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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

STATE OF HAWAII and ISMAIL ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as  
 President of the United States; U.S.  
 DEPARTMENT OF HOMELAND SECURITY;  
 ELAINE DUKE, in her official capacity as  
 Acting Secretary of Homeland Security; U.S.  
 DEPARTMENT OF STATE; REX  
 TILLERSON, in his official capacity as  
 Secretary of State; and the UNITED STATES  
 OF AMERICA,

Defendants.

**MOTION FOR LEAVE FOR  
 DOE PLAINTIFFS TO  
 PROCEED UNDER  
 PSEUDONYM, AND FOR IN  
 CAMERA REVIEW OF DOE  
 PLAINTIFFS' AND DOE  
 DECLARANTS' SIGNED  
 STATEMENTS;  
 [PROPOSED] ORDER;  
 CERTIFICATE OF  
 SERVICE**

Civil Action No. 1:17-cv-00050-  
 DKW-KSC

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**MOTION FOR LEAVE FOR DOE PLAINTIFFS TO PROCEED UNDER  
PSEUDONYM, AND FOR *IN CAMERA* REVIEW OF DOE PLAINTIFFS’  
AND DOE DECLARANTS’ SIGNED STATEMENTS**

Pursuant to Local Rule 7.6 for the United States District Court for the District of Hawaii and Rules 7, 10, and 15(a) of the Federal Rules of Civil Procedure, Plaintiffs State of Hawaii (the “State”) and Dr. Ismail Elshikh, as well as prospective Plaintiffs John Doe 1, John Doe 2, and the Muslim Association of Hawaii, Inc,<sup>1</sup> through their counsel, respectfully request leave for the Doe Plaintiffs to proceed as parties under pseudonym in this action.

In addition, pursuant to Rules 1, 7(b), and 26(c) of the Federal Rules of Civil Procedure and Local Rules 6.2, 10.2(f), and 83.12, Plaintiffs respectfully request that the Court review *in camera* Exhibits A, B, C, D, and E to the concurrently-filed Declaration of Deirdre Marie-Iha (the “Marie-Iha Declaration”), which is submitted in support of Plaintiffs’ Motion for Temporary Restraining Order (“TRO Motion”) and the instant motion. Exhibits A-E to the Marie-Iha Declaration are witness declarations submitted by the two Doe Plaintiffs as well as three Doe Declarants—namely Declarants Jane Doe 3, John Doe 4, and John Doe 5 (the “Doe Declarants”)—all of whom reasonably fear severe retaliation in the event that their names are publicly disclosed. The Doe Plaintiffs and Doe Declarants intend to file

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<sup>1</sup> The Doe Plaintiffs and the Muslim Association of Hawaii, Inc. are named parties to a Third Amended Complaint (“TAC”) that is the subject of Plaintiffs’ concurrently-filed Motion for Leave to file a Third Amended Complaint.

the substance of their declarations publicly, but request that the Court review named and signed copies of their declarations *in camera* in order to protect their identities from public disclosure. The only difference between the publicly filed versions of the Doe declarations and the *in camera* versions of their declarations, is that the latter contain the true names of the Doe Plaintiffs and Doe Declarants as well as their signatures and places of signature, while the publicly filed versions use “Doe” pseudonyms, redact the signatures, and redact the place of signature for two of the declarations (Exhibits C and D).

In the event that this Court denies the motion for the Doe Plaintiffs to proceed under pseudonym, Plaintiffs seek leave to file a revised version of the proposed Third Amended Complaint to remove the Doe Plaintiffs. If the Court denies the motion for *in camera* review of the declarations, Plaintiffs seek leave to withdraw Exhibits A-E to the Marie-Iha Declaration under Local Rule 83.12.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. CASE HISTORY**

The Court is well familiar with the history of this case, which is set forth in Plaintiffs’ TRO Motion and incorporated by reference herein. Briefly, Defendant Donald J. Trump issued Executive Order No. 13,769 (“EO-1”) on January 27, 2017. 82 Fed. Reg. 8977. The State filed its Complaint challenging EO-1 on February 3, 2017. Dkt. 1. The Complaint was accompanied by a motion for a

temporary restraining order. Dkt. 2. The State was the only plaintiff at that point in the litigation, but current Plaintiff Dr. Elshikh, as well as prospective Plaintiffs John Does 1 and 2, each filed declarations as witnesses in support of that initial TRO Motion. *See* Dkt.10-1 (*in camera* declaration of John Doe 1); Dkt. 10-2 (*in camera* declaration of John Doe 2); Dkt. 10-8 (declaration of Dr. Elshikh). Upon motion by Plaintiff and for good cause shown, the Court agreed to review the declarations of John Does 1 and 2, as well as of one additional witness, *in camera*. *See* Dkt. 29.

