds of disclosures to immigration attorneys, news agencies and advocacy organizations. *See, e.g.*, Dkt. 243 ¶¶8-21 (Plaintiffs' expert Jay Gairson describing USCIS disclosures of CARRP information in hundreds of A-Files received); Dkt. 97 ¶¶4-6 (same); CARRP FOIA Documents, https://www.aclusocal.org/carrp (documents obtained through two FOIA requests); *ACLU of Southern California v. USCIS*, 133 F.Supp.3d 234 (D.D.C. 2015) (FOIA litigation); Daniel Burke, "He applied for a green card. Then the FBI

Traverso, Practice Advisory: USCIS's CARRP Program, ACLU of So. Calif., shorturl.at/qtzGS; Nermeen Saba Arastu, Aspiring Americans Thrown Out in the Cold, 66 UCLA L. Rev. 1078 (2019); Ming Chen, Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military, 97 Denv. L. Rev. 669 (2020); Diala Shamas, A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants, 83 BKNLR 1175 (2018); *Jafarzadeh v. Nielsen*, 321 F.Supp. 3d 19 (D.D.C. 2018); *Ghadami v. United States Dep't of Homeland Sec.*, 2020 WL 1308376 (D.D.C. Mar. 19, 2020); *Siddiqui v. Cissna*, 356 F.Supp.3d 772 (S.D. Ind. 2018); *Al-Saadoon v. Barr*, 973 F.3d 794, 803–04 (8th Cir. 2020).

came calling," CNN, Oct. 3, 2019 (obtaining CARRP statistics from USCIS); Yesenia Amaro, "Little-known law stops some Muslims from obtaining US citizenship," Las Vegas Review-Journal (Apr. 16, 2016) (obtaining CARRP statistics from USCIS). In other litigation, USCIS filed CARRP policy memoranda on the public record too. *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 41–44 (D.D.C. 2018) (Dkt. 33-1).

Based on these disclosures, applicants and their attorneys have long been able to determine whether USCIS views them as a "national security concern."

This is merely one example, which undermines Defendants' core concern.

Defendants offer the Court no specific evidence to show how the documents Defendants ask to keep under seal now are any different or reveal any additional sensitive information from those already in the public domain. It is Defendants' burden, not Plaintiffs' burden, to demonstrate to the Court how any of the nonpublic information at issue in Plaintiffs' Motion is any different that the policy and statistical information already in the public domain. Defendants fail to meet this burden.

4. Statistical Information Should Not be Sealed.

For the same reasons discussed above, Defendants fail to meet the applicable standard for the statistics discussed in and supporting the dispositive briefs and the *Daubert* motions. Defendants claim to keep sealed "a very limited portion of the statistical data" referenced in the briefs and related *Daubert* motions. Yet, Defendants spend nearly half a page merely listing the data points they seek to hide from public scrutiny.

Defendants' argument for sealing the statistical data is merely more speculation, conjecture, and generalized assertions lacking any specific support or connection to the documents itself. For example, Defendants claim without any specificity or support that releasing this data could jeopardize U.S. foreign relations. That's nonsense. Equally absurd is

their position that disclosure of statistics could compromise USCIS' internal systems to hackers. Defendants even claim that releasing the statistics will somehow help malicious actors evade detection. Of course, Defendants offer no examples of that or any supporting evidence whatsoever. Defendants' bare assertions simply cannot overcome the public's right to access court records on a dispositive motion. This is especially true with the statistics that demonstrate the illegality and disparate impact of this program.[10]

[10] Regarding Mr. Kruskol's report, Plaintiffs do not object to sealing of applicants' date of birth as required by LCR 5.2(a)(1).

Dated: September 30, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record. I further certified that, at the direction of Defendants' counsel, a flash drive containing redacted and unredacted copies of all of the documents listed in Appendix A is being delivered to the Court on the same date as this filing.

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