

No. _____

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

IN RE ANGELICAVILLALOBOS, JUAN ESCALENTE, JANE DOE #4, and
JANE DOE #5

Original Proceeding from the United States District Court for the Southern District
of Texas, Brownsville Division
Case No. 14-cv-00254

PETITIONERS' MOTION TO PROCEED UNDER PSEUDONYM

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MOTION TO PROCEED UNDER PSEUDONYMS

Petitioners Jane Doe #4 and Jane Doe #5 (“Petitioners”) respectfully request this Court’s leave to proceed under pseudonyms to protect their identities from public disclosure while they pursue their right to file a Petition for a Writ of Mandamus and Emergency Motion to Stay with this Court.

Petitioner Jane Doe #4 is 26 years old and lives in Austin, Texas. Decl. of Karen C. Tumlin (“Tumlin Decl.”), Ex. A, ¶ 3. She is a student at the University of Texas, Austin, where she is finishing her bachelor’s degree in nursing. *Id.* ¶ 5. She received deferred action under the Deferred Action for Childhood Arrivals (“DACA”) policy in February of 2013 and, soon after, she received an Employment Authorization Document (“EAD”) valid for two years. *Id.* ¶ 9. Jane Doe #4 applied to renew her DACA and EAD in early October of 2014. *Id.* ¶ 10. On December 18, 2014 she received a new EAD valid for three years. *Id.* ¶ 11. Jane Doe #4 fears disclosure of her real name in this lawsuit because she worries that by disclosing her name and immigration status she could put at risk for exposure to herself and her family members. *Id.* ¶¶ 15-16, 18. Jane Doe #4 knows there are many in Texas who disagree with the DACA program, and she is worried that someone may try to retaliate against her or her family if they know of her DACA status or her participation in this case trying to stop Texas from obtaining her personal information. *Id.* ¶ 18.

Petitioner Jane Doe #5 is a 20 year old woman who lives in Houston, Texas. Tumlin Decl., Ex. B, ¶ 3. She works in patient care at an urgent care facility and will be starting a job in administration at a local hospital soon. *Id.* ¶ 7. She is also a student at Lone Star College. *Id.* ¶ 8. In June 2012, she received DACA and an EAD valid for two years. *Id.* ¶ 10. Jane Doe #5 applied for DACA renewal and was issued a new EAD on December 18, 2014. *Id.* ¶ 12. Jane Doe #5 fears disclosure of her real name in this lawsuit because she worries that by disclosing her name and immigration status she could put at risk for exposure her family members, especially her younger sister and her parents who are undocumented immigrants. *Id.* ¶¶ 15-16.

As shown below, Petitioners' request satisfies the Fifth Circuit's standard for permitting a party to appear under a pseudonym. *See Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981). Petitioners are challenging government action; the nature of the information they seek to protect is of the utmost intimacy; and release of their identities would make them vulnerable to extensive harassment, possible violent reprisals, and hostile public reaction were their identities disclosed to the public. Their need for privacy outweighs the public's interest in knowing their identities and any harm to the Parties from failure to disclose their names.

Petitioners' counsel informed all parties' counsel about this motion prior to filing. Plaintiffs' counsel took no position on this motion. Defendants' counsel

took no position on this motion at this time, and will inform the court of their position after they have had an opportunity to review the filed documents.

Intervenor-Defendants Jane Does #1-3's counsel did not oppose this motion. Tumlin Decl. ¶¶ 2-7.

BACKGROUND

On November 20, 2014, Secretary of the Department of Homeland Security, Jeh Johnson, issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parent of U.S. Citizens or Permanent Residents” (hereinafter referred to as “expanded DACA and DAPA”). Tumlin Decl., Ex. C. On December 3, 2014, Texas and 17 other states filed a lawsuit challenging expanded DACA and DAPA, *Texas v. United States*, No. 14-00254 (S.D. Tex.).¹

As a result of the proceedings in this underlying case, on May 19, 2016 the district court issued an order (“May 19 Order”) that, among other things, requires the Defendants in the case to turn over by June 10, 2016 a list including “all personal identifiers and locators including names, addresses, ‘A’ file numbers and all available contact information” for individuals who, between November 20,

¹ The complaint was later amended to add additional states and plaintiffs. *Texas v. United States*, No. 14-00254 (amended complaint, ECF Doc. 14) (S.D. Tex. filed Dec. 9, 2014).

2014 and March 3, 2015, received EADs valid for a three-year period. Tumlin Decl., Ex. D. Petitioners are concurrently filing a Petition for a Writ of Mandamus and Emergency Motion for Stay to challenge the order's requirement that the federal government produce this list to the district court and, potentially, to the Plaintiff States. It is for purposes of that Petition for a Writ of Mandamus and Emergency Motion for Stay that Petitioners seek permission from the Court to proceed using a pseudonyms.