Following legal proceedings, EO-1 was replaced by Executive Order No. 13,780 (“EO-2”) on March 6, 2017. 82 Fed. Reg. 13,209. The State and Dr. Elshikh filed a Second Amended Complaint and motion for a temporary restraining order against EO-2 on March 8, 2017. Dkts. 64, 65. On March 15, 2017, the Court issued a temporary restraining order prohibiting the implementation of Sections 2 and 6 of EO-2. Dkt. 219. The Court converted the TRO to a preliminary injunction on March 29, 2017. Dkt. 270. The Ninth Circuit affirmed the majority of the injunction on June 12, 2017. Dkt. 288.

The Government’s appeal of the Ninth Circuit’s order was pending before the Supreme Court when President Trump issued his September 24, 2017 “Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-

Safety Threats” (“EO-3”). Like EO-1 and EO-2, EO-3 blocks the entry of nationals of six Muslim-majority countries. EO-3 is the subject of Plaintiffs’ TAC and TRO Motion.

## **II. THE DOE PLAINTIFFS AND DOE DECLARANTS**

### **A. Plaintiff John Doe 1**

Prospective Plaintiff John Doe 1 is a U.S. citizen who resides in Hawaii. Marie-Iha Decl. Ex. A ¶ 1. He was born in Yemen and has lived in the United States for nearly three decades. *Id.* ¶ 1. Doe 1’s wife and four children are also U.S. citizens. *Id.* ¶ 2. His son-in-law is a national of Yemen and has a pending application for an immigrant visa. *Id.* ¶¶ 4, 7.

Doe 1 has participated in this lawsuit since the State filed its original Complaint and motion for a TRO. At that time, he allowed the general allegations of his declaration to be described in public documents accompanying the filings, *see* Dkts. 10, 10-1, 15, 15-1, but he requested that his full declaration be reviewed *in camera* only, *see* Dkts. 10, 15. This Court granted the request for “good cause” shown. Dkt. 29. Plaintiffs later moved to add Doe 1 as a party in the pending Supreme Court proceedings. *See* Respondents’ Mot. for Leave to Add Party John Doe, *Trump, et al. v. State of Hawaii, et al.*, No. 16-1540 (filed August 7, 2017). The Court deferred a ruling on that motion until the case is heard on the merits. Order, *Trump v. Hawaii*, No. 16-1540 (U.S. Aug. 24, 2017). Now, Doe 1 is

prepared to join this case as a plaintiff and to have his full declaration be publicly available, but—because of his profound fear of public reprisal and negative consequences for his relative’s visa application—he is willing to do so only if his name remains concealed. Marie-Iha Decl. Ex. A, ¶ 14.

### **B. Plaintiff John Doe 2**

Prospective Plaintiff John Doe 2 is a legal permanent resident who resides in Hawaii, teaches at the University of Hawaii, and is a national of Iran. Marie-Iha Decl. Ex. B ¶¶ 1-3. Many of Doe 2’s family members, including his mother, are nationals of Iran living in Iran. *Id.* ¶¶ 4-5. Doe 2’s mother and a few other close relatives intend to visit Doe 2 in the United States, and have therefore applied for tourist visas. *Id.* Doe 2 understands that if EO-3 is implemented, his mother and other family members will not be able to obtain visas to visit him. *Id.* ¶¶ 6-7.

Like Doe 1, Doe 2 has participated in this case from the outset as a witness declarant. When Plaintiffs filed their first Complaint and TRO motion, Doe 2 (like Doe 1) allowed for the general allegations of his declaration to be described in public documents, *see* Dkts. 10, 10-2, 15, 15-2, but requested that his full declaration be reviewed *in camera* only, *see* Dkts. 10, 15. Now, Doe 2 is prepared to join this case as a plaintiff, but—like Doe 1—Doe 2’s real fear of public reprisals and negative consequences for his relatives’ visa applications mean that he will only do so if his name remains concealed. Marie-Iha Decl. Ex. B ¶ 10.

