Linton Joaquin*
Karen C. Tumlin*
Shiu-Ming Cheer*
Melissa S. Keaney*
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, California 90010
Telephone: (213) 639-3900
Facsimile: (213) 639-3911
joaquin@nilc.org
tumlin@nilc.org
cheer@nilc.org
keaney@nilc.org

Omar C. Jadwat*
Andre I. Segura*
Elora Mukherjee*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 549-2660
Facsimile: (212) 549-2654
ojadwat@aclu.org
asegura@aclu.org
emukherjee@aclu.org

Attorneys for Plaintiffs

* Pro hac vice motion pending
\+ Counsel for all plaintiffs except SEIU and Workers' United

Cecillia D. Wang*
Katherine Desormeau*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, California 94111
Telephone: (415) 343-0775
Facsimile: (415) 395-0950
cwang@aclu.org
kdesormeau@aclu.org

Darcy M. Goddard (USB No. 13426)
Esperanza Granados (USB No. 11894)
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC.
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9862
Facsimile: (801) 532-2850
dgoddard@acluutah.org
egranados@acluutah.org

Bradley S. Phillips*+
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
brad.phillips@mto.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Utah Coalition of La Raza, *et al.*,
Plaintiffs,

v.

Gary R. Herbert, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DOE PLAINTIFFS' MOTION FOR LEAVE TO PROCEED UNDER PSEUDONYMS

Case No. 2:11-cv-00401-BCW

Judge: Brooke C. Wells

I. INTRODUCTION AND STATEMENT OF FACTS AND ISSUES

Plaintiffs Jane Doe #1, John Doe #1, and John Doe #2 (collectively "Doe Plaintiffs") respectfully request leave to proceed under pseudonyms. In this action, Doe Plaintiffs, along with several other named organizational and individual plaintiffs, challenge Utah House Bill 497 ("HB 497"). The Doe Plaintiffs request anonymity on several independent grounds.

First, public disclosure of the Doe Plaintiffs' identities and participation in this action would seriously jeopardize the very constitutional protections they and the other plaintiffs seek to vindicate in this lawsuit. The Doe Plaintiffs reasonably fear that, if their identities were to become public, there would be an increased risk that they or their family members would be subjected to unconstitutional detention by state or local law enforcement officials acting under the auspices of HB 497. They also fear that they or their family members could suffer adverse immigration consequences, up to and including immigration detention and the initiation of removal proceedings.

Second, immigration generally and HB 497 in particular have been the subject of intense and heated debate. In this highly charged atmosphere, the Doe Plaintiffs fear harassment and even physical harm if their identities and personal stories are disclosed publicly.

Third, this case turns on legal questions, not on the identities of any particular individuals. Thus, the public's interest in open judicial proceedings will not be affected if the Doe Plaintiffs are permitted to proceed anonymously.

Fourth, Defendants will not suffer any prejudice if the Doe Plaintiffs are permitted to proceed anonymously, because this case turns solely on the constitutionality of HB 497.

II. THE COURT SHOULD GRANT THE DOE PLAINTIFFS' MOTION TO PROCEED UNDER PSEUDONYMS

In determining whether to grant leave to proceed under a pseudonym, the court must conduct a case-specific balancing of the interests at stake. *See Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000). Relevant factors include: whether the issues involved are of a "highly sensitive" nature, *id.*; whether the litigant may be subjected to harassment or physical harm as a result of the views expressed in the litigation, *id.*; whether the need for anonymity outweighs the public interest in open judicial proceedings, *id.*; and whether anonymity would prejudice the defendants, *Coe v. U.S. Dist. Court for the Dist. of Colorado*, 676 F.2d 411, 416-17 (10th Cir. 1982).

As discussed below, the balance in this case weighs heavily in favor of each of the Doe Plaintiffs. Indeed, under very similar circumstances, the Third Circuit and the District of Arizona recently allowed plaintiffs to proceed under pseudonyms because of the threat of adverse immigration consequences, the climate of hostility surrounding immigration, and the fact that the plaintiffs' constitutional claims were of a purely legal nature. *See Lozano v. Hazleton*, 620 F.3d 170, 194-96 (3d Cir. 2010); Order Granting Motion to Proceed Anonymously, *Friendly House v. Whiting*, No. 10-1061 (D. Ariz. filed June 21, 2010) ("*Friendly House* Order").