ARGUMENT

A. Legal Standard

Although the Federal Rules of Civil Procedure require plaintiffs to disclose their names when they commence a lawsuit, FED. R. CIV. P. 10(a), this Court has long recognized the right of individuals to proceed anonymously through the use of a fictitious name. *Stegall*, 653 F.2d at 185. While recognizing that, as a general matter, there is “a clear and strong First Amendment interest in ensuring that ‘(w)hat transpires in the courtroom is public property,’” *id.* (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)), this Court has held that the “normal practice of disclosing the parties’ identities yields ‘to a policy of protecting privacy in a very private matter,’” *id.* (quoting *S. Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979)) (“SMU”) (internal citation omitted).

Under Fifth Circuit precedent, there is “no hard and fast rule for courts to follow when deciding whether to allow a party to proceed under a fictitious name.” *Stegall*, 653 F.2d at 185. Rather, the Court must decide whether the considerations calling for the maintenance of a party’s privacy outweigh the presumption of openness in judicial proceedings. *Id.* at 186; *see also Doe v. Beaumont Indep. Sch. Dist.*, 172 F.R.D. 215, 216 (E.D. Tex. 1997). The Court considers the following factors when determining whether to permit proceeding under a fictitious name: (1) whether the party seeking anonymity is suing to challenge governmental activity; (2) whether prosecution of the suit compels the party to disclose information of the utmost intimacy; and (3) whether the party is compelled to admit her intention to engage in illegal conduct, thereby risking criminal prosecution. *See Stegall*, 653 F.2d at 185. The Petitioners satisfy both factors one and two, which is sufficient to warrant proceeding anonymously. *See, e.g., Doe v. El Paso City Hosp. Dist.*, No. EP-13-CV-00406-DCG, 2015 WL 1507840, at *2 (W.D. Tex. Apr. 1, 2015).

In addition to these three commonly utilized factors, courts also consider “the relevant facts and circumstances of a particular case,” including, for example, “the threat of a hostile public reaction to a lawsuit, . . . in conjunction with the other factors, when deciding whether to permit a party to use a pseudonym.” *Rose v. Beaumont Indep. Sch. Dist.*, 240 F.R.D. 264, 266 (E.D. Tex. 2007). Petitioners’ fears of this very real threat and harassment, even violence, weighs in favor of

proceeding under pseudonyms. *See* Tumlin Decl., Ex. A ¶¶ 16, 18; Ex. B ¶¶ 15-16.

1. Petitioners seek to challenge government action

Courts have long recognized that litigants may face threats of harassment and retaliation for speaking out against high-profile government action, and that this risk tips in favor of allowing parties to proceed anonymously. *See SMU*, 599 F.2d at 713 (noting that the majority of cases allowing use of pseudonyms involved challenges to government, not private, action); *Doe v. Sante Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 651 (S.D. Tex. 1996). Petitioners need not be attempting “to have a law or regulation declared invalid” in order to satisfy this portion of the standard. *El Paso City Hosp. Dist.*, 2015 WL 1507840, at *3 (citing *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004)).

Here, Petitioners are seeking to intervene to challenge government action implicating their privacy rights. Most acutely, Petitioners are challenging the actions of their home states in connection with the states’ lawsuit against the federal government over the extension of a program that had tremendously enriched Petitioners’ lives—allowing them to obtain jobs with work authorization and to further their education. In addition, Petitioners are seeking to advance the same goal as the federal government defendants, who have taken action to stay the federal court order that would require the transmission of Petitioners’ personally

identifying information and sensitive data. *See* Defs' Motion to Stay May 19, 2016 Order Pending Further Review, *Texas v. United States*, No. 14-00254 (S.D. Tex.), ECF Doc. 354. Last, and most fundamentally, Petitioners challenge the action of a federal district court that requires the federal government to surrender to that court Petitioners' highly sensitive personal information, which violates their constitutionally-protected right to privacy.

2. The nature of Petitioners' sensitive and personal information justifies allowing them to proceed under pseudonyms.

Here, by identifying as individuals subject to the May 19 Court Order, Petitioners necessarily reveal that they are immigrant youth who were recently undocumented and who have, via the 2012 DACA program, gained temporary permission to live in the United States and work with federal work authorization. This information alone constitutes information of a highly sensitive and personal nature and favors allowing Petitioners to proceed anonymously. *See SMU*, 599 F.2d at 712-13.