### **C. Declarant Jane Doe 3**

Declarant Jane Doe 3 is a naturalized U.S. citizen who teaches at a university within the United States. Marie-Iha Decl. Ex. C ¶¶ 2-3. She is originally from Iran. *Id.* ¶¶ 1-2. Last year, Doe 3's husband developed a serious health condition. *Id.* ¶ 9. Her parents are nationals of Iran living in Iran, and they applied for tourist visas so they could come to the United States and support Doe 3 as she cares for her husband. *Id.* ¶¶ 9-12. EO-3 will block Doe 3's parents from entering the country. As a result, if EO-3 is implemented, Doe 3 will seriously consider looking for work abroad. *Id.* ¶ 14. Doe 3 is filing her declaration in support of Plaintiffs' TRO Motion and wishes to proceed anonymously<sup>2</sup> because of her profound fear that she will be subject to public reprisals. *Id.* ¶ 17.

### **D. Declarant John Doe 4**

Declarant John Doe 4 is a legal permanent resident who resides in the United States, teaches at a university within the United States, and is a national of Iran. Marie-Iha Decl. Ex. D ¶¶ 1, 2, 4. Doe 4's parents are Iranian, and both have pending tourist visa applications to visit Doe 4 in the United States. *Id.* ¶¶ 7-8. Under EO-3, both will be blocked from coming to the United States. In addition, Doe 4's wife has a serious medical condition and cannot be left alone. *Id.* ¶¶ 13-

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<sup>2</sup> Due to the small relevant communities, disclosing the locations where the declarations of Jane Doe 3 and John Doe 4 were signed effectively would disclose their identities. Unredacted, signed copies of their declarations with their locations are being submitted to the Court for *in camera* review. See Marie-Iha Decl. ¶¶ 4-5.

14. This means that if Doe 4's parents cannot visit him in the United States, he will remain entirely cut off from his other family members. *Id.* ¶ 14. If EO-3 takes effect, Doe 4 will seriously consider moving to another country. *Id.* ¶12. Doe 4 is filing his declaration in support of Plaintiffs' TRO Motion and wishes to proceed anonymously because of his extreme fear that he will be subject to public reprisals, and that his family's pending applications may be compromised. *Id.* ¶ 16.

#### **E. Declarant John Doe 5**

Declarant John Doe 5 is a legal permanent resident who resides in Hawaii, teaches at the University of Hawaii, and is a national of Iran. Marie-Iha Decl. Ex. E ¶¶ 1-4. Doe 5 and his family abroad have cancelled or postponed trips because of uncertainty created by EO-1, EO-2, and EO-3. *Id.* ¶ 9. Doe 5 has also been affected by the travel bans in his professional capacity, as they have hurt his department's recruitment and competitiveness for research funding. *Id.* ¶¶ 7-8. If EO-3 takes effect, Doe 5 intends to return to Canada. *Id.* ¶ 10. Doe 5 is filing his declaration in support of Plaintiffs' TRO Motion and wishes to proceed anonymously to avoid the threat of public reprisals. *Id.* ¶ 11.

### **ARGUMENT**

#### **I. THE COURT SHOULD GRANT LEAVE FOR THE DOE PLAINTIFFS TO PROCEED UNDER PSEUDONYM**

The Federal Rules of Civil Procedure require that the "title of the complaint must name all parties." Fed. R. Civ. P. 10(a). A plaintiff may preserve his or her

anonymity, however, under “special circumstances when the party’s need for anonymity outweighs prejudice to the opposing party and the public’s interest in knowing the party’s identity.” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (district court abused its discretion in denying plaintiffs’ motion for leave to proceed anonymously). In such cases, the district court should “preserve the party’s anonymity to the greatest extent possible without prejudicing the opposing party’s ability to litigate the case.” *Id.* at 1069.

In considering whether to permit plaintiffs to proceed anonymously, a Court considers five factors: (1) the severity of the threatened harm; (2) the reasonableness of the anonymous parties’ fears; (3) the anonymous parties’ vulnerability to retaliation; (4) the prejudice, if any, to the opposing party, and whether it could be mitigated; and (5) the public’s interest in requiring the parties to identify themselves by name. *Id.* Here, as in *Advanced Textile*, all of the factors support and “[n]o factors weigh against concealing plaintiffs’ identities.” *Id.*

**A. The Threatened Harms to the Doe Plaintiffs Are Severe.**

Leave to proceed anonymously is appropriate where plaintiffs fear “extraordinary retaliation, such as deportation, arrest, and imprisonment,” resulting from their participation in litigation. *Id.* at 1071. John Does 1 and 2 fear exactly that type of retaliation by the Government if they proceed as plaintiffs and their names are disclosed. As described in their declarations, they worry that they or

their family members will be subjected to unwarranted scrutiny, deportation, or denial of visa applications. These threatened harms are severe, and justify permitting plaintiffs to proceed under pseudonym. *See id.* (granting anonymity to foreign workers and noting the “extreme nature of the retaliation threatened”).