A. DISCLOSURE OF DOE PLAINTIFFS' IDENTITIES WOULD EXPOSE THEM TO SERIOUS HARM

1. Jane Doe #1

Plaintiff Jane Doe #1 is a Utah resident who was born in Mexico in 1968, and who entered the United States without authorization in 1989. Jane Doe #1 Decl. ¶¶ 2-3. For years, Jane Doe #1's partner, a U.S. citizen, sexually and physically abused her and physically abused

their older child. *Id*. ¶¶ 4-5. After she finally left this abusive relationship, her partner carried out his longstanding threat to report her to the federal immigration authorities, and she was placed in removal proceedings. *Id*. ¶¶ 4-6. Her case went on for several years, until in 2007 the federal government chose to administratively close her case. *Id.* ¶¶ 7-8. Therefore, although the federal government has elected not to remove her, her current status is tenuous and she is at risk of a new removal proceeding at any time. *Id*.

The balancing in this case weighs strongly in favor of allowing Jane Doe #1 to proceed under a pseudonym. A plaintiff's interest in proceeding anonymously may be compelling in circumstances where "the issues involved are matters of a sensitive and highly personal nature." *Coe*, 676 F.2d at 416 (internal quotation marks and citation omitted); *see also Femedeer*, 227 F.3d at 1246. Immigration status is a sensitive and private issue, for which courts have recognized that Doe motions may be warranted. *See, e.g.*, *Lozano v. Hazleton,* 496 F.Supp.2d 477, 508-09 (M.D. Pa. 2007), *aff'd in part*, 620 F.3d 170; *Keller v. Fremont*, No. 10-0270, 2011 WL 41902, *2 (D. Neb. Jan. 5, 2011); *see also EEOC v. BICE of Chicago*, 229 F.R.D. 581, 583 (N.D. Ill. 2005) (granting protective order because deposition "questions about immigration status are oppressive [and] . . . constitute a substantial burden on the parties"). The need for anonymity is particularly acute here because of the intensely private nature of the facts of Jane Doe #1's case – including the facts that she is a survivor of rape and both she and her oldest child are survivors of domestic abuse. "[P]ublic knowledge of such abuse can trigger new trauma even years after the fact." *John Doe 140 v. Archdiocese of Portland*, 249 F.R.D. 358, 361 (D. Or. 2008) (permitting abuse victim to proceed under a pseudonym).

Furthermore, public disclosure of Jane Doe #1's identity would heighten the risk that she will be subjected to unconstitutional detention by Utah state and local police officers. If HB 497 goes into effect, she will be forced to curtail her driving activities, Jane Doe #1 Decl. at ¶¶ 9-16, but she cannot ensure that she will not encounter law enforcement officials. By publicly identifying herself as an undocumented immigrant in this lawsuit, she will effectively flag herself as deportable for any Utah law enforcement officers who encounter her and recognize her name.

In addition, encounters with Utah law enforcement may result in Jane Doe #1's being transferred to federal custody, and may trigger the reopening of her removal proceedings. Although the federal immigration authorities know of Jane Doe #1's presence and have elected not to seek her removal, she has no formal authorization to remain in the United States. In analogous circumstances, where plaintiffs must declare their non-compliance with a law in the course of litigating their claims, courts have granted motions to proceed under a pseudonym. *See Coe*, 676 F.2d at 416 (recognizing anonymity was appropriate where plaintiffs "had to admit that they either had violated state laws or government regulations or wished to engage in prohibited conduct") (citation omitted); *see also Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004); *Stegall*, 653 F.2d at 185; *S. Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979).[1]

2. John Doe #1

Plaintiff John Doe #1 was born in Mexico in 1991, and came to the United States when he was nine years old. John Doe #1 Decl. ¶ 2. He, his parents, and his siblings are all

[1] *Nat'l Commodity & Barter Assoc. v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989), suggested in dicta that "the threat of criminal or civil prosecution" might not be sufficient to warrant granting a request to proceed anonymously. *See id.* at 1245. That dicta is not persuasive, however, given that it is contradicted by the Tenth Circuit's decision in *Coe*, 676 F.2d at 416, and the other cases cited above. In any event, the threat of removal proceedings is only one threatened harm among many in this case.