Courts have routinely recognized the particular vulnerability of undocumented immigrants and allowed them to proceed anonymously. *See, e.g., Lozano v. City of Hazelton*, 620 F.3d 170, 194-95 (3d Cir. 2010), *vacated on other grounds*, 131 S. Ct. 2958 (2011); *Ga. Latino All. for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011), *aff'd in part, rev'd in part on other grounds sub*

nom. Ga. Latino All. for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012). Additionally, in the landmark decision addressing the rights of undocumented children, the plaintiffs were allowed to proceed anonymously. *Plyler v. Doe*, 457 U.S. 202 (1982).

When considering whether immigration status is grounds to justify allowing parties to proceed anonymously courts have not isolated their analysis to undocumented immigrants, but have recognized that immigration status more generally is incredibly sensitive and its revelation can subject the individual to adverse consequences including “criminal prosecution, harassment, and intimidation.” *Hispanic Interest Coal. v. Gov. of Ala.*, 691 F.3d 1236, 1247 (11th Cir. 2012). *See also Friendly House v. Whiting*, No. 2:10-cv-1061-SRB, at ECF No. 212 (D. Ariz. June 21, 2010) (allowing individual with lawful presence to proceed anonymously due to concerns of revealing immigration status information).

Immigration generally, and the federal government’s executive actions on immigration in particular, have been the subject of intense and heated debate in Texas and across the country. In this highly charged atmosphere, the Petitioners fear harassment and even physical harm if their identities and personal stories are disclosed publicly, including the fact that they are recipients of the DACA 2012 program. For example, because Jane Doe #4 has experienced a significant amount

of anti-immigrant comments and attitudes in Texas, she worries that if people know her personal immigration information they “will try to harm me or my family, either physically or in some other way.” Tumlin Decl., Ex. A, ¶ 18.

Similarly, Jane Doe #5 is concerned that if her real name is provided in this legal action, she could be harmed. Tumlin Decl., Ex. B, ¶¶ 18-19. Finally, Jane Doe #4 is poignantly aware that “there are a lot of people in Texas who disagree with the DACA program,” and she worries that “someone may try to retaliate against me or my family if they know that I have DACA and that I am trying to stop the State of Texas from getting my personal information.” Tumlin Decl., Ex. A, ¶ 20.

Similarly, Jane Doe #5 has strong fears about the retaliation and harassment that she and her family could be subjected to if her name, and therefore her immigration status, is revealed to the public. Tumlin Decl. Ex. B, ¶¶ 14-15. Jane Doe #5 is “very worried that if my real name were used in this lawsuit, I or my family would be harmed physically or verbally or in some other way.” *Id.* at ¶ 19. Because she knows that “[t]here is a lot of anti-immigrant sentiment and people are very enraged about immigration” sometimes “they attack people in the street randomly” and she fears the same. *Id.* Her fear is amplified since she works in a very public place and doesn’t “want people to know about me or recognize me for the same reasons.” *Id.* Specifically, Jane Doe #5 is concerned that if her name and immigration status is disclosed in this litigation, she could risk exposure of her

family members, especially her younger sister and her parents who are undocumented immigrants. *Id.* ¶¶ 15-19.

Petitioners' fears for their safety and that of their families are well founded. Currently, anti-immigrant rhetoric and hostility are commonplace in their home states and nationwide, and the level of anti-immigrant sentiment is such that verbal and physical violence against immigrants is often a consequence. Tumlin Decl., Ex. E (news article on state Freedom of Information Commission decision refusing to allow production of the names and addresses of undocumented immigrants who applied for the city of New Haven's municipal identification card citing public safety risks from such disclosure given the level of anti-immigrant rhetoric and hate language surrounding the debate over the cards); Tumlin Decl., Ex. F (news report on the growing link between rising anti-immigrant rhetoric and violence towards Latinos and immigrants in Florida); Tumlin Decl., Ex. G (op-ed chronicling recent anti-immigrant hate crimes and increasing anti-immigrant speech nationwide).

Petitioners also justifiably fear retaliation by the plaintiff states if their names are disclosed as a part of this legal action. Petitioners' home state of Texas is leading the legal effort to stop the expansion of the DACA and DAPA programs. Moreover, Petitioner's home state has stated during a hearing before the district court that it could cancel the driver's licenses for the group of DACA recipients

with three-year EADs who live in Texas even though the federal government and the district court have not revoked those 3-year licenses. Ex. H (Tr. of Aug. 19, 2015 H'rg) at 32-34. *But see* Ex. I to the Pets.' Petition for Writ (Pls.' Advisory dated Sept. 4, 2015) at 6 (where Plaintiff States *agreed* that no driver's license modifications are warranted in the absence of an alteration of the three-year extensions). The two Texas Petitioners, Jane Doe #4 and #5, understandably fear that proceeding using their real names could result in this form of retaliation.