John Does 1 and 2 also fear significant “retaliation by third parties” if their names are revealed. *Id.* at 1070. Both of their declarations refer to concerns about public reprisals to themselves or to their children and families, providing another reason they should be permitted to proceed anonymously. *See id.*; *Lozano v. City of Hazleton*, 620 F.3d 170, 195 (3d Cir. 2010) (granting anonymity where “ethnic tensions had escalated” and plaintiffs would face a “risk of harassment, and even physical danger, if their identities were revealed”); *Roe v. Aware Woman Ctr. for Choice Inc.*, 253 F.3d 678, 687 (11th Cir. 2011) (granting anonymity where subject of case had “led to death, injury, harassment, [and] fear” previously).

### **B. The Doe Plaintiffs’ Fears are Reasonable.**

In determining whether the Doe Plaintiffs’ fears are reasonable, the Court “must consider the surrounding context.” *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1044 (9th Cir. 2010) (evaluating surrounding circumstances including “random acts of racial violence”). Here, the current political climate amply demonstrates the reasonableness of the Doe Plaintiffs’ fears. According to recent reports, hate crimes against Muslim- and

Arab-Americans, as well as against immigrants, have spiked.<sup>3</sup> Meanwhile, FBI data indicates that “[t]he number of physical assaults against Muslims in the United States reached 9/11-era levels last year.”<sup>4</sup> This is the kind of “surrounding context” that makes a plaintiff’s concern about public reprisal or harassment in response to his participation in a lawsuit reasonable. *See Lozano v. Hazleton*, 496 F. Supp. 2d 477, 508-09 (M.D. Pa. 2007). Furthermore, the reasonableness of the Doe Plaintiffs’ fears is compounded by the inability of *post hoc* remedies to protect them and their family members. *See Advanced Textile*, 214 F.3d at 1071.

**C. The Doe Plaintiffs are Vulnerable to Retaliation Due to Their Family Members’ Immigration Statuses.**

John Does 1 and 2 are also vulnerable to retaliation because their close family members are currently seeking admission to the United States as immigrants and non-immigrants. Like other courts, the Ninth Circuit has held that sensitivity pertaining to immigration status can justify shielding a plaintiff’s identity from disclosure, particularly where he might choose not to vindicate his legal rights at all without the requested anonymity. *See id.* at 1169 (plaintiffs’ “highly vulnerable [immigration] status” favored proceeding using pseudonyms);

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<sup>3</sup> *See, e.g.*, Council on Am.-Islamic Relations, *CAIR Report Shows 2017 on Track to Become One of Worst Years Ever for Anti-Muslim Hate Crimes* (July 17, 2017), available at <https://goo.gl/gh9Ti2> (reporting dramatic increase in anti-Muslim hate crimes during the first half of 2017, based on ethnicity or national origin).

<sup>4</sup> *See* Pew Research Center, *Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show* (Nov. 21, 2016), available at <https://goo.gl/zGMqQ7>.

*see also, e.g., Keller v. City of Fremont*, No. 8-10-cv-0270-LSC-FG3, 2011 WL 41902, at \*2 (D. Neb. Jan. 5, 2011); *Lozano*, 496 F. Supp. 2d at 508-09.

**D. Defendants Will Not Be Prejudiced if the Doe Plaintiffs Participate in this Case Under Pseudonyms.**

Defendants will not be prejudiced if the Doe Plaintiffs proceed anonymously. This case turns on legal issues, not on the specific identities of the plaintiffs. *See, e.g., Doe v. State of Alaska*, No. 96-35873, 1997 WL 547941, at \*1 (9th Cir. Sept. 2, 1997) (potential prejudice is minimized when the “issues raised are purely legal and do not depend on identifying the specific plaintiffs”). That Defendants are governmental rather than private parties reinforces the lack of prejudice. *See, e.g., Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) (considering, in addition to the *Advanced Textile* factors, whether defendants are government or private parties); *John Does 1-5 v. McCrory*, No. 1:13-cv-711, 2014 WL 29352, at \*2 (M.D.N.C. Jan. 3, 2014) (“Plaintiffs bring this action against a governmental party, which weighs in favor of anonymity”). Further, several suits challenging President Trump’s travel bans have involved John or Jane Doe plaintiffs, and Plaintiffs are unaware of any instance in which the Government has contended that this caused it prejudice. *See, e.g., Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017) (suit involved three John and Jane Doe plaintiffs); *Sarsour v. Trump*, 245 F. Supp. 3d 719 (E.D. Va. 2017) (similar).