undocumented immigrants. *Id*. John Doe #1 was placed in removal proceedings in 2010. *Id.* ¶¶ 4-6. He has been released on supervision while his case is pending before the Immigration Court. *Id.* ¶ 5. Although the federal government has chosen to release him from detention, it has not yet given him status, nor any form of identification he could show to Utah law enforcement officials to satisfy HB 497. *Id.* ¶ 8. In the past, John Doe #1 spoke to the media about his immigration case. *Id.* ¶ 14. After his story aired, a representative of Immigration and Customs Enforcement ("ICE") called John Doe #1's attorney and threatened to arrest John Doe #1, along with his family, if he gave another interview. *Id.* Because of this threat, he has stopped talking to the media. *Id.* He is "worried that ICE will retaliate against [him] and [his] family if [he] use[s] [his] name in this lawsuit." *Id.*

John Doe #1 should be permitted to proceed anonymously to prevent the harm that could result from disclosing such sensitive personal information as immigration status. *See supra* at page 3. Because he lacks proof of status, if HB 497 takes effect, John Doe #1 is likely to be subject to unlawfully prolonged traffic stops and other seizures while his immigration status is verified. Although he will curtail his driving if HB 497 goes into effect, he will still need to drive to buy groceries and other necessities, and he may encounter law enforcement officials when traveling by bus or light rail. John Doe #1 Decl. ¶¶ 10-11. If he were to be publicly identified as an undocumented immigrant in this lawsuit, he would be a target for detention and arrest by law enforcement officers.

John Doe #1 also faces a serious threat of adverse immigration consequences if his name is made public in connection with this lawsuit. ICE has already threatened him and his family with arrest if he speaks with the media about his case. *Id.* ¶ 14. This threat of retaliatory action

militates strongly in favor of allowing John Doe #1 to proceed under a pseudonym. *See Does I Thru XXIII v. Advanced Textile Corp*., 214 F.3d 1058, 1070-71 (9th Cir. 2000) (granting workers' request for anonymity where they faced retaliation from their employers, which could lead to their arrest and deportation).[2]

3. John Doe #2

Plaintiff John Doe #2 is a U.S. citizen who was born in Utah in 1964. John Doe #2 Decl. ¶ 2. His wife is a Guatemalan citizen who entered the United States without inspection in 1993. *Id.* ¶ 3. She applied for asylum and was denied. *Id.* She is currently on supervised release; she has applied for a U-visa, and has been granted a stay of removal while her application is pending. *Id.* ¶ 4. She has no documentation she can show to law enforcement officers to prove her status, making her vulnerable to detention and arrest by the police if HB 497 takes effect. *Id.* ¶¶ 5-7.

John Doe #2's participation in this lawsuit requires that he reveal sensitive information about his wife's immigration status which, if his name were known, could subject them both to public hostility and harassment. His wife's immigration status and the fact that she applied for a U-visa – a form of immigration relief available to victims and witnesses of certain serious crimes, under 8 U.S.C. § 1101(a)(15)(U) – are highly sensitive matters that should be protected from public view. *See supra* at page 3; *see also* 8 U.S.C. § 1367(a)(2) (providing that U-visa applicants' information is subject to confidentiality provisions). John Doe #2 fears that, if his

[2] *Femedeer* noted that one factor to be weighed in deciding whether to grant a plaintiff's motion to proceed anonymously is "whether the litigant has strictly maintained his or her anonymity." 227 F.3d at 1246. Although John Doe #1 did speak out in the past about his immigration situation, he has stopped speaking publicly about his status since receiving the threat from ICE. John Doe #1 Decl. ¶ 14. Moreover, as the Ninth Circuit has observed, "[p]ast acts of bravery in the face of danger is poor rationale for denying the courageous individual protection against future harm." *Advanced Textile Corp*., 214 F.3d at 1073 n.11.

name is made public in connection with this lawsuit, ICE may retaliate against his wife, possibly by denying her application or lifting the stay of removal. John Doe #2 Decl. ¶ 12.