3. The public interest weighs in favor of allowing Petitioners to proceed under pseudonyms.

Public interest weighs in favor of allowing the Petitioners to proceed under pseudonyms. The issue before the Court relates to an extraordinary court order that would, if allowed to stand, require production by June 10, 2016 of personal identifying information for nearly 50,000 young immigrants who are not parties before the district court. It is in the public interest for the court to hear directly from some of these young immigrants subject to this invasion of privacy.

Petitioners, if allowed to proceed as Does, can provide a critical viewpoint to this Court on the impact of the release of the personally identifying information that is part of the May 19 Order.

Public interest also favors allowing the Petitioners to proceed anonymously because what is at stake here is precisely Petitioners' right to privacy—a right that

would be defeated if Petitioners were forced to proceed under their names and disclosing their immigration status.

4. Allowing Petitioners to proceed under pseudonyms causes no prejudice to the parties in this case.

Finally, other parties will suffer no prejudice if the Court permits Petitioners to proceed anonymously. This case turns on legal questions, not on the identities or credibility of any particular individuals. Thus, the public's interest in open judicial proceedings will not be affected if the Petitioners are permitted to proceed anonymously. *See Barrow County*, 219 F.R.D. 189, 194 (N.D. Ga. 2003). Unlike anonymous lawsuits against private parties, anonymous lawsuits "challenging the constitutional, statutory, or regulatory validity of government activity . . . involve no injury to the Government's reputation." *SMU*, 599 F.2d at 713. None of the parties face any prejudice here if the Petitioners are allowed to proceed under pseudonyms.

CONCLUSION

Both Petitioners would be at risk of great harm if their identities were revealed. Permitting them to proceed anonymously would not materially harm the public interest in open court proceedings; nor would it prejudice the respondents.

Therefore, the Petitioners should be permitted to proceed under pseudonyms in this action.²

Dated: June 3, 2016

Respectfully submitted,

/s/ Karen C. Tumlin

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² In the alternative, if this motion is denied, Petitioners respectfully request that they be permitted to amend their petition and other filings to remove the Doe Petitioners or, if those Petitioners so choose, to proceed under their names.

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CERTIFICATE OF CONFERENCE

On June 3, 2016, I called counsel for all parties to the underlying litigation, *Texas v. United States*, No. 14-cv-00254 (S.D. Tex. filed Dec. 3, 2014), and informed them all of Petitioners' intent to file a petition for mandamus, a motion for a stay, and a motion for Jane Does #4-5 to proceed under pseudonyms. Counsel for the Plaintiff States stated that they oppose mandamus and a stay, and take no position on the motion to proceed under pseudonyms. Counsel for Defendant United States and the other federal government defendants stated that they take no position prior to the filing of these pleadings, and that they will inform the Court of their position after they have had an opportunity to review the filed documents. Counsel for Intervenor-Defendants Jane Does #1-3 stated that the Jane Doe Defendant Intervenor is not opposed to a stay of that portion of the district court's May 19, 2016 order requiring filing under seal of the names and other personal information of certain recipients of deferred action.

/s/ Karen C. Tumlin
Karen C. Tumlin
Counsel for Petitioners

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on June 3, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, <https://ecf.ca5.uscourts.gov/>.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Karen C. Tumlin
Karen C. Tumlin
Counsel for Petitioners

CERTIFICATE OF CONFERENCE

On June 3, 2016, I called counsel for all parties to the underlying litigation, *Texas v. United States*, No. 14-cv-00254 (S.D. Tex. filed Dec. 3, 2014), and informed them all of Petitioners' intent to file a petition for mandamus, a motion for a stay, and a motion for Jane Does #4-5 to proceed under pseudonyms. Counsel for the Plaintiff States stated that they oppose mandamus and a stay, and take no position on the motion to proceed under pseudonyms. Counsel for Defendant United States and the other federal government defendants stated that they take no position prior to the filing of these pleadings, and that they will inform the Court of their position after they have had an opportunity to review the filed documents. Counsel for Intervenor-Defendants Jane Does #1-3 stated that the Jane Doe Defendant Interveners are not opposed to a stay of that portion of the district court's May 19, 2016 order requiring filing under seal of the names and other personal information of certain recipients of deferred action.

/s/ Karen C. Tumlin
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CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on June 3, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, <https://ecf.ca5.uscourts.gov/>.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Karen C. Tumlin
Karen C. Tumlin
Counsel for Petitioners

CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the court and served by ECF or email on June 3, 2016, upon counsel of record in the underlying litigation, *Texas v. United States*, No. 14-cv-00254 (S.D. Tex. filed Dec. 3, 2014).

I further certify that some of the participants in the case are not registered CM/ECF users. I have emailed and/or mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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