**E. Permitting the Doe Plaintiffs to Proceed Under Pseudonyms Will Not Harm the Public Interest in Open Judicial Proceedings.**

The public’s interest in this case—and in resolving its weighty legal issues—can be satisfied without revealing the Doe Plaintiffs’ identities. *See Advanced Textile*, 214 F.3d at 1069; *see also Doe v. Barrow Cnty., Ga.*, 219 F.R.D. 189, 193 (N.D. Ga. 2003) (observing that the underlying constitutional issue would be litigated in an open forum and “the only thing potentially being shielded from the public is [the] plaintiff’s name”). Indeed, permitting the Doe Plaintiffs to proceed anonymously will “serve the public’s interest in this lawsuit by enabling it to go forward” with a larger group of plaintiffs that are severely harmed by the Order. *Advanced Textile*, 214 F.3d at 1073.

**II. THE COURT SHOULD REVIEW THE DOE PLAINTIFFS’ AND DOE DECLARANTS’ SIGNED DECLARATIONS *IN CAMERA***

The Doe Plaintiffs’ above-discussed fears of retaliation are also held by the Doe Declarants. These fears provide good cause for this Court’s *in camera* review of Exhibits A-E to the Marie-Iha Declaration. Those exhibits include declarations submitted by the Doe Plaintiffs (Exhibits A-B) as well as by three Doe Declarants (Exhibits C-E). The relief that the Doe Plaintiffs and Doe Declarants seek is modest: they are prepared to publicly file the substance of their declarations under Doe pseudonyms, and request only that copies of their declarations bearing their

names and signatures (and, in the cases of Jane Doe 3 and John Doe 4, signing locations) be reviewed *in camera* by this Court.

Although the public should generally have an opportunity to inspect and copy documents filed in judicial proceedings, courts maintain “broad discretion” to order *in camera* review of evidence when in the interest of “safety and security.” *Robinson v. Adams*, No. 1:08-cv-01380-AWI-BAM, 2012 WL 1027921, \*2 (E.D. Cal. Mar. 26, 2012) (citations omitted) (exercising “the discretion with which [the court] has been vested” and granting a motion to compel subject to *in camera* review, in the interest of “safety and security”); *accord Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597-98 (1978); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433-34 (9th Cir. 1995). For good cause shown, a court may issue an order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including by specifying terms for disclosure or requiring that documents or information be filed “in sealed envelopes, to be opened as the court directs.” Fed. R. Civ. P. 26(c).

Good cause exists to review the Doe Plaintiffs’ and Doe Declarants’ signed declarations *in camera*, without disclosure of those signed declarations to Defendants, their counsel, or the public. As set forth in the Marie-Iha Declaration, Exhibits A-E to that Declaration, and *supra*, the Doe Declarants and Doe Plaintiffs are reasonably fearful that the disclosure of their names could lead to negative

consequences to themselves or to their families. They fear retaliation by the Government, as well as reprisals by the public in the form of violence or harassment. These concerns are particularly understandable in light of several of the Does' family members' sensitive immigration statuses—Does 1, 2, 3, and 4 all have close family members with pending applications for immigrant or non-immigrant visas—and in light of recent violence perpetrated against Arab- and Muslim-Americans. *See supra* pp. 4-7, 9-10 & nn. 3-4; Marie-Iha Decl. ¶ 15 & Exs. A-D.

As this Court previously held based on submissions of similar sensitivity, there is good cause for the Court to review Exhibits A-E to the Marie-Iha Declaration *in camera*. *See* Dkt. 29; *see also* *Forgerson v. Cheeseburger Rests., Inc.*, No. 10-207 JMS-BMK, 2010 WL 3733019, \*1 (D. Haw. Aug. 31, 2010); *Barnard v. State of Hawaii*, No. 05-599 SPK-LEK, 2007 WL 954303, \*4 (D. Haw. Mar. 27, 2007); *Buckley v. Alameida*, No. 1:04-cv-05688-LJO-GBCPC, 2012 WL 6184970, \*1 (E.D. Cal. Dec. 11, 2012) (granting *in camera* review of exhibit, based on filer's attestation that his "safety would be placed in serious jeopardy if his identity were made known" through the exhibit).

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the Doe Plaintiffs leave to proceed under pseudonyms as parties to this case, and review *in camera* Exhibits A-E to the concurrently-filed Marie-Iha Declaration.

DATED: Washington, DC, October 10, 2017.

Respectfully submitted,

*/s/ Neal K. Katyal*

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