Utah state and local law enforcement officers, too, could take adverse action against John Doe #2 and his wife if his name is made public. If John Doe #2 is stopped by a police officer while driving his wife, *see id.* ¶ 7, and if the officer recognizes John Doe #2's name, both John Doe #2 and his wife may be detained pursuant to Utah Code Ann. § 76-9-1003(2), which mandates that officers question drivers upon reasonable suspicion that they are violating one of several smuggling-related state offenses. *See* Complaint ¶ 43. Additionally, if John Doe #2's name is made public, he risks criminal prosecution under Section 10 of HB 497, which criminalizes encouraging or inducing a non-citizen to "reside" in Utah "knowing or in reckless disregard of the fact" that the non-citizen's "residence is or will be in violation of law," with no requirement of commercial motive. *See* Utah Code Ann. § 76-10-2901(2)(c); Complaint ¶ 51. John Doe #2's ability to litigate this lawsuit depends on his being able to speak freely about his relationship with his wife and the other undocumented people to whom he gives assistance. *See* John Doe #2 Decl. ¶¶ 9-10. If his name were made public, he could face criminal prosecution for his actions. As noted above, in similar circumstances, where plaintiffs must declare their intent to violate a law in the course of litigating their claims, courts have granted motions to proceed under a pseudonym. *See supra* at page 4.

Finally, John Doe #2 fears that, if his participation in this lawsuit were made public, his employer, who does business with government agencies, would fire him. *Id.* ¶ 12. Courts have held that the risk of lost employment, together with other threats of harm, may warrant granting a motion to proceed under pseudonym. *See*, *e.g.*, *Friendly House* Order (granting motion where

the harm included, among other things, "loss of employment"); *Advanced Textile Corp*., 214 F.3d at 1070-71 (same).

B. DOE PLAINTIFFS FACE PUBLIC HOSTILITY, HARASSMENT, AND PERHAPS VIOLENCE IF THEIR IDENTITIES ARE MADE PUBLIC

The hostility and anti-immigrant sentiment surrounding the immigration debate strongly counsels in favor of allowing each of the Doe Plaintiffs to proceed anonymously. *See Hazleton*, 620 F.3d at 195 (anonymity warranted where "ethnic tensions had escalated" and plaintiffs "would face an 'exponentially greater' risk of harassment, and even physical danger, if their identities were revealed") (citation omitted); *Stegall*, 653 F.2d at 186 (anonymity warranted where plaintiffs faced "extensive harassment and perhaps even violent reprisals if their identities are disclosed to a . . . community hostile to the viewpoint reflected in plaintiffs' complaint").

The debate over HB 497, its companion laws, and immigration in general has been heated, with private citizens making frequent disparaging comments about immigrants. *See, e.g*., Goddard Decl. Ex. A at 4, 6 (online readers' comments to newspaper article about HB 497 and its companion laws; posts include: "Illegal aliens are 'parasites' who live off the American people!" and "There is always mandatory abortion to consider."). Professor Theresa Martinez, an Associate Professor of Sociology at the University of Utah, observes: "There is a strong anti-immigrant climate in Utah." Martinez Decl. ¶ 5. Octavio Villalpando, Director of the Center for Critical Race Studies at the University of Utah, similarly notes that "[t]here is a strong anti-Latino immigrant and anti-Asian immigrant discourse . . . in Utah" and that "HB 497 . . . ha[s] fueled an anti-immigrant climate." Villalpando Decl. ¶ 10.

Some of this public commentary overtly targets anti-immigrant animus at Latinos and other communities of color. Both Professor Martinez and Professor Villalpando personally have

received threatening and racist hate mail in connection with their public statements on immigration. *See* Martinez Decl. ¶ 8 (writing that in response to a radio interview she gave on HB 497, "I received an email that was very racist, sexist, and vicious. . . . The writer referred to me, as well as anyone who associates with immigrants, as less than human. The writer called immigrants 'brown hordes.'"); *id.* ¶ 9 (quoting one email she received, attacking Mexicans' "filthy customs and utterly inferior culture"); Villalpando Decl. ¶ 13 ("HB 497 ha[s] created a climate of fear and persecution in Utah. I personally received hate email for speaking out on diversity issues. . . . One or two of them concluded by saying that they would 'take me down'"). Salt Lake City Police Chief Chris Burbank, too, has received harassing phone calls and email in response to his statements on immigrants' rights. *See* Goddard Decl., Ex. B, at 1 (news article reporting that Chief Burbank received angry, "racist" email and phone calls after speaking out against Arizona's anti-immigrant law in 2010); *see also* Martinez Decl. ¶ 12 (discussing "hateful" comments directed toward Chief Burbank).

The Doe Plaintiffs themselves have observed these anti-immigrant and anti-Latino attitudes in their own lives. Jane Doe #1 has "heard a lot of hostile comments from people in Utah about undocumented immigrants, including one woman who publicly compared immigrants to 'bacteria' that need to be 'extracted' from the state." Jane Doe #1 Decl. ¶ 18; *see also* John Doe #1 Decl. ¶¶ 15-16 (discussing fears of racial profiling); John Doe #2 Decl. ¶ 8 (same). Both Jane Doe #1 and John Doe #1 are immigrants who speak Spanish and belong to racial and ethnic minorities. *See* Jane Doe #1 Decl. ¶¶ 3, 11; John Doe #1 Decl. ¶¶ 2, 9. As such, they are particularly vulnerable targets for public backlash against this lawsuit. And although John Doe #2 is not an immigrant or a minority, he is often mistaken for Latino due to

his appearance and Spanish ability, and his wife is an immigrant from Guatemala. *See* John Doe # 2 Decl. ¶¶ 2-3. All the Doe Plaintiffs reasonably fear that hey and their families risk similar harassing treatment, and possibly physical harm, if their identities are disclosed.

C. PERMITTING THE DOE PLAINTIFFS TO PROCEED ANONYMOUSLY WILL NOT HARM THE PUBLIC INTEREST IN OPEN PROCEEDINGS

The public interest in open court proceedings would not be seriously harmed by permitting three individual plaintiffs in this action to proceed under pseudonyms. As the Fifth Circuit has noted, party anonymity has only a limited impact on the public's access to the courts and "does not obstruct the public's view of the issues joined or the court's performance in resolving them." *Stegall*, 653 F.2d at 185. Shielding the Doe Plaintiffs from having their names publicized here will not hinder the resolution of the constitutional issues in an open and public forum. *See Doe v. Barrow County, Georgia*, 219 F.R.D. 189, 193 (N.D. Ga. 2003) ("The resolution of the underlying constitutional issue in this case . . . will be decided in an open and public forum. Should this case progress to trial, the public will be free to attend the proceedings. Any court orders or opinions concerning the merits of this case will be available for public inspection. In the end, the only thing potentially being shielded from the public is plaintiff's name and any court proceedings or opinions that might be necessary to determine standing.").

D. PERMITTING THE DOE PLAINTIFFS TO PROCEED ANONYMOUSLY WOULD NOT PREJUDICE DEFENDANTS

Finally, Defendants will suffer no prejudice if the Court permits the Doe Plaintiffs to proceed anonymously, as this case involves strictly legal issues and does not turn on questions of the individual Plaintiffs' background or credibility. Unlike anonymous lawsuits against private parties, lawsuits "challenging the constitutional, statutory, or regulatory validity of government

activity . . . involve no injury to the Government's reputation." *S. Methodist Univ.*, 599 F.2d at 713. *See also Stegall*, 653 F.2d at 185-86 (one factor weighing in favor of anonymity is that the parties seeking anonymity are challenging governmental activity); *Harlan County School Dist.*, 96 F.Supp.2d at 671 (in suit against school district, finding anonymity appropriate in part because "[t]he anonymity of the plaintiffs will not adversely affect the defendants"). The State of Utah faces no prejudice here if the Doe Plaintiffs are allowed to proceed under pseudonyms.

III. CONCLUSION

All three Doe Plaintiffs would be at risk of great harm if their identities were revealed. Permitting them to proceed anonymously would not materially harm the public's interest in open court proceedings; nor would it prejudice Defendants. Therefore, the Doe Plaintiffs should be permitted to proceed under pseudonyms in this action.

DATED this 4th day of May, 2011

Respectfully submitted,

/s/ Katherine Desormeau
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, IMMIGRANTS' RIGHTS PROJECT

/s/ Shiu-Ming Cheer
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION

/s/ Darcy Goddard
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC.

/s/ Elora Mukherjee
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, RACIAL JUSTICE PROGRAM

/s/ Bradley S. Phillips
MUNGER, TOLLES & OLSEN LLP